

THE PHOTOGRAPHER'S COPYRIGHT —
PHOTOGRAPH AS ART, PHOTOGRAPH AS DATABASE

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I. INTRODUCTION

“ORIGINALITY IN PHOTOGRAPHY AS DISTINCT FROM ORIGINALITY IN PAINTING LIES IN THE ESSENTIALLY OBJECTIVE CHARACTER OF PHOTOGRAPHY.” — ANDRÉ BAZIN¹

“IT IS THE RESULT OF ART, GUIDED BY CERTAIN PRINCIPLES OF SCIENCE.” — *UDDERZOOK V. COMMONWEALTH*²

It is a truism that developments in copyright law are largely driven by technological change. In our own times, the digital, networked environment has provided direct challenges to many, perhaps most, of copyright’s core ideas: a copy, reproduction, distribution, public performance, commercial use, transformative use, fair use, and various forms of secondary liability. Yet one of copyright’s core concepts that has so far escaped challenge is the bedrock idea of “originality” or “creativity.”³ There are those who tell us breathlessly that the Internet has changed creativity, making it more collaborative and more derivative, but they can point to few artistic or creative practices that were not already happening on a smaller, less sophisticated scale in the analog world. What you and I can do with Photoshop was already being done — quite well — by the Soviet commissar’s touch-up artists.⁴ Music sampling and video mashups were old hat by the time

1. ANDRÉ BAZIN, *The Ontology of the Photographic Image*, in 1 WHAT IS CINEMA? 9, 13 (Hugh Grey trans., University of California Press 2005).

2. 76 Pa. 340, 352 (1874).

3. Strictly speaking, under current U.S. doctrine, “[o]riginality is a constitutional requirement” for copyright protection and “originality requires independent creation plus a modicum of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). I use the two interchangeably. Assuming that “independent creation” will not occur without “creativity,” establishing creativity establishes originality. See Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 99–106 (1998) [hereinafter Hughes, *Personality Interest*] (exploring the melding of originality and creativity). Internationally, the originality standard of copyright is generally captured by the notion of intellectual creations. See Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC’Y U.S.A. 949, 971–72 (2002); Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 287 n.161 (2006) (citing European Community directives that define originality as “the author’s own intellectual creation”).

4. See generally DAVID KING, *THE COMMISSAR VANISHES* (1997).

ARPANET was born.⁵ As for massively collaborative works, how do you think Rodin made those enormous sculptures, Renaissance artists those grand tableaux, or Andy Warhol some 100,000 pieces of art at his Factory?⁶

But the challenge to copyright's concepts of originality and creativity is coming — there is no other way to sensibly read the tea leaves of new digital tools and artificial intelligence research. With such challenges on the horizon, it is worthwhile to meditate on copyright's adaptation to an earlier disruptive technology: photography. Photography was the technological development that posed the most serious challenge to copyright's theoretical structure in the nineteenth century, and it did this because it challenged our understanding of creativity.

It took copyright law a while to accept photography, and the rate and degree of integration of photographs into the copyright system varied from country to country. You can see this vividly in the gradual evolution of the international copyright norms for photography. Photography was first recognized in the original 1886 Berne Convention, but only in the Final Protocol's acknowledgment that countries that recognized the "artistic" character of photographs could "admit them to the benefits of the Convention";⁷ the 1896 revision of the Protocol eliminated this double reference to "artistic works" and simply acknowledged that it was a matter of domestic legislation to determine whether and how photographs would be protected as literary and artistic works.⁸ The 1908 revision finally mandated that all Berne signatories provide *some* protection for photographic works, but did not mandate a term of protection⁹ and, tellingly, kept photography in a distinct category from "literary and artistic works."¹⁰ It was not until

5. See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 476 n.236 (2003) ("The Internet was the network of networks that arose from ARPANet and a series of other networks, circa 1969.").

6. Georgina Adams, *Thorny Issues*, FIN. TIMES, November 26, 2011, at 5 (describing how Warhol employed "art workers" at the Factory and "had varying degrees of 'hands-on' input" with artworks).

7. Final Protocol, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 ("[I]t is agreed that those countries of the Union where the character of artistic works is not refused to photographs engage to admit them to the benefits of the Convention concluded today . . .").

8. Amendments to the International Copyright Convention of September 9, 1886, agreed to at Paris, May 4, 1896 (modifying the Final Protocol to provide "[p]hotographic works, and those obtained by similar processes, are admitted to the benefit of the provision of these acts, in so far as domestic legislation allows this to be done").

9. Art. 7, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Berlin on Nov. 13, 1908 ("For photographic works and works obtained by a process analogous to photography . . . the term of protection is regulated by the law of the country where protection is claimed . . .").

10. Article 2 of the 1908 Berne Convention inaugurated the laundry list of "literary and artistic works" that fall under the purview of the treaty, but the 1908 version did not include photographs, which were segregated into Article 3. Art. 3, Berne Convention for the Protec-

the 1948 revision that the Berne Convention recognized “photographic works” as a regular category of protected literary and artistic works.¹¹ Even then, the minimum term of protection for photography was left to the discretion of each country until a twenty-five year minimum was established in 1967.¹² Photographs were only brought fully into the obligatory term of “life plus fifty” by the World Intellectual Property Organization Copyright Treaty in 1996.¹³

This Article explores how copyright law came to protect photography, including the difficulty the law had — and has — reconciling the protection of photography with copyright’s originality standard. This Article seeks to convince the reader that, although generally unrecognized, the problem of copyright protection for photographs is really the same problem as copyright protection for compilations of fact because photographs are, from one perspective, databases. At the practical level, copyright protects far fewer photographs than is commonly understood and, as with the thin copyright of a database,¹⁴ offers less protection to those photographs that are copyrighted. This Article explores reasons why we have stretched and distorted our idea of originality to accommodate photography; how some European jurisdictions try to avoid this problem by offering a second level of protection to non-original photographs; and how photographic processes unavoidably press upon some of the ambiguities in our notions of originality and creativity. Finally, it is important to realize that this suite of problems for copyright will only worsen as we enter a period in which our daily lives are ubiquitously recorded in photography and videography. In such a world, the vast majority of the world’s photographs cannot be protected under copyright’s originality standard.

tion of Literary and Artistic Works, Sept. 9, 1886, as revised at Berlin on Nov. 13, 1908 (“The present Convention shall apply to photographic works and to works produced by a process analogous to photography. The contracting countries shall be bound to make provision for their protection.”).

11. Art. 2, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Brussels on June 26, 1948.

12. Art. 7(4), Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Stockholm on July 14, 1967.

13. World Intellectual Property Organization Copyright Treaty, art. 9, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [hereinafter WCT], available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (“In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.”); see also Letter of Submittal from Department of State on WCT (July 22, 1997) (on file with author).

14. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“This inevitably means that the copyright in a factual compilation is thin.”); *id.* at 340 (“[C]opyright protection extends only to those components of the work that are original to the author, not to the facts themselves. This fact/expression dichotomy severely limits the scope of protection in fact-based works.”); see David E. Shipley, *Thin but Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91 (2007) (discussing contours of thin protection).

II. THE CREATIVE TRUTH OF PHOTOGRAPHY

When photography was new, the initial, perhaps dominant, view was that the photographer was not a creator, but an operator of a machine: it was the machine's interaction with nature that was the source of the final photographic image.¹⁵ In an 1838 notice to investors, Louis Daguerre described his daguerreotype invention as "not merely an instrument which serves to draw Nature . . . [it] gives her the power to reproduce herself."¹⁶ Edgar Allen Poe saw these early daguerreotypes as "truth itself in the supremeness of its perfection."¹⁷ And in 1859, Oliver Wendell Holmes, Sr. christened the new emerging photographic technologies as the "invention of *the mirror with a memory*."¹⁸ In Britain, Elizabeth Eastlake described photography in 1857 as a source of "facts of the most sterling and stubborn kind."¹⁹ For another commentator, photographs were "free . . . from the deceptive and therefore vitiating element of human agency."²⁰

As the technology improved — dry plates, developing services, and film — perhaps the automated representation of reality seemed even more complete.²¹ As the Eastman Kodak Company put it plainly in the late 1880s, "You press the button, we do the rest."²²

15. Other scholars have made the same point. See, e.g., Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 419 (2004) (noting that in photography's early period, "very few photographers, and even fewer artists, considered photography to be within the realm of art"); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 297 n.17 (1992) ("Photography had perplexed nineteenth-century lawyers who saw the machine, rather than human agency, as the source of the photographic image.").

16. SUSAN SONTAG, *ON PHOTOGRAPHY* 188 (1977) (describing an 1838 Louis Daguerre notice circulated to attract investors).

17. Edgar Allen Poe, *The Daguerreotype*, ALEXANDER'S WKLY. MESSENGER, Jan. 15, 1840, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY 37, 38 (Alan Trachtenberg ed., 1980).

18. Oliver Wendell Holmes, Sr., *The Stereoscope and the Stereograph*, ATLANTIC MONTHLY, June 1859, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 71, 74. The comparison was more obvious in the silver metallic plates of daguerreotypes, although Camus makes the same sort of point a century later. ALBERT CAMUS, *An Absurd Reasoning*, in THE MYTH OF SISYPHUS AND OTHER ESSAYS 3, 15 (Justin O'Brien trans., Vintage Books 1991) (1955) ("Likewise the stranger who at certain seconds comes to meet us in a mirror, the familiar and yet alarming brother we encounter in our own photographs is also the absurd.").

19. Lady Elizabeth Eastlake, *Photography*, Q. REV. (1857), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 39, 65.

20. *Photography*, Q. REV., reprinted in 9 PHOTOGRAPHIC J. 137, 137 (1864).

21. Of course, the opposite might have happened as well. See discussion *infra* Part VI.

22. *History of Kodak*, KODAK, http://www.kodak.com/ek/US/en/About_Kodak_Top/Our_Company/History_of_Kodak.htm (last visited May 3, 2012).



Figure 1: Early Advertisement for the First Kodak Camera²³

This understanding of photographs as simple conveyors of truth is still very much alive, not just in our grocery store tabloids (yes, that's what she looks like without make-up), but also in much of twentieth century intellectual discourse on photography. Roland Barthes describes photography in these terms. In Barthes' analysis, with a photograph, "the fact [is] established *without method* The photograph is literally an emanation of the referent,"²⁴ the "referent" being the "*necessarily* real thing which has been placed before the lens, without which there would be no photograph."²⁵ For Barthes, photography can be understood primarily as simple reference and authentication: "[T]he [p]hotograph's essence is to ratify what it represents."²⁶ Susan Sontag's influential analysis of photography recognizes that a "photograph passes for incontrovertible truth that a given thing happened"²⁷ precisely because "[p]hotographed images do

23. This Kodak Camera advertisement appeared in the first issue of *The Photographic Herald and Amateur Sportsman* in November 1889. See *Pic of the Month*, THE HENRY FORD, <http://www.thehenryford.org/exhibits/pic/1999/99.aug.html> (last visited May 3, 2012).

24. ROLAND BARTHES, *CAMERA LUCIDA* 80 (Richard Howard trans., 1981).

25. *Id.* at 76.

26. *Id.* at 85. Barthes writes, "What I intentionalize in a photograph (we are not yet speaking of film) is neither Art nor Communication, it is Reference, which is the founding order of Photography." *Id.* at 77. He goes on to remark that "language is, by nature, fictional; the attempt to render language unfictional requires an enormous apparatus of measurements: we convoke logic, or, lacking that, sworn oath; but the Photograph is indifferent to all intermediaries: it does not invent; it is authentication itself." *Id.* at 87. For Barthes, "[e]very photograph is a certificate of presence." *Id.*

27. SONTAG, *supra* note 16, at 5.

not seem to be statements about the world so much as pieces of it, miniatures of reality that anyone can make or acquire.”²⁸

A. The Photograph As Fact(s)

As “miniatures of reality,” photographs were embraced by the law as a revolutionary form of legal evidence. Indeed, judges were struggling with the admissibility of photographs as a form of legal evidence well before judges were sorting out the copyrightability of photographs.²⁹ Photographs may have come before the Supreme Court as early as 1857³⁰ and, in an 1859 case, the Justices said, in effect, that the photographs submitted allowed them to determine the facts as effectively as the trial court judge.³¹

That same year, popular culture got into the act with *The Octoroon*, a play at New York City's Winter Garden Theater.³² Timely in many senses (the play dealt with race relations and prejudice), a central device of the plot is a “photographic apparatus”³³ that accidentally captures a murder in progress, eventually exculpating an accused Native American and placing the guilt squarely on another character. In the midst of a “trial,” an assistant discovers a (self-developed) picture in the camera:

PETE: [*Who has been looking about the camera.*]
Top, sar! Top a bit! O, laws-a-mussey, see dis;
Here's a pictur' I found stickin' in that yar telescope
machine, sar! look sar!

SCUDDER: A photographic plate. [PETE *holds lantern up.*] What's this, eh? two forms! The child —

28. *Id.* at 4. Sontag also memorably notes that photographs seem to be “unpremeditated slices of the world.” *Id.* at 69. To film theorist André Bazin, photographs carry “an integral realism, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artist.” André Bazin, *The Myth of Total Cinema*, in *WHAT IS CINEMA?* 17, 21 (Hugh Gray trans., 1967).

29. See Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *YALE J.L. & HUMAN.* 1 (1998).

30. Mnookin makes this claim regarding *United States v. Fossat*. *Id.* at 9. However, the opinion is not express on this point. 25 F. Cas. 1157 (C.C.N.D. Cal. 1857) (No. 15,137), *rev'd on other grounds*, 61 U.S. (20 How.) 413 (1857).

31. *Luco v. United States*, 64 U.S. (23 How.) 515, 541 (1859). On appeal, only photographic copies of allegedly forged documents were presented, but the Court had no problem asserting, “We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence ‘*oculis subjecta fidelibus*’) that the seal and the signatures of Pico on this instrument are forgeries” *Id.*

32. The play was itself the subject of copyright litigation. See *Roberts v. Myers*, 20 F. Cas. 898 (C.C.D. Mass. 1860) (No. 11,906).

33. DION BOUCICAULT, *THE OCTOROON* (1859), reprinted in *EARLY AMERICAN DRAMA* 444, 463 (Jeffrey H. Richards ed., 1997).

'tis he! dead — and above him — Ah! ah! Jacob
M'Closky, 'twas you murdered that boy!

M'CLOSKY: Me?

SCUDDER: You! You slew him with that tomahawk; and as you stood over his body with the letter in your hand, you thought that no witness saw the deed, that no eye was on you — but there was, Jacob M'Closky, there was. The eye of the Eternal was on you — the blessed sun in heaven, that, looking down, struck upon this plate the image of the dead. Here you are, in the very attitude of your crime!

M'CLOSKY: 'Tis false!

SCUDDER: 'Tis true! the apparatus can't lie. Look there, jurymen. [*Shows plate to jury.*] Look there. O, you wanted evidence — you called for proof — Heaven has answered and convicted you.³⁴

Such a plot device was (and is) an appealing one — it was reused by D.W. Griffith in the 1907 biograph *Falsely Accused!*³⁵ In the film, a woman is accused of her father's murder, but her boyfriend finds a motion picture camera inadvertently left running at the crime scene. Developing the film, he sees the true murderer and rushes with this knowledge — and the film — to the murder trial in session.³⁶ *The Octoroon* and *Falsely Accused!* present highly stylized visions of the courtroom, but they were probably not far off the mark as to the evidentiary power of the new medium. While formal evidence doctrine made photographs admissible as illustrative of other testimony ("demonstrative evidence"),³⁷ Jennifer Mnookin has made a persuasive case that nineteenth century courts grappled with the use of photographs "not just to clarify testimony but to prove matters of fact."³⁸

34. *Id.* at 485–86.

35. See Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 537 (2004) (discussing the plot of *Falsely Accused!*).

36. *Id.* J.J. Abrams used the same device in his 2011 film *Super 8*, where a running film camera, hastily abandoned during a train wreck, provides definitive evidence of the alien that emerges from the train's wreckage. *SUPER 8* (Bad Robot Productions 2011).

37. See, e.g., 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 9:23 (3d ed. 2011).

38. Mnookin, *supra* note 29, at 48. Mnookin gives an excellent example of this in an 1899 Missouri case in which the judge says that "[d]iagrams, drawings, and photographs are resorted to only because the witness cannot, with language, as clearly convey to the minds of the court and the jury the scene," but the same judge admits that "after that foundation has been laid, the photograph speaks with a certain probative force in itself." *Id.* at 49 (quoting *Baustian v. Young*, 53 S.W. 921, 922 (Mo. 1899)). See also Farley, *supra* note 15, at

In 1874, the Pennsylvania Supreme Court grappled with this problem in a case about a man's double identity. Concluding that the evidentiary status of the photos "depend[ed] upon the judicial cognisance we may take of photographs as an established means of producing a correct likeness,"³⁹ the court reasoned as follows:

The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognisance of it as a proper means of producing correct likenesses.⁴⁰

Over time, more and more courts and commentators warmed to the idea of the photograph as evidence, and their successors can now admit photographs and video under the Federal Rules of Evidence.⁴¹ As Jessica Silbey writes, many courts treat film evidence, particularly materials "that purport to be unmediated and unselfconscious film footage of actual events" as a kind of "*evidence verité*."⁴² Whatever the merits of such treatment, contemporary judges of this mind are surely the intellectual descendants of early commentators who urged that the photograph be accepted as "a witness on whose testimony the

389–91. Silbey has explored parallel questions concerning the admission of film as demonstrative evidence and its use to prove facts, concluding that common law courts have "failed to promote a coherent evidentiary doctrine governing the use and admissibility of film in the courtroom." Silbey, *supra* note 35, at 496.

39. *Udderzook v. Commonwealth*, 76 Pa. 340, 353 (1874).

40. *Id.* The photograph was used in the following way: "In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph [as a likeness of Goss] . . ." *Id.*

41. FED. R. EVID. 401 (stating that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action"). The notes to Rule 401 make clear that this includes "[c]harts, photographs, views of real estate, murder weapons, and many other items of evidence." FED. R. EVID. 401 advisory committee's note.

42. Silbey, *supra* note 35, at 501.

most certain conclusions may be confidently founded" (1864)⁴³ and who believed that photography's "business is to give evidence of facts, as minutely and as impartially as, to our shame, only an unreasoning machine can give" (1867).⁴⁴

Another way to understand this acceptance of photographs and film as evidence is to understand the photograph or film as a database. The parallelism between photographs and databases has generally been overlooked by copyright scholars,⁴⁵ although the fact-bearing capacity of photographs has been obvious to laypersons, as illustrated by the adage "a picture is worth a thousand words." Perhaps films are more obviously compilations of fact; think of how the Warren Commission used the Zapruder film of President Kennedy's assassination.⁴⁶ But even a portrait photograph is a compilation of facts, which is how they were treated by the Pennsylvania Supreme Court in *Udderzook* and by millions of people in the mid-nineteenth century who received images of their loved ones for the first time. As Lady Elizabeth Eastlake wrote in 1857 of the rise of portrait photography, "Portraits, as is evident to any thinking mind, and as photography now proves, belong to that class of facts wanted by numbers who know and care nothing about their value as works of art."⁴⁷

Consider the data held by one of the most iconic daguerreotypes made in America: an 1848 panoramic photograph of Cincinnati, Ohio, made by Charles Fontayne and William Porter using eight 6.5-by-8.5-

43. H.J. Morton, *Photography as an Authority*, 1 PHILA. PHOTOGRAPHER 180, 181 (1864). Morton clearly saw the machine, not the photographer, as the source of the image. He goes on to say that "the evidences of [photography's] reliability as an *exact* witness of things visible, are endless. . . . It bears testimony without fear or favor. It has no prejudices, either as preferences or disapprovals. We cannot say this of human witnesses." *Id.* at 182.

44. Eastlake, *supra* note 19, at 66; see also Marius De Zayas, *Photography and Artistic-Photography*, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 125, 130 ("In this epoch of fact, photography is the concrete representation of consummated facts. In this epoch of the indication of truth through materialism, photography comes to supply the material truth of Form."). Charles Baudelaire opposed thinking of photography as an art for just these reasons, urging that the new technology should be "the secretary and record-keeper of whomsoever needs absolute material accuracy for professional reasons." Charles Baudelaire, *The Modern Public and Photography*, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 83, 88.

45. I have found only one court case where a party argued that a photograph was merely a compilation of facts. The court agreed that a photograph, like a map, can show facts that cannot be copyrighted, but emphasized that maps and photographs can still have protectable expression. *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1124 (D. Nev. 1999).

46. The President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act") requires that records pertaining to the assassination of President John F. Kennedy be made available to the American public. JFK Act, Pub. L. No. 102-526, 2(a), 106 Stat. 3443 (1992) (codified as a note to 47 U.S.C. § 2107 (2000)). The JFK Act created an Assassination Records Review Board ("Review Board") to collect all assassination records. *Id.* The Review Board unanimously resolved that "the Zapruder film was an assassination record within the meaning of the JFK Act." ASSASSINATION RECORDS REVIEW BOARD, FINAL REPORT OF THE ASSASSINATION RECORDS REVIEW BOARD 124-25 (1998).

47. Eastlake, *supra* note 19, at 67.

inch daguerreotype plates.⁴⁸ The quality of the Fontayne and Porter photograph is extraordinary; a digital camera would have to record “140,000 megapixels per shot” to equal the total amount of data that Fontayne and Porter recorded with daguerreotype technology.⁴⁹ The eight plates hold approximately nine billion pixels of data in total.⁵⁰ Initially, the context of this data was uncertain, but using astronomical data and commercial records of steamboats as well as analyzing the angles of shadows, Frederick Way and Carl Vitz established that the photograph was taken on September 24, 1848 just before 2:00 p.m.⁵¹ Combined with those other sources of information, the Fontayne and Porter photograph suddenly becomes a precise database of the Cincinnati waterfront: a database not just of building locations and details, but a snapshot of what was happening at 2:00 p.m. that afternoon — which windows were open, which curtains were drawn, which carriages traveled the waterfront, and so on.

Another perspective on the information-laden nature of photographs comes from privacy disputes involving the publication of photographs because such cases are built on the express premise that the photograph conveys information.⁵² As Lord Hoffmann said in a 2004 United Kingdom decision involving covertly taken photographs of Naomi Campbell, “In my opinion a photograph is in principle information no different from any other information.”⁵³ The same year, in *Von Hannover v. Germany*,⁵⁴ the European Court of Human Rights observed that, with the publication of photographs, “the protection of the rights and reputation of others takes on particular importance” because the images can contain “very personal or even intimate ‘information’ about an individual.”⁵⁵ One of the most high profile cases in the English courts during the same decade was the dispute between the tabloid *Hello!* and actors Michael Douglas and Catherine Zeta-Jones over photos taken illicitly at the couple’s wedding.⁵⁶ The violation was, again, conceptualized as the disclosure of detailed information:

What is the information to which the confidence here attached? Plainly the information as to how the wedding looked — the photographic images which bring

48. Julie Rehmeyer, *History Exposed*, WIRED, Aug. 2010, at 124, 126.

49. *Id.* at 126.

50. *Id.* at 128.

51. *Id.* at 129.

52. See, e.g., *Aubry v. Éditions Vice-Versa, Inc.*, [1998] 1 S.C.R. 591 (Can.) (balancing invasion of privacy from publication of photo against photographer’s right to artistic expression and public’s right to information).

53. *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.), 477 (appeal taken from Eng.).

54. 40 Eur. Ct. H.R. 1 (2005).

55. *Id.* at 25.

56. *OBG Ltd. v. Allan*, [2007] UKHL 21 (appeal taken from Eng.).

the event to life and make the viewer a virtual spectator at it. How can one doubt that this was commercially confidential information or, if one prefers, a trade secret? It was, after all, secret information for which OK! had been prepared to pay £1 million, in the expectation, obviously, that it was to remain secret until they chose to make use of it.⁵⁷

This is not to deny that photographs are especially invasive of privacy because of their visceral nature, but that visceral nature is a function of the sheer amount of information the photo conveys. As the lower court said in the *Douglas v. Hello!* litigation, photographs “are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts.”⁵⁸ Indeed, the visceral nature of the photograph cannot be separated from it being considered an incredibly detailed database; as Paul Valéry notes:

[T]he development of [photography] and of its functions has resulted in a kind of progressive eviction of the word by the image. In fact, it is as if the image, in published form, has been led, by its overweening desire to steal the place of words, to steal some of their more irritating vices as well — prolixity and facility.⁵⁹

Seeing the parallel between photographs and databases has great dividends for those working in copyright law. It is no accident that the strongest, most stable bases for copyright protection of a photograph are *selection* and *arrangement* — the *Feist* foundation for copyright in compilations of data.⁶⁰ As we will explore below, the ways we use

57. *Id.* at [326].

58. *Douglas v. Hello!*, [2005] EWCA (Civ) 595, [84] (Eng.).

59. Paul Valéry, *The Centenary of Photography* (1939), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 191, 192–93.

60. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). The Supreme Court's 1991 *Feist* decision focused analysis of originality in compilations of data on selection and arrangement:

The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.

Id.

selection and arrangement as foundations for copyright in databases should help inform our thinking on some of the more esoteric issues of selection and arrangement with photography, particularly what one might call temporal selection and the hunt of the photojournalist. We will also consider how, just as originality-based copyright does not protect many of the databases we would find desirable to have, originality-based copyright has the same issue with photography and videography. We will also see how some jurisdictions have responded to the perceived limits of originality by offering two-tier protections for both photographs and compilations of facts.

B. The Photograph As Art

The very characteristics that made the photograph seem like “truth itself”⁶¹ initially made photography seem to be only a technology and outside the realm of artistic works, both to artists and to mid-nineteenth century minds conversant with copyright. As Colin Ford notes, “Most people in these very early days must have seen photographs merely as a way of recording reality rather than any kind of artistic endeavor”⁶² Describing French copyright, Bernard Edelman notes that, prior to photography, copyright dealt only with “manual” art — art done with chisels and brushes — and the “abstract” art of writing — done with pens.⁶³ What applied to photography also applied to cinematography at its inception. The question was: “[A] photographer who is satisfied to press a button, the cinematographer who turns a crank, are they *creators*?”⁶⁴ Initially, instead of the machine being seen as an instrument in a human process, many French commentators viewed the human operator as an accessory to a machine’s process, which is especially unsurprising given that the word for a camera’s “lens” in French is “*objectif*.”⁶⁵ As Robert Whitman has

61. Poe, *supra* note 17, at 38.

62. AN EARLY VICTORIAN ALBUM: THE PHOTOGRAPHIC MASTERPIECES (1843–1847) OF DAVID OCTAVIUS HILL AND ROBERT ADAMSON 12 (Colin Ford ed., 1976).

63. BERNARD EDELMAN, LE DROIT SAISI PAR LA PHOTOGRAPHIE 42 (2001) (“The law knew only ‘manual’ art, the brush, the chisel . . . or ‘abstract’ art, writing.”/“Le droit ne connaissait que l’art ‘manuel,’ le pinceau, le ciseau . . . , ou l’art ‘abstrait,’ l’écriture.”).

64. *Id.* (“Une photographie qui se contente d’appuyer sur un bouton, un cinéaste de tourner une manivelle, sont-ils des créateurs?”).

65. André Bazin, *The Ontology of the Photographic Image* (1967), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 237, 241. The Lucas treatise observes that the mechanical character of the camera’s operation made the possibility of personality in photographs seem doubtful under French law. ANDRE LUCAS & HENRI-JACQUES LUCAS, TRAITE DE LA PROPRIETE LITTERAIRE & ARTISTIQUE § 128 at 135 (1994) [hereinafter LUCAS] (“La difficulté principale tient ici au caractère mécanique de l’opération qui a fait douter de la possibilité d’une manifestation de personnalité.”). See also HENRI DEBOIS, LE DROIT D’AUTEUR EN FRANCE § 68 (3d ed. 1978) (“The camera shot itself is impersonal, mechanical, whereas the execution of a work of art gives the prevalence to the fact of the man.”/“La prise du vue proprement dite a un caractère impersonnel, mécanique, alors que l’exécution d’une œuvre d’art donne la prédominance au fait de l’homme.”).

said, the general attitude at the time toward cinematography was that “[i]t could never be an art form; it was simply a machine.”⁶⁶

But reassessment came quickly: from roughly 1860 onwards, photographs were brought within the ambit of copyright law in France, Great Britain, and the United States — the jurisdictions leading the development of sophisticated copyright laws. Great Britain and the United States added photographs to their copyright statutes in 1862⁶⁷ and 1865,⁶⁸ respectively, but in all three jurisdictions it was court decisions that convincingly extended copyright protection to photography and set the contours of that protection.

In the United States, the question of whether photography was properly protected by copyright law came to a head in the 1884 Supreme Court case, *Burrow-Giles Lithographic Co. v. Sarony*.⁶⁹ The fact pattern of *Sarony* speaks to how the improving technology created space for artistry that did not exist — or was not apparent — in the earliest days of photography. *Sarony* shows how questions about copyright and photography were closely connected to deeper debates about photography as an art form. But copyright law did not need a final resolution of the “is it art” question, but only an answer to the simpler question “is it artistic enough?” In *Sarony*, the trial court found that the Burrow-Giles Lithographic Company had made and put up for sale 85,000 copies of *Oscar Wilde No. 18*, a photograph of Oscar Wilde taken by photographer Napoleon Sarony in his studio.⁷⁰ There was no question that Burrow-Giles had violated copyright law if there was a valid copyright in Sarony’s photograph, so the defendant pressed two arguments against such a copyright before the Supreme Court. One was that Sarony had failed to abide by the copyright registration requirements of the time and the other was the more fundamental claim that photographs could not be protected by copyright at all.⁷¹

66. PICASSO AND BRAQUE GO TO THE MOVIES (Cubists 2008).

67. Fine Art Copyright Act, 1862, 25 & 26 Vict., c. 68 § 1 (U.K.).

68. Copyright Act Amendment, ch. 126, sec. 1, 13 Stat. 540 (1865) (repealed 1870).

69. 111 U.S. 53 (1884).

70. *Id.* at 54.

71. Statement and Brief for Plaintiff in Error at 5, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) [hereinafter *Burrow-Giles Brief*].



Figure 2: Oscar Wilde No. 18

Burrow-Giles boiled its constitutional argument down to “only this question: ‘Are Photographs the writings of Authors?’”⁷² But this simple six-word query naturally spun into two distinct but interrelated arguments: first, that protectable “writings” did not extend to anything beyond “literary productions”;⁷³ and second, that photographs were not the products of “Authors” because photographs lack originality.⁷⁴ Burrow-Giles must have realized the problem with the first of its arguments: the claim that “writings” were strictly limited to “literary productions” was in tension with a series of congressional actions extending copyright protection to “engravings” (1802),⁷⁵ “musical

72. *Id.* at 9.

73. *See id.* at 4, 7 (“[W]e are driven irresistibly to the conclusion that any Act of Congress, which goes further than to patent inventions and copyright literary works, is unconstitutional and void.”).

74. *See id.* at 5.

75. Engravings actually first came under copyright protection in the United States with an 1803 amendment that extended copyright to “historical engravings.” Copyright Act of 1802, ch. 36, § 2, 2 Stat. 171 (1802) (repealed 1831); that was broadened to “any print or engraving” in 1831. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (1831) (repealed 1870). The brief tries to paper over this problem of “engravings” by emphasizing that Congress was still clear about the originality requirement: “Here Congress had still in view, solely the protection of original work, as is seen by the use of the words ‘author,’ ‘invent’ and ‘design,’ each

compositions" (1831),⁷⁶ and paintings, drawings, sculptures, and models for works in the fine arts (1870).⁷⁷ In this sense, Burrow-Giles faced a problem that would become familiar a century later to the plaintiff in *Eldred v. Ashcroft*⁷⁸: in both cases, some of the most powerful reasoning available to the party challenging a more expansive copyright regime would undermine not just the legislative act being challenged, but others that had come before — threatening to unravel the structure of the law.⁷⁹ So, without formally abandoning its argument as to "writings," Burrow-Giles's counsel acknowledged that Congress had included artistic works in copyright and noted that it was "ready to discuss the question at issue on the basis of this wide construction, erroneous though we consider it."⁸⁰

On that basis, the bulk of Burrow-Giles's attack on the constitutionality of copyright protection for photographs was the argument that photographs could not be the work of "Authors." In making that argument, Burrow-Giles helped crystallize a copyright discourse for Americans that derived the originality requirement from the word "Authors" in the Constitution; indeed, Burrow-Giles's brief speaks of the originality requirement in thoroughly modern terms. Citing Webster's definition of an "author," Burrow-Giles argues that "[a]ll these synonyms and definitions presuppose the idea of originality",⁸¹ that for engravings and print, the copyright law can protect "only such as are original, and are founded in the creative powers of the mind",⁸² and that this standard in United States law was consistently applied, even before federal copyright law: "By the preambles to the State Statutes, we see that the matter to be protected must be ORIGINAL. This test has been kept steadily in view by the Courts of the United States, and is still the principal test."⁸³

of which pre-supposes that something new is produced, not a reproduction of something already existing." Burrow-Giles Brief, *supra* note 71, at 5.

76. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831) (repealed 1870).

77. Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198 (1870) (repealed 1909).

78. 537 U.S. 186 (2003).

79. Despite the potential cascade effect of Burrow-Giles's first argument, Sarony took Burrow-Giles's argument about the narrow meaning of "writings" quite seriously. Sarony countered it with a more general and amorphous reading of the Copyright and Patent Clause. Brief on the Part of the Defendant in Error at 7, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) [hereinafter *Saroni Brief*]. Indeed, he likely would have objected to calling it the Copyright and Patent Clause on the grounds that the framers of the Constitution specifically put the words "copyright" and "patent" before the Constitutional Convention — in the form of respective proposals from Madison and Pinckney — and chose *not* to use those words. *Id.* at 17. Sarony argued that it was "self-evident that the Constitutional provision was intentionally expressed in such general terms to enable the Legislature to provide for new arts, for new sciences, for new conditions, as they should arise, and as public interest should require." *Id.* at 18.

80. Burrow-Giles Brief, *supra* note 71, at 18.

81. *Id.* at 9.

82. *Id.* at 18 (quoting *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

83. *Id.* at 19.

With this originality-imbued understanding of “Author,” Burrow-Giles argued that “a photograph [was] not a . . . production of an author”⁸⁴ because a photograph was “a reproduction, on paper, of the exact features of some natural object, or of some person.”⁸⁵ In other words, Burrow-Giles claimed that a photograph was only a recordation or compilation of facts (“the exact features of some natural object or of some person”) and that there was no creativity or originality involved in a machine recording whatever facts are put in front of it. Burrow-Giles described the process of photography as “the reproduction of existing objects, by means which are merely applications of scientific principles”⁸⁶ and “simply the manual operation, by the use of . . . instruments and preparations, of transferring to [a] plate the visible representation of some existing object, the accuracy of this representation being its highest merit.”⁸⁷ We can imagine the same words being used by a prosecutor placing a crime scene photograph before a jury.

But Justice Miller, who wrote the Supreme Court’s opinion, was unwilling to view the fact-recording nature of a photograph as a bar to copyright. He pointed out that the first Congress, which included many of the Framers, had granted copyright to the “author or authors of any map, chart, book, or books, being citizen or resident of the United States.”⁸⁸ Justice Miller emphasized that this first copyright statute “not only make maps and charts subjects of copyright, but mentions them before books in the order of designation.”⁸⁹ Why did he think this order was important? Because maps and charts are prototypically fact-recording expressions. A map of Middle-earth might be a charming accompaniment to J.R.R. Tolkien’s books, but most of the time we want our maps and charts to correctly record facts about roads, intersections, bridges, bodies of water and such. Justice Miller reasoned that “[u]nless, therefore, photographs can be distinguished in the classification on this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why congress cannot make them the subject of copyright as well as the others.”⁹⁰ Foreshadowing the tensions between copyright and technology that would come in the next 125 years, Justice Miller concluded, “The only reason why photographs were not included in the extended list in the act of 1802 is, probably, that they did not exist.”⁹¹

84. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. at 56.

85. *Id.*

86. *Burrow-Giles Brief*, *supra* note 71, at 5.

87. *Sarony*, 111 U.S. at 57.

88. *Id.* at 56–57 (internal quotation marks omitted).

89. *Id.* at 57.

90. *Id.*

91. *Id.* at 58.

There is no question that Justice Miller's reasoning bypasses Burrow-Giles' argument. Burrow-Giles argued that there was something about the process of photography that was different from the process of drawing that was at the heart of the visual arts — including map-making and chart-making — up until that time.⁹² Justice Miller did not really confront this point, implicitly adopting “a tool is a tool” perspective that the camera is no different than the painter's box of brushes and colors.⁹³ *Sarony* was the first great copyright-meets-technology decision of United States copyright law and sets a tone of technological neutrality that is still with us.⁹⁴

Of course, Justice Miller was implicitly saying that Burrow-Giles misunderstood the process of photography. For Burrow-Giles, the photographic process was only the taking of the picture so that the tableau set up by Sarony — the drapes, props, and pose — had no relevance. This allowed Burrow-Giles to distinguish Sarony from one who creates “something new”⁹⁵ — something not yet in existence — and from “one who, by his own intellect, applied to the materials of his composition, produces an arrangement or compilation new in itself.”⁹⁶ Burrow-Giles maintains an extremely mechanical view of photography. While acknowledging that the painter's “choice of the . . . correct light and shade”⁹⁷ is an “act of an intellectual kind”⁹⁸ and that “[t]he light and shade in any picture varies with every painter, his own mental originality determining the same,”⁹⁹ there is no space for such originality in Burrow-Giles's professed view of the technology of photography: “in the case of the photographer the light and shades are beyond his power.”¹⁰⁰ In contrast, Justice Miller clearly agreed with the trial judge and Sarony that everything Sarony did in his studio to produce *Oscar Wilde No. 18* was part of an integral creative process.¹⁰¹

For many people who study copyright, *Sarony* stands for the proposition that all photographs are copyrightable. The Court only says that a photograph *can* be copyrightable, not that every photograph *is* or *probably will be* copyrightable. Indeed, after hearing Burrow-Giles's argument that photography is “simply the manual

92. See Burrow-Giles Brief, *supra* note 71, at 5.

93. *Sarony*, 111 U.S. at 60.

94. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

95. Burrow-Giles Brief, *supra* note 71, at 5.

96. *Id.* at 10.

97. *Id.* at 14.

98. *Id.*

99. *Id.* at 16.

100. *Id.*

101. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884). Burrow-Giles provided a weak, unconvincing argument to respond to this directly, saying that even if everything Sarony did was part of the photographic process, it would produce “at best a new arrangement of something already extant.” Burrow-Giles Brief, *supra* note 71, at 11.

operation, by the use of . . . instruments and preparations, of transferring to [a] plate the visible representation of some existing object,”¹⁰² the Court acknowledged that that description might “be true in regard to the ordinary production of a photograph, and [further,] that in such case a copyright is no protection.”¹⁰³ In other words, the Court said that a completely “ordinary . . . photograph” might have no copyright protection at all. This part of the *Sarony* decision is rarely discussed.¹⁰⁴

Once Justice Miller had rebuffed both the objection that photographs just record facts with the examples of maps and charts and the at least implied invitation to discriminate against the camera as a tool, *Sarony* was actually quite easy to decide. This is because *Oscar Wilde No. 18* was far from an ordinary photograph. By the time this case reached the courts, Napoleon Sarony was one of the country's most celebrated portrait photographers, and it was known that Sarony “posed and directed his sitters, using flattery, threat, mimicry, to bring out their histrionic powers.”¹⁰⁵ The *Sarony* trial court judge had drawn fairly express parallels between portraiture painting and portraiture photography in his conclusion that *Oscar Wilde No. 18* was a

useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own mental conception, to which he 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 expres-

102. 111 U.S. at 59.

103. *Id.* But the Court also said that “[o]n the question as thus stated we decide nothing.” *Id.* So technically, as Nimmer says, “[T]he Court expressly declined to rule on the question whether ‘the ordinary production of a photograph’ necessarily exhibits sufficient originality to claim copyright.” 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1] (2011) [hereinafter NIMMER]. Still, it seems to me that Justice Miller was fairly blunt in signaling his views.

104. *But see* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 308 (S.D.N.Y. 2000) (“The Supreme Court did not reject Burrow-Giles’s attack entirely, observing that a lack of originality may be ‘true in regard to the ordinary production of a photograph . . . [I]n such a case a copyright is no protection.’” (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884))). In a seminal photography copyright case, *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), the district court wrote, “The Supreme Court declined to say whether copyright could constitutionally be granted to ‘the ordinary production of a photograph.’” *Id.* at 141 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884)). But, of course, that’s wrong: Justice Miller did not “decline[] to say,” he said “[i]n such a case a copyright is no protection.” *SHL Imaging*, 117 F. Supp. at 308.

105. BEAUMONT NEWHALL, THE HISTORY OF PHOTOGRAPHY 71 (rev. & enlarged ed. 1982).

sion, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.¹⁰⁶

Armed with that description, Justice Miller was confident that this photograph was “an original work of art”¹⁰⁷ — and perhaps most people hearing that as a description of a picture (without saying whether a painting or a photograph) would agree. Indeed, twenty years before *Sarony*, an anonymous essay in *The Photographic Journal* had described a composition like Sarony’s as “[t]he simplest and most limited form in which photography can be made to interpret an artist’s thoughts.”¹⁰⁸ In other words, *Sarony* was an easy case on the question of copyrightability. The Court’s reasoning focused on the photographer’s staging of the photograph in order to find that it was “an original work of art, the product of plaintiff’s intellectual invention.”¹⁰⁹

It is useful to consider the context in which Justice Miller made these comparisons. While there was — and still is — substantial tension between seeing photographs as truth and seeing photographs as creative expression, Justice Miller actually could have drawn some collateral support from evidence law for both a formal analogy between photographs and maps and an informal analogy between photographs and paintings. Throughout the nineteenth century, judges admitted (although sometimes inconsistently) maps and charts, particularly surveys, as illustrative of testimony being offered as to facts.¹¹⁰ Mnookin notes that during the period from 1876 to 1904, for purposes of evidence law, “the prevailing judicial approach to the photograph was to align it, by analogy, with maps, models, and diagrams.”¹¹¹

In an 1879 case discussed above, *Udderzook*,¹¹² the Pennsylvania Supreme Court made specific comparisons between the admissibility of “a portrait or a miniature, painted from life” and the admissibility of photographs.¹¹³ And in a case decided just three years before *Saro-*

106. *Sarony*, 111 U.S. at 60 (quoting unpublished lower court decision). The courts may have actually overstated Sarony’s array of decisions, as Oscar Wilde came in his lecture attire and may himself have been responsible for the “calculated pose.” MARIA MORRIS HAMBOURG ET AL., IN *THE WAKING DREAM: PHOTOGRAPHY’S FIRST CENTURY* 340 (1992).

107. *Sarony*, 111 U.S. at 60.

108. *Photography*, *supra* note 20 at 143 (“The simplest and most limited form in which photography can be made to interpret an artist’s thoughts is, of course, by selecting a subject in accordance with the idea to be illustrated, and collecting the appropriate accessories, and distributing them so as to produce the best effect.”).

109. *Sarony*, 111 U.S. at 60.

110. Mnookin, *supra* note 29, at 43.

111. *Id.*

112. *Udderzook v. Commonwealth*, 76 Pa. 340 (1874).

113. *Id.* at 352. Specifically, the Court notes:

That a portrait or a miniature, painted from life and proved to resemble the person, may be used to identify him cannot be doubted, though, like all other evidences of identity, it is open to disproof or

ny, New York's highest court ruled that photographs and paintings were admissible on the same terms when accompanied by testimony showing them to be "truthful representations."¹¹⁴ In reaching this decision, the New York Court of Appeals noted that "[t]he portrait and the photograph may err, and so may the witness."¹¹⁵ Of course, what is error for purposes of evidence law might well be creative expression for purposes of copyright law. Acknowledging that the piece of photographic evidence might be worthless because it does not accurately reflect reality is one step on a path to saying that that same piece of photography is art.

The professional overlap between painters and photographers in the mid-nineteenth century may have helped judges make such inferences. The early pioneers of photography were often trained as painters. Daguerre himself "was a scenic artist; he had specialized in painting stage sets for the Opéra and popular theaters."¹¹⁶ Other pioneers in photography who had their professional or educational start as visual or fine artists included Oscar Gustav Rejlander,¹¹⁷ David Octavius Hill, Frederick Scott Archer, Henry Peach Robinson, Joseph Cundall, and Roger Fenton in the United Kingdom;¹¹⁸ Gustave Le Gray, Charles Marville, Nadar (Gaspard Felix Tournachon), Etienne Carjat in France; and William James Stillman and Albert Sands Southworth in the United States.¹¹⁹ Sarony himself "ache[d]"¹²⁰ to be more of an artist, and according to historian Beaumont Newhall, "[Sarony] spent his few odd moments in what he called his 'den,'

doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. It is true the photographs we see are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science.

Id.

114. *Cowley v. People*, 83 N.Y. 464, 478 (1881).

115. *Id.*; see also *Luke v. Calhoun Cnty.*, 52 Ala. 115, 118 (1875) (accepting a photograph as "evidence of the same character as a portrait or miniature"); *Udderzook*, 76 Pa. at 353; Mnookin, *supra* note 29, at 24–25.

116. NEWHALL, *supra* note 105, at 15.

117. See EDGAR YOXALL JONES, *FATHER OF ART PHOTOGRAPHY: O.G. REJLANDER 1813–1875* (1973).

118. For short biographies on all these British photographers, see ROBERT LEGGAT, *A HISTORY OF PHOTOGRAPHY FROM ITS BEGINNINGS UNTIL THE 1920S* (1995), available at <http://www.mpritchard.com/photohistory>.

119. The biographies of all these individuals (with the exception of William James Stillman) can be found in *THE OXFORD COMPANION TO THE PHOTOGRAPH* (Robin Lenman, ed., 2005).

120. NEWHALL, *supra* note 105, at 71.

drawing in charcoal such subjects as *Venus in the Bath* and *The Vestal Virgin*.¹²¹

Not surprisingly, early commentators used the language of the existing visual arts while recognizing that photography was something profoundly sui generis. An 1835 review in *Journal des Artistes* called daguerreotypes “the most perfect of drawings,”¹²² while in England, William Henry Fox Talbot initially called his own independently invented results “photogenic drawings”¹²³ and published a series of books on photography between 1844 and 1846 called *The Pencil of Nature*.¹²⁴ One of the largest portrait studios for daguerreotypes in New York in the 1850s was the Fredricks’ Photographic Temple of Art on Broadway.¹²⁵ Without using any photography-related terminology, Norwegian playwright Henrik Ibsen’s 1867 *Peer Gynt* features a character noting that “they have discovered in Paris of late / How to make portraits by means of the sun.”¹²⁶

At the same time, many recognized that photography was something both connected to and radically different from drawing. When he saw the first daguerreotypes exhibited in Paris, the American inventor and painter Samuel Morse wrote, “[T]hey resemble aquatint engravings; for they are in simple chiaro oscuro, and not in colors. But the exquisite minuteness of the delineation cannot be conceived. No painting or engraving ever approached it.”¹²⁷ The British astronomer Sir John Herschel said the same thing when he visited Paris: “The most elaborate engraving falls far short of the riches and delicateness of execution, every gradation of light and shade is given with a softness and fidelity which sets all painting at an immeasurable distance.”¹²⁸

121. *Id.*

122. *Id.* at 18.

123. AN EARLY VICTORIAN ALBUM, *supra* note 62, at 11; NEWHALL, *supra* note 105, at 22.

124. BRIAN COE, THE BIRTH OF PHOTOGRAPHY 28 (Spring Books 1989) (1976); NEWHALL, *supra* note 105, at 43.

125. See Collections, NELSON-ADKINS MUSEUM OF ART, <http://www.nelson-atkins.org/art/CollectionDatabase.cfm?id=47094&theme=photo> (last visited May 3, 2012); see also NEWHALL, *supra* note 105, at 58.

126. HENRIK IBSEN, PEER GYNT 202 (Rolf Fjelde, trans. 1980) (1867):

You know they have discovered in Paris of late
How to make portraits by means of the sun.
The pictures come either direct and alive,
Or else in the form of a negative.
In the latter, the lights and shadow reverse;
The casual eye will find it coarse —
But the likeness is there for all of that.

127. Letter from Samuel Morse to his brother (Mar. 9, 1839), N.Y. OBSERVER, Apr. 19, 1939, reprinted in NEWHALL, *supra* note 105, at 16.

128. NEWHALL, *supra* note 105, at 23.

Justice Miller's finding that *Oscar Wilde No. 18* was "an original work of art"¹²⁹ was based on the traditional, artistic side of such observations, emphasizing Sarony's "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,"¹³⁰ and so on. Notice how locating the creativity in the pre-exposure selection and arrangement of Wilde and his surroundings creates a boundary to the realm of originality. To understand this, compare *Oscar Wilde No. 18* to two possibilities: first, taking a photograph of the Lincoln Memorial at midday, and second, taking a photograph of a child blowing out the candles on a birthday cake. In all three situations, the camera, the mechanical unit itself, captures a small slice of reality. At some moment, Oscar Wilde was actually sitting in Sarony's studio, wearing those clothes, with those drapes behind him. Strictly speaking, all three photographs are direct, mechanical representations of some set of real-world facts. Each is a compilation of facts: Wilde wore a tie, held a book, had hair of a certain length, and so on.

In *Oscar Wilde No. 18*, what was captured was not, on the whole, a *preexisting* reality as Wilde arrived at the studio shortly before the photographs were taken. What was captured in *Oscar Wilde No. 18* also was not a *continuing* reality since Wilde got up and left after the photographs were taken. These two features distinguish *Oscar Wilde No. 18* from the Lincoln Memorial photograph, but not from the birthday photograph. Both the birthday photo and *Oscar Wilde No. 18* record a short-lived reality. The difference is that what was captured in the birthday photograph would have happened without the photograph; it was not composed for purposes of the photograph but had an independent purpose and, therefore, in an important sense, an independent reality. In contrast, *Oscar Wilde No. 18* was a staged or composed image, similar to a portrait painting. Sarony hammered on this point in his brief. Referring to *Oscar Wilde No. 18* as "Exhibit A," Sarony's brief before the Supreme Court notes that "in this case the plaintiff in error try [sic] to ignore or overlook the fact that the picture or scene from which Exhibit A was made; had no existence until invented, created, or set in order by Sarony."¹³¹

Another way to look at this is that the practice of photography, especially as classically understood, handicaps the photographer as artist compared to the painter because while the latter could simply

129. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

130. *Sarony*, 111 U.S. at 60 (quoting unpublished lower court decision).

131. Sarony Brief, *supra* note 79, at 13; *see also id.* at 12 (arguing that Burrow-Giles had "conceded that no such picture or scene as is depicted in 'Exhibit A' existed until Sarony placed the same in order, 'invented it,' that prior to making the negative, Sarony had had the conception of this invention in his mind; but he had not stopped there; he had designed and set in order the whole scene or picture").

imagine Wilde surrounded by luxurious tapestries and paint the same, the photographer has to place Wilde in actual surroundings. In contrast to how the painter or novelist works, the portrait photographer sets up real surroundings to produce the photograph.¹³² In other words, in classic photographic portraiture — the way they still do high school yearbook portraits and most modern fashion shoots — the surroundings are just a device for achieving the artistic image that the photographer wants to achieve. In the old-style portrait session (or the modern fashion shoot) where the photographer creates a new, highly stylized composition of people and props, that composition exists in reality — albeit momentarily. The composition is real, yet at the same time is close to a work of fiction.¹³³ This compositional element is critical, as one anonymous commentator noted:

If a photographer should photograph his sitter just as he happened into his studio, the result would, with an almost absolute certainty, not be a composition. But if he were to exercise his sense of order, and arrange the folds of the dress, the action of the figure, the background, and light and shade into a composition, and then photograph it, he would produce a work of art.¹³⁴

How much staging or composition is necessary to establish the originality that justifies a copyright in a photograph? Less than a year before *Sarony*, the English courts addressed this question in *Nottage v. Jackson*,¹³⁵ a case about a photograph of Australian cricket players. In *Nottage*, the photographer took a group photograph of the players

132. Of course, there are painters who relied on photography, perhaps none more than Norman Rockwell, who first composed almost all his classic paintings as photographs. See RON SCHICK, NORMAN ROCKWELL: BEHIND THE CAMERA (2009).

133. One could say that the assemblage of facts captured by the photograph of the composition are “created facts” — facts brought into existence momentarily for the express purpose of bringing the expression into existence. Elsewhere, I have used the term “created facts” for a narrower concept than here. See Justin Hughes, *Created Facts and the Flawed Ontology of Copyright*, 83 NOTRE DAME L. REV. 43 (2007) [hereinafter Hughes, *Created Facts*].

134. Anonymous, *Is Photography a New Art?*, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 138. The quotation continues:

To this proposition, it is frequently objected that the posed model would be the work of art, and the photograph only a photograph of a work of art. If this is true, the portrait-painter, who brings to bear all his imagination and taste in posing his model, and then copies what he sees, is not making a work of art. The proposition is absurd. The posing of the model is only a means to an end — of course, if it is *tableau vivant* that the artist is striving for, why then, that being the end, it itself becomes the work of art.

Id.

135. [1883] 11 Q.B.D. 627.

at the London cricket ground Kennington Oval.¹³⁶ In order to take the photograph, the photographer “[h]ad to arrange the group, to put them in the right position and the right focus.”¹³⁷ A dispute arose as to whether the author was the photographer or the London firm that had sent him to take the photograph. Justice Brett’s analysis is instructive:

The nearest I can come to is that [the author] is the person who effectively is . . . the cause of the picture which is produced — that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be — the man who is the effective cause of that.¹³⁸

So, even there on the cricket ground, there was enough arrangement to merit copyright.

Notice that the image in *Nottage* was again a momentary reality created for purposes of producing the photograph: the cricketers were told to line up a certain way, pose, and so on.¹³⁹ It is not categorically different from what Sarony did with Oscar Wilde. This still leaves us with a problem: if this composition-for-image is the grounding of copyright in photographs, then what happens if the subject being photographed has or had an independent reality and the photographer did not do any direction — as in a photograph of a child’s birthday party, a city skyline, a stand of Redwoods, a dramatic coastline, a homeless person on a sidewalk, or a political rally? Can there still be a copyright? This is where copyright’s understanding of originality in photography has expanded substantially, again in keeping with thinking about photography as art. Over time, courts — like critics and commentators — became comfortable moving beyond the idea of extra-machine composition to increasingly recognize personal expression in the process of using the machine.

Some explanation is warranted as to the meaning of “using the machine.” In *Sarony* (or *Nottage*), it is easy to imagine the camera as (relatively) stationary and the composition being selected and arranged in front of it. But as cameras became more mobile, selection and arrangement were determined by where one pointed the camera. As Edward Weston would later write, “By varying the position of his camera, his camera angle, or the focal length of his lens, the photog-

136. *Id.* at 628.

137. *Id.* at 632.

138. *Id.* at 632. Justice Miller cited this passage from *Nottage*, but he did not describe the problem that had been in front of the English court. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884). Notice how this passage also provides a general explanation of why the author of an audiovisual work is the director, and not the cinematographer.

139. *Nottage*, 11 Q.B.D. at 632.

rapher can achieve an infinite number of varied compositions with a single, stationary subject.”¹⁴⁰ It also became clear that light and shade were not just a matter of sunshine and artificial light as the human eye would see them during the photography shoot, but could also be controlled by the machine, whether a camera or darkroom. Filters, lenses, and developing techniques were increasingly recognized as tools by which the photographer would, in the words of one commentator, “blend the variables of interpretation into an emotional whole.”¹⁴¹

Indeed, practically all this had been recognized earlier in France. In the 1862 decision *Bethéder et Schwalbé c. Mayer et Pierson*,¹⁴² the Cour de Cassation upheld a lower court ruling that photographs could be protected under France’s *droit d’auteur* law of July 19, 1793.¹⁴³ Like the Court in *Sarony*, the Paris courts did not hold that photographs were “generally” or “absolutely” protected under *droit d’auteur*, but that a particular photographic portrait of the Count of Cavours taken in 1856 had crossed the threshold into original expression.¹⁴⁴ Commentators quickly concurred that photographic works could be protected under French law.¹⁴⁵ The argument made to, and embraced by, the Paris courts not only presages the reasoning in *Sarony*, but also provides a wider (albeit still incomplete) catalog of originality in photography:

Considering that photographic drawings should not necessarily be, or in all cases be, considered as lacking any artistic characteristics, nor counted among purely material works; — That indeed, these [photographic] drawings, though obtained using the dark-room and under the influence of light, can, to a

140. Edward Weston, *Seeing Photographically*, 9 COMPLETE PHOTOGRAPHER 3200 (1943), reprinted in PHOTOGRAPHERS ON PHOTOGRAPHY 159, 161 (Nathan Lyons ed., 1968).

141. W. Eugene Smith, *Photographic Journalism*, PHOTO NOTES (1948), reprinted in PHOTOGRAPHERS ON PHOTOGRAPHY, *supra* note 140, at 103, 104. As early as 1864, an unknown essayist made similar observations:

The balance of light and shade, the exact adjustment of the prominence due to each portion of the picture, is a peculiar beauty of the art, which seems to attain to greater and greater excellence with each succeeding year. Those who talk of photography as something purely mechanical would be surprised to know how much the attainment of this excellence depends upon natural gift, adroit manipulation, long experience, and careful study of nature.

Photography, 116 Q. REV. 482, 506 (1864).

142. Cour de Cassation, 28 November 1862, Dalloz 1863, 1:54, affirming the decision of the Cour de Paris, 10 April 1862, Dalloz 1863, 1:52.

143. *Id.* at 1:54.

144. *Id.*

145. See, e.g., EDOUARD DELALANDE, ÉTUDE SUR LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 102 (1879); EUGÈNE POUILLET, TRAITE THÉORIQUE ET PRATIQUE DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DU DROIT DE REPRÉSENTATION *passim* (1894).

certain extent and in a certain degree, being products of thought, of spirit, of taste and of the intelligence of the operator; — That their perfection, independent of manual skill, depends mainly, in the reproduction of the landscapes, the choice of point of view, the combination of the effects of light and shade, and, moreover, in the portraits, in the posing of the subject, the fitting of the costume and the accessories, and all things given over to artistic feeling and which give to the work of the photographer the imprint of his personality.¹⁴⁶

Today, courts still see the foundation for a photograph's copyright — the originality in the photograph — in roughly similar terms: in “the photographer's selection of background, lights, shading, positioning of subject, and timing”;¹⁴⁷ “decisions regarding lighting, appropriate camera equipment and lens, camera settings and use of the white background”;¹⁴⁸ or “posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”¹⁴⁹ Lists of this sort are repeated again and again in copyright cases in both the United States¹⁵⁰ and other juris-

146. *Bethéder* at 1:53 (“Considérant que les dessins photographiques ne doivent pas être nécessairement, et dans tous les cas, considérés comme destitués de tous caractères artistiques, ni rangés au nombre de œuvres purement matérielles; — Qu'en effet, ces dessins, quoique obtenus à l'aide de la chambre noire et sous l'influence de la lumière, peuvent, dans une certaine mesure et dans un certain degré, être le produit de la pensée, de l'esprit, du goût et de l'intelligence de l'opérateur; — Que leur perfection, indépendamment de l'habileté de la main, dépend en grande partie, dans la reproduction des paysages, du choix du point de vue, de la combinaison des effets de lumière et d'ombre, et, en outre, dans les portraits, des la pose du sujet, de l'agencement du costume et des accessoires, toutes choses abandonnées au sentiment artistiques et qui donnent à l'œuvre du photographe l'empreinte de sa personnalité.”); see also Laurent Pfister, *L'oeuvre, Une Forme Originale. Naissance d'Une Définition Juridique (XVIIIème–XIXème siècles)*, in LE PLAGIAT LITTÉRAIRE 245, 261 (Hélène Maurel Indart ed., 2002).

147. *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998).

148. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1230 (11th Cir. 2010).

149. *Roger v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

150. See, e.g., *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1551–52 (3d Cir. 1992) (indicating that copyright originality is in “the choice of light sources, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques”); *United States v. Hamilton*, 583 F.2d 448, 452 (9th Cir. 1978) (“[S]election of subject, posture, background, lighting, and perhaps even perspective alone . . . [are] protectible elements of a photographer's work.”); *Latimer v. Roaring Toyz, Inc.*, 550 F. Supp. 2d 1345, 1355 (M.D. Fla. 2008), *aff'd in part, rev'd in part*, 601 F.3d 1224, 1230 (11th Cir. 2010) (“The courts have concluded that copyrightable elements of a photograph include . . . the photographer's selection of the background, lighting, and shading, positioning of the subject, and determining the timing for the shot.”); *Gentieu v. John Muller & Co.*, 712 F. Supp. 740, 742 (W.D. Mo. 1989) (“The copyrightable elements, therefore, include the photographer's selection of background, lights, shading, positioning and timing.”); see also *CBS Corp. v. FCC*, 535 F.3d 167, 196 (3d Cir. 2008) (reiterating *Marco* factors); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1077 (9th Cir. 2000) (quoting *L.A. News Serv. v. Tullo*, 973 F.2d 791, 794

dictions.¹⁵¹ Courts rarely press further on the criteria of originality or creativity in photography, but a richer understanding of what these criteria are and are not will help us see present and future problems in how copyright law treats photography.

Let us start with what these criteria do *not* include. Courts and law commentators almost never mention airbrushing, photomontage, or “composition” techniques involving multiple negatives, although such techniques have been in limited use since the mid-nineteenth century and the results of such techniques would support a finding of originality. Why? We can conjecture that the main reason is that these have not been seen as proper photography among photography professionals and cognoscenti. After detailing all the ways that the photographer can express himself, Edward Weston concludes, “[t]hus, within the limits of his medium, without resorting to any method of control that is not photographic (i.e., of an optical or chemical nature), the photographer can depart from literal recording to whatever extent he chooses.”¹⁵² This is not to say that common law judges were reading critical essays on photography. The causality is much simpler: as long as most photographers accepted these conventional limits of the medium — that is, the exclusion of optical or chemical manipulations — then the disputes that would come before courts would be so limited.

As to the criteria or parameters for originality that the courts do mention, there is no question that the position of the camera, and therefore the choice of the image frame, produces selection in the copyright sense. For example, are you including the Chrysler Building in your photo of midtown? Are you framing the photo so that your ugly uncle is missing? Once the frame is chosen, there is another set of choices made by the photographer regarding the position of the subject, angle, and timing. These can be creative choices. As Martin Scorsese has said about even simple cinematographic scenes: “That angle had to be chosen. A creative choice had to be made.”¹⁵³ Surely the same applies to the position of the subject and timing — indeed, the three are intertwined.

(9th Cir. 1992) (quoting *Hamilton*)); *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1119 (D. Nev. 1999).

151. The list given by a 1990 French court decision recognizing copyright in a fashion photograph is exemplary. Cour d’Appel, Paris, 4th chambre A, 11 juin 1990: *RIDA* octobre 1990, n. 146 (“[C]hoice of the installation of the mannequins, the camera angle, adequate lightings, framing, the suitable moment for the shot, the quality of contrasts, the colors and the reliefs, the play of the light and volumes, the lenses and films, and the printing best suited to achieve the desired style.”/“[C]hoix de la pose des mannequins, de l’angle de prise de vue, des éclairages adéquats, de cadrage, de l’instant convenable de la prise de vue, de la qualité des contrastes, des couleurs et des reliefs, du jeu de la lumière et des volumes, de l’objectifs et de pellicules, des tirages les plus adaptés à la promotion du style souhaité.”).

152. WESTON, *supra* note 140, at 173.

153. PICASSO AND BRAQUE GO TO THE MOVIES, *supra* note 66.

In the paradigmatic *Sarony* situation, the photographer does not press the shutter button until the photograph-dependent arrangement of reality is complete. Even where there is a series of shutter clicks — as when a model moves around a created set for a fashion shoot — we could think of the creator as seeking a particular arrangement of bodies, limbs, garments, props, and background. But arrangement of the objects in a photo can also happen just *within* the image: the angle chosen for the shot arranges things in the visual image. Imagine the family Thanksgiving table, after the turkey has been delivered. Walk around the table with your camera, and select four or five places from which to take photographs. The reality does not change at all, but your selection of the camera angle (as one would say it in common parlance) produces the particular arrangement of the objects in the photograph (as one would say it from a copyright perspective).

Not only are selection and arrangement two workhorse concepts of copyright law, but these two concepts are also particularly important when it comes to copyright protection of databases. In the classic database case, the elements of the work are obviously preexisting things and it seems that the *only* creativity possible is in their selection and arrangement.¹⁵⁴ It should be evident that this same observation holds with photographs of independent reality. To the degree a photograph records an independent reality, it — like a database — can still acquire copyright protection through the selection and arrangement of the “datum” captured.

Of course, selection can be temporal as well as spatial. In contrast to a staged photo shoot, when the creator is traversing independent reality for a “moment” she wants to capture, the creative expression may be the selection of that particular temporal moment of independent reality and its placement into a different framework and universe.¹⁵⁵ In fact, spatial arrangement and temporal selection go hand in hand in photography, whether it is picking the moment to photograph a model on a Milan runway or picking the moment to photo-

154. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); *supra* text accompanying note 60.

155. In a 1916 case, Judge Mayer provides a thorough description of this in deciding the copyrightability of a photograph of a block of Fifth Avenue in midtown New York City:

It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc. The photograph in question is admirable. The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done.

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

graph nuns crossing a ruined town street.¹⁵⁶ Equipped with this idea of originality in temporal selection, copyright doctrine can deal with photojournalism. But the case for originality in the temporal selections of photojournalism is still different from and more tenuous than the *Sarony*-style composed image. Sontag aptly described photojournalism as driven by “[t]he view of reality as an exotic prize to be tracked down and captured by the diligent hunter-with-a-camera.”¹⁵⁷ In Part V, we will return to this problem and how technology may throw into doubt the equation of temporal selection in photography with originality.

For now, we can see how copyright initially struggled with the technology of photography, first came to see the most composed photographs as original art, and then came to reflect artistic theory in accepting that human aesthetic choices permeate many photographs. Although discussing photography generally, Sontag again gives us an elegant formulation of the art world’s perspective on the medium that serves well for copyright’s understanding of photography: “[A]s people quickly discovered that nobody takes the same picture of the same thing, the supposition that cameras furnish an impersonal, objective image yielded to the fact that photographs are evidence not only of what’s there but of what an individual sees”¹⁵⁸ Instead of producing an impersonal, objective image, the camera “opened up a new model of freelance activity — allowing each person to display a certain unique, avid sensibility.”¹⁵⁹

III. ORIGINALITY AND TWO UNDERSTANDINGS OF HOW IT HAPPENS

To return to Sontag’s observation that photography “allow[s] each person to display a certain unique, avid sensibility,” there is an important difference between a technology that *allows* everyone to display their originality and a technology that *causes* everyone to display originality. Photography does the former — it allows people untalented in drawing or painting to create visual images they might otherwise imagine but be unable to create. Sontag’s formulation is ambiguous because “allowing” everyone to display their “unique, avid sensibility” does not mean that everyone *has* a unique sensibility or that, even if each person does, that each person is always displaying that sensibility. These distinctions reflect what may be two under-

156. See, e.g., *Koen Wessing, Nicaragua (1979)*, FLICKR, http://www.flickr.com/photos/kcl_photography_usa_2010/4240883224 (last visited May 3, 2012).

157. SONTAG, *supra* note 16, at 54–55.

158. *Id.* at 88.

159. *Id.* at 89.

standings — subtly but importantly distinct — of how originality actually happens.

As with many discussions of originality in American copyright law, the starting point is Justice Holmes's 1903 opinion in *Bleistein v. Donaldson Lithographing Co.*¹⁶⁰ *Bleistein* provided American law with an originality threshold low enough that all can enter, giving us a deeply egalitarian, democratic copyright law that has neither place nor need for the creative genius.¹⁶¹ But Justice Holmes's brilliant exposition implies things he might not have intended. In describing copyrightable original expression, Justice Holmes says:

[The work] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.¹⁶²

Justice Holmes's use of "personality" as a synonym for — or a source of — originality is hugely important. Not only does Justice Holmes expressly establish a low originality threshold ("a very modest grade of art"), but he also aligns personality with protectable originality so that any man or woman with a personality can get a copyright. For Justice Holmes, the author is not Romantic; the author is everyman.

Justice Holmes's example of handwriting carries the opinion's reasoning at this point and has awkward implications. Handwriting, particularly one's signature, is a paradigmatically intentional act. But

160. 188 U.S. 239 (1903).

161. On rare occasions judges have opined that genius was a requirement for copyright. See, e.g., *Jollie v. Jaques*, 13 F. Cas. 910, 913 (C.C.S.D.N.Y. 1850) (No. 7437) (noting that copyright protects only works that "requir[e] genius for [their] construction"). But courts and commentators agree that copyright's originality standard is not as demanding as patent law's novelty standard. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951); *Henderson v. Tompkins*, 60 F. 758, 764 (C.C.D. Mass. 1894) ("There is a very broad distinction between what is implied in the word 'author,' found in the constitution, and the word 'inventor.' The latter carries an implication which excludes the results of only ordinary skill, while nothing of this is necessarily involved in the former. Indeed, the statutes themselves make broad distinctions on this point."); 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.2.1 (1989) ("Copyright law's originality standard is thus far less exacting than patent law's counterpart standards of novelty and nonobviousness . . ."); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1445–56 (2010); John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 134 (1991). See generally Hughes, *Personality Interest*, *supra* note 3, at 119–22 (discussing some scholars' misreading of copyright jurisprudence as relying on the notion of the "creative genius").

162. *Bleistein*, 188 U.S. at 250.

that does not mean that the *expression* of personality is intentional.¹⁶³ Justice Holmes's language actually suggests that the expression of personality is somehow involuntary: "[the personality] expresses its singularity."¹⁶⁴ Even if you are not trying or intending to express yourself, those big, round "o"s, heavy lettering, or spindle-shaped writing convey your distinctive personality; your failure to cross those "t"s and dot all those "i"s also expresses your way of being.¹⁶⁵

There is an important difference between "it expresses itself" and "you express yourself." If personality is *de facto* synonymous with originality (as Justice Holmes seems to use it), then instead of an expression theory of originality, we have a type of fingerprint or seepage theory of originality: whatever you do, you leave your imprint. Try as you may, as soon as you take up a pen, keyboard, brush, or guitar your personality will leave its mark. Under this seepage theory, the default value is in favor of originality.

Of course, if you uncontrollably display your personality when you pick up an ink pen, there is no reason that the same will not happen with the camera. Judge Learned Hand understood this exactly and extended Holmes's reasoning directly to photographs in the 1921 case *Jewelers' Circular Publishing v. Keystone Publishing*.¹⁶⁶ *Jewelers' Circular* is remembered as a case about copyright in compilations, but Hand begins the opinion with a discussion of a prior decision that had denied copyright to a book of "photographic illustrations of bathtubs and the like."¹⁶⁷ Hand disagreed. He acknowledged the *Sarony* teaching that "some photographs might not be protected,"¹⁶⁸ but he believed that Holmes's analysis in *Bleistein* had altered the copyright

163. Justice Holmes, likely aware of intellectual trends, may have had in mind the growing nineteenth century movement of "graphology," the analysis of individual psychology through handwriting. In November 1871, Jean-Hippolyte Michon, the father of modern handwriting analysis, began publication of his *La Graphologie: Journal des Autographes*. See Shaik Landau, *Michon and the Birth of Scientific Graphology*, THE BRITISH INSTIT. OF GRAPHOLOGISTS, <http://www.britishgraphology.org/analyses/MichonAndTheBirthOfScientificGraphology.pdf> (last visited May 3, 2012). His subsequent books, *SYSTÈME DE GRAPHOLOGIE* (1875) and *MÉTHODE PRATIQUE DE GRAPHOLOGIE* (1878) established his vision of the new science.

164. *Bleistein*, 188 U.S. at 250.

165. Another Holmes working in the late nineteenth century — Sherlock — is portrayed as a believer that handwriting manifested personality and as an expert in graphology. See *SHERLOCK HOLMES: A GAME OF SHADOWS* (Warner Brothers 2011). My thanks to Dean Marks for helping me confirm the passage. Sherlock Holmes also displayed his expertise as a graphologist in some of Sir Arthur Conan Doyle's original stories. See, e.g., A. CONAN DOYLE, *The Adventure of the Reigate Puzzle*, in *MEMOIRS OF SHERLOCK HOLMES* 114, 130–32 (new & rev. ed. 1903); Richard L. Kellogg, *Conan Doyle and Graphology*, 11 *TEACHING OF PSYCHOL.* 112, 112–13 (1984).

166. 274 F. 932 (S.D.N.Y. 1921).

167. *Id.* at 934 (citing *J.L. Mott Iron Works v. Clow*, 82 F. 316 (7th Cir. 1897)). Concerning a catalog of photographs of bathtubs, there would be a question of both the copyrightability of any one bathtub photograph and the copyrightability of the catalog as a compilation or collective work.

168. *Id.* at 934.

landscape.¹⁶⁹ Following the *Bleistein* reasoning, Hand felt that “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”¹⁷⁰ Hand favored — or felt he was obliged to follow — a seepage model of personality.

Even in *Sarony*, there were hints of a seepage idea of originality. One of the arguments Burrow-Giles deployed to disprove originality in photographs was his claim that an observer would only know the source of a photograph if the photographer signed it, but with a painting, engraving, or sculpture, there was true originality because:

[H]is individuality lives in his works. . . . [H]is name attached thereto is not as good proof of authorship as the unwritten evidence of his genius. . . . That unexpressed but ever living stamp of individuality which lives in a true artist's work, and marks it for his own, is what the law means by originality.¹⁷¹

In other words, in 1884 Calman implicitly appealed to the apparent lack of seepage to argue against originality in photographs — and he may have had good reason. As Newhall writes in his seminal history of photography, “[B]y far the majority of [mid-nineteenth century] portraits bear no indication of producer. For the most part daguerreotypes reflect the style of a period, rather than of an individual, and personal attribution becomes impossible in the absence of documentation.”¹⁷² Photographer Alfred Stieglitz reached a similar conclusion regarding photographs made during that period.¹⁷³

169. *Id.*

170. *Id.* But for Hand, this was all unnecessary because he believed that neither the statute nor the Constitution required originality. Hand also believed that the 1909 Copyright Act protected photographs as a matter of statutory law, regardless of originality, writing that the question of originality “all seems to me quite beside the point, because under section 5(j) [of the 1909 Act] photographs are protected, without regard to the degree of ‘personality’ which enters into them.” *Id.* Hand was comfortable with this interpretation of the statute because he did not see the constitutional problem that would later drive the Supreme Court’s decision in *Feist*. He writes, “The suggestion that the Constitution might not include all photographs seems to me overstrained.” *Id.* at 935.

171. Burrow-Giles Brief, *supra* note 71, at 17 (emphasis omitted).

172. NEWHALL, *supra* note 105, at 32. Of course, some claimed that individual photographers’ styles could be detected the same as any visual artist. See *Copyright in Photographs*, 6 PHOTOGRAPHIC NEWS, May 30, 1862, at 253 (1862) (“[I]n photography it was as possible for the artist to stamp his individuality upon his productions, and be distinguished by his ‘manner,’ as in painting.”).

173. Discussing the popular conclusion in the nineteenth century that early photography was purely mechanical and not artistic, Stieglitz acknowledged that “[i]t must be admitted that this verdict was based upon a great mass of the evidence — mechanical professional work. This evidence, however, was not of the best kind to support such a verdict. It unquestionably established that nine-tenths of the photographic work put before the public was purely mechanical . . .” Alfred Stieglitz, *Pictorial Photography*, reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 119.

Although the dominant copyright rhetoric remains focused on intentional expression, we simply should not underestimate the influence of Hand's views in the *Jewelers' Circular* case, particularly in the realm of photography. As recently as 2000, the Ninth Circuit opined that "[i]n assessing the 'creative spark' of a photograph, we are reminded of Judge Learned Hand's comment that 'no photograph, however simple, can be unaffected by the personal influence of the author.'"¹⁷⁴ Quoting the Nimmer treatise, the Ninth Circuit panel continued:

This approach . . . "has become the prevailing view," and as a result, "almost any[] photograph may claim the necessary originality to support a copyright merely by virtue of the photographers' [sic] personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken." . . . This circuit is among the majority of courts to have adopted this view.¹⁷⁵

Notice that the criteria laid out by the Ninth Circuit and the Nimmer treatise are correct — and would be true under either view of how originality happens. The influence of the implicit seepage view of originality is found in the court's abstract proposition that "almost any[] photograph may claim the necessary originality to support a copyright."

There is a final, important point here. As long as the copyright system had a registration requirement, there was no need to decide whether originality happened only through intentional expression or could also happen through seepage. Registration was the author's or her successor's assertion that originality had come through. (The act of registration can even be viewed itself as an act of expression converting any originality that has seeped out into intentional expression.¹⁷⁶) Now that the registration system is gone,¹⁷⁷ we might

174. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (quoting *Jewelers' Circular*, 274 F. 932, 934 (S.D.N.Y. 1921)).

175. *Id.* at 1076–77 (quoting NIMMER, *supra* note 103, § 2.08[E][1]).

176. The distinction between personality being expressed and personality seeping out makes a difference only in select areas of copyright thinking. For example, the work-for-hire doctrine (the automatic assumption of authorship by an employer and the denial of moral rights to the author-employee) is less defensible if you take the seepage perspective because under that view, the employee always has a protectable personality interest.

177. Abandonment of formalities, including registration, was a requirement for the United States to join the Berne Convention. Hence the Berne Convention Implementation Act of 1988 removed most statutory formalities, including the registration requirement for works originating in foreign signatories to the Berne Convention. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.). See generally Melville B. Nimmer, *Implications of the Prospective*

consider ourselves in a different situation, particularly as technological changes push us towards what might be called “the ubiquitously photographed world,” the subject of Part VII.

IV. UNCOPYRIGHTED PHOTOGRAPHS AND UNPROTECTED ELEMENTS

There is a widespread belief that all photographs are protected by United States copyright law¹⁷⁸ — what Eva Subotnik calls a “tradition of near-presumptive copyright protection” for photographs.¹⁷⁹ Indeed, this belief often produces absurd results. For example, the assumption that all photographs are copyrighted, and therefore owned by someone, seems to be the foundation for a bizarre claim in 2011 by a news agency that it owned photographs of a macaque monkey taken by the

Revisions of the Berne Convention and the United States Copyright Law, 19 STAN. L. REV. 499 (1967).

178. For example, wikiHow starts off its page titled “How to Copyright Photographs” with “You already own the copyright on anything original that you have made such as a photo.” *How to Copyright Photographs*, WIKIHOW, <http://www.wikihow.com/Copyright-Photographs> (last visited May 3, 2012). Similarly, eHow offers as its first “instruction” on “How to Copyright Photography” the following:

Take the photograph. A work is considered to be protected under copyright once it is made into tangible form. As long as you can show the work to another person in some way, it is copyright protected. Printed photographs and photographs on disk or video are all considered to be in tangible form.

Angel Sharum, *How to Copyright Photography*, EHOW, http://www.ehow.com/how/4448837_copyright-photography.html (last visited May 3, 2012). On another page, eHow says simply, “A copyright is granted when a photo is taken, whether or not the photographer registers the photo with the Copyright Office.” Josh Shear, *Copyright Laws on Photographs*, EHOW, http://www.ehow.com/facts_5184643_copyright-laws-photographs.html (last visited May 3, 2012). On Yahoo! Answers, the “best answer” to the question “How do I go about on getting a copyright for my photos?” starts, “For the most part, it’s already copyrighted if you take the photo,” and makes no mention of an originality requirement. *Best Answer to Question “Copyrights for photographs?”*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20060821214147AASoCEZ> (last visited May 3, 2012). This is probably true of other jurisdictions as well. See Paul Katzenberger, *Advisory Opinion on the Legal Protection of the Images, Data and Products of Remote Sensing Satellites*, in 1ST EUMETSAT WORKSHOP ON LEGAL PROTECTION OF METEOROLOGICAL SATELLITE DATA, 13–14 March 1989 (1991) 31, 143 (describing French law: “The conclusion drawn . . . in the literature by prominent authors is that ultimately every photograph is protected by copyright, because every photograph is based on choices and decisions” by the photographer) [hereinafter EUMETSAT WORKSHOP].

179. Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1493 (2011). Subotnik cites to an earlier version of this article. Later she concludes that the de facto presumption is so strong that “[i]t is not entirely clear why litigants continue to view the lack of originality defense as a viable weapon in their arsenal.” *Id.* at 1528. See also David McGowan, *Copyright and Convergence: A Pragmatic Perspective*, in INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS: COPYRIGHT AND ITS ALTERNATIVES 233, 246 (Robert F. Brauneis ed., 2009) (“At some point, we will have an iconic picture taken with a phone camera that gives its owner no choices to speak of at all; courts will still grant the owner rights.”).

monkey itself when a camera was accidentally left where the simian could access it.¹⁸⁰

But a large percentage of the world's photographs are likely not protected by American copyright law because the images lack even a modicum of creativity; this should also be true of any national copyright laws that apply an "intellectual creation" standard. Indeed, as digitization makes photography more and more ubiquitous, we have probably already crossed a threshold beyond which most of the world's photographic images are not truly protected by copyright.¹⁸¹ Saying that many photographs are not protected by copyright does not detract from the profoundly democratic character of copyright because it still says that every (human) photographer is capable of producing copyrighted works. Let us consider a few examples.

A. Completely Unprotected Photographs

It is important to recognize that where the content of the photograph has an independent reality, and the photographer seeks only to achieve and does in fact achieve an accurate representation of that independent reality, there is a good chance that the photograph has no copyright protection at all. Judge Lewis Kaplan reached this correct result in the 1999 case of *Bridgeman Art Library, Ltd. v. Corel Corp.*,¹⁸² in which the library tried to assert copyright over photographic transparencies of paintings that were in the public domain. The goal of the choices made in lens, focus, lighting, angle, and so on had been exclusively to produce extremely accurate representations of the paintings: "[P]laintiff by its own admission ha[d] labored to create 'slavish copies' of public domain works of art."¹⁸³ Kaplan concluded that "[w]hile it may be assumed that this required both skill and effort, there was no spark of originality — indeed, the point of the exercise

180. See Mike Masnick, *Monkeys Don't Do Fair Use; News Agency Tells Techdirt to Remove Photos*, TECHDIRT (July 12, 2011, 11:08 AM), <http://www.techdirt.com/articles/20110712/01182015052/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos.shtml> (describing correspondence between Techdirt and a news agency in which the news agency continues to assert that *someone* owns a copyright in the monkey photos); Mike Masnick, *Monkey Business: Can a Monkey License Its Copyrights to a News Agency?*, TECHDIRT (July 7, 2011, 7:32 AM), <http://www.techdirt.com/articles/20110706/00200314983/monkey-business-can-monkey-license-its-copyrights-to-news-agency.shtml> (showing photos taken by monkeys for which the news agency claimed copyright).

181. In *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999), Judge Lewis Kaplan wrote, "There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection." *Id.* at 196. I doubt if Judge Kaplan was correct then, but I am surer that the statement is wrong now, after a decade's substantial increase in satellite photography, images from Google Maps with Street View, etc.

182. 36 F. Supp. 2d 191.

183. *Id.* at 197.

was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”¹⁸⁴

Kaplan's conclusion is the dominant view for copyright law in the United States, and presumably should be for any other jurisdiction that applies an originality standard at least as rigorous as post-*Feist* American law. As Daniel Gervais writes in a survey discussion of copyright in various jurisdictions, “[A] photographer trying to take a technically perfect picture is not making creative choices”¹⁸⁵ Similarly, the Nimmer treatise advises that a “photograph should be denied copyright for lack of originality” if it “amounts to nothing more than a slavish copying” and gives the example of “[a] photograph of a painting or drawing” captured in this manner.¹⁸⁶ The Wikimedia Foundation puts the point in more strident terms: “[F]aithful reproductions of two-dimensional public domain works of art *are* public domain, and . . . claims to the contrary represent an assault on the very concept of a public domain.”¹⁸⁷ Even in *Bleistein*, Holmes made it clear that his “very modest grade of art”¹⁸⁸ standard did not extend copyright to “pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have no artistic merit or originality.”¹⁸⁹

Yet there are some nuanced views that continue to lend a basis to support originality-based copyright in faithful art reproductions, and some art museums, foundations, and artist's estates continue to try to assert copyright in such photographs — both in the United States and in other jurisdictions. As to the nuanced views, treatise writers on United States copyright law acknowledge some slender reeds on

184. *Id.*

185. Gervais, *supra* note 3, at 956; see also Mary Campbell Wojcik, *The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L.J. 257, 267 (2008) (“[T]he law is becoming increasingly clear: one possesses no copyright interest in reproductions . . . when these reproductions do nothing more than accurately convey the underlying image.”).

186. NIMMER, *supra* note 103, § 2.08[E][2]. For a parallel discussion and conclusion in relation to medical and scientific imaging, see generally Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archaeology*, 10 HARV. J. L. & TECH. 281 (1997). See also Subotnick, *supra* note 179, at 1514 (Based on an interview with a Copyright Office official, Subotnik reports that “[t]ypically, the images for which the Office denies registration are X-rays or other medical images whose purpose is articulated to be diagnostic rather than creative or instructional.”).

187. *When to Use the PD-Art Tag*, WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/Commons:When_to_use_the_PD-Art_tag (last visited May 3, 2012). The page is “an official policy on Wikimedia Commons.” *Id.*

188. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

189. *Id.* at 244 (“We have nothing to do with cases involving attempts to copyright *mere catalogues or price lists*, or labels, sometimes containing pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have no artistic merit or originality.” (emphasis added)); see also *Simon v. Birraporetti's Rests., Inc.*, 720 F. Supp. 85, 88 (S.D. Tex. 1989) (holding that the faithful reproduction in poster form from an earlier public domain photograph is not copyrightable).

which copyright in reproductions of art might be justified.¹⁹⁰ The situation is even more ambiguous in the United Kingdom. An enigmatic 1868 decision, *Graves' Case*,¹⁹¹ continues to give British museums a basis to argue that their photographic reproductions of public domain paintings are themselves copyrighted.¹⁹² Indeed, organized criticism of the *Bridgeman* decision came directly from British museums and was built around *Graves' Case*.¹⁹³ The European Union's 2006 copyright term directive¹⁹⁴ has further muddled the waters as to the current standard for copyright of photographs in the United Kingdom.¹⁹⁵

190. The Nimmer treatise reasons that the 1909 Copyright Act "provided for registration of reproductions of works of art" and that "art reproductions" remain embedded in the 17 U.S.C. § 101 definition of "pictorial, graphic, and sculptural works," but acknowledges the *Bridgeman* decision and advises that "such a reproduction copyright may be obtained only if the claimant can demonstrate that his reproduction contains an original contribution not present in the underlying work of art." NIMMER, *supra* note 103, § 2.08[C], [2], [2] n.133.1 (2011). In contrast, Paul Goldstein offers that if a "photographer reproduces a photograph or painting in order to provide prints or slides for a museum collection or for publication in an art book, the . . . photograph will be entitled to copyright." 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.11.1 (3d ed. 2005 & Supp. 2012). But Goldstein later bases this on pre-*Feist* decisions and offers a theory of "originality in the *absence* of any distinguishable variation over the original." *Id.* § 2.11.1.4. This simply repeats the error Judge Kaplan identified in *Bridgeman*: mistaking technical "skills" for creativity. Goldstein also acknowledges that there is a "broadclass [sic] of unprotectible reproductions of works of art," *id.*, suggesting that even he would find his originality-through-verisimilitude theory applies only in rare circumstances.

191. In that early decision under the revised United Kingdom copyright law, Justice Blackburn opined that:

The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute.

Graves' Case [1869] 4 L.R.Q.B. 715, 722 (Blackburn, J. opinion).

192. See Ronan Deazley, *Photography, Copyright, and the South Kensington Experiment*, 2010 INTEL. PROP. Q. 293, 310 ("Based upon the reasoning in *Graves' Case*, the V&A, the National Gallery, the National Portrait Gallery, and so on, all claim copyright protection in the photographs they make of paintings and other works from their collections . . ."). But other UK cases point in the opposite direction. See *Interlego AG v. Tyco Industries Inc.*, [1989] A.C. 217 (P.C.) ("Skill, labour or judgment merely in the process of copying cannot confer originality."); *The Reject Shop plc v. Manners*, [1995] F.S.R. 870 (Q.B.D.) (finding there is no copyright in enlarged photocopy).

193. Ronan Deazley discusses how the Museums Copyright Group has sought to neutralize any effect of *Bridgeman* in the United Kingdom. See *id.* at 308–09.

194. See discussion *infra* Part V.A.

195. Prior to 2006, at least one treatise gave an ambiguous, "skill"-oriented formulation of the originality standard in the UK for protection of photographs. See, e.g., 1 KEVIN GARNETT, GILLIAN DAVIES, & GWILYM HARBOTTLE, COPINGER AND SKONE JAMES ON COPYRIGHT § 3-142 at 129 (15th ed. 2005) [hereinafter COPINGER AND SKONE JAMES]. Even if that correctly states the standard under UK law, it is not clear that digital photography involves even this level of "skill" and "judgment" as compared to truly and merely technical calculations. An excellent summary of the complete ambiguity of UK copyright law on the protection of non-original photographs following the 2006 directive is given in L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW 109–11 (3d ed. 2009).

As to museum policies, commentary shortly after *Bridgeman* was critical of museums for failing to abide by Kaplan's analysis.¹⁹⁶ But measured by their art postcards and websites, the policies at a number of museums probably evolved in the decade following the decision. Among the museums outside the United Kingdom that continue to claim copyright in completely faithful photographic postcards of paintings in their collections are the Norton Simon Museum in Pasadena, the Philadelphia Museum of Art, the Banco de México Diego Rivera & Frida Kahlo Museums Trust, the State Russian Museum in St. Petersburg, and many of the museums in Paris and Brussels (or their postcard suppliers).¹⁹⁷ The National Gallery in Washington asserts copyright in such postcards, a doubly egregious claim.¹⁹⁸ Other museums, including the Museum of Modern Art and the Frick Collection in New York, the Cincinnati Art Museum, and the Baltimore Museum of Art do not assert copyright in their postcards that faithfully reproduce public domain paintings.¹⁹⁹ Some institutions' positions are

196. See, e.g., Colin T. Cameron, *In Defiance of Bridgeman*, 15 TEX. INTELL. PROP. L.J. 31, 48 (2006) ("[M]ost museums seem to be wholly ignoring the fact that this holding invalidated Bridgeman's claims of copyright in exact photographic reproductions of public domain images."); Mary Campbell Wojcik, *The Antithesis of Originality*, 30 HASTINGS COMM. & ENT. L.J. 257, 270–71 (2008) ("Although certain museums responded to *Bridgeman* with a change in their rights and reproduction policies, others took a different route, namely denial and evasion. Like Bridgeman, many museums have decided to simply ignore the law . . .").

197. (Sample postcards on file with author.) For example, postcards of perfectly done photographic reproductions of Frida Kahlo paintings (*La Columna Rota* (1944) and *Autorretrato con Collar* (1933)) contain the copyright claim: "© 2007 Banco de México Diego Rivera & Frida Kahlo Museums Trust." Museums in Paris and Brussels making such copyright claims include the museums served by the Réunion des Musées Nationaux in France, the Musée Jacquemart-André in Paris run by Culturespaces, and the Musées royaux des Beaux-Arts de Belgique. See *Photo Agency*, RÉUNION DES MUSÉES NATIONAUX, <http://www.photo.rmn.fr/c/htm/home.aspx> (last visited May 3, 2012) (including copyright notices on photos of public domain works); *Photo Gallery*, MUSÉE JACQUEMART-ANDRÉ, <http://www.musee-jacquemart-andre.com/en/discover/photo-gallery> (last visited May 3, 2012) (same); *Collections*, MUSÉES ROYAUX DES BEAUX-ARTS DE BELGIQUE, http://www.fine-arts-museum.be/site/EN/frames/F_peinture.html (last visited May 3, 2012) (same). Postcards of public domain paintings bought at the museum in 2011 carried copyright notices from 1–3 entities each, including ones for "Exclusivité Culturespaces," "Editions du Castelet" and "C. Recoura" (the last expressly designated for the photo, suggesting a claim of copyright over the back of the postcard too). Of course, a single museum may carry postcards of paintings from several different vendors, with some claiming copyright and others not.

198. (Sample postcards on file with author.) Not only are the paintings in the public domain, but as a federal institution, the work product of its employees cannot be copyrighted pursuant to 17 U.S.C. § 105 (2006).

199. MoMA does print on its postcards some (doubtful) copyright claims on behalf of artists' estates, but these are clearly for the paintings. MoMA also puts copyright notices on posters that are *predominantly* public domain paintings, but do have enough independent composition to make such copyright claims credible. In fact, similar postcards collected by this author from the National Gallery in London no longer assert copyright, although Ronan Deazley reports that the National Gallery was still asserting such copyrights in 2010, see Deazley, *supra* note 192, at 309; and they do seem to do so under the "license this image" pages for public domain photos.

less straightforward on the issue. For example, the Metropolitan Museum of New York ("Metropolitan") now says on its most visible web pages only that many of its "images are available to be licensed for study, editorial, and commercial usage."²⁰⁰ Nonetheless, when one bores down on the Museum's position, it continues to assert copyright in the actual terms and conditions it offers both academic publishers²⁰¹ and educational users.²⁰² Given the Metropolitan's generous terms for educational and non-commercial uses (they seem to allow people to download the images freely from their web pages), one might infer that the museum understands the weakness of its copyright claims. The Baltimore Museum of Art may be even more nuanced: the museum seems to assert exclusive control over images of works in its collection without claiming copyright.²⁰³

To fully appreciate the weakness of copyright claims under U.S. law to faithful, photographic reproductions of public domain paintings, consider an almost perfect reproduction of Edouard Manet's 1864 painting *The Battle of the U.S.S. "Kearsarge" and the C.S.S. "Alabama."* I say "almost perfect" because the photo cuts off a modest amount of the painting on the right side and a very tiny slice on the left side. Here is the original painting on the left, and the museum card reproduction on the right:

200. *Image Resources*, THE METRO. MUSEUM OF ART, <http://www.metmuseum.org/research/image-resources> (last visited May 3, 2012).

201. *See Images for Academic Publishing (IAP) Metropolitan Museum of Art Terms and Conditions of Use*, ARTSTOR, <http://www.artstor.org/what-is-artstor/w-pdf/met-iap-terms-of-use.pdf> (last visited May 3, 2012) (Museum claims its "images are protected by copyright and/or other applicable laws.").

202. *See Terms and Conditions*, METRO. MUSEUM OF ART, <http://www.metmuseum.org/information/terms-and-conditions> (last visited May 3, 2012) ("The text, images, and data on The Metropolitan Museum of Art (the 'Museum') website (the 'Site') are protected by copyright and may be covered by other restrictions as well. The Museum retains all rights, including copyright, in data, images, software, documentation, text, and other information contained in these files (collectively, the 'Materials'). Copyright and other proprietary rights may be held by individuals or entities other than, or in addition to, the Museum.").

203. *See The Baltimore Museum of Art: Rights and Reproductions Conditions of Use*, BALT. MUSEUM OF ART, <http://www.artbma.org/about/documents/RIGHTS-conditionsWEB.pdf> (last visited May 3, 2012). While the museum does not itself assert copyright, it acknowledges in this document that "[w]orks of art appearing in BMA images, even if such objects are owned by the BMA, may be protected by copyright, publication rights, or related interests that are not owned by the BMA." *Id.*



Figure 3: The Full Version of *The Battle of the U.S.S. "Kearsarge" and the C.S.S. "Alabama"* on the Left, and the Cropped Postcard Version on the Right. The Copyright Notice on the Postcard Reads "© 2004 Philadelphia Museum of Art. All rights reserved. Printed in Canada." (Color print in Appendix)

Manet died in 1883, and the painting itself has almost certainly fallen out of any copyright it had (which would not be 2004 regardless),²⁰⁴ so the only conceivable copyright claim is that because the postcard photograph lops off 10–12 percent of the right side of the canvas (and maybe 1 percent on the left side), the photographer or editor had some originality in the "selection." The faithful photograph of the painting is, in essence, a data field with each pixel being a data point; the decision to exclude a set of pixels on the far right of the image would be like the decision to exclude the easternmost fringe of a city or country from a local telephone book. In the best of circumstances, that kind of decision could earn extremely thin protection. But here there is no creativity in cutting off the bow of the *C.S.S. Alabama* because the obvious reason the painting was cropped on the right side was to fit a standard five-inch by seven-inch card size.²⁰⁵

204. Determining the copyright term of an old painting is very complicated. This painting was almost certainly exhibited prior to January 1, 1978, and exhibition under the 1909 Copyright Act might, depending on the circumstances, itself have constituted "publication." NIMMER, *supra* note 103, § 4.09. In most scenarios, the painting would be in the public domain in the United States, although if it could be argued that it was not "published" — by exhibition, postcards, or catalog raisonnée — until some point between January 1, 1978 and December 31, 2002, then it arguably has a copyright lasting until December 31, 2047.

205. To cover all possibilities, the cards were printed in Canada and while the assertion of copyright is misleading in the United States, would the photos be copyrighted separately from the paintings in Canada? Canadian copyright law does have a slightly different standard for originality than United States copyright law. In Canada, there is more protection of

This is not an expression of personality; it is neither a “very modest grade of art”²⁰⁶ nor a “modicum of creativity.”²⁰⁷

We need to have the same rigor when we consider copyright claims for what is produced by surveillance cameras, satellite systems, New York taxicab cameras, and Google Maps Street View. The surveillance camera captures as much of the hallway as possible or as much of the facial features of the person operating an ATM as possible. If it is a poor or distorted image of reality, it is because the camera was not well maintained or because the lighting was suboptimal, not because of some aesthetic choice by the security company. The selection of the image is garden-variety — adjusted for purely utilitarian, information-gathering purposes. The parameters for Google’s ambitious Street View project are telling. According to Wikipedia, the photographic images are “taken from a fleet of specially adapted cars. . . . On each of these vehicles there are nine directional cameras for 360° views at a height of about 8.2 feet, or 2.5 meters, GPS units for positioning and three laser range scanners . . . for the measuring of up to 50 meters 180° in the front of the vehicle.”²⁰⁸

Such surveillance camera records, satellite photos, and street view images are not intended as creative expression at all; they are intended as plain historical records. To echo Kaplan, they may require “skill and effort”²⁰⁹ but there is “no spark of originality.”²¹⁰ In discussing the use of such materials as courtroom evidence, Silbey notes that “[w]ith surveillance films or other real-time video, whether taken by news cameras, undercover officers, or by automatic cameras, the assumption is that the film transparently . . . grants the jurors access to the truth of the event to be tried as if they were the eyewitnesses themselves.”²¹¹ A corollary of this assumption is a lack of what copyright would call originality.

With all these photographs — photographs of museum paintings, images captured at ATMs and by immigration officials stamping your passport, Google Maps Street View, aerial reconnaissance photographs — there is no originality to give rise to copyright. These images may have copyright in the few countries that still base copyright

“sweat of the brow” than in the United States. See Gervais, *supra* note 3, at 963–67 (discussing Canada’s ambiguous adoption of *Feist* in various cases while maintaining a “skill labor” test as good law).

206. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

207. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

208. *Google Street View*, WIKIPEDIA, http://en.wikipedia.org/wiki/Google_Street_View (last visited May 3, 2012).

209. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

210. *Id.*

211. Silbey, *supra* note 35, at 516.

protection on “sweat of the brow,”²¹² but not in the United States or most countries in the European Union.²¹³ To paraphrase Justice Miller’s 1884 words, these twenty-first century satellite photos are the product of automated operations “by use of . . . instruments” to create “the visible representation of some existing object[s].”²¹⁴ Again, Sontag captured the point nicely:

[I]n the vast majority of photographs which get taken — for scientific and industrial purposes, by the press, by the military and the police, by families — any trace of the personal vision of whoever is behind the camera interferes with the primary demand on the photograph: that it record, diagnose, inform.²¹⁵

As a result, it seems that the claim that many — perhaps most — of the world’s photographs are completely unprotected by copyright arises simply because “[i]n most uses of the camera, the photograph’s naïve or descriptive function is paramount.”²¹⁶ This descriptive function produces what is really a pixelated database, and there is therefore an insufficient “trace of the personal vision of whoever is behind the camera” for us to grant copyright under the standards in United States and European copyright law.²¹⁷

212. See generally Feist, 499 U.S. at 352–55 (explaining “sweat of the brow” doctrine as it developed in United States copyright law up until 1991); Abraham Drassinower, *Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law*, 1 U. OTTAWA L. & TECH. J. 107 (2003) (discussing Canada’s move away from a pure sweat of the brow doctrine).

213. In the European Union, the originality standard in copyright is only harmonized in relation to some subject matter. Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, art. 3(1), 1996 O.J. (L 77) 20, 25 (extending copyright to “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation”). For other copyrighted works, the European Union’s directive on the information society only implies that copyright protection is extended to “intellectual creation.” Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 11. Nonetheless, a series of national court and European Court of Justice decisions have made it clear that most European jurisdictions have an originality standard at least as rigorous as Feist. See Justin Hughes, *Political Economies of Harmonization: Database Protection and Information Patents* 18–23 (Cardozo Law Sch., Pub. Law Research Paper No. 47, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=318486.

214. *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 59 (1884).

215. SONTAG, *supra* note 16, at 133. This follows from Sontag’s view that “like every mass art form, photography is not practiced by most people as an art.” *Id.* at 8.

216. *Id.* at 132–33.

217. See, e.g., 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 452 (2d ed. 2006) (offering “an image made in a photomat machine, or one taken by a security surveillance camera” as those that would fail to meet the “intellectual creation” standard of E.U. law).

B. Satellite Photographs or Something More?

An interesting problem remains with images like those offered on Google Maps. Given the many viewing options available for the non-satellite maps on Google Maps, such as coloration for terrain or traffic patterns and photographs placed at different points, Google Maps seems to fall under a classical analysis for copyright in maps.²¹⁸ For satellite images, however, Google permits the user to remove such labels so that the user sees no artificial markings. Google and its partners unequivocally claim copyright in these photographs by placing copyright notices on the photographs themselves. Below are two satellite photographs from Google Maps of Nantucket Island (the first was captured by satellite in 2008, and the second in 2012) that provide copyright notices for Google (in the watermark on the 2012 image) and TerraMetrics, one of its data suppliers.



Figure 4: 2008 Satellite Photo of Nantucket Island on Google Maps
(Color print in Appendix)

218. This is not to deny that there may be some evolution in the copyright protection accorded maps in American copyright law. *See, e.g.*, Dennis S. Karjala, *Copyright in Electronic Maps*, 35 JURIMETRICS J. 395, 395–415 (1995) (discussing maps as compilations in the wake of *Feist*).



Figure 5: 2012 Satellite Photo of Nantucket Island on Google Maps
(Color print in Appendix)

In 2009, the Google Maps/Earth Terms of Service provided that Google granted the user “a nonexclusive, non-transferable license”²¹⁹ and expressly stated that the user could “not copy, translate, modify, or make derivative works of the Content or any part thereof.”²²⁰ The basis of these restrictions was ownership through copyright. In 2012, these Terms of Service maintain the same structure and restrictions in relation to any satellite image; the user still receives a license and the user is barred from a range of activities drawn from 17 U.S.C. § 106:

(b) copy, translate, modify, or make derivative works
of the [image] or any part thereof;

(c) redistribute, sublicense, rent, publish, sell, assign,
lease, market, transfer, or otherwise make the [im-
age] available to third parties²²¹

These license terms may forbid even fair uses, but the more basic question is whether there is any copyright in these images at all. One can begin the analysis by starting with a simplified scenario: that what the user of Google Maps sees are actual satellite photographs without

219. *Google Terms of Service 2009*, GOOGLE ¶ 1, http://web.archive.org/web/20091217154949/http://www.google.com/help/terms_maps.html.

220. *Id.* ¶ 2(b).

221. *Google Terms of Service 2012*, GOOGLE ¶ 2(b)–(c), http://www.google.com/intl/en_us/help/terms_maps.html (last modified Mar. 1, 2012).

any processing. In such a case, we should first consider what are the potentially copyrightable works? It is difficult to know exactly where the edges of these works are because Google Maps displays the images as seamlessly overlapping. Even if the satellite were producing individual digital photographic images, the satellite would take image after image to capture the entire territory in question and there would be no aesthetic judgments in selecting what to photograph and what not to photograph. Even if the satellite “selected” to capture entire islands and towns in discrete, individual photographs, that would be no different than a telephone company selecting to create a telephone book for Nantucket: in both cases, there is no protection for garden-variety selection in recognizing basic boundaries that already exist in the world.

How about selection or arrangement of a set of photographs as a whole? Again, the whole set of images represents an effort at a comprehensive database of images — exactly the sort of database selection the *Feist* decision tells us is not protected by copyright. The “arrangement” as the images are stored on Google’s servers could conceivably be original, but this is not very likely. Even if this arrangement is original, it is something the user never copies anyway. As for the argument that the frame of what you see on your computer is a copyrightable work, the selection of the framed image is a function of *your* search: you can zoom in, zoom out and move around east, west, north, and south until you run out of images.

This analysis, which is focused on selection and arrangement, is premised on these images being satellite photographs. If so, there is similarly no requisite originality in the focus, angle, or lighting. In the case of satellite photography, those decisions would be made with the sole technical objective of enhancing the clarity and utility of the photographs to produce an accurate representation of the surface of the Earth.

But this is an old-fashioned way of thinking about satellite photography. Today, unenhanced satellite images are just raw data streams in which there definitely is no copyright based on the originality standard articulated in *Feist*.²²² With satellite images today, it is common to speak of a data collection date and a “visualization” date (when the raw data was converted into the final image displayed).²²³

222. See, e.g., Richard Bagehot, *Copyright Protection of Satellite Originating Data Under UK Law*, in EUMETSAT WORKSHOP, *supra* note 178, at 249–50, 253 (describing the METEOSAT satellite of the 1980s as producing photographic images with a “radiometer telescope which examines the earth by producing three spectral band images on a series of east to west scans in small steps from south to north,” at 250, and that “[t]he Satellite makes its scans automatically and without human intervention, and there is no human influence whereby any scan, or the half hourly composite of the world scans, becomes an artistic or literary work at the moment of transmission”).

223. See, e.g., Guam, NASA, <http://visibleearth.nasa.gov/view.php?id=77189> (last visited May 3, 2012).

With more complex images, data may come from a series of inputs gathered over a long period of time. For example, TerraMetrics, one of Google Maps' data suppliers, explains what the user sees in a Google Maps satellite image as follows:

When you are using Google Earth and Google Maps, you are often looking at multiple layers of data such as satellite imagery, aerial photography, synthetic ocean imagery, roadways, location names, addresses and more, which come from many different data and imagery providers. The "Satellite" layer consists of a mix of mid-resolution and high-resolution satellite and aerial imagery from multiple providers for a given area.²²⁴

In other words, even if we eliminated all the "roadways, location names, addresses and more," we could still have a satellite image with "multiple layers of data." Although the Nantucket image seems to be mainly TerraMetrics's "TruEarth 15-meter imagery" (that is, each pixel represents 15 meters), it also seems to have the "synthetic ocean imagery" that TerraMetrics expressly says it does not provide to Google.²²⁵ A similarly complicated effort went into one of NASA's iconic satellite photographs, the 2000 "Blue Marble" Earth image:

The underlying image of the full disk of Earth and its clouds was taken on September 9, 1997, by a Geostationary Operational Environmental Satellite (GOES) operated by the U.S. National Oceanic and Atmospheric Administration (NOAA), and built by NASA. The ocean data was collected in late September and early October 1997 by NASA's Sea-viewing Wide Field-of-view Sensor (SeaWiFS) satellite. The land color is portrayed by a vegetation index calculated using data collected from September

224. *Support: Terra Metrics and Google Earth*, TERRAMETRICS, http://www.trueearth.com/support/faqs_content_google.htm (last changed Apr. 2, 2012).

225. *Id.* In the "FAQs" section, TerraMetrics poses the question, "Google Earth or Google Maps shows an image with TerraMetrics' credit line that I'd like to use . . . can I grab a screen capture and use it?" *Id.* It then prudently answers:

[W]e are happy to provide permission to use our imagery to the extent that it is our TruEarth® 15-meter imagery displayed on the Google Earth or Google Maps screen capture. Please note that Google Earth/Google Maps screen captures may contain imagery and other data from other providers including Google. We cannot and do not extend any further permissions regarding the use of Google Earth's portrayal of our imagery or Google's or other parties' work.

Id.

9–19, 1997, by Advanced Very High Resolution Radiometer (AVHRR) instruments carried aboard NOAA's Polar Orbiting Environmental Satellites (POES). These data are draped across a digital elevation model of Earth's topography from the U.S. Geological Survey.²²⁶

NASA goes on to explain that “[t]he researchers chose to translate the digital data over land into a color scheme where heavy vegetation is green and sparse vegetation is yellow.”²²⁷ They also gave elevations significant accentuation, so as to be visible in a way that would not be true from orbit.²²⁸

Therefore, if the Google layers of data are compiled in a way that serves the ends of making a more factually accurate satellite image, i.e., what a perfect satellite would see on a perfect day with absolute fidelity, then these choices would seem to involve only the same skill and effort at issue in *Bridgeman Art Library*. The vegetation color choices of the NASA team might very well be what Justice O'Connor would have called “garden-variety” choices.²²⁹ On the other hand, the addition of “synthetic ocean imagery” by Google and the quirky portrayal of elevations at NASA are not as easy to dismiss, particularly because they suggest representations beyond the perfect satellite image. To the degree that the layering of data from different sources including some synthetic imagery produces an enhanced satellite image different from what our best direct observational equipment could produce, copyrightability of that image will probably turn on subtle nuances in our originality standard.

Indeed, an important question may be whether these enhancements are added manually or by algorithms. A 1999 law review article gave a still-accurate description that highlights the ambiguous status of this imagery: “Enhanced data are images interpreted by computers and/or technical specialists” and such “[d]ata interpretation requires knowledge of both remote sensing and the sensed material's characteristics and involves extensive human labor and application of computer systems.”²³⁰ Simply put, “extensive human labor,” “application of computer systems,” and “interpret[ation] by computers” do not establish the human originality required under American copyright law. If originality is an expression of personality, there still seems to

226. *Earth — Blue Marble*, NASA, <http://visibleearth.nasa.gov/view.php?id=54388> (last visited May 3, 2012).

227. *Id.*

228. *Id.*

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

230. Charles Davies et al., *Moving Pictures: How Satellites, the Internet, and International Environmental Law Can Help Promote Sustainable Development*, 28 STETSON L. REV. 1091, 1116 (1999).

be no grounds to find the images copyrighted. On the other hand, if the standard is “a very modest grade of art”²³¹ or a “modicum of creativity”²³² without any imputation of personal expression, the combinational efforts here could yield a copyright. Some commentators on French copyright law have hesitantly concluded as much.²³³ For jurisdictions that adhere to an arguably looser standard closer to “intellectual labor,” it might be even easier to establish copyright. For example, the “independent intellectual effort”²³⁴ and “human intellectual endeavor”²³⁵ tests enunciated by the Australian Court of Appeals in 2010 seem to point in this direction.²³⁶

Claims of copyright to such photographic images could just be the result of prudent lawyering in the face of the murkiness of the originality standard in most jurisdictions. Claims to copyright for the clearly unoriginal photographs discussed earlier could just be the result of aggressive lawyering.²³⁷ But Google Maps' satellite images point us to three structural reasons that our originality standard tends to become less stable in the face of photography: the need for incentives, our concern for fairness, and our sense of beauty. In Part V, we will return to those reasons after we consider the protection that copyright brings to even the protected photograph.

C. Limited Originality-Based Protection for Photographs

Even if a photograph is copyrightable because it manifests some originality, there may not be much in the photograph that is actually *protected* by copyright. In considering some of these situations, we will see again some of the structural reasons that copyright's concept

231. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

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

233. For example, Pierre-Yves Gautier notes that a satellite photograph can be protected under French law at least where there are “adjustments done on the ground and especially subsequent treatment” of the image. PIERRE-YVES GAUTIER, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE § 118, at 151 (6th ed. 2007) (“[I]mpliquant au minimum des mises au point effectuées au sol et surtout un traitement postérieur.”). A 2003 French decision, *Rubie's France c. M Sat Editions*, Cour d'appel [CA] [regional court of appeal] Riom, May 14, 2003, D. 2003 Somm. 2754, obs. P. Sirinelli, found satellite images to be protected under copyright where the putative copyright owner argued that its own processing of the raw data had involved “human creations and initiatives” in generating the satellite images. Not all commentators were convinced that there was protectable originality in the data processing. See, e.g., Philippe Gaudrat, *La Terre vue d'en haut sur les puzzles des amateurs d'en bas: brèves observations à propos de Riom*, 1 RTD.com 308 (March 2004).

234. *Telstra Corp. v. Phone Directories Co.*, (2010) 194 FCR 142, 145 (Austl.).

235. *Id.* at 183.

236. In this opinion, the Federal Court of Australia also suggested other tests, including that the authors contribute “sufficient effort of a literary nature” (which would not seem to apply to the satellite images), *id.* at 172, and that the protected work be a “product of a human intellectual process” (which might apply), *id.* at 183.

237. As I have said before, sometimes our copyright law is just “dragged by clever lawyers into dark alleys where it should not go.” Justin Hughes, *Size Counts (or Should) in Copyright Law*, 75 FORDHAM L. REV. 575, 636 (2005).

of originality is destabilized and over-extended in the realm of photography. There are good reasons for allowing this phenomenon to persist, though the same ends could be achieved more directly.

In 2009, a dispute erupted concerning the emblematic “Hope” poster used in Barack Obama’s presidential campaign. The poster, created by Shepard Fairey, was based on a photograph taken by Man-
nie Garcia, a Washington freelance photographer, while he was working for the Associated Press²³⁸ (“AP”). AP claimed ownership of the photograph and sought payment for the poster as a derivative work.²³⁹ The case settled in the spring of 2011,²⁴⁰ but a careful examination of the facts shows that there was really no copyright claim between the original Garcia photo and the Fairey poster. Here is the original photograph and the poster:



Figure 6: The Garcia Photo and the Fairey Poster (Color print in Appendix)

238. It was a bad idea for AP to make this claim because its contractual relationship with Garcia was not clear, meaning that the work was not unequivocally a work-for-hire. Garcia says that at the time he took the Obama photograph, he “was brought in to pick up the slack while an AP staffer was out for a few weeks on leave,” and that there was no signed agreement between him and AP. Donald R. Winslow, *AP Restates Ownership; Claims Copyright Infringement of Obama Poster Image*, NAT’L PRESS PHOTOGRAPHERS ASS’N (Feb. 5, 2009), http://nppa.org/news_and_events/news/2009/02/poster.html.

239. *Id.*

240. See Summary Order, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. dismissed Mar. 16, 2011); see also *Sign of ‘Hope’ over Photo Dispute*, WASH. POST, Jan. 13, 2011, at C3 (reporting that Fairey agreed to share the profits from sales of “Hope” merchandise and get permission from AP before using any of their photographs in the future).

In the face of AP's claim, Fairey brought a declaratory relief action, seeking a court judgment that his use of the Garcia photo was non-infringing.²⁴¹ His principal argument was fair use, and that is how most people understood the case.²⁴² But if the court had properly applied copyright doctrine, any disposition of the case would never have gotten to the question of fair use. The reason is simple: although the Garcia photograph is probably copyrighted, Fairey did not copy any protectable elements from the Garcia photograph.²⁴³

A fundamental principle of copyright law is that when something is copyrighted, the copyright only protects the expression that was original to the author.²⁴⁴ So what is original to Garcia or to AP? Certainly neither Obama's face nor the shape of his head. Not his haircut (that *could* be a copyrighted work, but not the photographer's), nor the color or knot of his tie. Perhaps Fairey copied the expression on Obama's face, but that too was Obama's; Garcia just *captured* it. He did not arrange or evoke the expression in the way a fashion photographer might (or as Sarony did). The weakness of AP's claim becomes more apparent when we scrutinize this passage from the company's court filing:

Fairey could have selected from any one of countless images of President Obama Instead, Fairey was drawn to the unique qualities of this particular photo, made distinctive by Mr. Garcia's creative and artistic input, including (1) his deliberate selection of a specific moment in time to capture President Obama's expression; (2) his choice in using a particular type of lens and light for optimal impact; and (3) his careful and unique composition of the photograph.²⁴⁵

241. Complaint for Declaratory Judgment and Injunctive Relief, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. Feb. 9, 2009).

242. See, e.g., *A Poster Child for Fair Use*, L.A. TIMES, Jan. 17, 2011, at A14; Rachael L. Shinoskie, *In Defense of Fairey and Fair Use*, 28 ENT. & SPORTS LAW. 16 (2010); Shelly Rosenfeld, *A Photo Finish? Copyright and Shepard Fairey's Use of a News Photo Image of the President*, 36 VT. L. REV. 355 (2011); Jo-Na Williams, *The New Symbol of "Hope" for Fair Use: Shepard Fairey v. The Associated Press*, LANDSLIDE, Sept.-Oct. 2009, at 55, 55 ("This could be one of the most compelling cases to date on fair use . . .").

243. I presented a more abbreviated version of this argument in an earlier essay for the Media Institute. See Justin Hughes, *Election Copyright — "You Press the Button, We Do the Rest,"* THE MEDIA INST. (May 6, 2009), http://www.mediainstitute.org/IPI/2009/050609_ElectionCopyright.php.

244. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); see also *Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) ("The copyright is limited to those aspects of the work — termed 'expression' — that display the stamp of the author's originality.").

245. Answer, Affirmative Defenses, and Counterclaims of the Defendant at 12-13, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. filed Mar. 11, 2009), available at http://www.wired.com/images_blogs/threatlevel/files/apphoto.pdf.

Of course, for copyright law it does not matter whether Fairey was “drawn” to certain qualities of the photograph. So, AP recites the usual things — lighting, lens, composition, and temporal selection.²⁴⁶

The problem is that the lighting was not reproduced by Fairey’s quirky colors and, even if it were,²⁴⁷ most of the lighting at the event was not something Garcia controlled. What about Garcia’s “choice in using a particular type of lens?” Personal choices about cameras, films, and lenses do not, by themselves, establish originality.²⁴⁸ The measure is the resulting visual image and Garcia’s results are not original in the sense that some of the results from Ansel Adams’ lens and exposure choices might have been. We are left with the claim about temporal selection, which produces the “composition” as the principal foundation for both copyright protection and the allegation of infringement.

For reasons we will explore below, this provides a weak claim for copyright protection, and it probably only provides a very thin copyright. The nature of this thin copyright may mean that the photograph is effectively protected from slavish, reprographic copying, but has little protection against unauthorized copying of most elements in a derivative work. In this particular case, Fairey clearly created a poster *based* on the photograph, but he did not copy any original elements of the photograph.

A 2011 district court decision from Massachusetts correctly understood how to analyze the problem in *Fairey*. In *Harney v. Sony Pictures Television*,²⁴⁹ the plaintiff claimed that an audiovisual image from a made-for-television film infringed a still photograph that he had taken of a father and daughter leaving their Beacon Hill church on Palm Sunday. The father turned out to be Clark Rockefeller — a.k.a. Christian Gerhartsreiter — who later “absconded with his daughter following an acrimonious divorce.”²⁵⁰ After the kidnapping, the FBI and Boston Police used the photograph in “WANTED” posters.²⁵¹

When Sony created a made-for-television film based on the Rockefeller kidnapping, it used a similar image of the actors playing father and daughter, both as a moving picture sequence in the film and as still photographs on the “WANTED” posters used by law enforce-

246. *Id.* at 12–13.

247. The one possible exception is the way the shadow cuts across the right side of Obama’s collar. For sake of argument, let us say that shadow was protectable expression and Fairey copied it. The copying is still *de minimis*.

248. *See, e.g., Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2006) (“Decisions about film, camera, and lens, for example, often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original.”).

249. 98 U.S.P.Q.2d 1755 (D. Mass. 2011).

250. *Id.* at 1755.

251. *Id.*

ment in the film.²⁵² Although Judge Zobel found the Harney photograph to be copyrighted, she also found that Sony had not copied any of the protectable original expression.²⁵³ Judge Zobel's analysis is exactly the sort that should have resolved the *Fairey* dispute had it gone to trial:

Harney captured a moment in time of a father and daughter passing through Beacon Hill. The Rockefellers were not models. Harney did not select their clothes, give them a church program and palm leaf as props, or ask them to pose. Those aspects of the Rockefellers' appearance are factual realities that exist independently of any photo. They are not Harney's original expression, and they are not copyrightable elements of his photograph.²⁵⁴

In noting that "aspects of the Rockefellers' appearance [were] factual realities that exist[ed] independently," Judge Zobel implicitly recognized the database nature of Harney's photograph. Indeed, it was the database aspect of the photograph that caused it to be used by the police in their "WANTED" posters.

As to protectable originality, Judge Zobel found that the respective lightings of the works were different, just as the colorations of the AP photograph and the *Fairey* poster were different. In fact, Judge Zobel found that the only protectable expression that Sony might have copied was "the position of the individuals relative to the boundaries of the photo" and that this "limited sharing [was] not enough to establish substantial similarity and copyright infringement."²⁵⁵ In *Fairey*, even that was not copied. The position of Obama "relative to the boundaries" of the work is substantially different between the AP photograph and the *Fairey* poster.

Judge Nelson engaged in similar analysis in her dissent in the Ninth Circuit's 2000 *Ets-Hokin v. Skyy Spirits, Inc.*²⁵⁶ decision. The district court had concluded that the plaintiff's photograph of the cobalt blue vodka bottle used by the Skyy brand was itself a derivative work on the blue bottle.²⁵⁷ On that basis, the district court judge granted summary judgment to the defendant, stating that there was insufficient originality to give a copyright in the photograph to the plaintiff.²⁵⁸ Citing *Jewelers' Circular* and other cases, the appellate

252. *Id.* at 1756.

253. *Id.*

254. *Id.*

255. *Id.*

256. 225 F.3d 1068 (2000).

257. *Id.* at 1072.

258. *Id.* at 1073.

majority reversed the trial court and held that the plaintiff's photographs were copyrighted.²⁵⁹ Judge Nelson dissented on the grounds that, regardless of the plaintiff's copyright, the defendant's photographs of the Skyy vodka bottle were non-infringing: "These subsequent photographs are based on slightly different angles, different shadows, and different highlights of the bottle's gold label. Thus, even if the district court had applied the proper standard of originality, Ets-Hokin's lawsuit would not have survived summary judgment because the subsequent photographs also possess originality."²⁶⁰ Similarly, the Fairey poster presented Obama with slightly different angles, different shadows, and different colors.

Is the Garcia photograph of Obama protected by copyright at all? It is safe to assume that the answer is yes. The originality test is a low threshold, and the Garcia photograph is, in the words of the *Sarony* decision, a "new, harmonious, . . . and graceful picture."²⁶¹ But we must recognize that any inclination to conclude that the Garcia photograph is copyrighted may come from three structural reasons previously mentioned: the need for incentives, our concern for fairness, and our sense of beauty. All of these may tend to make us look at the copyrightability of photographs generously.

V. WHY ORIGINALITY GETS STRETCHED

If I am claiming that Fairey took no protectable elements from the Garcia photograph, how could it be generous to say that the Garcia photograph is protected by copyright? Why bother to say that there is copyright on this photograph at all? It is important to understand that unauthorized, non-transformative, and slavish reproduction of the entire photograph by a newspaper, news service, or television station is — and *should* be — an infringement of copyright.²⁶² Protection of a "reality reporting" photograph against unauthorized, non-transformative, and slavish reproduction of the entire photograph is analogous to the thin copyright protection offered to a database that similarly reports reality — that is, pre-existing facts. There are several reasons why we might stretch our conception of originality in photography.

259. *Id.* at 1076, 1082.

260. *Id.* at 1082–83.

261. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

262. As Judge William Pauley observed in a 2000 decision recognizing copyright over some industrial photographs of mirror and picture frames, "Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did." *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000).

A. The Need for Incentives

First among the reasons that we might stretch our originality doctrine to cover more things is a desire to create financial incentives to produce the widest possible range of images. Judge Hand's commentary in *Jewelers' Circular* — opining that a catalog of “photographic illustrations of bathtubs and the like” deserved copyright — certainly showed a keen desire to protect reasonable investments.²⁶³ Museum postcards, passport and police photographs, industrial catalogs, surveillance videos, satellite imagery, and Google Maps Street View all involve intentional, careful programs to record reality for fact-gathering purposes. Sometimes, as with police photographs and surveillance cameras, the photographs are never distributed for sale. Sometimes, as with industrial catalogs, the images are distributed, but the distribution is part of a business model that does not depend on control of the images.²⁶⁴ Finally, sometimes the business model depends on controlling the distribution or availability of the image, as may be the case with art postcards and posters, news coverage photography and videography, freelance photography of all sorts, and services like Google Maps Street View. Without other legal tools to protect adequately the investment in these categories, there will be inevitable pressure to find a way for copyright to offer that protection.

The problem is that an originality standard — even our low one — does not fulfill the general policy objective of giving people incentives to create non-original photographs and films. History shows that this is not a new problem for copyright and photography. When photographs were expressly brought within the ambit of British copyright law in 1862,²⁶⁵ there was the same sort of interplay between the originality standard and investment-oriented objectives. Initially, the 1862 bill did not include an express originality requirement.²⁶⁶ When the bill was debated in the House of Commons, one member opposed inclusion of photography under copyright on the familiar

263. *Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (citing *J.L. Mott Iron Works v. Clow*, 82 F. 316 (7th Cir. 1897)). Judge Hand has also showed a desire to protect an investment in fanciful or arbitrary trademarks. See *Waldes v. Int'l Mfrs. Agency, Inc.*, 237 F. 502, 505 (S.D.N.Y. 1916) (discussing importance of recognizing trademark rights based on priority of use rather than consumer recognition).

264. Elsewhere, I have proposed that when a compilation of facts actually involved facts created by the compiler — as with used car valuations or catalogs of parts numbers — we need to ask whether the compiler relies on sales of the “created facts” compilation to support the valuable activities. Hughes, *Created Facts*, *supra* note 133, at 92–107.

265. Though recognizing the ambiguity of the state of the law, some believed that pre-1862 English copyright law already protected photographs. See *Copyright in Photographs*, THE PHOTOGRAPHIC NEWS, April 8, 1859, at 59 (“[W]e are of the opinion that an action at law against any one for a glaring case of piracy would result in a verdict for the plaintiff. The whole case of copyright in photographs is, however, in a very unsatisfactory state . . .”).

266. Copyright (Works of Art) Bill, 1862, H.C. Bill [26] cl. 1 (U.K.).

grounds that “[p]hotography was not a fine art, but a mechanical process.”²⁶⁷ Solicitor General Roundell Palmer, the principal sponsor of the copyright bill, responded that he would not budge on the issue of photography, but his defense made it clear that he was motivated by concerns about investment:

THE SOLICITOR GENERAL observed that although, strictly and technically speaking, a photograph was not in one sense to be treated as a work of fine art, yet very considerable expense was frequently incurred in obtaining good photographs. Persons have gone to foreign countries — to the Crimea, Syria, and Egypt — for the purpose of obtaining a valuable series of photographs, and had thus entailed upon themselves a large expenditure of time, labour, and money. Was it just that the moment they returned home other persons should be allowed, by obtaining negatives from their positives, to enrich themselves at their expense? He could not consent to exclude photographs from the Bill.²⁶⁸

Eventually concerns of this sort — echoed in the House of Lords²⁶⁹ — prompted amendment of the final Act, which granted to authors of “every *original* Painting, Drawing and Photograph . . . the sole and exclusive Right of copying, engraving, reproducing and multiplying . . . such Photograph, and the Negative thereof.”²⁷⁰

Nonetheless, commentary continued to see the extension of copyright to photography as protecting *investment*. For example, a subsequent 1862 article went to great lengths to explore how photographs could be “original” and therefore protected under the new statute, but the writer also justified the new protection by saying “[t]he photographer may photograph the Polar regions at great labour and expense,

267. 165 PARL. DEB., H.C. (3d ser.) (1862), 1890 (U.K.) (remarks of Mr. Harvey Lewis).

268. *Id.* at 1891.

269. Lord Stanhope worried that he “could not see how the principle of copyright” — meaning originality — “could be carried out in the case of photographs.” See *Copyright in Photographs*, *supra* note 172, at 253 (internal quotation marks omitted). He also raised what we would now recognize as a public domain concern, i.e. that “dispute and litigation” would occur from people taking similar photographs of “the same scene, building, or work of art from the same spot, and under the same circumstances.” 166 PARL. DEB., H.L. (3d ser.) (1862), 2016–17 (U.K.). Lord Overstone also expressed concerns about the bill’s lack of an originality standard, prompting the bill’s amendment. *Id.* at 2014. The influential *Athenaeum* journal also echoed these concerns. See *Our Weekly Gossip*, 1862 ATHENAEUM 333, 334.

270. An Act for Amending the Law relating to Copyright in Works of the Fine Arts, and for Repressing the Commission of Fraud in production and Sale of such Works, 1862, 25 & 26 Vict., c. 68 (U.K.) (emphasis added).

return home, and put himself and his work under its protection.”²⁷¹ Another commentary the same year mixed a true originality justification with justifications based on labor and “such other things costing effort, skill, and money.”²⁷²

In France, the impulse to reward investment within an “originality” context manifested itself in a different, curious way. Although the Paris Cour de Cassation recognized copyright in photographs as early as 1862, photographs were not expressly included in the copyright statute until 1957. The 1957 amendment to the law provided for the protection of “photographic works of an artistic or documentary character.”²⁷³ This difference in classification (not protection) could be seen in the prior French jurisprudence²⁷⁴: photographs of the first group (“artistic”) could be likened to painting — composed scenes, portraits, nudes²⁷⁵ — while photographs of the second were those where the photographer’s intention was to capture *an image of interest to the public* for reasons other than the image’s aesthetic appeal.²⁷⁶ Nonetheless, by putting the distinction into the statute, the new law may have done “nothing but complicate things, the courts not knowing how to determine the documentary or artistic character of the photograph.”²⁷⁷

The second category of “documentary” photographs obviously created tension with the originality standard embedded in French cop-

271. Andrew Mure, *Observations on the Recent Copyright Act*, 9 BRITISH J. PHOTOGRAPHY 390, 391 (1862). The same pressure to reward investment for photography of far-flung places occurred elsewhere. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTING OF LITERARY AND ARTISTIC WORKS: 1886–1986* § 6.39, at 263 (1987) (discussing decisions of French and Belgian courts that accorded copyright protection to “photographs of distant places which were themselves quite ‘unartistic’ but had great commercial value because of the trouble involved in taking them”).

272. *Copyright in Photographs*, *supra* note 172, at 254. The same motivation may have also been at work in the United States. William Patry speculates that the role of photography in conveying the horrors of the Civil War provided much of the impetus for express inclusion of photographs in the copyright statute in 1865. 1 WILLIAM PATRY, *COPYRIGHT LAW & PRACTICE* 244 (1996); see also NEWHALL, *supra* note 105, at 89 (quoting the *New York World* describing Matthew Brady’s Civil War photos as “inestimable chroniclers of this tempestuous epoch, exquisite in beauty, truthful as the records of heaven”).

273. LUCAS, *supra* note 65, § 128, at 136 (describing how Article 3 of the law of March 11, 1957 expressly extended French copyright to “oeuvres photographiques de caractère artistique ou documentaire”); see also YSOLDE GENDREAU, *LA PROTECTION DES PHOTOGRAPHIES EN DROIT D’AUTEUR FRANÇAIS, AMÉRICAIN, BRITANNIQUE ET CANADIEN* 2–3 (1994).

274. GAUTIER, *supra* note 233, § 115, at 148 (“Le texte originaire distinguait, pour sa part, les photographies artistiques et documentaires, cette différence, non point de traitement mais de pure classification, ayant été antérieurement forgée par la jurisprudence.”).

275. *Id.*

276. Pierre-Yves Gautier notes that in this category there is a “melding of visual image and the photographer’s will” (“l’alliance de l’élément visuel et de la volonté de l’opérateur”). *Id.* § 117, at 150.

277. LUCAS, *supra* note 65, § 128 at 136 (“Mais ce statut spécial... ne fit que compliquer les choses, les tribunaux ne sachant comment déterminer le caractère documentaire ou artistique d’une photographie.”).

wright law, i.e., that only “works of the spirit” manifesting “creative activity” deserve copyright.²⁷⁸ The documentary category also seemed to contradict the *Bleistein*-like provision in French law that copyright exists in works regardless of “merit.” Nonetheless, copyright for “documentary” photographs in French law shows the continuing intellectual appeal of the idea that we *should* protect investment and reward labor. In July 1985, French copyright law was revised to eliminate the artistic/documentary distinction,²⁷⁹ leaving French law in a position parallel to American law: photographs should only be protected if they meet the same originality standard required for all works, and courts may find themselves stretching that standard to accommodate photographs and programs of photography that they believe merit some kind of protection from free-riding.²⁸⁰

Just like these nineteenth- and twentieth-century policymakers, we too want people taking many non-original photographs and videos. Indeed, we want people taking exhaustive photographic records of political campaign events, natural disasters, public demonstrations, and thousands of other kinds of events. We want them to turn on the camera when things get interesting, remarkable, or newsworthy. If we think financial incentives will result in more such works (and that we might not have enough in quantity or quality otherwise), then we have practical reasons for saying that direct copying of the Garcia photograph for commercial uses *should be* illegal.

Some European laws deal with this problem more directly by granting limited protection to non-original photos. Article 6 of the 2006 European Union Directive on the term of copyright protection states: “Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.”²⁸¹ In other words, countries in the Europe-

278. *Id.* at 136–37 & n.391 (“La protection des photographies de ‘caractère documentaire’ était de ce point de vue exorbitante du droit commun de la propriété artistique, dans la mesure où l’attribution du monopole était ouvertement liée au contenu de l’oeuvre et même à des circonstances extérieures.”).

279. Following the general provision of Articles L-112-1 extending French copyright to “all works of the spirit, whatever their genre, form of expression, merit or intended use” (“toutes les oeuvres de l’esprit, quels qu’en soient le genre, la forme d’expression, le mérite ou la destination”), CODE DE LA PROPRIÉTÉ INTELLECTUELLE, art. L112-1, Article L-112-2 specifies that this includes “photographic works and those works made with the aid of techniques analogous to photography” (“Les oeuvres photographiques et celles réalisées à l’aide de techniques analogues à la photographie”), CODE DE LA PROPRIÉTÉ INTELLECTUELLE, art. L112-2.

280. *Cf.* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 20, 2011, decision No. 10-21251 (Fr.).

281. Directive 2006/116/EC, of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372) 12, 14.

an Union are required to give copyright to photographs that meet a general originality standard, but they are also permitted to give legal protection (copyright or otherwise) to other non-original photographs.

Germany, Italy, and Norway are three European countries that offer protection to non-original photographs.²⁸² Under German law, works of photography (“Lichtbildwerke”) are photographs with a sufficient level of originality or “artificial craftsmanship,” and are subject to the regular copyright term of life plus seventy years.²⁸³ All other photographs (“Lichtbilder”) fall under § 72, paragraph 3 of the German Copyright Code (“Urheberrechtsgesetz”), which provides that for photographs not meeting the originality standard:

The right pursuant to para. 1 [to have photographs protected under copyright] runs until 50 years after the publication of the photo, or, if its first authorized public display has occurred earlier, after this first authorized public display, but in any case 50 years after production if the photo has not been published or legitimately shown publicly. The term is to be calculated in accordance with § 69.²⁸⁴

In other words, photographs with sufficient originality have the standard life-plus-seventy term of protection, while all other photographs enjoy only a fifty-year term of protection from the date of publication (or, if unpublished, the date the photograph was taken).

Norway provides a similar two-tier system of protection, expressly naming “photographic works” among categories of copyrightable works, but providing separate protection “[i]n the case of photographic pictures which are not a literary, scientific, or artistic work.”²⁸⁵ The non-copyrightable “photographic pictures” (as distinct from the copy-

282. Norway is not a member of the European Union, but it is required to implement the terms of EU Directives under the EEA Agreement, which extends the EU Internal Market to Norway, Iceland, and Liechtenstein. Agreement on the European Economic Area art. 7, May 2, 1992, 1994 O.J. (L 1) 3, 9 (entered into force Jan. 1, 1994).

283. Urheberrechtsgesetz [UrhG] [Copyright Law], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL. I], as amended, § 2 Para. 1 (Ger.) (including “Lichtbildwerke” among the list of protected works).

284. *Id.* § 72 Para. 3 (“(3) Das Recht nach Absatz 1 erlischt fünfzig Jahre nach dem Erscheinen des Lichtbildes oder, wenn seine erste erlaubte öffentliche Wiedergabe früher erfolgt ist, nach dieser, jedoch bereits fünfzig Jahre nach der Herstellung, wenn das Lichtbild innerhalb dieser Frist nicht erschienen oder erlaubterweise öffentlich wiedergegeben worden ist. Die Frist ist nach § 69 zu berechnen.”)

285. LOV OM OPPHAVSRETT TIL ÅNDSVERK [COPYRIGHT ACT] 12. mai 1961 nr. 2 § 1, translated in *Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, etc., with Subsequent Amendments, Latest of 22 December 2006 (in Force 1 January 2007)*, GOV'T OF NOR., http://www.regjeringen.no/upload/KKD/Medier/Acts%20and%20regulations/Aandsverkloven_engelsk_versjon_nov2008.pdf (last visited May 3, 2012).

righted “photographic works”) have a life plus fifteen years, but not less than production date plus fifty years, term of protection with roughly the same exclusive rights as copyrighted “photographic works.”²⁸⁶ Italy takes a simpler approach than Norway or Germany. Article 87 of the Italian Copyright Law creates a twenty year neighboring right for non-original photographs of “persons or of aspects, elements or events of natural or social life,” but excludes from any protection “photographs of writings, documents, business papers, material objects, technical drawings and similar products.”²⁸⁷

One could look at both the European Union Directive and these national laws as echoes or vestigial remainders of the period when people resisted the idea of photography as art; recall the grudging admission of photographic works to the Berne Convention. Some might also say that the term of protection for non-original photographs is still too long in these national laws, but it is always significantly shorter than the protection for original photographs. But both of these observations miss the key point: a two-tier system of protection like German, Italian, or Norwegian law recognizes that we sometimes want to reward non-original expressions. Such a system can help keep lawyers and policymakers from distorting the originality standard. Without this system, courts may continue to stretch originality to include in the realm of copyright many arguably uncreative photographs and videos.²⁸⁸

286. *Id.* § 43a. The Norwegian Copyright Act provides:

A person who produces a photographic picture shall have the exclusive right to make copies thereof by photography, printing, drawing or any other process, and to make it available to the public. The exclusive right to a photographic picture shall subsist during the lifetime of the photographer and for 15 years after the expiry of the year in which he died, but for not less than 50 years from the expiry of the year in which the picture was produced. If the exclusive right is shared by two or more persons, the term of protection shall run from the expiry of the year in which the last surviving person died. The provisions of sections 2, second and third paragraphs, 3, 6 to 9, 11 to 21, 23 to 28, 30 to 39f and 39j to 39l shall apply correspondingly to photographic pictures to the same extent that they apply to photographic works. If a photograph is subject to copyright, such right may also be enforced.

Id.

287. Legge 22 aprile 1941, n. 633 § 87, *translated in Italy: Law No. 633 of April 22, 1941, for the Protection of Copyright & Neighboring Rights*, WORLD INTELLECTUAL PROP. ORG. (Feb. 10, 2012), http://www.wipo.int/wipolex/en/text.jsp?file_id=128275#JD_IT099E_A87. The protection of non-original photographs in Italy extends to “reproductions of works of figurative art,” *id.*, suggesting that museum photos of the *Bridgeman Art Library* sort are expressly protected. My thanks to Giorgio Spedicato for confirming these points.

288. A point politely noted by a German commentator looking at French copyright law. Katzenberger, *supra* note 178, at 151 (“Since French law does not contain a supplementary special protection for simple photographs, unlike German law, it must be assumed that the criterion of originality . . . must be applied to all the types of works mentioned, with uniformly minimum requirements.”).

It is no coincidence that the two-tier system for protection of photographs in German law has some similarity to the two-tier system of protection for databases in the European Union. In 1996, the European Union established a *sui generis* form of intellectual property to protect investment in databases lacking sufficient originality for copyright protection.²⁸⁹ This harmonized system was intended to replace varying national standards for the protection of databases: a system in which the United Kingdom and Ireland protected non-original databases under their “sweat of the brow” doctrine in copyright; Nordic countries protected non-original databases under a *sui generis* “catalog rule”; and France, Italy, the Netherlands, and Spain offered no protection to the same databases.²⁹⁰ The 1996 directive elevated the originality standard for copyright protection of databases above what some countries required, while establishing a fifteen-year term of protection for investment in non-original databases.²⁹¹ The European Union’s *sui generis* database protection regime remains controversial, with no evidence that it has increased database production in Europe.²⁹² This lack of evidence calls into question the wisdom of the older regimes for protection of non-original photographs.

Even if we have the general policy objective of wanting people to take lots of non-original photographs and films — to make a rich documentary record of the world — it is fair to ask whether we need to provide *incentives* for these activities in a world where billions and billions of digital cameras are being distributed. As the head of the news agency Reuters provocatively asked, “What if everybody in the world were my stringers?”²⁹³ Yet even in that world, there are reasons to think we would want incentives. First, because we want the *quality* of work produced by professional photographers, even when the work product is just “documentary.” Second, the run-of-the-mill photography assignments appear to be a critical form of financial support for the more creative endeavors of the same photographers,²⁹⁴ which may

289. Directive 96/9/EC, *supra* note 213, at pmbl.

290. Among continental legal systems, it had long been thought that Dutch law might be the most amenable to protection of non-original databases. MARK J. DAVISON, *THE LEGAL PROTECTION OF DATABASES* 133 (William R. Cornish et al. eds., 2003). But in *Romme v. Van Dale Lexicographe B.V.*, the Dutch Supreme Court concluded otherwise. See HR 4 januari 1991, NJ 1991, 608 m.nt. DWFV (*Romme / Van Dale Lexicographe B.V.*), translated in *PROTECTING WORKS OF FACT: COPYRIGHT, FREEDOM OF EXPRESSION AND INFORMATION LAW* 93 (Egbert J. Dommering et al. eds., 1991).

291. See Directive 96/9/EC, *supra* note 213, at 26.

292. See Comm’n of the European Communities, *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases* § 1.4, available at http://ec.europa.eu/dgs/internal_market/evaluation/evaluationdatabasesdirective.pdf.

293. Saul Hansell, *Have Camera Phone? Yahoo and Reuters Want You to Work for Their News Service*, N.Y. TIMES (Dec. 4, 2006), <http://www.nytimes.com/2006/12/04/technology/04yahoo.html>

294. FRED RITCHIN, *AFTER PHOTOGRAPHY* 37 (2009) (“Photographers, in search of the authentic, often find themselves using their own money, along with grants, to work on self-

be an important difference in a marketplace served by freelance individuals versus the larger corporations that maintain commercial databases.

B. The Concern for Fairness

Whether or not legal protection of non-original works such as photographs or databases increases production of these works, it is important to recognize that there may also be a sense of fairness that is closely aligned with, if not incorporated in, the issue of incentives. Those who make the effort to capture valuable photographic images may deserve some form of legal protection, particularly against competitors. Courts and commentators have noted this sense of fairness with respect to other information products, such as telephone books.²⁹⁵ There is no reason to expect that we would have a different intuition for non-original photographs. Where we think it is fair to offer legal protection, we will be more likely to find copyright-sustaining originality.

C. The Sense of Beauty

Yet another reason we may tend to see originality coursing through all photography is that we mistake beauty for originality. All of us have been similarly struck by the beauty of photographs of Earth taken from outer space, or just portions of its surface like the Nantucket photographs in Part IV.B. By capturing beautiful vistas, beautiful faces, and beautiful vegetation, photographs are faithful records of the world's beauty, most of it unrelated to human creativity and all of it unrelated to the creativity of the particular photographer.

In most circumstances, we have no problem distinguishing human-made beauty (which is the result of creativity) from natural beauty, even when the two are mixed. Think of the judgments we make about the beauty of urban areas, such as the natural beauty of San Francisco, Rio, or Cape Town, as compared to the human-made beauty of the Champs-Élysées in Paris or the Magnificent Mile in Chicago. The nature of photography muddles this distinction; with a photograph of a great mountain or waterfall, the thing before you can be

defined multiyear projects.”); Subotnik, *supra* note 179, at 1550–51 (detailing examples of successful photographers who have used their more pedestrian work to support financially their more adventurous artistic or documentary projects).

295. In discussing the Australian case *Telstra Corp., Ltd. v. Desktop Marketing Systems Pty., Ltd.*, [2001] F.C.A. 612, which found that telephone books were protectable under copyright, Gervais notes, “The key to the *Telstra* decision is probably a fairness issue: the court expressed the need to find a way to protect investments in a compilation. As we have argued above, this is a matter best left to tort law or perhaps, though with some hesitation, to *sui generis* legislation as was done in Europe.” Gervais, *supra* note 3, at 968 (footnotes omitted).

both a human product and a thing of natural beauty. In this way, photographs can “give the impression of artistic creations” without the photographer making any deliberate effort to be creative.²⁹⁶

Photography — in its plucking of something from space and time — also has an inherent element of melancholy in it. For things long gone — whether cityscapes or vibrant youth — photographs have the “melancholy beauty of a vanished past.”²⁹⁷ But even this conception misses something important. When the object of the photograph — an old city quarter, a youthful face, a dinner party, a poetic street scene — has vanished, the photographer has captured beauty that would otherwise be lost to us. The photographer gives us an object of beauty that we would not otherwise have, thus causing the lines between preserving and creating beauty to blur. Indeed, aesthetics expert Elaine Scarry describes “perpetuating beauty that already exists” and “originating beauty that does not yet exist” as “the two distinguishable forms of creating beauty.”²⁹⁸ We will return to this problem in Part VI.B to discuss originality in the “hunt” of the photo-journalist or the nature photography of Ansel Adams.

VI. UNDERSTANDING ORIGINALITY IN PHOTOGRAPHY

Although courts have had well over a century to develop an understanding of the originality in photography that will support copyright protection, no one would accuse the case law in this area of being overly regimented or unduly structured. Consider a passage from a treatise of English copyright law co-authored by Justice Hugh Laddie that provides an elegant, though somewhat chaotic, summary of how English courts have thought about the originality standard of copyright in relation to photographs:

It will be evident that in photography there is room for originality in three respects. First, there may be originality which does not depend on creation of the

296. Siegfried Kracauer, *Photography, in* THEORY OF FILM: THE REDEMPTION OF PHYSICAL REALITY (1960), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 245, 257. Kracauer writes:

Pictures of this kind need not result from deliberate efforts on the part of the photographer to give the impression of artistic creations. In fact, Beaumont Newhall refers to the intrinsic “beauty” of aerial serial photographs taken with automatic cameras during the last war for strictly military purposes. It is understood that this particular brand of beauty is an unintended by-product which adds nothing to the aesthetic legitimacy of such mechanical explorations of nature.

Id.

297. *Id.* at 261. See also NEWHALL, *supra* note 105, at 94.

298. ELAINE SCARRY, ON BEAUTY AND BEING JUST 115 (1999). Scarry was not discussing originality standards in copyright, but beauty and creativity in aesthetics. *Id.*

scene or object to be photographed or anything remarkable about its capture, and which resides in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc: in such manner does one photograph of Westminster Abbey differ from another, at least potentially. Secondly, there may be creation of the scene or subject to be photographed. We have already mentioned photo-montage, but a more common instance would be arrangement or posing of a group; this might also involve work in setting up or controlling the illumination of the subject to be photographed. Thirdly, a person may create a worthwhile photograph by being at the right place at the right time. . . . He may capture a scene worth preserving because he made a special effort to go and find it, as where a news photographer covers a story, or he may be there and press the trigger at just the right time by sheer good fortune or by selecting just the right moment to do so; but it is submitted that this makes no difference, for the law would be unrealistic if it tried to exclude this element of serendipity.²⁹⁹

Working through these categories will help us clarify the various sources of originality in photography. It will also help us understand how aesthetic judgments on photography have narrowed the range of originality cognizable under copyright law, and how that narrowing has in turn contributed to judges' focus on processes rather than outcomes. Finally, we will turn to the vexing problem posed by Laddie's third category of originality, where a photograph is created by being in the right time at the right place.

In a real sense, Laddie's second category, creating the scene or subject captured in the photograph, should be the first category of originality in a photograph because it occurs before any photographic processes and is independent of any decisions concerning photographic equipment. Also, as discussed above, composing and posing can form a significant basis for copyright. Moreover, Laddie includes in this category "creation of the scene or subject to be photographed," but that would be the first "zone" of originality: selection of what will be photographed, whether done through the people and objects one brings into the studio or the things out in the world at which one chooses to point the camera. Either approach produces an initial level

299. HUGH LADDIE, PETER PRESCOTT & MARY VITORIA, *THE MODERN LAW OF COPYRIGHT AND DESIGN* § 4.57 (2000) [hereinafter LADDIE].

of the “creation of the scene.” Laddie includes “work in setting up or controlling the illumination of the subject to be photographed” in his second category, and we can understand that this too occurs before the use of the photographic equipment.

In Laddie's *actual* first category, he mentions the “angle of the shot” and the use of the photographic tool (the camera) for significant arrangement of the image.³⁰⁰ The other items in this category are “light and shade, exposure, effects achieved by means of filters, developing techniques etc.”³⁰¹ These are the ways the photographer manipulates the image through the photographic equipment besides the choice of what is seen through the camera aperture. But this list also seems to merge two different technical phases of photography that we will want to parse out: (1) technical decisions made before and while the image is taken (filters, lens, and exposure) and (2) technical decisions made after the image is taken (development of the image). For example, “light and shade” might sound like something done in the arrangement (e.g., using elaborate lights at a photo shoot), but that is not what Laddie meant. By “light and shade” Laddie was referring to the control of light and shade that can be done in the development of the image, chemically or digitally.³⁰²

If we were to reorganize these elements in a more rigorous way, then the list might look like Table 1.

300. *Id.* § 4.57.

301. *Id.*

302. Laddie seemed to indicate as much when he described the lighting at the photography shoot in his second point, stating: “This might also involve work in setting up or controlling the illumination of the subject to be photographed.” *Id.* The reference to “light and shade” in Laddie's first point must therefore indicate a distinct technical feature.

Creative Choices in Constructing a Scene

Selection of objects in the photo — *Whether this is done by inviting people to a studio or gathering objects for a “still life” style photo or deciding what things will be in the frame of the camera*

- “Physical” selection
- “Temporal” selection

Arrangement of objects in the photo — *Whether this is done by physically moving the objects around (“posing”) or moving the camera around to capture different spatial relationships between the objects; this will sometimes be angle of the shot*

- Temporal selection also becomes arrangement where objects move on their own (street scenes)

Control of actual light and shade in the scene

Creative Choices in Initial Image Capture

Angle of the shot — *There may be artistic aspects of the angle of the shot that do not constitute “arrangement” of the objects in the frame*

Effects from control of exposure

Effects from choice of lens

Effects from choice of filters

Creative Choices in Processing or Manipulation

Effects from developing techniques in traditional chemical photography or digital manipulation of the captured image

Table 1: Sources of Originality in a Photograph

It is worthwhile to consider what is not (or not yet) in this table due to the fact that copyright's perspective on photography has been informed by a debate among the aesthetic elite as much or more than any debate within the legal establishment. Not surprisingly, the early view of photography as a purely mechanical process prompted those who viewed it differently to try to change this prevailing notion. In the 1850s, Sir William Newton was already reportedly advocating "the heresy that pictures taken slightly out of focus, that is, with slightly uncertain and undefined forms, 'though less *chemically*, would be found to be more *artistically* beautiful.'"³⁰³ An anonymous essay from 1864 humorously describes another sort of response to make photography more "artistic":

There are some photographers, and more photographic critics, who are of opinion that a photograph cleanly taken, and properly focused, is 'inartistic;' [sic] and if asked why they pass upon it this terrible condemnation, they will reply, taking refuge behind another word of power, that it is 'realistic.' . . . One critic recommends that the sitter should move slightly while the portrait is being taken. That critic can never have stood behind a camera. The result . . . would undoubtedly be to banish the realistic; but whether the effect would be artistic may be questioned. The simple consequence of the remedy would be that the sitter would be presented to the world with an elongated mouth, two noses, or one nose the size of two, and eyes squinting outwards.³⁰⁴

Blurry lenses and moving subjects are one thing, but shortly after the development of photographic techniques, people began to chafe at the idea that the photograph could only record things actually assembled in front of it. We think of Communist propagandists as the purveyors of doctored photographs, but the practice became well known on both sides of the Atlantic from at least the 1850s onward. In America, there were famous doctored photos of Abraham Lincoln³⁰⁵ and Ulysses S. Grant.³⁰⁶ In England, the composition prints of Oscar

303. Eastlake, *supra* note 19, at 59–60.

304. *Photography*, *supra* note 20, at 142. Of course, less than a century later, Pablo Picasso would produce figures with misshaped noses and these would be considered quite artistic.

305. See *A Brief History of Photo Fakery*, NYTIMES.COM, (Aug. 23, 2009), http://www.nytimes.com/slideshow/2009/08/23/weekinreview/20090823_FAKE_SS_index.html (follow arrow to "2 of 13").

306. See *id.* (follow arrow to "3 of 13" and "4 of 13").

Gustave Rejlander³⁰⁷ and Henry Peach Robinson³⁰⁸ were widely known and widely debated. Rejlander's most famous photographic composition was the allegorical work *The Two Ways of Life*;³⁰⁹ Robinson may have been best known for *Fading Away*.



Figure 7: Oscar Gustave Rejlander, *The Two Ways of Life* (1857)

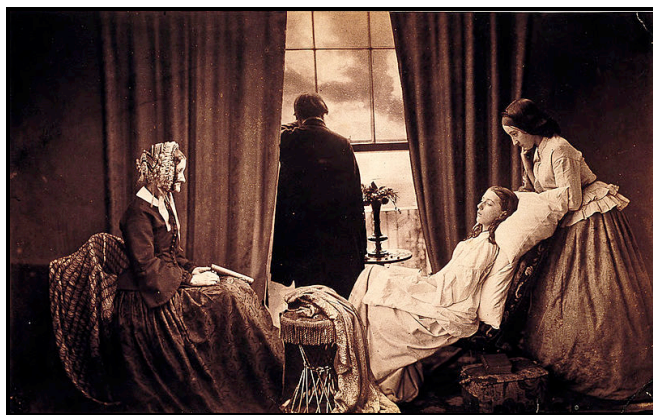


Figure 8: Henry Peach Robinson, *Fading Away* (1858)

307. The Getty Museum notes that photographer Oscar Gustave Rejlander “[b]eliev[ed] that photography would make painters more careful draftsmen, [and] he earned a modest living making photographic studies for artists, probably including Sir Lawrence Alma Tadema.” *Oscar Gustave Rejlander*, J. PAUL GETTY MUSEUM, <http://www.getty.edu/art/gettyguide/artMakerDetails?maker=1686> (last visited May 3, 2012).

308. *Henry Peach Robinson*, J. PAUL GETTY MUSEUM, <http://www.getty.edu/art/gettyguide/artMakerDetails?maker=1972> (last visited May 3, 2012); *see also* Mnookin, *supra* note 29 at 26; *Photography*, *supra* note 20, at 142.

309. Patricia D. Leighton, *Critical Attitudes Toward Overly Manipulated Photography in the 20th Century*, 37 ART J. 133, 133–34 (1977–1978).

In the case of each work, the harsh reaction was not solely against it being a montage, but also the scene in the photograph (though each scene would be quite acceptable to Victorian sensibilities in the form of a painting).³¹⁰

Beyond montage, the nineteenth century saw a variety of other artistic experiments and practices based on photographic processes. There was the school of "photo-painting" in which, by Weston's description, "the negative was taken as a point of departure — a first rough impression to be 'improved' by hand until the last traces of its unartistic origin had disappeared."³¹¹ Beyond the reality-capturing technologies of photography itself, there was also *clichés-verre*, a technique for producing images by painting or scratching a glass plate, then using the plate as a negative placed directly against photosensitive paper in a frame;³¹² French artist Jean Baptiste Camille Corot was perhaps the best-known practitioner of this "cameraless photography."

It is difficult to distinguish photographic composition, "photo-painting," and other practices from what painters and other visual artists were already doing at the time.³¹³ But over time, these practices apparently lost out against a vision of legitimate photography that offered a "narrower" field of creativity.³¹⁴ There was increasingly less

310. HELMUT GERNSHEIM, *CREATIVE PHOTOGRAPHY: AESTHETIC TRENDS, 1839–1960* 77 (1962); HENRY PEACH ROBINSON, *LETTER ON LANDSCAPE PHOTOGRAPHY* 70 (2010). *The Two Ways of Life* was a combination print montage of thirty-two different images, created and assembled in the course of about six weeks. The work is clearly inspired by Raphael's *School of Athens* (1509–11). Of the five prints known to have been made, one was purchased by Queen Victoria as a gift for Prince Albert. Despite royal patronage, the image continued to generate controversy; the nudity on the left hand of the tableau caused half the work to be draped — and only the right side shown — when the photo-montage was exhibited in Scotland.

311. WESTON, *supra* note 140, at 171 ("Behind the photo-painter's approach lay the fixed idea that a straight photograph was purely the product of a machine and therefore not art. He developed special technics [sic] to combat the mechanical nature of his process. In this system, the negative was taken as a point of departure — a first rough impression to be 'improved' by hand until the last traces of its unartistic origin had disappeared.")

312. See Karen Rosenberg, *Sleight of Camera, Capturing Fleeting Impressions*, N.Y. TIMES (Mar. 14, 2008), <http://www.nytimes.com/2008/03/14/arts/design/14bald.html>.

313. The same anonymous 1894 essay that railed against elongated mouths and multiple noses defended Henry Peach Robinson's techniques as legitimate from an artistic perspective, arguing:

Its legitimacy hardly seems to us to need much discussion; for it is in fact no more than what is done by almost every artist, who, when he sees any object or figure whose beauty strikes him, sketches it in his sketch-book, for future use when occasion offers. . . . [S]o far there is nothing within the reach of the artist's pencil which is not equally within the reach of photography by double printing.

Photography, *supra* note 20, at 143.

314. Even in the *Sarony* case, Sarony argued that photographers were creative, but in a narrower range than other artists:

The limitations and requirements of the art of the photographer, are of course peculiar to that art, and differ from other arts, and we do not claim that a photographer has the scope for his work which the paint-

acceptance, to use Mark Rothko's phrase, of "the photographer contriving little tricks to blur the objective accuracy of his machine to achieve for it the soul of paintings."³¹⁵ This set of techniques was seen as a "dodge, trick, and conjuration" used by people who could master neither the new technology nor the new art form.³¹⁶ In the mid-late twentieth century, Weston distinguished legitimate "photographic" methods from those "of an optical or chemical nature,"³¹⁷ and Roland Barthes reconciled the realism of photography with its artistry by concluding that "[m]an's interventions in the photograph (framing, distance, lighting, focus, speed) all effectively belong to the plane of connotation."³¹⁸ Such an aesthetic remains quite strong. For example, in the 2010 blockbuster film *Inception*, director Chris Nolan and cinematographer Wally Pfister sought to avoid color alteration of the 35mm stock they shot,³¹⁹ even though the final act of the film moves among three dream sequences, which are distinguished from one another by distinct color patinas.³²⁰

A. Originality in Outcomes, Not Process

The narrow spectrum for original expression in legitimate photography may prove challenging for judges confronted with disputes about copyright in photographs and has contributed to some imprecision by courts on the nature of the originality in a photograph. The problem is that courts tend to use formulae that locate the originality in the work based on the process that produced the work: "the photographer's selection of background, lights, shading, positioning of subject, and timing;"³²¹ or "posing the subjects, lighting, angle, selection

er or sculptor has. His field is narrower. He must set in order his whole picture, he must arrange his light and shade, his drapery, his proportions, his distances; in fact, he must create exactly what he wants to convey — no chance for adding artistic touches after the picture has once been taken. All the characteristic features, the expression, the position, the pose, the surroundings, must be complete and perfect.

Burrow-Giles Brief, *supra* note 71, at 15.

315. MARK ROTHKO, *THE ARTIST'S REALITY* 111 (2004).

316. Kracauer, *supra* note 296, at 249 (discussing "artist-photographers" retouching for artistic effect and "badly made lenses"; the "use of any kind of 'dodge, trick, and conjuration' so that pictorial beauty might arise out of a 'mixture of the real and artificial'" (quoting Henry Peach Robinson)).

317. WESTON, *supra* note 140, at 173 (referring to "any method of control of . . . an optical or chemical nature" as not photographic).

318. ROLAND BARTHES, *RHETORIC OF THE IMAGE, IMAGE, MUSIC, TEXT* 32 (Stephen Heath trans., 1977), *reprinted in* CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 17, at 269, 278.

319. See David Heuring, *Dream Thieves*, AM. CINEMATOGRAPHER, July 2010, at 26, 39.

320. *Id.* at 34. The film was shot on Kodak Vision3 500T 5219 and 250D 5207 stock. *Id.* at 39.

321. Jack Leigh v. Warner Bros., 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998).

of film and camera, evoking the desired expression, and almost any other variant involved.”³²² In short, it is correct yet problematic to find authorship in “the choice of light sources, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques”³²³ or to conclude that there is original expression because the photographer “made all decisions regarding lighting, appropriate camera equipment and lens, camera settings and use of the white background.”³²⁴ Even leading treatises in the United States tend toward this form of ambiguity-laden shorthand.³²⁵

In contrast, the Laddie treatise states the correct test: it is not the “means of filters, developing techniques, etc.,”³²⁶ but rather the actual effects on the visual image — the “effects achieved.”³²⁷ The Ninth Circuit panel in *Ets-Hokin v. Skyy Spirits*³²⁸ adopted a similar stance, admitting that “[c]ourts today continue to hold that such decisions by the photographer — or, more precisely, the elements of photographs that *result* from these decisions — are worthy of copyright protection.”³²⁹ Courts should, like the panel in *Ets-Hokin*, emphasize that it is not the choices or the decisions that factor into whether there is original expression; it is the results. If I wrote this article in longhand with ink made of maple syrup and blackberry extract — backwards — that process, on its own, would do nothing to make the resulting article original. Likewise, the originality in a screenplay cannot emanate from the choice of word processing program. As Judge Easterbrook correctly summarized, “the [creator’s] input of time is irrelevant.”³³⁰

322. *Roger v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

323. *Marco v. Accent Publ’g Co.*, 969 F.2d 1547, 1551–52 (3d Cir. 1992).

324. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1230 (11th Cir. 2010). A more mixed example is *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 308 (S.D.N.Y. 2000) (holding that “an author must imbue the work with a visible form that results from creative choices”). One could quibble with the *SHL* holding, however, because it is “visible form” that must be “creative” not the “choices.” However, the court later clarifies its understanding, elaborating on the linkage between photographers’ creative choices and the effects they produce. *See id.* at 310 (“The technical aspects of photography imbue the medium with almost limitless creative potential.”).

325. A “photograph may claim the necessary originality to support a copyright merely by virtue of the photographers’ personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.” NIMMER, *supra* note 103, § 2.08[E].

326. LADDIE, *supra* note 299, § 4.57.

327. *Id.* The Nimmer treatise also gets this right with regard to United States copyright law. *See* NIMMER, *supra* note 103, § 2.08[E][1] (“[A]ny (or as will be indicated below, almost any) photograph may claim the necessary originality to support a copyright merely by virtue of the photographers’ personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.”).

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

329. *Id.* at 1074–75.

330. *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo.*, 768 F.2d 145, 148 (7th Cir. 1985); *see also id.* (“[C]opyright laws protect the work, not the amount of effort expended. . . . Copyright covers . . . only the incremental contribution and not the underlying information.”).

Formally speaking, it is acceptable to say that the choice of camera, film, and aperture speed are evidence contributing to a determination of originality. Similarly, those decisions can be evidence of authorship. It is also acceptable to say that “the creative decisions involved in producing a photograph may render it sufficiently original to be copyrightable,”³³¹ but originality must be in the visible effects in the work itself, not in the means of achieving those effects.

This does not mean that judges are being sloppy; there are some distinct reasons judges engage in this process-based reasoning. First, it is easier to receive objective evidence on the choice of camera, film, and the like than to receive subjective evidence of originality in the image, which often entails expert testimony and the problem of accepting that testimony. Second, as soon as a judge starts assessing originality in the visual image, it is easy to slip into the murky zone of artistic judgments that *Bleistein* warns judges to avoid.³³² In 1884, Justice Miller was comfortable agreeing that *Oscar Wilde No. 18* was a “harmonious, characteristic, and graceful picture”³³³ and in 1916, a district court judge was comfortable saying that a photograph of the New York Public Library was “admirable . . . pleasing, and the lights and shades are exceedingly well done.”³³⁴ But a jurist who takes to heart Holmes’s admonition to avoid judging “the worth of pictorial illustrations, outside of the narrowest and most obvious limits”³³⁵ will quickly become uncomfortable trying to describe the nuanced elements of a photograph. The simplest solution is to focus on creative choices and decisions.³³⁶

B. Originality Hunting

Let us now consider Laddie’s third category of originality in photographs: a “worthwhile photograph by being at the right place at the right time”³³⁷ or an image of “a scene worth preserving because [the photographer] made a special effort to go and find it.”³³⁸ Is that originality or just hard work? What about someone who gets a worthwhile photograph “by sheer good fortune?”³³⁹ Another authority on English copyright law says, “[I]t seems that the test of originality may be sat-

331. *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992).

332. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

333. *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 54 (1884).

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

335. *Bleistein*, 188 U.S. at 251.

336. The same hesitancy of courts to make such judgments has been noted in French copyright law. *See LUCAS, supra* note 65, § 128, at 138 (“And it is certain that fear to put forth a value judgment inclines the courts to behave indulgently.”/“Et il est certain que la crainte d’émettre un jugement de valeur incline les tribunaux à l’indulgence.”).

337. LADDIE, *supra* note 299, § 4.57, at 229.

338. *Id.*

339. *Id.*

isfied by little more than the opportunistic pointing of the camera and the pressing of the shutter button.”³⁴⁰ Among the characterizations in this third form of originality, Laddie and his coauthors similarly include cases where the photographer “capture[s] a scene worth preserving . . . by selecting just the right moment to [press the trigger].”³⁴¹ In AP’s “analysis,” one of the grounds for copyright in Garcia’s photograph of Barack Obama was Garcia’s “deliberate selection of a specific moment in time to capture President Obama’s expression.”³⁴²

Such characterizations — “opportunistic pointing of the camera,” making “a special effort” to find an image, “selecting just the right moment” to press the button, and “captur[ing]” an expression — are quite instructive. Are these descriptions of originality or are they descriptions of hard work or good luck that we believe we should reward? Capturing reality through “opportunistic pointing of a camera” certainly has its own value, but it is fair to ask whether that value is more akin to early twentieth-century big-game hunting than to early twenty-first century aesthetics of painting. Susan Sontag’s observation of the hunter-with-a-camera³⁴³ echoes a sentiment heard throughout the history of photography. As early as 1859, Oliver Wendell Holmes, Sr. predicted that people would eventually collect photographic images like hunting trophies.³⁴⁴ In a similar essay on photography, Eastlake recognizes how the new technology sparked a human interest akin to “the gambler’s excitement in the frequent disappointments and possible prizes of the photographer’s luck.”³⁴⁵ In 1931, German critic Walter Benjamin concluded that “the amateur returning home with his mess of artistic photographs is more gratified than the hunter who comes back from his encounters with masses of animals which are useful only to the trader.”³⁴⁶

The tension between this hunting metaphor and how we normally understand originality runs deep, especially in photojournalism. This,

340. COPINGER AND SKONE JAMES, *supra* note 195, § 3-142, at 129.

341. LADDIE, *supra* note 299, § 4.57.

342. Answer, Affirmative Defenses, and Counterclaims of the Defendant at 12–13, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. filed Mar. 11, 2009), *available at* http://www.wired.com/images_blogs/threatlevel/files/apphoto.pdf.

343. SONTAG, *supra* note 16, at 54–55.

344. *See* Holmes, *supra* note 18, at 81 (“Every conceivable object of Nature and Art will soon scale off its surface to us. Men will hunt all curious, beautiful, grand objects, as they hunt the cattle in South America, for their skins, and leave the carcasses as of little worth.”).

345. Eastlake, *supra* note 19, at 41 (“An instinct of our nature, scarcely so worthily employed before, seems to have been kindled, which finds something of the gambler’s excitement in the frequent disappointments and possible prizes of the photographer’s luck.”).

346. Walter Benjamin, *A Short History of Photography* (1931), *reprinted in* CLASSIC ESSAYS IN PHOTOGRAPHY, *supra* note 17, at 199, 211–12 (“Indeed the amateur returning home with his mess of artistic photographs is more gratified than the hunter who comes back from his encounters with masses of animals which are useful only to the trader. And the day seems to stand before the door when there will be more illustrated periodicals for photographs than game and poultry shops.”).

of course, is because photojournalism is built upon the authenticity of photos. For example, the authenticity of Robert Capa's stunning 1936 photograph *Falling Soldier* from the Spanish Civil War³⁴⁷ and Joe Rosenthal's 1945 photograph *Raising the Flag at Iwo Jima* have been a subject of debate for decades.³⁴⁸ In both cases, the sheer beauty of the image likely fuels the authenticity controversy. They are suspect because they seem too beautiful to be reality; they look staged, composed, and created rather than discovered. Of course, if the photographs were staged, they move closer to the aesthetics of *Oscar Wilde No. 18* in *Sarony* (i.e., closer to originality in the classic sense of the plastic arts).³⁴⁹

The tension in our notion of originality comes out vividly in a 1953 English case, *Bauman v. Fussell*.³⁵⁰ In *Bauman*, each judge rendered his own opinion on an interesting problem of original expression. Bauman was a well-known photographer who had taken a dramatic photograph of two birds in a cockfight.³⁵¹ The defendant had made a painting, admittedly taking the idea from the photograph.³⁵² The painter apparently copied neither the style of the photograph³⁵³ nor the color and shading.³⁵⁴ But the judges all agreed that the painter reproduced the position of the fighting birds in the photograph.³⁵⁵ Justice Somervell was clearly troubled by the issue of originality in the position of the birds and drew a parallel to a photographer at a parade:

A man takes a photograph of a procession . . . He, of course, has chosen when and from where the photograph should be taken. The relative position of those in the procession . . . is not, however, his work,

347. See Richard Whelan, *Proving that Robert Capa's "Falling Soldier" is Genuine: A Detective Story*, PBS (May 28, 2006), <http://www.pbs.org/wnet/americanmasters/episodes/robert-capa/in-love-and-war/47>.

348. The controversy about Rosenthal's photograph seems to derive from a misunderstanding of something he said about a later photograph he took of soldiers standing around a flagpole. See John I. Carney, *Iwo Jima Photo Was Not Staged, Says Exhibit Curator*, SHELBYVILLE TIMES-GAZETTE (June 30, 2006), available at <http://www.t-g.com/story/1158666.html>.

349. See *supra* Part II.B.

350. [1978] 95 R.P.C. 485 (C.A.) (appeal taken from County Court) (U.K.). The case was heard in the Supreme Court of Judicature — Court of Appeals before Lord Justices Somervell, Birkett, and Romer. The decision was issued on May 18, 1953, and it is not clear why it was not published in official reporters until 1978, although that fact has not been lost on some commentators.

351. *Id.* at 485.

352. *Id.*

353. *Id.* at 487 (Somervell, J., opinion) (stating that the painting was "painted in a vigorous style which no one could describe as photographic").

354. *Id.* at 488 ("In the photograph there is sunlight and shadow as part of the art of the photographer. There are no shadows really in the picture as an integral part. I will only mention a few important differences. There is no sun and no shadow in the painting and no attempt to produce shadow.").

355. See *id.* at 487.

or his design, in the sense in which the relative position of the figures on the ceiling of the Sistine chapel was the work and design of Michelangelo. The order and arrangement of the procession has been, no doubt, carefully planned and designed by someone else. It is an individual's work that the Act is intended to protect. I do not think that a painter who was minded to make a picture of the procession, in his own style, would be committing a breach of copyright if he used the photograph to enable him to get accurately the relative position of those taking part.³⁵⁶

However, Justice Somervell's example is problematic because another author's intention is at issue — the person who arranged the parade. The photographer definitely cannot claim that aspect of the arrangement as his own because that arrangement owes its existence to another person who seems to have made aesthetic, stylistic, social, and even political judgments, such as the particular order and mix of bands, floats, and civic groups. Of course, the photographer could still claim originality in the angle and the selection of his particular parade photograph. Justice Somervell continued, "At the other end of the photographic scale one can imagine a case where the photographer has made an original arrangement of the objects animate and inanimate which he photographs in order to create a harmonious design representing, for example, Spring. Here the design would be his work."³⁵⁷ That, of course, is the *Sarony* situation. Somervell concluded, "The position of the birds here is betwixt and between. It is, I think, nearer to the former than the latter category."³⁵⁸ In other words, Somervell thought that capturing the birds in that particular position had some originality but not originality that rose to the level of actually arranging the tableau. Justice Birkett was also troubled by this problem and offered his own analysis:

[T]here were undoubtedly features of the [painting] which owed their existence to their presence in the photograph. The chief of these was the position of the birds. One of the main contentions of the appellant was that the position of the birds was reproduced in the picture and that was the reproduction of a substantial part of the photograph. I am bound to say that it was this part of the case that occasioned me

356. *Id.*

357. *Id.*

358. *Id.*

the most difficulty. The appellant did not arrange the position of the birds, but no doubt waited for the moment to take the photograph when the birds were in the position he wanted them to be³⁵⁹

Justice Birkett agreed with Justice Somervell that capturing the birds in that position was not enough to find that the photographer's copy-right had been infringed.³⁶⁰

Justice Romer, however, disagreed. He thought that the painter had taken the most important feature of Bauman's photograph because the position in which Bauman had caught the birds was "the essence of the plaintiff's skilful presentation of that activity."³⁶¹ Justice Romer gave a blunt example to show that he believed copyright should reward those risk-takers who capture the moment:

[A]ssume the case of a man who preferred photographing big game to shooting them and was fortunate enough, and sufficiently skilled, to take a series of photographs of some incident which had rarely, if ever, been caught by a camera before, for example, a battle between a tiger and an elephant; would the figures of the animals be at the disposal of any artist who wanted to paint a similar incident but was reluctant to visit the jungle for his material? Here again, the copying of the forms of the animals by the artist for his picture would, in my judgment, constitute a reproduction of a substantial part of the photographer's work.³⁶²

This passage shows that Justice Romer understood the requisite originality as something closer to "industrious collection."³⁶³ Of course, in keeping with what I have said about the Garcia photograph of Obama, all three English judges evidently believed that Bauman's photograph was properly copyrighted and slavish reproduction as a photograph would have been an infringement.

So who was right? Does capturing on film a moment that would otherwise exist, whether a cockfight or a child's birthday party, constitute the kind of originality we require for copyright? Does capturing on film the majesty of an independent reality, whether Table Moun-

359. *Id.* at 490 (Birkett, J., opinion).

360. *Id.*

361. *Id.* at 492 (Romer, J., opinion).

362. *Id.* at 492-93.

363. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991) ("Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling facts.").

tain in Cape Town or the Lincoln Memorial in Washington, constitute the kind of originality we require for copyright? Imagine that I went hiking in a remote area and found a striking, enigmatic rock formation. Returning with a team of quarrying experts, I chop off the rock formation, bring it home, and display it as a large-scale sculpture in an art museum. Would the shape of the formation constitute my originality since I made a special effort to find it and bring it back? I believe that the initial intuition of most copyright experts will be a straightforward no. Yet the answer is not completely clear.

Museum curators and art critics might accept that the rock shape was my creative expression. Marcel Duchamp's *Fountain* is a ready-made, already existing ceramic urinal³⁶⁴ that might as well have been chopped off a bathroom wall. Duchamp signed the urinal (with a pseudonym) and put it on display as art in 1917.³⁶⁵ In 2004, a British survey of 500 art experts voted it the most influential piece of modern art, ahead of all works by Picasso, Matisse, and Warhol.³⁶⁶ Then-Tate Gallery spokesperson Simon Wilson was surprised by the choice, but remarked that the vote "reflects . . . the idea that the creative process that goes into a work of art is the most important thing — the work itself can be made of anything and can take any form."³⁶⁷ Of course, the art world may embrace the idea that the "creative process that goes into a work of art is the most important thing," and judges may recognize the creative process in their discussions of originality, but copyright law should require the modicum of creativity to be experienced through the work itself.³⁶⁸

364. See *Duchamp's Urinal Tops Art Survey*, BBC NEWS (Dec. 1, 2004), <http://news.bbc.co.uk/2/hi/entertainment/4059997.stm>.

365. *Id.*

366. *Id.*

367. *Id.*

368. See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005). The court states:

[C]ourts have not always distinguished between decisions that a photographer makes in creating a photograph and the originality of the final product. Several cases, for example, have included in lists of the potential components of photographic originality 'selection of film and camera,' 'lens and filter selection,' and 'the kind of camera, the kind of film, [and] the kind of lens.' Having considered the matter fully, however, I think this is not sufficiently precise. Decisions about film, camera, and lens, for example, often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original. 'Sweat of the brow' is not the touchstone of copyright. Protection derives from the features of the work itself, not the effort that goes into it.

Id.

C. Complicating Factors

It may be that we have framed the problem too roughly. Consider three metrics on which our intuitions about the originality question may be sensitive:

1. Capturing a Reality That Is Someone Else's Design or Intention

The reasoning here is straightforward: when the photographer captures a reality that is clearly the expression of another person's judgments or personality, the apparent originality of the photograph is reduced. Examples would include when the focus of a photograph is someone else's painting or sculpture,³⁶⁹ a vodka bottle³⁷⁰ or any other artifact, building façade, or the broad sweep of a parade organized by others.³⁷¹

2. Capturing a Reality That Would Otherwise Be Lost to Us Versus Capturing a Reality That Continues to Exist

There may be an important distinction between capturing a slice of reality that no longer exists and capturing a slice of reality that continues to exist. There are two broad ways that a slice of reality might no longer exist. First, there are the events that passed quickly into the past: the models on the runway, the birthday child blowing out the candles on her cake, the politician at a press conference. Second, there are the things that have been lost: the old Paris torn down to make way for Baron Haussman's boulevards, the orange groves of Orange County that are now suburban landscapes, the glaciers in the Alps or the Rockies that no longer exist.

As to the events, I have already proposed that temporal selection is a legitimate form of originality, particularly when the temporal selection produces specific physical arrangement or physical selection — what would definitely happen with the models on a runway or the politician speaking at a press conference. Indeed, I do not see any way we can say that spatial selection in photography can be a form of originality but temporal selection in photography cannot. But as to both the events and the things, the photographer does something that the creative individual also does: gives us some visual image that would otherwise not be available to us. We typically measure creativity by what has existed *before*, but we can also measure it — and perhaps do implicitly measure it — by what would have existed

369. See, e.g., *Jack Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1374 (S.D. Ga. 1998).

370. See, e.g., *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1071 (9th Cir. 2000).

371. See, e.g., *Bauman v. Fussell*, [1978] 95 R.P.C. 485 (C.A.) 487 (appeal taken from County Court) (U.K.).

otherwise. By that measure, doesn't the photographer who preserves an image otherwise lost to us do the same thing as the poet who gives us a sonnet that would otherwise not exist?

3. Capturing a Reality That Is Natural or Random Through Your Own Intentional Program

If we eliminate human agency from the preexisting subject of the photograph so that we now have a photograph of something that is natural or random, then we may find another important distinction between photographs that capture slices of reality as part of an "intentional program" and photographs that are not part of an intentional program. By intentional program, I mean the expeditions of Ansel Adams, the nighttime excursions of Brassai, every time Mannie Garcia goes out on assignment, and every occasion when a photographer wanders around a city in search of interesting imagery.

We might put the question this way: is there any significant difference between (a) a copyright in the work of a photographer who went into the field and captured a unique, unexpected scene in nature, and (b) a copyright in a work of Jackson Pollack who went into the studio to paint and produced a unique, unexpected tableau with the drip technique?³⁷² It is true that the photographer captures something that exists separate from her creative program and the drip technique painting exists only because of the painter's creative program. However, in both cases the resulting work is the previously unforeseen product of an intentional program. The intentional dedication to a particular program of action empowers one to take advantage of specific random occurrences. As Louis Pasteur said, "chance only favors the prepared mind."³⁷³ The "action painting"³⁷⁴ may have resulted from a process intended to express the painter's emotional state or existential struggle, but this is not categorically different from the photographer who, in László Moholy-Nagy's observation, "often *finds* images in nature which express his feelings."³⁷⁵

In prior work, I conclude that the case for creativity is doubtful with the unforeseen discoveries of scientists, explorers, and photo-journalists.³⁷⁶ But notice the tension in the word unforeseen. One can-

372. See Roberta Smith, *Rivalry Played Out on Canvas and Page*, N.Y. TIMES, May 2, 2008, at E25, available at <http://www.nytimes.com/2008/05/02/arts/design/02acti.html>.

373. Hugo Kubinyi, *Chance Favors the Prepared Mind — From Serendipity to Rational Drug Design*, 19 J. RECEPTOR & SIGNAL TRANSDUCTION RES. 15, 16 (1999).

374. See *id.*

375. Kracauer, *supra* note 296, at 261.

376. Hughes, *Personality Interest*, *supra* note 3, at 148 ("Whatever gloss witnesses and jurists give to these cases, it is a stretch to pour the making of the Zapruder film and the LANS videotapes into the mold of creative acts. My suggestion here is that we would do better to recognize the personhood interest in these works as arising from intentionality, not creativity.").

not say “unplanned” or “unintentional” because the scientist, explorer, and photojournalist embark on their physical and intellectual voyages with the plan or intention of discovering something. As I have said elsewhere, programs of discovery, whether the Lewis and Clark expedition or a photo safari, may have varying degrees of clarity and precision about the expected goal.³⁷⁷ The initial intent to engage in an activity or program need not — and probably will not — include intent all the way down to detailed actions or events, a point made by Ludwig Wittgenstein with the example of chess.³⁷⁸ When Sam Francis entered his studio and started a drip technique painting, he intended to paint. Sometime later, he might have picked up the can of red paint and intended to produce red drippings. He might never have had an intention at all regarding the shape, thickness, or composition of the red drippings that were ultimately put on the canvas. Nonetheless, those red drippings are part of his expression.

Between the scientist and the geographic explorer, dip technique painter, and photojournalist, the latter three may have more in common with one another than with the scientist. Robert Nozick, for example, drew a distinction between experimentation and exploration, concluding that exploration, while a directed activity, “does not have the structure of a well-designed experiment [characterized by] fixed observation along well-defined alternatives.”³⁷⁹ Perhaps the photojournalist is akin to the explorer, seeking out new things without too much “structure” and without “well-defined alternatives” in mind.

Whether the discovery is or is not in the midst of an intentional program may affect how much that discovery seems like a personal expression of the photographer. With the Zapruder film, Abraham Zapruder had set out on a program to film Kennedy’s motorcade in Dallas on November 22, 1963.³⁸⁰ With the film of the 1991 Rodney King beating, George Holliday had just bought a video camera and was drawn to his apartment balcony by the noise of the altercation; he had a specific intention that night to make as complete and clear a record as possible of what he was seeing, but it was not a program or plan equivalent to what Zapruder had done.³⁸¹

The third point — the intentional program of discovery — also points to a deeper uncertainty in copyright: we cannot completely foreclose the possibility that originality is not wholly distinct from

377. *Id.* at 147.

378. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, ¶¶ 197–205 (G.E.M. Anscombe trans., Macmillan Publ’g Co., 3d ed. 1973).

379. ROBERT NOZICK, *THE EXAMINED LIFE* 44 (1989).

380. *See Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 133 (S.D.N.Y. 1968).

381. *See* Beth Shuster, *Man Who Taped King Beating Defends LAPD*, L.A. TIMES, Mar. 10, 1996, at B1 (“Holliday, who had given the video camera to his first wife for Valentine’s Day, had been playing with it earlier in the evening, trying to figure out the focusing mechanism, among others things.”).

discovery. That possibility has long been reflected in our discourse. The United States Constitution speaks of securing rights to inventors for their “discoveries,”³⁸² indicating that that which is invented is also in some sense discovered. For instance, the sculptor may think that “he chips away bits to expose a shape that was inside the stone all along”³⁸³ or a poet may believe that writing “was like copying down a poem someone was whispering in his ear.”³⁸⁴ These examples are not qualitatively different from the photographer who finds an amazing image. Perhaps artistic creativity and scientific discovery are, as W.V. Quine puts it, “all of a piece.”³⁸⁵ As Quine writes, “If the fantasy of the UNIVERSAL LIBRARY were realized, literary creativity would likewise reduce to discovery: the author’s book would await him on the shelf.”³⁸⁶

VII. THE UBIQUITOUSLY PHOTOGRAPHED WORLD

Let us finish this discussion by returning to technology. As laypersons, we tend to think of photography as one single realm. But that view is incorrect, both technologically speaking and in technology’s interaction with the law. The move from daguerreotypes, which could not be reproduced easily, to dry plates, and then to film was a shift in technology that brought photography into the realm of copyright.³⁸⁷ The move from chemical photography to digital photography itself triggered statutory amendments in some countries. For example, Britain’s Copyright Act of 1956 defined photographs as “any product of photography or any process akin to photography.”³⁸⁸ The copyright law in many countries still uses this type of definition.³⁸⁹ But is digital image technology a “process akin” to chemical photography? In the United Kingdom law of 1988, the definition of a photograph was revised to mean “a recording of light or other radiation on any medium on which an image is produced or from which an image may by any

382. U.S. CONST. art. I, § 8, cl. 8.

383. W.V. QUINE, *QUIDDITIES* 38 (1987).

384. ORHAN PAMUK, *SNOW* 87 (Maureen Freely trans., Alfred A. Knopf 2004).

385. QUINE, *supra* note 383, at 39.

386. *Id.*

387. Production of a negative, from which copies could be made, went through several media — glass, paper, film. *See, e.g., Photography, supra* note 20, at 142 (1864) (discussing the “wax-paper process, in which the negative was taken upon waxed paper, instead of upon glass”).

388. Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, § 48.

389. For example, Korean copyright law protects “photographic works,” which include photographs and “other works produced by similar methods,” Jeojakgwon beob [Copyright Law], Act. No. 432, Jan. 28, 1957, *amended by* No. 9625, Apr. 22, 2009, art. 4(1) (S. Kor.). Austrian law defines photographic works as “works produced by a photographic process or a process analogous to photography.” URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT] BUNDESGESETZBLATT [BGBl] No. 111/1936, as amended, No. 25/1998, pt. 1, ch. 1, art. 3(2) (Austria).

means be produced.”³⁹⁰ Of course, this discussion is more concerned with how digital technology challenges our notions of originality in copyright; some developments present us with subtle quandaries that threaten our notion of originality while other developments may make many photographs easier to protect under copyright.

The first quandary is the way that digital photography permits the professional photographer to take hundreds of images in a short time and at a minimal cost. This directly challenges the notion that the photographer “capture[s] a scene worth preserving . . . by selecting just the right moment to” press the trigger.³⁹¹ That notion comes from a time when film was limited and each shot had to count. The difference between this old notion of photography and modern digital photography is like the difference between a pistol and a machine gun. In other words, much of what news photographers do now has moved in the direction of industrious collection and away from the exercise of judgment about individual shots. When a photographer takes over one hundred shots of a politician giving a single talk, how much does each photograph still display what Sontag would call “a certain unique, avid sensibility?”³⁹²

A vivid example of this comes from the controversy over Fairey’s use of the Garcia photograph. When Garcia first saw Fairey’s “Hope” poster, he did not recognize it as derived from one of his own photographs, precisely because Garcia had taken so many photos of Obama that Fairey did not know which ones AP had published.³⁹³ In short, whatever elements Fairey copied, Garcia did not recognize those elements as his own. We certainly have less respect for the hunter who uses a machine gun than for the hunter who uses a rifle or, better still, a bow because the machine gunner is expected to kill everything in sight. The more we recognize that the digital photographer is capturing everything in sight, surely this undermines the idea that the photographer is engaging in selection, temporal or otherwise. One might try to save originality in selection by saying that the eventual selection among the images constitutes originality, but the problems with that theory are obvious: the images have already been fixed; the selection might be done by an editor, not the photographer; and this theory might eliminate copyright post hoc from all but the selected image.

Another possibility is that the ubiquity of digital technology, particularly digital videography, may also put pressure on our concept of originality if that concept is rooted at least partially in programs of intentionality. Consider disputes about amateur and professional films: the Zapruder film of President Kennedy’s assassination in

390. COPINGER AND SKONE JAMES, *supra* note 195, § 3-142.

391. LADDIE, *supra* note 299, § 4.57.

392. SONTAG, *supra* note 16, at 89.

393. *See* Williams, *supra* note 242, at 59.

1963, the Los Angeles News Service ("LANS") 1992 film of the attack on Reginald Denny, and Holliday's 1991 video of the beating of Rodney King. Zapruder was an amateur, but his 1963 effort shows the work needed at the time, including his decisions on "the area in which the pictures were to be taken . . . and (after testing several sites) the spot on which the camera would be operated."³⁹⁴ The LANS film was taken by a professional news organization that had deployed a cameraman in a helicopter, which was no small investment.³⁹⁵ In contrast to Zapruder and LANS, Holliday happened to have a video camera nearby when he was awakened by the ruckus of four LA policemen beating Rodney King.³⁹⁶

Courts have found the first two — the Zapruder film and the LANS film — to be protected by copyright using the regular tools, including liberal reliance on the filmmaker's decisions concerning the type of camera, film, lens, time, and position of camera.³⁹⁷ But would the same kind of reasoning be possible for Holliday's video? Holliday's video of the Rodney King beating had great social impact, but Holliday was not engaged in anything nearing the intentional program that Zapruder and LANS were.

The ubiquity of digital cameras today, including video streams from cell phones, has prompted discussions of a new culture of "sousveillance." As Clive Thompson noted in 2011, "Right now, sousveillance requires an act of will; you have to pull out your phone when you see something fishy. But always-on videocams are spreading."³⁹⁸ As more and more of us become equipped with the capacity to

394. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968).

395. *See L.A. News Serv. v. KCAL-TV*, 108 F.3d 1119, 1121 (9th Cir. 1997). The court noted:

The fact that K-CAL used LANS's copyright footage free of charge, rather than paying LANS or someone else for the footage, or investing in its own helicopter and crew to obtain the footage itself, at least raises an inference that its articulated purpose of reporting the news was mixed with the actual purpose of doing so by using the best version — whether or not it meant riding LANS's (or some other station's) copyrighted coattails.

Id.

396. According to the site hosting the video, "The beating was so loud and raucous, in fact, that it caught the attention of George Holliday in his nearby apartment. He got out of his bed and went to his window, where he witnessed the horrible scene. Holliday immediately went to get his video camera, and he captured the whole awful episode on tape." *Rodney King Beating Video*, MUTISHOW TELEVISION & MEDIA, <http://www.multishowtv.com.ar/rodneyking> (last visited May 3, 2012).

397. *See KCAL-TV*, 108 F.3d at 1122 (videotape of Reginald Denny beating); *Time*, 293 F. Supp. at 142–44 (Zapruder film); *see also L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992) (upholding the district court ruling that the news film of a train wreck was copyright protected because of the creator's decisions about "the newsworthiness of the events and how best to tell the stories . . . the selection of camera lenses, angles and exposures; the choices of the heights and directions from which to tape and what portion of the events to film and for how long").

398. Clive Thompson, *Watching the Watchers*, WIRED, July 2011 at 52, 52.

take digital images 24 hours a day, 7 days a week³⁹⁹ — when we are all wearing ear-mounted video devices⁴⁰⁰ — can our notion of originality as being at the right place, at the right time hold up? Or will we be forced to admit that protecting images gathered by being at the right place, at the right time is more like rewarding industrious collection or rewarding simple good luck?

In contrast to these developments that might further destabilize our idea of originality, there is a vast array of digital technology related to photography that is moving many photographic images in the direction of traditional plastic arts. As Fred Ritchin notes, “Increasingly much of the photographic process will occur after the shutter is released.”⁴⁰¹ In that sense, we are returning to the world of photograph composition. Of course, after Oscar Gustave Rejlander and Henry Peach Robinson⁴⁰² these techniques continued to be perfected. Authoritarian propagandists and Hollywood publicists have long made opponents and wrinkles disappear. And we would all agree that when a propaganda office makes a commissar vanish or a missile launch that did not,⁴⁰³ it is, in its own way, creative.

Software systems like Photoshop and GIMP simply make ubiquitous what anyone could already do. For example, the “cloning tool” is simply copying a piece of an image and inserting it in another place in that image or in another image, along the same lines as what the Soviet⁴⁰⁴ and Chinese propagandists⁴⁰⁵ did manually when they eliminated a disfavored or fallen official from an official photograph. A variety of choices that photographers could only make easily while shooting can now be easily remade later. Digital filters essentially act as lenses by passing the data set of the photograph through an algorithm that alters the image globally. Colors can be shifted or intensified; focus can be sharpened (to imitate what would be produced by specialized types of lenses); lighting can be changed and apparent time of day altered — something that used to be a process *during* filming.⁴⁰⁶ Then, one can take a digital airbrush to the image, altering specific

399. In 2009, photography professor Fred Ritchin wrote, “By the year 2010 it is expected that we will be producing half a trillion photographs annually.” RITCHIN, *supra* note 294, at 19.

400. For example, the “Looxcie” is a series of ear-worn video devices that record hours of video and synch with one’s iPhone or Android smart phone. See LOOXCIE, <http://looxcie.com> (last visited May 3, 2012).

401. RITCHIN, *supra* note 294, at 34.

402. See *supra* notes 307–310 and accompanying text.

403. In July 2008, Iranian state agencies released a photo of intermediate missile testing that showed four missiles flaring off to their targets; in fact, only three properly launched. See *A Brief History of Photo Fakery*, *supra* note 305 (follow arrow to “12 of 13”).

404. See, e.g., *id.* (follow arrow to “5 of 13”).

405. See, e.g., *id.* (follow arrow to “8 of 13”).

406. The Hollywood technique of shooting during the day, but creating the impression of nighttime is called “nuit américaine” by French filmmakers. Inez Hedges, *Form and Meaning in the French Film, III: Identification*, 56 FRENCH REV. 207, 215 (1982).

parts of the image. One did this in the past with a traditional airbrush or in the dark room (such as by making parts of the image brighter or darker by varying the exposure time during printing).

The ubiquity of these processes could enrich our general understanding of the copyright-founding originality of photographic works (that is, a front-end with traditionally understood photographic choices and a richer back-end of digital decision-making for the final image). But one technological development points toward a future in which the front-end loses some of the framework for originality determinations: the "light field camera." One of the principal metrics for the improvement of photography, particularly since the inception of digital cameras, is the quantity of data (pixels) initially captured. And the more pixels captured, the more the initial photograph is a data field. As Michael Kass, a senior scientist at Pixar says, the "holy grail" of photography would be a photographic device that would record every photon that hit it while taking a picture.⁴⁰⁷ In a light field camera, instead of light going through a lens and hitting a pixel sensor, a micro-lens array is used so that the light that would be headed toward one particular pixel sensor ends up in a different sensor location depending on the angle of incidence (and how this path was altered by the micro-lens array).⁴⁰⁸ In other words, while a regular digital camera records how much light was headed toward a particular spot on the sensor, the light field camera records how much light came from each different direction.

Light field camera technology need not be a dramatic quantitative advance in the recordation of data because the trade-off is less resolution (that is, fewer pixels in exchange for more information about what was happening at each pixel). Also, current versions do not capture the entire light field. Nonetheless, there is still a sense that light field cameras take us much closer to the image of photography that Oliver Wendell Holmes, Sr. had in 1859 when he remarked that "[t]heoretically, a perfect photograph is absolutely inexhaustible."⁴⁰⁹ This is because there is no focus with a light field camera. The photographer still frames the shot (selecting what is in and not in the photograph image) and still arranges the objects (through selection of

407. The concept of the light field camera was pioneered by Arun Gershun. Marc Levoy, *Light Fields and Computational Imaging*, 39 IEEE COMPUTER 46, 46 (2006). In principle, a light field camera would record the full behavior of visible light within a volume. See also Ren Ng, *Fourier Slice Photography*, 24 ACM TRANSACTIONS ON GRAPHICS 735, 735 (2005) [hereinafter Ng, *FSP*]. For an example of light field photography, see Ren Ng, *Fourier Slice Photography*, STANFORD COMPUTER GRAPHICS LAB. (July 2005), <http://graphics.stanford.edu/papers/fourierphoto>. For a broader discussion and syllabus of materials, see generally *Light Fields and Computational Photography*, Stanford Computer Graphics Lab., <http://graphics.stanford.edu/projects/lightfield> (last visited May 3, 2012).

408. See Ng, *FSP*, *supra* note 407, at 735.

409. Holmes, *supra* note 18, at 77.

angle), but the key artistic choice of focus disappears and can be settled later in post-production.⁴¹⁰

But the light field camera points to a future in which the creativity of photography could break cleanly into a two-step process: first, the creativity in the selection and arrangement of the image (the portion of reality being recorded) and second, the creative choices in selecting and altering the digital ghost of each and every recorded photon. Imagine the use of multiple light field cameras to construct the visible light patterns of an entire environment: the author in post-production would have even more choices, including some of the selection and arrangement choices that would have normally been made at the time the images were captured. We are a long way from such capacity to *completely* record reality before we start manipulating it, but as artist Derek Mueller notes, we have already reached the point where “a mediocre photo can be turned into an award winning piece of art on the strength of the adjustments made to it with photo editing software.”⁴¹¹ When taking a photograph means preparing a first draft that will be subject to substantial revision, the final copyrighted work — which we may continue to call a photograph — is no longer dependent on reality but instead corresponds to our wishes in the same way that a painting or drawing always has.⁴¹²

VIII. CONCLUSION

In the middle decades of the nineteenth century, photography was the child of artists and scientists, and a vexing problem for courts. In a relatively short time, judges were persuaded that photographs were, for evidentiary purposes, revolutionary new records of fact. In different contexts, legislators and judges were persuaded that photographs were carriers of creativity sufficient to support copyright protection. These seemingly conflicting conclusions were possible because photographs can be both art and compilations of data.

Yet when someone says that “photography is protected by copyright,” they are being as conceptually sloppy — the same as if they had said that words are protected by copyright. Like words, traditional photography is a medium out of which creative expression is made. Words can give us ingredient lists or Faulkner’s novels; mud can give us bricks or the terracotta warriors of Emperor Qin’s army; photography can give us satellite images of city blocks or Brassai’s nocturnal vision of Paris. Photography is both a form of expression and a form

410. For a demonstration of this, see LYTRO, <http://www.lytro.com/living-pictures> (last visited May 3, 2012).

411. Email from Derek Mueller, Academy of Art University, Professor (June 3, 2009, 07:42 pm) (on file with author).

412. ERIK ORSENNA, VOYAGE AUX PAYS DU COTON 131 (2006) (“Le numérique permet de tricher, permet de changer la réalité jusqu’à ce qu’elle corresponde à nos souhaits.”).

of recording information; it is not an art form like poetry.⁴¹³ The camera is just a tool. Even in *Sarony*, the photographer argued that the camera was just like “the printing machine called the ‘type writer.’”⁴¹⁴ In more modern times, David Montgomery expressed the same idea when he gave *New York Times* photographer Bill Cunningham his first camera, telling Cunningham to “use it like a notebook.”⁴¹⁵

Laypersons, lawyers, and courts often lose sight of this — thinking, claiming, and finding that there is copyright in photographs that are lacking in original expression. But probably most of the world’s photographs and video — made only to record information — do not qualify for copyright protection under a reasonably administered originality standard. That includes identification photographs, security camera videos, industrial product photographs, satellite imagery, crime scene photographs, and Google Maps Street View. Some jurisdictions have responded to the limitations of copyright’s originality standard by enacting a second tier of protection for non-original photographs, presaging the *sui generis* protection for non-original databases that the European Union established in 1996. It is unclear — both with photographs and databases — whether such protection is needed to get adequate production, although at the very least, a second tier of protection arguably helps courts avoid distorting the originality standard of copyright to protect a greater range of photographs (and databases).

Even when there is copyright in a photograph, the copyright may be quite thin and effectively protect the photographic work only from slavish copying — this is particularly true with images that emerge from modern photojournalism. But again, it is not clear whether any more protection than that is needed, particularly in a world where most everyone carries a camera. As we move toward the ubiquitously recorded world in which we are not only constantly photographed, but we ourselves continuously record photographic images and video streams, the whole idea of originality in photography may come under renewed scrutiny.

413. As Sontag wrote, “Although photography generates works that can be called art — it requires subjectivity, it can lie, it gives aesthetic pleasure — photography is not, to begin with, an art form at all. Like language, it is a medium in which works of art (among other things) are made. Out of language, one can make scientific discourse, bureaucratic memoranda, love letters, grocery lists, and Balzac’s Paris. Out of photography, one can make passport pictures, weather photographs, pornographic pictures, X-rays, wedding pictures, and Atget’s Paris. Photography is not an art like, say, painting and poetry.” SONTAG, *supra* note 16, at 148.

414. *Sarony Brief*, *supra* note 79, at 13.

415. Bill Cunningham, *Bill on Bill*, N.Y. TIMES, Oct. 27, 2002, at A5, available at <http://www.nytimes.com/2002/10/27/style/bill-on-bill.html> (“One night, in about 1966, the illustrator Antonio Lopez took me to dinner in London with a photographer named David Montgomery. I told him I wanted to take some pictures. When David came to New York a few months later, he brought a little camera, an Olympus Pen-D half-frame. It cost about \$35. He said, ‘Here, use it like a notebook.’ And that was the real beginning.”).

IX. APPENDIX: COLOR FIGURES



Figure 3: The Full Version of *The Battle of the U.S.S. "Kearsarge" and the C.S.S. "Alabama"* on the Left, and the Cropped Postcard Version on the Right. The Copyright Notice on the Postcard Reads "© 2004 Philadelphia Museum of Art. All rights reserved. Printed in Canada."



Figure 4: 2008 Satellite Photo of Nantucket Island on Google Maps



Figure 5: 2012 Satellite Photo of Nantucket Island on Google Maps



Figure 6: The Garcia Photo and the Fairey Poster