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REFORMING COPYRIGHT INTERPRETATION

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I. INTRODUCTION

Copyright law has an interpretation problem that is in need of reform. Judges routinely face complex interpretive choices when they resolve disputes over potentially copyrightable works. Judges choose whether to resolve an issue as a matter of law, whether to admit — or even require — extrinsic evidence that may be relevant to their interpretation, and whether to rely on judicial intuition or formal analysis in their decision-making. The interpretive choices that judges make about works have played an important but unacknowledged role in outcomes of cases involving screenplays, architecture, novels, pop songs, nonfiction works, and photography.

The problem can be simplified to two choices: Judges must determine *what* they should use as the sources of their interpretation, and *how* they should interpret the works being litigated. These competing interpretive methods require judges to choose among different sources: the work itself, and the context around the work, including its reception, the author's intentions, or expert opinions. Further, judges must decide whether to produce formalist analysis applying copyright doctrines or to offer conclusions with little more than judicial intuition to show their reasoning.

Even though judges in copyright cases face potentially outcome-relevant choices among competing sources of interpretation, their selection of interpretive methods has been almost entirely overlooked by scholars and judges alike. Indeed, the very existence of interpretive choices as a crucial methodological question in copyright cases has not yet been widely acknowledged. This Article addresses that gap in scholarship by demonstrating that interpretive choices are ubiquitous and necessary in copyright litigation and by illuminating the competing methods and sources that judges select from when they make their interpretive decisions.

Copyright's interpretive choice regime controls questions of major importance for the parties, such as whether an issue is a matter of law or fact, whether an issue may be decided at summary judgment, whether expert testimony is allowed, and whether a use is fair. The resulting lack of transparency characterizing copyright's interpretive practices creates unpredictability and unfairness for the parties. As a function of interpretive choice, works of art may escape destruction if found non-infringing;[1] movies may get made or languish as legal dis-

1. *See* Cariou v. Prince, 714 F.3d 694, 712 (2d Cir. 2013).

putes get ironed out;[2] novels may get banned or declared a fair use;[3] fan works may be threatened.[4] Ultimately, awareness of interpretive choice helps us to evaluate the proper allocation and scope of decisional authority, to properly characterize issues, and to identify the best tools to use in copyright's interpretive work. The Article concludes with a call for greater methodological transparency, and it offers a few modest prescriptions about which interpretive methods might be best adopted, by whom, when, and why. It proposes that judges in copyright cases incline more toward analysis than intuition and prioritize text over context, as default settings.

This Article describes two dimensions of largely unacknowledged and unconstrained realms of interpretive complexity that judges face. First, judges make decisions about sources of interpretive authority somewhere on an axis, one end of which would vest interpretive authority entirely in the text[5] and the other entirely in the context,[6] around or beyond the text. This Article terms this spectrum of judicial decision-making the Text/Context axis. Second, judges must decide what interpretive mode to use in approaching the text, and here they make decisions somewhere along an axis where one end represents analysis or exegesis of the works and the other end represents judicial intuition.[7] This Article terms this second realm of copyright's interpretive complexity the Analysis/Intuition axis. These two axes help explain copyright's interpretive choice regime. Along the Analysis/Intuition axis, judges must decide whether (1) to offer affirmative analysis of the text of the works at issue, explaining their reasoning but perhaps constraining their future decision-making and leaving them vulnerable to greater reversal rates, or (2) to offer conclusions about the works at issue, justified by what appears to be little more

2. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936); Effie Film, LLC v. Murphy, 932 F. Supp. 2d 538 (S.D.N.Y. 2013).

3. *See* Salinger v. Colting, 607 F.3d 68, 83 (2d Cir. 2010); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001).

4. *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008).

5. By "text," I mean any potentially copyrightable work at issue in copyright litigation, whether or not it contains actual "text." Consequently, when this Article refers to "texts," it includes works of literature, music, film, visual art, and so on. The word "text" is a term drawn from semiotic and aesthetic theories of interpretation, where it has a meaning independent of meanings in law. *See, e.g.*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 2–3, 303–10 (1980) (describing a formalist notion of the text as stable and a "self-sufficient repository of meaning" but advancing his own contrary theory of interpretive authority, namely, that the text cannot generate meaning without a reader actualizing it, subject to linguistic, institutional, and other constraints).

6. By "context," I mean the context "external" to the work, such as statements of authorial intention, evidence of reader response and expert opinions.

7. By "analysis," I mean focused discussion of the works at issue as texts that can be interpreted through exposition of "textual evidence," such as scenes from a film, shapes in a painting, literary language, characters, and musical structures.

than judicial intuition. Along the Text/Context axis, when considering potentially copyrightable works, whether judging them through analysis or through intuition, judges must decide (1) whether to focus on the work itself (a text-based approach) or (2) to consider the context around the work (a contextualist approach).

Both of these interpretive axes, Analysis/Intuition and Text/Context, directly implicate important doctrinal and evidentiary questions in copyright law. In other words, these complex interpretive questions can change the outcome of individual cases. Indeed, they raise a question that has been fundamental in law and literature as a question of power: "Who or what 'controls' the meaning of a text — the author, the reader, the words of the text, [or] conventions of reading?"[8] A judge, as a reader, derives meaning through interpretive choices; it is in relying on one or more of these grounds — author, reader, text, or conventions — that the reader makes a claim to interpretive authoritativeness.[9] Yet despite their import for legal outcomes, these interpretive choices rarely receive explicit treatment as such. The various combinations of choices along the pair of axes exist among a range of possible modalities of interpretation, no one of them necessarily more correct than another. Judges can apply text-based, contextualist, or other interpretive lenses, and indeed they do.[10] In fact, judicial decisions along the Analysis/Intuition axis may strongly — yet at the moment, invisibly — influence the decision-making process, including some of the determinative issues on the Text/Context axis, ultimately implicating crucial doctrinal and evidentiary questions in copyright law.

These interpretive choices may also dictate whether questions may be resolved by the judge as a matter of law or whether they require further consideration by a jury or a judge acting as the trier of fact. Furthermore, interpretive choice may determine what level of constraint a judge will impose on her own analysis to ensure its legitimacy: Is judicial fiat (or gestalt) sufficient, or must the judge "show her work," that is, "give reasons"?[11] This Article will demonstrate that

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8. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1071 (1999).

9. Interpretive authority is a term of art in the humanities, associated with producing a disciplined or reliable reading of a text, and at times challenged or destabilized as a concept because no such reliable reading is possible. *See* FISH, *supra* note 5, at 13, 14, 301. It is thus different from the term "interpretive authority" as understood in law, where the term is more commonly used in the context of the delegation of interpretive power from Congress to agencies in administrative law. *See* Jeffrey Wertkin, *Reintroducing Compromise to the NonDelegation Doctrine*, 90 GEO. L.J. 1055, 1076. In the humanities, the concept of interpretive authority refers to the justifications for the interpreter's interpretation; in law, it refers to who possesses the right — as a matter of democratic design — to decide what a statute or rule may mean.

10. *See* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 251 (1998).

11. *See* Frederick Schauer, *Giving Reasons*, 43 STAN. L. REV. 633, 633–34 (1995).

judges make choices between an analytical mode and an intuitive one in how they choose to interpret works, even though these choices rarely surface as such.

This Article recasts interpretive choices as integral to copyright law: They make the law operate properly. Copyright adjudication *requires* judges to adopt interpretive methodologies, whether or not they address them explicitly.[12] Interpretive choices can offer some explanation for the great divergence in outcomes and reasoning seen in infringement analysis more generally. Recognizing its importance can improve the cogency of copyright doctrine throughout litigation.

Relatedly, exploring the impact interpretive choice has on copyright litigation helps expose two pernicious assumptions that recur in case law: first, that nontechnical copyrightable works, that is, involving art rather than works of technology such as software, are not complex; second, that analyzing such artistic works is not difficult.[13] In fact, the reigning view is that judges presiding in copyright litigation over nontechnical works have it easy.[14] In reality, judges, even in so-called nontechnical copyright cases, often operate under interpretive conditions of considerable "empirical uncertainty."[15] It is no surprise then, that judges may seem unclear about the import of their methodological selection when they interpret the works at issue. Just as patent law requires "technological engagement" of judges,[16] copyright law requires a kind of interpretive engagement, in the form of selecting interpretive methods along two axes of complexity.

It ought to be stated that acknowledging copyright's complexity does not mean that interpreting works for the purposes of copyright litigation is hopeless or that the works themselves are semiotically

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12. Both Farley and Yen discuss the range of possible aesthetic (or interpretive) theories, from intentionalism to aesthetic pragmatism. *See* Yen, *supra* note 10; Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 845–46 (2006). But neither of them focuses on how these theories reflect interpretive methodologies that, elsewhere, the law recognizes as legally significant choices. I concur with Professor Yen that each "move to a new analytical perspective is itself a decision of aesthetic significance." Yen, *supra* note 10, at 250. However, I am more interested in the fact that shifts in perspective point to unacknowledged, legally relevant choices about interpretive method.

13. I adopt the term "nontechnical" based on its use in prior case law. *See, e.g.*, Stromback v. New Line Cinema, 384 F.3d 283, 295–96 (6th Cir. 2004) (holding that expert testimony will not generally be permitted or necessary if the subject matter is not "complex or technical"); Price v. Fox Entm't Group, 499 F. Supp. 2d 382, 389 (S.D.N.Y. 2007) ("These are not highly technical works. The jury is capable of recognizing and understanding the similarities between the works without the help of an expert.").

14. *See, e.g.*, Gable v. Nat'l Broad. Co., 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010) ("[T]he Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training . . . ."), *aff'd*, Gable v. Nat'l Broad. Co., 438 F. App'x 587, 588 (9th Cir. 2011).

15. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) ("[M]any debates over interpretive doctrine are of this character, and should be reframed as problems of choosing optimal interpretive doctrine under conditions of severe empirical uncertainty.").

16. Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 7 (2010).

indeterminate. It is important to distinguish between the complexity of the works and their hermeneutic indeterminacy. The former refers to interpretive complexity in law, which could lead to different legal outcomes; the latter refers to indeterminacy in semiotic or hermeneutic theory — that works are susceptible to many readings and can mean different things for different readers — for non-legal purposes such as art criticism, literary analysis, reading, rewriting, and even other functional uses of copyrightable works. And neither of these is the same as legal indeterminacy, which is the idea that some answers to legal questions are unknowable.[17] So long as the interpretation of the work is not serving litigation or other legal purposes, the indeterminacy of the work's meaning need not concern us. However, in copyright litigation, the works at issue *must* be interpreted for legal purposes, and here it is indisputable not only that a fixed meaning may attach but that frequently for an outcome to be reached, it *must* attach so that copyright doctrines can be applied. This is nothing new, from the vantage point of law and humanities, which concerned itself with this debate over meaning at its outset.[18] It has likewise been discussed in patent law to considerable extent already, in the context of the determinacy of patent claims.[19]

Here, this Article makes no claims about the indeterminacy of textual meaning, or what we might term the "semiotic indeterminacy thesis" which interested early law-and-literature scholars.[20] Instead, this Article aspires to show that something else important and little remarked upon is taking place. Judges make difficult interpretive choices that can be helpfully viewed as taking place along two pre-

17. Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341 (1996) ("[A] proposition of law . . . is indeterminate if the materials of legal analysis — the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy — are insufficient to resolve the question, 'Is this proposition or its denial a correct statement of the law?'").

18. A distillation of that debate might be many meanings: literature; a single meaning: law. *See, e.g.*, Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Michael Pantazakos, *The Form of Ambiguity: Law, Literature, and the Meaning of Meaning*, 10 CARDOZO STUD. L. & LITERATURE 199, 217 (1998) ("[L]aw is not nor should it be taught as *only* what we say it is. Law is not mere formulas but forms. However . . . [this] does not mean nor should it be taught to mean that these alternatives necessarily define law as a formless relativism.").

19. An excellent variation on this discussion of interpretive determinacy has clarified its import for debates over meaning in patent claim construction. Professors T.J. Chiang and Lawrence Solum have argued that the indeterminacy inherent in claim construction (the claim's linguistic elements) does not typically drive patent litigation, which is instead determined by policy choices judges make about what role claim construction should play. Their identification of what they term the "linguistic indeterminacy thesis" helps them accurately diagnose what ails patent law. Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 534 (2013). That fine distinction holds here too, if the potential indeterminacy of texts, that is, their susceptibility to multiple meanings, is isolated and identified as "semiotic indeterminacy."

20. *See generally* Guyora Binder, "*What's Left: Beyond Critique: Law, Culture, and the Politics of Form*," 69 TEX. L. REV. 1985 (1991).

dictable axes of complexity. The actual range of interpretive methods used by judges contains many variations, but for conceptual clarity distilling those choices into two pairings — Analytical/Intuitive and Text/Context — helps illuminate the impact the interpretive method has on the outcome of a case.

Accordingly, this Article seeks to make several contributions. First, it offers a descriptive theory of copyright's interpretive practices by showing multiple points at which judges do, and indeed must, make complex but often unacknowledged interpretive decisions, along two different but interrelated axes.[21] Second, it shows that judges make legally meaningful, but inconsistent, decisions about interpretive methods in copyright cases. The Article calls for greater methodological transparency, and it offers a few modest prescriptions about which interpretive methods might be best adopted, by whom, when, and why. It proposes that judges in copyright cases should be more inclined toward analysis than intuition and prioritize text over context, as default settings. Copyright law could benefit from a rule-structured analytic system, a set of interpretive defaults that (1) prioritize analysis over intuition and (2) focus first on the work but then allow a reasonable "escape route," or methodological second tier, to soften the possible harshness of the rule-based approach. A turn to analysis and an emphasis on text could constrain judicial discretion and steer judges toward more transparent reasoning. In turn, these interpretive defaults could help produce greater consistency and fairness. Part II shows how interpretive choices are built into copyright law along two interrelated axes of complexity and provides examples of cases in which judges make inconsistent choices along these interpretive axes in ways that can affect outcomes. It shows that there is little coherence or consistency in judicial method selection and that there is confusion about what might even count as a method. Part III argues against the reigning view that so-called nontechnical copyright cases are somehow interpretively simpler than technical ones, such as software cases. Part IV proposes a turn toward analysis and away from intuitionism, along with greater judicial emphasis on texts over context. Part V concludes.

II. JUDGES MAKE NECESSARY AND DIVERGENT INTERPRETIVE CHOICES IN COPYRIGHT LAW

Copyright adjudication requires that judges select among interpretive choices in order to resolve the basic issues at the heart of any dispute, but copyright scholarship has only begun to acknowledge the

21. Even avoiding interpretation and aesthetic theories reflects an implicit methodological decision, a tendency toward "intuitionism" and conclusory analysis. *See infra* Part II.D.2.

extent to which judges may be making or avoiding interpretive decisions. Professor Tushnet's pioneering scholarship on judicial interpretation of images has shown that judges do make what amount to methodological choices about visual works they confront in copyright cases.[22] Professor Yen's work laid crucial groundwork by positing that aesthetic theories parallel judicial reasoning in copyright law, thus showing that judges necessarily make interpretive choices.[23] Professor Farley's scholarship similarly revealed the substantial role played by judicial intuition in the adjudication of works of art underscoring the ubiquity of judicial choice.[24] Other works contributed to a scholarly conversation largely focused on aesthetic issues and objectivity in copyright adjudication.[25] The interpretive problem addressed herein is broader than that. It is methodological, not purely aesthetic or evaluative. Further, it is confined neither to one particular methodological approach,[26] nor to one class of works, such as visual or musical works, where earlier scholars have focused.[27] Most crucially, interpretive choices play a direct role in litigation, or at least they can. All potentially copyrightable works force judges to grapple with interpretive questions that copyright scholarship has overlooked as a legally relevant methodological issue.[28] The extant literature on interpretive choice in copyright law is thus promising but incomplete.

A range of possible interpretive methods exists, but for the purposes of conceptual clarity, this Article distills the interpretive options

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22. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

23. Yen, *supra* note 10, at 250. I note that Yen's footnotes draw mostly on primary sources (cases) and on secondary sources external to law (such as art theory). I take that as evidence that the state of scholarship on copyright's interpretive practices was underdeveloped before Yen's seminal, interdisciplinary article.

24. Farley, *supra* note 12, at 845–46.

25. *See, e.g.*, Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 305–07 (1991); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 184–95 (1990); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987).

26. *See, e.g.*, Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008); H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335 (2011); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20 (2013); Elizabeth Winkowski, *A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art*, 12 J. MARSHALL REV. INTELL. PROP. L. 746 (2013).

27. *See, e.g.*, Tushnet, *supra* note 22; Olufunmilayo B. Arewa, *The Freedom To Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477 (2007); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Melissa M. Mathis, Note, *Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law*, 22 CARDOZO L. REV. 595 (2001); Jessica Silbey, *Images in/of Film*, 57 N.Y.L. SCH. L. REV. 171 (2012–13).

28. Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet's* Worth a Thousand Words, 16 STAN. TECH. L. REV. 349 (2013).

by relying on the interrelated complexities of the Analysis/Intuition axis and the Text/Context axis. Copyright requires that judges make interpretive choices about *how* they will interpret the works at issue and *what* they will focus on in the course of their interpretive work.

In order to understand the effect and operation of copyright's interpretive choice regime, it is first necessary to situate these interpretive choices in copyright law. Part II.A sketches the trajectory of a standard copyright infringement case and shows that, at multiple points in copyright's analytic trajectory, the adjudication of expressive works *requires* that judges make decisions about the method of interpretation they will use. Part II.B shows that many interpretive modalities exist for judges to select. Part II.C fleshes out the operation of interpretive choice in the copyright context and provides examples of cases that illuminate the complexity of the Analysis/Intuition axis, when courts choose analysis, intuition, or a point somewhere between the two. Part II.D focuses on the interpretive complexity of the Text/Context axis that requires judges to focus their attention on a source of interpretive authority at different points in the litigation.

A. Copyright Cases Follow an Analytical Trajectory

Interpretive choice is a feature, not a bug, in copyright law. To assert a valid claim for copyright infringement, a plaintiff must show "(1) ownership of a valid copyright and (2) copying . . . of protectable elements of the work."[29] The first step is typically straightforward. Once copyright ownership of a registered copyright has been proven, the analysis in a copyright infringement claim involves two distinct inquiries: whether a work was copied and whether any such copying was improper.[30] The first inquiry can be answered with the defendant's admission or other direct evidence of copying,[31] but in practice, these are rarely available.[32] More typically, copying is proven through a two-pronged inferential analysis: (1) proof of defendant's access to the copied work and (2) substantial similarity between the plaintiff's work and the defendant's work.[33] The term substantial similarity is confusing because it arises at two different stages: first, when plaintiffs must prove copying; second, when they must prove that the copying was improper. The general rule is that expert evidence may be admissible on the question of substantial similarity on the copying

29. CDN Inc. v. Kapes, 197 F.3d 1256, 1258 (9th Cir. 1999).

30. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

31. *See* Boisson v. Banian, 273 F.3d 262, 267 (2d Cir. 2001).

32. Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003).

33. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977); Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976); *Arnstein*, 154 F.2d at 468.

inquiry,[34] when it is sometimes helpfully referred to as *probative* similarity.[35] This inquiry is a question of law, deemed to be well-suited for disposition by a judge.[36]

The inquiry on substantial similarity with respect to improper copying determines whether the copying was the sort that is legally actionable.[37] The court must determine, theoretically as a question of fact, whether the similarities between the works pertain to copyrightable material and not simply to unprotectable ideas.[38] At this stage, the court again considers the substantial similarity of plaintiff's and defendant's works, only this time the standard is typically that of the lay observer, not the expert.[39] In fact, expert testimony is generally inadmissible on this point.[40] At this phase, substantial similarity is something the ordinary observer can and must discern without the aid of an expert witness.[41] It is considered a subjective inquiry that goes to the jury unless a judge finds that no reasonable juror could find substantial similarity.[42] In practice, judges often make the determination of substantial similarity on early motions and also in lieu of a jury. This brief outline constitutes the analytic trajectory for a judge to follow in a copyright infringement case.[43]

Within this trajectory, doctrinal questions, such as the idea/expression dichotomy, merger, conceptual separability, and scènes à faire also make interpretive demands on judges. Each of the core requirements for copyrightability, a threshold inquiry in copyright law, implicates some aesthetic or interpretive theory. Copyright

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34. *See Krofft*, 562 F.2d at 1164.

35. Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990).

36. *See Krofft*, 562 F.2d at 1164.

37. 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2014).

38. Hoehling v. Universal City Studios, Inc. 618 F.2d 972, 977 (2d Cir. 1980).

39. *Arnstein*, 154 F.2d at 473.

40. An exception exists where works, such as software, are thought to be sufficiently complex that a jury or factfinder would be unable to make a determination without expert assistance. Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 733 (2010).

41. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266 (11th Cir. 2001); Castle Rock Entertm't, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 139 (2d Cir. 1998); Shaw v. Lindheim, 919 F.2d 1353, 1356–57 (9th Cir. 1990).

42. Swirsky v. Carey, 376 F.3d 841, 844–45 (9th Cir. 2004).

43. My account here is intended as a descriptive, uncontroversial account of the way copyright cases are structured, and it draws on the dominant accounts of copyright law found in the most oft-cited opinions and treatises. However, other scholars have lamented many aspects of the structure of copyright infringement analysis, and their critiques populate the footnotes of this Article. Notably, one scholar has called one aspect of substantial similarity analysis — the admissibility of expert evidence — "exactly backwards." Lemley, *supra* note 40, at 736. Another writes that "[o]ur current treatment of infringement, which asks whether there is 'substantial similarity' between two works, makes impossible and self-contradictory demands on factfinders . . . ." Tushnet, *supra* note 22, at 687–88.

protection extends only to "original works of authorship fixed in any tangible medium of expression."[44] The qualifying requirements of copyright can thus be enumerated as follows: originality, status as a work, authorship as the Act defines the term, and fixation in a tangible medium.[45] How does one find originality? What counts as a work? What are the boundaries of authorship? What does fixation look like in the digital world? Or in the natural world? Each of these issues creates an interpretive pressure point, at which judges must select an interpretive method.

Copyrightability provides fertile terrain for exploring interpretive pressure points because it is both a threshold inquiry for copyright law and up to the judge to decide. Because copyrightability is a question of law, it empowers judges to determine the question with considerable discretion and without the need for fact-finding.[46] Efforts by parties to include expert testimony on this question have often been unsuccessful, and judges continue to assert their own authority, independent of expert guidance.[47]

Yet folded into the determination of originality are necessarily interpretive decisions about which not all judges are explicit. Some seem to ignore these choices altogether; others recognize these choices but seek to avoid the appearance of making a choice not properly for the determination of a judge.[48] Determining a work's copyrightability may require all of the following: determination of its originality;[49] inquiry into whether its form and context meet copyright law's fixation requirement;[50] determination of whether its form and context are useful,[51] and thus excluded from copyright protection; and idea-expression analysis, including a filtering of elements that should remain in the public domain (such as ideas, historical facts, or scènes à faire) from those that can be protected under copyright.[52] To resolve

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44. 17 U.S.C. § 102(a) (2012).

45. 4-13 NIMMER & NIMMER, *supra* note 37.

46. 3-12 NIMMER & NIMMER, *supra* note 37, § 12.10.

47. Delightful examples of turf-protecting dicta populate cases, such as: "If the court determines that mannequin heads are copyrightable subject matter, the jury will be so instructed . . . . There is no need for expert testimony on this subject; in a trial there is only one legal expert — the judge." Pivot Point Int'l v. Charlene Prods., 932 F. Supp. 220, 225 (N.D. Ill. 1996); *see also infra* Part II.D.

48. *See* Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir. 1983) ("Artistic originality indeed might inhere in a detail, a nuance, a shading too small to be apprehended by a judge."); *infra* Part II.D (observing that courts fear to make aesthetic judgments).

49. Section 102(a) extends copyright protection only to "original works of authorship." 2 PATRY ON COPYRIGHT § 3:26.

50. Goldstein v. Cal., 412 U.S. 546, 561 (1973).

51. 2 PATRY ON COPYRIGHT § 3:145.

52. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 544 (1985) ("[S]imilarities between the original and the challenged work traceable to the copying or paraphrasing of uncopyrightable material, such as historical facts, memoranda and other public documents, and quoted remarks of third parties, must be disregarded in evaluating whether the second author's use was fair or infringing.").

these inherent copyright issues, judges make legally meaningful interpretive choices, with little meaningful guidance about how to do so and many competing options at their disposal.[53]

B. Many Interpretive Modalities Exist

Interpretive issues are tightly interwoven with most of the substantive questions that make up a copyright infringement case. Most issues that arise can be considered subsets of these three main groupings: copyrightability, improper copying, and defenses. Interpretive pressure points, like the ones raised by these doctrines, are present and inevitable in copyright law. And at each of these pressure points, judges may select from among a number of possible interpretive methods.

When judges decide *how* to interpret, they are making choices along the Analysis/Intuition axis, and when they decide on *what* to focus, they must make choices along the Text/Context axis.[54] The range of interpretive methods corresponds roughly to different aesthetic theories of art. The seminal article on this topic is by Professor Yen, who categorizes the major schools of interpretive theory as formalism, intentionalism, and institutionalism, and tracks their deployment in copyright cases.[55] Yen's article draws on art history, and his categories make sense in that context. It could be argued, mistakenly, that the impact of Yen's scholarship is limited to cases in which the works at issue are artistic ones, such as plays, paintings, or novels. On the contrary, these aesthetic and interpretive issues arise in all copyright litigation. Hence, for the purposes of this Article, the emphasis lies less on the aesthetic nature of the works and their interpretive puzzles, and instead more on the interpretive complexity that copyright litigation itself produces. This complexity requires that judges decide how to interpret works at issue and on what to base their interpretive authority.

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53. *See* Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1823 (stating that it is "problematic . . . that there are too many different tests [for copyright infringement] and not enough guidance about which one to use in what kinds of cases" and calling for courts to "give more guidance about what constitutes protectable expression in copyrighted works and what aspects, besides abstract ideas, are unprotectable by copyright").

54. This paradigm is neither purely literary, which would require more categories, nor purely legal, which would require engagement with existing, but heavily overdetermined terms, like textualism, originalism, and purposivism. Instead, it draws on literary and aesthetic theories but addresses the realities of copyright litigation. For example, this interdisciplinary classification reflects awareness of the role admissibility of evidence plays, as well as the legal significance of allocating decision-making power, and it focuses on the practical importance of interpretive theories for copyright's substance and procedure.

55. Yen, *supra* note 10.

C. Courts Disagree over What Methods and Sources To Use

Courts often disagree about the proper interpretive choices, as a recent example makes plain. In *Cariou v. Prince*, the Second Circuit Court of Appeals held twenty-five of thirty paintings by the defendant, an appropriation artist, to be making fair use of the photographer Patrick Cariou's work.[56] It reversed and remanded as to the remaining paintings, on which Judge Deborah Batts of the Southern District of New York had previously granted plaintiff injunctive relief.[57] The parties settled as to the last five paintings.[58] In my reading of the case, the grounds for the Second Circuit's reversal lie in a rejection of Judge Batts's interpretive choices.

Patrick Cariou is a photographer who produced a book of portraits of Jamaican Rastafarians and photographs of the Jamaican landscape for a book called *Yes, Rasta*.[59] Richard Prince is a well-known appropriation artist who purchased a copy of *Yes, Rasta* and then removed and reused the photos as the basis for an exhibition of his own, entitled "Canal Zone."[60] Cariou sued Prince, as well as Larry Gagosian, the gallery owner who was to exhibit "Canal Zone" in Manhattan.[61] Prince readily admitted to unauthorized use of Cariou's photographs, which could normally constitute copyright infringement.[62] In Prince's case, however, his lawyers argued that he had transformed the works and therefore could claim fair use.[63] Judge Batts rejected defendants' theory, finding it difficult to square a claim of semiotic transformativeness with Prince's deposition, in which he admitted that he had not intended any particular message to comment on Cariou's artwork.[64] Grounding her interpretive authority in Prince's authorial intentions,[65] she granted Cariou injunctive relief, which would have permitted Cariou to seize and destroy the several dozen paintings in the "Canal Zone" exhibit.[66]

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56. 714 F.3d 694, 698 (2d Cir. 2013).

57. *Id.* at 698–99.

58. Randy Kennedy, *Richard Prince Settles Copyright Suit with Patrick Cariou over Photographs*, N.Y. TIMES (Mar. 18, 2014, 6:23 PM), *available at* http://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/.

59. Cariou v. Prince, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011).

60. *Id.*

61. *Id.* at 342.

62. *See id.* at 344.

63. *See* Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment at 14–16, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (No. 108-CV-11327).

64. *See Cariou*, 784 F. Supp. 2d at 349.

65. *See id.* ("Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos, and Prince's own testimony-shows [sic] that his intent was not transformative within the meaning of Section 107 . . . .").

66. *Id.* at 355.

Judge Batts's reasoning was facially appropriate, if the remedy she selected seems somewhat draconian. Batts followed *Rogers v. Koons*, a case which had stressed the need for a fair user to comment on the work,[67] and defined transformativeness narrowly: "Prince's Paintings are transformative only to the extent that they comment on [Cariou's] Photos."[68] She found the works could not possibly be transformative because Prince had, by his own admission, no intention of commenting on the underlying works.[69] Instead, he had testified that he wished to use the photos as facts, for their truth value.[70]

The Second Circuit reversed and remanded in terms that delivered something of a rebuke.[71] The Second Circuit held that all but five of the paintings were fair use, and the remaining ones were to be considered anew by the district court.[72] The key holding of the decision on appeal was that Judge Batts had applied an incorrect legal standard for determining transformativeness by rigidly applying the *Rogers* standard[73] and by emphasizing the author's intent rather than the reasonable observer's perception of the work.[74] In the terms of this Article's argument, Batts prioritized authorial intention over other sources of interpretive authority, such as text, audience reception, or expert testimony. Choosing authorial intention reflected a particular methodology that Batts selected without discussion and that arguably provided the grounds for *Cariou*'s reversal, when the Second Circuit disavowed Batts's legal analysis.[75]

The choices over interpretive methods in the *Cariou* litigation are neither unique nor simple. Judges must — and routinely do — make methodological choices regarding whether to produce analysis or offer intuition and where to locate their interpretive authority. Depend-

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67. 960 F.2d 301 (2d Cir.1992)

68. *Cariou*, 784 F. Supp. 2d at 349.

69. *See id.*

70. *Id.* ("Prince also testified that his purpose in appropriating other people's originals for use in his artwork is that doing so helps him 'get as much fact into [his] work and reduce[] the amount of speculation.'").

71. *Cariou*, 714 F.3d at 706 ("As even Cariou concedes, however, the district court's legal premise was not correct. The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.").

72. *Id.* at 712.

73. *See* Kim J. Landsman, *Does* Cariou v. Prince *Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for A Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 341–42 (2014).

74. *See* Kathleen K. Olson, *The Future of Fair Use*, 19 COMM. L. & POL'Y 417, 428–29, 431 ("The Second Circuit in *Cariou* discounted the artistic intent of the secondary user and substituted its own judgment as part of its 'reasonable observer' standard for judging whether a different expressive purpose was present in the secondary work.").

75. It is worth noting that Batts's choice was not unreasonable in its methodology, even if it was ultimately overruled. Authorial intention remained sufficiently viable that it animated the dissent of the Second Circuit's Judge Wallace. *Cariou*, 714 F.3d at 713 ("Unlike the majority . . . I view Prince's statements — which, as Prince acknowledges, consist of 'his view of the purpose and effect of each of the individual [p]aintings' — as relevant to the transformativeness analysis.") (Wallace, J., dissenting).

ing on where a judge focuses interpretive authority, a case could result in a different outcome. The problem is that, at present, there is little consensus that sophisticated interpretation is necessary, let alone guidance on how interpretation can and should be done.[76] Yet interpretive grounds compete for authority. Choosing one interpretive method over another, as Judge Batts did in the *Cariou* litigation, does not occur in a vacuum of critical and legal theory, or at least it should not since those fields have already weighed the impact of making particular interpretive choices.[77]

D. The Analysis/Intuition Axis

Judges in most copyright cases offer some amount of analysis of the works at issue. This may be as minimal as a brief summary or as extended as a discussion of tropes, characters, settings, or sources. Different circuits have developed habits of judicial analysis, and even formal tests for substantial similarity, that would seem to dictate the manner and necessity of conducting these so-called tests.[78] All the tests are designed to sift the protected from the unprotected and conclude whether or not the works are substantially similar. The tests include (1) two-step copying and improper appropriation;[79] (2) extrinsic dissection/intrinsic judgment;[80] (3) abstractions test;[81] (4) total concept and feel;[82] and (5) abstraction, filtration, and comparison.[83] All tests, except for the concept and feel test, require courts to conduct analysis that creates a record of judicial discussion of textual evidence.[84]

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76. *See infra* Part III.B (arguing that interpreting works for the purpose of copyright law is complex and requires sophisticated analysis).

77. *See* Farley, *supra* note 12, at 839 ("[L]aw can often operate in a vacuum. The difficult questions . . . that courts encounter here have been addressed in philosophy, art history, and art criticism. But courts never acknowledge that these questions have already been theorized and that there are bodies of scholarship that are relevant and could be helpful.").

78. It is beyond the scope of the Article to discuss each of the tests and their merits; besides, Pamela Samuelson's essay sets the tests out and describes their pros and cons, Samuelson, *supra* note 53, at 1823–40, and Mark Lemley's essay describes the tests in the context of the general confusion across circuits, Lemley, *supra* note 40.

79. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

80. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

81. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122–23 (2d Cir. 1930).

82. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109–10 (9th Cir. 1970). The phrase "total concept and feel" originates with *Roth* but is sometimes found elsewhere in the case law as the "overall look and feel" approach. Shyam Balganesh, Irina Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 274 (2015).

83. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992).

84. *See* Lemley, *supra* note 40, at 725.

1. The Analysis Approach

When judges produce such analysis, they typically train their focus on the works and their similarities and differences, and they may discuss artistic choices that are evident in the works themselves.

For example, in *Mannion v. Coors Brewing Co.*, Judge Kaplan of the Southern District of New York was called on to determine the nature of copyright protection of photographs,[85] which in turn required his assessment of the amount of originality in plaintiff's photograph.[86] In an action between a photographer, Jonathan Mannion, and an advertising agency representing Coors Brewing Co., Kaplan held that Mannion's photograph was sufficiently original to warrant protection.[87] Mannion had created a three-quarter-length portrait of Kevin Garnett, a basketball star, in the foreground and a cloudy sky in the background.[88] Garnett wore a white t-shirt, white athletic pants, and bright jewelry.[89] Defendants' photograph featured a similarly posed young man, also muscular and African-American, wearing white clothing in front of a cloudy backdrop.[90] Kaplan's opinion offers a sophisticated and granular discussion of types of originality: originality in rendition (how a work is created),[91] originality in timing,[92] and originality in creation of the subject.[93] While Kaplan ultimately turned to judicial intuition to analyze the photographs in question, his interpretive methodology started with the author's intention as a function of choices the *works* make manifest:

> 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.[94]

85. 377 F. Supp. 2d 444, 447 (S.D.N.Y. 2005).
86. *See id.* at 454–55.
87. *Id.*
88. *Id.* at 447.
89. *Id.*
90. *Id.* at 448.
91. Originality in rendition refers to how the work is created. *See id.* at 452 ("[C]opyright protects not *what* is depicted, but rather *how* it is depicted.").
92. Originality in timing refers to when a photographer is in the right place at the right time. *Id.* at 452–53.
93. Originality in creation of the subject refers "to the extent that the photographer created 'the scene or subject to be photographed.'" *Id.* at 453.
94. *Id.* at 451 (footnote omitted).

Merely working hard, no matter how intense the effort, does not give rise to copyright in the final product.[95] This is true in theory, at least, if not always in application. Judges are often at pains to distinguish choices that reflect so-called "sweat of the brow," which copyright does not protect per se, from choices that are in fact creative decisions.[96] Put another way, no matter how much an author *intends* a work to be original or works hard to make it so, the proof lies in the text, not in the intention or the effort.

Despite the appeal of focusing on the works themselves, courts do not always engage in such analysis. This avoidance of analysis may have to do with a peculiar feature of copyright law. *Bleistein v. Donaldson*,[97] an early photography case, contained dicta that has come to be known as the aesthetic non-discrimination principle: It stands for the idea that judges in copyright cases will refrain from "judicial art evaluation" to make determinations about what can be protected by copyright.[98] Yet this principle has been understood more broadly — and perhaps improperly — to stand for the idea that aesthetics of any kind do not belong in copyright law.[99] Judges may reasonably fear that discussion of certain issues connected with interpretive aesthetics will run afoul of *Bleistein*.[100] Accordingly, at times judges offer reasons or what appear to be intuition-fueled judgments precisely to *avoid* the kind of interpretive puzzles that this Article argues are inevitable in copyright litigation.

2. Intuition in Copyright Law

Intuitionism refers to the judicial tendency to rely on intuition rather than analysis, hunch rather than data. The term in this Article encompasses two related forms of intuitionist analysis: first, gestalt intuitionism; second, intuitionism about the ordinary observer standard. The gestalt, or holistic approach,[101] holds that the whole may be greater than or different from the sum of the parts. Copyright's total

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

96. *See id.* (citing Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991)).

97. 188 U.S. 239 (1903).

98. Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001).

99. *Id.* at 1.

100. The aesthetic non-discrimination principle refers to the entrenched principle that judges in copyright cases should not evaluate works of art for their aesthetic merits in the course of adjudication. *Bleistein*'s nondiscrimination principle has been called "[o]ne of the more enduring observations in all of copyright." *Id.*

101. The term gestalt, or gestaltism, comes from "[t]he theory in psychology that the objects of mind come as complete forms or configurations which cannot be split into parts; *e.g.*, a square is perceived as such rather than as four discrete lines." *Gestalt Definition* 368920, STEDMANS MEDICAL DICTIONARY *available at* Westlaw.

concept and feel approach, for instance, has operated to create a copyrightable whole out of uncopyrightable parts.[102] The second intuitionist area for copyright interpretation lies in judicial speculation about the ordinary observer. In theory, the lay (or ordinary) observer functions much like the reasonable person in tort law.[103] In tort law, this is commonly a jury question informed by the commonplace experiences of twelve different people. In copyright law, by contrast, this determination is often little more than a judicial pronouncement of what one judge believes the ordinary person would take to be the work's "aesthetic appeal."[104] This determination is little more than intuitionism.

In a fundamental sense, judicial intuition is always at work in legal analysis in the common law system. Usually though, intuition does not substitute for formal methods. A judge would be hard pressed to defend an intuitive reading of a statute against a textualist reading.[105] Judges do not simply say: "this is what the statute seems to mean to me," or "my gut tells me the Constitutional meaning of liberty is . . . ." Doing so would be replacing canons of construction and other interpretive tools with hunches. Yet this sort of intuitionism operates with frequency in copyright law. It does so both by design and by accident. It does so by design through legal standards that empower judges to speak in the guise of the ordinary observer, and to make legal rulings based on the "total concept and feel" of the works at issue. For example, in one case concerning the copyrightability of the jungle character Tarzan, the court issued a pronouncement of his copyrightability with nothing more than intuition to support it.[106] The court offered its own impressions of Tarzan's copyrightability: "Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotion. He is athletic, innocent, youthful, gentle and strong. He is Tarzan."[107]

Thus, intuitionism in copyright cases casts a long shadow – through general judicial intuition and through the lay observer standard employed in copyright law. Under the "lay observer standard," the trier of fact must determine whether the works in question would be

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102. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

103. *See* Irina Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012).

104. *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) ("[T]he patterns in which these figures are distributed to make up the design as a whole are not identical. However, the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their *aesthetic appeal* as the same.") (emphasis added); Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001).

105. The same would hold for a plain-meaning, structuralist, purposivist, originalist, or pluralist reading.

106. *See* Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 815 (2013).

107. Burroughs v. Metro-Goldwyn-Mayer, Inc., 519 F. Supp. 388, 391 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982).

found substantially similar by a "hypothetical" ordinary observer whose reasonably expected impressions are supposed to guide the judge.[108] The lay observer standard receives fuller discussion below.

Another area of intuitionist adjudication in copyright law is the "total concept and feel" test first announced in *Roth Greeting Cards v. United Card Co*.[109] In *Roth*, the Ninth Circuit found the plaintiff's cards to be copyrightable, which consisted of "common and ordinary English words and phrases which are not original with Roth and were in the public domain prior to the first use by plaintiff."[110] In so finding, it reversed the lower court's decision and held that the combination of uncopyrightable factors nonetheless created something copyrightable:

> It appears to us that in total concept and feel the cards of United are the same as the copyrighted cards of Roth . . . . [T]he characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially the same as in Roth's cards.[111]

Roth's analysis consists of examining the elements themselves to try to capture what their "total feel" conveys. It is an approach that downplays granular analysis and dissection into component parts, in favor of a holistic (or gestalt) approach.

Since *Roth*, the total concept and feel test has become the most prominent approach to comparing works of fiction.[112] However, the test raises numerous questions and, arguably, was not intended to become a generalizable test beyond the facts of the specific case.[113] Which elements should be included in the enumeration of things to consider as part of the "feel"? Should unprotectable aspects, such as ideas, stock characters, or fonts, be filtered out before the impressionistic assessment begins? How can such an approach — which Tushnet

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108. Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411, 422 (2d Cir. 1985) ("Of course, the ordinary observer does not actually decide the issue; the trier of fact determines the issue in light of the impressions reasonably expected to be made upon the hypothetical ordinary observer.").

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

110. *Id.* at 1109.

111. *Id.* at 1110.

112. Mitchell J. Rotbert, *Total Concept and Feel: A Doctrine Running Amok*, 45 MD. B.J. 20, 24 (2012).

113. Samuelson, *supra* note 53, at 1833 ("While the *Roth* majority certainly used the total concept phrase, it did not announce this as a test that should be widely used in infringement cases. The phrase was more an off-hand comment than a well-conceived way to think about nonliteral infringement.").

refers to wryly as "a sort of magic by which unprotectable parts together become protected"[114] — overcome the fact that unprotectable aspects do not, by themselves merit protection? Is the total concept and feel equivalent to what *Feist* called the creative selection and arrangement of facts?[115] How does this impressionistic assessment avoid being "highly subjective,"[116] or an outright "abdication of analysis," given that the standard seems to target a "wholly amorphous referent"?[117] In *Tufkenian Import*, a case about competing Oriental rug designers, the court emphasized that the *Roth* test should be applied only after a court's dissection into original and unprotectable parts.[118] *Tufkenian Import*'s approach to *Roth* suggests that the "total concept and feel test" is but one of many possible interpretive approaches.[119]

Unfortunately, though, many courts apply it less carefully, tending to treat it less as an approach and more as an internal element.[120] Judicial opinions may divide their analysis into discussion of similarities between the works, and subheadings will indicate that the analysis treats plot, characters, settings, and total concept and feel all as equally situated and inevitable aspects of the works themselves.[121] In other words, one interpretive method, which is merely a possible perspective on the work, gets internalized as an element of the work. This naturalizes the approach and makes it difficult for subsequent courts to adopt alternative approaches. Further, it makes the interpretive logic effectively unassailable. As Tushnet has shown, under this test "the factfinder is directed to the gestalt, but a gestalt can't be broken down."[122] Nonetheless, the gestalt approach often trumps other interpretive methods and sources, as it arguably did in *Roth*, when plaintiffs' claims would have otherwise failed to clear the copyrightability hurdle.

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114. Tushnet, *supra* note 22, at 718.

115. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

116. *See* Rotbert, *supra* note 112, at 25.

117. *See* Tufkenian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003) (citation omitted).

118. *Id.*

119. *See id.* at 134 (stating the court's approach to the test "is not so incautious" as to abdicate analysis).

120. *See* Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996) (stating the court must "examine the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting of the [works]").

121. *See, e.g.*, Canal+ Image UK Ltd. v. Lutvak, 773 F. Supp. 2d 419, 429 (S.D.N.Y. 2011) (listing total concept and feel among the elements courts examine in "assessing whether two works are similar"); Crane v. Poetic Prods. Ltd., 593 F. Supp. 2d 585, 596 (S.D.N.Y. 2009), *aff'd*, 351 F. App'x 516 (2d Cir. 2009).

122. Tushnet, *supra* note 22, at 719 (footnote omitted).

3. The Limits of Intuition

Some courts have recognized the limitations of the total concept and feel test. *Shaw v. Lindheim* is a classic copyright case that took aim at intuitionism; its holding arguably hinges on a shift in interpretive method.[123] Lou Shaw was a successful television scriptwriter who argued that his program, *The Equalizer*, had been unlawfully copied by defendants' pilot script for their television series *Equalizer*.[124] Defendants conceded access to the work because Richard Lindheim, an executive at NBC, had reviewed Shaw's script before NBC declined to purchase it.[125] Thereafter, Lindheim left NBC and created his own series, conceding that he copied his title from Shaw's script.[126] Thus, the case hinged on whether the two works were substantially similar to support a finding of improper appropriation.[127] The district court had held as a matter of law that the works in question were not substantially similar.[128] Shaw appealed, arguing that a reasonable trier of fact could have found substantial similarity, and thus summary judgment was improper.[129] Court of Appeals for the Ninth Circuit agreed, and the court reversed and remanded on this issue.[130]

In *Shaw*, it appears that the Ninth Circuit favored a combination of formalist and reader-response approaches to interpret the works, whereas the lower court prioritized a gestalt approach to interpretation. The court trained its attention on its own prior, much-criticized substantial similarity analysis.[131] *Krofft* had set out a bifurcated analysis: Step 1 was confined to what it called the "extrinsic" analysis, or "dissection" of the works, that is, in this Article's paradigm, formalist analysis.[132] At this stage, a court, perhaps relying on expert guidance, could examine elements, such as subject matter and the setting for the subject, so as to determine similarity of ideas as a matter of law.[133] Step 2 consisted of an "intrinsic," more intuitionist analysis by the trier of fact, based on the ordinary reasonable person's perception of the works.[134] This second phase focused on the *expression* of the work's ideas, where analytic dissection and expert testimony are not appropriate.[135]

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123. Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990).
124. *Id.* at 1355.
125. *Id.*
126. *Id.*
127. *See id.*
128. *Id.*
129. *Id.*
130. *See id.* at 1363–64.
131. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).
132. *Id.* at 1164.
133. *Id.*
134. *Id.*
135. *Id.*

Shaw seized upon the ways in which *Krofft*'s distinction between extrinsic and intrinsic analysis was flawed, especially *Krofft*'s rule that the two phases should correspond to similarity of ideas and expression, respectively.[136] Instead of framing Steps 1 and 2 as, respectively, (1) extrinsic/ideas and (2) intrinsic/expression, *Shaw* framed the bifurcation as (1) objective and (2) subjective, both geared toward analysis of expression.[137]

Shaw sought to correct *Krofft*'s mistaken bifurcation, and to minimize the impact of the subjective, manipulable part of infringement analysis.[138] Indeed, *Shaw* expressly criticized judicial discretion to substitute intuitionism in place of actual assessment by a jury or trier of fact: "a judicial determination under the intrinsic test is now virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two literary works are or are not simi-similar."[139]

This subjective judgment was improper because "at the summary judgment stage, the judge's function is not [herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[140] *Shaw* thus rejected a gestalt, or intuitive approach, specifically lamenting its lack of meaningful analysis.[141] For support of its own critique, *Shaw* cited to cases whose analyses were more conclusory pronouncements than thoughtful deliberations, allowing them to "reach[] a result under the intrinsic test in one paragraph."[142] Further, *Shaw* referred to an "absence of legal analysis" as "frustrat[ing] appellate review of the intrinsic test."[143]

In *Shaw*, a change in interpretive method could be said to constitute the main holding on appeal, even though *Shaw* did not cast its decision explicitly in those terms.[144] This discussion of *Shaw* illustrates different interpretive tests courts can employ: the use of intuitionism (by the lower court) and its critique and rejection in favor of a more text-based formalism (in the appellate court). These methods can affect the outcome of the case. Notwithstanding that defendants won again on remand when new facts came to light, *Shaw* could have come out differently on the original facts had the court applied a more analytical method.

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136. *See* Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990).
137. *Id.*
138. *See id.*
139. *Id.*
140. *Id.* at 1359 (alteration in original) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).
141. *See id.* at 1357.
142. *See id.*
143. *Id.*
144. *See id.* at 1363–64.

E. The Text/Context Axis

This Section discusses the way different sources can serve as interpretive grounds, requiring that judges make complex decisions about how to decide what counts as interpretable evidence. When they locate the grounds for their interpretive authority, judges variously prioritize: the text;[145] the author's intentions about it;[146] the expert's testimony about it;[147] the lay observer's or audience's reception of the text;[148] or the judge's own intuitions or impressions of the work.[149] In most copyright cases, judges emphasize the texts at issue and center their analysis there, sometimes even to the exclusion of contextual evidence. Though many factors external to the text might be relevant to interpretation under another approach, a formalist approach views the internal features as carrying dispositive weight. This approach parallels the "four-corners" approach to contracts in legal analysis.[150] In the context of patent law, Craig Nard has called such an approach "hypertextual."[151] Many classic copyright cases display some version of formalist analysis, and some are, to paraphrase Nard, hypertextual or exclusionary toward contextual evidence.[152]

1. Focus on the Text

In *Walker v. Time Life Films*, the author of the autobiographical police memoir *Fort Apache* sued the authors and producers of a screenplay entitled *Fort Apache: The Bronx*.[153] The Court of Appeals for the Second Circuit affirmed the lower court's dismissal of plaintiff's motion, holding that no reasonable observer could have found the two works in question to be substantially similar beyond unprotectable elements such as ideas.[154] The court also held that it had not been error for the lower court to base its judgment on the judge's own assessment of the works after having read the book and watched the

145. *See, e.g.*, Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57 (2d Cir. 2010); Walker v. Time Life Films, Inc., 615 F. Supp. 430, 434 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 44 (2d Cir. 1986).

146. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

147. *See, e.g.*, Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004); Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003); Dawson v. Hinshaw, 905 F.2d 731 (4th Cir. 1990); Tisi v. Patrick, 97 F. Supp. 2d 539 (S.D.N.Y. 2000).

148. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

149. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

150. *See, e.g.*, LON L. FULLER ET AL., BASIC CONTRACT LAW: CONCISE EDITION 525–26 (9th ed. 2013); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 957–63 (2010).

151. Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1, 4 (2000).

152. *See id.*

153. 784 F.2d 44, 46 (1986).

154. *Id.*

movie, even though it meant refusing to view some of the evidence plaintiff Walker had prepared and offered as proof of the works' similarities.[155]

In the course of the lower court's largely well-reasoned opinion, Judge Edelstein considered a number of interpretive theories. He began and ended with the text, stating: "In determining copyright infringement, the works themselves supersede and control contrary allegations and conclusions, or descriptions of the works as contained in the pleadings."[156] He chose to locate his interpretive authority in the text, prioritizing the court's own close reading of the text itself over "conclusions, or descriptions of the works,"[157] such as critical readings and expert testimony. By excluding plaintiff Walker's own analysis of the works' similarities, Judge Edelstein also placed the text over the author's intentions and statements about it.[158] To be sure, the plaintiff is self-interested, and thus any statements offered up about the works may be presumed to be informed by litigation strategy as well as artistic intention. Nonetheless, Judge Edelstein's emphasis on the text reflected a choice: The text, in a formalist approach, transcends forces beyond or external to it in terms of its capacity to provide interpretive authority.

The opinion's analysis is thorough, attentively considering several elements, including genre.[159] In its awareness of the importance of genre,[160] the court gestured to something like an audience interest, which is external to the text. This is because works that operate within the same genre will likely contain many similarities: think of two cowboy westerns, two hardboiled detective stories, two movies about dinosaur theme parks, and so on. The similarities common to a genre require audience "decoding."[161] The presence of particular and usually uncopyrightable elements[162] is what allows audiences to recognize certain genres as such.

Still, the opinion is unmistakably formalist, or text-based, in its orientation. When Walker raised actual audience confusion as a plausible way of determining similarity, Judge Edelstein rejected his argument.[163] Walker pointed to three newspaper articles which

155. *Id.* at 52.

156. Walker v. Time Life Films, Inc., 615 F. Supp. 430, 434 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 44 (2d Cir. 1986).

157. *Id.*

158. *See id.* at 436–37.

159. *Id.* at 437–39.

160. *See id.* at 437.

161. STEPHEN NEALE, GENRE (1980).

162. *Walker*, 615 F. Supp. at 436 ("[I]ncidents, characters or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic — are not protected."). For instance, "[i]n any account based on experiences in a poverty stricken, crime-ridden environment, depictions of bribery, prostitution, purse-snatching and neighborhood hostility to law enforcers are inevitable." *Id.*

163. *See id.* at 437.

purported to confuse his and defendant's works.[164] These articles failed to persuade the court that the lay observer in general would have found the works substantially similar, because "a few opinions cannot enlarge the scope of statutory protection enjoyed by a copyrighted property."[165] The text transcended the audience, at least on this scant evidence.[166]

Walker's formalist approach is also evident it its citation to *Davis v. United Artists*, a case involving a film and a novel both based on the Vietnam War.[167] In *Davis*, the court granted defendants' motion for summary judgment, and it excluded plaintiff's literary expert's opinion of the works' similarity.[168] The rationale for this exclusion was strongly formalist: The court's own reading and viewing of the works gave it the clear ability to discern, on the basis of the works themselves, that there was no similarity.[169] The court cloaked its decision-making in the language of audience reception, yet the audience was simply a construct imagined to share the same intuitions and analysis as the court.[170]

Subsequent courts have relied heavily on *Walker*'s dicta, namely, that "the works themselves supersede and control contrary descriptions of [the works]."[171] Indeed, the Second Circuit's reasoning in *Walker* emphasized this text-centered approach, downplaying similarities that might have otherwise become apparent from expert analysis.[172] In *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.* ("Gaito II"), a case involving architectural plans, the Second Circuit Court of Appeals affirmed a grant of defendant's motion to dismiss for failure to state a claim, because substantial similarity can be determined at that early stage as a matter of law.[173] If no substantial similarity exists between the works, plaintiff's claim should be dismissed for failure to state a claim.[174] The standard for determining whether

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164. *Id.*

165. *Id.*

166. The court does not rule here that actual audience confusion could never provide interpretive authority for the finding that the works are substantially similar; it merely rules that, in this case, there is too little evidence of audience confusion.

167. 547 F. Supp. 722, 723 (S.D.N.Y. 1982).

168. *Id.* at 724–28.

169. *See id.* at 725.

170. *Id.* (The court observed that if it "had read plaintiff's book and seen defendants' motion picture, unaware of this infringement action, it never would have dawned upon it, as an average observer, that there was the slightest connection between the two works other than in the common title and the subject of the Vietnam War").

171. Walker v. Time Life Films, Inc., 784 F.2d 44, 52 (2d Cir. 1986).

172. *See id.* at 51 ("[C]omparison of secondary or descriptive materials cannot prove substantial similarity under the copyright laws . . . because the works themselves, not descriptions or impressions of them, are the real test for claims of infringement.").

173. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp. (*Gaito II*), 602 F.3d 57, 59 (2d Cir. 2010), *aff'g* 2009 WL 5865686 (S.D.N.Y. May 22, 2009).

174. *See* Peter F. Gaito Architecture, LLC v. Simone Dev. Corp. (*Gaito I*), No. 08 Civ. 6056(WCC), 2009 WL 5865686, at *4 (S.D.N.Y. May 22, 2009).

substantial similarity exists is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[175] On the basis of this language, one might expect the emphasis to be on the audience or the court's understanding of the works. It is audience perception of the similarity that appears to be the standard for infringement. Instead, however, to determine whether copyright infringement existed, the *Gaito I* court quoted the *Walker* rule that works "supersede and control."[176]

In *Gaito II*, the question was whether a copyright infringement claim could be decided on a Rule 12(b)(6) motion to dismiss, which was then an issue of first impression in the Second Circuit.[177] The case's posture understandably steered the court's discussion to the text as a source of interpretive authority since the crucial question was whether the texts and the parties' pleadings, without more, could serve as a sufficient basis for a final disposition. Still, the case is noteworthy for doubling down on the autonomy of the text in resolving copyright disputes. Substantial similarity is typically considered an "extremely close question of fact,"[178] requiring resolution by the trier of fact,[179] and not usually recommended for resolution as a matter of law.[180] However, substantial similarity can sometimes be determined as a matter of law, either because no reasonable jury could find that the two works are substantially similar or because the similarity concerns only uncopyrightable elements.[181]

Gaito II reasoned that when a court considers substantial similarity, "no discovery or fact-finding is typically necessary, because 'what is required is only a visual comparison of the works.'"[182] Drawing on *Walker*, the *Gaito II* court ruled that the text trumps other sources of interpretive authority — or at least, it can. The court's language emphasizes formalism: "It is well settled that in ruling on [a motion to dismiss], a district court may consider 'the facts as asserted within the four corners of the complaint' together with 'the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.'"[183]

Because the works had been attached to the pleadings as documents for the court to review, the court was deemed to have all it needed for its ruling.[184] Judge Katzmann concluded that "where, as

175. Hamil Am. Inc. v. GFI, 193 F.3d 92, 100 (2d Cir. 1999) (citation omitted).
176. *Gaito I*, 2009 WL 5865686, at *5.
177. *See Gaito II*, 602 F.3d at 59, 63.
178. *Id.* at 63.
179. Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 918 (2d Cir. 1980).
180. *See Gaito II*, 602 F.3d at 63.
181. *See id.*
182. *Id.* at 64 (citation omitted).
183. *Id.* (citation omitted).
184. *See* Effie Film, LLC v. Pomerance, 909 F. Supp. 2d 273 (S.D.N.Y. 2012) ("Although substantial similarity analysis often presents questions of fact, where the court

here, the district court has before it all that is necessary to make a comparison of the works in question," it is entirely proper for a court to decide a motion to dismiss on the basis of substantial similarity (or the lack thereof).[185] According to this view, which subsequent case law has continued to adopt, the text possesses all the interpretive tools needed to unlock it, for the purposes of answering the questions copyright would ask of it.[186]

In *Gaito II*, following *Walker*, Judge Katzmann effectively located the court's interpretive authority in the text, but clarified that in some cases it might not be proper to decide the question of non-infringement without discovery.[187] Implicit in his decision is the idea that some cases are too complex to be determined without assistance but that this was not such a case. He cited *Computer Associates v. Altai* as an example of when expert testimony might be necessary, because the "strictures of [the court's] own lay perspective" might be too limiting to understand the issues at bar.[188]

As the analysis above demonstrates, *Gaito II* adopted formalism by adhering to the works over and above any sources about or outside the work. In contrast to formalism, contextualism may start outside the work[189] and may encompass many different interpretive methods, including an approach that relies heavily on authorial intention or statements about the author's work.[190]

2. Authors' Statements

For legal analysis, the distinction between the work's four corners and the world beyond offers a helpful, bright-line division of evi-

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has before it 'all that is necessary to make a comparison of the works in question,' it may rule on 'substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss.'") (citing *Gaito II*).

185. *Gaito II*, 602 F.3d at 65.

186. *See* Klauber Bros., Inc. v. Bon-Ton Stores, Inc., 557 F. App'x. 77, 80 (2d Cir. 2014).

187. *See Gaito II*, 602 F.3d at 65.

188. *Gaito II*, 602 F.3d at 65 (quoting Computer Assocs. Int'l Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992)).

189. Formalism starts and ends with the formal analysis of the work, whereas contextualism may use as a source for interpreting the work the historical era in which the work was produced; the unequal power dynamics the work reflects or entrenches; biographical analysis that shows how the author's life parallels or diverges from the work; statements of authorial intention; the conditions of the work's reception, including analysis of its audience(s); or the material conditions of the book's publication and dissemination.

190. These approaches are really all identifiable as critical theory, but they generally include historicism, Marxism, feminism, post-structuralism, psychoanalysis, biographical criticism, critical bibliography, post-colonial theory, queer theory, and cultural studies, among others. JONATHAN CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION (1997) at preface. Indeed, contextualist interpretive methods predominate in non-legal realms, where a backlash against formalism has occupied the humanities since the late 1940s. FRANK LENTRICCHIA, AFTER THE NEW CRITICISM 305 (1983).

dence. When judges have before them the works at issue, they can, under one theory, simply adjudicate those with nothing beyond the parties' pleadings.[191] However, this formalist approach is not an inevitable way to proceed; alternatives do exist. For instance, a court could find that an author's statements about his work, found *outside* the work itself, are relevant. A court did so in *Blanch v. Koons*, granting deference to Jeff Koons, the appropriation artist who had made unauthorized use of the image of a sandal shot by fashion photographer Andrea Blanch.[192] In the court's words, "we need not depend on our own poorly honed artistic sensibilities" when there is "no reason to question [Koons's] statement that the use of an existing image advanced his artistic purposes."[193] In so finding, it downplayed other potential factors, such as formalist dissection, judicial intuition, and audience responses.

Likewise, in *Suntrust v. Houghton Mifflin*, the court chose a contextualist approach over other possible methods.[194] The dispute concerned an unauthorized sequel to Margaret Mitchell's *Gone with the Wind*.[195] The trial court used a formalist interpretive lens in finding Alice Randall's work, *The Wind Done Gone*, to be infringing and granted an injunction.[196] On appeal, the Eleventh Circuit vacated the preliminary injunction and held that Randall was likely to prevail on the question of fair use, largely because the circuit court shifted interpretive gears from formalism to contextualism and seemed to recognize in Randall's efforts a larger social critique of slavery.[197] Judge Birch's opinion dealt with defendant's work generously. He immediately characterized Randall's defenses as "persuasive," and cited her stated purpose favorably: "[Randall] persuasively claims that her novel is a critique of *GWTW*'s depiction of slavery and the Civil-War era American South. To this end, she appropriated the characters, plot and major scenes from *GWTW* . . . ."[198] Birch's summary of her use as directed toward critique is, in some sense, a legal conclusion. To lead with this legal conclusion suggests an emphasis on the larger critical context in which it was written.[199] Judge Birch acknowledged the difficult — and subjective — undertaking of finding fair use,[200] but did not appear to do much to minimize his own subjective input.

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191. *See id.* at 59.

192. *See* Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006).

193. *Id.*

194. *See* Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001), *vacated*, 268 F.3d 1257 (11th Cir. 2001).

195. *Id.*

196. *See id.*

197. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1272 (11th Cir. 2001).

198. *Id.* at 1259.

199. *See id.* at 1270.

200. *See id.* at 1273 ("[W]e must determine whether the use is fair. In doing so, we are reminded that literary relevance is a highly subjective analysis ill-suited for judicial inquiry.

Judge Marcus's concurrence went further and added more robust contextualist analysis: "Like a political, thematic, and stylistic negative, *The Wind Done Gone* inverts *Gone With the Wind*'s portrait of race relations of the place and era."[201] Judge Marcus emphasized the way that *The Wind Done Gone* had positioned itself as an inversion of the prior work, which necessarily takes account of the way the book is intended to be received and its larger critical context. He called the case an easy one for fair use but stressed the relevance of the books' "two literary worldviews of . . . perfect polarity," and thus their involvement in controversies outside the four-corners of the works themselves.[202]

Given the concurrence of views between Judge Marcus and Judge Birch, who seem to differ mostly in degree, it is interesting to note their departure from Judge Pannell's far more formalist opinion in the lower court. Judge Pannell offered more textual analysis, and he placed less reliance on the social critique of slavery; he wrote:

> This new vision [of defendant], however, does not simply comment on the antebellum South by giving the untold perspective of a mulatto slave who is sold from the plantation, develops a relationship with a caucasian [*sic*], lives well and travels the world. Rather, the new work tells *Gone With the Wind*'s story, using its characters, settings, and plot.[203]

Judge Pannell's formalist analysis was responsible for finding a likelihood for plaintiff to prevail on the merits, and an injunction issued.[204] Perhaps based on the sheer volume and quality of the amount copied,[205] Pannell's opinion found that Randall's story "told" or, in some sense, stole Mitchell's story using materials created by the latter. Thus, formalism stressed the works' similarity; contextualism stressed the need for so much borrowing. The Eleventh Circuit opinion shows that a contextualist approach that takes full consideration of the critical context, including the author's statements about her purpose — which seemed plausible in this case — can lead to a different outcome.

Thus we are presented with conflicting and opposing arguments relative to the amount taken and whether it was too much or a necessary amount.").

201. *Id.* at 1279–80 (Marcus, J., concurring).

202. *Id.* at 1278.

203. Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001), *vacated*, 268 F.3d 1257 (11th Cir. 2001).

204. *See id.* at 1367–70.

205. *See id.* at 1368 ("The court finds that *The Wind Done Gone* . . . is substantially similar to *Gone With the Wind* in both quantitative and qualitative terms.").

3. Historical Context and Genre

Another recent example illustrates what it looks like when a court deliberately situates its interpretive authority in a work's context, discussing both genre and historical context. Because the same plaintiff came before the court multiple times with versions of the same work (albeit naming different defendants), the court's various interpretive approaches can be discerned and meaningfully compared. In two actions based on the same screenplay, before two different judges, the court made different methodological choices, first grounding its authority in the text and subsequently grounding it in context.

In *Effie Film, LLC v. Pomerance*, the actress and author, Emma Thompson, sought a declaratory judgment of non-infringement for her screenplay about the unhappy marriage of Euphemia ("Effie") Gray and John Ruskin, and the subsequent marriage between Effie and the pre-Raphaelite painter, John Everett Millais.[206] Ruskin and Millais were important figures from the arts and letters of the Victorian era.[207] Eve Pomerance had previously published two screenplays about these same figures, and when she threatened suit, Effie Film sued for declaratory relief on behalf of Thompson.[208] In the course of granting Effie Film's 12(c) motion, Judge Oetken of the Southern District of New York carefully summarized all three of the works at issue.[209] In so doing, he grounded his authority in the texts at issue, adopting a formalist approach.

In *Effie Film, LLC v. Murphy*, decided by a different judge on the same court the following year, Judge Griesa cited to Judge Oetken's opinion in *Pomerance* approvingly.[210] Gregory Murphy, an author of numerous plays and other literary works, had produced a play for the stage and a screenplay both entitled *The Countess*, that likewise focused on the Gray-Ruskin marriage, the Gray-Millais romance, and related historical events.[211] In the stage of litigation that concerns us here, the court had before it Thompson's complete, allegedly infringing screenplay, and it could have proceeded directly to analyzing the two works. In so doing, it would have been using a formalist approach to copyright's substantial similarity analysis, which is the means of

206. Effie Film, LLC v. Pomerance, 909 F. Supp. 2d 273, 278 (S.D.N.Y. 2012).

207. *See id.*

208. *See id.*

209. *See id.* at 279–90.

210. Effie Film, LLC v. Murphy, 932 F. Supp. 2d 538, 553 n.3 (S.D.N.Y. 2013), *aff'd*, 564 F. App'x 631 (2d Cir. 2014) ("Judge Oetken has recently provided an excellent analysis of copyright law as it applies to works of historical fiction, and even the 'Effie' screenplay itself, in granting an analogous motion in another action brought by Effie Film against another author of a screenplay based on the same historical events.").

211. *Id.* at 542.

determining whether prima facie infringement has occurred.[212] A great deal of prior case law suggests that courts may grant motions even at early stages on the basis of nothing more than textual analysis of the works themselves, with no consideration of context, discovery, or expert testimony.[213] Thus nothing, in theory, prevented the court from adopting a formalist approach, simply doing a close reading of the two works, and rendering judgment. Perhaps most importantly, this would have followed the interpretive approach the court itself had taken in the *Pomerance* litigation the year before.

The *Effie* court did not do so. It made an interpretive choice to ground its analysis in what might be called a contextualist or historicist reading of the works. Even more precisely, we might call it a hermeneutically historicist approach.[214] Put in less florid terms, the court was simply contextualizing the works by trying to evoke the Victorian era, helpfully cataloguing characteristics likely to appear in any work about that epoch. It is striking that the first things the court said about the work are not directly about the work at all, but about the era in which the stories are set:

> Both 'Effie' and 'The Countess' present fictionalized accounts of the same historical events. Therefore it is necessary to review the historical episode that both works draw from . . . . [I]t will be impossible to gauge the creative similarities of the works without some grasp of the historical narrative.[215]

The court stated that substantial similarity analysis was "impossible" without reference to a contextual framework. The court was thus suggesting that the task of comparing the works — the central task in any finding of copyright infringement — requires a historically informed interpretation.

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212. *See* Peter F. Gaito Architecture, LLC v. Simone Dev. Corp. (*Gaito II*), 602 F.3d 57, 65 (2d Cir. 2010) ("[W]here . . . the district court has before it all that is necessary to make a comparison of the works in question, it may rule on substantial similarity as a matter of law . . . .").

213. *See id.* at 65–66; *see also* Jacobsen v. Deseret Book Co., 287 F.3d 936, 941–42 (10th Cir. 2002); Christianson v. W. Publ'g Co., 149 F.2d 202, 203 (9th Cir. 1945).

214. I qualify my use of the term "historicist" because typically historicism refers to investigation into the era of a work's production. The animating idea of historicism, or at least the new historicism, is that works cannot be understood except as artifacts reflecting the social ideas and environment, the "network of material practices," of the time of their creation. H. Aram Veeser, *Introduction*, *in* THE NEW HISTORICISM ix, xi (H. Aram Veeser ed., 1989). Here instead the approach is informed by historical research, which allows the court to engage in analysis of copyright doctrines, such as scènes à faire and the idea/expression dichotomy. The court's focus nonetheless draws on an approach Paul Hamilton has identified as hermeneutic historicism, in which "[t]he past is to be understood on the model of interpreting a text; and texts, literary or otherwise, only have meaning within an economy of other texts . . . ." PAUL HAMILTON, HISTORICISM 3 (2d ed. 1996).

215. *Effie*, 932 F. Supp. 2d at 543.

Put another way: To read the text, the court said, one must look first *outside* the text. Remarkably, the court dedicated thirteen paragraphs of its opinion to a summary of the historical moment and to biographical events that help set the stage for both *Effie* and *The Countess*.[216] Yet in the earlier adjudication of this same plaintiff's work, the other district court had adopted a different approach. While the earlier case, *Pomerance*, acknowledged that the issue of historical fiction presented particular issues, and mentioned the Victorian era in passing,[217] it devoted the bulk and the emphasis of its opinion to formalism, offering summary and exegetic analysis of the works.[218] *Pomerance* dedicated thirteen paragraphs to the *Effie* script and fifteen and eleven to each of defendant Pomerance's scripts respectively.[219]

Consider by way of further contrast with *Effie*'s approach to historical context, *Hoehling v. Universal City Studios, Inc.*, a landmark, if oft-criticized, case about the copyrightability of nonfiction historical accounts.[220] There, the works at issue both took place in Nazi Germany,[221] no less complex and important an era than the one discussed in the *Effie* litigation. Even though discussion of the historical era depicted in both works was a doctrinally important part of its analysis,[222] *Hoehling* is hardly a model of historicist emphasis. Instead, *Hoehling* focuses on copyright's subject matter limitations as a matter of sound public policy, sidestepping close analysis of the works after simply

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216. *See id.* at 543–45.

217. *See* Effie Film, LLC v. Pomerance, 909 F. Supp. 2d 273, 278 (S.D.N.Y. 2012).

218. In its approach, *Pomerance* appears to follow the classic Learned Hand opinion, *Sheldon v. Metro-Goldwyn Pictures*, providing what looks like a close reading and doing no more than acknowledging the historical era with a quick textual nod. *Compare Pomerance*, 909 F. Supp. 2d at 278, *with* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 49 (2d Cir. 1936).

219. *See Pomerance*, 909 F. Supp. 2d at 279–90.

220. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980); *see* Nash v. CBS, 899 F.2d 1537, 1542 (7th Cir. 1990) (criticizing *Hoehling* for failing to generate incentives efficiently); 2 PATRY ON COPYRIGHT § 3:63 (2014) ("Difficulties . . . have arisen in the area of history as the result of a poor first analysis . . . . Judge Hand's comments reflect a naïve and blinkered understanding of how history is written . . . . [N]o narrative can be, as Hand suggested, a self-defining, self-selecting, self-ordering aggregation of facts . . . ."); Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after* Hoehling v. Universal City Studios, 29 J. COPYRIGHT SOC'Y U.S.A. 647, 648 (1982) ("The *Hoehling* court's approach is fundamentally flawed for at least five reasons.").

221. *Hoehling*, 618 F.2d at 975.

222. *See id.* at 979 ("[A]ll three works contain a scene in a German beer hall, in which the airship's crew engages in revelry prior to the voyage[,] . . . common German greetings of the period, such as 'Heil Hitler,' or songs, such as the German National anthem. These elements, however, are merely *scenes a faire* . . . .").

offering peremptory summaries.[223] *Hoehling* chooses an interpretive methodology rooted in copyright instrumentalism.[224]

The *Effie* court made a different choice by including thirteen paragraphs of historical background. As this historical background both preceded and, in some sense, preempted formalist analysis, the choice arguably determined the court's disposition in finding no infringement.[225] The court could have selected other interpretive methods, such as the "total concept and feel" test.[226] Generally, this impression-based judgment leads more easily to the conclusion of infringement when two works possess many similarities, even if the particular similarities are historical facts and thus unprotectable in their own right.[227]

The decision of the *Effie* court to ground its interpretive authority in a historicist reading, thus emphasizing or inflating historical *context* and downplaying *text*, reflects an important interpretive choice. To be sure a historicist or contextualist approach may be more appropriate in historical or biographical genres, where the copyright protection is already thin and the presence of common historical elements is more likely. After all, both works strive for fidelity to the same historical era, even if differently conceived.

Judges can and do apply contextualist approaches to fiction too. In particular, when judges look at the question of genre they are analyzing the context in which the work may be understood. A hard-boiled detective novel, for instance, looks extremely similar to another in its genre, until one considers that certain common tropes, plots, characters, and settings are likely to exist in both. Thus, part of the work of decoding a text is situating it in terms of its semiotic context, including its genre.[228] Courts have recognized that, at times, a genre

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223. *Id.* at 978 ("To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.").

224. *See Pomerance*, 909 F. Supp. 2d at 295 ("To achieve that end, *Hoehling* prioritizes an *instrumental* conception of copyright law and concludes that weak copyright protections will best facilitate the creation and dissemination of new historical knowledge.").

225. This is not to say that an historical or contextualist approach would always lead to a finding of non-infringement; at times the use of particular interpretive approaches reflects, as much as anything else, a commitment to judicial pragmatism, or perhaps a commitment to an outcome, where analysis is instrumentally serving that outcome.

226. *See supra* Part II.D.

227. *See* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 411 (1989) ("If copyright claims can in fact be maintained at such a high level of abstraction, practically any similarity could conceivably support a finding of infringement."); Lemley, *supra*, note 40, at 739.

228. *See* Said, *supra* note 28, at 365 ("Typically, what texts demand of us, whether they are visual or verbal texts, is at least in part a function of genre. Texts, whether verbal or visual, are often virtually incomprehensible without reference to the generic tradition to which they belong, however uneasily.").

makes demands on a work and limits authorial choices.[229] Where that is true, similarity analysis must filter out the "elements dictated by efficiency, necessity, or external factors."[230]

In conclusion, nearly all copyright cases reflect clear interpretive choices. Some cases display a marked reliance on one interpretive modality; still others feature a mélange of methods. Many cases make no mention of interpretive methods as such, yet the method — and their evidentiary and decisional implications — can be discerned in most copyright cases. Examples from the case law demonstrate that, at present, courts shift between these interpretive gears, without explaining their choices even when those may be influential upon the case's disposition. These cases illustrate that judges make affirmative choices about their own interpretive authority. These choices are not merely aesthetic;[231] they are methodological choices that are legally relevant levers in litigation. Judges may choose to ground their interpretive authority in a single source of authority, or they may discuss multiple authoritative grounds. Sometimes they offer no justifications for their finding,[232] or they offer reasons without explaining their relative weight.[233]

Loosely, one might say that judges most commonly choose analysis over intuition and text over context, and some opinions will lean more heavily on one axis.[234] In many cases, a mix of approaches exists. In rare cases, judges emphasize authorial intention. Finally, judges, in their frequent reliance on the "total concept and feel" of a work, cast as an element of the work what is actually a method, intuitionism. It is important to distinguish between what is *in* the work from how to approach it, methodologically. Such distinctions can carry legal weight, and they arise to our attention only once it is acknowledged that copyright possesses many interpretive pressure points, featuring multiple interpretive choices.

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229. *See, e.g*, Kohus v. Mariol, 328 F.3d 848, 856 (6th Cir. 2003); Matthew Bender & Co. v. West Publ'n Co., 158 F.3d 674, 682 (2d Cir. 1998); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 707–08 (2d Cir. 1992).

230. Trek Leasing, Inc. v. U.S., 66 Fed. Cl. 8, 16 (Fed. Cl. 2005).

231. *Pace* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). *See supra* Part II.D.

232. For example, in substantial similarity analysis, as when the text is seen to speak for itself. *See supra* Part II.E.

233. For instance, their reasons may track the fair use factors, but one factor may inexplicably trump the others, or reflect unclear and indeterminate analysis. Joseph Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 573 (2007) ("A significant problem with the current four-factor fair use test is its indeterminacy. Courts and commentators have long complained that the existing four-factor test provides scant guidance to those who would engage in fair uses.").

234. I qualify my assessments about the frequency of the use of particular approaches. These are not empirically tested claims. They simply reflect my opinion after reading, writing about, teaching, and rereading many copyright cases.

III. COPYRIGHT'S INTERPRETIVE CHOICE REGIME IS COMPLEX

Interpretive issues in copyright are difficult and militate in favor of a doctrine that guides judges rather than assuming they already possess all the tools they might need for the task. Copyright law should recognize that analysis of copyrightable works is methodologically embedded in an intellectual history, both deep and wide, of sophisticated methods of interpretation in which judges already participate.

A. All Copyrightable Works Are Complex

Judges in copyright cases sometimes assume that nontechnical works in copyright cases are not complex and thus do not require methodologically explicit interpretation. This view is incorrect: Both the analysis and the works analyzed are complex, dynamic things and should be acknowledged as such. Judges have to make difficult methodological decisions no less complex than those required of them when confronted with technical (software) cases. However, courts and scholars have not generally acknowledged the inevitable complexity in copyright cases, while they have done so in technical cases.

Elsewhere in the law, when judges face complex or "polycentric" issues or issues that explicitly require interpretation, they offer reasons and otherwise explain their work. Typically in such cases, judges receive expert evidence to guide their analysis. By contrast, in copyright law, when questions of interpretation grow very complex, judges sometimes offer conclusions with little to no support or explanation.[235] Judges sometimes proceed as though expressive works were effectively self-interpreting, facially clear, and thus semiotically accessible.[236] Tushnet has referred to this as a judicial tendency to treat certain works as though they were "transparent," that is, clear on their surfaces and thus requiring no interpretive apparatus.[237] Displaying what Tushnet has aptly called, in the context of visual works, "the epistemic hubris" of copyright law, judges see fit to make rulings on artistic works as though these objects of study required no special methodology.[238] That is, they can be said to treat expressive works as

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235. *See* Farley, *supra* note 12, at 838–39 ("Probably the most prevalent way that courts deal with the tension . . . is simply to reach a conclusion on that question without including any supporting analysis . . . . The courts must have relied on certain ideas about the nature of art, but no reasoning was articulated.").

236. The view of texts as self-explicating or semiotically autonomous is discernible in judicial language stressing that artistic works themselves supersede any statements of them, as discussed *supra* with respect to dicta in *Gaito II* and *Walker*. *See supra* Part II.E.

237. Tushnet, *supra* note 22, at 687.

238. *Id.* at 721; *see* Folio Impressions Inc. v. Byers Cal., 937 F.2d 759, 766 (2d Cir. 1991) (requiring only a visual comparison of the works).

if they were transparent (Tushnet's language) or autonomous (this Article's language).

To be sure, this judicial tendency toward textual autonomy is efficient, since it collapses the possibilities of the multiple into the certitude of the singular.[239] Yet this interpretive hubris also at times betrays an interpretive provincialism. Some judges seem to think that certain objects of their analysis are hard, and some are easier. *Computer Associates v. Altai*, a case that has become a lynchpin in copyright's infringement analysis, held that it was simply "the reality that computer programs are likely to be somewhat impenetrable by lay observers — whether they be judges or juries," and it argued that it could not "disregard the highly complicated and technical subject matter at the heart of these claims."[240] Likewise this language, from a piece of scholarship published in a highly respected law review, captures the idea:

> Unfortunately, while judges are commonly familiar with literature, they are not necessarily familiar with the intricacies of computer technology. Judges have well-developed intuitions about what is and is not important in comparing two works of literature. One cannot hope for a similar understanding of computer programming, due to its more technical nature.[241]

The patronizing tone here reflects the idea that "nontechnical," expressive works are accessible to judges because of their training in (what in our era, in our country happens to be considered by many) the humanistic discipline of law.[242] By contrast, judges are thought to lack the expertise to weigh in on complex software matters since legal training does not equip judges with familiarity in computer code languages.[243] This presumption is not just a philistine nuisance; it has unfortunate ramifications for copyright law, as the next two subparts argue.

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239. *See* Tushnet, *supra* note 22, at 688.

240. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992).

241. David W.T. Daniels, *Learned Hand Never Played Nintendo: A Better Way To Think About the Non-Literal, Non-Visual Software Copyright Cases*, 61 U. CHI. L. REV. 613, 635 (1994).

242. *See* Graeme B. Dinwoodie, *Refining Notions of Idea and Expression Through Linguistic Analysis*, *in* COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 204 (Lionel Bently et al. eds., 2010) ("[C]ourts, who work daily with words, perhaps instinctively believe they understand the nature of literary works.").

243. *See Altai*, 982 F.2d at 713; Lee, *supra* note 16.

B. Analysis of Copyrightable Works Is Interpretively Complex

At present, a consensus seems to exist that copyright adjudication does not require complex interpretive work of judges when they adjudicate expressive and artistic or "nontechnical" works.[244] Copyright law contrasts expressive works with technical works such as software; the former are thought not to require particular training or sophistication for their adjudication. Both the works and the analysis necessary to adjudicate them are cast as nontechnical and thus accessible. Judges are thought to be able to decode the works at issue simply by having them in front of them; dicta refer to the way that texts offer a kind of testimony that judicial common sense can simply discern: "the 'mute testimony' of the forms put him in as good a position as the Copyright Office to decide the issue,"[245] and "[g]ood eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts."[246] Some courts only allude to the purported simplicity of the work before them, while others say so outright: "[T]he Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training . . . ."[247]

In fact, however, the analysis of these works is methodologically complex. One court has bemoaned the "turbid water of the 'extrinsic test'" and referred to its application in one context as a "somewhat unnatural task, guided by relatively little precedent."[248] When judges interpret an artistic text, they are necessarily making a set of unacknowledged methodological choices that presuppose anterior interpretive and theoretical judgments.[249]

Experience or expertise surely increases the ability to make those judgments. Judge Richard Posner, also the author of a widely disseminated book on law and literature acknowledges that, at least in one context of copyright law, judges must make judgments based on their interpretation of the works at issue.[250] He argues that judges often must be able to grasp the point of a parody in order to find it noninfringing.[251] To that end, he thinks literariness a virtue, suggesting

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244. *See Altai*, 982 F.2d at 713; Lemley *supra* note 40 (describing the state of the law).

245. Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 414 (2d Cir. 1985) (referring approvingly to Judge Wexler's reasoning in the lower court's decision).

246. Klauber Bros., Inc. v. Russell-Newman, Inc., No. 11 Civ. 4985(PGG), 2013 WL 1245456, at *8 (S.D.N.Y. Mar. 6, 2013) (referring to the lower court's decision).

247. Gable v. Nat'l Broad. Co., 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010), *aff'd*, 438 F. App'x 587 (9th Cir. 2011).

248. Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).

249. *See* Zahr Said Stauffer, *'Po-Mo Karaoke' or Postcolonial Pastiche? What Fair Use Analysis Could Draw from Literary Criticism*, 31 COLUM. J.L. & ARTS 43, 49–50 (2007).

250. *See* RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 544 (3d ed. 2010).

251. *See id.* ("The more literary the judges, the greater the probability of finding [the] point" of the parody.).

that expertise helps what is otherwise a complex task.[252] Many judges do not seem to view any particular expertise as necessary to the task of adjudicating copyright disputes over expressive, nontechnical works.

Yet the complex task of adjudicating expressive works in copyright cases always requires some methodological choice. This is true even when judges speak from an analytical stance clothed in intuition, that is, a stance that appears to consist merely of common law-style legal reasoning. Professor Adrian Vermeule writes, "[t]he idea that judges should take each case as it comes, interpreting statutes sensibly in light of the materials at hand, itself constitutes an implicit choice of interpretive method and an implicit allocation of interpretive authority."[253] Intuitionism is a choice, as is the refusal to apply a particular method or to give reasons. These choices differ from conventional interpretive methods, but they should be viewed as methods judges sometimes choose.

The interpretive choices attaching to expressive works are necessarily complex, and how to negotiate these choices is by no means clear. The works themselves are also semiotically complex. Still, many courts proceed as though interpretive choices with respect to expressive works are unnecessary, and adjudicating cases concerning artistic works is easier than resolving questions raised by cases concerning technology and science. The perceived lack of complexity means no robust methodology for how to analyze these works has emerged. Yet for matters of law, judges exercise a great deal of discretion — indeed they have nearly unfettered access to a range of interpretive choices — and they usually decide, without external constraints, what interpretive sources they will select. Judges lack clear guidance on what to do when confronted with expressive or artistic works, because at present there is little awareness of the interpretive complexity inherent in these works.

C. Scholarly Awareness of Copyright's Interpretive Complexity Is Growing

Despite the prevailing view in case law that complexity tracks technicality, thus making nontechnical works presumptively non-complex, recent scholarship has begun to explore copyright's interpretive complexity. Though this emerging body of scholarship has not emphasized interpretive method selection, it acknowledges assumptions about copyright's inherent complexity in its attempts to locate heuristics to clarify copyright analysis.

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252. *Id.*
253. Vermeule, *supra* note 15, at 97.

In copyright law, the question of "originality as a legal construct" offers certain challenges in the contemporary creation landscape.[254] Professor Ed Lee has argued that originality, though historically a simple determination, may have grown more difficult to decide in the digital era.[255] Nonetheless, judges at present do have what Lee characterizes as "considerable discretion to decide the issue" of originality, and Lee laments that "the precise contours of [its] requirements remain obscure."[256] Professor Eva Subotnik has suggested that maintaining a low threshold for copyright makes sense.[257] This would seem to allow judges to do as little normative analysis as possible in an area fraught with aesthetic complexity.

Both Subotnik and Lee propose certain heuristics to try to reduce uncertainty, the former as a three-part test, the latter as a set of proxies. Subotnik writes, "[c]aught between the impermissibility of relying upon aesthetic virtues, on the one hand, and the degree of effort expended by an author, on the other, the closest courts can come to identifying originality, at least under the current copyright framework, is through proxies for the legal concept."[258] Subotnik's suggested use of proxies underscores the complex work that judges do and the difficulty they have had in articulating, let alone employing, interpretive methodology consistently. Likewise, Lee has proposed a heuristic designed to resolve problems arising from uncertainty around what authorship and originality mean in the digital era.[259] Lee's model would introduce authorial intent in combination with other factors, rather than focusing on only the text.[260] In his emphasis on authorial efforts and skill, Lee acknowledges that independent creation will feature "a wide degree of subjective choices by the artist."[261] These choices seem likely to introduce issues of subtlety and complexity sufficient to make administering originality tests very difficult, absent clear guidance with respect to interpretation. It is striking, though, that both Subotnik and Lee seek to introduce legal strategies to guide judges, which is an indication of copyright's inherent complexity.

Relatedly, in the fixation context, scholars have noted the intricate theoretical questions judges must decide; difficulty is arguably augmented by lack of clarity as a matter of interpretive method. For instance, discussion of whether a work is "fixed" for the purposes of copyright's fixation requirement requires selection of an interpretive

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254. *See* Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1490 (2011).
255. Edward Lee, *Digital Originality*, 14 VAND. J. ENT. & TECH. L. 919 (2012).
256. *Id.* at 920.
257. Subotnik, *supra* note 254, at 1495.
258. *Id.* at 1494.
259. Lee, *supra* note 255, at 936.
260. *See id.* at 937.
261. *Id.* at 940.

method with which to proceed. Interpretive methods could vary in how to define the work, including how to conceptualize what counts as its "text" versus its context. For example, if the context around a work affects the work, does it erode the boundaries of the work? Put another way, once the text and context have been defined, what effect should context have on text, in a court's definition of a work's fixation? A court asked an intriguing version of this question recently: If a horticultural sculpture is eroded by wind and rain, does it change so much that it can no longer be considered fixed?[262] Or perhaps a garden lies at the other end of the spectrum — it changes too much by its very nature to be considered properly fixed in the first place: "[G]ardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed."[263] *Kelley*'s fixation question tees up the difficulty of defining a work for the purposes of copyright law.

How one frames what counts as "the work" in the first place is largely a function of interpretive method selection.[264] Robert Rotstein has shown how bringing aesthetic theories to copyright law reveals a disconnect between the legal notion of a work as fixed and immutable, and the literary notion of a text as inherently mutable.[265] Unlike the stable and autonomous "work," which the law treats as akin to an object, the text is a process — an act of speech that occurs when a member of an audience (a reader, viewer, listener, computer operator) interacts with the textual artifact (that is, the book, motion picture, song, or computer program). Thus, for example, the song *The Boxer* in 1969 was a different "text" from *The Boxer* in 1981, because the listeners in each case "created" different texts.[266] Rotstein's view of the text as functionally dependent on its reader may overstate the critical influence of reception theory. Whether or not that view is accurate, it highlights the normative nature of defining the boundaries and function of a work of authorship for the purposes of copyright law.

Similarly, Professor Michael Madison has examined the constructedness of the notion of the work and urged scholars to treat the boundaries of a work with greater fluidity.[267] Professor Laura Heymann has drawn attention to the way that fixation delineates a legally constructed line around a work, and she stresses the fact that its

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262. Kelley v. Chicago Park Dist., 635 F.3d 290, 303–04 (7th Cir. 2011).

263. *Id.* at 304.

264. Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 727 (1992) ("Contemporary literary theory has vigorously debated the significance of the mutability of 'works of authorship.'").

265. *Id.*

266. *Id.*

267. *See* Michael J. Madison, *IP Things as Boundary Objects: The Case of the Copyright Work* 2 (Univ. of Pittsburgh Legal Studies Research Paper No. 2013-12, 2013), *available at* http://ssrn.com/abstract=2256255.

boundaries are not otherwise aesthetically fixed or inevitable.[268] For Heymann, fixation is what "creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs."[269] Her analysis sheds nuanced light on the complex boundary that fixation creates:

> It transforms the creative process (and its subject) from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation. Even in contexts in which there is no competing claim as to control, fixation still works to bound the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights. Once an "author" has fixed a certain version of her work, she has propertized its subject, subordinating the work to the various laws and tropes that come with a property-based regime such as copyright law: ownership, transformation, borrowing, and theft. Fixation is what allows the subject to be commercialized and analyzed; it is what marks the transformation to subject in the first place.[270]

In Heymann's vision, the dynamism of interpretive fluidity yields to static lines the law draws in order to demarcate — and contain — property. Heymann's account of the "work" hints at the semiotic play between the various interpretive grounds in which authority can lie. If a judge grounds interpretive authority in the text (in *Kelley*, it was the horticultural sculpture), then changes like those made by the wind, the rain, and the fauna in *Kelley* would dictate a finding of non-fixation, and thus uncopyrightability. If a judge focuses on the work as something that exists in perpetual dialogue with its audience, thus embracing a reader-response theory, or a contextualist approach, a work's contours will seem less defined. Viewed with such a lens, the work will evolve as perceptions of it evolve. Consequently, it would likely be held to be unfixed by its nature, like the garden in *Kelley*, unless an argument could be made that the work required flux and growth as part of its reception, without losing copyright protection altogether. Interestingly, Sir Arthur Conan Doyle's estate attempted to make a version of this argument in order to extend copyright in Sherlock

268. Laura A. Heymann, *How To Write A Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 829–30 (2009).

269. *Id.* at 830.

270. *Id.*

Holmes, but the court rejected this line of reasoning as an end-run around the limited duration requirement.[271] This brief discussion of the "work" as a legal construct shows yet another way in which interpretive methods can make a legally relevant difference by invalidating for lack of fixation a copyright that otherwise appears valid.

Recent scholarship attests to copyright's inherent interpretive complexity. Scholars have responded by proposing heuristics and trying to accurately diagnose when and where these difficulties arise. Scholars' view of copyright law, however, does not align with the judicial presumption, alive and well in most circuits, that copyright law in nontechnical works is not interpretively complex and does not require special treatment or judicial guidance.

D. Judges Receive Little Guidance and Have Much Discretion

Conceiving of expressive works — and the analysis they require — as non-complex has two further consequences for copyright law. First, expert testimony tends to be disallowed on questions that are nonetheless difficult and could benefit from illumination by experts. Second, copyright imposes no requirement that judges be transparent about how they decide where to ground their interpretive authority and how much weight to accord any one source.[272] Because the question is not considered difficult at present, its resolution requires no scrutiny and imposes no constraints. We might shrug and conclude that this flexibility is a characteristic aspect and one of the chief benefits of the common law system. Yet elsewhere in copyright's analysis, judges do face some procedural constraints, and it is unclear that the scope of interpretive latitude exists by design, rather than because judicial interpretation has escaped our collective focus.[273] Indeed, the proper scope of judicial discretion in choosing how, when, and even whether to interpret the works in copyright cases can be evaluated only once it is clear that copyright law routinely requires that judges face these choices and that these choices are complex.

Indeed, a robust literature exists outside of copyright law that puts copyright's interpretive regime into helpful perspective. In other areas of law similar questions have long been considered because of their

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271. Klinger v. Conan Doyle Estate, Ltd., 755 F.3d 496, 503 (7th Cir. 2014) ("[The characters] were "incomplete" only in the sense that Doyle might want to (and later did) add additional features to their portrayals.").

272. *See supra* Part II.A.

273. Some areas of copyright leave judges with little discretion, either because the statute contains a provision that is more rule-like than standards-like, or because the law of particular jurisdictions has evolved in that fashion. For instance, in some circuits, judges cannot admit expert testimony or engage in analytic dissection during the second stage of substantial similarity analysis. Lemley, *supra* note 40, at 723.

importance for doctrine and outcomes alike. Professor Kent Greenawalt has enumerated "dimensions of inquiry" arising in interpreting wills and contracts.[274] He frames a list of binarisms to help determine how meaning should be derived from the text: Writer or reader? Subjective or objective? Abstract or contextual? Specific aim or general objective? Document or external evidence? Time of writing or time of interpretation?[275] Those questions already arise in copyright cases, and judges are often pressed to answer them in some form, with little guidance. Judges in copyright cases make interpretive selections with little to no discussion of their choices being embedded in a larger critical conversation on interpretive theory, in both law and aesthetics. Partly because the interpretive decision-making process lies below the surface it remains malleable and produces inconsistent results. At present, judges may rely on whatever interpretive methods seem to them to be warranted, without explaining why. Even within the focus on one of these sources, the analysis is not consistent or coherent across courts. With respect to the focus on audience, for instance, the judicial analysis appears circuit dependent and seems to consist of a hybrid of standards.[276] Demonstrably, though, judges choose to prioritize one method of interpretation over another, without saying that — or why — they are doing so, thus creating a confused and confusing body of law.[277]

These interpretive tensions exist in aesthetics as well. Rita Felski, a contemporary literary critic, has written: "We inflate context, in short, in order to deflate text; while newly magnified social conditions dispose and determine, the artwork flickers and grows dim."[278] Felski's almost plaintive tone is in some sense trying to capture the difficult analytic balance between a text's clearly internal factors and its external ones.[279] Her comment evokes a longstanding set of debates over grounds of interpretive authority in schools of aesthetic and critical thought. These debates suggest that in the competition for interpre-

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274. Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 541–43 (2005).

275. *Id.*

276. *See* Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1273 (2014).

277. Yen, *supra* note 10, at 250 ("Analytically inconsistent cases [] exist simultaneously as 'good law.' . . . [T]he precedent which governs new cases may be inconsistent.").

278. Rita Felski, *Context Stinks!*, 42 NEW LIT. HIST. 573, 582 (2011).

279. I acknowledge that the distinction between internal and external is reductionist, even problematic. The point of new historicism, after all, is to suggest that what I am calling external factors cannot be divorced from the way the text comes together; its social moment *produces* the text, suggesting that any internal/external binarism is destined to fail. What is outside the text (history) is necessarily contained within it under a theory that says that historical forces have contributed to shaping all texts. For the moment, I set aside these admittedly difficult textual metaphysics. Here, I mean simply to refer to internal in its formalist or four-corners meaning and external to mean extrinsic or metatextual, that is, non-formalist approaches to the text. *See* Said, *supra* note 28, at 361.

tive authority, internal and external sources compete. When the so-called "death of the author" occurs, thus lifting the reader to semiotic prominence, Roland Barthes writes, "the birth of the reader must be requited by the death of the Author."[280] The different approaches taken by the two courts in *Cariou* reflect this potentially deep methodological divide,[281] one to which scholars of aesthetics and humanities are highly sensitized, since the politics of interpretation occupy center stage in those fields of inquiry. Of course, interpretive choices about method also matter a great deal to legal outcomes. Because these choices matter, it is worth underscoring that they are difficult to make, full of semiotic, legal, and factual complexity.

Despite this significant complexity, as it now stands, most circuits do not allow judges to receive a great deal of assistance from experts on what are arguably the hardest interpretive questions.[282] This may be a consequence of the enduring fallacy that artistic works are not deserving of, or rather, do not *require* technical interpretation in the way that technical works, such as computer software programs, do.[283] Even when it is allowed, expert evidence plays a much more minor role in copyright law than it could play.[284] Indeed, judges routinely deny or seem to ignore interpretive assistance when it is proffered.[285] Recognizing the genuine challenges of copyright's interpretive complexity could affect when and whether to admit expert testimony to assist fact-finders.

At common law, the standard for infringement was whether an ordinary observer would recognize a work as having been impermissibly copied by another.[286] *Altai* held that expert testimony could be admitted in the narrow cases of complex works that might be too difficult for lay observers to understand.[287] *Altai* thus reaffirmed "the traditional role of lay observers in judging substantial similarity in copyright cases that involve the aesthetic arts, such as music, visual works or literature."[288] Similarly, *Whelan Associates v. Jaslow* held that the ordinary observer test should not be applied in "cases involving exceptionally difficult materials," because cases involving software infringement might possess "complexity and unfamiliarity to most members of the public."[289]

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280. ROLAND BARTHES, *The Death of the Author*, *in* THE RUSTLE OF LANGUAGE 49, 55 (Richard Howard trans., 1986).

281. *See supra* Part II.C.

282. *See* Lemley, *supra* note 40, at 726; *supra* Part II.A.

283. *See supra* Part III.A.

284. *See* Lemley, *supra* note 40, at 724.

285. Salinger v. Colting, 607 F.3d 68, 72 (2d Cir. 2010) (ignoring expert evidence from experts presenting arguments in favor of finding a fair use).

286. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713–14 (2d Cir. 1992).

287. *See supra* Part III.A.

288. *Altai*, 982 F.2d at 713–14.

289. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232–33 (3d Cir. 1986).

Technical subject matter commonly merits expert testimony, yet courts continue to hold that the aesthetic arts need no expertise beyond that of the lay observer — a standard applied by the factfinder, very often the judge.[290] The admissibility of expert testimony is subject to court discretion under the federal rules of evidence, guided by the premise that the testimony "will help the trier of fact to understand the evidence or to determine a fact in issue."[291] However, with regard to nontechnical works courts have found expert testimony unnecessary.[292]

Much subsequent case law has reaffirmed this distinction between technical and accessible, unfamiliar and familiar, scientific and artistic, hard and easy, subject matter. Important legal consequences flow from this simplistic set of distinctions, which are, perhaps, reflected in the entrenchment of the terms "soft intellectual property" (referring to copyright, trademark, trade secret, and trade dress law), and "hard intellectual property" (referring to patent law).[293] In a majority of circuits, judges are permitted to consider expert testimony in cases with technical issues, even when such testimony would be excluded in cases with nontechnical issues.[294]

Most circuits do not allow expert analysis on the question of whether copying was improper.[295] Not all copying is unlawful, yet discerning what has been copied — and why — can be an extraordinarily difficult exercise in line drawing. It may seem counterintuitive, then, that the majority of courts exclude expert testimony during the stage of the analysis when analysis seems to grow most complex.[296] Even when, in theory, courts *could* admit expert testimony, judges frequently view such evidence with wariness. An early example comes from Judge Learned Hand, who refused to consider expert testimony as to substantial similarity in the classic case of *Nichols v.*

290. *See* Gable v. NBC, 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010), *aff'd*, Gable v. NBC, 438 F. App'x 587 (9th Cir. 2011) ("[T]he Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training.").

291. FED. R. EVID. 702.

292. *See* Stromback v. New Line Cinema, 384 F.3d 283, 295 (6th Cir. 2004) ("[T]he subject matter is not complex or technical, such as a computer program or a functional object . . . but instead involves a literary work aimed at a general audience, [so] expert testimony will seldom be *necessary* to determine substantial similarity.").

293. *See, e.g.*, Marc E. Hankin, Comment, *Now That We Know "The Way Forward," Let Us Stay the Course*, 77 CHI.-KENT L. REV. 1295, 1298–99 (2002); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 471 (2011); Andrew A. Schwartz, *The Corporate Preference for Trade Secret*, 74 OHIO ST. L.J. 623, 668 (2013). *But see* Eric Goldman, 18 NO. 2 CYBERSPACE LAW. 11 (2013) (calling into question the validity of the soft/hard distinction).

294. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992).

295. Lemley, *supra* note 40, at 726.

296. See Balganesh, Manta & Wilkinson-Ryan, *supra* note 82, at 272–73.

Universal.[297] As a methodological manifesto in the making, it is worth quoting in full:

> We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. *It ought not to be allowed at all*; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the *less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal*. We hope that in this class of cases such evidence may in the future be entirely excluded, and *the case confined to the actual issues*; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical.[298]

Though in the case of *Nichols*, factors particular to the litigation may have disinclined Judge Learned Hand from taking expert evidence seriously, many subsequent cases have evinced this similarly bristling attitude towards it. Even those judges who seem not to object to expert opinions scarcely welcome them. In *Tisi v. Patrick*, for instance, the court viewed the expert opinion as little more than window dressing to judicial intuition:

> This action requires an analysis of the common and unique aspects of the two rock music compositions at issue . . . . Thanks to the skill of counsel and the clarity of the Defendants' expert witness, the unfamiliarity of the court with the genre has been overcome. A combination of common sense and a hastily trained ear dictate the forthcoming result.[299]

To be sure, the expert witness assisted, but the outcome relied on judicial "common sense" as much as anything else.

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297. 45 F.2d 119 (2d Cir. 1930).
298. *Nichols*, 45 F.2d, at 123 (emphasis added).
299. Tisi v. Patrick, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000).

In sum, because judges do not acknowledge that they are making choices about their interpretive methodologies, their opinions can — and often do — reflect interpretive judgments that appear to be driven more by outcome than consistency, coherence, or expert guidance. That is, on a crucial underlying aspect of copyright adjudication, judges frequently move the goalposts in ways that frustrate the goals of predictability, fairness, and accountability in litigation.

Copyright law should abandon its non-complexity premise, with respect to the work it requires of judges and the interpretively complex nature of expressive works. The consequences of assuming non-complexity are that expert guidance is disallowed right when it is most needed, and judges are not attentive to their interpretive methodology with expressive works because none appears necessary. The interpretive complexity inherent in copyrightable works supports the conclusion that copyright adjudication would benefit from greater transparency and more judicial guidance with respect to choice of interpretive methods. Acknowledging complexity underscores the benefit of an approach that emphasizes judicial analysis and downplays intuition, except in cases when intuition is acknowledged as its own method of interpretation.

IV. DOCTRINE SHOULD STRUCTURE JUDGES' INTERPRETIVE CHOICES

Doctrine should play a bigger role in shaping, perhaps constraining, judicial decisions regarding interpretation in copyright cases. Copyright's interpretive choice regime reflects its doctrinal complexity, and these choices matter to outcomes. Interpretive choices can control questions of major importance for the parties, such as whether an issue may be decided at summary judgment, whether expert testimony is allowed or required, and whether a use is fair (among multiple other doctrinal issues). Characterizing what copyright demands of judges helps clarify the proper scope of their authority and the proper tools for them to use in exercising it. Currently, the lack of structure that characterizes copyright's interpretive practices creates unpredictability and unfairness for the parties. Ultimately, the approach likely to produce the greatest predictability and fairness is one that incentivizes judges to produce analysis-structured reasoning rather than intuition-based judgments and that constrains judicial discretion over interpretive choice by defaulting to a focus on the text and the context only when necessary. This approach effectively relies on doctrine to structure judicial choices more consistently.

A. Interpretive Choice Belongs with the Judge

One of the chief benefits of recharacterizing judicial practices in copyright as interpretively complex, as Part III has done, is being able to address the allocation of decisional authority more precisely. Judges in copyright cases are called on to make complex interpretive choices about how to read a given work. While judges may not need a hearing simply on the interpretive issues in a copyright case, it is not unreasonable to think they might, in some cases, benefit from expert testimony or from extrinsic evidence that goes beyond the four corners of the work. The discretion to decide should be, however, not a doctrinal rule — as it is in copyright now, existing in an incoherent patchwork of different circuits' rules — but a matter for judicial decision-making. Copyright judges should continue to exercise their authority to make interpretive choices about the works they adjudicate, and they should do so largely as a matter of law, with exceptions discussed below. This is important because judges may choose from many different interpretive methods and could be encouraged to do so, so long as their reasoning remains transparent and is thoroughly explained. Keeping key interpretive questions with the judge and emphasizing analysis over intuition, and text over context, could allow courts to dispose of more cases through early stage motions, without the need for a fuller record or a full trial. In turn, this would have the salutary effect of minimizing the need for jury trials and, perhaps, shorten the timeline of copyright litigation generally.

B. Judges Should Rely on Texts as a Default

Our current regime provides judicial discretion over interpretive choice, with no mandate for transparency about the methodological choices that exist and that judges select. Greater constraints on this discretionary power make a good deal of sense if the goal is to make copyright law more consistent and predictable. In a two-tiered structure, judges deciding issues as a matter of law could default to the text as a source of interpretive authority, but proceed to other interpretive grounds, if such a departure is warranted. This would create greater predictability in outcomes and could minimize litigation time and expense.

Text-based interpretation is well-suited to analysis by a single individual with the ability to "read" evidence like the patterns created through dissection or other "objective" analysis. While not every reader will draw the same conclusions from a set of similarities, the similarities are often inarguably present or absent. That is, parties can point to a list of similarities that is either more or less convincing, but

that amounts to external, objective evidence.[300] When parties offer a battle of the lists of similar features, judges can evaluate the strength of these lists against a baseline of their own extrinsic analysis of the works. Apples can be compared to apples and oranges discerned more readily as a different fruit. This extrinsic or objective analysis takes as its starting point the figurative "four corners" of the work, or what we might call the bounds of the work when it is not textual or paginated. The work serves as the source of interpretive authority, thus minimizing the amount of evidence required at that stage and narrowing the grounds available for dispute. Even if judges adopt an approach on the Analysis/Intuition axis that favors intuition, as long as they are focused on the text alone, the playing field is clear from the beginning, and the boundaries of the judgment are thus somewhat clearer than they would be under an approach that treated text and context with equal discretion.

However, under this Article's proposed approach, judges are advised to choose analysis over intuition. There are many virtues to acknowledging that intuition plays a part in copyright law at present, from the "total concept and feel" test and the lay observer standard to instances in which judges make pronouncements on doctrinal matters without referring to anything more than their own intuition. Yet there are more virtues still to minimizing its role as much as possible going forward. For one thing, the confusion surrounding the "total concept and feel" test has converted it into an element that judges consider, when in fact it makes little sense to refer to the holistic aspects of a work's impression in terms that put that perception of the whole on par with the individual elements such as plot, characters, and setting, which are indisputably part of the work. For another thing, what one judge finds intuitive may differ considerably from what another finds intuitive; it is axiomatic that an intuitive understanding may and often does diverge from descriptive and normative understanding. Finally, when a judge relies on intuition alone, it is difficult for subsequent courts to reconsider the issue on appeal.

Consequently, this Article calls for text-based formalism. Formalism, in general, is rule-based, rather than standards-based[301] and seeks to minimize flexibility and maximize predictability.[302] No interpretive method guarantees perfect predictability, of course. However, a method, such as text-based formalism, that emphasizes the same starting

300. *See* Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001), *vacated*, 268 F.3d 1257 (11th Cir. 2001) ("Such lists, however, are inherently subjective and unreliable, particularly where the list contains random similarities, and many such similarities could be found in very dissimilar works.") (internal quotation marks omitted).

301. Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV.1393 (1998).

302. Fredrick Schauer, *On Formalism*, 97 YALE L.J. 509, 539 (1988).

point each time — the work or text at issue — *and* the same modes of procedure within that work, will create greater consistency across cases. Judges can use formalism to weed out non-meritorious cases, or cases that are perhaps easy ones, lacking questions of fact about context, intention, and other complicating factors. Simply producing a "close reading" of both texts will often suffice to resolve the question. Explicitly acknowledging that they are applying a formalist or four-corners type of lens will curtail the fallacy that the work "speaks for itself," which has in the past operated as a trump card to exclude other interpretive approaches, and extrinsic evidence.[303] Texts are not self-interpreting but require interpretive engagement of judges. Formalism brings judicial analysis to the surface, forcing judges to produce a record of analysis that is more objective than a hunch about the works in question.

The formalism that would best serve copyright by producing the greatest predictability is a text-based formalism that emphasizes procedure, consistent reason giving, and process- rather than outcome-driven reasoning. To the extent that this text-based formalism creates a mandate that judges "give reasons," it creates commitments for the future, thus imposing a new set of constraints. If predictability and consistency are two of the key goals to keep in mind for improving copyright's infringement analysis, a shift to text-based formalism will work best.

Formalism is not, however, without drawbacks. The cost of using rules rather than standards is often loss of tailoring, and it can sometimes create unfairness.[304] If judges explicitly adopt formalism in their resolution of questions of law, they will need some fallback or next-level mechanism for what happens when formalism does not sufficiently resolve the questions at bar. However, the need to move past formalism can be anticipated based on the types of work at issue and the specific facts in play. If parties believe a formalist approach will miss crucial elements of the litigation, they can brief the court accordingly and signal to the judge that the case is one that should not be resolved as a matter of law, nor on a solely formalist basis. For instance, they may point to expert depositions or even prior scholarship to indicate that expert opinions should be central to disposition of a case, or they may flag complex questions of fact that make pre-trial disposition improper. Where formalism appears inadequate, say, in cases requiring additional context or resolution of factual disputes, a

303. *See supra* Part III.A.

304. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 607, 621 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–65 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957–58 (1995).

fuller trial is, in any event, appropriate, as the rules around summary judgment already reflect.[305]

Text-based formalism's virtues, if deployed in the way this Article envisions, include offering defendants a more predictable and streamlined way to cut off litigation pre-trial because of a rebuttable presumption that judges, as a matter of law, could properly resolve a matter on the basis of objective or extrinsic analysis alone. Resolving disputes earlier on will help minimize costs to the parties and take pressure off the judicial docket by obviating the need for trial or for additional evidence on summary judgment motions. Additionally, explicitly relying on formalism will improve predictability and transparency: Parties can anticipate that judicial focus will be on the works themselves and on analysis of their structures, themes, and concrete elements, rather than on a malleable, unpredictable impression of the works. The shift to a more objective standard of analysis makes sense in light of the increased reliance on summary judgment as a dispute resolution mechanism.[306] Historically, courts withheld summary judgment in copyright cases because of the concern that judges would have to wade into subjective analysis of similarity.[307] Though it is now well-settled that courts may find non-infringement as a matter of law on a motion of summary judgment,[308] such determinations are limited to cases in which only uncopyrightable elements have been copied or because the two works at issue are objectively *not* substantially similar: No reasonable juror could find otherwise.[309] For all the foregoing reasons, when interpreting works at stages in which issues exist as questions of law judges should default to formalism as a clear, predictable, rule-based interpretive method, whose analysis has the greatest capacity to be objective, efficient, and transparent.

C. Text-Based Formalism by Itself May Not Suffice

In certain cases, however, text-based formalism will not be the interpretive method best suited to achieve predictability, transparency, and fairness. Specifically, when questions of fact arise, formalism ceases to be the ideal default interpretive method. This is because some doctrines will require fact-finding (on questions of access and copying, for instance) or call for extensive inquiry into potentially subjective questions (such as an author's intent, the meaning of an unclear scope of assignment of copyright, or an audience's reception

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305. FED. R. CIV. P. 56.

306. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1913 (2007).

307. *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980).

308. *E.g.*, Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63–64 (2d Cir. 2010); Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir.1983); *see also* 3-12 NIMMER § 12.10.

309. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1247 (11th Cir. 1999).

of a work). Certain doctrines may, in fact, require particular lenses, and in those cases contextualism may be more procedurally burdensome but fairer than formalism. Thus, there are many doctrines in which text-based formalism alone may not render a fair or thoroughly reasoned decision.

For instance, when judges consider issues of joint authorship, works made for hire, and transfers and assignments of copyright, they are very likely to encounter uncertainties that go beyond the four corners of the given works. Disputes may touch on the works' similarities, and to that extent an explicitly formalist lens still makes sense on those issues. But the broader range of issues implicated will include authorial intention, employment conditions, contracts, targeted audience, and so on. Judges adjudicating questions not amenable to text-based formalist approaches may consider intentionalism, institutionalism, contextualism, or some mix of those approaches.[310]

An interesting test case lies in interpretive methods used to determine fair use. The range of possible fair use cases is great, and some uses are much more clearly fair than others.[311] In some cases, the strong speech interests involved in fair use litigation would support a robust formalist approach that allows a judge to determine whether a use was fair on the basis of his or her objective analysis of the works alone. Such a clear, rule-based approach to the doctrine would help defendants with stronger constitutional interests, for example, because their use is for news reporting or is clearly non-commercial.[312] Yet the backdrop of fair use cases shows that, in many of them, formalism could prove to be a poor fit because fair use often requires discovery and resolution of mixed questions of law and fact.[313] The nature and purpose of the use, which drives the first prong of fair use analysis,[314] is sometimes not readily visible under a formalist approach. Sometimes it reveals itself under contextualist analysis (looking at genre or audience reception by a particular interpretive community to which the judge is not privy); sometimes it can be informed by statements of authorial intention, expert opinions, or greater information, generally, all of which lie outside the text.[315] Indeed, fair use is often considered a question of mixed fact and law and his-

310. *See* Yen, *supra* note 10.

311. For instance, to the extent that the use of a work falls within those uses specifically enumerated in the preamble to 17 U.S.C. § 107 (2012), which includes "criticism, comment, news reporting, teaching . . . scholarship, or research," that use will more easily be found to be "fair."

312. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 540 (1985); New York Times Co. v. United States, 403 U.S. 713 (1971).

313. *See* Wright v. Warner Books, Inc., 953 F.2d 731, 735 (2d Cir. 1991).

314. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006) ("Most important to the court's analysis of the first factor is the 'transformative' nature of the work.").

315. *See supra*, Part II.E (discussing the Text/Context axis).

torically tended to be almost exclusively the province of the fact-finder.[316] Quite plainly, the statute itself incorporates a formalist analysis in its asking about the amount of work borrowed, but it just as plainly calls for moving beyond the text to the author's purpose, and to the effect of the work's publication on the relevant market.[317] Because of its sensitivity to findings of fact, fair use may be a poor candidate for a text-based formalist approach designed to cull cases at early stages, using rules and narrowing the scope of judicial inquiry.[318] Finally, an undeniable part of fair use's power lies in its ability to bless what might have looked like infringing cutting-edge technologies and forms of avant-garde expression. When the boundaries between new and old are evolving and uncertain, a rules-based approach without flexibility may not adhere to copyright's larger mandate to promote progress. It may trade clarity for adaptability and fairness. Thus, judges in fair use cases would do well to rely less heavily on text-based formalism, and litigants would do well to expect that many fair use cases will require broadening beyond the narrow scope of the work alone.

Under a text-based formalism, judges would begin with formalist analysis and, only if necessary, proceed to a second tier of more fact-intensive analysis. Intuition could play a role, but only in realms appropriate for intuition alone, say, for instance, in the lay observer standard which is applied by the fact-finder. In the second tier of analysis, judges could select from contextualist, intentionalist, and other approaches to interpreting the works. Such an approach would make clear what methodology was being used and shine light on methodological abdication or unprincipled intuitionism when it occurs. At times, judges simply conclude an issue, offering little other than an announcement with no method apparent or reasoning offered.[319] This has received some attention in the scholarship but could continue to benefit from further theorization.[320]

Perhaps, as a policy matter, the lay observer standard is appropriate for judicial intuitionism when judges, as fact-finders, substitute their judgment for that of the jury. This may be "a decision-making environment," like those in which, as Professor Schauer has written, it may be normatively a good thing for decision makers not to have to

316. Ned Snow, *Fair Use as a Matter of Law*, 89 DENVER U. L. REV. 1 (2012).

317. *See* 17 U.S.C. § 107 (2012).

318. *See* Salinger v. Colting, 641 F. Supp. 2d 250, 255 (S.D.N.Y. 2009) ("In applying the fair use doctrine '[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis' and 'all [of the four factors] are to be explored, and the results weighed together in light of the purposes of copyright.'"), *vacated*, 607 F.3d 68 (2d Cir. 2010) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994)).

319. *See supra* Part II.D.

320. *See* Lemley, *supra* note 40, at 729–30.

give reasons.[321] If giving reasons means giving commitments, then perhaps it would overly constrain future judges to be bound to particular methods in arriving at a conclusion purporting to capture the lay observer's perspective. Yet the problem with the current thinking is that intuitionism does effectively already make a choice. By assuming that they can discern the lay observer's view of the works based on their own intuitive responses to the works before them, judges make a methodological choice. Such judges may not have given a reason, but at some level of generality they have made a kind of commitment. That commitment is to a standard that broadly accords judges the discretion to fill it through intuitive analysis. When one chooses an intuitive methodological approach, one is necessarily choosing it over oth-other approaches.[322]

Because intuitionism is a method (of sorts), but an extremely manipulable one that is difficult to evaluate on appeal, it ought to arise only in cases in which there is a strong argument that other methods are inadequate, from a text-based formalism perspective. A shift to an intuitionist method should not arise out of an outcome-determinative analysis that finds that, for example, a holistic approach is the sole way to arrive at a finding of infringement (as it was in *Roth*, the case that has come to stand for the total concept and feel test).[323] If intuitionism adds depth or nuance to an already robust analysis, it may, perhaps, have some value for judicial reasoning.

In sum, judges are the proper authority to make decisions of interpretive choice in copyright law. When they confront matters of law, judges should adopt formalism unless the parties can rebut the presumption that formalism should operate, either by showing that a question of fact exists that would trigger a shift in method or by showing that formalism will fail to capture some crucial aspect of the case. Nonetheless, judges should acknowledge the limits of formalism; sometimes other methods will be required, as when matters of fact arise or when doctrines arise that inherently require inquiry beyond the text, thus minimizing the utility of formalism. Judges should still be empowered to decide, as a matter of law, that a different interpretive method is required and to acknowledge an occasionally inevitable broadening of scope. With greater guidance of interpretive choice in copyright law steering judicial analysis increasingly toward text-based formalism, outcomes can be more transparent, predictable, consistent,

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321. Schauer, *supra* note 11, at 634 ("[M]any decisionmaking environments eschew the very feature that the conventional picture of legal decisionmaking takes as an essential component of rationality.").

322. Said, *supra* note 28, at 365 ("If one can be said to grasp an image's meaning immediately upon receipt, one necessarily implies that the work's critical reception, its genre, and its author's intention matter less, if at all.").

323. *See supra* Part II.D.

and logical. Perhaps these preceding qualities will also increase fairness.

V. CONCLUSION

Judges in copyright adjudication face numerous, inevitable, and difficult interpretive questions. Specifically, at recurring interpretive pressure points in their analysis judges must decide what interpretive methods to use, just as they would if they were adjudicating legally determinative textual objects such as contracts. Judges focus on certain sources for their interpretive authority, locating their choices somewhere along the Text/Context axis. They then deploy certain interpretive methods, somewhere along the Analysis/Intuition axis. This Article has shown how these choices implicate larger theoretical questions with real legal significance for outcomes. Far from having answered these questions, copyright scholarship has not yet really asked them in any systematic way. Moreover, these interpretive questions are not issues that arise in only a narrow stratum of difficult cases. They arise in all copyright cases, just as interpretive questions can exist in all cases concerning contracts, wills, statutes,[324] and the Constitution; indeed, just as in those other areas, questions of interpretive method are often the hardest issues to decide. In that sense, copyright law is not meaningfully different from these other areas of law.

Copyright law requires judges to act with interpretive precision, but it denies them meaningful, consistent guidance. It also empowers them to act with considerable discretion with regards to the interpretive methods they use. Their decisions as to their interpretive authority are not made on the surface, and thus they are not explicitly reviewed on appeal.

Streamlining and clarifying copyright adjudication through the adoption of defaults to the text over its context, and to analysis over intuition, could serve the values of transparency, predictability, efficiency, and fairness. This would effectively reflect a shift from interpretive chaos to interpretive order, from interpretive standards to interpretive rules. Additional changes could be contemplated in the rules around expert evidence. Many possible solutions exist. At a higher level of abstraction, any systematic change will require a jurisprudentially informed discussion of the desirable scope of judicial authority as well as the tradeoffs of rules versus standards. At a much more immediate level, it requires awareness that what judges *do* with

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324. *See, e.g.*, Greenawalt, *supra* note 274; Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389 (2002).

the works they adjudicate in copyright cases is, like the works themselves, interpretively complex. Accordingly, interpretive choice should be understood to be a key part of the judicial work in copyright cases, thus meriting sustained scholarly attention and greater judicial awareness. Once it is acknowledged that interpretive pressure points are built into copyright law, the question of how judges do — and perhaps how they should — decide among interpretive approaches can rise to the surface. Where they fall along the Text/Context and Analysis/Intuition axes often matters to outcomes and should therefore be subject to the same sorts of rules that govern other factors that affect outcomes. At present, judges possess great discretion over their interpretive method selection, and the lack of any constraints mandating transparency or guiding their decision-making creates inconsistency and unpredictability. Accordingly, this Article addressed the benefits of a turn to text-based adjudication and analysis rather than intuition in the form of a two-tiered analysis. Under this proposal, judges would begin with text-based formalism to review issues arising as a matter of law, and then only move beyond formalism in cases where such an expansion is warranted and can be argued by the parties or decided and justified by a judge.