

IN THE LANGUAGE OF PICTURES* : HOW COPYRIGHT LAW FAILS TO ADEQUATELY ACCOUNT FOR PHOTOGRAPHY

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* Roy E. Stryker, discussing documentary photography, said:

The documentary attitude is not a denial of the plastic elements which must remain essential criteria in any work. It merely gives these elements limitation and direction. Thus composition . . . [is] made to serve an end: to speak, as eloquently as possible, of the thing to be said in the language of pictures.

BEAUMONT NEWHALL, *THE HISTORY OF PHOTOGRAPHY FROM 1839 TO THE PRESENT DAY* 149 (4th rev. ed. 1964) (quoting ROY E. STRYKER, *THE COMPLETE PHOTOGRAPHER* 1364–71 (1942)).

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I. INTRODUCTION

Photography is a unique medium. It is simultaneously an art and a science. And it pushes the boundaries of both disciplines: it initiated nothing short of a revolution in the visual arts; as a science, it is perhaps the “most valuable invention since that of the printing press.”¹ But this blend of art and science, intriguing as it may be, also produces problems. In fact, in the late 1800s, when photography was in its infancy, the art establishment summarily rejected it as an art form. Most artists simply could not accept the idea that photographs deserved the same esteem as paintings, drawings, prints, and sculptures. Scientists were similarly confounded. They delighted in the physics and chemistry of photography, in the problems of negatives and positives, and in the quest for a permanently-fixed image, but they were largely incapable of attending to photography’s aesthetic dimension. In the words of an unidentified scientist of the era, “[p]hotography would be a most interesting subject, were it not for the pictures.”²

Today, the scientific problems photography faced in its early years have been solved. The tensions between photography’s artistic and scientific attributes have been dissipated. And the controversy over photography as a fine art has been put to rest. Or has it? Is it possible that some of the prejudices against photography as an art form persist to this day? That they infect our application of copyright principles to original works that happen to be photographs? This Article explores those questions.

It begins with a little history. At the turn of the last century, a philosophical battle raged between those who viewed photography as an art form and those who viewed it as something more mundane. The proponents of photography-as-art eventually won the battle, but their victory was, at first, Pyrrhic. It was based on a “pictorial” ethic, a belief that photography was an art form only insofar as it resembled the traditional arts.³ In other words, photography was art only insofar as it was *un*-photographic. Pictorialism, thus, had its limitations. And some photographers recognized that fact. They

¹ HELMUT GERNSHEIM & ALISON GERNSHEIM, *THE HISTORY OF PHOTOGRAPHY* 11 (1969).

² *Id.*

³ *See infra* Part II.B.

advocated for “straight photography,” an aesthetic that was true to the camera’s distinctive qualities and, in particular, its realism. Today, straight photography is the dominant photographic aesthetic. Unfortunately, copyright law has not fully embraced it.

In 1865, Congress expressly listed photographs in the Copyright Act.⁴ When litigants challenged that legislation some twenty years later, they did so on the grounds that machines produced photographs, not human beings, and photographs, therefore, lacked originality.⁵ The Supreme Court disagreed, declaring that photographs were authored by people, that they, in other words, had originators, and that they accordingly satisfied the Constitution’s originality requirement.⁶ The Court based its decision on the then-prevailing pictorial ethic: photographs were original because photographers used models, elicited expressions, posed sitters, staged backgrounds, and otherwise altered reality.⁷ Subsequently, courts declared all sorts of photographs, both pictorial and straight, original.⁸ Now, in fact, almost any photograph, save those that deliberately attempt exact duplication of copyrighted works, can satisfy the originality requirement.⁹

A pictorial ethic has, however, lingered in other areas of copyright law.¹⁰ It appears in particular in the fact-expression dichotomy, a doctrine requiring that facts be free for the taking, that copyright laws protect only the *expression* of facts and not the facts themselves.¹¹ This doctrine emanates from the Copyright Act’s ultimate goal: to promote the progress of science and the arts. Scientists and artists build on those who come before them.¹² Thus, allowing scientists and artists to freely take facts from their predecessors promotes the public good; the fact-expression dichotomy is crucial to the balance the Copyright Act strikes between rewarding and promoting innovation.¹³

But the fact-expression dichotomy, as applied to straight photography, has several shortcomings. First, it uses rules designed for literature on a medium that is fundamentally different from literature. Take, for example, an academic paper. The individual words may represent unprotected facts, but the phrasing of those words is copyrightable expression. In the face of an

⁴ See *infra* Part III.

⁵ See *infra* Part III.A.

⁶ See *infra* Part III.A.

⁷ See *infra* Part III.A.

⁸ See *infra* Part III.B.

⁹ See *infra* Part III.B.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part IV.

¹² See *infra* Part IV.

¹³ See *infra* Part IV.

infringement claim, it is a relatively simple process to distinguish words from phrasing. But, as many courts have noted, the exercise is not so simple in the case of a straight photograph. Straight photographs' subject matter, after all, is factual, and the question where the facts end and the expression begins is a thorny one. In fact, a photograph's facts and expression are, arguably, inseparably wed. Visual facts are not discrete packages, like facts expressed in words.

Second, the fact-expression dichotomy privileges pictorial photographs over straight ones. This occurs most commonly in the context of the fair use defense. Courts applying the second fair use factor—"the nature of the copyrighted work"¹⁴—reflexively deem pictorial photographs creative and straight ones factual. They do not typically acknowledge that works can be both factual and creative. This means that straight photographs automatically receive less protection from copying than pictorial photographs.

Finally, courts often use the fact-expression dichotomy clumsily, as a proxy for public-interest rationales. They designate a straight photograph factual even though it displays all of the same characteristics that would, outside the public-interest context, result in a finding of creativity. In other words, they rely on a legal fiction. They do so because they recognize that the defendant should be allowed to disseminate the copyrighted work, often because it is newsworthy, but the copyright laws have not given them the tools to express that rationale directly.

Ultimately, the fact-expression dichotomy provides limited copyright protection for straight photographs, which are, by today's standards, highly creative and valuable to the public discourse. The courts need a more-principled approach. This Article attempts to present one. Part II provides historical context, describing early arguments for and against photography as a fine art, explaining how photography gained legitimacy as an art form through pictorialism, and discussing the ultimate shift to straight photography. Part III provides legal context, describing how the Supreme Court used a pictorialist rationale, early on, to hold that photographs could meet the Copyright Act's originality requirement. Part IV describes the problem: how today, in an era where a straight photographic aesthetic predominates, pictorialism still influences courts' rationales.

Part V presents a solution. It suggests that courts evaluating straight photographs use a "compositional-equivalence" test to isolate facts from expression. If a secondary work duplicates a copyrighted work's composition—if, stated differently, there is compositional equivalence between the two works—the defendant has taken protected expression. Part V also suggests that, when it comes to news photographs or photographs with potentially high public-interest value, there are two situations in which the public's interest should trump the copyright holder's interest: when a photograph has become

¹⁴ 17 U.S.C. § 107(2) (2006).

“evidentiary in nature” and when a photograph contains “demonstrative expression.”

The first situation, where a photograph has become evidentiary in nature, occurs when a photograph helps prove the truth of a matter, important to the public, that is in controversy. For example, the infamous photograph of former U.S. Senator Gary Hart with Donna Rice on his lap suggested that allegations of Hart’s infidelity, which he had vehemently denied, were more likely true than not. In addition, the photograph was one-of-a-kind: it was, essentially, the only proof the public had at its disposal. The second situation, where a photograph contains demonstrative expression, occurs when a photograph’s expressive elements, themselves, have become controversial or are of interest to the public for some reason other than their aesthetic appeal. When, for instance, *Time Magazine* ran a mug shot of O.J. Simpson on its cover, with his complexion artificially darkened, the public was interested in the photograph’s aesthetics not because of aesthetic appeal, per se, but because the aesthetics were demonstrative of something other than artistic expression, i.e., racism.

In both situations, the public should probably have access to the photographs in order to adequately analyze the controversies—not, as current law would have it, because the photographs lack expression. The compositional-equivalence test, and the tests for evidentiary status and demonstrative expression, would enable courts to approach straight photographs in a more-principled, more-modern manner. They also seem to explain many of the precedents in the straight-photography arena better than the rules the courts are purporting to use.

II. PHOTOGRAPHY’S BATTLE FOR FINE-ARTS STATUS

This Part provides historical background that will enable the reader to fully appreciate the arguments presented later in the paper. It describes the public’s initial reaction to the invention of photography, and how the public at first rejected this new vocation as an art form, and gives insight into why the law has struggled to account for photography as an expressive medium.

Although human beings have been acquainted with certain fundamental photographic principles, such as the camera-obscura phenomenon,¹⁵ for thousands of years,¹⁶ it was not until 1839 that an artist, Louis Jacques Mande

¹⁵ Such a camera consists, in its simplest form, of a room with a small hole, or “aperture,” in the wall. Sunlight passing through the aperture projects the view outside the room, upside-down, onto the opposite wall. BARBARA LONDON UPTON & JOHN UPTON, PHOTOGRAPHY 350 (3d ed. 1985); see Anonymous, *Diagram of Camera Obscura* (drawing), available at http://lashp.files.wordpress.com/2011/01/camera_obscura_1.jpg.

¹⁶ Many ancient scholars, all across the globe, wrote about the camera obscura. One of the earliest to do so was the Greek scholar, Aristotle. See GERNSEIM & GERNSEIM, *supra* note 1, at 17. In 1038, Middle-Eastern scholar Hassan ibn Hassan (also known as “Ibn Al-Haitham” and

Daguerre,¹⁷ presented the world with the first commercially viable photograph. He called his invention the “daguerreotype.”¹⁸ It was extremely lifelike, with realistic gradations in tone. Its chiaroscuro, luminosity, tonal range, and detail were impressive, even by today’s standards.¹⁹

And the art world took notice. In fact, painters and engravers feared that the new technology would render their talents obsolete.²⁰ Paul Delaroche, a popular French painter of the era, remarked, upon seeing a daguerreotype, that

“Alhazen”) wrote about the camera obscura in his treatise, *Perspectiva*. *Id.* at 13, 17. He provided perhaps the first truly clear and scientifically-accurate written description of the device. *Id.* at 17. Notably, however, he did not give any indication that he was presenting novel information in terms of the phenomenon itself, suggesting, as stated in the text, that ancient peoples were quite familiar with it already. *Id.*

¹⁷ It is important to note, in light of the camera’s dual nature as an instrument of science and art, that both scientists and artists contributed to its invention. In 1826, for example, the French inventor, Nicéphore Niépce became the first person to permanently fix a photograph taken from nature. *See, e.g., id.* at 13–14, 57–58. This was the first photograph taken from nature, as opposed to a photograph taken to reproduce an engraving. *See id.* at 58. It was the view outside Niépce’s window. JAY BOCHNER, AN AMERICAN LENS, SCENES FROM ALFRED STIEGLITZ’S NEW YORK SECESSION 2 (2005); *see also* Joseph Nicéphore Niépce, *View from the Window at Le Gras* (circa 1826) (photograph), available at <http://cool.conservation-us.org/byorg/abbey/an/an26/an26-3/an26-307.html>. Some historians date the first photograph (by the same photographer) at 1824; the better view, however, is that Niépce succeeded in producing the first true photograph in 1826. GERNSHEIM & GERNSHEIM, *supra* note 3, at 57–59. The 1826 photograph was, in contrast to previous attempts, permanently-fixed; in other words, it could be exposed to light without ever darkening. UPTON & UPTON, *supra* note 15, at 351.

¹⁸ GERNSHEIM & GERNSHEIM, *supra* note 1, at 67; *see also* Louis-Jacques-Mandé Daguerre, *Still Life* (1837) (daguerreotype), available at <http://kids.britannica.com/comptons/art-3117/Still-Life-daguerreotype-by-Louis-Jacques-Mande-Daguerre-1837-in>.

¹⁹ *See* UPTON & UPTON, *supra* note 15, at 352. However, developing and fixing daguerreotypes required highly-toxic chemicals. *Id.* Moreover, daguerreotypes were difficult to view. *Id.* They were copper plates coated in silver that was mirror-like. *Id.* Thus, the “image could be seen clearly only from certain angles.” *Id.* In addition, there was no way to easily produce copies. *Id.* Less than three weeks after the daguerreotype’s debut, William Henry Fox Talbot, an English amateur scientist, demonstrated a technique he called the “calotype,” which had several advantages over the daguerreotype. *Id.* at 354. In particular, calotypes involved a negative-positive process and were, therefore, reproducible. *Id.* This was a necessary precursor to modern photographic technology. Unfortunately, Talbot’s invention did not take off with the public, probably because the calotype’s image quality struck many viewers as inferior to that of the daguerreotype. *Id.* Nevertheless, although Talbot would never know it, his invention “became the basis of modern photographic chemistry.” *Id.* Of course, the switch to digital photography was a radical departure from older technologies. Digital technology converts light into binary digits and circumvents much of the developing processes, for film and prints, that traditional technology required. TODD GUSTAVSON, CAMERA 340 (2009). Kodak produced the first digital camera surprisingly early, in-house, in 1975. *Id.* at 338. It offered the first digital, single-lens-reflex camera for professionals in 1991, and the first more-simple digital camera for ordinary consumers in 1997. *Id.* at 340, 342.

²⁰ *See* GERNSHEIM & GERNSHEIM, *supra* note 1, at 70.

“painting is dead!”²¹ But photography had a long way to go to stand side-by-side as an equal with painting and other fine arts. In America, especially, the public refused for many years to view photography as an art form.

Alfred Stieglitz was the man who changed all of this. Today, he is probably best known as Georgia O’Keeffe’s husband,²² but, in the early 1900s, he “was a figure of mythic proportions.”²³ He was “a giant in the art world.”²⁴ And he was the single most important warrior²⁵ in the battle between those who viewed photography as merely a utilitarian endeavor and those who saw its potential as art. One commentator even suggests that Stieglitz had more impact on American art than anyone before or since:

Alfred Stieglitz . . . is perhaps the most important figure in the history of visual arts in America. That is certainly not to say that he was the greatest artist America has ever produced. Rather, through his many roles—as a great photographer, as a discoverer and promoter of photographers and of artists in other media, and as a publisher, patron, and collector—he had a greater impact on American art than any other person has had.²⁶

As this commentator aptly put it, Stieglitz’s impact on American art was far-reaching and cannot be underestimated. It extended well beyond photography and into painting, sculpture, and all kinds of modern art. But, for purposes of this paper, it is Stieglitz’s role in the debate about photography as an art form that is most important. The next two Sections will discuss that debate, and how Stieglitz figured into it, in more detail.

²¹ *Id.*

²² Stieglitz was significantly older than O’Keeffe. Thus, he was in his prime of life and at the height of his fame before O’Keeffe had become the household name that she is today; in other words, her more-recent and perhaps more-lasting fame has eclipsed his.

²³ ROXANA ROBINSON, *GEORGIA O’KEEFFE: A LIFE* 140 (1990).

²⁴ *Id.*

²⁵ Groups rarely owe credit for their accomplishments to one individual, but the Photo-Secession—a group devoted to elevating photography to a fine art—owes it to Stieglitz. He was the Photo-Secession’s “unchallenged motivating force,” and he supplied its ideological framework. His labor, his magnetic personality, and his networking all made the Photo-Secession a powerful force in the art world. He had his faults, but must be credited for nearly single-handedly raising American photography within a very short time period to a position of international prominence such that it not only equaled but exceeded developments in Europe. WILLIAM INNES HOMER, *ALFRED STIEGLITZ AND THE PHOTO-SECESSION* 160 (1983).

²⁶ ALFRED STIEGLITZ, *STIEGLITZ ON PHOTOGRAPHY: HIS SELECTED ESSAYS AND NOTES* ix (Richard Whelan 2000).

A. *The Arguments Against Photography as a Fine Art*

In its early days, photography struck many people as not quite science and not quite art, and as inferior to both: “a handmaiden to science and art.”²⁷ One group of critics declared that photography had no hope of “resulting in works which could . . . ever be compared with those works which are the fruits of intelligence and the study of art.”²⁸ Another stated glibly that “[p]hotography as a fad is well-nigh on its last legs, thanks principally to the bicycle craze.”²⁹ Many people believed that a bad painting was more art than a good photograph.³⁰ An anecdote involving Stieglitz sums up the attitude: when Stieglitz suggested to Luigi Palma di Cesnola, an antiquities collector, that photographs could be art, “Cesnola gasped, ‘Mr. Stieglitz, you won’t insist that a photograph can possibly be a work of art!’”³¹

Many of the people who held these views were, themselves, artists and art lovers. This is not as surprising as it may, at first blush, seem. For centuries, a painter’s goal had been to reproduce reality. But the camera could reproduce reality better than a painting, even in the hands of an amateur; thus, painters and their patrons were threatened by the new device.³² French poet Charles Baudelaire worried, in fact, that photography would destroy the visual arts: “By invading the territories of art, this industry has become art’s most mortal enemy. If photography is allowed to supplement art in some of its functions[,] it will soon have supplanted or corrupted it altogether.”³³ In short, the camera scared traditionalists, and they argued, either out of earnestly held beliefs or as a justification for their attacks on the new discipline, that it was industrial or “soulless” instead of art.³⁴

Circumstances did not help matters. By the late 1800s, many schools taught photography, but their clientele was engineers, military personnel,

²⁷ GERNSEIM & GERNSEIM, *supra* note 1, at 456, 459 (quoting PETER HENRY EMERSON, THE DEATH OF NATURALISTIC PHOTOGRAPHY (1890) (referring to Emerson’s own, earlier book, *Naturalistic Photography*, in which he had advocated passionately for photography as a fine art)).

²⁸ UPTON & UPTON, *supra* note 15, at 372.

²⁹ Alfred Stieglitz, *The Hand Camera—Its Present Importance*, in PHOTOGRAPHY IN PRINT: WRITINGS FROM 1816 TO THE PRESENT 214 (Vicki Goldberg ed. 1988).

³⁰ BOCHNER, *supra* note 17, at 26.

³¹ ROBINSON, *supra* note 23, at 63 (quoting DOROTHY NORMAN, ALFRED STIEGLITZ: AN AMERICAN SEER 67 (1973)). Cesnola was not solely an antiquities collector; he was also, at one time or another, a soldier, amateur archaeologist, ambassador, and teacher.

³² See *id.* at 63–64. Of course, photography could not, in its early days, produce full-color images, but the threat to painting existed nonetheless, in part because many photographers hand-colored their prints.

³³ GERNSEIM & GERNSEIM, *supra* note 1, at 243 (quoting Baudelaire’s review of the Salon of 1859).

³⁴ *Id.* at 243, 248.

architects, physicians, and other science-oriented professionals.³⁵ Moreover, most portraitists were interested mainly in making a living; they had never been formally educated in their discipline, let alone in the more-established arts.³⁶ Thus, their work was not very high-quality.³⁷ Finally, many people were accustomed to photographs that were purely scientific or commercial, showing such things as ruins, antiquities, and landscapes.³⁸ They saw photographs as a means of visual reporting, not as a means of visual expression.³⁹

B. The Arguments for Photography as a Fine Art

Those who saw photography as expressive and artistic probably had the better case, but they struggled to find the most persuasive argument to advance their position. They initially argued, with great success, that pictorial photographs, those that looked like paintings, were art. Eventually, however, after recognizing various shortcomings in the pictorial ethic, they argued that straight photographs—those that were true to the mechanics of the camera, to its lens and film and *realism*—those that did not seek to copy the aesthetics of another art form like painting—were art. This attitudinal shift from a pictorial ethic to an ethic favoring straight photography is relevant to the present-day legal regime governing photography because the law never really adopted the shift: the courts have not quite figured out how to accommodate straight photographs as highly-expressive works entitled to copyright protection as stringent as that afforded to pictorial photographs.

1. pictorialism: attempting to imitate the traditional fine arts

At first, those who believed that photographs could be art homed in on an argument based on “mimesis,” the imitative representation of the natural world. At first, this argument makes sense. After all, photography’s principal attribute is its ability to accurately reflect reality.

The proponents of this position did not, however, base their arguments on photography’s unique attributes; rather, they looked at the established fine arts and at painting in particular. Paintings at that time were largely mimetic: they were more-or-less realistic in their depiction of people and scenes. Many photographers argued that photographs should resemble paintings. If they did, then photographers could argue that photographs were art because they looked like art.

³⁵ *Id.* at 231.

³⁶ *See id.* at 126.

³⁷ *Id.*

³⁸ *See id.* at 126–27.

³⁹ *See* ROBERT DOTY, PHOTO-SECESSION: STIEGLITZ AND THE FINE-ART MOVEMENT IN PHOTOGRAPHY 57 (reprint ed., Dover Publ’ns, 1978) (1960).

This position was variously termed “High Art photography”⁴⁰ and “pictorialism.”⁴¹ Admittedly, it went a long way toward establishing photography as an art form.⁴² But it had its drawbacks. For one thing, the paintings of the day were not really as naturalistic as people supposed. Many of them were allegorical. They told stories. They “illustrate[d] scenes from literature, drama, and history.”⁴³ They were contrived, not candid, representations of life. Painters used professional models, instead of real subjects—even for scenes of supposedly everyday people. Such scenes were sentimental and idealized, and “genuine country people were [deemed] . . . too clumsy”⁴⁴ to use as sitters. In short, painters were striving for, and making claims to, naturalism, but faking it.⁴⁵

And the pictorialists followed suit. Henry Peach Robinson was the most influential pictorialist.⁴⁶ He urged photographers to arrange their subjects, to tell stories, and to convey morals; he also advocated for the hand-manipulation of negatives and photographs.⁴⁷ Photographers acceded. They presented sentimental views of daily life using models, costumes, and painted backdrops.⁴⁸ They manipulated their photographs to look like paintings, by using techniques such as composite printing, where multiple negatives are combined to give the appearance of a single photograph,⁴⁹ and by adding brush strokes to create a painting-like surface texture.

Pictorial photography was, essentially, “a conscious emulation of pictures made by the brush, the pencil, or the etcher’s burin.”⁵⁰ The pictorialists patterned their aesthetics after those employed by the most-venerated painters of the era.⁵¹ In fact, “[n]othing delighted [the pictorialists] more than the exclamation, ‘By Jove, that doesn’t look a bit like a photograph!’”⁵²

Many pictorialists even abandoned one of the photograph’s main attributes—its potential for clarity—in favor of hazy, dream-like images.⁵³

⁴⁰ See, e.g., GERNSHEIM & GERNSHEIM, *supra* note 1, at 456.

⁴¹ See, e.g., UPTON & UPTON, *supra* note 15, at 374.

⁴² See HOMER, *supra* note 25, at 155.

⁴³ GERNSHEIM & GERNSHEIM, *supra* note 1, at 244 (discussing photographs that imitate allegorical painting).

⁴⁴ *Id.* at 248.

⁴⁵ See *id.* at 248–50.

⁴⁶ See HOMER, *supra* note 25, at 9.

⁴⁷ See *id.*

⁴⁸ UPTON & UPTON, *supra* note 15, at 373; see also BOCHNER, *supra* note 17, at 2.

⁴⁹ UPTON & UPTON, *supra* note 15, at 373, 376.

⁵⁰ DOTY, *supra* note 39, at 28.

⁵¹ *Id.*

⁵² GERNSHEIM & GERNSHEIM, *supra* note 1, at 463.

⁵³ See DOTY, *supra* note 39, at 28.

They wanted to “remove the sense of the mechanical” in their artwork and undermine the camera’s “just-about-perfect rendering.”⁵⁴ If people were reluctant to see photographs as art because of their technical refinement (e.g., a perfectly detailed representation of Egyptian ruins), then photographers would give them something else. They would not merely record facts. They would express themselves in a painterly fashion. And it worked: by 1910, many people viewed photography as an art form.⁵⁵

2. straight photography: developing a true photographic aesthetic

At first, “pictorial” simply meant photographs that were art rather than document; it was a way of differentiating art from non-art.⁵⁶ Thus, Stieglitz—ever the advocate for photography as art—initially embraced pictorialism. One author even describes him as the movement’s “leader and catalyst.”⁵⁷

Eventually, however, he and others began to see pictorialism’s limitations. Pictorialism posits that photographs are artistic only insofar as they look *un*-photographic. The more forward-thinking photographers saw the error and irony in that position. They began to experiment with what they called “straight photography,” something that “was more honest, more true to the clear optical image that the camera was naturally inclined to produce. . . . cherishing . . . the very characteristics of the medium that did not resemble painting.”⁵⁸ They rejected handwork, such as retouching and composite printing, in favor of images that accurately recorded visual facts.⁵⁹ They began to build a new aesthetic geared specifically to the photographic medium.⁶⁰ The term “pictorial” became a derogatory term, describing “fawning attempts to recreate the . . . day’s conventional painting,”⁶¹ akin to what we might refer to today as “kitsch.”

Photographers who adopted a straight-photography ethic include such greats as Ansel Adams, Imogen Cunningham, and Edward Weston.⁶² Stieglitz, though, was unquestionably the movement’s leader. And his principal vehicle for promoting straight photography was the Photo-Secession, “a select body of American photographers who rocked the foundations of the conservative

⁵⁴ BOCHNER, *supra* note 17.

⁵⁵ HOMER, *supra* note 25, at 155.

⁵⁶ See BOCHNER, *supra* note 17, at 39, 88.

⁵⁷ UPTON & UPTON, *supra* note 15, at 375.

⁵⁸ HOMER, *supra* note 25, at 155.

⁵⁹ *Id.* at 9–11.

⁶⁰ *Id.*

⁶¹ BOCHNER, *supra* note 17, at 39.

⁶² UPTON & UPTON, *supra* note 15, at 376.

branch of their discipline.”⁶³ Stieglitz created the group in 1902⁶⁴ as a way of rebelling against a pictorialist aesthetic rooted in romantic, Victorian-era painting.⁶⁵ He and other Secessionists wanted photography to be considered an art form, but they wanted it to be considered such on its own terms. They did not want to merely replicate aesthetics that were “not . . . intrinsically photographic aesthetics.”⁶⁶ They wanted “an authenticity” that was true to “their machinery of lens and film.”⁶⁷ They realized that photography’s “chief contribution to art lies in its realism.”⁶⁸

3. straight photography and the moment of meaningfulness

One way that Stieglitz and the Photo-Secession promoted straight photography was to organize shows that featured the style. In 1910, for example, they organized a landmark show in Buffalo, New York, displaying photography alongside avant-garde painting.⁶⁹ The show critiqued both

⁶³ HOMER, *supra* note 25, at page 1 of unnumbered preface. Members of the Photo-Secession included Gertrude Kasebier, Minor White, Joseph Keiley, Edward Steichen, Frank Eugene, and Alvin Langdon Coburn, along with Stieglitz. *Id.* at 57. The Photo-Secession’s official publication and mouthpiece was *Camera Work*. *Id.* at 111–12. The name “Photo-Secession” came from two European groups, the British “Linked Ring” and the German “Secession.” *See id.* at 32–33, 52. Both groups saw themselves as seceding from the art establishment, as rejecting the conventions of the period, including, for the non-photographic arts, naturalism and representation. For Stieglitz, “[t]he idea of a radical group of aesthetes was highly appealing, and in choosing the name [Photo-Secession, he] . . . established his alliance with the revolutionary elements in the international art world.” ROBINSON, *supra* note 23, at 65. Another reason Stieglitz had for creating the Photo-Secession was that he wanted to wrench control of the American photographic movement from his Boston-based rival, F. Holland Day, and to keep the center of its activities in New York City. HOMER, *supra* note 25, at 42.

⁶⁴ HOMER, *supra* note 25, at page 1 of unnumbered preface.

⁶⁵ BOCHNER, *supra* note 17, at 87.

⁶⁶ *Id.*

⁶⁷ *Id.* at 40.

⁶⁸ *See* GERNSHEIM & GERNSHEIM, *supra* note 1, at 244.

⁶⁹ The camera was fomenting a revolution in the fine arts: “[p]aradoxically, the availability of a breathtakingly precise reproduction of visual reality had rendered it valueless. . . . [S]omething more than literal realism was required of” the established arts. ROBINSON, *supra* note 23, at 64. Enter avant-garde, or modern, art. Artists working in this tradition abandoned mimesis in favor of abstraction. HOMER, *supra* note 25, at 155. At the same time the Photo-Secession was developing a straight-photography ethic, avant-garde artists, working in the traditional media of painting, drawing, printmaking, and sculpture, were embracing the “unphotographic,” DOTY, *supra* note 39, at 50, or “antiphotographic,” BOCHNER, *supra* note 17, at 79, in their work. They began to abstract reality, by, among other things, flattening or fracturing it, heightening its colors and textures, and even by playing with the idea of a multi-dimensional world. Stieglitz loved it. And he all but introduced the genre to America. He owned a gallery, “The Little Galleries of the Photo-Secession,” in New York City. HOMER, *supra* note 25, at 118. It would be hard to exaggerate its importance. It was the first American venue for figures who are, simply,

representational painting and pictorial photography which sought to copy such painting. It also presented photographs in a single line, one artist at a time, showing the artist's evolution. By showing that "a photographer could have her own style, the myth of the objective, inexpressive camera was neatly exploded."⁷⁰

Stieglitz himself had "extraordinary skill with the camera."⁷¹ But his excellence did not come from showiness, from some sort of contrived, self-conscious attempt to create "art." On the contrary, he produced simple, honest images that were true to the photographic medium. He showed the world as it was, without romanticizing it. To do that, and to do it well, he trained himself to take pictures "at a precise moment of meaningfulness."⁷²

In *Winter—Fifth Avenue*, for example, Stieglitz photographed a horse-drawn carriage and its driver on a snowy day in New York City.⁷³ Carriage tracks crisscross the snow-covered street. Snow falls directionally; one can sense the wind driving it hard, not only downward, but laterally as well. The driver is frozen in time, his hand raised. It is one of the first action shots:

The subject has not posed, has not already been for some time in the attitude that will be the image; it is one of the first times an exposure has been devoted so clearly to conveying the flow of changing event, the stilled moment culled from change in order to convey the change. The anecdote, true or false, of waiting in the storm for three hours for this image to compose itself, reminds us that, for Stieglitz, only one special twenty-fifth of a second in particular would tell the story of the flow as he knew he saw it.⁷⁴

luminaries in the art world: Henri Matisse, Auguste Rodin, Henri de Toulouse-Lautrec, Paul Cezanne, Henri Rousseau, Pierre-Auguste Renoir, Edouard Manet, Pablo Picasso, Constantine Brancusi, Georges Braque, and Georgia O'Keeffe. BOCHNER, *supra* note 17, at 50, 62; DOTY, *supra* note 39, at 45, 52, 58; ROBINSON, *supra* note 23, at 103.

⁷⁰ BOCHNER, *supra* note 17, at 43.

⁷¹ HOMER, *supra* note 25, at page 1 of unnumbered preface.

⁷² BOCHNER, *supra* note 17, at 155; *see also* HOMER, *supra* note 25, at 155 (discussing how a photographer must "skillfully seize[] 'pictures' from the infinite possibilities offered by the visual world").

⁷³ Alfred Stieglitz, *Winter—Fifth Avenue* (1893) (photograph), available at http://www.moma.org/collection/browse_results.php?criteria=O%3AAD%3AE%3A5664&page_number=4&template_id=1&sort_order=1.

⁷⁴ BOCHNER, *supra* note 17, at 13. Another author describes Stieglitz's *The Rag Picker* similarly, as a meaningful moment skillfully culled from the flow of time: "[A] moment later, the poignant action would have passed." HOMER, *supra* note 25, at 19. For a reproduction of the photograph in question, see Stieglitz, *supra* 73.

The same could be said for *The Steerage*, Stieglitz's signature piece, taken in 1907,⁷⁵ arguably one of the most important photographs of the twentieth century. It, like *Winter—Fifth Avenue*, culls a precise, meaningful moment from the flow of time. It depicts a ship's steerage section, housing the lowest-paying passengers. Stieglitz memorialized the scene not as a documentarian, but as an artist:

There were men and women and children on the lower deck of the steerage. . . . On the upper deck, looking over the railing, there was a young man with a straw hat. The shape of the hat was round. He was watching the men and women and children on the lower steerage deck A round straw hat, the [smokestack] leaning left, the stairway leaning right, the white drawbridge with its railings made of circular chains—white suspenders crossing on the back of a man in the steerage below, round shapes of iron machinery, a mast cutting into the sky, making a triangular shape. I stood spellbound for a while, looking and looking. Could I photograph what I felt . . . ? I saw shapes related to each other. I saw a picture of shapes and underlying that the feeling I had about life.⁷⁶

He saw himself working firmly within the tradition of other fine arts, such as painting:

And as I was deciding, would I try to put down this seemingly new vision that held me—people, the common people, the feeling of ship and ocean and sky and the feeling of release that I was away from the mob called the rich—Rembrandt came into my mind and I wondered would he have felt as I was feeling.⁷⁷

He only had one plate with him, only one opportunity to take the photograph that had planted itself in his mind's eye. He rushed to his cabin, gathered his equipment, and returned to the bow. Miraculously, he found his picture intact: “[I was] out of breath, wondering whether the man with the straw hat had moved or not. If he had, the picture I had seen would no longer be. The relationship of shapes as I wanted them would have been disturbed and the

⁷⁵ See, e.g., DOTY, *supra* note 39, at 119 (presenting the photograph with a 1907 date). Stieglitz did not publish *The Steerage* until 1911, in *Camera Work*. KATHERINE HOFFMAN, STIEGLITZ: A BEGINNING LIGHT 236 (2004). For a reproduction of the photograph in question, see Alfred Stieglitz, *The Steerage* (1907) (photograph), available at <http://www.metmuseum.org/toah/works-of-art/33.43.419>.

⁷⁶ HOFFMAN, *supra* note 75, at 233–34.

⁷⁷ *Id.* at 234.

picture lost.”⁷⁸ Thankfully, no one had changed position and Stieglitz was able to give the world a new photographic masterpiece.

III. PHOTOGRAPHY AND ORIGINALITY: A PICTORIALIST RATIONALE EVOLVES INTO A STANDARD THAT “ALMOST ANY” PHOTOGRAPH CAN SATISFY

Photography’s ephemeral qualities confounded the legal community in much the same way that they confounded the art world. This Part therefore discusses the legal response to the invention of photography. It starts with the original Copyright Act itself. Then, it examines among other cases, the 1884 *Burrow-Giles*⁷⁹ and the 1921 *Jewelers’ Circular*⁸⁰ cases, which both analyzed whether photographs could satisfy the Constitution’s originality requirement. It ends with a discussion of the current state of the originality requirement as it applies to photographs.

The Constitution directs Congress, in Article I, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸¹ Congress obeyed this directive in 1790, shortly after the Constitution’s ratification, passing the first Copyright Act.⁸²

That Act, not surprisingly, did not provide for copyrighting photographs, as the camera had not yet been invented. In 1826, however, Nicéphore Niépce produced the first true photograph.⁸³ Thus, Congress had an opportunity, at least in theory, to address photography in its 1831 general revision of the Act, but it did not do so.⁸⁴ This may have been because many people still saw photography as a science rather than as an art. At the time, in fact, patents and licenses were applied not only to the camera and ancillary chemical processes, but to photographs as well.⁸⁵ In 1865, however, Congress

⁷⁸ *Id.*

⁷⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

⁸⁰ *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921), *aff’d* 281 F. 83 (2d Cir. 1922).

⁸¹ U.S. CONST. art. I, § 8, cl. 8.

⁸² *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

⁸³ See, e.g., BOCHNER, *supra* note 17; GERNSEIM & GERNSEIM, *supra* note 1, at 13–14, 58; NEWHALL, *supra* note n.*, at 16; UPTON & UPTON, *supra* note 15, at 351. This photograph was crude and blurry in comparison to the later daguerreotype. Compare Niépce, *supra* note 17, with Daguerre, *supra* note 18.

⁸⁴ See 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1-23 (2009). Congress could have also added photography through amendment; it amended various portions of the Act in 1834, 1846, 1855, 1856, 1859, and 1861. See *id.* §§ 1:24–1:29.

⁸⁵ See, e.g., GERNSEIM & GERNSEIM, *supra* note 1, at 162 (describing agreement forbidding photographer from giving away prints without first obtaining permission).

did extend copyright protection to photographs.⁸⁶ It had been thirty-nine years since Niépce took the first photograph and twenty-six years since Daguerre gave the world his daguerreotype.

A. *Burrow-Giles Introduces a Pictorialist Ethic into the Originality Inquiry*

In 1884, almost twenty years later, the Supreme Court entertained a challenge to that legislation. The question was whether photographs contain sufficient originality to be subject to copyright. The Copyright Act did not explicitly mention originality, but most courts understood that an originality requirement flowed, necessarily, from the Constitution's use of the word "author"; an author means an "originator" and, hence, originality.⁸⁷ This originality requirement is "the *sine qua non* of copyright."⁸⁸ Courts have described it as "the very 'premise'" and a "bedrock principle" of copyright law.⁸⁹

The case that challenged photographs' copyrightability was *Burrow-Giles Lithographic Co. v. Sarony*.⁹⁰ The plaintiff was Napoleon Sarony, a professional photographer. He had photographed writer and poet Oscar Wilde.⁹¹ The defendant, Burrow-Giles Lithographic Co., had reproduced Sarony's copyrighted photograph, without permission, selling some 85,000 copies of it.⁹²

Burrow-Giles argued that it could not be liable for copyright infringement because photographs were not copyrightable, and that Congress had erred in legislating otherwise.⁹³ It relied on Article I of the Constitution, asserting that "a photograph is [neither] a writing nor the production of an author."⁹⁴ It took the same position as those who refused to see photography as an art form, that photographs were merely mechanical, not expressive: "a photograph being a reproduction, on paper, of the exact features of some natural object, or of some person, is not a writing of which the producer is the

⁸⁶ PATRY, *supra* note 84, § 1:31.

⁸⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351–52 (1991).

⁸⁸ *Id.* at 348.

⁸⁹ *Id.* at 347 (quoting, in the first instance, *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981)).

⁹⁰ 111 U.S. 53 (1884).

⁹¹ See Napoleon Sarony, *Oscar Wilde No. 18* (1882) (photograph), available at <http://www.smithsonianmag.com/arts-culture/indelible-may-2004.html>.

⁹² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

⁹³ *Id.* at 55.

⁹⁴ *Id.* at 56.

author.”⁹⁵ And it derided photography for “the accuracy of [its] representation being its highest merit.”⁹⁶

The Court disagreed, expressing “no doubt that the [C]onstitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”⁹⁷ It noted that the only reason Congress had not included photographs in earlier versions of the Copyright Act was that “photography, as an art, was then unknown.”⁹⁸ It accepted the lower court’s description of Sarony’s photograph as “harmonious” and “graceful.”⁹⁹ And it found sufficient authorship, or originality, in Sarony’s photograph, such that it was susceptible to copyright, in Sarony’s posing Wilde, “selecting and arranging the costume, draperies, and other various accessories in [the] photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression.”¹⁰⁰

Burrow-Giles was rightly decided. Sarony’s photograph of Wilde was original and copyrightable, and *Burrow-Giles* violated the copyright laws when it pirated Sarony’s material and sold it for profit. Nevertheless, the case is a product of its time in three important ways.

First, it was litigated at a time when the pictorialist ethic was the predominate, if not the only, argument in favor of photography as an art form. And the Court’s opinion is firmly rooted in that ethic.¹⁰¹ The opinion designates as expressive those parts of the photograph that were pictorialist in nature: a posed model, a contrived scene, costuming, and other theatrics. Sarony was not working in a straight-photography tradition, and that, apparently, was a good thing in terms of his photograph’s copyrightability. If Sarony had taken a

⁹⁵ *Id.*

⁹⁶ *Id.* at 59.

⁹⁷ *Id.* at 58.

⁹⁸ *Id.*

⁹⁹ *Id.* at 60.

¹⁰⁰ *Id.* (quoting the lower court); *cf.* *Falk v. Donaldson*, 57 F. 32, 33 (S.D.N.Y. 1893) (identifying similar pictorialist qualities as those that made photograph at issue, of actress Julia Marlowe, original). The Court’s list of copyrightable elements seems to be, in one writer’s words, “somehow prephotographic . . . with no mention whatsoever of a camera.” Mitch Tuchman, *Inauthentic Works of Art: Why Bridgeman May Ultimately be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 298 (2001).

¹⁰¹ On the other hand, the Court does not rely on the handwork so common among pictorialists (composite printing, negative manipulation, the addition of brush strokes to prints, etc.). See Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 390 (2004). Perhaps this is simply because the photograph at issue did not obviously evidence such manipulation. Moreover, Sarony did not involve himself in the printing process; he knew nothing about the chemistry of photography. Tuchman, *supra* note 100, at 295. He only set up the camera and posed the sitter. *Id.* He did not even always take the pictures himself. See *id.*

candid shot of Wilde, then the Court's rationale may not have applied at all. At most, the Court provides two traits—and very ambiguous ones, at that—that might support a candid photograph's copyrightability: harmony and grace.

That said, the Court deserves credit for being well-versed in the day's most cutting-edge theories regarding art photography. The Court did not simply accept the argument, popular among some circles at the time, that photography was merely mechanical or industrial, and, therefore, not artistic, creative,¹⁰² or original at all. Rather, it embraced the best, then-existing argument to the contrary: pictorialism.

Second, the case is a product of its time because the Court, like most of the public, was probably acquainted with photographs that were, by and large, pseudo-scientific, commercial, or documentarian, i.e., portraiture and photographs of such things as Native Americans, Egyptian pyramids, and the Civil War.¹⁰³ Pictorialists, of course, were trying to distance themselves from such photographs, to appear, for instance, more painterly. There was, in other words, a bifurcation between photographs that were seen as merely recording facts and those that imitated the traditional fine arts. The former were not art; the latter were. The Court seems to have embraced this bifurcation. Burrow-Giles argued that photographs were produced by cameras, not by people, and that, therefore, they were not "original" within the meaning of the Copyright Act. Although the Court rejected this notion for all photographs, as a blanket rule, it did observe that Burrow-Giles's argument "may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection."¹⁰⁴

Finally, the justices themselves had undoubtedly posed for their own portraits, as the Court was, starting in the 1880s, routinely photographed.¹⁰⁵ These portraits were done in "a studio setting complete with painted backdrops, a peripatetic column, figured carpets, and potted ferns."¹⁰⁶ In fact, in 1890, six years after the Court decided *Burrow-Giles*, Sarony himself photographed the justices.¹⁰⁷ Thus, the jurists were familiar with sitting for the camera, and they

¹⁰² Many authors have criticized the notion of creativity as applied to the originality requirement, arguing, probably rightly, that it is rooted in an inaccurate romantic vision of the artist. See, e.g., Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 980 (2004) ("The paradigmatic Romantic author was, as many commentators have observed, a quasi-mythological genius, inspired by a divine muse while laboring in a secluded garret.").

¹⁰³ Patry suggests that Matthew Brady's Civil War photographs, which had a great impact on the public, had something to do with Congress adding photography to the Copyright Act. See PATRY, *supra* note 84, § 1:31.

¹⁰⁴ *Burrow-Giles Lithographic Co.*, 111 U.S. at 59.

¹⁰⁵ Tuchman, *supra* note 100, at 298–99.

¹⁰⁶ *Id.* at 299.

¹⁰⁷ *Id.*

could readily identify—from a sitter’s perspective—with those things they witnessed the photographer doing: providing backgrounds and props, adjusting lighting, and eliciting expressions and poses, to name a few. The justices saw originality, in other words, from a front-of-the-camera perspective, not from a behind-the-camera perspective.

B. Burrow-Giles’s Progeny and the Move Away from a Strict-Pictorialist Viewpoint

After *Burrow-Giles*, the originality cases involving photographs moved away from a strict-pictorialist viewpoint. This may have been because everyday people, including judges, had become more familiar with the camera. They had begun, themselves, to own cameras and produce photographs. As perhaps a consequence of these developments, the cases began to include more behind-the-camera rationales for photographic originality. They acknowledged the originality in candid, unstaged photographs, and the inevitability of unique and differentiable styles among individual photographers.

1. originality and candid photographs

Courts began as early as 1897 to hold that straight photographs have sufficient originality for copyright. In *Bolles v. Outing Co.*,¹⁰⁸ for example, the Second Circuit held that a reasonable person could conclude that a photograph of a yacht under sail was original. The court below had directed a verdict for the defendant on the ground that the plaintiff’s copyright notice was invalid. On appeal, the defendant advanced that same ground as well as the familiar argument that a machine, not a man, produced the picture; according to the defendant, “no original, intellectual conception was involved in the production of the . . . photograph.”¹⁰⁹

The court disagreed. It held that a reasonable juror could conclude, and may well *have* to conclude, the contrary, that the photographer produced an original, artistic work. And it did not base its holding on a pictorial ethic. Instead, it relied on attributes inherent in straight photography: the photographer’s selection and use of venue, subject matter, light, and other naturally occurring phenomena:

Whether a photograph is a mere manual reproduction of subject-matter, or an original work of art, is a question of fact; and there is certainly sufficient evidence in the present record to justify, if not to compel, the conclusion that the one in question embodies an exceptional degree of artistic conception

¹⁰⁸ 77 F. 966 (2d Cir. 1897), *aff’d*, 175 U.S. 262 (1899).

¹⁰⁹ *Id.* at 970 (summarizing the defendant’s argument).

and expression. It required the photographer to select and utilize the best effects of light, cloud, water, and general surroundings, and combine them under favorable conditions for depicting vividly and accurately the view of a yacht under sail.¹¹⁰

In 1916, in *Pagano v. Chas. Beseler Co.*,¹¹¹ the Southern District of New York issued a similar ruling. The case involved a photograph of the New York Public Library.¹¹² The defendant argued that a photograph of a public building could not be copyrighted. The idea, more broadly stated, was that nobody could copyright “a photograph of an everyday inanimate object.”¹¹³ The plaintiff argued that his photograph had sufficient originality. He contended that his concept, his interpretation of the subject matter, the library, was original. He gave visible form to that concept, he said, by, among other things, selecting the proper moment to snap his shutter.¹¹⁴

The court agreed, issuing a judgment on the pleadings in favor of the plaintiff. Its opinion, like the Second Circuit’s in *Bolles*, relies on a straight-photography ethic, emphasizing such things as venue, timing, lighting, framing, positioning, and background. And it makes very clear that a candid photograph, which freezes people and objects in certain attitudes, can be artistic:

It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc. The photograph in question is admirable. The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers’ Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done.¹¹⁵

Thus, as of the late 1800s, both pictorial and straight photographs could claim sufficient originality to warrant copyright protection. But the question left open in *Burrow-Giles*—whether some photographs were completely lacking in originality—was still unanswered. *Bolles*, like *Burrow-Giles*, appears to accept the idea that some photographs were utterly lacking in

¹¹⁰ *Id.*; see also Charles E. Bolles, *The Vigilant* (circa 1895) (photographic print), available at <http://www.loc.gov/pictures/item/2003678322>.

¹¹¹ 234 F. 963 (S.D.N.Y. 1916).

¹¹² *Id.* at 963.

¹¹³ 2 PATRY, *supra* note 84, § 3:118.

¹¹⁴ See *Pagano*, 234 F. at 963–64.

¹¹⁵ *Id.* at 964.

originality. After all, it viewed the question whether “a photograph is a mere manual reproduction of subject-matter, or an original work of art”¹¹⁶ as a fact question for the jury. Moreover, although it viewed the yacht photograph as artistic and expressive, its description of that photograph as “the one in question”¹¹⁷ suggests that other pictures might lack those qualities.

2. originality and the photographer’s own distinctive style

In 1921, Judge Learned Hand revisited the question left open in *Burrow-Giles*: are some photographs so lacking in originality that they are not copyrightable? The case was *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*,¹¹⁸ and it involved a copyright dispute over a catalog of jewelers’ trademarks. The plaintiff had obtained trademarks, either from the jewelers themselves, or from sketches he commissioned, and transferred them, photographically, to die-cuts for printing.

Judge Hand decided *Jewelers’ Circular* eleven years after the historic Buffalo Show, which had destroyed the myth of machine-as-photographer by showcasing the evolving styles of individual photographers. It was ten years since the Photo-Secession had disbanded.¹¹⁹ Photographers, including Stieglitz, felt that they had won the battle for fine-arts status.¹²⁰ And straight work was dominating fine-art photography. The Boston Museum of Fine Arts was on the verge of becoming the first museum to have in its permanent collection multiple works by a single photographer, Stieglitz.¹²¹

And the *zeitgeist*, the spirit of the time, seemed to influence Judge Hand, just as an earlier *zeitgeist* had influenced the *Burrow-Giles* Court. The argument that photographers had their own, unique style had persuaded Judge Hand. He declared that “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”¹²² And he pronounced that “[t]he suggestion that the Constitution might not include all photographs”¹²³ was “overstrained.”¹²⁴ This, according to the leading copyright treatise, “has become the prevailing view, so that . . . almost

¹¹⁶ *Bolles*, 77 F. at 970.

¹¹⁷ *Id.*

¹¹⁸ 274 F. 932 (S.D.N.Y. 1921), *aff’d* 281 F. 83 (2d Cir. 1922).

¹¹⁹ The Photo-Secession never formally disbanded; it simply disappeared, in approximately 1911. DOTY, *supra* note 39; *see* HOMER, *supra* note 25, at 148. By 1906 or 1907, the group had a sense that it had accomplished its mission. HOMER, *supra* note 25, at 122.

¹²⁰ By 1910, Stieglitz believed that he had won the battle for photography as a fine art. *See* DOTY, *supra* note 39, at 56; HOMER, *supra* note 25, at 144–47.

¹²¹ BOCHNER, *supra* note 17, at 51.

¹²² *Jewelers’ Circular Publ’g Co.*, 274 F. at 934.

¹²³ *Id.* at 935.

¹²⁴ *Id.*

any . . . photograph may claim the necessary originality to support a copyright”¹²⁵

C. *The Current State of the Originality Requirement as It Applies to Photographs*

And this is probably as it should be. The originality bar—whether for photographs or other works—is low. It means only that “the work owes its creation to the author.”¹²⁶ It is “little more than a prohibition of actual copying.”¹²⁷ It requires “some minimal degree of creativity,”¹²⁸ but only a “slight amount”¹²⁹ or “a dash”¹³⁰ is needed. The “vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”¹³¹ For photographs, “even [those having only] the slightest artistic touch will meet the originality test.”¹³²

Courts deem photographs to be original based on a photographer’s exercise of discretion in three areas: craft, subject matter, and aesthetics.¹³³ The

¹²⁵ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1], at 2-129 (Matthew Bender ed., 2012) (footnote omitted); *accord* Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (stating that the overwhelming majority of photographs probably have the modest amount of originality necessary for copyright). Still, Judge Hand’s edict was too far-reaching. Consider, after all, the photographs at issue; they merely depicted trademarks, in the only way those trademarks could be depicted, without any embellishment whatsoever, for purposes of transferring the marks to die-cuts for printing. The Supreme Court has recently commented on the opinion, deeming it a “misunderst[anding]” of the Copyright Act. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991). In particular, the Court stated that *Jewelers’ Circular* improperly endorsed a theory of originality that would reward sweat-of-the-brow efforts. *Id.*

¹²⁶ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (en banc).

¹²⁷ *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (E.D.N.Y. 1929); *accord* *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) (quoting *Hoague-Sprague*, 31 F.2d at 586).

¹²⁸ *Feist Publ’ns, Inc.*, 499 U.S. at 345 (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT § 2.01[A]–[B] (1990)).

¹²⁹ *Id.*

¹³⁰ *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

¹³¹ *Feist Publ’ns, Inc.*, 499 U.S. at 345 (quoting 1 NIMMER & NIMMER, *supra* note 128, § 1.08[C][1]).

¹³² *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000).

¹³³ These categories are rough and can bleed into one another. For example, many technical choices, i.e., choices about craft, such as the choice of a shutter speed, will have an impact on aesthetics. According to the Second Circuit:

The technical aspects of photography imbue the medium with almost limitless creative potential. For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter

first area, craft, has to do with the camera and photographic process. Photographers exercise discretion with regard to their craft by choosing a camera, film, lenses, and filters,¹³⁴ creating or selecting lighting conditions,¹³⁵ adjusting the camera's shutter speed and focus,¹³⁶ employing specific developing techniques,¹³⁷ and, in recent years, altering various aspects of a photograph via computer.¹³⁸ Discretion in this area would also include such things as selecting the proper f-stop,¹³⁹ choosing a certain type of photographic paper or other medium for printing the final image, using techniques like dodging and burning¹⁴⁰ (and any of a variety of choices made with an enlarger or computer during printing), and handwork of the type employed by pictorialists.¹⁴¹

The second area, subject matter, has to do with representation. Photographs are, by and large, representative of nature or some invented scene. And even in the rare case where a photograph is not representative in that way,

color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative.

SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000). For courts that go to great lengths to document the originality, individuality, and artistry in photo-making, see *Skyy Spirits*, 225 F.3d at 1073–74 (quoting photojournalist W. Eugene Smith and art-photographer Edward Weston describing their processes); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992) (“The camera operator described herself as ‘an artist. I use a paintbrush. I use the camera to tell a story.’”).

¹³⁴ See, e.g., *Rogers*, 960 F.2d at 307 (staged photograph of couple holding puppies); *Tullo*, 973 F.2d at 794 (films of news events); *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1206 (D. Haw. 2006) (candid photograph of hula dancer); *SHL Imaging, Inc.*, 117 F. Supp. 2d at 310 (photographs of frames); *Epic Metals Corp. v. CONDEC, Inc.*, 867 F. Supp. 1009, 1013 (M.D. Fla. 1994) (photographs of composite floor systems); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (film of Kennedy assassination).

¹³⁵ See *Skyy Spirits, Inc.*, 225 F.3d at 1077 (considering staged photograph of vodka bottle made for advertising purposes); *Rogers*, 960 F.2d at 304 (discussing decisions about natural lighting); *Reece*, 468 F. Supp. 2d at 1206; *SHL Imaging, Inc.*, 117 F. Supp. 2d at 310; *Epic Metals Corp.*, 867 F. Supp. at 1013; 1 NIMMER & NIMMER, *supra* note 125, § 2.08.

¹³⁶ See *Tullo*, 973 F.2d at 794 (discussing “exposure”); *SHL Imaging Inc.*, 117 F. Supp. 2d at 310.

¹³⁷ See *SHL Imaging, Inc.*, 117 F. Supp. 2d at 310.

¹³⁸ See *E. Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417–18 (S.D.N.Y. 2000); *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1124 (D. Nev. 1999).

¹³⁹ See *Friedman v. Guetta*, No. CV 10–00014 DDP (JCx), 2011 WL 3510890, at *3 (C.D. Cal. May 27, 2011) (discussing depth of field).

¹⁴⁰ Dodging is a technique in which the photographer prevents light from reaching a print, to make certain areas of the print lighter. Burning is a technique in which the photographer allows more light to reach certain areas of a print, making those areas darker. There are corresponding techniques for digital photography.

¹⁴¹ See, e.g., *Friedman*, 2011 WL 3510890 at *3 (mentioning photographer’s choice of “graininess” for final image).

it still has a subject matter: it is *about* something. This “aboutness” qualifies the work as representative.¹⁴² Photographers exercise discretion with regard to representation when they select a venue, whether natural or artificial,¹⁴³ choose the exact subject matter (focal point) for their work,¹⁴⁴ determine “how best to tell the story” of their subject,¹⁴⁵ requisition the precise moment of meaningfulness,¹⁴⁶ and pose models, elicit expressions, and do all of the things associated with portraiture that the *Burrow-Giles* Court highlighted.¹⁴⁷

The final area, aesthetics, encompasses all of the considerations that go into creating some sort of formal arrangement. That formal arrangement will involve shape, line, texture, movement, massing, chiaroscuro, and the like.¹⁴⁸ It will make an appeal to the senses.¹⁴⁹ It will not necessarily be beautiful to every viewer, but it will allow the viewer to contemplate the work’s formal arrangement.¹⁵⁰ Aesthetic considerations include decisions about perspective

¹⁴² RICHARD ELDRIDGE, AN INTRODUCTION TO THE PHILOSOPHY OF ART 79 (2003).

¹⁴³ See *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1077 (9th Cir. 2000) (analyzing photograph of vodka bottle in artificial setting); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 133, 143 (S.D.N.Y. 1968) (discussing Abraham Zapruder’s film of President Kennedy’s assassination and his choice of the area to be filmed); see also BILL JAY, THE THING ITSELF: THE FUNDAMENTAL PRINCIPLE OF PHOTOGRAPHY (2006), available at <http://www.billjayonphotography.com/The%20Thing%20Itself.pdf> (telling photography students about the importance of their choice of subject matter).

¹⁴⁴ *L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992) (discussing photographers’ choice of “newsworth[y]” subjects); see also *Skyy Spirits Inc.*, 225 F.3d at 1077; 1 NIMMER & NIMMER, *supra* note 125, § 2.08. But see *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 637 (S.D. Tex. 2007) (stating that “[u]nprotected aspects include the general subject”); 1 NIMMER & NIMMER, *supra* note 125, § 2.08[E][1] (“[C]opyright in [a] photograph conveys no rights over the subject matter conveyed in the photograph.”). The latter cases stand for the proposition that copyright protects the photograph itself, not the subject matter of the photograph. In other words, Mannie Garcia can photograph President Obama, and he can prevent others from improperly using that photograph, but he cannot prevent others from going to the original source, President Obama himself, and re-photographing him.

¹⁴⁵ *Tullo*, 973 F.2d at 794.

¹⁴⁶ See *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1206 (D. Haw. 2006); *Time, Inc.*, 293 F. Supp. at 143; 1 NIMMER & NIMMER, *supra* note 125, § 2.08.

¹⁴⁷ *Skyy Spirits, Inc.*, 225 F.3d at 1077; *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992); *Epic Metals Corp. v. CONDEC, Inc.*, 867 F. Supp. 1009, 1013 (M.D. Fla. 1994). But see *Straus*, 484 F. Supp. 2d at 638 (“[I]n cases involving photographs, a plaintiff’s copyrights cannot monopolize the various poses used, and can protect only [the] plaintiff’s particular photographic expression of these poses and not the underlying ideas therefore.”) (quoting *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987)).

¹⁴⁸ See *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 304 (S.D.N.Y. 2000) (chiaroscuro); see also ROBERT H. GOODSALL, PICTORIAL PHOTOGRAPHY 8 (5th ed. 1945) (discussing photographic composition).

¹⁴⁹ G.W.F. HEGEL, THE INTRODUCTION TO HEGEL’S PHILOSOPHY OF FINE ART 169–70 (Bernard Bosanquet trans., 1905) (presenting Hegel’s terminology about sensory appeals).

¹⁵⁰ See, ELDRIDGE, *supra* note 142, at 48, 62–63.

(the angle of the shot),¹⁵¹ composition,¹⁵² tonality,¹⁵³ and presumably, numerous other design principles.

Of course, there is an outer limit to photographic originality, a point where the photographer has not exercised enough discretion of the type described to qualify her work as “original.” In *Bridgeman Art Library, Ltd. v. Corel Corp.*, the Southern District of New York confronted that limit. There, the plaintiff created and sold photographic reproductions of famous works of art. The artworks themselves were in the public domain.¹⁵⁴ But the plaintiff wanted to copyright its reproductions. The defendant argued that the reproductions lacked sufficient originality to be copyrightable.

The court agreed. It concluded that the plaintiff had done no more than slavishly copy the original, and that copyright was not, therefore, available:

In this case, [the] plaintiff by its own admission has labored to create “slavish copies” of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.¹⁵⁵

Extending copyright to such works would “‘put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.’”¹⁵⁶

In *Bridgeman*, the defendant only made choices about craft, e.g., the choice of camera and lens. It did not make choices about representation and aesthetics; the existing, public-domain works dictated those choices. *Bridgeman* thus makes clear that craft-related choices are not, alone, enough.¹⁵⁷ A photographer must also make choices about representation or aesthetics, or

¹⁵¹ *Skyy Spirits, Inc.*, 225 F.3d at 1077; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992); *Rogers*, 960 F.2d at 307; *Reece*, 468 F. Supp. 2d at 1206; *Epic Metals*, 867 F. Supp. at 1013; 1 NIMMER & NIMMER, *supra* note 125, § 2.08; *see also Time, Inc.*, 293 F. Supp. at 133 (discussing Zapruder’s meticulous choice of a place to set up his camera for the best view of the presidential caravan).

¹⁵² *E. Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417–18 (S.D.N.Y. 2000) (considering “lay-out”).

¹⁵³ *SHL Imaging, Inc.*, 117 F. Supp. 2d at 310 (discussing “brightness”).

¹⁵⁴ *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 196 (quoting *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (en banc)).

¹⁵⁷ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) (using *Bridgeman* to conclude that “[d]ecisions about film, camera, and lens . . . often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original.”).

his craft-related choices must impact the final product in some discernible way, perhaps by *producing* some representational or aesthetic effects.

IV. PHOTOGRAPHY AND THE FACT-EXPRESSION DICHOTOMY: PICTORIALISM'S LINGERING LEGACY

Pictorialism does not, anymore, infect courts' assessments of photographic originality. It does, however, spill over into another area of copyright law, the fact-expression (or idea-expression) dichotomy.¹⁵⁸ And this poses a problem: it is nearly a century after the shift to straight photography. Today, the art world not only accepts straight photography as a legitimate aesthetic vis-à-vis pictorialism, it arguably recognizes it as the superior aesthetic.¹⁵⁹ The copyright laws do not, however, reflect this attitudinal change.

This Part therefore connects the historical background presented in the two previous Parts—about the American public's reluctance to accept photography as an art form and about the copyright laws' struggle with accommodating photography as an expressive medium—to the fact-expression dichotomy and its two offspring, the substantial-similarity test and the nature-of-the-original prong of the fair use doctrine. First, it gives the reader an overview of the fact-expression dichotomy. Second, it gives the reader an overview of the substantial-similarity test and the fair use defense. Finally, it demonstrates the ways in which these tests, doctrines, and defenses shortchange straight photographs.

A. *An Overview of the Fact-Expression Dichotomy*

Congress designed the Copyright Act to secure a public benefit, as directed by the Constitution: to encourage invention and creativity. The Act thus delicately balances competing interests. It rewards and encourages authorship by giving authors a monopoly in their works. But it also limits that monopoly for fear that protecting authors' interests too vigorously would undermine the very public benefit the Act seeks to promote. After all, authors build on those who go before them. As Sir Isaac Newton famously put it, "If I have seen further it is by standing on ye sholders [sic] of giants."¹⁶⁰

¹⁵⁸ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).

¹⁵⁹ For example, the *Old Glory* photograph of soldiers raising the American flag at Iwo Jima captivated the nation with its stunning composition as well as the story it told. There is a controversy, though, over whether the photograph was staged, and many people would hold the photograph in lower regard if that were the case. See Joe Rosenthal, *Old Glory Goes Up on Mt. Suribachi, Iwo Jima* (1945) (gelatin silver print), available at <http://www.mfah.org/art/detail/old-glory-goes-mt-suribachi-iwo-jima>.

¹⁶⁰ ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT 9 (1965). Newton was not the first, or only, person to make the statement, but he did make it quite famously. See *id.*

The fact-expression dichotomy makes the giants' shoulders available to secondary users like Newton. Facts cannot be copyrighted; expression can be. Section 102(b) of the Copyright Act makes this proposition explicit: "In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . ." ¹⁶¹ According to the Supreme Court, this is "[t]he most fundamental axiom of copyright law." ¹⁶²

That axiom stems inevitably from the Constitution's originality requirement. Facts are simply *not* original. "This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." ¹⁶³ Facts "are part of the public domain available to every person." ¹⁶⁴ And they must be so if the Constitution's mandates, to promote the progress of science and the arts, and to facilitate free speech, are taken seriously.

What, then, does copyright protect? Authors must, to give facts meaning, express them somehow—in words or by some other objective manifestation. Copyright protection extends to that expression, i.e., to the selection, coordination, and arrangement of facts. ¹⁶⁵ For literature, it extends to the crafting of the language. If an author "clothes facts with an original collocation of words," ¹⁶⁶ she can claim a copyright in those words. Secondary users can copy her facts, but not her "word-for-word" presentation of facts. ¹⁶⁷ Moreover, they cannot even closely paraphrase her; as Judge Learned Hand put it, copyright "cannot be limited literally to the text, else a plagiarist would escape [punishment] by [making] immaterial variations." ¹⁶⁸ Plagiarism is not, in other words, fair use.

For example, Diana K. Sugg's Pulitzer Prize winning newspaper article, *New Hope for Halting a Killer Illness*, has beautiful, poignant language. ¹⁶⁹ The first paragraph reads:

¹⁶¹ 17 U.S.C. § 102(b) (2006).

¹⁶² *Feist Publ'ns, Inc.*, 499 U.S. at 344–45.

¹⁶³ *Id.* at 347.

¹⁶⁴ *Id.* at 348.

¹⁶⁵ *Id.* at 357, 360.

¹⁶⁶ *Id.* at 348.

¹⁶⁷ *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 563–64 (1985); *see* 1 NIMMER & NIMMER, *supra* note 125, § 2.11.

¹⁶⁸ *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930); *accord* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189 (1970).

¹⁶⁹ Diana K. Sugg, *New Hope for Halting a Killer Illness*, BALT. SUN, June 2, 2002, at 1A, available at <http://www.baltimoresun.com/news/maryland/bal-sugg0602,0,7049077.story>.

She thought it was just a cold. Her throat was sore, and she felt tired all over. But as JoAnn Barr got her son ready for school that morning in March, she started gasping for breath. Within a few hours, Barr was on a ventilator in intensive care, her blood pressure bottoming out, her kidneys failing.¹⁷⁰

But one can easily extract the facts from the expression: on a March morning, JoAnn Barr (1) thought she had a cold; (2) had a sore throat and fatigue; (3) was getting her son ready for school when she experienced severe respiratory problems; (4) was in a hospital's intensive-care unit, at most, three hours later; (5) needed a ventilator; (6) had dangerously low blood pressure; and (7) was experiencing kidney failure.

The expression resides in Sugg's exact phraseology, e.g., "she felt tired all over." It resides in her use of short, tension-building sentences: "She thought it was just a cold." It resides in her unusual use of the word "But" at the front of a sentence to signify a change of tone (Barr thought she had a cold. But it was really a life-threatening medical emergency). It resides in her provocative and unexpected word choices, like "gasping" and "bottoming out." It resides in her sequencing, the way she tells the story from getting ready for an ordinary school day to winding up in the hospital with kidney failure. And it resides in her use of rhetoric, particularly asyndeton, where she omits the conjunctive "and," keeping readers speeding through the text: she was "in intensive care, her blood pressure bottoming out, her kidneys failing."

Other journalists can cover Barr's story. And they can use Sugg's article to do so, even if Sugg objects. They can take the article's facts without independently verifying them (so far as their own journalistic standards permit). But they cannot take Sugg's expression. Copyright protects her phraseology, sentence structure, transitions, word choices, sequencing, punctuation, and the like.¹⁷¹

B. The Fact-Expression Dichotomy, Substantial Similarity, and Fair Use

The fact-expression dichotomy is, as mentioned above, a sub-species of the Constitution's originality requirement. In practice, however, it appears most often in the context of substantial similarity and fair use.

¹⁷⁰ *Id.*

¹⁷¹ See *Int'l News Serv. v. Assoc'd Press*, 248 U.S. 215, 234 (1918); *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95–96 (2d Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976); *Chi. Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 798–99 (7th Cir. 1921).

1. the fact-expression dichotomy and substantial similarity

A plaintiff litigating a copyright-infringement case must prove two elements: ownership of a valid copyright and copying by the defendant.¹⁷² The plaintiff can establish the latter element, copying, via either an admission by the defendant or proof of substantial similarity between the plaintiff's and defendant's works.¹⁷³ The substantial-similarity inquiry must, however, be tailored appropriately. Fact-finders can only compare the copyrightable elements in the respective works. Thus, the fact-expression dichotomy comes into play: the defendant's work must substantially resemble the plaintiff's expression. If it merely duplicates her ideas, or borrows her facts, there is no infringement. In the case of a newspaper article, like Sugg's article, above, the fact-expression dichotomy may apply in a fairly straightforward way. But the exercise is often less straightforward for fictional works. Where, for such works, does the boundary between fact and expression lie?

- a. the abstractions test

According to Judge Learned Hand, ruling on a case involving a play, "[n]obody has ever been able to fix that boundary, and nobody ever can."¹⁷⁴ He nevertheless applied a test, now known as the "abstractions test," to roughly delineate a boundary:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use

¹⁷² See 4 NIMMER & NIMMER, *supra* note 125, § 13.01.

¹⁷³ Some commentators prefer the term "probative similarity" to "substantial similarity." They view the element of copying to have two components, factual copying and actionable copying. A plaintiff may prove factual copying even though there is no substantial similarity between her work and the defendant's work. However, to show that the copying amounts to infringement, she must show substantial similarity. Stated differently, copying does not, in and of itself, indicate infringement. In order to be infringing, the copying must be substantial. *See id.* § 13.03.

¹⁷⁴ *Nichols*, 45 F.2d at 121; *see also* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."); 4 NIMMER & NIMMER, *supra* note 125, § 19E.04[B][1], at 19E-35 ("There is an inherent difficulty separating an idea from its expression.").

of his “ideas,” to which, apart from their expression, his property is never extended.¹⁷⁵

Take Tennessee Williams’ *A Streetcar Named Desire*. Could another playwright produce a play about a southern belle who loses the family plantation? The answer is most certainly “yes.” The idea, abstracted so generally, is not protectable. However, if this secondary author includes enough detail from the original play—the school that employed the southern belle fired her for having an affair with a student; the southern belle is forced to live in New Orleans with her sister and brother-in-law; the southern belle is obsessed with male attention and lives in a world that is part fantasy and part reality; the brother-in-law is a rough, cruel man who eventually rapes the southern belle; and the southern belle has a nervous breakdown and is committed to a mental institution—then she will have crossed the line from fact to expression, infringing the original author’s copyright.

Thus, the idea of a watch depicting a cat and mouse, with the mouse as the second hand, circling the cat, is unprotectable.¹⁷⁶ Other watchmakers can produce cat-and-mouse watches without the original watchmaker’s permission. But they cannot copy the first watchmaker’s expression. They cannot, for instance, use a seated Tabby cat facing left along with a stylized version of a mouse.¹⁷⁷ Similarly, the idea of a businessman on the verge of jumping from a city building is unprotectable.¹⁷⁸ Other artists can copy that idea. But they cannot copy its execution: they cannot copy the original artist’s use of a horizontal, panoramic perspective, a metallic ledge, a view of converging streets filled with taxicabs, and a diagonal shadow that directs the viewer’s eye to the model’s shoes.¹⁷⁹

b. stock scenes and merger

Sometimes, even with the abstractions (and other) tests, courts just cannot separate idea from expression. This is where the *scènes à faire* and merger doctrines come into play. The *scènes à faire* doctrine recognizes that copyright cannot protect expression that amounts to a stock scene flowing

¹⁷⁵ *Nichols*, 45 F.2d at 121. Some courts use other tests, not the abstractions test, to judge substantial similarity. *See, e.g.*, *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (discussing the “total concept and feel” test); 4 NIMMER & NIMMER, *supra* note 125, § 13.03 (discussing the patterns test and other alternatives to the abstractions test).

¹⁷⁶ *Direct Mktg. of Va., Inc. v. E. Mishan & Sons, Inc.*, 753 F. Supp. 100, 104 (S.D.N.Y. 1990).

¹⁷⁷ *Id.*

¹⁷⁸ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 324 (S.D.N.Y. 2001).

¹⁷⁹ *See id.* at 326–27.

necessarily from the chosen storyline or setting.¹⁸⁰ “In two works dramatizing the trial of Judas Iscariot, for example, it was only natural to feature Satan as a character, dressed formally, ridiculing the examining lawyer.”¹⁸¹

The merger doctrine is similar. It recognizes that some ideas are “inseparably tied to a particular expression.”¹⁸² In other words, idea and expression merge. When that occurs, copyright cannot protect the expression lest it confer a monopoly on the underlying idea. “The merger doctrine operates as an exception to the normal idea-expression dichotomy. The doctrine holds that, when there are so few ways of expressing an idea, not even the expression is protected by copyright.”¹⁸³

For example, in a case involving a candy-cane-shaped die used to stamp shapes out of construction paper and other materials, the court held that the design was not copyrightable. In the court’s words, “[t]here are extremely limited ways in which to depict a candy cane and still be able to express the idea. Therefore, an attempt to copyright the expression of a candy cane is essentially an attempt to copyright the idea.”¹⁸⁴ This makes sense. Candy canes are always striped and hook-shaped. The best way to depict them is in profile, facing either left or right. There may be variations, in girth, length, color, stripe-style, and perspective, but they are limited. Thus, the candy cane example is a relatively easy case of merger.

2. the fact-expression dichotomy and fair use

The fair use defense, set forth in Section 107 of the Copyright Act, limits an original author’s monopoly in her copyrighted work. It “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁸⁵ It represents “a privilege in others than the owner of the copyright to use the

¹⁸⁰ Straus v. DVC Worldwide, Inc., 484 F. Supp. 2d 620, 637 (S.D. Tex. 2007).

¹⁸¹ 4 NIMMER & NIMMER, *supra* note 125, § 13.03[B][4], at 13-88.8 (footnote omitted).

¹⁸² *Id.*

¹⁸³ BUC Int’l Corp. v. Int’l Yacht Council Ltd., 489 F.3d 1129, 1143 (11th Cir. 2007).

¹⁸⁴ Ellison Educ. Equip., Inc. v. Tekservices, Inc., 903 F. Supp. 1350, 1360 (D. Neb. 1995); *see also* Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987) (stating, in case involving plush toys shaped like dinosaurs, that the copyright holder could “place no reliance upon any similarity in expression resulting from either the physiognomy of dinosaurs or from the nature of stuffed animals”); Psihoyos v. Nat’l Geographic Soc’y, 409 F. Supp. 2d 268, 277–78 (S.D.N.Y. 2005) (holding that there were limited ways of illustrating fossil of fighting dinosaurs because fossil dictated creatures’ physiology and stance).

¹⁸⁵ Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 60 (2d Cir. 1980)) (internal quotation marks omitted).

copyrighted material in a reasonable manner without his consent.”¹⁸⁶ Courts have called the fair use doctrine “the most troublesome” in the whole of copyright law.¹⁸⁷

The second fair use factor, “the nature of the copyrighted work,” is one of the doctrine’s more mysterious components. Legislative history and case law do not shed much light on it; the factor is “superficially discussed and little understood.”¹⁸⁸ That said, courts assess the factor by considering, among other things, whether an original work is creative or factual. Creative works are “closer to the core of intended copyright protection.”¹⁸⁹ They are “fictional,” “fanciful,” and “fantas[tical],”¹⁹⁰ things like Michaelangelo’s *David* or P.I. Tchaikovsky’s *Swan Lake*. Courts diligently safeguard such works; people who copy them have a hard time establishing fair use.¹⁹¹ Factual works, like telephone books, catalogs, and biographies, are a different matter. They are not core works.¹⁹² And they are more susceptible to fair use claims.¹⁹³

In short, the second fair use factor involves an inquiry into creativity. This inquiry is very similar to the one in *Burrow-Giles*, where the Court had to determine whether photographs contain the minimal originality necessary to support a copyright in the first place. However, there is one significant difference. The creativity needed for a favorable second-factor ruling is higher than that needed for a work to be deemed original and copyrightable: “Creativity for the purposes of fair use is harder to establish than threshold copyrightability.”¹⁹⁴ Accordingly, courts are more likely to find a work factual under the second fair use factor than they are to find a work unoriginal at an earlier stage of litigation.

¹⁸⁶ Harper & Row Publ’ers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)) (internal quotation marks omitted).

¹⁸⁷ Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

¹⁸⁸ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

¹⁸⁹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*; Harper & Row Publ’ers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985).

¹⁹³ Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

¹⁹⁴ Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 188 (D. Mass. 2007).

C. *The Fact-Expression Dichotomy as Applied to Straight Photographic Works*

The fact-expression dichotomy—whether part of a copyrightability, substantial-similarity, or fair use analysis—is difficult to apply.¹⁹⁵ It is tricky to broadly categorize certain individual works as either “creative” or “factual.” Most works are some combination of the two, and calculating the relative proportion of one to the other is an inexact science. It requires going deeper than mere labels. A fictional romance may seem to be a core creative work, but, as a leading treatise puts it, “[s]ome factual works (e.g., computer programs and test questions) contain more inventiveness than some fictional works (e.g., formula romances).”¹⁹⁶

1. identifying the facts in a straight photograph

Part of the problem is that Congress wrote the Copyright Act with literature in mind. Courts are thus exporting rules designed for literature to other media. And the rules may need to bend accordingly:

[T]he same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings. Isolating the idea from the expression and determining the extent of copying required for unlawful appropriation necessarily depend to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvas.¹⁹⁷

According to Second Circuit Judge Jon O. Newman, the problem “is not just a matter of vocabulary. Words convey concepts, and if we use identical phrases from one context to resolve issues in another, we risk failing to notice that the relevant concepts are and ought to be somewhat different.”¹⁹⁸ In other

¹⁹⁵ *E.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001); *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

¹⁹⁶ 4 PATRY, *supra* note 84, § 10:138 (footnotes omitted).

¹⁹⁷ *Franklin Mint Corp.*, 575 F.2d at 65; *see also* *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 241 (2d Cir. 1983) (acknowledging “tension” from application of rules formulated for literary works to graphic and three-dimensional art); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005) (“The idea/expression distinction arose in the context of literary copyright” but “[i]n the visual arts, the distinction breaks down.”); Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y 560, 562 (1982) (“in many fact works the literary or artistic expression is dictated by and inseparable from the underlying information”).

¹⁹⁸ Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 697 (1999).

words, the problem is not just in drawing lines between facts and expression. Courts routinely engage in line-drawing. The problem “is that the line itself is meaningless because the conceptual categories it purports to delineate are ill-suited to the subject matter.”¹⁹⁹

Photographs are a case in point. For photographic works, especially straight photographs, the problem of untangling facts and expression is particularly thorny. The “line between idea and expression . . . is often blurry and difficult to identify in the context of a photograph.”²⁰⁰ One court has even declared that, “[i]n the context of photography, the idea/expression distinction is not useful or relevant.”²⁰¹

- a. straight photography seamlessly blends facts and expression

One of the problems is that photographs, particularly straight ones, seamlessly blend facts and expression.²⁰² In the example above, involving Diana K. Sugg’s article, *New Hope for Halting a Killer Illness*,²⁰³ the fact-expression dichotomy was relatively easy to apply. I was able to simply pluck the facts out of the expression. I could even make a list of facts, and describe the remaining expression in fairly concrete terms.

But try that same exercise with a photograph, say Alfred Eisenstaedt’s famous photograph of an American sailor kissing a nurse in Times Square on V-J day.²⁰⁴ If we try to pluck the facts out of the expression, we may start with the following list: (1) a man is kissing a woman; (2) the man is wearing a sailor’s uniform; (3) the woman is wearing a nurse’s uniform; (4) the man is bending over the woman, who is leaning back; (5) the woman is kicking her right calf up; (6) the man is in back of the woman; (7) the man is facing the photograph’s right and the woman is facing the photograph’s left; and (8) the One Times Square building is in the background just behind the man’s right shoulder.

The list looks pretty good, but now try to describe the remaining expression. What is left over? Or, to take a different tack, what would a list of the photograph’s expression look like? I submit that it would look a lot like the

¹⁹⁹ *Mannion*, 377 F. Supp. 2d at 458 (discussing the fact-expression dichotomy and photography).

²⁰⁰ *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1205 (D. Haw. 2006).

²⁰¹ *Mannion*, 377 F. Supp. 2d at 461.

²⁰² *E.g.*, Nimmer, *supra* note 168, at 1197 (“[L]ittle is contributed by the idea divorced from its expression.”).

²⁰³ *See supra* Part IV.A.

²⁰⁴ Alfred Eisenstaedt, *The Kiss* (1945) (photograph), available at http://en.wikipedia.org/wiki/File:Legendary_kiss_V%E2%80%93J_day_in_Times_Square_Alfred_Eisenstaedt.jpg.

list we just created: a sailor kissing a nurse, bending her over backwards, her leg in that classic kiss-me pose, him in back facing right and her in front facing left, with the most-identifiable corner in Times Square visible in the background.

The problem is that the language of literature is different from the language of photographs, and the fact-expression dichotomy is geared towards the former. Literature uses an abstract language, composed of symbols, which make up words. Some of those words represent facts, which are not copyrightable, and some of them represent expressions, which are. Each word is separate from the next, so excising a word, or combination of words, that represents a fact is relatively straightforward.

Photographs, in contrast, use a concrete, visual language. That language is not composed of abstract symbols like the characters in an alphabet. It does not use words, which are individual and self-contained, each one distinct from its counterparts. Rather, it is composed of facts in the world, and those facts are stitched together so tightly into an expressive whole that the idea of removing a single fact from the tableaux is absurd. Visual facts, unlike words, do not sometimes amount to facts and sometimes to expression (the statement itself is nonsensical). They are facts, plain and simple. And viewers perceive them all at once. This differs from an article or a book, “from which pertinent sections may be culled.”²⁰⁵

- b. the fact-expression dichotomy causes confusion over a fact and its depiction

Another problem with the fact-expression dichotomy, as applied to photographs, is that it engenders confusion over the role of subject matter. Photographs are almost always representational. They depict some object or scene. They have subject matter. Is that subject matter copyrightable? It depends. If the photograph is pictorial, like a staged portrait with an artificial background, the answer is probably “yes.”

In *Gross v. Seligman*,²⁰⁶ for instance, a photographer staged an allegorical photograph, *Grace of Youth*, featuring a young nude with a “sedate” expression.²⁰⁷ He then sold the copyright to another party.²⁰⁸ Later, however, he re-staged the original, posing the same model in the same position. He called the second photograph “*Cherry Ripe*.”²⁰⁹ It duplicated the original, except that the model was two years older, smiling, and had a cherry stem between her

²⁰⁵ Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373, 412 (1993).

²⁰⁶ 212 F. 930, 931 (2d Cir. 1914).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 930.

teeth.²¹⁰ The court held that the photographer had infringed the copyright on the original photograph.²¹¹

Today, a court would likely characterize *Cherry Ripe* as a permissible parody of *Grace of Youth*, but the basic principle—that re-staging a copyrighted photograph infringes that photograph—is still good law.²¹² And, with some caveats, it probably applies with equal force to pictorial and straight photographs. Suppose, for example, that I take a candid photograph of Maya Angelou. I cannot prevent others from later re-photographing (or painting or drawing or otherwise representing) her.²¹³ On the other hand, I can prevent them from actually copying my photograph. As Justice Oliver Wendell Holmes put it, “[t]he opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy.”²¹⁴

Confusion arises, however, with straight photographs, because their subject matter is factual, and facts, of course, cannot be copyrighted. People seem to have a hard time distinguishing between the fact and the depiction of the fact. The former is not copyrightable. The latter is. Take, for example, Shepard Fairey’s *Obama Hope* bumpersticker.²¹⁵ Fairey admittedly based it on a copyrighted photograph.²¹⁶ And he copied that photograph wholesale, duplicating its composition exactly.²¹⁷ The only changes he made were heightening the contrast, changing the skin tones to red-white-and-blue, removing an already-sparse background, and adding a lapel pin where, before, there was none. Fairey’s work did not comment on the original, so it would seem to violate the rule against “copy[ing] the copy.”²¹⁸ Nevertheless, numerous commentators took Fairey’s side.²¹⁹

²¹⁰ *Id.*

²¹¹ *Id.* at 931–32.

²¹² *See, e.g.*, 1 NIMMER & NIMMER, *supra* note 125, § 2.08[E][2].

²¹³ *See, e.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 454 (S.D.N.Y. 2005).

²¹⁴ Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

²¹⁵ *See* David Kravets, *AP Blasts Obama “Hope” Artist in Copyright Flap*, WIRED (Mar. 11, 2009, 12:17 PM), <http://www.wired.com/threatlevel/2009/03/ap-blasts-obama> (providing a side-by-side comparison of Manny Garcia’s original photograph and Shepard Fairey’s secondary artwork).

²¹⁶ *See id.*

²¹⁷ *See id.*

²¹⁸ This language is from Justice Holmes’s opinion in *Bleistein*. 377 F. Supp. 2d at 454.

²¹⁹ *E.g.*, Edward L. Carter, *Copyright Ownership of Online News: Cultivating a Transformation Ethos in America’s Emerging Statutory Attribution Right*, 16 COMM. L. & POL’Y 161, 191 (2011); Alison C. Gaughenbaugh, *Is There Hope? Incorporating the First Amendment into a Fair Use Analysis*, 36 U. DAYTON L. REV. 87, 113 (2010); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 456 (2009); Hiro Senda, *Hope or Nope—Is “Obama*

The better view, though, is that the original photograph was, like any other photograph, expressive in terms of such things as composition. Anyone can freely photograph President Obama because he is, in the context of this discussion, a fact in the world. But President Obama's likeness, frozen photographically in a certain attitude, is not a fact.²²⁰ A photograph is not President Obama. It is a depiction of President Obama. The judge in the *Fairey* case recognized as much, telling the parties that "sooner or later, [the plaintiff] . . . is going to win."²²¹

Still, the *Fairey* case demonstrates that people struggle with the fact-expression dichotomy in the context of straight photographs. Such photographs are, by nature, appropriative of visual facts. People confuse those facts with the photographer's expression of them.

2. the fact-expression dichotomy pits pictorial photographs against straight ones

The fact-expression dichotomy is also problematic in that it pits pictorial photographs against straight ones: Pictorial photographs, which repudiate the camera's natural tendency toward realism, are creative.²²² Consequently, straight photographs, which embrace realism, are not.

*Haberman v. Hustler Magazine, Inc.*²²³ illustrates the courts' typical response to pictorial photographs. The case involved two highly-manipulated, surrealistic photographs. The first, *Cracking Eggs*,²²⁴ depicted a broken egg with eyeballs instead of white and yolk. The second, *The Feast*,²²⁵ depicted a

Hope" Protected by Idea/Expression Dichotomy, Fair Use Doctrine, & First Amendment?, 10 CHI.-KENT J. INTELL. PROP. 65, 101 (2010); Rachael L. Shinoskie, *In Defense of Fairey and Fair Use*, 28 ENT. & SPORTS L. 16, 20 (Spring 2010).

²²⁰ See *Friedman v. Guetta*, No. 10-00014 DDP (JCx), 2011 WL 3510890, at *5 (C.D. Cal. May 27, 2011) ("Our language is rich with words that attempt to communicate the many feelings and thoughts that make us human. We also use facial expressions, actions, and body language to convey meaning. A particular countenance might express happiness, interest, boredom, fear, or some combination of the almost limitless expressions that make up our unspoken language. . . . A photograph of a person captures a person's expression in a particular instant of time, and will almost always possess the requisite level of creativity to warrant protection.").

²²¹ Dave Itzkoff, *Judge Urges Resolution in Use of Obama Photo*, N.Y. TIMES, May 29, 2010, at C2, available at 2010 WLNR 11057700.

²²² The term "expressive" is more appropriate for the originality question, where the fact-expression dichotomy is at the forefront. The term "creative" is more appropriate for the fair use question, where the second fair use factor is at the forefront. However, this Article will use the terms interchangeably.

²²³ 626 F. Supp. 201 (D. Mass. 1986).

²²⁴ Jim Haberman, *Cracking Eggs* (2011) (photograph), available at <http://www.jimhaberman.com/Site%20/Silver%20Fantasy%20.html>.

²²⁵ Jim Haberman, *The Feast* (2011) (photograph), available at <http://www.jimhaberman.com/Site%20/American%20Scenes.html>.

family of wormlike creatures, with no facial features save for enormous mouths, seated at a table for Thanksgiving dinner. The plaintiff won on the second fair use factor (“the nature of the copyrighted work”): the court described the photographs as “fine art photographs of a surrealistic character” and “works of fantasy.”²²⁶ It noted that they evidenced “pronounced creativity.”²²⁷ Hence, it deemed them “creative, imaginative, and original.”²²⁸

The defendant had used the photographs fairly, to comment on the originals in a humorous, newsy way. Thus, the court resolved the case correctly; it also resolved the second fair use factor correctly; pictorial photographs do deserve stringent protection. But its rationale was rooted firmly in a turn-of-the-century attitude. That attitude incorrectly bifurcates pictorial and straight photographs.

This bifurcation is apparent in *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Foundation*.²²⁹ The case involved a movie, *Carnegie Hall*, that tells the fictional story of a mother who works as a janitor at Carnegie Hall, and her son, who becomes a talented musician who performs at that venue.²³⁰ The movie includes live musical performances by well-known classical artists, but those performances are staged.

The defendant argued that the performances were factual because they featured real artists really performing. The court disagreed, holding that the performances were not factual because of the directorial choices involved in the staging.²³¹ This implies that, if the directors had used clips from un-staged performances, the court would have deemed them factual—even though, presumably, there would be no discernible difference between staged performances, made to look real for a movie, and real performances, candidly filmed. The court’s stated rationale therefore leads to an inconsistent result. The idea that photographic works are creative only insofar as they are unrealistic is, simply, flawed.

It not only fails to account in a sensible way for copyright’s protection of pictorial photographs; it does an outright disservice to straight photographs. For example, in *Mathieson v. Associated Press*,²³² the court held that the second fair use factor favored the defendant. The case involved a photograph of Oliver

²²⁶ *Id.* at 211. *Cf.* *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (“[P]hotographs taken for aesthetic purposes . . . are creative . . . and . . . fit squarely within the core of copyright protection.”).

²²⁷ *Haberman*, 626 F. Supp. at 211.

²²⁸ *Id.*

²²⁹ *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, No. 04 CIV.5332(NRB), 2005 WL 2875327, at *7 (S.D.N.Y. Nov. 2, 2005).

²³⁰ *Id.* at *2.

²³¹ *Id.*

²³² No. 90 CIV 6945 (LMM), 1992 WL 164447 (S.D.N.Y. June 25, 1992).

North, which had appeared on the cover of a brochure for “body armor.”²³³ The Associated Press used the photograph, without permission, in a newspaper article about North’s business activities. North’s involvement in a company that sold bullet-proof vests was newsworthy due to his role in the Iran-Contra scandal. The court concluded that the Associated Press’s use was fair and the photograph “complemented the text of the news story in a usual and customary way.”²³⁴

The case was, like *Haberman*, correctly decided. But the court’s analysis of the second fair use factor is interesting. The court held that the photograph was factual, noting that it was “considerably less ‘imaginative’ or ‘creative’ than it might have been had [the] plaintiff employed *more dramatic artistic effects*.”²³⁵ And it cited to *Haberman*. This phraseology, “dramatic artistic effects,” combined with a reference to the surrealistic photographs in *Haberman*, suggests that the photograph at issue would have fared better if it had been artificially manipulated and less true to the photographic medium. The court’s rationale, in other words, was decidedly pictorialist.

*Nunez v. Caribbean International News Corp.*²³⁶ suffers from similar flaws. The case involved photographs of Joyce Giraud, who was Miss Puerto Rico Universe in 1997. A professional photographer photographed Giraud for her modeling portfolio. At least one of the photographs depicted her nude or nearly nude. Consequently, a controversy arose about the photographs’ appropriateness given Giraud’s title.

A newspaper published several of the photographs, without permission, in the context of news articles about the controversy.²³⁷ That use was clearly fair commentary on the originals, but the court’s resolution of the second fair use factor is telling. The court stated that the photographs “could be categorized as either factual or creative.”²³⁸ And it deemed the second fair use factor “neutral.”²³⁹ It explained that “the photographs were not artistic representations designed primarily to express [the photographer’s] . . . ideas, emotions, or feelings, but instead a publicity attempt to highlight Giraud’s abilities as a potential model.”²⁴⁰

It cited *Haberman* as a positive analogy, noting that “surrealistic art” was creative. Once again, the court decided the overall case correctly, but it probably got the second fair use factor (and the general rationale) wrong. The

²³³ *Id.* at *1.

²³⁴ *Id.* at *3.

²³⁵ *Id.* at *7 (emphasis added).

²³⁶ 235 F.3d 18 (1st Cir. 2000).

²³⁷ *Id.* at 21.

²³⁸ *Id.* at 23.

²³⁹ *Id.*

²⁴⁰ *Id.*

idea that a portrait lacks creativity, even though the photographer posed the model, elicited expressions, and staged the background, contravenes the age-old rules announced in *Burrow-Giles* and applied over and over again in subsequent cases. In fact, *Nunez* seems to take the pictorialist ethic to extremes. Pictorialism traditionally encompassed portraiture as well as hand-altered photographs. But *Nunez* completely disregards the former, suggesting not only that straight photographs lack creativity, but that portraiture does, as well. It implies that hand-worked photographs are the only creative photographs.

All of that said, courts by and large resolve cases correctly, and they even often resolve originality and fair use questions correctly. But, just as often, their rationales are shaky. As the Ninth Circuit has observed, “the classification the court selects [fact or expression] may simply state the result reached rather than the reason for it.”²⁴¹ And reasons matter. The law depends on sound rationales for its force. Without them, the law appears arbitrary and unprincipled. Right outcomes do not make up for wrong rationales. Those rationales seep into future cases and undermine the law’s stability.²⁴²

3. the fact-expression dichotomy does not accommodate works that are both factual and expressive

Yet another problem with the fact-expression dichotomy is that it fails to accommodate works that are both factual and expressive. A work can be factual or creative but not, strictly speaking, both.²⁴³ This presents a quandary for courts confronting claims involving straight photographic works. Again, the problem is not so much that the courts are deciding cases wrongly, although they frequently mishandle the second fair use factor. The problem is that their rationales are unconvincing.

This problem is most apparent in cases involving news footage. The courts’ rationales, invariably, are that news footage is not creative. But courts can only reach that conclusion by discounting the very same decisions about craft, representation, and aesthetics that, in a different context, would support a finding of creativity.

²⁴¹ *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

²⁴² According to Judge Pierre N. Leval:

Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.

Leval, *supra* note 188, at 1106–07 (footnotes omitted).

²⁴³ *But see* 2 PATRY, *supra* note 84, § 4:36 (stating that the dichotomy should actually be a continuum).

Take, for example, *Fitzgerald v. CBS Broadcasting, Inc.*²⁴⁴ The case involved candid, outdoor photographs of a well-known mobster shortly after his arrest.²⁴⁵ The photographer, a professional photojournalist, made choices about composition, timing, lighting, and location. Courts routinely view such choices as creative ones. The *Fitzgerald* court, however, did not. It concluded that the photographer had “exercised no more than the minimum authorial decision-making necessary to make a work copyrightable.”²⁴⁶ In the court’s view, this decision-making “was not a creative process.”²⁴⁷

Similarly, in *Fuentes v. Mega Media Holdings, Inc.*,²⁴⁸ the court held that news-oriented video footage was factual. The footage depicted various members of the Cuban military elite in Angola during the Angolan civil war.²⁴⁹ The videographer, a professional journalist, made choices about subject matter, composition, framing, perspective, timing, lighting, and so forth²⁵⁰—the types of decisions that ordinarily result in findings of creativity. But the *Fuentes* court disregarded them.

It concluded, like the *Fitzgerald* court did, that the videographer had exercised only enough authorial control to make the video copyrightable.²⁵¹ It explained that “a reasonable fact-finder could clearly see that there is little to no ‘expressive content’ of the work; there is only what seemingly amounts to [the videographer’s] . . . decision to turn the camera on or turn the camera off. These are ‘home videos,’ and the [videographer] . . . has referred to them as such.”²⁵² It viewed the videographer’s statement that he recorded “everything [he] found interesting”²⁵³ as damaging, disregarding the traditional view that a photographer’s choices about representation—about the elusive moment of meaningfulness—are creative.

A leading commentator sums up the prevailing view about journalism and creativity: “[n]ewspapers, talk show material, and television news reporting broadcasts should be subject to liberal appropriation since *they typically contain little expression*.”²⁵⁴ That idea—that news reports are unexpressive—is

²⁴⁴ 491 F. Supp. 2d 177 (D. Mass. 2007).

²⁴⁵ *Id.* at 180.

²⁴⁶ *Id.* at 188.

²⁴⁷ *Id.* The plaintiff ultimately prevailed, on partial summary judgment, on his claim of copyright infringement, but he lost on the second fair use factor. *Id.* at 179.

²⁴⁸ No. 09-22979-CIV, 2011 WL 2601356 (S.D. Fla. June 9, 2011).

²⁴⁹ *Id.* at *1–*2.

²⁵⁰ *See id.* at *14.

²⁵¹ *Id.*

²⁵² *Id.* at *15.

²⁵³ *Id.* at *14.

²⁵⁴ 4 PATRY, *supra* note 84, § 10:138 (2009) (emphasis added) (footnotes omitted). *But see* Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2002) (“Photographs that are meant to be

like a sound bite. When repeated over and over, it somehow becomes the truth. If, however, one stops to reflect on the sound bite, it is at best an overstatement and at worst a fallacy.

Some scholars would call the copyrights in factual works “thin.”²⁵⁵ They would argue that there is not much expressive material left over once the facts are subtracted from the work as a whole.²⁵⁶ But the excerpt above, *New Hope for Halting a Killer Illness*,²⁵⁷ shows that news stories can, and do, display substantial creativity. They are a mixture of facts and expression. They deserve protection from exact and close copying just like any other copyrighted work.

I am not denying that news photography is factual. I am merely saying that it is also expressive,²⁵⁸ and that the fact-expression dichotomy presents courts with a false choice: a work can be factual or expressive, but not both. I am also taking issue with the metaphor of a “thin” copyright and its embedded assumption that the proportion of copyrightable material in factual works is trivial.²⁵⁹ The metaphor of a “porous” copyright—one that gives way to facts but holds fast with regard to expression—the relative proportions of which are not predetermined, would be more apt.²⁶⁰

viewed by the public for *informative* and aesthetic purposes . . . are generally creative in nature.”) (emphasis added).

²⁵⁵ See, e.g., 1 NIMMER & NIMMER, *supra* note 125, § 2.11.

²⁵⁶ Schiffer Publ’g, Ltd. v. Chronicle Books, LLC, No. CIV.A. 03-4962, 2004 WL 2583817, at *9 (E.D. Pa. Nov. 12, 2004).

²⁵⁷ Sugg, *supra* note 170.

²⁵⁸ *Accord* Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc., 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (“Anyone who has seen any of the great pieces of photojournalism—for example, Alfred Eisenstadt’s classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V-J Day and the stirring photograph of U.S. Marines raising the American flag atop Mount Surabachi on Iwo Jima—or, perhaps in some eyes, more artistic, but nevertheless representational, photography—such as Ansel Adams’ work and the portraits of Yousuf Karsh—must acknowledge that photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations.”) (footnote omitted); see also *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073–74 (9th Cir. 2000) (presenting an in-depth discussion of the creative elements of photojournalism and other genres of straight photography).

²⁵⁹ *Accord* Morgan M. Stoddard, *Mother Nature As Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 611–12 (2008) (criticizing the idea of a “thin” copyright for certain works of visual art).

²⁶⁰ Cf. Gorman, *supra* note 197, at 593. Professor Gorman argues that

there should be yet greater protection of expression in works of fact than in works of fancy; the author of a fact work must cling to expression-protection as his [or her] only incentive to produce, because the underlying facts are in the public domain, while the author of a fanciful work can in any event rely upon copyright of the underlying fictional story line as incentive enough.

Id. at 586. In Professor Gorman’s view, there are many stylistic variations available for most fact works, and the expression in such works should get no lesser protection than fanciful works. *Id.*

4. courts use the fact-expression dichotomy as a proxy for public-interest rationales

A final problem with the fact-expression dichotomy is that it is often used to disguise a public-interest rationale. This problem is, again, most obvious in the case of news footage. Such footage may be more subject to appropriation, but not because it lacks significant creativity. That is a convenient legal fiction.

True, facts are free for the taking. But to the extent that someone can copy news-related works wholesale, it is not because those works lack expression. It is because the public interest in the works' dissemination trumps the copyright holder's interest in their protection. After all, "the primary purpose of copyright is not to reward the author, but . . . to secure 'the general benefits derived by the public from the labors of authors.'"²⁶¹

The fact-expression dichotomy forces courts to shoehorn public-interest rationales into the confines of an entirely distinct doctrine. In *Fuentes*, for instance, the Angola video was one-of-a-kind. It depicted high-level Cuban officials, involved in the Angolan civil war, in a way that no other photographs or videos could do. The videographer had traveled to Angola approximately twenty times. The officials trusted him and treated him as an intimate. He had access to them in a way that no other journalists could. Eventually, fourteen of the officials were tried for, among other things, treason and drug trafficking, and some of them were executed.²⁶²

Obviously, the public had a tremendous interest in a video of these officials' behavior in Angola. And the court seemed to place some importance on that interest.²⁶³ But it based its opinion on the fair use defense, holding, as mentioned above, somewhat disingenuously, that the video was factual rather than creative (even though the videographer made various decisions that courts normally view as evidence of creativity).²⁶⁴ As Professor Nimmer has pointed out, shoehorning issues into fair use which more properly belong under the umbrella of free speech, is troublesome.²⁶⁵

²⁶¹ *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 446 (S.D. Ohio 1980) (quoting *Fox Film v. Doyal*, 286 U.S. 123, 127 (1932)).

²⁶² *Fuentes v. Mega Media Holdings, Inc.*, No. 09-22979-CIV, 2011 WL 2601356, at *1 (S.D. Fla. June 9, 2011).

²⁶³ *Id.* at *15.

²⁶⁴ *Id.* at *14; *see also* *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) (deeming video tapes of airplane crash and train wreck factual, and citing three cases with explanatory parentheticals focused on public-interest considerations).

²⁶⁵ Nimmer, *supra* note 168, at 1200-01.

V. SUGESSTIONS FOR A MORE-PRINCIPLED APPROACH TO STRAIGHT PHOTOGRAPHY: SOMETHING OLD AND SOMETHING NEW

The fact-expression dichotomy, as applied to photography, is not only antiquated, but ill-suited to the photographic medium. It provides limited copyright protection for straight photographs, which are, by today's standards, highly creative and valuable to the public discourse. Thus, courts need a more-principled approach to straight photographs. This Part presents one.

A. *Something Old: Substantial Similarity and the Non-Copyrightability of Ideas*

The substantial-similarity inquiry, discussed in detail above, requires that courts distinguish facts from expression: If a defendant's work resembles a plaintiff's work solely in terms of facts, the plaintiff will lose; there is no infringement in such a case because facts are part of the public domain.²⁶⁶ If, on the other hand, the defendant has borrowed substantially from the plaintiff's expression, the plaintiff will win because expression is precisely what the Copyright Act protects.²⁶⁷

The problem is that it is difficult, in the case of a straight photograph, to excise the bare facts from the plastic elements. A photograph's visual facts are intertwined with one another and with the photograph's overall expression.²⁶⁸ They are not, like words, discrete packages of information. One cannot simply pick them out of the expressive milieu.²⁶⁹ Moreover, one should not confuse a photograph's subject matter for its facts.²⁷⁰ That said, it is possible to differentiate facts from expression in straight photographs. The facts can be found in the photograph's overarching ideas. The expression, in its fundamental design elements.

1. a photograph's facts reside in its overarching idea

First, a straight photograph's "facts" can be found in its overarching ideas. In other words, the fact-expression dichotomy, strictly defined, does not work, but its counterpart, the idea-expression dichotomy, does. Courts cannot pluck facts from a photograph like they can words from a book. But they can identify a photograph's principal idea, mentally exclude that idea, and restrict their substantial-similarity inquiries to whatever remains.

²⁶⁶ See *supra* Part IV.B.

²⁶⁷ See *supra* Part IV.B.

²⁶⁸ See *supra* Part III.C.

²⁶⁹ *But see* *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (analyzing case in which defendant took only one image out of the original photograph).

²⁷⁰ See *supra* Part III.C.

Several cases employ this technique. They mostly involve pictorial photographs, but their methodologies would apply equally well to straight photographs. Take, for instance, *Kaplan v. Stock Market Photo Agency, Inc.*²⁷¹ The works at issue were staged, pictorial photographs. The original depicted a businessman standing on the ledge of a tall building.²⁷² The secondary work depicted the same thing.²⁷³ The Southern District of New York noted that the businessman-on-the-ledge theme was an unprotectable idea.²⁷⁴ Then, it compared the two photographs' copyrightable elements: background, perspective, lighting, shading, color, and the like.²⁷⁵ The stark differences in these elements led the court to hold that the secondary work was not infringing.²⁷⁶

Four years later, the Southern District confronted a similar problem in *Bill Diodato Photography, LLC v. Kate Spade, LLC.*²⁷⁷ The plaintiff's photograph showed a woman's shins and feet, visible under the door of a stall in a public bathroom;²⁷⁸ the defendant's photograph showed the same thing.²⁷⁹ Both photographs showcased high-fashion shoes and other accessories. The court correctly held that the woman-sitting-on-a-toilet theme was an unprotectable idea.²⁸⁰ The photographs' remaining attributes—the ratio of negative to positive space, the lighting, and the accessories²⁸¹—were so different that the court granted summary judgment in the defendant's favor and dismissed the complaint.²⁸² Other courts have reached similar results using similar methodologies.²⁸³

The idea-expression dichotomy enabled all of these courts to isolate the protectable elements in the plaintiffs' photographs. These were the things that

²⁷¹ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001).

²⁷² *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 467 (S.D.N.Y. 2005).

²⁷³ *Id.* at 468.

²⁷⁴ *Kaplan*, 133 F. Supp. 2d at 323.

²⁷⁵ *Id.* at 326–27.

²⁷⁶ *Id.* at 328.

²⁷⁷ 388 F. Supp. 2d 382, 386 (S.D.N.Y. 2005).

²⁷⁸ *Id.* at 384.

²⁷⁹ *Id.* at 385. Interestingly, the defendant's work was a candid photograph. *Id.* at 387.

²⁸⁰ *Id.* at 394–95.

²⁸¹ *Id.* at 393.

²⁸² *Id.* at 395.

²⁸³ See generally *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D. Haw. 2006) (holding that stained glass depicting hula dancer in traditional "ike" pose did not infringe photograph of hula dancer in same stance); *Gentieu v. Tony Stone Images/Chi., Inc.*, 255 F. Supp. 2d 838 (N.D. Ill. 2003) (holding that copyright in photographs of, among other things, babies on white backgrounds did not prevent others from photographing babies on white backgrounds); cf. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 453 (S.D.N.Y. 2005) (discussing straight photograph of salmon jumping into mouth of brown bear).

courts traditionally view as creative, decisions relating to craft (e.g., choosing a camera, film, and lenses), subject matter (e.g., selecting a venue and choosing a focal point), and aesthetics (e.g., perspective, composition, and value structure).²⁸⁴ Some of them ran into the same sort of line-drawing problems that plague the abstractions test. For example, in *Kaplan*, the plaintiff argued that his photograph was about “a *person* contemplating a leap from a city building.”²⁸⁵ The defendant argued that it was about “a ‘distraught *businessman* standing on the ledge of a tall city building.’”²⁸⁶ The court decided that the plaintiff had “overgeneralize[d]”²⁸⁷ and drew the line where the defendant had suggested.

Thus, line-drawing problems are not insurmountable. Courts face and resolve them all the time. Moreover, as Professor Leslie A. Kurtz has pointed out, the “inquiry gains clarity and focus” in the context of both the plaintiff’s and defendant’s works.²⁸⁸ “It is unnecessary to determine at what hypothetical point th[e] line is crossed, or whether other, hypothetical uses would infringe.”²⁸⁹ The court merely needs to decide where the line is crossed with respect to the specific works at issue.

2. the compositional-equivalence test: finding a photograph’s expression in its basic design elements

In both *Kaplan* and *Bill Diodato*, the plaintiffs lost. The defendants had borrowed (or independently duplicated) the plaintiffs’ ideas. Otherwise, the works differed significantly. Their expression was distinct. But what, exactly, is expression? And how can courts isolate it from ideas?

If the copyright laws do not protect ideas, they must be using the word “expression” to mean “form” as distinct from content. Definitions of “expression” confirm this conclusion: according to the dictionary, expression is “the manner . . . in which a thing is . . . [put] in[to] words; wording;

²⁸⁴ See *supra* Part III.C.

²⁸⁵ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 324 (S.D.N.Y. 2001) (quoting Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 10, *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (2001) (No. 99 CIV.10218 AGS)).

²⁸⁶ *Id.* (quoting Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 10, *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (2001) (No. 99 CIV.10218 AGS)).

²⁸⁷ *Id.*

²⁸⁸ Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1234 (1993).

²⁸⁹ *Id.*

phrasing.”²⁹⁰ It is “the stylistic characteristics of an utterance (opposed to meaning).”²⁹¹ It is, in other words, form, not substance. In a book, it is not the words, themselves, or their meanings; it is the selection and organization of words—in aggregate.

For visual works, form is composition. And composition is “the harmonious arrangement of the parts of a work of art in relation to each other and to the whole.”²⁹² It is the end result of the author’s choice of focal point, his manipulation of line, shape, texture, color, and tonality, and his use of rhythm, movement, repetition, variety, balance, scale, and proportion. Taken alone, these basic design elements may be facts.²⁹³ After all, one cannot copyright a line or a shape. Taken together, however, they are expression: they are like words woven together into a tapestry of meaning.

Courts should, therefore, in isolating expression, concentrate on the original work’s overall composition. In *Kaplan*, the case involving the businessman-on-the-ledge idea, the court did just that. It noted that the plaintiff’s photograph was laid out horizontally, in landscape fashion,²⁹⁴ while the defendant’s photograph was laid out vertically, in portrait fashion.²⁹⁵ It observed that, in the plaintiff’s photograph, the background was composed almost entirely of the street below, whereas, in the defendant’s, it was composed of the building opposite.²⁹⁶ It pointed out that the plaintiff’s photograph depicted an empty, worn, metallic ledge and that the defendant’s depicted a smooth, concrete ledge with a pigeon and a briefcase.²⁹⁷ These compositional differences compelled the court to find for the defendant.

The same types of comparisons were at play in *Bill Diodato*, the case involving photographs of women in public bathrooms. The plaintiff’s

²⁹⁰ *Expression*, DICTIONARY.COM, <http://dictionary.reference.com/browse/expression+> (last visited Oct. 20, 2012).

²⁹¹ *Id.*

²⁹² *Composition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/composition> (last visited Oct. 20, 2012); *cf.* *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 60 (1884) (using similar language).

²⁹³ *Cf.* Paul M. Grinvalsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 416 (1992) (“The notes, chords, and rhythms, by themselves, like words in literature, are in the public domain. They cannot be copyrighted.”) (footnote omitted).

²⁹⁴ *Kaplan*, 133 F. Supp. 2d at 326–27; *see also* *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 467 (S.D.N.Y. 2005) (showing photographs at issue in *Kaplan*).

²⁹⁵ *Kaplan*, 133 F. Supp. 2d at 327; *see also* *Mannion*, 377 F. Supp. 2d at 468 (showing photographs at issue in *Kaplan*).

²⁹⁶ *Kaplan*, 133 F. Supp. 2d at 326–27.

²⁹⁷ *Id.* at 327.

photograph showed a substantial portion of the bathroom floor and stall.²⁹⁸ The defendant's photograph showed little floor and virtually no stall.²⁹⁹ The floors were different, the shoes were different, the purses were different, the garments were different, the focuses were different, the depths of fields were different, and the lighting was different. Compositionally, the works had virtually nothing in common with one another. Thus, the court found for the defendant.³⁰⁰

Kaplan and *Bill Diodato* were easy cases in some respects. They involved works that differed so fundamentally that any casual viewer, even a lay one, could readily list the compositional differences. Nevertheless, the defendants' attorneys could have driven the point home by creating templates of the originals—simple, black-and-white line drawings of the originals' major design features—and superimposing them over the allegedly infringing works. A template of the plaintiffs' works would have had no relationship whatsoever to the defendants' works.³⁰¹ And the plaintiffs would have been hard-pressed, therefore, to argue that the defendants had copied their expression.

In *Reece v. Island Treasures Art Gallery, Inc.*,³⁰² the plaintiff's attorney used just such an approach. He created a "transparent black and white overlay" of the plaintiff's photograph and superimposed it upon a copy of the defendant's allegedly infringing work.³⁰³ The tactic did not help the plaintiff, but it did help the court (and the defendant). It enabled the court to detect differences between the plaintiff's and defendant's compositions, and to hold that the defendant's work was not substantially similar to the plaintiff's.³⁰⁴

²⁹⁸ *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 384 (S.D.N.Y. 2005).

²⁹⁹ *Id.* at 385.

³⁰⁰ *Id.* at 384.

³⁰¹ See e.g., *Mannion*, 377 F. Supp. 2d at 467–68 (showing that, in *Kaplan*, defendant's photograph had significant compositional differences from plaintiff's photograph); Teresa Bruce, *Author's Image No. 1*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App1.html> (last visited Oct. 12, 2012) (see Figure 1, showing significant compositional differences when a template of the original work in *Diodato* is superimposed over the allegedly infringing work in that case; *id.* (see Figure 2, showing significant compositional differences between plaintiff's and defendant's works, from *Diodato*, when templates of both are superimposed over one another). In *Diodato*, the defendant's photograph would look more like the plaintiff's photograph if the latter image was cropped to exclude everything but its focal point, or "heart." Thus, one could give the plaintiff (who was ultimately the losing party) the benefit of the doubt by comparing the defendant's work *only* to the heart of the plaintiff's work. That said, the plaintiff would still lose: the compositions are a bit more similar this way, but significant differences nonetheless remain. See Teresa Bruce, *Author's Image No. 2*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App2.htm> (last visited Oct. 12, 2012) (showing the defendant's work as compared solely to the heart of the plaintiff's work).

³⁰² 468 F. Supp. 2d 1197 (D. Haw. 2006).

³⁰³ *Id.* at 1207.

³⁰⁴ *Id.* at 1208. I am not entirely sure that *Reece* was correctly decided. The central image in the two works is strikingly similar, even given that both works depicted a dancer in a pose and

This process—in which courts seek out compositional equivalencies between supposedly similar works—seems to have played a role in *Friedman v. Guetta*,³⁰⁵ as well. There, the defendant made and sold various products based on a copyrighted photograph of the hip-hop group Run-DMC.³⁰⁶ The products portrayed the band members exactly as they had appeared in the original photograph. In the court's words, "the distinct figures in [the p]laintiff's [p]hotograph remain clearly visible and readily identifiable. In fact, the *outline* of each figure is almost exactly replicated."³⁰⁷ The court did not, presumably, have an actual outline in front of it. But it was certainly visualizing one. A forward-looking plaintiff's attorney could have spared the court this mental exercise. She could have fashioned an actual, hard-copy template, based on the plaintiff's photograph, and demonstrated to the court compositional-element-by-compositional-element that the defendant had appropriated protected expression.

In fact, a compositional-equivalence test seems to explain many cases. For example, in *Straus v. DVC Worldwide, Inc.*,³⁰⁸ the court held that various photographs of golfer Arnold Palmer were not substantially similar.³⁰⁹ The pictures do resemble one another in certain respects. After all, they all depict the same person. However, if one applies the compositional-equivalence test, one sees that, compositionally, the photographs are very different.³¹⁰ Similarly,

wearing attire prescribed by a traditional dance, and even though the backgrounds are quite different. Compare Kim Taylor Reece, *Makanani* (1988) (photograph), available at http://the.honoluluadvertiser.com/dailypix/2007/Jan/31/FPI701310351AR_b.jpg (showing plaintiff's copyrighted photograph), with Marylee Colucci, *Nohe* (1998) (stained glass), available at http://www.hawaiiancouncil.org/docs/e-products/images/reece_2.jpg (showing defendant's allegedly infringing stained glass). However, the defendant testified to having independently created her work, and I must assume that the court judged her testimony to be credible. *Reece*, 468 F. Supp. 2d at 1199. If the plaintiff had been able to prove copying, the outcome may have been different.

³⁰⁵ No. CV 10-00014 DDP (JCx), 2011 WL 3510890 (C.D. Cal. May 27, 2011).

³⁰⁶ *Id.* at *1–*2.

³⁰⁷ *Id.* at *5 (emphasis added). Compare Glen E. Friedman, *Untitled Portrait of Run-DMC* (1985) (photograph), available at <http://www.photoattorney.com/wp-content/uploads/2011/06/Friedman-photo-of-Run-DMC.jpg> (showing original, copyrighted photograph), with Thierry Guetta, *Untitled Work* (2008) (painting), available at <http://www.boingboing.net/filesroot/bwrecords.jpg> (showing infringing artwork).

³⁰⁸ 484 F. Supp. 2d 620, 638 (S.D. Tex. 2007).

³⁰⁹ *Id.*

³¹⁰ Compare *id.* at 650 app. A [hereinafter *A Golfer's Life*] (showing original), with *id.* at 651–52 apps. B, C [hereinafter *MetroWest* and *NicoDerm*] (showing alleged copies); see also Teresa Bruce, *Author's Image No. 3*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App3.htm> (last visited Oct. 12, 2012) (showing outlines of original work superimposed over allegedly infringing works) [hereinafter *Author's Image No. 3*]. In the *Straus* case, the outlines of the allegedly infringing works are somewhat difficult to compare to the original works due to the low quality of the images reproduced in the court's opinion. However, in the upper

in *Gentieu v. Tony Stone Images/Chicago, Inc.*, the plaintiff's photographs of babies on white backgrounds resemble the defendants' photographs of babies on white backgrounds. Compositionally, however, the works are very different.³¹¹

The compositional-equivalence test also works in the well-known cases of *Rogers v. Koons*³¹² and *Blanch v. Koons*.³¹³ In *Rogers*, the court held that the defendant's sculpture infringed the copyright in the plaintiff's photograph.³¹⁴ If one compares the sculpture to the photograph, one sees that the compositions are almost identical; a template of the plaintiff's photograph lines up very closely with a photograph of the sculpture.³¹⁵ In *Blanch*, in contrast, the court held that the defendant's collage did not infringe the copyright in the plaintiff's photograph.³¹⁶ There, the template test would reveal significant compositional differences. In fact, a line-drawing of the photograph's major design elements would share nothing in common with the collage.³¹⁷

half of *Author's Image No. 3*, one can see that the right side of the head and shoulders and the noses do not align. Moreover, by simply looking at *A Golfer's Life*, *MetroWest*, and *NicoDerm*, it is apparent that Palmer's expressions are different in the three works. See *Straus*, 484 F. Supp. 2d at 650–52 apps. A–C. For example, he is smiling with his teeth showing in the original work and has his mouth closed in the allegedly infringing works. *Id.* In addition, Palmer's right ear is only visible in the original work. *Id.* Moreover, his shirts, the backgrounds, and the overall poses are different (not to mention that he is visibly older in the defendants' works). *Id.* In the lower half of *Author's Image No. 3*, one can also see significant differences between the original and allegedly infringing work: Palmer's right shoulder, which is a significant part of the original composition, does not appear in the defendant's work; the shirt collars, although both white, are configured differently; Palmer's left shoulders are not aligned; and the ears do not align. *Author's Image No. 3, supra.*

³¹¹ See Teresa Bruce, *Author's Image No. 4*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App4.htm> (last visited Oct. 12, 2012) (showing, on the lower right, that the babies' shoulders, armpits, hairlines, eyes, noses, and mouths are not in alignment).

³¹² 960 F.2d 301 (2d Cir. 1992).

³¹³ 467 F.3d 244 (2d Cir. 2006).

³¹⁴ See *Rogers*, 960 F.2d at 303.

³¹⁵ See Teresa Bruce, *Author's Image No. 5*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App5.htm> (last visited Oct. 12, 2012) (showing that infringing sculpture's composition is essentially identical to original photograph's composition).

³¹⁶ *Blanch*, 467 F.3d at 244.

³¹⁷ Compare Andrea Blanch, *Silk Sandals* (2000) (photograph), available at <http://www.owe.com/legalities/legalities30.htm> (showing Blanch's original photograph), with Jeff Koons, *Niagra* (2000) (collage), available at <http://www.owe.com/legalities/legalities30.htm> (showing Koon's collage that uses original as small element).

B. Something New: An Alternative Approach to the Second Fair Use Factor

This Section's second suggestion for a more-principled approach to straight photographs has to do with the fair use doctrine's second factor, the "nature of the copyrighted work." As demonstrated above, that factor becomes an encumbrance instead of an asset when the original work is photographic in nature. This Section proposes an alternative approach: it (1) sets forth a procedure for designating a photograph either pictorial or straight and (2) suggests using the traditional second-factor rules for pictorial photographs and a balancing test for straight photographs.

1. differentiating pictorial photographs from straight ones

Imagine a fair use case where the original work is a copyrighted photograph. As with all such cases, the plaintiff will have proved copying via an admission by the defendant or a showing of substantial similarity to the original work; the secondary work will infringe the plaintiff's copyright in the absence of a fair use finding.³¹⁸

Now, imagine the court delving into the second fair use factor, "the nature of the copyrighted work." The court should ask, first, whether the photograph is pictorial or straight. The court does not have to judge the artistry involved in a work, venturing outside its area of competency,³¹⁹ because the question is an objective one. A photograph is pictorial if it is a non-candid portrait or has been altered by hand.³²⁰ The author of a pictorial photograph will have either staged the photograph, using models, backgrounds, props, and the like, or manipulated the photograph after taking it, by, for instance, adding artificial color or texture, altering the photograph to look like a painting, or combining multiple images into one.

In the latter case, of a hand-worked photograph, the court should look for after-the-fact³²¹ alterations that make the photograph look *less* realistic. Other sorts of changes, like removing red-eye, do not amount to a rejection of straight-photographic techniques. Thus, courts should not view such changes as pictorial in nature.³²²

³¹⁸ *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998) ("[S]econdary users need invoke the fair use defense only where there is substantial similarity between the original and allegedly infringing works, and thus actionable copying.").

³¹⁹ See 4 NIMMER & NIMMER, *supra* note 125, § 19E.04[B][1], at 19E-37 ("[L]iterary or artistic interpretation . . . strains or exceeds judicial competence.").

³²⁰ This terminology obviously comes from the pre-digital era, but the concept, altering a photograph via non-photographic techniques, can apply equally forcefully to digital photographs.

³²¹ That is, alterations that occurred *after* the photographer shot the photograph.

³²² Alternately, they can view such changes as *de minimus*.

If the court cannot answer the question whether the photograph is pictorial or straight by simply analyzing the photograph, it should consult the record. In cases with well-developed records, and even in cases at the summary-judgment stage, the court will likely have access to depositions or affidavits detailing the original photographer's methodology.

2. courts should apply the traditional creativity continuum to pictorial photographs and a balancing test to straight photographs

Ultimately, if the court concludes that the photograph is pictorial, it should assess the second fair use factor in the traditional manner. It should deem the photograph creative and hold the defendant to a higher standard on the other fair use factors.

If, however, the court concludes that the photograph is straight, it should abandon the traditional inquiry. Straight photographs are a mixture of fact and expression. Therefore, the second factor's either-or choice between creative or factual works is unhelpful. The court should, instead, focus on the true essence of the second fair use factor. The factor's language, "the nature of the copyrighted work,"³²³ comes from Justice Joseph Story's opinion in *Folsom v. Marsh*,³²⁴ a case that laid the foundations for the fair use doctrine. *Folsom* presented the question whether a publisher could use excerpts from President George Washington's private letters without permission. Justice Story held that it could not.³²⁵ In so doing, he considered "the value of the materials taken"³²⁶ from the original. According to Judge Pierre N. Leval, this language not only begot the current "nature of" language, it clarifies that language: "Justice Story's word choice . . . suggests that some . . . [works are] more 'valued' under copyright law than others."³²⁷

Thus, the true essence of the second fair use factor is not whether a work is fact or fantasy, published or unpublished, or the result of an investment of time made in anticipation of financial reward.³²⁸ The true essence is whether the original work is of a sort that the law should, as a matter of public policy, either protect or disseminate.

Our hypothetical court, deliberating over its straight photograph, should, then, at this juncture, ask itself: Would dissemination of this

³²³ 17 U.S.C. § 107(2) (2006).

³²⁴ 9 F. Cas. 342 (C.C.D. Mass. 1841)

³²⁵ *Id.* at 345.

³²⁶ *Id.* at 348.

³²⁷ Leval, *supra* note 188, at 1117; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (discussing the origins of the "nature of" phrase).

³²⁸ These are the three traditional inquiries under the second fair use factor. *E.g.*, *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 211–12 (D. Mass. 1986).

photograph advance or impede the goals of the Copyright Act? Does the public's need for dissemination outweigh the original author's need for protection? Is the defendant's purpose a core purpose, like "criticism, comment, news reporting, teaching . . . , scholarship, or research"?³²⁹ How much access does the public already have to this sort of information?³³⁰ How much reward do authors need to create photographs like this one?³³¹ It should, in other words, balance the plaintiff's need for protection against the public's need for dissemination.³³²

This balancing test will result in a decision that favors the defendant when the photographic work: (a) has become evidentiary in nature or (b) contains demonstrative expression.

- a. the second fair use factor should favor the defendant if the original photograph has become evidentiary in nature

Professor Nimmer has given the paradigmatic examples of photographic works that have become evidentiary in nature: photographs of the My Lai massacre and Abraham Zapruder's film of President John. F. Kennedy's assassination. In his view, the free-speech value of these documents outweighs the values advanced by copyright laws (to encourage people to create new works by rewarding them for doing so).³³³

³²⁹ 17 U.S.C. § 107 (2006). Of course, our hypothetical court may have already addressed this question, about the defendant's purpose, in its resolution of the first fair use factor.

³³⁰ Thus, the court should consider whether information about a certain issue is especially scarce. *Cf.* *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (discussing the Copyright Term Extension Act, which takes into account whether a work is already being exploited commercially or is unavailable); *Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (noting that "only a finite number of photographers capture images of a given historical event").

³³¹ According to Professor Nimmer, the law should keep "the price as low as possible—no more than is needed to provide authors a bare incentive to create." 4 NIMMER & NIMMER, *supra* note 125, § 19E.01[D], at 19E-7.

³³² Professor Gorman agrees that the second fair use factor involves consideration whether the original work embodies information of great public value. Gorman, *supra* note 197, at 597. Professor Elliott Abramson has suggested that the second fair use factor is superfluous because the fact-expression dichotomy already protects the public's need for information. Elliot M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMP. L. REV. 133, 156 (1988). He also questions whether the public has more of an interest in receiving factual information than in receiving other information, say artistic or inspirational information. *Id.* I think Professor Abramson's questions are provocative and worth considering. The latter question, about the public's need for non-factual information, raises the possibility that allowing dissemination of photographs that have become evidentiary in nature is unprincipled and potentially a slippery slope leading to dissemination of all sorts of non-factual photographs.

³³³ See 4 NIMMER & NIMMER, *supra* note 125, § 19E.03.

In the case of the My Lai photographs, “a denial that . . . any deaths had occurred would have been devastatingly refuted by the photographs in a way that the verbal reports of the deaths simply could not do.”³³⁴ Thus, such photographs had become, in a sense, evidentiary. Whatever their expressive content—and I think that content is significant—they are also evidence of some fact in the world. They help to establish the truth of the matter, that reports of a massacre were more likely accurate than not. Moreover, presumably, the defendants using them would be news organizations, discharging one of the Copyright Act’s core purposes. In addition, the My Lai photographs were one-of-a-kind. They were the best truth-approximating evidence available to the public.

In short, the My Lai photographs scream “dissemination” in answer to almost every question our hypothetical court would be asking itself. And so does the Zapruder film: “[I]n the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility.”³³⁵ The film had become evidentiary, making various alleged facts more or less likely to be true.³³⁶ The defendant wanted to disseminate portions of the film (in the form of drawings) for a core purpose (a book questioning the Warren Commission’s findings). And the film was one-of-a-kind, the only photographic record of the assassination.³³⁷

There is only one question that the My Lai photographs and the Zapruder film do not answer definitively in favor of dissemination: How much reward does a photojournalist or other individual need to create works of this sort in the first instance? The question is an important one. It is easy to tell oneself that photojournalists answer to a higher power, that they are above the arguably greed-based incentive system in the Copyright Act.³³⁸ And that may be true when a non-professional author, like Zapruder, originates a newsworthy piece due merely to the fortuity of being in the right place at the right time.

In most cases, though, a photojournalist needs to make a living. She needs to put food on the table. And she needs organizational backing: colleagues who can identify the world’s “hot spots,” travel allowances, camera equipment, local contacts, lodging, logistical support, and so forth. News-

³³⁴ Nimmer, *supra* note 168, at 1198.

³³⁵ *Id.*

³³⁶ 4 NIMMER & NIMMER, *supra* note 125, § 19E.03[A][2], at 19E-22 (“[I]n the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility.”).

³³⁷ See also *L.A. News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) (considering scarcity of news footage).

³³⁸ Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1021 (2004).

gathering is arguably just as much a core First-Amendment activity as news-reporting.³³⁹ And the Copyright Act cannot facilitate the latter without rewarding the former.³⁴⁰

Professor Nimmer recognizes this conundrum, and he suggests a compulsory-license approach to ensure both that the public gets crucial information and that news organizations receive adequate funding.³⁴¹ In other words, in cases where our hypothetical court found it necessary to allow dissemination of a copyrighted work, after subjecting the work to the questions listed above, it could also order the defendant to pay for its use of the material (or—better yet—Congress could amend the Copyright Act to provide for such licenses). This approach should satisfy potential critics, those who would argue that according lesser rights to “works that are of greatest importance to the public” is “fundamentally at odds” with the Copyright Act’s overall scheme.³⁴²

Another potential criticism of this balancing test is that it would be overinclusive, which would result in a finding of dissemination for every poignant news photograph. That, however, is not the case. The test would, for example, favor protection (not dissemination) in the case of Patrick Ferrell’s Pulitzer Prize winning photographs of Haiti in the aftermath of Hurricane Ike.³⁴³ Those photographs were not principally evidentiary. They did not, in general, serve a truth-finding function. And they were not the only source of information about the disaster. The same would be true of the many powerful photographs of the 911 disaster.³⁴⁴

³³⁹ See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113, 189 (2008).

³⁴⁰ See *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1497 (11th Cir. 1984); see also Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1576 (1963) (“The public concern for rapid and accurate dissemination of news is obvious; the newsgatherer’s concern for the protection of his efforts in the fiercely competitive field of news coverage is equally so.”).

³⁴¹ Nimmer, *supra* note 168, at 1199.

³⁴² See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558–59 (1985) (“In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

³⁴³ See *The 2009 Pulitzer Prize Winners: Breaking News Photography: Works*, THE PULITZER PRIZES, <http://www.pulitzer.org/works/2009-Breaking-News-Photography> (last visited Sept. 18, 2012).

³⁴⁴ Of course, if one of those photographs was in a unique position to prove or disprove some of the conspiracy theories about 9/11 or some other disputed question about the timing of events, the damage to the buildings, or the like, there would be a different result.

A benefit of the balancing test is that it would provide courts with more-consistent rationales. For example, in *Monge v. Maya Magazines, Inc.*,³⁴⁵ the district court held that the defendant's use of the plaintiffs' photographs was fair. The photographs were straight photographs of the plaintiffs' wedding.³⁴⁶ The court, hamstrung with the traditional bifurcation of creative and factual works, held that the photographs were "essentially factual [in] nature."³⁴⁷ It did so even though the photographs necessitated the same sorts of choices about craft, representation, and aesthetics that courts typically view as creative choices.

The real reason for the court's holding was that the photographs had become evidentiary in nature. The plaintiffs were celebrities who had secretly married. The defendants published the photographs, without the couple's permission, to prove the marriage.³⁴⁸ There is no reason why the court should have deemed the photographs uncreative under the second fair use factor.

The proposed balancing test would have enabled the court to deem the photographs creative under the second fair use factor. It could have also held that the defendant used the photographs fairly. It could have explained that the photographs had come to serve a truth-approximating function and that the public's interest in dissemination, therefore, trumped the newlyweds' interest in protection.³⁴⁹

³⁴⁵ No. CV 09-5077-R, 2010 WL 3835053 (C.D. Cal. Sept. 30, 2010), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

³⁴⁶ *Id.* at *2–*3.

³⁴⁷ *Id.* at *2.

³⁴⁸ *Id.* at *1–*2.

³⁴⁹ On appeal, the Ninth Circuit reversed the district court, instructing it to award summary judgment in the plaintiffs' favor. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1184 (9th Cir. 2012). There are two aspects of the Ninth Circuit's decision that are relevant to this Article. First, the court held that the district court had erred in concluding that the photographs at issue were factual rather than creative:

Simply because a photo documents an event does not turn a pictorial representation into a factual recitation . . . Photos that we now regard as iconic often document an event—whether the flight of the Wright Brothers' airplane, the sailor's kiss in Times Square on V-J Day, the first landing on the moon, or the fall of the Berlin Wall.

Id. at 1177. In other words, the court recognized, just as this Article does, that the district court's handling of the second fair use factor was not in keeping with a modern perspective on straight photographs. Second, the court engaged in an analysis very similar to the evidentiary exception proposed here. It described the photographs at issue as "photographic evidence that constitutes proof of a newsworthy event." *Id.* at 1174. But it concluded that this alone did not absolve the defendants of wrongdoing, noting that "publication of photographic evidence . . . is not automatically fair use"; that "[t]he photos were not . . . necessary to prove th[e] controverted fact—the marriage certificate, which is a matter of public record, may have sufficed"; and that "[e]ven absent official documentation, one clear portrait depicting the newly married couple in wedding garb with the priest [rather than six] would certainly have sufficed to verify the clandestine wedding." *Id.* at 1174–75, 1179. In other words, the court essentially applied the

- b. the second fair use factor should favor the defendant if the original photograph contains demonstrative expression

The second fair use factor should also favor the defendant when the original, copyrighted photograph contains something I call “demonstrative expression.” This is expression that has, itself, become a fact in controversy. It is not important for its substance, but, rather, for its style.

The classic example of such expression is President Ford’s reference to the White House tapes as a “smoking gun.”³⁵⁰ Most commentators view this as a case of merger, in which the idea and its expression became inseparably wedded.³⁵¹ However, Professor Jay Dratler has offered a better explanation, that President Ford’s expression became fact because its style was provocative, not because of merger:

This phrase of Ford’s became fact, not through any merger of expression and idea, but because the manner and vividness of the expression were themselves historical facts of considerable importance.

The argument that expression itself is a fact or “news” should not be confused with the doctrine of merger of idea and expression. Under the “merger” doctrine, copyright does not protect the expression of an idea when there are only a limited number of ways to express it. In contrast, the “expression as fact” argument may apply when there are many ways to express the same idea, but a particular person’s choice of one of those ways is itself a newsworthy event. The argument is analogous to the rule of evidentiary law for verbal acts, which admits evidence of statements made outside a courtroom as non-hearsay when the statements themselves are operative facts.³⁵²

Other examples of expression-as-fact, or demonstrative expression, include a “biographer [who] sought to support a portrait of his subject as a liar by showing he had lied; as a bigot by showing he had made bigoted

evidentiary exception proposed here, determining that either: (1) a necessary prerequisite to applying the exception—that the photograph in question be the only evidence, or nearly so, of a fact in question—was absent or (2) if the prerequisite *was* satisfied, and the six photographs at issue were the only evidence of the marriage, the defendants might have been able to use one photograph without permission without running afoul of copyright laws. *Id.*

³⁵⁰ *E.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

³⁵¹ See 4 NIMMER & NIMMER, *supra* note 125, § 19E.03.

³⁵² Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 306 (1988) (footnotes omitted).

pronouncements; as pompous and self-important by quoting self-important statements.³⁵³

These examples of expression-as-fact all involve literary works. But the phenomenon can also apply to photographs and other graphic works. For example, in the aftermath of Nicole Brown Simpson's murder, *Time Magazine* famously altered O.J. Simpson's mug shot, making his complexion look darker than it really is.³⁵⁴ The mug shot became a matter of controversy, and newsworthy, not because of its substance, but because of its style, the way in which *Time* had altered it.

Our hypothetical court, encountering this photograph, would resolve the second fair use factor in favor of dissemination. Its rationale would be that the photograph had become demonstrative expression. It would not need to use the legal fiction that the photograph was uncreative.³⁵⁵ Secondary users could publish the photograph without *Time's* permission because the photograph's expression, itself, regardless of the substance it conveyed, had become a fact in which the public had an interest.

Nunez, the case involving the racy photographs of Miss Puerto Rico, provides another example of photographic expression becoming fact. The photographs at issue in the case were not newsworthy because they depicted Miss Puerto Rico; instead, they were newsworthy because of the way in which they depicted her.³⁵⁶ If our hypothetical court confronted the *Nunez* case, it would acknowledge that the photographs were creative, in keeping with precedent (unlike the real *Nunez* court), but it would also deem them demonstrative expression, thus allowing the defendant to disseminate them without the plaintiffs' permission (assuming, of course, that the other fair use factors also suggested such an outcome).

C. *Examples: Applying the Concepts of Compositional Equivalence, Truth-Approximation, and Demonstrative Expression to Straight Photographs*

The Parts above suggested new approaches for evaluating substantial similarity and the nature of the copyrighted work. This Part will apply those new approaches to several well-known straight photographs.

³⁵³ Leval, *supra* note 188, at 1113–14.

³⁵⁴ See Oleg Tikh, *Falsification of History*, http://www.tc.umn.edu/~hick0088/classes/csci_2101/false.html (last visited Sept. 18, 2012). This webpage contains several examples of photographs that illustrate the expression-as-fact phenomenon. *Id.*

³⁵⁵ One interesting aspect of this example is that *Time* arguably handworked the mug shot, which would make it pictorial. *Id.* On the other hand, the better view is probably that this did not amount to handworking; it was not a technique that rejected the straight-photographic “look.” *Id.*

³⁵⁶ See *supra* Part IV.C.2.

1. the Obama “Hope” bumpersticker

First, consider Mannie Garcia’s now-famous photograph of then-senator Barack Obama attending a press conference on Darfur, Sudan. Shepard Fairey admitted to copying the photograph, but a court evaluating the case would still have to consider whether the bumpersticker was substantially similar to the photograph in terms of that photograph’s protectable elements.³⁵⁷ In other words, the court would have to apply the fact-expression dichotomy.

Initially, the court would differentiate between the photograph’s ideas and its expression. In *Kaplan*, the photographs were allegorical, depicting businessmen standing on skyscrapers’ ledges. They depicted familiar scenes from the cultural narrative. Thus, the idea was easy to pinpoint. With a straight photograph, like Garcia’s, however, the expression is more subtle. The idea was, perhaps, a politician showing concern. Or maybe it was Senator Obama, who was, even then, raising speculation about a presidential run, looking presidential.

Regardless, the court’s next step, identifying the photograph’s expression, clarifies matters. The court could, *sua sponte*, as a matter of judicial notice, take account of the photograph’s major compositional elements. Preferably, an attorney would provide the court with this information, making a template of the original work. Either way, the court would then conduct a compositional-equivalence test. It would superimpose the template upon the secondary work to see if the secondary artist borrowed protected expression.

That test would show, with regard to Garcia’s photograph and Fairey’s bumpersticker, that the two pieces are compositionally equivalent. In fact, Fairey took Garcia’s composition wholesale, with hardly any changes at all.³⁵⁸ Even those who embrace the metaphor of a thin copyright would have to say that Fairey took too much: thin copyrights protect against exact copying and that appears to be just what Fairey did.

That does not, however, end the inquiry. The court would have to consider Fairey’s fair use defense. In assessing the second factor, the court would, applying the suggestions above, deem Garcia’s photograph straight and bypass the ordinary question about whether the photograph was creative or factual. Then, it would balance Garcia’s need for the photograph’s protection

³⁵⁷ See 4 NIMMER & NIMMER, *supra* note 125, § 13.03[A], at 13-37 (“Just as copying is an essential element of copyright infringement, so substantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying. ‘This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.’” (footnotes omitted) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004))).

³⁵⁸ See Teresa Bruce, *Author’s Image No. 6*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App6.htm> (last visited Oct. 12, 2012) (showing that an outline of Fairey’s work superimposed over Garcia’s, rotated slightly clockwise, duplicates Garcia’s composition).

against the public's need for its dissemination. The public's need would trump Garcia's need if the photograph had become evidentiary or if it contained demonstrative expression.

Garcia would prevail on both counts. First, the court would not deem the photograph evidentiary. After all, there was no question about Obama having actually attended the conference, about whether he was paying attention at the conference, about whether his suit was too expensive, or the like. In other words, the photograph does not help to establish the truth of some controversial, public matter.

Second, the court would not characterize the photograph as demonstrative expression. Fairey could not credibly make an expression-as-fact argument. He was not commenting on the photograph's style, and there is nothing about that style that is in and of itself significant to the public discourse. It is still possible that Fairey could prevail, overall, in our hypothetical case, depending on the outcome of the other three fair use factors, but my bets are on Garcia.³⁵⁹

2. Alfred Stieglitz's *The Steerage*

Now, consider Alfred Stieglitz's masterpiece, *The Steerage*.³⁶⁰ Suppose Stieglitz had a valid copyright on *The Steerage*. Suppose further that I downloaded the piece off of the Internet and used it as the basis for my immigrant rights poster, *Liberty*.³⁶¹ If Stieglitz sued me for copyright infringement, the court would initially consider whether the two works were substantially similar.

The idea, immigrants on a steamship, would be unprotectable. But the expression, embodied in the composition, would be. With expression in mind, my poster may, at first glance, seem very different from Stieglitz's photograph. The poster is an impressionistic piece, complete with brush strokes and soft edges. The photograph, in contrast, is naturalistic, straight, with hard lines and

³⁵⁹ This assumes a hypothetical case in which Garcia still retained the copyright to his photograph and in which the secondary work was a bumpersticker instead of, say, a poster. In the real case, the Associated Press owned the copyright to Garcia's photograph and the secondary works were posters and other merchandise. See Complaint for Declaratory Judgment and Injunctive Relief, *Fairey v. Assoc. Press*, No. 09-01123 (AKH) (S.D.N.Y. Feb. 9, 2009), available at http://cyberlaw.stanford.edu/biguploads/Fairey_v_AP_complaint_with_exhibits.pdf; Answer, Affirmative Defenses and Counterclaims of Defendant, *The Associated Press, Fairey v. Assoc. Press*, No. 09-01123 (AKH) (S.D.N.Y. Mar. 11, 2009), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2009cv01123/340121/13/0.pdf?ts=1236870878>.

³⁶⁰ Stieglitz, *supra* note 75.

³⁶¹ Teresa Bruce, *Author's Image No. 7*, UNIV. OF DENVER, <http://www.law.du.edu/documents/Bruce/App7.htm> (last visited Oct. 12, 2012) (showing, on top half, the image created by the Author).

little texture. The people, so individual in Stieglitz's work, are blurry and anonymous in mine. Even the lighting in the two pieces appears to be quite different: Stieglitz's feels sunny, bleak, and stark. Mine feels dark and atmospheric.

The compositional-equivalence test shows, however, that the expression is substantially similar. The compositions are the same.³⁶² I have unquestionably taken more than just Stieglitz's idea. I have taken his manner of expressing that idea. I could argue that my work is fair, but Stieglitz's photograph is neither evidentiary, rare proof of some fact in the world, nor demonstrative, expression-as-fact. Thus, barring some slam-dunk on one of the other fair use factors, I will likely lose my case.

3. Gary Hart, Monkey Business

Finally, imagine yourself in 1987. Senator Gary Hart, a married man and a rising star in the Democratic party, has been accused of womanizing. He denies the allegation, daring the press to put a tail on him. They do. Or, at least, they dig up some dirt on him. *The National Enquirer* obtains a photograph of Senator Hart with aspiring actress/model Donna Rice on his lap.³⁶³ They are sitting on a dock waiting to board a luxury yacht, called, appropriately, "Monkey Business." Imagine further that the photographer, Hart's friend, objects to the photograph's dissemination.³⁶⁴ He sues the *Enquirer* for copyright infringement. There is no substantial-similarity question: the *Enquirer* has published the photograph without any alterations.

Is the use fair? Certainly. And that would presumably be the outcome even applying traditional fair use methodologies. However, under the methodology suggested above, the court does not have to deem the photograph factual, even though it displays all of the same creative characteristics that courts typically—in cases that do not involve a strong public interest—consider creative. Instead, it can recognize that the photograph has become evidentiary. The photograph makes the allegations against Hart more likely true than not. And it is rare. It is the only evidence of its kind. The citizens deserve to see it and judge the matter for themselves. The friend's interest in protection must give way to the public's interest in dissemination.

³⁶² See *id.* (showing, on bottom half, an outline of Stieglitz's photograph superimposed over my poster).

³⁶³ National Enquirer, *Untitled Photo of Gary Hart and Donna Rice* (1987) (photograph), available at http://www.people.com/people/gallery/0,,687082_717846,00.html.

³⁶⁴ This is purely hypothetical.

VI. CONCLUSION

Photography has captivated and confounded humanity since its inception. It is both a science and an art. But the latter title did not come easily. Alfred Stieglitz battled in the early 1900s for photography's acceptance as a fine art. He won the battle, but the victory was, at first, Pyrrhic. It was based on a pictorial ethic. This ethic held that photography was an art form only insofar as it resembled the traditional arts, painting, drawing, printmaking, and sculpture. Later, Stieglitz and others recognized pictorialism's limitations. They advocated for straight photography, an aesthetic that was true to the camera's distinctive qualities and, in particular, its realism. Today, straight photography is the dominant photographic aesthetic.

Unfortunately, copyright law has not embraced that aesthetic. In 1865, Congress expressly listed photographs in the Copyright Act. Some twenty years later, litigants challenged that legislation, arguing that machines produced photographs, not human beings, and that photographs, therefore, lacked originality. The Supreme Court disagreed, declaring that photographs were authored by people; that they, in other words, had originators; and that they accordingly satisfied the Constitution's originality requirement. It based its decision on the then-prevailing pictorial ethic: photographs were original because photographers used models, elicited expressions, posed sitters, staged backgrounds, and otherwise altered reality.

Subsequently, courts declared all sorts of photographs, both pictorial and straight, original. Now, in fact, almost any photograph, save those that deliberately attempt exact duplication of copyrighted works, can satisfy the originality requirement. A pictorial ethic has, however, lingered in other areas of copyright law. It appears in particular in the fact-expression dichotomy, a doctrine requiring that facts be free for the taking; the copyright laws only protect the expression of facts, not the facts themselves. This is because the Copyright Act's ultimate goal is to promote the progress of science and the arts. Scientists and artists build on those who go before them. Thus, allowing scientists and artists to freely take facts from their predecessors promotes the public good.

The fact-expression dichotomy, as applied to photography, has several shortcomings. For example, it uses rules designed for literature on a medium that is fundamentally different from literature. It is a relatively simple process to distinguish individual words used in an academic paper from the exact phrasing of those words. The individual words may be unprotected facts, but the phrasing is copyrightable expression. The exercise is not, however, so simple in the case of a straight photograph. Distinguishing that photograph's facts from its expression is often impossible because the two are inseparably wed. Visual facts are not discrete packages, like facts expressed in words.

Additionally, the fact-expression dichotomy privileges pictorial photographs over straight ones. This occurs most commonly in the context of

the fair use defense. Courts applying the second fair use factor reflexively deem pictorial photographs creative and straight ones factual. They do not typically acknowledge that works can be both factual and creative. This means that straight photographs automatically receive less protection from copying than pictorial photographs.

Finally, courts often use the fact-expression dichotomy, clumsily, as a proxy for public-interest rationales. They designate a straight photograph factual even though it displays all of the same characteristics that would, outside the public-interest context, result in a finding of creativity. In other words, they rely on a legal fiction. They do so because they recognize that the defendant should be allowed to disseminate the copyrighted work, but the copyright laws have not given them the tools to express that rationale directly.

Ultimately, the fact-expression dichotomy provides limited copyright protection for straight photographs, which are, by today's standards, highly creative and valuable to the public discourse. Copyright law should not penalize photography for characteristics that are inherent to the medium. The courts need a more-principled approach. This Article attempts to present one. It suggests that fact-bound works have a "porous" copyright, not a "thin" one. The metaphor of a porous copyright does not, in contrast to the metaphor of a thin copyright, embed the assumption that non-fiction contains little expression, little that copyright would protect. It indicates that copyright will give way to some degree, and in some area, but not in any preordained proportion.

The Article also suggests that courts evaluating straight photographs use a "compositional-equivalence" test to isolate facts from expression. This test involves the creation, either mentally or in fact, of a template showing the copyrighted work's major design elements. The court superimposes the template over the allegedly infringing work. If that work has duplicated the copyrighted work's composition—if, stated differently, there is an equivalence between the template and the allegedly infringing work—the defendant has taken protected expression. This test seems to explain many of the precedents in the straight-photography arena.

The Article suggests, in addition, that courts assessing photographs take a different approach to the second fair use factor. First, it suggests that they differentiate pictorial from straight photographs. Second, it suggests that, in the case of straight photographs, courts abandon the normal "is-it-creative-or-factual?" inquiry in favor of a balancing test. That balancing test would weigh the copyright holder's interest in protection against the public's interest in dissemination. There are two instances in which the public's interest would trump the copyright holder's interest: when a photograph has become "evidentiary in nature," and when a photograph contains "demonstrative expression."

Photographs like those of the My Lai massacre and Gary Hart with Donna Rice on his lap are evidentiary in nature. The former prove the truth of a massacre that some people denied had happened. The latter proves that

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allegations of Hart's infidelity were more likely true than not. All of them serve a truth-approximating function. And all of them were rare, essentially the only evidence the public had at its disposal.

Photographs like O.J. Simpson's mug shot and Miss Puerto Rico's modeling portfolio contain demonstrative expression. *Time Magazine* had altered the mug shot so that Simpson's complexion appeared darker than it really is. The public had an interest in the photograph, not because it depicted Simpson, but because of the *way* in which it depicted Simpson. Miss Puerto Rico had distributed photographs that showed her nude or nearly nude. Some portion of the public believed that this was inappropriate, given her title. They were interested in the photographs, not because they depicted Miss Puerto Rico, but because of the *way* in which they depicted her. In such a situation, the public must have access to the photograph in order to adequately analyze the controversy.

All in all, courts are doing a relatively good job in terms of outcomes. The cases, usually, are rightly decided. The problem is that the courts have been given the wrong tools for the job. It is like they are using a hammer to turn screws. And their rationales suffer. This Article has attempted to offer courts the right tools for the job in the hopes that their rationales, which, at the end of the day, may be even more important than outcomes, will benefit.