

# ARTICLE

## ORIGINALITY IN CONTEXT

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### I. INTRODUCTION

There is no universally applicable view of authorship, originality, and creativity. Postmodernists argue that no single work manifests creativity and innovation deriving from a unitary source.<sup>1</sup> Drawing on this view, legal scholars have criticized

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1. Roberta Rosenthal Kwall, “*Author-Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 21 (2001); see also Rochelle Cooper Dreyfus, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1214–15 (2000).

copyright law as a whole for its implicit reliance on the romantic view of authorship.<sup>2</sup> If true artistic creativity is, in essence, a fiction, then no reason exists for privileging authors above other producers when it comes to maintaining the integrity of their works.<sup>3</sup> Moreover, literary theorists document that the concept of “authorship” as we understand that term today is a relatively recent phenomenon that began to take shape in the eighteenth century.<sup>4</sup> English professor Martha Woodmansee reminds us that how we see the concept of “authorship” today was not inevitable, given that the heritage of the Renaissance was to view authors as either “craftsmen” who mastered what was put before them for the enjoyment of the “cultivated audience of the court” or, alternatively, as “inspired” by external forces.<sup>5</sup> The idea that an author is personally responsible for his work was inconsistent with both of these conceptions but emerged later, in part as a result of the influence by a class of professional writers in the eighteenth century who sought to justify legal protection for their efforts.<sup>6</sup> Thus, perhaps the authorship construct in which we indulge today was “neither natural nor inevitable.”<sup>7</sup> Without doubt, however, this construct is the one that has prevailed and thus it cannot be readily removed from the discourse.

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

3. See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”*, 17 *EIGHTEENTH-CENTURY STUD.* 425, 440–42 (1984) (observing that when a book is viewed as a truth-conveying vehicle, there is no reason to privilege any of the numerous craftsmen involved in its production). A similar view was exemplified in China during the Cultural Revolution in the 1960s. During this time, “the Communist government instituted radical policies undermining property rights and material incentives.” Shin-yi-Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL’Y J.* 13, 17 n.88 (2000) (referencing David B. Dreyfus, Comment, *Confucianism and Compact Discs: Alternative Dispute Resolution and Its Role in the Protection of United States Intellectual Property Rights in China*, 13 *OHIO ST. J. DISP. RESOL.* 947 (1998)). The prevailing view was that “if a steel worker need not put his name on an ingot he had produced, why should a writer enjoy the privilege of putting his name on the article he produced?” *Id.* (internal quotations omitted). As a result of this position, all works of creativity were blocked and unprotected. *Id.*

4. See, e.g., Roland Barthes, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* (Stephen Heath trans., 1977); Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141 (Josué V. Harari ed., 1979); Woodmansee, *supra* note 3, at 426.

5. Woodmansee, *supra* note 3, at 426–27; see generally Martha Woodmansee, *Response to David Nimmer*, 38 *HOUS. L. REV.* 231, 231–32 (2001) (criticizing the modern era’s authorship construct).

6. Woodmansee, *supra* note 5, at 232; see also Jaszi, *supra* note 2, at 32–33 (discussing the influences documented by other scholars with respect to the current construction of “authorship”).

7. See Jaszi, *supra* note 2, at 29–30 (discussing the work of Michel Foucault).

Moreover, the postmodern view ignores the reality that when an author borrows from the cultural fabric in crafting her work, it is still the unique combination of past efforts and the author's original contributions that invests the author's work with its unique and inviolate stamp. As Alfred Yen has observed: "Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion, and transformation of input gained from the author's experience within a broader society."<sup>8</sup> By questioning the ability of authors to draw upon personal originality as their creative inspiration, the postmodern perspective arguably does not sufficiently account for the inspirational dimension of authorship. Although authors freely borrow from the landscape of existing cultural production, a work of creative authorship nonetheless manifests the author's individual process of creativity and artistic autonomy. Indeed, the very act of authorship entails an infusion of the creator's mind, heart, and soul into her work. This inspirational or "noneconomic" impetus to create provides the theoretical predicate for moral rights protection such as the right of an author to receive attribution and to maintain some control over her work's public presentation.<sup>9</sup>

In order to adequately address authorship concerns with respect to works whose creation is rooted, either wholly or partially, in the inspirational realm, the focus must be on the author's relationship to her work and her sense of personal satisfaction or fulfillment resulting from the act of creativity itself. Under this framework, the external work of authorship is seen as the embodiment of the author's internal creative processes. Moral rights protections, such as attribution and integrity rights, reaffirm the author's work as a reflection of its creator and a testament to the author's autonomy and dignity. As a behavioral category, dignity can find realization only in the external embodiments that are seen as commodifications of the author's inner personality.<sup>10</sup>

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8. Alfred Yen, *The Interdisciplinary Future of Copyright Theory*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 2, at 166.

9. For a more complete treatment of the importance of noneconomic motivations for creativity, see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *NOTRE DAME L. REV.* 1945 (2006).

10. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.U. L. REV.* 962, 971 (1964) ("[O]ur Western ethico-religious tradition posits such dignity and independence of will in the individual that the common law secures to a man 'literary and artistic property'—the right to determine 'to what extent his thoughts, sentiments, emotions, shall be communicated to others.'"); Kwall, *supra* note 9, at 1973–74 ("[D]ignity can find realization only in its external embodiments that allow the inner personality to commodify itself, to explain and interpret itself to the outside world.").

According to this view, authorship dignity “cannot be assessed absent the author’s externalized message, but in turn the message . . . of the author’s work cannot be understood without reference to the author’s intrinsic motivations.”<sup>11</sup> Thus, safeguarding an author’s right to select an attribution of choice is vital because attribution is a central component of authorship dignity. Similarly, assaults upon a work’s integrity damage authorship dignity because a work that has been modified against the author’s will no longer represents her original internal creative processes.

The purpose of this Article is not to make the case for moral rights protection. Instead, it asks whether moral rights should be accorded to limited works of authorship. Even those who argue that moral rights protections in the United States are justified might still question whether they should be applicable to all types of “authored” works. International instruments that attempt to situate intellectual property rights within the discourse of human rights do not necessarily require a work to be copyrightable in order to receive moral rights protection.<sup>12</sup> Still, in most, if not all, countries, moral rights protection attaches to works that are subject to copyright protection.<sup>13</sup> If we assume that copyright law, at least in the United States, sets a particular floor for the concept of originality, it would not make sense to discuss moral rights in conjunction with works that do not possess at least this minimal level of originality. On the other hand, just because a work is sufficiently original to obtain copyright protection does not mean that it automatically should receive the additional safeguards of moral rights.

Sound reasons may support confining the application of moral rights to a smaller category of works than are covered by copyright law. For example, the conventional justifications for applying moral rights only to works we label “fine art,” rather than to the products of all artisans, embrace the view that such works are unique, entail substantial skill and effort, and “are generally acquired principally for their expressive or decorative character, and not for functional

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11. Kwall, *supra* note 9, at 1974.

12. See, e.g., International Covenant on Economic, Social and Cultural Rights art. 15(1)(c), Jan. 3, 1976, S. Exec. Doc. D, 95-2, 993 U.N.T.S. 3, 5 (recognizing the right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”). For a full discussion of this Covenant and its implications, see Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975–78, 987–1000 (2007).

13. See Cyrill Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 360 (2006).

or utilitarian uses.”<sup>14</sup> Such works, therefore, are perhaps less likely to need modifications that may ultimately conflict with the creator’s artistic vision in order to serve their intended functions.<sup>15</sup> Even in France, regarded as the birthplace of moral rights, limitations exist regarding the enforcement of moral rights depending on the nature of the work: “[O]bviously, a [French] court is going to be less scrupulous about an editor’s polishing up a set of instructions for use of a home appliance than his reworking the text of a poem.”<sup>16</sup>

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

## II. ORIGINALITY UNDER COPYRIGHT LAW

The 1909 Copyright Act provided that “the works for which copyright may be secured . . . shall include all the writings of an author.”<sup>17</sup> By stipulating that copyright protection applies to “works” and includes “all the writings of an author,” the statute neither confined copyright protection to “writings” nor included any limit on the types of works eligible for protection.<sup>18</sup> The 1976 Copyright Act circumvented these problems by stipulating that copyright protection instead extends to “original works of authorship.”<sup>19</sup>

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14. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103–04 (1997).

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

16. ANDRE LUCAS, ET AL., INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7(2)(a). This idea also accounts for the special rules governing moral rights in connection with computer programs. For example, an author is precluded “from preventing any ‘adaptation of a computer program’ that complies with ‘the rights he has transferred’ and from ‘exercising his right to retract or correct.’” *Id.*

17. See Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 4, 35 Stat. 1075, 1076 (codified as amended at 17 U.S.C. § 102(a) (2000)). Although the Copyright Clause uses the term “writings,” the intent of the Framers in this regard is far from clear. See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 59–64 (2003) (examining the original intent underlying “the meaning of ‘writings’”).

18. See Walterscheid, *supra* note 17, at 65–66 (examining the 1909 Copyright Act’s language, which “seemed to suggest that there was no constitutional limitation on what could be copyrighted”).

19. Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544 (codified as amended at 17 U.S.C. § 102(a) (2000)); see also Walterscheid, *supra* note 17, at 66 (arguing that Congress’s substitution of “‘works’ for ‘writings,’ while pragmatically honest

In 1991, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* declared originality to be a constitutional requirement in a case denying copyright protection to the plaintiff telephone company's white page listings.<sup>20</sup> In elaborating upon the standard for originality, the Court held that it requires "only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."<sup>21</sup> *Feist* thus defines originality as requiring two elements: first, independent selection, and second, at least minimal creativity, thereby merging the concept of originality with that of creative authorship.<sup>22</sup> In *Feist*, independent selection was not at issue because there were no allegations that the plaintiff copied its listings from any other work. Thus, the focus of the Court's opinion is on whether the plaintiff's listings possessed the requisite degree of creative authorship.<sup>23</sup>

Prior to *Feist*, however, some courts and commentators drew a distinction between originality and creativity, positing that originality refers to whether the creator made an independent contribution, whereas creativity is a more subjective concept that is concerned with the nature of that contribution.<sup>24</sup> Other courts viewed the subjective element of originality as a requirement that the author contribute "more than a 'merely trivial' variation."<sup>25</sup> Still, *Feist's* adoption of a subjective, even if very minimal, "creativity" requirement for copyright has been severely criticized on the ground that it is at odds with the legislative history of the 1976 Act and furnishes an ambiguous and inappropriately high standard for protection.<sup>26</sup> On the other

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and declarative of congressional intent, is the ultimate legal fiction generated with respect to copyright"). The legislative history for the 1976 Copyright Act notes that by omitting a definition of originality, the statute intended to "incorporate without change the standard of originality established by the courts under the [1909 Act]." S. REP. NO. 94-473, at 50 (1975), as reprinted in 1976 U.S.C.C.A.N.5659, 5664.

20. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363-64 (1991).

21. *Id.* at 345 (internal citation omitted).

22. *Id.* In his contribution to this symposium, Keith Aoki observes that *Feist* is probably the most influential intellectual property opinion written by Justice O'Connor. Keith Aoki, *Balancing Act: Reflections on Justice O'Connor's Intellectual Property Jurisprudence*, 44 HOUS. L. REV. 965, 996 (2007).

23. *Feist*, 499 U.S. at 361.

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

25. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)); *Gross v. Seligman*, 212 F. 930, 930-32 (2d Cir. 1914).

26. See Russ VerSteeg, *Originality and Creativity in Copyright Law*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE

hand, Diane Zimmerman has observed that *Feist* suggests the Court may believe a degree of genuine, recognizable creativity is a constitutionally mandated part of the originality inquiry.<sup>27</sup> In any event, regardless of whether creativity is viewed separately from originality or as an element of originality, copyright law is clear that a copyrightable work must manifest a contribution that is both independent and creative.

As discussed, the necessary degree of creativity is minimal according to *Feist*. Distinguishing originality from novelty, the court emphasized that “the requisite level of creativity is extremely low; even a slight amount will suffice,” and “[t]he vast majority of works make the grade quite easily.”<sup>28</sup> Thus, factual compilations may possess the requisite originality in light of the author’s selection and arrangement of otherwise unprotectable material.<sup>29</sup> The Court does caution, however, that “[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”<sup>30</sup>

In the United States, copyright’s standard of originality arguably fulfills the goals of the Copyright Clause with respect to works whose incentive for creation depends completely, or even primarily, upon an economic motivation. There are, quite simply, copyrightable works with fairly low degrees of originality, such as arrangements of databases or specific computer programs, that would not be created at all if their authors did not have the guarantee of some economic reward. *Feist* recognizes this difficulty by setting a low standard for originality and suggests that the level of originality in a particular work will determine the scope of copyright protection such work receives.<sup>31</sup> Works

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DIGITAL AGE 1, 20 (Peter K. Yu ed., 2007) (recommending the terms “material variation” or “distinguishable variation” as opposed to “creativity”). For a pre-*Feist* critique of originality as a “legal fiction” that is “inherently unascertainable,” see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969, 1004–07 (1990).

27. See Diane L. Zimmerman, *It’s An Original!(!): In Pursuit of Copyright’s Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 211 (2005). Additionally, she ponders whether judges should be required to “distinguish among works, based on qualitative or equivalent norms.” *Id.*

28. *Feist*, 499 U.S. at 345 (1991). *Feist*’s articulation of the originality standard is vulnerable to criticism on the ground that it fails the objectives of the Copyright Clause by including works that will not necessarily promote progress. See Walterscheid, *supra* note 17, at 71 (advocating “novelty rather than originality ought to be the constitutional prerequisite for copyrightability” and arguing that it is “simply not apparent” that “granting an exclusive right in a writing that is not novel in any way promotes the progress of science”).

29. *Feist*, 499 U.S. at 348.

30. *Id.* at 359.

31. *Id.* at 345, 347–51 (recognizing “that the fact/expression dichotomy limits severely the scope of protection in fact-based works” because copyright protection “may

containing large amounts of unprotected expression will have more thin copyright protection than works containing greater amounts of truly expressive material. Indeed, *Feist* instructs us that “copyright in a factual compilation is thin. . . . [A] subsequent compiler remains free to use [such] facts . . . to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”<sup>32</sup>

Courts have further massaged the concept of originality under copyright law by invoking a more stringent test for infringement when the work at issue has a narrow range of protectable and unauthorized expression. For example, in assessing the degree of protection afforded an artist’s glass-in-glass jellyfish sculptures, the Ninth Circuit held that only the artist’s original contributions, such as the distinctive curls of particular tendrils and the arrangement of certain hues, are capable of sustaining a “thin copyright.”<sup>33</sup> Moreover, the artist’s “thin copyright” affords protection only against copying resulting in a virtually identical work, as opposed to a work that is merely substantially similar.<sup>34</sup>

Photography presents a particularly interesting study of the application of originality and creativity given that this medium straddles “the boundaries between technology and artistic expression.”<sup>35</sup> Although photography was included in the copyright statute as protectable subject matter as early as 1865,<sup>36</sup> the Supreme Court did not have occasion to consider the scope of protection in photographs until 1884. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court looked to the findings of fact with respect to the photograph in question and concluded that copyright protection was warranted due to it being a “useful, new, harmonious, characteristic, and graceful picture, [which the plaintiff created] entirely from his own original mental conception . . . .”<sup>37</sup> The Court gave the following examples of the

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extend only to those components of a work that are original to the author”).

32. *Id.* at 349.

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

34. *Id.*; see also *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995) (invoking the “virtual identity” test rather than the more lenient “substantial similarity” test for infringement); *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 19 (2005) (noting that the test for infringement of copyright in a Post Office building constructed in a particular architectural style requires “supersubstantial similarity” because the plaintiff’s copyright is “thin”).

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

36. Copyright Act of 1865, ch. 126, § 1, 13 Stat. 540 (extending protection to “photographs and the negatives thereof”).

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

plaintiff's original conception: the subject's pose and arrangement, the selection and arrangement of the costume, draperies and other accessories used in the photograph, and the arrangement and disposition of the lighting, which resulted in the "desired expression."<sup>38</sup> Based on these findings, which focused on the photographer's staging of the process as the justification for originality, the Court held that the photograph was "an original work of art, the product of the plaintiff author's intellectual invention."<sup>39</sup>

Christine Farley explains the Court's decision in terms of both the artistic view of photography prevalent at that time and the need for preserving the notion that post-shutter activities are free of artistic choice, and thus remain author-free and objective.<sup>40</sup> Due to photography's inherent mechanical nature, at the time of *Burrow-Giles* "very few photographers, and even fewer artists, considered photography to be within the realm of art."<sup>41</sup> The "artistry" of photography at this time understood "arranging" or "picture-making" as the primary component of the art.<sup>42</sup> Moreover, there was a prevailing view that the image produced by photography was free of human intervention and therefore well-suited as objective evidence in legal disputes.<sup>43</sup> A focus on the photographer's input as consisting of pre-shutter activity facilitated this conception.<sup>44</sup>

Significantly, the holding in *Burrow-Giles* was extraordinarily narrow, extending only to the particular photograph before the Court<sup>45</sup> and thus reserved the more difficult question of the copyrightability of "ordinary," as opposed to "high art," photographs.<sup>46</sup> The Court's limited holding rendered later courts without adequate guidance;<sup>47</sup> even today,

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quotations omitted).

38. *Id.*

39. *Id.*

40. Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 437 (2004).

41. *Id.* at 419.

42. *Id.* at 417, 427–28.

43. *See id.* at 389, 437 (describing the original conception of photographs as "inscrutable conveyors of truth" in court and stating that *Burrow-Giles* preserved this understanding). *Cf.* Jaszi, *supra* note 2, at 33 n.17 ("Photography had perplexed nineteenth-century lawyers who saw the machine, rather than human agency, as the source of the photographic image.")

44. *See* Farley, *supra* note 40, at 389–91.

45. *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884).

46. *See* Farley, *supra* note 40, at 430.

47. *Id.* at 438. *But cf.* *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934–35 (S.D.N.Y. 1921) ("[N]o photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike").

determining originality in the context of photographs raises complicated questions. For example, sometimes a photograph is not the result of deliberate artistic decisions being made by the photographer. There have been documented instances of photographers shooting in a deliberately haphazard manner, without any creative choices being exercised with respect to the work.<sup>48</sup> Contemporary methods of photography such as surveillance cameras and satellite images take this problem to a new level.<sup>49</sup>

Moreover, the theoretical premise of *Burrow-Giles* is consistent with the idea, invoked even in modern cases, that unless a photograph is actively staged, it is lacking in originality on the ground that it simply duplicates that which exists in nature.<sup>50</sup> When the subject matter in question is, in fact, that of nature itself, this issue is especially relevant. In *Dyer v. Napier*, a federal district court observed that “it is well-settled that when a live creature commonly appearing in nature is reproduced, the only elements protected by copyright are those original aspects which are not required in the depiction of the creature as expressed in nature.”<sup>51</sup> Thus, in that case the court held that the photographer of a “mother mountain lion perched on a rock with a kitten in her mouth”<sup>52</sup> enjoyed a “thin” layer of copyright protection with respect to his original elements such as the choice of location, background, lighting, shading, timing, angle, and framing.<sup>53</sup> Nevertheless, the court granted summary judgment to the defendant who had created a bronze sculpture of a mother mountain lion in the same pose as the lion in the plaintiff’s photograph.<sup>54</sup> According to the court, any similarity between the two works was the result of nonprotectable elements of the plaintiff’s copyrighted photograph.<sup>55</sup>

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48. See Olsson, *supra* note 35, at 1497 n.49 (discussing the later work of Garry Winogrand).

49. Farley, *supra* note 40, at 388.

50. *Id.* at 432; *cf.* *Bridgeman Art Library, Ltd. v. Ration*, 36 F. Supp. 2d 191, 200 (S.D.N.Y. 1999) (holding that insufficient originality exists with respect to color transparencies of paintings in the public domain).

51. *Dyer v. Napier*, 81 U.S.P.Q.2d 1035, 1044 (D. Ariz. 2006).

52. *Id.* at 1042.

53. *Id.* at 1043 (internal quotations omitted).

54. *Id.* at 1036.

55. *Id.* at 1044. According to the evidence in the case, the plaintiff hired animal trainers to assist him in manipulating the animals so they would present themselves in the desired pose. *Id.* at 1037. Specifically, the plaintiff “placed a baby mountain lion on the end of a boulder near a drop-off. When the mother mountain lion was released, she instinctively walked over to the boulder and used her mouth to pick up the kitten.” *Id.* To produce the photograph in question, this procedure was repeated more than twelve times. *Id.*; see also *Satava v. Lowry*, 323 F.3d 805, 807 (9th Cir. 2003); *supra* note 33 and

The artistry of photography can inhere not only in the pre-shutter staging process, but also in both the creative choices associated with the timing of the click of the shutter and in post-shutter activity. With regard to timing, creative choices include “the precise timing to click the shutter, the angle of the shot, the frame, the focus, the distance from the subject, [and] the centering of the subject.”<sup>56</sup> As for post-shutter activity, actions such as retouching, cropping, framing, redeveloping, and coloring seem obvious exercises of creative decisionmaking.<sup>57</sup> Moreover, digital technology has multiplied the opportunities for post-shutter creativity. For example, the well-known photographs of Depression-era, southern tenant-farmers taken by Walker Evans have now been digitally reproduced by two of his former colleagues.<sup>58</sup> Evans worked on an assignment for the Farm Security Administration, so his photographs are public property in the Library of Congress and are capable of being reproduced by anyone.<sup>59</sup> The new prints “modulate and unify the midranges of grays in [the original] pictures to soften contrasts and give a warmer ambience to photographs.”<sup>60</sup> The resulting prints are “seductive and luxurious,” qualities that stand in sharp contrast to both the subjects themselves and to Evans’s original “gelatin silver prints.”<sup>61</sup>

Thus, despite the challenges presented by photography to the application of the originality requirement,<sup>62</sup> the medium’s potential to express substantial degrees of individual creativity is

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accompanying text. In *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), Judge Holmes observed: “Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique.” *Id.* at 249–50 (internal citations omitted).

56. Farley, *supra* note 40, at 434; *see also* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (finding “many elements of creativity” in the Zapruder pictures, namely, selection of the type of camera, type of film, type of lens, area of the subject matter, timing, and the shooting location); Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916) (describing the photographer’s timing as a creative choice that “undoubtedly requires originality”).

57. *See* Farley, *supra* note 40, at 390, 435–37.

58. *See* Michael Kimmelman, *Walker Evans. Or Is It?*, N.Y. TIMES, Aug. 25, 2006, at E27 (critiquing the digitally remade photographs).

59. *Id.*; *see* 17 U.S.C. § 105 (2000) (disallowing copyright protection for any work of the government of the United States).

60. Kimmelman, *supra* note 58.

61. *Id.*

62. Interestingly, the Berne Convention differentiates the term of protection for photographic works and works of applied art by stating that the individual members should make this determination, although protection should last at least “twenty-five years from the making of such a work.” Berne Convention for the Protection of Literary and Artistic Works of 1971 art. 7(4), Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

clear. A compelling example of this point is furnished by the unique role photography plays in art therapy. As a medium that does not require knowledge of drawing, painting, or sculpting, photography has lowered the barriers to entry. In midtown Manhattan, for example, the International Center of Photography encourages poor, urban, teenage girls with few other positive outlets for their energies to develop their self-awareness and gain control of their lives through digital photography.<sup>63</sup> In contrast, other genres of works that may challenge copyright's originality requirement in certain instances lack photography's potential to express substantial creativity. Yet, all copyrightable works, even compilations of noncopyrightable material, now receive protection for the life of the author plus seventy years.<sup>64</sup> The reality of a relatively low standard of originality qualifying works for copyright protection, combined with an expanding duration of protection, has given rise to the current concern that copyright law is far too bloated.<sup>65</sup>

This concern with expanding copyright protection impacts the dialogue on moral rights. Yet, many fail to appreciate that moral rights and copyright are clearly distinguishable. Moral rights are aimed at preserving an author's artistic autonomy and dignity; copyrights afford economic protection and are steeped in a utilitarian framework. Moreover, although many scholars share concerns regarding an increasingly expansive copyright law on the ground that copyright law inappropriately allocates speech entitlements to politically savvy and influential speech organizations,<sup>66</sup> these concerns do not necessarily apply to moral rights protections. Specifically, individual creators, as opposed to large corporations, will often gain the benefits from such laws. In fact, Congress's decision to confine moral rights protection to the limited categories of visual art designated in the Visual Artists

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63. Randy Kennedy, *Lessons in New Ways to See: Troubled Girls Learn an Art of Examination*, N.Y. TIMES, July 5, 2006, at E1.

64. See 17 U.S.C. § 302(a) (2000); see also *Eldred v. Ashcroft*, 537 U.S. 186, 192–94 (2003) (upholding the constitutionality of Congress's retroactive extension of the duration of copyright protection). Note, however, Section 302 provides different terms of protection for works made for hire (Section 302(c)) and joint works (Section 302(b)).

65. Cf. Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 786–87 n.18 (2006) (noting the increase in scholarly interest in the public domain is partially the result of the discourse concerning copyright term extension).

66. Kwall, *supra* note 9, at 1996 & n.286; see also Jaszi, *supra* note 2, at 32–33 (noting that such “distributors have reaped most of the benefits of copyright’s cultivation of Romantic ‘authorship’”); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 64–65 (2001) (discussing “entitlement allocations that accord politically powerful speakers control over speech or speech conduits that could reasonably be distributed to a multitude of individual or small entity speakers or even left open to the public at large”).

Rights Act of 1990 (VARA)<sup>67</sup> resulted from its desire to avoid conflict with the industrial forces that expressed concern about their ability to maintain profits and power with more expansive moral rights coverage.<sup>68</sup> VARA, the product of political lobbying, poor drafting, and a hasty and thoughtless legislative process,<sup>69</sup> is in need of considerable attention in many respects. The remainder of this Article addresses the issue of the appropriate degree of originality for moral rights protection in a broader context than VARA.

### III. ORIGINALITY IN A MORAL RIGHTS FRAMEWORK

Significantly, *Feist's* elevation of the originality requirement to a constitutional magnitude signifies the importance of Congress's role in determining the parameters of how the originality standard should be applied. As William Patry has observed: "The *Feist* Court did not strip Congress of its voice on all originality issues; instead, the Court only set a threshold standard. Congress is free to set a higher standard, or, in protecting particular types of works, to declare how the originality requirement must be satisfied."<sup>70</sup> I have argued elsewhere that moral rights protections that are narrowly crafted to promote public education regarding the authorship and original artistic message of the work represent appropriate measures to achieve the objectives of the Copyright Clause.<sup>71</sup> In

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67. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.).

68. Kwall, *supra* note 9, at 1997.

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

70. William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 377 n.104 (1999). Interestingly, the standard for copyright originality varies within the European Community. See Herman Cohen Jehoram, *The EC Copyright Directives, Economics and Authors' Rights*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 821, 829 (1994) (noting that, historically, Germany's standard was among the most stringent to the extent "courts require more than just personal expression").

71. See Kwall, *supra* note 9, at 1983–87. "In the early republic, the conventional understanding of promoting progress appeared to be equivalent to the utilitarian conception of dissemination of knowledge." *Id.* at 1985–86. For a comprehensive historical study of the Copyright Clause, see Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006). Moral rights can function as "limited" rights granted to authors for the purpose of promoting progress. Specifically, the objective of "promoting progress" is "best achieved through a legal framework that promotes the public's interest in knowing the original source of a work and understanding it in the context of the author's original meaning." Kwall, *supra* note 9, at 1986. Given that the Supreme Court has long deferred to Congress's judgments regarding the specific implementation of copyright legislation, moral rights is within the scope of Congress's legitimate actions pursuant to the

this section, I develop the argument that despite the minimal threshold for originality developed under copyright law, moral rights protection should only be accorded to works satisfying a heightened standard of originality, as manifested by substantial—rather than “a modicum”—of creativity.<sup>72</sup>

The current low standard for creativity should not be imported unthinkingly as the standard for a work’s eligibility for moral rights protection. For works whose creation is rooted in the inspirational realm of authorship, economic incentive is not the only relevant factor.<sup>73</sup> As discussed earlier, the importance of an author’s artistic autonomy and dignity are critical in driving the intrinsic dimension of creativity, which forms the theoretical predicate for moral rights.<sup>74</sup> Therefore, works should be required to manifest heightened originality with “substantial” creativity in order to be protected through moral rights legislation.<sup>75</sup>

The standard suggested here would require courts to become involved in determining whether a particular work manifests the requisite degree of originality to qualify for protection. At first blush, this may seem to be a controversial suggestion based on “the doctrine of avoidance’ of artistic determinations,” which represents “one of the most stable and explicitly stated doctrines across art law.”<sup>76</sup> This position has a strong pedigree, dating at least as far back as Justice Holmes’s famous statement in

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Copyright Clause. *See id.* at 1987–88 (predicting the Supreme Court’s continued deference to congressional discretion under the Copyright Clause, particularly with regard to moral rights). Indeed, “the task of definition, of inclusion and exclusion, upon deliberation and compromise, is precisely the type of line drawing that is the function of the legislature.” Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 839 (2001).

72. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 362 (1991).

73. As Elliot Silverstein of the Directors Guild of America testified before Congress in 1987 against film colorization, “some values are more important than material reward . . . some things are just not for sale.” Kwall, *supra* note 1, at 15 (quoting *Legal Issues That Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black and White: Hearings Before the Subcomm. on Tech. and the Law of the S. Comm. on the Judiciary*, 100th Cong. 12 (1987) (statement of Elliot Silverstein, Directors Guild of America)). *See generally* Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569 (2000) (arguing that because the economic incentive model does not adequately explain the application of intellectual property laws to the serious fine arts, these laws primarily apply to mass-produced works that are distributed in volume).

74. *See supra* notes 9, 15 and accompanying text (discussing the “inspirational or ‘noneconomic’ impetus to create” as the foundation of moral rights protection).

75. *Cf.* Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, 159 REVUE INTERNATIONALE DU DROIT D’AUTEUR 3 (1994) (proposing that authorship norms require “some personal imprint,” while marketplace norms require “at most minimal creativity”).

76. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 811–15 (2005) (discussing the arguments made for why judges should not judge art).

*Bleistein v. Donaldson Lithographing Co.* that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”<sup>77</sup> This language has become “a refuge for judges who do not want to engage with aesthetic questions.”<sup>78</sup>

A distinction can be drawn, however, between a work’s artistic merit and its artistic rank. That is to say, Judge Holmes’s discussion in *Bleistein* seems directed toward judicial assessment of a work’s artistic merit. In contrast, the concepts of heightened originality and substantial creativity also can be applied to assess a work’s artistic rank. If Congress were to enact expanded moral rights protection, it could provide some assistance in these matters by excluding certain ranks, or categories, of works from the scope of coverage. A straightforward way to accomplish this result legislatively is to preclude completely moral rights protection for certain types of works that are essentially functional in their totality and, therefore, lacking in any significant artistic characteristics. In contrast, for categories of works that incorporate both functional as well as artistic qualities, courts will have to assess whether to accord these works moral rights protection on an individual basis. As this Article discusses shortly, copyright law contains adequate guidance for facilitating such judicial evaluations.<sup>79</sup>

As a practical matter, an outright statutory exclusion of the type contemplated would eliminate the possibility of moral rights being asserted in *particular types* of subject matter such as databases, building codes, office memos, and cabinets.<sup>80</sup> On the other hand, it would leave the door open for works such as architecture and even the type of pictorial advertising at issue in *Bleistein*.<sup>81</sup> Such cabined requirements for protection not only comport with the underlying theory of moral rights, but also avoid potential criticisms that stronger moral rights will open the

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77. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 351 (1903).

78. Farley, *supra* note 76, at 818.

79. See *infra* notes 114–37 and accompanying text.

80. See Lee, *supra* note 71, at 839–40 (recognizing legitimate criticism of a moral rights system that would protect subject matter such as office memos and cabinets); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 662–69 (questioning the application of conventional moral rights protection with respect to software); see also *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (holding that a private organization’s model building codes are copyrightable until they are legislatively enacted as law, after which time they enter the public domain).

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

door to covering a multitude of “creative” enterprises with little significant artistic value.<sup>82</sup>

By analogy, it is helpful to consider the extent to which VARA has provided guidance with respect to what constitutes “a work of visual art” under the statute. VARA explicitly excludes any “poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication” as well as merchandising, advertising, or promotional material.<sup>83</sup> Leaving aside the statute’s problematic exclusion of highly original works other than visual art, the list of statutory exclusions suggests that the statute intends to exclude more functional types of visual art.<sup>84</sup> This intention is reinforced by the statute’s provision that with respect to the right to protect against the destruction of a covered work the work must meet the additional requirement of possessing “recognized stature.”<sup>85</sup> Although the statute fails to define “recognized stature,” one court has interpreted this requirement as “a gate-keeping mechanism” affording protection only to art work “that art experts, the art community, or society in general views as possessing stature.”<sup>86</sup>

Indeed, in enumerating those works of visual art covered by VARA, the statute establishes some basic parameters with

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82. See Sarah Kutner & Holly Rich, Note, *Dirty Dancing: Attributing the Moral Right of Attribution to American Copyright Law: The Work for Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham*, 22 HOFSTRA LAB. & EMP. L.J. 325, 349 (2004) (urging that VARA be expanded to “include art forms beyond ‘visual art,’ namely performing arts” and noting that the creativity of choreography is particularly “the most misunderstood and underestimated” of the performing arts due to its seemingly effortless and undisciplined physical appeal). Cf. *Open Source Yoga Unity v. Choudhury*, 74 U.S.P.Q.2d 1434, 1438 (N.D. Cal. 2005) (observing that if the selection and arrangement of the yoga sequence at issue is entitled to copyright protection, the resulting protection would be considered “thin”); David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 184–85 (2001) (noting how works of “low authorship” such as “innumerable notes, memoranda, doodlings, [and] sketches . . . flood the theoretical portholes for federal copyright protection” but attract very little attention because so few people attempt to copy such works).

83. 17 U.S.C. § 101 (2000) (defining what is not a “work of visual art”).

84. See *id.* (listing certain functional items as excluded from the definition of a “work of visual art”).

85. See 17 U.S.C. § 106A(a)(3)(B) (2000).

86. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). One commentator has observed, however, that the “recognized stature” standard is controversial to the extent it requires courts “to make distinctions based on aesthetic considerations.” Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1965 (2000).

respect to the requisite originality, creativity, and aesthetics of the eligible works. Thus, the statute covers only paintings, drawings, prints, or sculptures existing in single copies or in limited editions of two hundred copies or fewer that are signed and consecutively numbered by the author.<sup>87</sup> Photographic images also are covered, but only those produced for “exhibition purposes,” signed by the author, and existing in a single copy or a limited edition of two hundred or fewer copies.<sup>88</sup> The legislative history contains the testimony of Professor Jane Ginsburg recognizing that there is a unique value inherent in the original or limited edition of a copy of a work of art because these objects “embody the artist’s ‘personality’ far more closely than subsequent mass produced images.”<sup>89</sup> I question VARA’s “limited edition” and “exhibition purposes” requirements on the ground that they bear no relationship to the level of originality of the underlying work, which I see as the operative issue in connection with the scope of coverage for moral rights. Still, by offering a circumscribed definition of “visual art,” VARA provides a model for how legislation can delineate limited coverage.

Predictably, courts applying VARA have denied moral rights protection in cases involving mass-produced posters<sup>90</sup> and original drawings used as the basis for the design of a trophy.<sup>91</sup> In another case, the question was whether a public sculpture park with a nautical theme should be considered a work of visual art within the meaning of VARA.<sup>92</sup> The district court declined to consider the plaintiff’s contributions to the park as an integrated piece of “sculpture” covered by VARA, based on the judiciary’s tendency to construe the definitions in VARA narrowly and the fact that “a park does not fit the traditional definition of [a] sculpture.”<sup>93</sup> The

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87. 17 U.S.C. § 101 (2000) (enumerating the categories included in the definition of a “work of visual art”). In the case of multiple cast, carved, or fabricated sculptures, the statute covers 200 or fewer, as long as they are “consecutively numbered by the author and bear the signature or other identifying mark of the author . . .” *Id.*

88. *Id.*

89. VISUAL ARTISTS RIGHTS ACT OF 1990, H.R. REP. NO. 101-514, at 6922 (1990) (testimony of Professor Jane Ginsburg).

90. *See, e.g.*, *Silberman v. Innovation Luggage, Inc.*, 67 U.S.P.Q.2d 1489, 1494 (S.D.N.Y. 2003).

91. *See, e.g.*, *Nat’l Ass’n for Stock Car Auto Racing, Inc. (NASCAR) v. Scharle*, 184 F. App’x 270, 276 (3d Cir. 2006).

92. *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 98 (D. Mass. 2003), *aff’d by Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 129, 143 (1st Cir. 2006).

93. *Id.* at 98–99. The district court left open the question whether a park could ever be a “work of visual art” as defined by VARA, holding instead this particular park did not qualify. *Id.* at 99.

First Circuit affirmed the judgment against the artist, but predicated its holding on the view that VARA does not protect site-specific art.<sup>94</sup> On the other hand, a district court held that an intermediate clay model of the head of Queen Catherine that would have been used to create a large bronze statue qualified as a work of visual art, as it was analogous to other protectable preliminary work such as “certain photographic negatives” or a painter’s drawings and sketches.<sup>95</sup> As these cases show, the scope of VARA’s coverage is narrowly crafted and interpreted so as to assure, to the extent possible, that protected works manifest a high degree of artistic originality and creativity.<sup>96</sup>

VARA’s intent in this regard is clearly evident in its treatment of photography. Recall that in order to be protected under VARA, a photograph must be made “for exhibition purposes only.”<sup>97</sup> In *Lilley v. Stout*, a district court considered the applicability of VARA in a controversy arising from the collaboration of photographer Lilley and his one-time girlfriend, Stout.<sup>98</sup> Lilley sued Stout under VARA as a result of Stout’s incorporation of Lilley’s photographs, without attribution, in *Red Room at Five*, a work consisting of the photographs placed in a binder with a red cover and illustration.<sup>99</sup> In her defense, Stout argued that the photographs were not produced for “exhibition purposes only” because they were taken as studies for potential paintings.<sup>100</sup> The court sided with Stout, denying Lilley his right of attribution based on its view that, in taking the photographs, the plaintiff’s purpose was to assist Stout with her project rather than to exhibit the works.<sup>101</sup>

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94. *Phillips*, 459 F.3d at 129.

95. *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 529–34 (S.D.N.Y. 2001).

96. In a recent landmark VARA case, a district court in Illinois ruled that a sculpture of native wildflowers located on Chicago’s lakeside Grant Park was a protected work under VARA, and therefore, the city’s destruction of the sculpture violated the artist’s moral rights. *See Kelley v. Chi. Park Dist.*, No. 04-C-07715 (N.D. Ill. Nov. 14, 2007). As of this writing, no written opinion is available but the court’s preliminary ruling noted that the value of the sculpture was \$1,500,000.

97. *See supra* text accompanying note 88; *see also* Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 840–41 (1992) (questioning this standard and suggesting that it “should not be interpreted as mutually exclusive of ‘for purposes of selling’”).

98. *Lilley v. Stout*, 384 F. Supp. 2d 83, 84–85 (D.D.C. 2005).

99. *Id.*

100. *Id.* at 86–87 (internal quotations omitted).

101. *Id.* at 88–89.

Apart from VARA, copyright determinations are more complex with respect to fine art photography.<sup>102</sup> Nevertheless, there is no doubt that photography as a category should be accorded moral rights protection under a standard requiring heightened originality with substantial creativity. Now more than ever, photographs are potentially subject to unauthorized modifications that may be out of keeping with the original message of the author's work—as the digitization of the Evans prints shows.<sup>103</sup> The Evans prints were digitized by two individuals who brought “the authority of first-hand experience with Evans and an obvious devotion to him.”<sup>104</sup> Yet, even here, the author of a newspaper article discussing an exhibit of the digitized prints was critical of the resulting prints and observed that “[s]omebody looking at one of these new Evans prints is likely to assume it is by Evans, which it is of course only up to a point.”<sup>105</sup> Judges will need to draw lines, however, in determining how this standard should apply to particular photographs in question. As discussed, historically courts have made these same types of determinations with respect to whether photographs manifest the requisite originality for copyright protection.<sup>106</sup>

Other types of works will also raise these same line-drawing issues with respect to an originality standard requiring substantial creativity. For example, music scholars have argued that popular music is far less original and creative than the classical genre because its market orientation necessitates little variation between songs.<sup>107</sup> In this regard, Professor Simon Frith explains that popular music is “music produced commercially, for profit, as a matter of enterprise not art.”<sup>108</sup> Classical music, in contrast, is far more artistically driven and thus displays much greater diversity in

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102. See Olsson, *supra* note 35, at 1489–90; see also *supra* notes 35–61 and accompanying text.

103. See *supra* notes 58–61 and accompanying text (discussing the digital reproduction of Walker Evans's well-known Depression-era photographs).

104. Kimmelman, *supra* note 58.

105. *Id.*

106. See *supra* notes 35–57 and accompanying text. *But cf.* *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1551 (3d Cir. 1992) (engaging in a similar ad hoc evaluation of a photograph's creativity in the context of a work for hire determination).

107. See Simon Frith, *Pop Music*, in *THE CAMBRIDGE COMPANION TO POP AND ROCK MUSIC* 93, 94–96 (Simon Frith et al. eds., 2001).

108. *Id.* at 94. *But cf.* *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984) (noting that “in a field such as that of popular music in which all songs are relatively short and tend to build on or repeat a basic theme,” the inference of copying must be established by testimony regarding the relative complexity of the compositions at issue).

composition. As music critic Tim Smith has observed: “[T]he great composers didn’t follow the rules, but made the rules follow them.”<sup>109</sup>

The foregoing discussion supports the idea that although certain functional types of works should be excluded per se from moral rights protection,<sup>110</sup> other works such as art, literature, music, and even architecture, presumptively should qualify if a sufficient showing of originality can be made with respect to the particular work at issue. For many works, the requisite level of originality likely will not be an issue. For works at the margins, however, courts will have to decide whether a heightened originality standard with substantial creativity has been met. Any originality determination thus will necessitate at least some judicial evaluation of the artistic rank of a given work.

Realistically, if a heightened standard of originality with substantial creativity were to be embraced in moral rights legislation, the judicial line-drawing that would result will not be much different from that which currently takes place in applying the *Feist* standard for copyright originality. In *Burrow-Giles*, the Supreme Court recognized that, because copyright law lacks the patent system’s safeguard of a prior examination by an authoritative tribunal, it is more important in a copyright case for the author to prove “the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author . . . .”<sup>111</sup> So from an early point in time, courts were sensitive to the importance of how to prove originality in copyright law.<sup>112</sup> In discussing the legal determination of piracy,

109. TIM SMITH, THE NPR CURIOUS LISTENER’S GUIDE TO CLASSICAL MUSIC 2–3 (2002). Smith explains:

Typically, the pop music composer is finished after creating a tune with chords (harmony) underneath it. By contrast, the classical composer’s task is far from over with the writing of a melody or a chord or a rhythmic pattern; that’s only the beginning. The classical composer is interested in developing the full potential of the melodic and harmonic ideas . . . .

*Id.* at 3. *But see* Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN—IDENTIFYING THE COMMONS IN INFORMATION LAW 121, 143 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (noting that musicologists have documented borrowings and reworkings among classical composers). An interesting comparison is presented in *Montgomery v. Montgomery*, 60 S.W.3d 524 (Ky. 2001). The court there was faced with the question of whether music videos should be considered commercial for purposes of a right of publicity claim. *Id.* at 527–28. The majority observed that music videos display the same artistic and creative elements as motion pictures, *id.* at 529, whereas the dissent claimed that music videos are merely profit driven and lacked artistic quality, *id.* at 533–34 (Keller, J., dissenting).

110. *See supra* note 80 and accompanying text.

111. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884).

112. *But see* Litman, *supra* note 26, at 1004–05 (arguing that despite its “esteem” in copyright jurisprudence, “originality . . . is irrelevant to the resolution of actual cases”).

an issue related to the concept of originality, David Lange has stated that courts need to determine whether they are dealing with “appropriation unmotivated by any creative exercise.”<sup>113</sup> In advising how to do this, he writes: “There is no escaping: we must decide,” a decision that, in his view, “ought to be grounded in fact-finding affected by law.”<sup>114</sup> That same reasoning applies to the determination of heightened originality with substantial creativity for purposes of applying moral rights protections.

Under copyright law, there is precedent in the Second, Seventh, and Ninth Circuits for applying a heightened standard of originality when derivative works, defined in the statute as original works of authorship “based upon one or more preexisting works,” are at issue.<sup>115</sup> The Second Circuit has held that with respect to reproductions of artistic works, a higher degree of skill, “true artistic skill,” may be required to make a reproduction copyrightable.<sup>116</sup> Although courts following this approach might be somewhat inclined to evaluate the artistic merits of a given work, the Seventh Circuit’s case law clarifies that the purpose of this heightened standard of originality for derivative works is to make certain that a sufficiently pronounced difference exists between the underlying and derivative works so that subsequent artists are not faced with copyright problems if they depict the underlying work.<sup>117</sup> In other words, courts need to determine

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

114. *Id.*

115. See 17 U.S.C. § 101 (2000) (defining “derivative work”); see also *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1218–20 (9th Cir. 1997) (adopting the Second Circuit’s *Durham* test, which requires “the original aspects of a derivative work be more than trivial” to warrant copyright protection (internal citations omitted)); *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909–11 (2d Cir. 1980); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491–92 (2d Cir. 1976) (en banc). At least one commentator has suggested that this view “represent[s] a considerable departure from traditional copyright doctrine.” Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 461–62 (1991).

116. *Batlin*, 536 F.2d at 491. In calling for “at least some substantial variation, not merely a trivial variation,” *Batlin* is seemingly inconsistent with *Bell*’s “merely trivial” standard. *Id.*; *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951) (internal citation omitted). On the other hand, *Bell* also uses the phrase “distinguishable variation.” *Bell*, 191 F.2d at 102.

117. See *Gracen*, 698 F.2d at 304–05 (“[A] derivative work must be substantially different from the underlying work to be copyrightable.”). More recent cases in the Seventh Circuit suggest somewhat of a retraction from *Gracen*’s heightened originality standard, although that standard has not been explicitly overruled. See, e.g., *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1193 (7th Cir. 1987) (observing that derivative works are copyrightable if they have “some incremental originality” and the copyright “is limited to that increment” (emphasis added)). *But cf.* *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) (“There has to be some original

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

In elucidating different levels of originality, *Burrow-Giles* is an important precedent not only because the Court elevated art photography above ordinary photography, but also because the Court elected to mark this distinction by focusing on the artistic process as narrated by the artist in addition to the final product.<sup>118</sup> According to the Court, although authorship is evident in the photograph itself, the narrative supplied by the photographer was vital in assisting the Court's perception.<sup>119</sup> The photographer's narrative emphasized that his actions were taken in furtherance of pre-shutter, "composition-making" activity.<sup>120</sup>

This emphasis on the author's decisionmaking during the artistic process has a parallel in the case law concerning whether subject matter constitutes copyrightable applied art or noncopyrightable industrial design. As will be discussed, relevant cases consider the author's narrative with respect to the design process in making this determination. By way of background, according to the 1976 Copyright Act, copyright protection does not extend to "useful articles" that have "an intrinsic utilitarian function."<sup>121</sup> The legislative history accompanying the definition of a "useful article" speaks of physical and conceptual separability as the appropriate litmus tests in determining whether a particular useful article constitutes copyrightable art.<sup>122</sup> Thus, courts have recognized that a work can obtain copyright protection when the artistic features are physically or

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expression contributed by anyone who claims to be a co-author . . .").

118. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *see also* Farley, *supra* note 40, at 431-32.

119. *See Burrows-Giles*, 111 U.S. at 60; *see also* Farley, *supra* note 40, at 426.

120. *Burrows-Giles*, 111 U.S. at 60; Farley, *supra* note 40 at 427-29. Sarony's narrative with respect to his creative choices was intended not only to inform the Court but also to distinguish his work from that of the numerous non-art photographer portraitists. Farley, *supra* note 40, at 429.

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

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

conceptually separate from those that are utilitarian.<sup>123</sup> Although the application of the physical separability test is rather clear in that it simply asks whether the ornamental nature of the object in question can be physically separated from the object,<sup>124</sup> it is unlikely to be of much aid when the object under consideration is two-dimensional rather than three-dimensional.<sup>125</sup>

The conceptual separability test is more complex than the physical separability test and courts have used a variety of approaches in determining whether the artistic components of a work are conceptually separate from the work's utilitarian function.<sup>126</sup> In *Brandir International, Inc. v. Cascade Pacific*

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123. See, e.g., *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 931–32 (7th Cir. 2004) (invoking conceptually separable test to uphold copyrightability for the “hungry look” on the face of a mannequin); *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145–47 (2d Cir. 1987) (applying Professor Denicola's conceptually separable test to reject copyright protection of a thick, interwoven wire initially constructed as artwork but later modified into a bicycle rack); *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 923–24 (11th Cir. 1983) (holding wire wheel covers not copyrightable because they did not contain physically or conceptually separable works of art); *Animal Fair, Inc. v. Amfesco Indus., Inc.*, 620 F. Supp. 175, 187–88 (D. Minn. 1985) (holding bear-paw designs on slippers conceptually separable), *aff'd by*, 794 F.2d 678 (8th Cir. 1986); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 95 F.R.D. 95, 99 (D. Del. 1982) (finding a genuine issue of material fact as to the conceptual separability of eyeglass display cases).

124. *Pivot Point*, 372 F.3d at 917.

125. *Id.* at 922 (citing Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 744 (1983)); see also *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1392 (C.D. Cal. 1993) (holding artistic packaging physically separable from the utilitarian aspects of the perfume inside); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733, 734–36 (S.D.N.Y. 1966) (holding copyrightable a simulated antique telephone encasing a pencil sharpener based on physical separability test).

126. In addition to the design process test adopted in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987), and discussed *infra* notes 127–33 in accompanying text, other tests have been suggested by courts and commentators. One formulation determines conceptual separability from the standpoint of the ordinary reasonable observer by looking to whether the article at issue “stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.” *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting); see *infra* notes 137–38 and accompanying text. Other tests include whether the primary use of the work is artistic or utilitarian and whether the work is marketable as art. See *Brandir*, 834 F.2d at 1144 (calling neither one of these tests “very satisfactory”); see also *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 421 (5th Cir. 2005) (adopting “the likelihood-of-marketability standard for garment design only”). In addition, Professor Goldstein has proposed a test positing that a particular “feature incorporated in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.” PAUL GOLDSTEIN, COPYRIGHT § 2.5.3.1(b) (2d. ed. 2005). Several courts have adopted the Goldstein test. See, e.g., *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444, 455–56 (M.D. N.C. 2003) (holding sculpted leaves of a furniture collection sufficiently separable to be copyrightable); *Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905, 914–15 (S.D. Ind. 2002) (finding the sculptural aspects of a tiger costume conceptually separable from its utilitarian functions).

*Lumber Co.*, the test adopted by the court looks to whether the design process reflects the creator's artistic judgment, as exercised independently of functional considerations.<sup>127</sup> *Brandir* affirmed the Copyright Register's denial of copyright for a bicycle rack originating from a wire sculpture on the ground that it is a useful article and the artistic aspects of the work were not conceptually separable from its utilitarian function pursuant to the test invoked by the court.<sup>128</sup> In evaluating whether the design of the bicycle rack should be protected as a "sculptural work"<sup>129</sup> or denied protection as a useful article, the court noted that the application of its "design process" test would require the parties "to present evidence relating to the design process and the nature of the work."<sup>130</sup> According to the majority, such a test would not be difficult to apply since "[t]he work itself will continue to give 'mute testimony' of its origins."<sup>131</sup>

Although *Brandir* was a case about copyrightable subject matter rather than the originality requirement, the test it adopts for determining the copyrightability of applied art is relevant to determining how a heightened originality with substantial creativity requirement can be applied in the context of moral rights. The test in *Brandir* seeks to determine the author's creative intent and relies upon the sequences of the author's actions or decisions in the design process.<sup>132</sup> The *Brandir* model thus relies on evidence regarding the design process and the nature of the completed work.<sup>133</sup> This same type of evidence also can facilitate a judicial determination of heightened originality requiring substantial creativity based on the creator's conscious artistic choices as manifested in the design process and the nature of the work itself. Such a test for the applicability of moral rights makes particular sense because, according to the theoretical predicate for moral rights, the external product of creativity embodies the author's artistic autonomy and dignity.

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127. *Brandir*, 834 F.2d at 1145–46.

128. *Id.* at 1146–47.

129. *See* 17 U.S.C. § 102(a)(5) (2000).

130. *Brandir*, 834 F.2d at 1145–46.

131. *Id.* at 1145. The dissent in *Brandir* objected to the majority's test for conceptual separability in part on the ground that a work's copyrightability should not "depend upon largely fortuitous circumstances concerning the creation of the design in issue." *Id.* at 1150–51 (Winter, J., concurring in part and dissenting in part).

132. *See id.* at 1145 (majority opinion).

133. *See id.* at 1145–46.

Thus, case law involving the conflict between copyrightable art and nonprotectable industrial design<sup>134</sup> furnishes a helpful path for contemplating the operation of a standard for determining whether particular works in question manifest heightened originality with substantial creativity. Rather than making these determinations according to the judiciary's individual perceptions of an author's creativity, courts should take the author's own narrative of creativity into account. Thus, courts should ask whether, in light of the author's articulated narrative, his design choices reflect heightened originality with substantial creativity. Random actions by the artist that are not the result of artistic decisionmaking in furtherance of his message would militate against a work satisfying this test.

The advantage of such a test for heightened originality with substantial creativity is that it would free courts from having to ascertain unilaterally the nature and significance of a creator's message. Rather than the court determining whether a work's message embodies sufficient creativity, the court would determine whether, based upon the author's narrative, the design process reflects heightened originality with substantial

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134. To further illustrate the operation of this bifurcation, garment designs can be compared with decorative quilts. Garment designs—even those which are quite elaborate—historically have been denied copyright protection on the ground that they are useful articles that are the product of a craft or trade, rather than art. *See, e.g., Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419–22 (5th Cir. 2005) (denying copyrightability to casino uniforms). Courts have, however, held that patterns or other artistic elements featured on a fabric may be eligible for copyright protection if they can be identified separately from the useful purpose of the clothing. *See, e.g., Express, LLC v. Fetish Group, Inc.*, 424 F. Supp. 2d 1211, 1224–25 (C.D. Cal. 2006) (upholding copyright protection for “the placement, arrangement, and look” of lace trim on a tunic). In contrast to clothing for humans, clothing for a toy bear has been held copyrightable on the ground that it has no utilitarian function. *See, e.g., Boyds Collection, Ltd. v. Bearington Collection, Inc.*, 365 F. Supp. 2d 612, 617–18 (M.D. Pa. 2005). Currently, however, federal legislation is pending that will afford a form of *sui generis*, or copyright-like, protection for the overall appearance of new and original fashion designs. Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007).

In contrast, copyright protection has been recognized in quilt tops (the artistically decorated top cover of a quilt), as well as to the individual quilt blocks, which sewn together comprise the quilt top. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 269, 271 (2d Cir. 2001) (upholding copyright protection of the layout and color scheme of a quilt consisting of square blocks containing the capital letters of the alphabet displayed in order); *Brown v. McCormick*, 23 F. Supp. 2d 594, 603–04 (D. Md. 1998) (upholding original elements in a quilt block depicting a “black bird flying over a man and a woman holding hands”). In her book *Who Owns Culture*, Susan Scafidi notes that in 1971, a New York museum mounted an exhibition of quilts from diverse communities and “was perhaps the first curatorial recognition of quilts as American women's artwork.” SUSAN SCAFIDI, *WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* 27 (2005). In a similar vein, courts have held that artistic designs woven or imprinted onto rugs qualify for copyright protection. *See, e.g., Peel & Co., Inc. v. The Rug Mkt.*, 238 F.3d 391, 394–95 (5th Cir. 2001).

creativity in furthering the author's articulated message. In terms of its operation, this test would be similar to the one invoked in *Brandir* in terms of its reliance on the design process in determining whether a particular work was so influenced by artistic design so as to qualify as copyrightable art. Thus, heightened originality requiring substantial creativity will be measured by the process itself, with the evidence being provided by the author.

In addition, some courts have augmented *Brandir*'s focus on the design process with a consideration of whether "the artistic aspects of an article can be 'conceptualized as existing independently of their utilitarian function.'"<sup>135</sup> This approach would be especially useful for judicial determinations of whether a particular work manifests heightened originality with substantial creativity for purposes of moral rights protection because it additionally would incorporate a consideration of the degree to which reasonable observers perceive the object as creative. Thus, an appropriate test for heightened originality with substantial creativity also should consider evidence bearing upon the perceptions of the reasonable beholder. Such evidence could include the extent to which the object has been used or displayed, custom and usage within the art world, expert opinion, and survey evidence, including the object's marketability as art.<sup>136</sup> As noted by Judge Newman in his renowned dissent in *Carol Barnhart Inc. v. Economy Cover Corp.*, the "ordinary, reasonable observer" is a good standard for assessing such matters and, in fact, has been entrusted "to decide other conceptual issues in copyright law, such as whether an allegedly infringing work bears a substantial similarity to a copyrighted work."<sup>137</sup> In approaching the issue of heightened originality with substantial creativity from this standpoint, perhaps some "courts will inevitably be drawn into some minimal inquiry as to the nature of art," but

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135. See *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 931 (7th Cir. 2004) (quoting Judge Newman's dissent in *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985)); see also *Stanislawski v. Jordan*, 337 F. Supp. 2d 1103, 1112 (E.D. Wis. 2004) (adopting the *Pivot Point* standard).

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

137. *Carol Barnhart*, 773 F.2d at 422 (Newman, J., dissenting).

realistically “some threshold assessment of art” cannot be avoided in these inquiries.<sup>138</sup>

Another advantage of this test is that it comports with the reality that certain works may not manifest heightened originality with substantial creativity according to a reasonable observer even if they possess specific messages intended by the author. Appropriation art is one such example in that it borrows from common images in the media and advertising and places them in new contexts, with the objective of attempting to change society’s thinking about these images.<sup>139</sup> The creativity inherent in this practice stems from “the selection of the texts and their recontextualization.”<sup>140</sup> Thus, in the 1980s, postmodern artist Sherrie Levine created a series of photographs in which she intentionally rephotographed famous photographs in order to comment on the concept of originality.<sup>141</sup> Another appropriation artist, Jeff Koons, has produced work involved in several reported decisions. Recently, in *Blanch v. Koons*, the Second Circuit held that Koons’s use of part of a copyrighted photograph of a pair of women’s legs in a collage painting was a fair use.<sup>142</sup> The painting by Koons in that case consisted of “four pairs of women’s feet and lower legs dangling” over images of sweets with Niagara Falls and a grassy field in the background.<sup>143</sup> One of the pairs of legs featured in Koons’s painting was from the plaintiff’s work.<sup>144</sup> A particularly interesting facet of this case is the court’s reliance on the message of the work as articulated by Koons himself. The court concluded that Koons not only possessed a genuine creative rationale for borrowing the plaintiff’s work, but also that his work possessed a sufficient transformative value such that it altered the borrowed work “with new expression, meaning, or message.”<sup>145</sup> The opinion emphasized Koons’s message of this particular work with the following observation: “By juxtaposing women’s legs against a backdrop of food and landscape . . . he intended to ‘comment on the ways in which some of our most

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138. *Id.* at 423.

139. Farley, *supra* note 76, at 837 (defining the term “appropriation art”).

140. *Id.*

141. See Farley, *supra* note 40, at 451 n.252 (citing Constance Lewallen, *Sherry Levine*, J. CONTEMPORARY ART, available at <http://www.jca-online.com/slevine.html> (last visited Oct. 12, 2007)).

142. *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

143. *Id.* at 247.

144. *Id.* at 247–48.

145. *Id.* at 253 (quoting *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

basic appetites—for food, play, and sex—are mediated by popular messages.”<sup>146</sup>

Although Koons’s work in *Blanch v. Koons* might have satisfied both components of the proposed test, other works of appropriation art might possess a particular message but still fail to satisfy ordinary, reasonable observers that heightened originality requiring substantial creativity is present. The benefit of the proposed test is that it incorporates a dual standard that, taken together, is a useful measure of a work’s originality for purposes of determining whether it should be entitled to moral rights protection. Such a standard for heightened originality with substantial creativity is preferable to one that requires the trier of fact to discern independently the creator’s message. Thus, reliance on the author’s narrative with respect to the design process and on evidence concerning the perceptions of ordinary reasonable observers is a viable way for courts to assess whether a work possesses the requisite originality to be within the scope of moral rights protection.<sup>147</sup>

#### IV. CONCLUSION

The United States is a long way from the enactment of a statute that treats moral rights thoughtfully and comprehensively, and thus it continues down a path that is out of step with global norms.<sup>148</sup> Moreover, the Internet environment makes our deficiency particularly problematic because violations of textual integrity can occur with unprecedented ease, and the results can be disseminated to countless recipients with the mere press of a key. Given this situation, it is important to contemplate what an adequate moral rights structure for the United States would entail. This Article focuses on the appropriate degree of originality a work must display in order to be eligible for moral rights protection, an issue which represents just one piece in the overall moral rights puzzle.

I argue that moral rights protection should be afforded to a more narrow range of works than are currently covered by

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146. *Id.* at 247 (internal citation omitted). The court further quoted Koons as stating: “[b]y re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.” *Id.* (internal citation omitted).

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

148. Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap”*, 2007 UTAH L. REV. 651 (2007).

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copyright law. Specifically, whereas copyright law applies to works with a minimal degree of creativity, only works with heightened originality as manifested by substantial creativity should be eligible for moral rights protection. Categories of works that are largely functional should be excluded from protection. In addition, for works of authorship that are eligible for moral rights protection, judges still will need to make determinations on a case-by-case basis as to whether a given work meets the requisite standards for protection. To facilitate this inquiry, courts can invoke tests that draw from the originality and subject matter litigation under copyright law. These tests minimize the court's independent assessment of creativity and instead focus on the author's narrative in explicating his artistic choices and on the perceptions of reasonable observers. The proposed standard recognizes that although both moral rights and copyrights are concerned with works of authorship, significant differences in their underlying philosophies should render their specific applications clearly distinct even if somewhat parallel.