

ARTICLE

RECALIBRATING ORIGINALITY

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ABSTRACT

In all countries, a work is eligible for copyright protection only if it is “original.” However, the manner in which that requirement is interpreted varies by country. This article first surveys the ways in which “originality” is currently construed, then proposes a reorientation of the doctrine that would advance more effectively than any of the extant interpretations the proper objectives of the copyright system.

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I. INTRODUCTION

This Essay argues that, if the principal purpose of copyright law is to foster a diverse and stimulating culture that, in turn, enhances the ability of all persons to live fulfilling lives, the

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originality doctrine should be modified to require a significant degree of novelty as a precondition for copyright protection.

The argument proceeds as follows: Part II surveys the ways in which various countries have recently interpreted originality for the purposes of copyright law. Part III distills from that survey a taxonomy of possible meanings of originality. Part IV summarizes the cultural theory of copyright, which provides the normative beacon for the remainder of the Essay. Part V identifies the institutional constraints that might limit substantial reform of the originality doctrine. Part VI proposes a reinterpretation of originality compatible with those constraints that would improve the alignment between the copyright system and the cultural theory.

II. THE CURRENT STANDARDS

In all countries, a work must be “original” to be entitled to copyright protection. Two distinct requirements are encompassed by that principle. First, the work must be independently created—in other words, not copied from another work. Second, the work must embody a modest degree of something extra—what might be described, intentionally vaguely, as a “contribution” by the author.

The meaning of the first requirement is not quite as self-evident as is commonly assumed. It is not obvious, for example, whether subconscious copying is incompatible with independent creation.¹ Nevertheless, there has been almost no discussion or controversy concerning this dimension of originality. In all jurisdictions, it is mandatory—and assumed to be analytically straightforward.

By contrast, the second requirement has provoked considerable disagreement and controversy. Twenty-five years ago, countries diverged substantially concerning the kind or degree of contribution a putative author must make to be entitled to copyright protection. Jurisdictions influenced by the common law tradition typically applied lenient standards, while jurisdictions influenced by the civil law tradition typically were more demanding. For most types of works, this disagreement did not make much difference in practice, because the overwhelming majority of commercially valuable works easily satisfied even the most stringent of the requirements. In two major contexts, however, the disagreement mattered: photography and software. In the United States and other common law countries, virtually all photographs—including amateur “snapshots” taken with “point-and-shoot” cameras—were deemed sufficiently original

1. *Cf.* *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000) (holding that subconscious copying can support a finding of infringement, but not addressing whether it precludes independent creation); *ABKCO Music, Inc. v. Harrisongs Music Ltd.*, 722 F.2d 988, 997, 999 (2d Cir. 1983) (same).

to enjoy protection.² By contrast, as Roman Heidinger has shown, in Austria photographs were given copyright protection only if they differed significantly from pre-existing photographs.³ Efforts to use copyright law to shield software programs from unauthorized uses produced similarly diverse responses. In the United States, the originality requirement has never posed a significant barrier to copyright protection for software.⁴ By contrast, in Germany, programs qualified for protection only if they embodied degrees of creativity greater than that exercised by average programmers.⁵

Starting in the 1990s, several jurisdictions modified or clarified their interpretations of the originality requirement in ways that, in the aggregate, substantially reduced the degree of global variation. The clarification most familiar to lawyers in the United States was made by the Supreme Court in the *Feist* case—the decision around which this symposium revolve.⁶ Justice O'Connor's deservedly famous opinion in that case sharpened U.S. doctrine in two offsetting ways. First, O'Connor made clear that *some* degree of creativity is essential to originality—and thus repudiated the so-called “sweat of the brow” doctrine that some lower courts had employed to extend protection to works that were altogether uncreative but had required time and effort to produce.⁷ Second, she made equally clear that the amount of creativity required was quite modest: “[T]he requisite level of creativity is extremely low; even a slight amount will suffice. 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.”⁸

The courts in some other common law jurisdictions have followed the lead of the United States in tightening, at least

2. Justin Hughes, *The Photographer's Copyright—Photograph as Art*, *Photograph as Database*, 25 HARV. J.L. & TECH. 339, 373 (2012).

3. Roman Heidinger, *The Threshold of Originality Under EU Copyright Law* 1, 3 (2011), https://www.law.cuhk.edu.hk/en/research/cfred/download/CFRED_COREACH_IP_Workshop_Dr_Roman_Heidinger_20Oct2011.pdf [<https://perma.cc/3BE8-LMFV>]. In one illustrative case, a conventional photograph depicting two bikers in a landscape was held uncopyrightable on the ground that it failed that requirement. Oberster Gerichtshof [OGH] [Supreme Court] Dec. 10, 1993, 4 Ob 121/93, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_19931012_OGH0002_00400B00121_9300000_000 [<https://perma.cc/N2HT-TP8B>].

4. See Arthur Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 983 (1993).

5. Bundesgerichtshof [BGH] Sept. 5, 1985, 94 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 276, 1985. For comments on *Inkasso* and comparison of the German and French positions with respect to originality in software, see *Commission Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, at 187–88, COM (1988) 172 final (June 7, 1988).

6. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991).

7. *Id.* at 345, 359–60, 362.

8. *Id.* at 345.

slightly, the originality requirement. In Australia, for example, as late as 2002, the courts took the position that the expenditure of “substantial labour in collecting, verifying, recording and assembling . . . data” was sufficient to satisfy the statutory requirement of originality; creativity was unnecessary.⁹ In 2009, the Australian High Court repudiated this position, holding that originality hinges on the degree to which an author made choices in the creation of the work at issue, rather than upon his skill or labor.¹⁰ Applying this new, more demanding standard, the Court ruled that a television programming schedule, chronologically arranged, was “obvious and prosaic” and “dictated by the nature of the information”—and thus non-original.¹¹ In subsequent cases, the same court and lower Australian courts have applied the clarified standard in ways that closely resemble post-*Feist* jurisprudence in the United States.¹²

The corresponding doctrine in Canada was recently adjusted in the same direction—although, at least ostensibly, not quite so far.¹³ Before 2004, some Canadian courts took the position that industriousness is sufficient for originality, while at least one court rejected that proposition.¹⁴ In 2004, the Supreme Court of Canada addressed the issue—and adopted what it characterized as an intermediate position: To satisfy the originality requirement the creation of a work must involve an “exercise of skill and judgment,” with skill denoting the use of one’s knowledge, developed aptitude, or practiced ability; and judgment denoting the evaluation of and discernment between different options.¹⁵

9. *Desktop Mktg Sys Pty Ltd v Telstra Corp* (2002) 119 FCR 491. The statutory requirement is contained in *Copyright Act 1968* (Cth) pt III div 2 s 32(1).

10. *IceTV Pty Ltd v Nine Network Austrl Pty Ltd* (2009) 239 CLR 458.

11. *Id.* The originality at issue in *IceTV*, however, was technically originality in infringement. *Id.* Originality is relevant to determining whether a defendant copied a substantial portion of the protected work under Australian copyright law. *Id.*

12. For example, in *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142, the Full Court relied on *IceTV* to issue a ruling directly contrary to *Desktop Mktg Sys Pty Ltd v Telstra Corp* (2002) 119 FCR 491: A phone directory was not protected by copyright, in part because it lacked originality. Similarly, in *Primary Health Care Ltd v Comm’r of Taxation* (2010) 86 IPR 259, a Federal Court found that patient records did not constitute an original compilation since medical practitioners exercised skill not to express an idea but to make and record medical diagnoses. In *Tonnex Int’l Pty Ltd v Dynamic Supplies Pty Ltd* (2012) 99 IPR 31, the court upheld copyright protection for a compatibility chart of computer consumables, but only on the ground that the selection of data and layout reflected creativity.

13. Copyright Act, R.S.C. 1985, c C-42, § 5.

14. *B.C. Jockey Club v. Standen*, 1985 D.L.R. 591 (Can. B.C. C.A.) (holding implicitly that facts themselves, and not only their arrangement, are copyrightable if the author expended independent research and labor to discover them); *U & R Tax Servs. Ltd. v. H & R Block Can. Inc.*, [1995] F.C.J. 96 (Can. F.C.T.D.). *But see* *Tele-Direct (Publ’ns) Inc. v. Am. Bus. Info., Inc.*, (1997), 154 D.L.R. 4th 328 (Can. C.A.).

15. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 [2004] 1 S.C.R. 339, 352.

Both must involve “intellectual effort,” rather than merely executing mechanical actions; changing a font, for instance, would not suffice.¹⁶ However, neither creativity, nor novelty, nor non-obviousness is required.¹⁷ Since that ruling, Canadian courts interpreting the originality requirement have focused on the degree to which a work resulted from the author’s deliberate choices. Although they do not use the term “creativity,” their analyses closely resemble the approaches of U.S. courts. For example, in *Cinar Corp. v. Robinson*, the Supreme Court of Canada found that characters in a children’s television program were original because they had “distinct” appearances, had “particular personalities,” and interacted on an island that was not generic.¹⁸ Lower courts have found software modifications, a form, and a payroll book to lack originality because the content or layout of the works were dictated by external sources, such as technical requirements, functional considerations, or the law.¹⁹ By contrast, a translation was deemed original because the translator altered the vocabulary and used more figurative language than had been employed by a previous translator; architectural plans were deemed original because the author chose which architectural components to place where; and a book of maps was deemed original because the author made choices regarding which maps to include, pagination, labeling, and indices.²⁰

The originality doctrine in India recently underwent a similar shift. Like most copyright statutes, India’s Copyright Act states that protection extends to original literary, dramatic, musical, and artistic works, but does not define originality.²¹ Until 2007, Indian courts interpreted the term according to the “sweat of the brow” test. For example, in 1924, the High Court of Bombay cited approvingly Justice Story’s declaration in *Emerson v. Davies* that “whosoever by his own skill, labour and judgment writes a new work may have a copyright therein,” and in 1995, the Delhi High Court relied on this

16. *Id.*

17. *Id.* at 356. Applying this standard, the court found that a publisher’s case headnotes, summaries, and index of cases were original. The author exercised skill and judgment when deciding which sections of opinions to excerpt and how to arrange them. The reported judicial decisions were also original because each consisted of a particular arrangement of the opinion, case summary, case title, and headnotes. *Id.* at 358–60.

18. *Cinar Corp. v. Robinson*, 2013 SCC 73 [2013] 3 S.C.R. 1168, 1194; *see also* *Constr. Denis Desjardins Inc. v. Jeanson*, [2010] QCCA 1287 (CanLII), para. 16 (Can. Que. C.A.).

19. *Distrimed Inc. v. Dispill Inc.*, [2013] FC 1043 (CanLII), para. 324 (Can. Que. Fed. Ct.); *Harmony Consulting Ltd. v. G.A. Foss Transp. Ltd.*, [2011] FC 340 (CanLII), paras. 161–63 (Can. Ont. Fed. Ct.); *Bonnette v. Dominion BlueLine Inc.* (2005), 41 C.P.R. 4th 331 (Can. Que. C.A.).

20. *Drolet v. Stiftung Gralsbotchaft*, [2009] F.C. 17, paras. 228–29 (Can.); *Jeanson*, 2010 QCCA (CanLII) at para. 16; *R v. Allen* (2006), 399 A.R. 245, para. 20 (Can. Alta. Prov. Ct.).

21. Indian Copyright Act, No. 14 of 1957, INDIA CODE (1957), § 13(a).

principle in ruling that a customer database is an original literary work because its creation involved time, money, labor, and skill.²² In the 2007 *Eastern Book Company* case, the Supreme Court of India changed course.²³ The issue in the case was whether published editions of judicial opinions are original.²⁴ After surveying British and Indian copyright law, the U.S. decision in *Feist*, and the Canadian decision in *CCH*, the Supreme Court concluded that the “sweat of the brow” approach was too generous to authors to the detriment of the public interest.²⁵ The standard the Court adopted instead closely resembled the intermediate “skill-and-judgment” approach now in force in Canada.²⁶ The manner in which the Court applied that standard, however, differed little from the approach used by the U.S. Supreme Court in *Feist*.²⁷ In subsequent cases, lower courts in India have relied on *Eastern Book* to rule that a math textbook lacked copyright protection because the questions, answers, and arrangement did not exhibit “the minimum degree of creativity”;²⁸ that the game, Scrabble, was unprotected in part because the tile and board designs did not show a “modicum of creativity”;²⁹ and most broadly that customer databases no longer enjoy copyright protection.³⁰

In civil law jurisdictions, the European Court of Justice has led an analogous process of clarification and harmonization. In a series of decisions between 2009 and 2012, the Court announced and then refined a new general definition of originality.³¹ The

22. *Macmillan & Co. Ltd. v. K. & J. Cooper*, AIR 1924 PC 74 (Bom.); *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*, 1995 (15) PTC 278.

23. *E. Book Co. & Ors v. D.B. Modak*, 2008 (36) PTC 1.

24. *Id.*

25. *Id.*

26. *Id.*

27. For example, the Court found that some of the changes the publisher had made to the judicial opinions—adding citations, correcting quotations, simplifying case history, and formatting abbreviations—did not demonstrate originality because they did not “give the flavour of minimum requirement of creativity.” *Id.* ¶ 40. In the end, however, the Court ruled that because adding new paragraph breaks, a separate numbering system, and whether judges were joining, concurring, or dissenting involved legal skill and judgment (“careful consideration, discernment and choice”) rather than the application of mechanical rules, those changes qualified for copyright protection. *Id.* ¶ 41.

28. *Chancellor Masters & Scholars of The Univ. of Oxford v. Narendera Publ'g. House*, 2008 (38) PTC 385.

29. *Mattel, Inc. v. Jayant Agarwalla*, 2008 (38) PTC 416. The court’s originality analysis is not doctrinally precise, however, as it intermixes discussions of originality and the merger doctrine. *See id.*

30. *Tech Plus Media Private Ltd. v. Jyotijanda*, 2014 (60) PTC 121.

31. The key decisions are: Case C-604/10, *Football Dataco Ltd. v. Yahoo! UH Ltd.* (2012), <http://curia.europa.eu/juris/liste.jsf?num=C-604/10&language=EN> [https://perma.cc/K372-BFT4]; Joined Cases C-403/08 & C-429/08, *Football Association Premier League*, 2011 E.C.R. I-09083; Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533; Case C-393/09, *Bezpečnostní softwarová asociace [Safety Software Association]*, 2010 E.C.R. I-13971; Case C-5/08, *Infopaq Int'l*, 2009 E.C.R. I-06569. Detailed

principal roots of the new approach were directives harmonizing the standards of originality applicable to computer software, photography, and databases. The language employed in those directives was extended by the Court to include copyrighted works of all sorts. Under this new approach, two related things—in addition to independent creation—are both necessary and sufficient to make a work eligible for copyright protection: the work must reflect the author's own intellectual creation; and the author, when creating the work, is able to make unconstrained choices and thus impresses her personal touch on the work.³² The new standard is widely seen as an effort to forge a compromise between the more stringent rules previously in force in many continental countries and the more relaxed approach previously in force in Ireland and the United Kingdom.³³

The articulation of this standard by the European Court of Justice has caused courts in several of the member countries of the European Union to adjust their originality thresholds. Countries that formerly had unusually stringent rules have softened them. In Austria, for example, it's now easier to secure copyright protection for modestly creative photographs than it used to be.³⁴ And in Germany, a larger set of software programs are now eligible for copyright protection; the only things now excluded are simple, routine programs that ordinary programmers would write the same way.³⁵

In other member countries, the stance taken by the European Court of Justice has prompted the national courts to alter the language they employ when applying the originality requirement but seemingly without materially changing case outcomes. In the Netherlands, for example, although the copyright statute does not expressly require that works be original, the courts have long interpreted it to contain such a requirement—and have construed the requirement to necessitate that a work bears the personal stamp of the creator.³⁶ In a 2008 decision, the Dutch Supreme Court offered some additional detail: a work enjoys protection if and only if the author made enough creative choices that the work is not banal or trivial. However, the author need not have made

discussion of the nature and underpinnings of the ECJ's intervention may be found in Thomas Margoni, *The Harmonisation of EU Copyright Law: The Originality Standard*, in GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 85 (Mark Perry ed., 2016) and Michel M. Walter, *Object of Protection*, in EUROPEAN COPYRIGHT LAW 5.1.8 (Michel M. Walter & Silke von Lewinski eds., 2010).

32. Walter, *supra* note 31, 5.1.15.

33. *Id.* 5.1.16.

34. *See id.* 5.1.18 to .20.

35. Bundesgerichtshof [BGH] Mar. 3, 2005, IX ZR 111/02, (Ger.), <http://www.rechtsberaterhaftung.de/PDF/442.pdf> [<https://perma.cc/EEM8-5TUE>].

36. Auteurswet 23 september 1912, Stb. 1912, 308; HR 4 januari 1991, NJ 1991, 608 (Romme/Van Dale).

the work with a single creative vision in mind.³⁷ This standard is subjective in that it asks whether the work is original from the author's perspective, rather than whether it is new in light of other works.³⁸ Opinions by the Dutch Supreme Court rendered after the ECJ opinions use somewhat different language, but differ little in substance. For example, in deciding that the design of a chair can be original, the Court referenced *Infopaq's* declaration that a work must be the expression of the author's intellectual creation.³⁹ Similarly, the Court found the color scheme of the Rubik's cube to be original because it was not dictated by technical requirements.⁴⁰

In Belgium, the principal effect of the ECJ's stance seems to have been to counteract a brief deviation from a longstanding interpretation of originality. As in the Netherlands, the copyright statute in Belgium does not require that a work be original, but the courts do. The Cour de Cassation traditionally took the position that a work satisfies the originality requirement if it either constitutes an expression of the author's intellectual work or bears the author's personal stamp.⁴¹ Applying this test, the Supreme Court in the 2005 *Balta* case found that a carpet depicting farm animals was not original because the design was similar to animal drawings commonly found in children's books.⁴² Further, combining public domain works does not render a work original.⁴³ In 2012, the Cour de Cassation temporarily changed course. In *Artessuto*, it overturned an appellate court's decision that had required an original work to bear the stamp of the author's personality and held that an original work need only be an author's own intellectual creation.⁴⁴ The Court did not directly explain how the two conceptions differ; it did state, however, that "a personal stamp" indicates the work was influenced by and shows the author's personal character, while "intellectual" requires the author to have exerted mental activity to reflect on the manner of the work.⁴⁵ One year later, however, the Court

37. HR 30 mei 2008, NJ 2008, 556 m.nt. EJD (Endstra's Sons/Middelburg). The facts of the case are eccentric: The plaintiffs claimed their father owned a copyright to a transcript of his taped conversations with the police discussing his blackmailer. The defendants had procured and published the transcript in a book. In its judgment, the Dutch Supreme Court refrained from addressing whether the transcript was original and remanded the issue for the lower court to apply the clarified originality standard. *Id.*

38. HR 16 juni 2006, NJ 2006, 585 m.nt. JHS (Kecofa/LancomeParfums).

39. HR 22 februari 2013, NJ 2013, 502 m.nt. PBH (Stokke/H3 Products) (Neth.).

40. HR 19 september 2014, NJ 2015, 179 m.nt. DWFV (Rubik/Beckx Trading) (Neth.).

41. Cour de cassation [Cass.], Mar. 11, 2005, C030591N, <http://www.cass.be> (Belg.); Cour de cassation [Cass.], Apr. 27, 1989, 75/5348, <http://www.cass.be> (Belg.).

42. Cour de cassation [Cass.], Mar. 11, 2005, C030591N, <http://www.cass.be> (Belg.).

43. *Id.*

44. Cour de cassation [Cass.], Jan. 26, 2012, C.11.0108.N, <http://www.cass.be> (Belg.).

45. *Id.*

re-recognized the “personality” requirement in light of the ECJ’s decision in *Painer*. As the Court explained, a work is only an author’s intellectual creation if it is an expression of her personality and she makes creative choices in creating the work.⁴⁶

Many years ago, French copyright law contained much more formidable barriers to protection. In the early nineteenth century, French courts required works to pass an objective test resembling novelty.⁴⁷ In the late nineteenth century, they shifted to a more subjective approach, focusing on the relationship between the work and its author—at which point, courts began more commonly to use the term, *originalité*.⁴⁸ By the late twentieth century, French copyright standards differed little from the standards applied in Belgium or the Netherlands. Works of most types were accorded protection if and only if they reflected or contained an imprint of the author’s personality.⁴⁹ In light of the close resemblance between that formulation and the standard recently adopted by the ECJ, this approach is not likely to change in the near future. The only dimension of French law that may require adjustment concerns software. Since the 1980s, French courts have evaluated the originality of software programs using a slightly different test.⁵⁰ That test may have to be modified to conform to the generalized originality standard now in force for all works, but the impact on cases is not likely to be great.

The EU member country whose approach to originality was most different from the standard developed by the ECJ is the United

46. Cour de cassation [Cass.], Oct. 31, 2013, C.12.0263.N, <http://www.cass.be> (Belg.). This same standard was subsequently reiterated by the Court in *Tradart*, where it found photographs of coins to be original because the photographer made specific decisions on depicting his subjects: he used gray hues to emphasize their designs and highlighted the same areas on each coin to create more uniformity. Cour de cassation [Cass.], Mar. 17, 2014, C.12.0317.F, <http://www.cass.be> (Belg.).

47. See Frédéric Rideau, *Commentary on the Court of Cassation’s Decision of 13 February 1857, on Originality*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds.) http://www.copyrighthistory.org/cam/commentary/f_1869/f_1869_com_1862008212913.html [<https://perma.cc/27RY-T4VC>].

48. *Id.*

49. See, e.g., Cour de cassation [Cass.] 1e civ., Oct. 20, 2011, 10-21251 (Fr.) (finding photographer did not show how photo of two fish arranged on a plate revealed his personality); Cour de cassation [Cass.] 1e civ., June 13, 2006, Bull. civ. I, No. 307 (Fr.) (quashing court of appeal holding that a perfume can bear the imprint of its creator); Cour de cassation [Cass.] 1e civ., Nov. 13, 2008, Bull. civ. I, No. 258 (Fr.) (noting the author’s aesthetic choice in painting the word “paradise” in gold and placing it above a dilapidated door bearing a cross). See Elizabeth F. Judge & Daniel Gervais, *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27 CARDOZO ARTS & ENT. L.J. 375, 379–80 (2009).

50. See, e.g., Cour de cassation [Cass.], ass. plén., Mar. 7, 1986, 83-10.477 (Fr.); Cour de cassation [Cass.] 1e civ., May 2, 1989, 87-17657 (Fr.). The French Supreme Court may have felt compelled to find computer programs copyrightable, and thereby recognize intellectual contribution and creative choice as an avenue to originality, because France did not amend its copyright code to protect computer programs until 1992. See J.A.L. STERLING, *WORLD COPYRIGHT LAW* 7.07 (3d ed. 2008).

Kingdom. For decades, the U.K. hewed expressly to the “sweat of the brow” approach.⁵¹ In the past few years, one intermediate appellate court has acknowledged that that approach cannot survive the decisions in *Infopaq* and its progeny and has redefined originality in terms of whether the author made expressive and creative choices.⁵² Two other British courts, however, have adhered to the traditional approach.⁵³ If (as now seems highly likely), the U.K. soon leaves the EU, the British courts may be able, if they wish, to reconfirm the validity of their traditional stance.

The Japanese approach to originality appears to fall into the (shrinking) gap between the current U.S. and EU approaches. As in the United States, artistic merit, financial investment, and labor are all deemed irrelevant.⁵⁴ Creativity is required, but the necessary amount is quite modest.⁵⁵ Entirely conventional works are denied protection.⁵⁶ But minimally creative works are likely to pass muster.⁵⁷

The corresponding doctrine in China is difficult to pin down, in part because the pertinent law is quite recent,⁵⁸ and in part because the Chinese courts do not often address originality.⁵⁹ But, as best one can tell, the Chinese rule is similar to the rule in the United States. Works must be both creative and independently created, but the amount of creativity required is slight.⁶⁰ So, for

51. See *Walter v. Lane* [1900] AC 539 (HL) (appeal taken from Eng.); *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.* [1916] 2 Ch 601 (Eng.).

52. *SAS Inst. Inc. v. World Programming Ltd.* [2013] EWCA (Civ) 1482, [33]–[37] (Eng.).

53. See *Taylor v. Maguire* [2013] EWHC (Ch) 3804, [8]; *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2011] EWCA (Civ) 890, [20], *rev'd on other grounds sub nom.*, *Pub. Relations Consultants Ass'n Ltd. v. Newspaper Licensing Agency Ltd.* [2013] UKSC 18.

54. See Tatsuhiko Ueno, *General Substantive Requirements for Protection and Irrelevant Factors*, in 2 COPYRIGHT THROUGHOUT THE WORLD § 22:11 (Silke von Lewinski ed., 2015).

55. *Id.*

56. See, e.g., *Tokyo Chihō Saibansho* [Tokyo Dist. Ct.] Nov. 17, 2005, Hei 2004 (wa 7) no. 19816, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 1–2, <http://www.courts.go.jp> (Japan); *Tokyo Chihō Saibansho* [Tokyo Dist. Ct.] July 18, 2013, Hei 2012 (wa 7) no. 25843, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 1, <http://www.courts.go.jp> (Japan); see Dennis S. Karjala & Keiji Sugiyama, *Fundamental Concepts in Japanese and American Copyright Law*, 36 AM. J. COMP. L. 613, 620–21 (1988).

57. See Keiji Sugiyama, Presentation at Fordham University IP Conference: Japanese Copyright Law Development 23 (Apr. 19, 2001), http://www.softic.or.jp/en/articles/fordham_sugiyama.html [https://perma.cc/R2YL-RAJJ]; Presentation, Toshiko Takenaka, Professor, University of Washington School of Law, Intellectual Property System in Japan, <http://slideplayer.com/slide/10605907/> [https://perma.cc/4BAU-STFR].

58. The originality requirement is set forth in the 2002 Regulations implementing China's accession to the World Trade Organization. See Regulation for the Implementation of the Copyright Law of the People's Republic of China (promulgated by the State Council, Aug. 2, 2002, effective Jan. 8, 2011; *rev'd* by the State Council, Jan. 30, 2013), CLI.2.40997(EN) (Lawinfochina).

59. See Li Yufeng, *Copyright Protection in China*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 86 (Rohan Kariyawasam ed., 2011).

60. Interpretation of the Supreme People's Court Concerning the Application of Laws

example, in *Interlego*, the Beijing Higher People's Court found Lego toy blocks to be original because the company chose among multiple possible block designs.⁶¹ And in determining a webpage to be original, the Shanghai Second Intermediate People's Court pointed to the structure, arrangement, and colors of the page.⁶²

To summarize, during the past twenty-five years, clarifications or modifications of the way in which originality is construed have substantially reduced the differences among jurisdictions on this issue. Generally speaking, common law countries have tightened their standards, repudiating the position that labor alone is sufficient to support copyright protection, while civil law countries have softened their standards, reducing the amount of creativity they require. Harmonization is far from complete, however. Significant differences remain in the ways in which the standards are phrased. Most importantly, many civil law countries continue to pay some attention to the degree to which a work reflects the "personality" of the creator, a concern largely absent in common law countries.

In addition, not all countries have participated in the harmonization process. On one hand, at least two common law jurisdictions continue to subscribe to the "sweat of the brow" theory. The courts in New Zealand still take the position that nothing more than a minimal level of skill and labor is necessary to establish originality.⁶³ Similarly, in South Africa, the courts maintain that originality "refers to original skill or labor in execution" and does not require creativity—expressly refusing to follow the lead of the United

in the Trial of Civil Disputes over Copyright (promulgated by the Judicial Comm. of the Sup. People's Ct., Oct. 12, 2002, effective Oct. 15, 2002), No. 31 [2002] (Lawinfochina).

61. Ruishi Ying Te Lai Ge Gongsì v. Ke Gao (Tianjin) Waniu Youxian Gongsì Zhuzuoquan Jiufen An (瑞士英特莱格公司诉可高(天津)玩具有限公司著作权纠纷案) [*Interlego AG v. Coko (Tianjin) Toys Co.*], Chinalawinfo (Beijing High People's Ct. 2003), <http://www.lawinfochina.com/DisplayJourn.aspx?lib=qikan&Gid=1510088723&keyword=Interlego> [<https://perma.cc/UW5F-S2NN>].v

62. Shanghai Dongfang Wang Gufen Youxian Gongsì v. Jinan Kaifa Qu Menghuan Duomeiti Wangluo Jishu Kaifa Zhongxin Bu Zhengdang Jingzheng Jiufen An (上海东方网股份有限公司诉济南开发区梦幻多媒体网络技术开发中心不正当竞争纠纷案) [*Shanghai Eastday Ltd. v. Dream Multimedia Net Technology Development Center*], pkulaw (Shanghai Second Interm. People's Ct. Apr. 24, 2001), http://www.pkulaw.cn/case_es/pfnl_1970324837063219.html?match=Exact [<https://perma.cc/YHN3-JLLZ>].

63. See, e.g., *Henkel KgaA v. Holdfast* [2006] NZSC 102, [2007] 1 NZLR 577 at [37]; *Karum Grp. LLC v. Fisher & Paykel Fin. Servs. Ltd.* [2014] NZCA 389 at [87]; *Univ. of Waikato v. Benchmarking Servs. Ltd.* [2004] NZCA 90, (2004) 8 NZBLC 101,561 at [27]. There are some signs that this stance may be weakening. For example, in the *Waikato* case mentioned above, the Court of Appeals did refer to the author's expenditure of "creative effort and skill" in finding that a publication of survey results was original. [2004] NZCA 90, (2004) 8 NZBLC 101,561 at [42]. And in 2010, an intermediate appellate court acknowledged some uncertainty concerning the status of the sweat of the brow theory. *YPG IP Ltd. v. Yellowbook.com.au Pty Ltd.* [2010] NZHC 943 at [27] (N.Z.). But, thus far, the traditional approach still holds.

States in *Feist*.⁶⁴ On the other hand, Swiss courts, when assessing originality, appear to consider the “statistical uniqueness” (“statistische Einmaligkeit”) of the work at issue, suggesting that some degree of objective novelty (of the sort that France once required) is necessary for copyright protection.⁶⁵

III. THEMES

Woven through the tapestry of case law described in the preceding section are six distinct conceptions of originality. This section isolates and examines the threads—in hopes of clarifying the options from which we might pick when considering possible reforms of the doctrine.

The first conception is independent creation. The Oxford English Dictionary alludes to this variable in the fifth of its many definitions of the term, “original”: “produced first-hand; not imitated or copied from another.”⁶⁶ The OED formulation (and common parlance) treat this variable as binary; a work is either copied from some other source or it is not. As mentioned above, there are reasons to doubt this assumption—to acknowledge that there are situations in which an author mimics a preexisting work closely but is only vaguely or “subconsciously” aware of that preexisting work during her creative process. But, for better or worse, no jurisdiction currently does so.

The second (less intuitively relevant) conception is the amount of labor that the creation of the work required. Labor, in turn, might be measured in various ways. The simplest would be to ascertain how much time the author devoted to the project. More refined approaches would take into account such variables

64. See, e.g., *Kalamazoo Div. (Pty) Ltd. v. Gay* 1978 (2) SA 184 (C) at 190 A; *Appleton v. Harnischfeger Corp.* 1995 (2) SA 247 (A) at para. 99; *Haupt t/a Softcopy v. Brewers Mktg. Intelligence (Pty) Ltd.* 2006 (4) SA 458 (SCA) at paras. 35–37; *Bd. of Healthcare Funders v. Discovery Health Med. Scheme* 2012 ZAGPPHC 65, at para. 30; *Snap-On Africa (Pty) Ltd. v. Joubert* 2015 ZAGPPHC 821, at para. 22 (finding operations manual to be original because of the author’s “inspiration, expertise, effort and labour”); *Nat’l Soccer League v. Gidani (Pty) Ltd.* 2014 (2) SA 461 (GJ) at para. 63. The courts’ position on this issue does not seem to have been affected by the 1980 reform of the pertinent provision of the South African copyright statute, which might have been construed to lower the originality bar. See Copyright Amendment Act 1980, GN 988 of GG 7010 (23 May 1980) (annotating the deletions and insertions to the Copyright Act of 1978).

65. See Bundesgericht [BGer] Apr. 1, 2010, 136 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 225; BGer Feb. 13, 2008, 134 BGE III 166; BGer Sept. 5, 2003, 130 BGE III 168. The courts’ stance on this issue derives at least in part from the unusual way in which the Swiss copyright statute of 1992 defined the set of works subject to copyright protection: “intellectual creations with an individual character.” RECUEIL SYSTÉMATIQUE DU DROIT FÉDÉRAL [RS] [SYSTEMATIC COMPILATION OF FEDERAL LAW] Oct. 9, 1992, RS 231.1, art. 2(1).

66. *Original*, OXFORD ENG. DICTIONARY, [http://www.oed.com/view/Entry/132564?redirectedFrom=original&\[https://perma.cc/XBB6-SCKK\]](http://www.oed.com/view/Entry/132564?redirectedFrom=original&[https://perma.cc/XBB6-SCKK]).

as the intensity of the effort the author expended during that period or the extent to which the author can fairly claim credit for labor by other people, such as employees or independent contractors. Again, however, such nuances are generally ignored by the courts that adopt this perspective.

Third, one might measure the skill required to generate the work at issue. The intuition that underlies this variable is that certain kinds of effort are more deserving of protection than others.⁶⁷ A week of work by a master craftsman is different from a week of work by an apprentice.

The fourth conception is the degree to which the work reflects the exercise of choice by the author. Viewed from this angle, originality is dependent upon creative freedom. If the author had no choice but to employ a particular mode of expression—perhaps because of the expectations of her intended audience (e.g., for an alphabetical arrangement of the names in a phone book) or because of an imperative related to functionality (e.g., for the “interoperability” of a software program)—then, from this perspective, the use of that mode is not original. Like all of the other perspectives, originality in this sense is scalar, not binary. The design of a shopping center produced by an architect who is bound by strict instructions concerning its function and cost will have some originality in this sense, but less than the plot of a typical novel.

The fifth conception is the degree to which a work reflects the personality of the author. Originality in this sense is closely related to self-expression. There are at least two possible variants of this perspective. A subjective approach would seek to ascertain how much of herself the author feels she has invested in the work. An objective approach would ask how much authorial self-expression can be discerned through examination of the work itself.

The sixth conception is novelty. This theme predominates in one of the OED’s other definitions of “originality”: “The quality of being independent of and different from anything that has gone before; novelty or freshness of style or character, esp. in a work of art or literature.”⁶⁸ The key factor here is straightforward: how new is the work? But many complications lurk just under the surface of that inquiry (most of them familiar to patent lawyers):

67. See Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 624–25 (1993).

68. *Originality*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/132565?redirectedFrom=originality#eid> [<https://perma.cc/XTQ3-C7GY>]. The OED’s corresponding definition of “original” (in contrast to “originality”) is more muddled, blending the first and sixth themes: “Having the quality of that which proceeds directly from oneself; such as has not been done or produced before; novel or fresh in character or style.” *Original*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/132564?redirectedFrom=original&https://perma.cc/XBB6-SCKK>].

How does one define the body of “prior art” in relation to which “newness” is assessed? Does it matter whether the work, although strictly speaking “new,” nevertheless represents a natural or expected next step along a familiar path? And so forth. Currently, Switzerland is the only country that expressly ties originality to novelty, but Justice Douglas once argued that U.S. copyright law ought to recognize a similar link.⁶⁹

For the most part, these scales are independent of one another. How a work fares when evaluated by one measure has no necessary impact on how it fares when evaluated on another. Partly for that reason, the perspectives are not mutually exclusive. Adequate showings on more than one axis might be required for copyright protection. Alternatively, the law might permit works (of the same sort or of different sorts) to clear the originality bar in more than one way.

The chart set forth below describes, roughly, the amount of each of these things that are required to establish the originality necessary to secure regular copyright protection in each of the countries discussed in Part II.⁷⁰

	<i>Independence</i>	<i>Labor</i>	<i>Skill</i>	<i>Choice</i>	<i>Self-expression</i>	<i>Novelty</i>
USA	■			■	■	
Canada	■		■	■		
India	■		■	■		
Netherlands	■			■	■	
Belgium	■			■	■	
France	■			■	■	
UK	■	?	?	?	?	
Japan	■			■	■	
China	■			■	■	
South Africa	■	■	■			
New Zealand	■	■	■			
Switzerland	■					■

69. *Lee v. Runge*, 404 U.S. 887, 890–91 (1971) (Douglas, J., dissenting from a denial of certiorari).

70. Disclaimer: The ambition of the chart is to enable rough comparison of the different ways in which the courts in each jurisdiction *describe* their originality requirements, not to indicate differences in “what the courts will do in fact.” *Cf.* Justice Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

One possible conception of originality is missing from this catalogue: value. Its omission is not accidental; to date, no jurisdiction has included it as a factor when determining whether a work is entitled to copyright protection. Non-lawyers familiar with the theoretical and empirical literature on creativity (which, as we have seen, is commonly treated as one element of originality) will likely find this surprising, insofar as the large majority of definitions of creativity within that literature combine two elements: novelty and value (appropriateness, utility, significance, etc.).⁷¹ The principle underlying the inclusion of the latter element is that an innovation that fails to contribute in any way to the aesthetic or practical project for which it is offered should not be described as uselessly creative, but rather should not be deemed creative at all.⁷² Lawyers will likely be less surprised by the exclusion of this element from the case law. Several reasons not to entrust judges with assessments of the value of intellectual products will occur to them—some of which we will discuss in due course.⁷³ It is nevertheless striking that a factor so commonly treated as a component of creativity in other settings and so seemingly germane when deciding whether to envelop a work with the shield of copyright law should find no place in the law.

IV. ASPIRATIONS

When determining the set of works eligible for protection, it makes most sense to select a definition that will best advance the purpose of the copyright system. What, then, is that purpose? The range of views on that fundamental question remains remarkably broad. Each of four sharply different perspectives continues to have considerably currency.⁷⁴ Some scholars and lawmakers contend that copyright law should respect and enforce the natural rights of authors. Others argue that its principal goal should instead be to nurture and protect the psychic bonds between artists (broadly defined) and their creations. The members of a third, especially influential group contend instead that the function of the system should be to induce socially beneficial innovation—and then to make

71. See, e.g., Long Wang & J. Keith Murnighan, *Ethics and Creativity*, in THE OXFORD HANDBOOK OF CREATIVITY, INNOVATION, AND ENTREPRENEURSHIP 245, 247 (Christina E. Shalley et al. eds., 2015); Furong Huang, Jin Fan & Jing Luo, *The Neural Basis of Novelty and Appropriateness in Processing of Creative Chunk Decomposition*, NEUROIMAGE, June 2015, at 122 (2015); ROBERT J. STERNBERG & TODD I. LUBART, DEFYING THE CROWD: CULTIVATING CREATIVITY IN A CULTURE OF CONFORMITY 11–13, 41–43 (1995). I am grateful to Andres Sawicki for alerting me to this literature.

72. Huang, Fan & Luo, *supra* note 71, at 122.

73. See *infra* notes 87–90 and accompanying text.

74. The four perspectives summarized in this paragraph are described and evaluated in William W. Fisher, *Theories of Intellectual Property*, in *New Essays in the Legal and Political Theory of Property* (Stephen R. Munzer ed., 2001).

the fruits of that innovation available to consumers—as efficiently as possible. Finally, a fourth group contends that the law should foster a rich and diversified culture that offers all persons opportunities for human flourishing.

I have argued in previous essays that the fourth of these approaches is best.⁷⁵ I will not restate that argument here. Instead, for present purposes, I will assume that the fourth approach—sometimes described as the cultural theory of intellectual property—should be our normative beacon. Set forth below is a summary (adapted from the aforementioned essays) of what that theory entails.

Its foundation is the proposition that there exists such a thing as human nature, which is hard to discern, but real and stable. Because of their nature, people flourish under some conditions and suffer or atrophy under others. From those observations emerges a normative guideline: social and political institutions, including law, should be organized so as to facilitate human flourishing.

Substantial literatures in the fields of philosophy, psychology, history, and sociology point toward eight conditions as especially important to human flourishing. The first and most obvious is life itself. Flourishing is possible only if you are alive—somewhat more specifically, if you are able to live a life of normal length.

The second, nearly as obvious, is health. Illness impairs flourishing. Freedom from physical and psychic pain is one of the conditions that contribute to living well. As Martha Nussbaum observes, health in this sense includes reproductive health.

Third, a substantial degree of autonomy is important to human flourishing. No one, of course, is wholly self-made or self-directed. But a life without any measure of self-determination is a life not fully lived. Some refinements: (a) Autonomy does not mean freedom from social connections; it means, rather, that the bonds and communities through which we define ourselves are at least partly chosen, not inherited or coerced. (b) The dimension of autonomy that contributes most to well-being is the subjective feeling of self-determination, which is only partially dependent on the objective number of options one has. (c) Autonomy not only makes one feel better; it's also adaptive. Social psychologists have found that autonomous motivations (in other words, motivations arising out of voluntary choice) increase job performance,

75. William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001); William W. Fisher, III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 33–34 (2007); William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1746, 1752 (1988); William Fisher, *Cultural Theory: Premises*, COPYRIGHT^x, <http://copyx.org/lectures/> [<https://perma.cc/YU8N-33ZU>] (last modified Jan. 24, 2016).

particularly when the task at issue is complex and requires creativity.

The fourth condition conducive to flourishing is engagement, in the sense of participation in shaping an important dimension of one's environment. Engagement of this sort can be achieved in at least three settings. In his early writings, Marx emphasized the workplace; his vision of "meaningful work" remains insightful. The leaders of the American Revolution (and an important group of legal scholars convinced of the wisdom of their ideology) emphasized politics; they celebrated a particular style of engagement in civic life—altruistic, deliberative, guided by commitment to the welfare of the polity as a whole, rather than self-interest or factional interest. A third equally important potential arena for engagement is culture itself. We live today in a cloud of symbols and images that, like our jobs and our politics, all too often seem out of our control. The result is cultural alienation analogous to alienation in the workplace. Retaking some degree of responsibility and control for the shape of that semiotic environment is another way of achieving self-fulfillment.

Closely related to engagement in this sense is the fifth of the conditions: self-expression. Projecting one's self into or onto the world has long been recognized as constitutive. (It is on this dimension that the cultural theory of copyright veers closest to the personality theory of intellectual property.)

The sixth of the conditions is competence. We feel better, and we do better, when we have the sense that we are capable of performing the tasks we address. Not that we are certain of success, but that we have the requisite talents and skills.

The seventh is sociability. We flourish through connection with others; we atrophy alone. The vocabulary employed in different disciplines to express this age-old insight varies. A philosopher, such as Nussbaum, might use the term "affiliation." The psychologists Deci and Ryan use the term, "relatedness"—and place it on a par with autonomy and competence as a fundamental human need. In political theory, the theme finds clearest expression in communitarian theory.

Last but not least, human flourishing is facilitated by some degree of privacy. Zones, physical or virtual, that are free from scrutiny and surveillance and thus are conducive to experimentation and intimacy are crucial to self-fulfillment.

This list should not be regarded as canonical. Although grounded in millennia of reflection and experience, it is still being tested and refined. But it provides a reasonably reliable catalogue of the underpinnings of a good life.

A just society would afford all persons access to a life enriched by conditions of these sorts. To be sure, perfect equality of access is

not necessary—and, indeed may not be possible. But equalization to a degree not yet achieved by any country should be our goal.

Achievement of that objective would require reforming many dimensions of our economic, political, and legal systems. Copyright law is far from the most important. That said, the copyright system is by no means inconsequential. It does or might have a major impact on at least four dimensions of culture that, in turn, powerfully affect opportunities for human flourishing.

The first such dimension is cultural diversity. Diversity fosters flourishing in many interlocking ways. It increases both the fact and the experience of choice. Thus, at least if those choices concern things that matter to the chooser, diversity increases autonomy. Diversity also increases invitations and opportunities for self-expression and for engagement.

For many of the same reasons, a rich artistic tradition sustains opportunities for flourishing of many sorts. As Ronald Dworkin has explained: The more complex and “resonant” the “shared language” of a culture—the richer it is in the raw materials of representation, metaphor, and allusion—the more opportunities for creativity and subtlety in communication and thought it affords its members.⁷⁶

Education is at least as important to the good life. Autonomy, engagement, self-expression, and competence are all dependent upon the kinds of knowledge and skill that only education can provide. To be sure, not all extant educational systems do in fact play this role. But properly structured, education can support creativity, competence, and confidence.

The fourth dimension is democracy—understood, broadly, to denote wide distribution of opportunities to participate actively in the shaping of our collective life. Participatory political democracy would of course fit this bill, but so too would “workplace democracy” and “semiotic democracy.”

These, then, are the cultural conditions we should strive to foster: diversity; a rich artistic tradition; education; and democracy (defined capaciously).

V. CONSTRAINTS

In the final section of this Essay, we will consider what reforms of the originality doctrine would best advance the agenda sketched above. Before doing so, however, we must survey the fences within which the analysis of that issue must be conducted. Neither we nor the lawmakers whose decisions we might influence are philosopher queens. We and they operate within a complex set

76. *Panel Discussion: Art as a Public Good*, 9 COLUM. J.L. & ARTS 143, 153–57 (1985).

of institutional constraints. Recommendations for doctrinal reform that ignore those constraints have poor prospects for adoption. If we wish to accomplish something, we need to bear them in mind.

The most likely sources of such constraints are the multilateral treaties that curtail the flexibility of most countries when adjusting their copyright systems. None of those treaties is likely to be amended soon, so their terms can be regarded as “hard” limits on doctrinal reform.

With respect to most aspects of copyright law, the most important such treaties are the Berne Convention and the TRIPS Agreement.⁷⁷ They bind the large majority of countries in the world, and, in combination, they prescribe reasonably comprehensively the minimum levels of copyright protection that those countries must provide.⁷⁸ Surprisingly, however, neither defines—or even refers to—the “originality” requirement. Conceivably, some guidance concerning originality might be gleaned from Article 2(1) of the Berne Convention, which provides that the “literary and artistic works” that the Convention is designed to protect “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”⁷⁹ But if that language were construed to identify the set of works that member countries *must* protect, it would seem to forbid confining protection to “original” works—an interpretation that, as we have seen, is inconsistent with every national copyright system in the world. We thus must conclude that the Berne Convention (and the TRIPS Agreement, which incorporates by reference most of its pertinent provisions) leaves countries free both to impose an originality requirement and to define it.

Substantially more restrictive references to originality may be found in some of the directives that bind member countries of the European Union. For example, Article 1(3) of the 1991 Software Directive provides: “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.”⁸⁰ Similarly, Article 6 of the 1993 Photography Directive provides: “Photographs which are original

77. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

78. Currently 172 countries are contracting parties of the former, and 164 countries are members of the World Trade Organization and thus are bound by the latter. *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/X4X9-DBZV]; *WIPO-Administered Treaties: Contracting Parties—Berne Convention*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 [https://perma.cc/YDB9-RFJG].

79. Berne Convention, *supra* note 77, art. 2(1).

80. Council Directive 91/250, art. 1(3), 1991 O.J. (L 122) 3 (EC).

in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection."⁸¹ Both provisions, as can be seen, apply to only one type of work, but, as discussed in Part II, the European Court of Justice has extended the approach to originality that they embody to all types of copyrightable works. In combination, (a) the language of these directives; (b) the ECJ's jurisprudence construing them; and (c) the recent modifications of the originality standards of several of the EU member countries to conform to that jurisprudence make substantial readjustment of originality in the EU unlikely in the foreseeable future.

In the United States, a miscellaneous combination of norms establishes softer constraints on possible re-definitions of originality. The most important is the U.S. Constitution. In *Feist*, the Supreme Court held that limiting copyright protection to works that embody at least a modest degree of creativity is required by the language of Article I, Section 1, Clause 8.⁸² The result is that serious constitutional problems would attend any effort to lower the bar of originality. But the Constitution establishes no comparable barrier to raising the bar—at least prospectively.

What about regional agreements—analogueous to those that are so important in the European Union? Of the various such agreements to which the United States is a party, the only one that might be construed to control definitions of originality is the North American Free Trade Agreement.⁸³ Article 1705(1) of NAFTA provides:

Each Party shall protect the works covered by Article 2 of the Berne Convention, including any other works that embody original expression within the meaning of that Convention. In particular:

(a) all types of computer programs are literary works within the meaning of the Berne Convention and each Party shall protect them as such; and

(b) compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such.

The protection a Party provides under subparagraph (b) shall not extend to the data or material itself, or prejudice any copyright subsisting in that data or material.⁸⁴

81. Council Directive 93/98, art. 6, 1993 O.J. (L 290) (EC).

82. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

83. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 670 [hereinafter NAFTA].

84. *Id.* art. 1705(1).

Although the phrase, “original expression,” used in the first paragraph of this provision is not defined, it might conceivably be read to incorporate the reference to “intellectual creations” in the paragraph dealing with compilations. But particularly in view of the wide variety of interpretations of originality that obtained when NAFTA was drafted and adopted, such a construction seems implausible.

If the Trans-Pacific Partnership ever comes into force, it will limit Congress’s discretion in adjusting copyright law in ways at least as important as NAFTA. Again, somewhat surprisingly, the TPP does not purport to limit countries’ discretion in defining originality. However, a little noticed provision of the current draft of the agreement arguably encourages Congress to raise the originality bar if necessary to protect the public interest. Article 18.66 provides:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.⁸⁵

Although generally regarded as platitudinous, this provision in fact constitutes the first treaty provision ever to advocate (albeit not mandate) the maintenance of an overall “balance” between authors’ exclusive rights and public-regarding exceptions thereto. Arguably, one way to preserve such a balance would be to withdraw copyright protection from types of works the protection of which does not advance the public good.

In short, although the Constitution sets a floor on permissible interpretations in the United States of the concept of originality, neither the Constitution nor any treaty to which the United States is (or will soon likely be) a party appears to set a ceiling on such interpretations.

What about the U.S. Copyright statute? Although it of course could be modified by Congress, it might curtail the freedom of the federal courts to adjust the definition of originality in the absence of statutory reform. Once again, however, no such constraint can be found. The statute itself does not define originality. The House Report that accompanied the comprehensive 1976 revision of the

85. The current draft of this provision is available at Office of the U.S. Trade Representative, *Trans-Pacific Partnership Chapter 18: Intellectual Property*, MEDIUM (Nov. 5, 2015), <https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7ad#.oi23n4v9y> [<https://perma.cc/MS53-336Q>]. It is no accident that the language of the provision echoes in part section 107 of the U.S. Copyright statute. See 17 U.S.C. § 107 (2012).

statute does indicate that Congress meant to approve the way in which the judiciary had already defined the term.⁸⁶ Conceivably, one might argue that the effect of that expression of legislative intent is to “freeze” the meaning of originality as of 1976. However, that seems strained. To the extent that expressions of legislative intent are relevant at all, it seems fair to assume that Congress meant to leave the judiciary free to continue to craft the doctrine in response to changing social and economic conditions—in much the way that judiciary, with Congress’s approval, has continued since 1976 to modify the fair-use doctrine.

There remains, however, one potential limitation that, although vague, is formidable: the reluctance of the judiciary to make judgments concerning the quality of creative works. The best expression of that reluctance is Justice Holmes’s famous statement in *Bleistein*:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.⁸⁷

This passage reflects (and has amplified) four powerful themes in U.S. law: sensitivity to institutional competence (belief that judges lack the expertise necessary to assess the quality of artistic works); fear of elitism (worry that an upper class would use the opportunity to assess artistic quality to impose their tastes on the rest of the population); hostility to paternalism (belief that judgments by government officials of any sort concerning the merits of artistic works entails overriding citizens’ opinions concerning how best to pursue their own conception of the good); and worry that the continued disagreement among aesthetic theorists regarding the

86. H.R. REP. NO. 94-1476, at 51 (1976) (“The phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.”).

87. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

nature of art is evidence of the absence of objective criteria of artistic quality. Whatever the merits of these four concerns, the salient fact for present purposes is that many judges share them—and consequently would be loath to adjust the definition of originality in a way that would require them (and their colleagues) to assess more often the quality of the works at issue in copyright disputes.

However, even in the United States, the jurisdiction where such concerns have historically been most powerful, there are signs of change. As Fred Yen has demonstrated, judges in copyright cases have always covertly made aesthetic judgments.⁸⁸ In recent years, those judgments have become more overt. In a few contexts, judges are now *required* to assess the quality of works of art—for example, when interpreting Section 106A(a)(3)(B) of the Visual Artists Rights Act, whose ambit is limited to works “of recognized stature.”⁸⁹ In other contexts, they have shown increasing confidence and comfort evaluating the “meanings” of artistic works—for example, when construing the protean criterion of “transformation” in the fair-use doctrine.⁹⁰ These shifts suggest that commitment to the principle of aesthetic neutrality may be weakening. It must be conceded, however, that, for the time being, that commitment remains strong enough to frustrate all but modest changes in the doctrine we are considering.

In sum, for different reasons, the prospects for radical revision of originality are dim in the European Union, while in the United States, they are only modestly brighter. In many other parts of the world, however, the opportunities for change are much greater. As indicated above, the major multilateral treaties impose no barriers. Nor are most countries subject to regional agreements that contain restrictions comparable to those contained in the EU directives. Last but not least, judges in most countries are less queasy about assessing the quality of artistic works than are judges in the United States. It is primarily to lawmakers in those countries that the analysis in the following section of this Essay is addressed.

VI. RETHINKING ORIGINALITY

For many years, scholars have been documenting ways in which copyright law, as currently construed and applied, undermines the four cultural conditions identified in Part III that help to sustain widespread access to the good life. Some examples: The exclusive

88. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249–50 (1998).

89. See 17 U.S.C. § 106A (2012); see also Visual Artists Rights Act, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128, 5129 (1990).

90. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 705–09 (2d Cir. 2013); *Seltzer v. Green Day*, 725 F.3d 1170, 1176–77 (9th Cir. 2013).

rights enjoyed by authors, the extraordinarily long duration of those rights, the absence of an effective way of making use of orphan works, and the unwieldy and obsolete TEACH Act all operate to raise the cost and limit the effectiveness of education—especially of “distance learning.”⁹¹ The familiar defects of the exceptions and limitations (e.g., the narrowness of the enumerated exceptions used by EU countries; the amorphousness of [and expense of asserting] the fair use doctrine in the United States and a growing number of other jurisdictions; and in the United States, the absence [at least until very recently] of a *de minimis* use exception applicable to copyrights in sound recordings) curtail opportunities to make “appropriation art” and rap and hip-hop music and thus reduce the richness of our collective artistic tradition.⁹² The same doctrines and others make it more difficult for nonprofessionals to produce and share “mashups,” fan fiction, and “user innovations”—thereby stunting semiotic democracy and further reducing cultural diversity.⁹³

Most of these criticisms of the impact of the extant copyright regimes have been accompanied by proposals for doctrinal reform. Several scholars, for example, have suggested shortening the duration of copyrights—thereby “freeing” more works for creative or educational uses.⁹⁴ Others have proposed reducing the scope of owners’ exclusive rights—for example, by eliminating the right to prepare derivative works.⁹⁵ Still others have suggested enlarging

91. See, e.g., William W. Fisher & William McGeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, BERKMAN KLEIN CTR. FOR INTERNET AND SOC’Y (Aug. 10, 2006), http://cyber.law.harvard.edu/publications/2006/The_Digital_Learning_Challenge [<https://perma.cc/NQ3T-VQED>]; William Fisher, *Lessons from CopyrightX*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* (Ruth Okediji ed., Cambridge University Press, forthcoming Jan. 2017) (draft available at https://cyber.harvard.edu/people/ffisher/cx/Fisher_CopyrightX_2015.pdf [<https://perma.cc/2ASA-XWKB>]).

92. See, e.g., JULIE COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* ch. 4 (2012); William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 275 (2012); William Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 2 (2000). *But cf.* *VMG Salsoul v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016) (repudiating the position previously taken by the Sixth Circuit and adopting a *de minimis* exception for sound recordings).

93. See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 76–77, 80, 83 (2008); William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1460 (2010); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

94. For example most if not all of the participants in the debate concerning “Copyrights and Wrongs,” hosted by The Economist in May 2009, agreed that the term of protection should be shortened. An archive of the debate is available at https://cyber.harvard.edu/people/ffisher/cx/Economist_Debate_2009.htm [<https://perma.cc/63NU-HWKZ>].

95. See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 391 (2008).

the set of exceptions and limitations.⁹⁶ Finally, many scholars now favor reintroducing compliance with formalities as a precondition of copyright protection.⁹⁷

As one might expect, all such proposals have been controversial. Opponents have argued that they would do more harm than good (or no good at all).⁹⁸ Assessing the various proposals and the objections thereto is well beyond the scope of this paper. The salient point for present purposes is that none of the proposals has had much impact on the ways in which countries have been adjusting their copyright systems. Among the reasons is that most if not all run afoul of treaty provisions. For example, shortening the copyright term substantially would violate Article 7 of the Berne Convention (incorporated by reference in the TRIPS Agreement). Eliminating the right to prepare derivative works would violate Articles 8, 12, and 14. The reinstatement of formalities would violate Article 5(2). Finally, some of the proposals for expanding the set of exceptions and limitations would violate the so-called “three step test,” variants of which are contained in many of the relevant treaties.⁹⁹

Against this backdrop, it is surprising that so little attention has been paid to the possibility of using the originality requirement to narrow the set of works subject to copyright protection. As the previous section showed, such a reform would encounter fewer obstacles in the extant copyright treaties than any of the major reform proposals currently on the table. Equally important, it would help alleviate many of the ways in which copyright law adversely and unnecessarily affects our common culture. Not all, to be sure. Such a reform would certainly not be a panacea. But it could help a good deal.

Suppose, for example, that all countries instituted (prospectively) the requirements that once obtained in Germany and Austria, respectively: software programs qualify for copyright protection only if they embody degrees of creativity greater than that exercised by average programmers, and photographs qualify for copyright protection only if they differ significantly from pre-existing photographs. The result would be to open for general use huge numbers of routine programs and snapshots. Similar benefits would accrue from withdrawing copyright protection from:

96. See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1546, 1569, 1578 (2005).

97. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 486–89, 554–68 (2004).

98. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* (Stanford Univ. Press rev. ed. 2003); Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537 (2013).

99. TRIPS Agreement, *supra* note 77, arts. 13, 26.2, 30.

musical compositions that consist of minor variations on tunes and chord progressions customary in western popular music; plots that mimic well-established narrative arcs; and educational materials that merely restate well-known arguments or facts.

Readers inclined to reject such radical suggestions out of hand might consider that, in the context of patent law, analogous restrictions are entirely conventional. Indeed, it is customary to describe patents upon inventions that do not deviate significantly from the prior art as “junk patents”—and to hunt for doctrinal reforms (e.g., tightening the requirement of nonobviousness/inventive step) that would purge the system of them.¹⁰⁰ Why should we not use originality as a weapon against “junk copyrights”?

Two potential reasons come immediately to mind. First, such a reform might unduly corrode incentives to create socially valuable cultural products. Second, the costs of designing and running an administrative apparatus capable of sifting the wheat from the chaff might dwarf the benefits of such a reform.

The first of these objections is the more easily met. Most of the types of works excluded from copyright protection by a reform of the sort we are considering would continue to be generated in at least optimal numbers. Snapshots, for example, would surely continue to be produced with bewildering frequency using the portable multi-function devices to which rapidly growing percentages of people throughout the world now seem to be addicted.¹⁰¹ The production of educational materials that merely rehash familiar arguments (e.g., student essays; law-review articles; summaries of the causes of major historical events; interpretations of major works of literature) would still be motivated by incentives not dependent on copyright protection. Alternatively, if a tightened originality requirement did indeed reduce the production of such works by increasing the disparity between the returns available to the authors of truly creative cultural products and those available to authors of conventional works, should we not be pleased rather than dismayed?

The second objection, by contrast, is formidable. The task of developing an improved substantive standard and an associated enforcement mechanism that, in combination, would resolve cases

100. See, e.g., Jeffrey D. Sullivan & David Loretto, *Symbol Technologies v. Lemelson, Prosecution Laches, and the Still-Unmet Challenges of Junking “Junk Patents”*, 33 AIPLA Q.J. 285, 298–304, 319 (2005).

101. Cf. Ingrid Lunden, *6.1B Smartphone Users Globally By 2020, Overtaking Basic Fixed Phone Subscriptions*, TECHCRUNCH (June 2, 2015), <https://techcrunch.com/2015/06/02/6-1b-smartphone-users-globally-by-2020-overtaking-basic-fixed-phone-subscriptions/> [<https://perma.cc/URP3-W5RR>] (“Those 6.1 billion smartphone users works out to some 70 percent of the world’s population using smartphones in five years’ time.”).

in a coherent fashion without incurring prohibitive costs is indeed daunting.¹⁰²

Some assistance in doing so might be obtained by examining the ways in which other sectors of intellectual-property law evaluate degrees of creativity. Two aspects of U.S. law might provide such guidance: the standards used to determine whether “useful articles” exhibit the “conceptual separability” necessary to qualify for copyright protection; and the interpretation of the non-obviousness requirement in the context of design patents. Both sectors, unfortunately, turn out to be analytical swamps. “Conceptual separability” is the only aspect of U.S. law that exceeds in amorphousness the fair use doctrine, and the currently dominant interpretation of that requirement (exemplified by the Seventh Circuit’s *Pivot Point* decision) penalizes unsophisticated designers in indefensible ways, while fostering socially wasteful strategic behavior by sophisticated firms.¹⁰³ Despite valiant efforts by the Federal Circuit,¹⁰⁴ the quest to define a sensible boundary between obvious and non-obvious ornamental designs has also failed.¹⁰⁵

European intellectual-property law, however, contains a more promising model. The EU Community Design regime contains a requirement that resembles nonobviousness, but deviates from it in intriguing ways. To qualify for protection under this regime, a design must not only be “new,” but also have “individual character.”¹⁰⁶ The latter requirement is deemed satisfied if and only if “the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public.”¹⁰⁷ Not all commentators are entirely happy with this rule, but in general it is seen as both reasonably predictable in application and fair, insofar as it protects (only) genuine advances.¹⁰⁸

102. Cf. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 71, 81–84 (2003).

103. See *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 920–21, 931 (7th Cir. 2004). It is possible, though unlikely, that the Supreme Court will clarify the doctrine when it decides the *Varsity Brands* case in the coming Term.

104. See, e.g., *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238–39 (Fed. Cir. 2009).

105. Commentators are nearly unanimous on this score. See, e.g., DONALD S. CHISUM, 8 *CHISUM ON PATENTS* § 23.03[6] (2014).

106. Council Regulation 6/2002, art. 4, 2001 O.J. (L 3) 4 (EU).

107. Council Regulation 6/2002, art. 6, 2001 O.J. (L 3) 4 (EU).

108. See Estelle Derclaye, *The British Unregistered Design Right: Will it Survive Its New Community Counterpart to Influence Future European Case Law?*, 10 *COLUM. J. EUR. L.* 265, 277–78 (2004); Thomas Hoeren, *The European Union Commission and Recent Trends in European Information Law*, 29 *RUTGERS COMPUTER & TECH. L.J.* 1, 25–29 (2003); Janice M. Mueller & Daniel Harris Breen, *Overcoming the “Impossible Issue” of Nonobviousness in Design Patents*, 99 *KY. L.J.* 419, 533–36 (2010); Tiffany Mahmood, Note, *Design Law in the United States*

Taking a cue from the EU's approach to designs, one might modify the definition of obviousness in the copyright context to include a requirement that *the overall impression that the work at issue produces on a reasonable person differs from the overall impression produced on such a person by any other single work that had been publicly available prior to the creation of the work at issue.*

This proposal has four main attractions. First, it is “objective,” not “subjective.” In other words, it compares the work at issue to the publicly available prior art, but ignores the mental or physical processes by which the work in question was created. (In this respect, it contrasts sharply both with the way in which many EU countries are currently interpreting originality and the way in which many courts in the United States construe conceptual separability.) Its objective orientation, in turn, would both (i) reduce the need for “discovery” to gather the evidence necessary to apply the standard and (ii) avoid giving authors incentives to fabricate or exaggerate evidence concerning the degree of freedom they enjoyed when creating their works.

Second, by using the perspective of a reasonable person, rather than a person having ordinary skill in the relevant art, the proposed standard both (i) avoids the difficulty (which has plagued interpretations of nonobviousness with respect to design patents) of defining the relevant art with respect to aesthetic products; and (ii) enables a judge (or jury) to apply the standard without consulting expert witnesses.¹⁰⁹

Third, the proposed standard corresponds more closely than the currently dominant legal interpretations to the way in which most people interpret the word, “original.”¹¹⁰

Last but not least, the proposed standard grants protection to all works that add to the diversity and richness of the culture, but liberates for incorporation, appropriation, or recoding all works that do not. It thereby seems to reconcile several of our aspirations: maintaining (or increasing) incentives for works that enrich our

as Compared to the European Community Design System: What Do We Need to Fix?, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 567–68 (2014); Kathryn Moore, Note, *Anatomy of a Design Regime*, 22 IND. J. GLOBAL LEGAL STUD. 789, 791–94 (2015); Katherine M. Olson, Note, *The Innovative Design Protection and Piracy Act: Re-fashioning U.S. Intellectual Property Law*, 61 DEPAUL L. REV. 725, 749–50 (2012).

109. The term, “reasonable person,” well known to U.S. lawyers, might seem obscure to lawmakers in other jurisdictions. If so, they might find suitable an approximation, such as “typical person.”

110. For example, both the first definition of “original” offered in the Oxford English Dictionary (“[t]hat is the origin or source of something; from which something springs, proceeds, or is derived”) and the second (“[b]elonging to the beginning or earliest stage of something; existing at or from the first; earliest, first in time”) align reasonably well with the proposed approach. *Original*, OXFORD ENG. DICTIONARY, [http://www.oed.com/view/Entry/132564?redirectedFrom=original& \[https://perma.cc/XBB6-SCKK\]](http://www.oed.com/view/Entry/132564?redirectedFrom=original&[https://perma.cc/XBB6-SCKK]).

environment, while opening up opportunities for engagement and semiotic democracy.

Some crucial procedural questions remain, however. Who would apply this standard—and when? The most obvious option would seem to be: a national copyright office as part of a mandatory registration and “examination” process. But that approach is plainly a nonstarter. Not only would it violate the Berne Convention’s prohibition on the use of formalities, it would be prohibitively expensive. Partly for the latter reason, the EU Community Design system does not require (or authorize) the Office of Harmonization in the Internal Market to conduct substantive examinations of applications for compliance with the “individual character” requirement. Rather, challenges to the validity of designs for noncompliance with Article 4 are limited (for the most part) to infringement proceedings.¹¹¹ In other words, defendants typically raise the issue in the form of a counterclaim. That approach seems the only sensible option in the context of the copyright regime.

But would not waiting until litigation to address such issues make the enforceability of copyrights unpredictable? For the overwhelming majority of commercially valuable works, the answer is no—because they would easily clear the bar. For the minority that would be vulnerable to challenge for noncompliance with the new standard, the answer is yes, to some degree. And to that extent, the impact of the reform would probably be pernicious.

Such regrettable uncertainty could, however, be mitigated by adapting to the present setting an institutional innovation that is beginning to take root in the context of “traditional knowledge.” Led by India, a growing number of countries are developing databases of traditional knowledge, for the purpose of preventing the patenting (typically in developed countries) of ostensible innovations that do not differ materially from knowledge gathered or developed (typically long ago) by indigenous groups.¹¹² The principle at the heart of this movement—that cataloguing and indexing the body of extant knowledge can and should be used to block socially needless intellectual-property protection for creations that are not genuinely innovative—is as germane to art as it is to medicine.

111. Council Regulation 6/2002, arts. 24–25, 2002 O.J. (L 3) 8 (EC).

112. See, e.g., TRADITIONAL KNOWLEDGE DIGITAL LIBRARY, <http://tkdl.res.in/tkdl/langdefault/Common/home.asp?GL=Eng> [<https://perma.cc/85FU-B95V>]; GLOBAL GATEWAY TO KOREAN TRADITIONAL KNOWLEDGE, <http://www.koreantk.com/ktkp2014> [<https://perma.cc/SH5U-R4TP>]; Yanhuai Liu & Yanling Sun, *China Traditional Chinese Medicine (TCM) Patent Database*, 26 WORLD PATENT INFO. 91, 91 (2004) (summarizing China’s TCM Patent Database). For a catalogue and analysis of these and other similar databases, see World Intell. Prop. Org. (WIPO), *Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore*, WIPO/GRTKF/IC/3/6 (May 10, 2002), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_6-main1.pdf [<https://perma.cc/NMD4-5VMZ>].

Fortunately, to avail ourselves of this option, we need not start from scratch. Many databases already exist that, with modest adjustments, could function as repositories of copyright prior art. For photographs, they include Flickr.¹¹³ For (open source) computer software, SourceForge.¹¹⁴ For sound recordings, Audible Magic.¹¹⁵ For digital audiovisual works, Youtube.¹¹⁶ For literary works, Google's "books" database.¹¹⁷ The adoption of the reform sketched above would likely accelerate the emergence of others.

The increased scope (and searchability) of such databases provoked by adoption of the proposed reform would have an incidental advantage: The databases would function, not just as reservoirs of materials that could be used to challenge the copyrightability of "new" works, but also as mechanisms for ascertaining the status of—and locating the owners of—extant works. Unless and until the current ban on copyright formalities crumbles, this would mitigate the notorious problems created by the absence of comprehensive official national (or international) copyright registries.

Some examples might help sharpen this proposal—and to suggest its cultural benefits. If the standard set forth above had been applied to the plaintiffs' works in the following actual or hypothetical cases, the results (on summary judgment) would likely have been as follows:

113. FLICKR, <https://www.flickr.com> [<https://perma.cc/5LQ2-C4FR>].

114. SOURCEFORGE, <https://sourceforge.net> [<https://perma.cc/VTV7-GW9B>].

115. AUDIBLE MAGIC, <https://www.audiblemagic.com> [<https://perma.cc/TN27-Z8WE>].

116. YOUTUBE, <http://www.youtube.com> [<https://perma.cc/TN27-Z8WE>].

117. GOOGLE BOOKS, <http://books.google.com> [<https://perma.cc/AZG2-P4ZE>].

Not Original	Original
Most student essays ¹¹⁸	<i>Gone with the Wind</i> ¹¹⁹
The photograph taken by Manny Garcia that was used by Shepard Fairey as the reference work for the “Hope Poster” ¹²⁰	The LA Times photograph that was used by Shepard Fairey as the reference work for “Palestinian Woman” ¹²¹
The floor plan of a suburban home at issue in <i>Intervest Construction v. Canterbury Estate Homes</i> ¹²²	The floor plan of the Jewish Museum in Berlin ¹²³
The choreography embodied in most demonstrations of the tango ¹²⁴	The choreography of Anne Teresa De Keersmaeker ¹²⁵
The character of the snowman in the animated film, “Snowman” ¹²⁶	The character of the Batmobile ¹²⁷
The “bass line” of Marvin Gaye’s composition, “Got to Give it Up” ¹²⁸	The tune of “Kookaburra” ¹²⁹

118. Cf. *A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630, 645 (4th Cir. 2009).

119. Cf. *Suntrst Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (appropriately taking for granted the originality of *Gone with the Wind*).

120. See William Fisher et al., *supra* note 92, at 329 fig.4.

121. See *id.* at 333 fig.11.

122. See *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 922 (11th Cir. 2008) (displaying the original floor plan and allegedly infringing floor plan).

123. See STUDIO LIBESKIND, <http://libeskind.com/work/jewish-museum-berlin/> [<https://perma.cc/974U-KQNT>]. Compare *id.*, with *National Museum of Australia, ARM ARCHITECTURE*, <http://armarchitecture.com.au/projects/national-museum-of-australia/> [<https://perma.cc/UU2S-27L2>] (displaying the floor plan for the National Museum of Australia).

124. See, e.g., Robert Blais, *Tango Negro Flaco Dany et Silvina Vals*, YOUTUBE (Feb. 8, 2007), <https://www.youtube.com/watch?v=53V9y06jMUc>; ducati doc, *Sebastian Arce & Mariana Montes at Tango Amadeus 2013*, YOUTUBE (May 18, 2013), <https://www.youtube.com/watch?v=sxm3Xyutcl1s>.

125. See Anne Teresa De Keersmaeker, *Danza Contemporanea/“Achterland.”* YOUTUBE (Nov. 19, 2011), <https://www.youtube.com/watch?v=mTCIVAXDstk>; James C. McKinley Jr., *Beyonce Accused of Plagiarism over Video*, N.Y. TIMES (Oct. 10, 2011, 5:50 PM), http://artsbeat.blogs.nytimes.com/2011/10/10/beyonce-accused-of-plagiarism-over-video/?_r=0 [<https://perma.cc/6GXB-E3DJ>].

126. See Kelly Wilson & Neil Wrischnik, *The Snowman*, YOUTUBE (Jan. 10, 2013), <https://www.youtube.com/watch?v=PJ6c7RLV8ew>.

127. See *DC Comics v. Towle*, 802 F.3d 1012, 1027 (9th Cir 2015), *cert. denied*, 136 S. Ct. 1390 (2016).

128. See Ben Sisario & Noah Smith, *Hit Single Plagiarized 1977 Song, Jury Rules*, N.Y. TIMES, Mar. 11, 2015, at B1 (“The disputes involved passages as short as four notes, as well as mash-ups pairing the bass line of one song with the vocals from the other.”).

129. See Associated Press in Sydney, *Men at Work Lose Appeal over Kookaburra Riff*, THE GUARDIAN (Oct. 7, 2011), <http://www.theguardian.com/world/2011/oct/07/men-at-work-lose-appeal> [<https://perma.cc/7JM7-4DPT>].

All of the works in both columns of this chart did or would qualify as original under the standards now regnant in most countries. Altering the standard so as to exclude from copyright protection the works in the first column would, I submit, enhance the capacity of the copyright system to foster a culture in which we could all flourish.