Copyright Originality

Dale P. Olson

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COPYRIGHT ORIGINALITY*

DALE P. OLSON†

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I. INTRODUCTION

Originality is the "sine qua non" of copyright.1 For a work to be entitled to copyright protection under the Copyright Act of 1976 (1976 Act),2 it must exhibit two fundamental qualities: it must be fixed in a "tangible medium of expression"3 and it must constitute an "original work of author-

* Copyright © 1982 by Dale P. Olson.
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3. 17 U.S.C. § 102 (Supp. IV 1980) provides:
   (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
      (1) literary works;
      (2) musical works, including any accompanying words;
      (3) dramatic works, including any accompanying music;
      (4) pantomimes and choreographic works;
      (5) pictorial, graphic, and sculptural works;
      (6) motion pictures and other audiovisual works; and
      (7) sound recordings.
   (b) In no case does copyright protection for an original work of au-
ship." These conditions are imposed by the current copyright statute, which provides automatic copyright protection for works that meet these criteria, but they long predate the January 1, 1978, operative date of the new statute. The first of these requirements, that the work be fixed in a tangible medium of expression, is effectively a subject matter requirement which the previous statute, the Copyright Act of 1909 (1909 Act), phrased in terms of the published "writings of an author." The expansiveness of the 1976 Act's coverage extends copyright protection to any written work that also meets the originality requirement.

...thorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Under the 1976 Act, a work is "fixed in a tangible medium of expression" when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id. § 101. Prior to the 1976 Act, unpublished works were ordinarily protected by common law copyright protection provided by the states, an area specifically preserved by the Copyright Act of 1909. See id. § 2 (1976) (repealed 1978). States were also permitted to provide concurrent copyright protection unless the protection conflicted with federal protection. See Goldstein v. California, 412 U.S. 546, 560 (1973) (state record piracy statute constitutional). The 1976 Act precludes state protection for rights equivalent to federal copyright protection. 17 U.S.C. § 301 (Supp. IV 1980).


5. Copyright is automatic since it "subsists" in a work exhibiting these qualities. Registration with the Copyright Office is not required as a condition of copyright. An incentive to register a work is provided by the broader remedies of attorney's fees and statutory damages for infringements occurring after registration. 17 U.S.C. § 412 (Supp. IV 1980). Registration or an attempt to register is also a prerequisite to the filing of an infringement action. Id. § 411. A permissive registration may also be made, id. § 408, and registration is required to correct any omissions of notice, id. § 405(a). The statute contains a separate requirement of deposit of published works for the Library of Congress collection. Id. § 407. Ordinarily, deposit and registration can be combined and only one set of copies submitted to comply with both requirements. Id. § 408. See generally M. Peters, General Guide to the Copyright Act of 1976 at 11:1-10 (1977).


8. More accurately, the protection of the 1976 Act extends to any "work fixed in a tangible medium of expression," a term considerably broader than simply "written material." See note 3 supra. Additionally, the statute precludes copyright protection for "any work of the United States government" unless ownership is obtained by a transfer. 17 U.S.C. § 105 (Supp. IV 1980). That provision has been
The second requirement for copyright protection is that a work be an "original work of authorship." Although the 1976 Act is the first statutory recognition of the originality requirement, originality has long and consistently been judicially required for protection as a consequence of the constitutional clause granting authority for copyright legislation. Indeed, the 1976 Act does not attempt to define the originality requirement except in terms of the judicially developed definition; the legislative history accompanying the provision states that the statute is "intended to incorporate without change the standard of originality established by the courts under the present copyright statute."

Despite extensive experience in imposing an originality requirement, the judicially developed doctrine remains uncertain and confused, a condition that stems largely from an uncertainty over the appropriate nature of judicial review of material in which copyright is claimed. This Article will (1) examine the development of the copyright originality doctrine, with a particular emphasis on the perspective of judicial review, in order to analyze the competing considerations involved in formulating the standard of originality for determining whether a work is entitled to copyright; (2) explore the impact of varying standards on the nature of judicial review in determining copyrightability; and (3) propose an analytical framework for defining the appropriate standard for copyright originality. At the center of this analysis is the premise that the erratic development of the principles of originality has led to an approach that historically, and quite impermissibly,

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9. U.S. CONST. art. I, § 8, cl. 8 empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884), "author" was defined as "[h]e to whom anything owes its origin; originator, maker." See also Puddu v. Buonamici Statuary, Inc., 450 F.2d 401, 402 (2d Cir. 1971). "Thus, the one indispensable element of authorship is originality. . . . However, originality itself must exhibit a modicum of intellectual labor in order to constitute the product of an author." 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.06, at 1-37 (1982) (footnotes omitted). See generally Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 GEO. L.J. 109 (1928); Richards, The Value of the Copyright Clause in Construction of Copyright Law, 2 HASTINGS CONST. L.Q. 221 (1975).

bly, utilized subject matter as a touchstone for making that determination. This, in turn, has caused the development of originality standards that first require a subject matter classification and then require the application of an originality standard tailored to the specific classification. This fragmented approach has been exacerbated by a failure to adequately and precisely define the proper standard of judicial review of originality in copyrighted works. Despite the sensitivity of imposing subjective standards on literary or artistic efforts, the judicially developed standard of originality has failed to take into account this concern. At times, the problem has been aggravated by an inaccurate comparison of copyright protection with patent protection and a failure to fully appreciate the genuinely limited scope of copyright protection. Central to the continued confusion surrounding the appropriate standard of copyright originality is the failure to select an objective judicial standard.

II. The Nature and Scope of Copyright

Originality is a condition of copyright protection.11 Central to evaluating originality as a condition of protection is an understanding of the nature and purpose of copyright. Copyright has been succinctly and accurately defined as the “sole right of multiplying copies” of the protected work.12 The 1976 Act accords to the copyright proprietor a set of five rights: to reproduce the work; to prepare derivative works from the original; to distribute copies of the protected work to the public; to perform the work; and to display the work publicly.13 The House Report, in describing this provision, states, “These exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases.”14 Each is subject to division and may be owned and enforced separately.15 Regardless of the specific nature of the identified right, each provides protection consistent only with the protection accorded by copyright: the right to prevent copying. Importantly, copyright does not protect against an independently created work since, by definition, it is not copied. Consequently, similar—even identical—works may exist without any infringement occurring.16

15. 17 U.S.C. §§ 201(d), 501(b) (Supp. IV 1980).
16. See, e.g., Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151 (S.D.N.Y. 1924), which uses the analogy of identical maps created by perfectionists. Both maps are subject to copyright protection and neither map infringes the other. As Judge
The scope of copyright protection is subject to other limitations. The statute provides a series of exemptions from infringement liability,\(^\text{17}\) including the important exception for fair use, a judicially developed doctrine that has been statutorily recognized for the first time in the 1976 Act.\(^\text{18}\) The statute also imposes compulsory licenses on copyright owners for certain types of uses,\(^\text{19}\) a development which has caused concern that these restrictions pose "critical problems for the future of the fundamental concept that the author should have the right to control the use of the copyrighted work."\(^\text{20}\) In addition, well developed doctrines regarding the scope of copyright limit the reach of copyright protection. These restrictions are succinctly summarized in the 1976 Act:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.\(^\text{21}\)

Further, although a pictorial, graphic, or sculptural work is protected when it is incorporated in a useful article, protection does not extend to the utilitarian aspects of the work.\(^\text{22}\) In Mazer v. Stein,\(^\text{23}\) the United States Supreme Court held that a statuette which was fitted for use as a lamp base did not lose its copyright protection for that reason. The scope of protection, how-

Learned hand expressed it in Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669 (1936):

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. . . . But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an "author" because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work.

18. Id. § 107. Although the statute lists a series of factors to be considered in determining whether the doctrine of fair use exempts an otherwise infringing copy, the rule is to be applied as it was judicially developed. HOUSE REPORT, supra note 10, at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680.
19. 17 U.S.C. §§ 111, 115, 116, 118 (Supp. IV 1980). The 1976 Act also establishes the Copyright Royalty Tribunal to distribute the royalties received under certain of these compulsory licenses and to make adjustments of the rate of others. Id. §§ 801-810. See generally M. PETERS, supra note 5, at 9:1-15.
22. Id. § 113.
ever, did not preclude others from making similar lamps which did not track the protected statuette: "Absent copying there can be no infringement of copyright. . . . [The copyright owners] may not exclude others fro using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article."24

A recent case involving “designer” belt buckles illustrates the occasional complexity of applying this distinction. In Kieselstein-Cord v. Accessories by Pearl, Inc.,25 the plaintiff brought an infringement action on a belt buckle formed from a sculptured design; the buckle had been registered by the Copyright Office. Characterizing the case as on the “razor’s edge of copyright law,” the United States Court of Appeals for the Second Circuit upheld the finding that the sculptural features of the belt buckle were separate from its utilitarian features.26 This finding was facilitated by evidence that the buckles had been worn as neck jewelry, supporting a determination that they were primarily ornamental in nature.27

Copyright is a severely limited form of protection. This is not to say that a copyright cannot be valuable, but what is protected by copyright is sufficiently narrow that in assessing the originality standards to be applied in determining whether copyright should be granted it is important not to lose sight of the nature of copyright protection. The limited nature of copyright protection also requires an emphatic rejection of any comparison with patents, either in the standards to be applied in protecting works in which copyright is claimed or in identifying the parameters of copyright protection.28 The patent owner is granted the right to exclude others from practicing the patented invention even if independently discovered.29 As a consequence, the requirements for granting patents are concomitantly higher than the standards for copyright protection.30

Finally, in identifying the appropriate originality standards, it is important to articulate the reasons why copyright protection exists. A suc-

24. Id. at 218 (footnote omitted).
25. 632 F.2d 989 (2d Cir. 1980).
26. Id. at 990.
27. Id. at 993.
28. The distinction was described by the Supreme Court in Mazer v. Stein: “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of an idea—not the idea itself.” 347 U.S. at 217 (footnote omitted).
29. 35 U.S.C. § 271(a) (1976) provides: “Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.” See generally D. CHISUM, PATENTS §§ 16.01-.02 (1981).
cinct answer to that question identifies the values underlying the granting of copyright protection:

The objective of a copyright system is to create a social and economic climate which will encourage the creation and dissemination of material of this nature by enabling authors to profit from their labors, and by making it possible for industry to profit from the publication, distribution and promotion of these products. An adequate copyright system ensures widespread communications of these works by providing a legal basis permitting their distribution and dissemination without loss of dominion over the inherent literary property.31

In providing an atmosphere conducive to the production of works, the Supreme Court has emphasized that the primary purpose underlying copyright protection is a public rather than a private one. In Mazer v. Stein the Court stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."32

At the same time, however, that interest is promoted by permitting the creator of a work to control access to a protected work and to set the price of that access.33 While the public need is a primary motivation, that primary motivation is advanced through the immediate effect of securing "a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."34 These goals are an important backdrop to measuring the standards imposed in according copyright protection since protection is limited to works exhibiting sufficient originality.

III. EARLY DEVELOPMENT OF THE ORIGINALITY REQUIREMENT

A. Statutory Copyright

Originality has long been imposed as a requirement of copyright protection. Justice Story articulated the requirement in Gray v. Russell,35 an 1839 case involving a public domain work, Adam's Latin Grammar. Copy-

32. 347 U.S. at 219.
34. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
right was claimed in “original annotations” accompanying the existing unprotected text. The notes were allegedly prepared by Benjamin Gould. The defendant also published an edition of Adam’s Latin Grammar which was accompanied by notes allegedly prepared by C.D. Cleveland. The plaintiff claimed, however, that the notes were taken from Gould’s copyrighted annotations. The second publisher defended on the ground that copyright in the Gould annotations was invalid for lack of original material since Gould had apparently collected annotations from various editions of the book. In holding the copyright valid, Justice Story stated:

There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources, have produced a similar work, one party may at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials, which have been accumulated and combined together by him. Take the case of a map of a county, or of a state, or an empire; it is plain, that in proportion to the accuracy of every such map, must be its similarity to, or even its identity with, every other. Now, suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map, and has thereby produced one far excelling every existing map of the same sort. It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party.  

In a similar case dealing with a mathematics book, Emerson v. Davies, Justice Story returned to the standard of originality, again utilizing the map example applied in Gray. After stating that a person is entitled to a copyright on a map he compiles from existing materials or from his own survey, the Justice explained that a second mapmaker does not infringe by independently making a map of the same territory using his own “skill, or labor, or expense.” But the second mapmaker is not permitted to substantially reproduce the copyrighted map. “If he copies substantially from the map of the other, it is downright piracy; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other.”

Gray and Emerson established a minimal standard of originality, emphasizing the necessity that the work for which protection is sought be independently created and confining the scope of protection to those portions of

36. 10 F. Cas. at 1038.
37. 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436).
38. Id. at 619.
39. Id.

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the work that are. Justice Story effectively composed a standard which permitted copyright to exist in a work which was prepared with "skill, or labor, or money."\(^{40}\) Being phrased in the disjunctive, these requirements are separable. They are each of equal importance, so that skill and labor are viewed as equivalents and no qualifying standards are imposed on the type of labor utilized. Collectively, these conditions state a standard that is effectively negative: a work is protectable if it is not copied.

Other courts were less generous in their assessment of originality. In \textit{Clayton v. Stone},\(^{41}\) a case which preceded Justice Story's opinions, the court denied copyright protection to a daily market price list. Focusing on the copyright clause, the court determined that the Constitution intended to limit protection to works of a "fixed, permanent, and durable character."\(^{42}\) Focusing on the title of the statute, the court said that the copyright legislation was passed "for the encouragement of learning . . . and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."\(^{43}\)

Although the case law from this era is sparse, \textit{Clayton} is not unrepresentative of the treatment accorded to works that were deemed commercial as opposed to literary. Commercially oriented material was felt to be the result of "mere industry," not exhibiting the permanence necessary for copyright protection.\(^{44}\) Fifty years later, Eaton Drone theorized that the appeal of the \textit{Clayton} approach had waned and that a "more liberal doctrine" was prevalent which would accord price lists and market reports the same copyright protection accorded to directories.\(^{45}\) Drone cited \textit{Drury v. Ewing},\(^{46}\) which held a garment-cutting chart copyrightable, as the principal basis for his optimism.

That optimism was misplaced. In \textit{Baker v. Selden},\(^{47}\) decided shortly after Drone's treatise was published, the United States Supreme Court cited \textit{Clayton} with approval. In its discussion of originality in that case, which remains important and viable for its statements on the scope of copyright protection,\(^{48}\) the Court lent support to the use of a subject matter approach

\(^{40}\) Id.
\(^{41}\) 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2872).
\(^{42}\) Id. at 103.
\(^{43}\) Id.
\(^{44}\) See, e.g., Taylor v. Gilman, 24 F. 632 (C.C.S.D.N.Y. 1885); Ehret v. Pierce, 10 F. 553 (C.C.E.D.N.Y. 1880); Rosenbach v. Dreyfuss, 2 F. 217 (D.C.S.D.N.Y. 1880).
\(^{45}\) E. Drone, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 210 (1879).
\(^{46}\) 7 F. Cas. 1113 (C.C.S.D. Ohio 1862) (No. 4095).
\(^{47}\) 101 U.S. 99 (1879).
\(^{48}\) \textit{Baker v. Selden} permitted copying of a copyrighted work for "use" but not for purposes of "explanation." \textit{Id.} at 104. In part, the holding states the unimpeachable rule of copyright law that protection extends only to the expression of an idea and not to the idea itself, a concept now contained in the statute. 17 U.S.C.
to defining originality and accordingly denied copyright protection to works of a commercial nature. While these decisions were soon superseded by two opinions which greatly expanded copyright protection by removing artificial limitations on subject matter, they retain importance as early examples of the judicial temperament in assessing the scope of copyright and the appropriate standards for originality.

Given the authoritative tone of Justice Story's opinions in Gray and Emerson, it would seem that the standards of originality generally would have been well established. But the tenor of other decisions, including Clayton and Baker, indicate unwillingness to impose purely objective standards. The judiciary, unfavorable in these early decisions to copyright in works other than traditional literature or art, imposed a gloss on the constitutional and statutory copyright provisions that the language of those provisions does not support. In doing so, the courts imposed a standard of artistic or literary effort that reflected a bias against non-traditional forms of expression and demonstrated a willingness to make highly subjective judgments on the proper subjects of copyright protection. Although this standard was eroded by the Supreme Court in a decision involving a photograph and effectively displaced by a case involving a circus poster, it has not been completely dissipated in contemporary case law.

This erratic development of the standards of originality and copyrightable subject matter, viewed in many cases as synonymous questions, was modified by two important cases. In Burrow-Giles Lithographic Co. v. Sarony and Bleistein v. Donaldson Lithographing Co., the Supreme Court greatly broadened the subject matter entitled to copyright protection and simplified the standards applicable to determining originality. The Court also directly addressed the issue of judicial review of copyrighted material.

The subject of the Court's attention in Sarony was a photograph entitled "Oscar Wilde No. 18." The trial court found the photograph to be a

§ 102(b) (Supp. IV 1980). The House Report states that the purpose of § 102(b) was "to restate, in the context of a new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged." 

49. 101 U.S. at 107.


53. See Part II infra.

54. 111 U.S. 53 (1884).

55. 188 U.S. 239 (1903).
"useful, new, harmonious, characteristic, and graceful picture," produced by the photographer

entirely from his own original mental conception, to which he
gave visible form by posing the said Oscar Wilde in front of the
camera, selecting and arranging the costume, draperies, and other
various accessories in said photograph, arranging the subject so as
to present graceful outlines, arranging and disposing the light and
shade, suggesting and evoking the desired expression, and from
such disposition, arrangement, or representation . . . [produced
the photograph].

The infringer first argued that a photograph was not within the con-
stitutional provision authorizing copyright legislation. The argument, as
phrased by the Court, was "that a photograph being a reproduction on
paper of the exact features of some natural object or of some person, is not a
writing of which the producer is an author." In refuting that contention
the Supreme Court looked to the first copyright statute, which authorized
copyright protection for subjects consisting of "any map, chart, book or
books." The subsequent statute, the Copyright Act of 1802, provided
copyright protection for prints or engravings. The Court placed particular
emphasis on these first two copyright statutes because the early Congresses
that enacted these provisions were nearly contemporary with the drafting of
the Constitution and many of the congressmen had been members of the
Constitutional Convention. The Court found no basis on which to distin-
guish photographs from other, clearly permissible, subjects of copyright
protection, concluding that the constitutional provision was broad enough
to authorize copyright protection for photographs "so far as they are represen-
tatives of original intellectual conceptions of the author."

In turn, the Court distinguished between ordinary mechanical pho-
notographs and those which embodied the intellectual processes of the photog-
rapher. The Court declined to address the first category, photographs
involving only a manual operation, since the photograph under considera-
tion involved a work which demonstrated "intellectual production of
thought, and conception on the part of the author." Having satisfied
those requirements, the copyright was valid.

Nearly twenty years later, the Supreme Court again addressed the pa-
rameters of the subject matter of copyright in Bleistein. In an opinion by
Justice Holmes, the Court held that a circus advertising poster was within

56. 111 U.S. at 54-55.
57. Id. at 56.
58. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124.
59. 111 U.S. at 56.
61. 111 U.S. at 57.
62. Id. at 58.
63. Id. at 60.
64. Id. at 61.
the subject matter of copyright. Although the posters had been properly copyrighted, the trial court directed a verdict for the defendant on the ground that the posters were not copyrightable, a determination affirmed on appeal.

In the initial portion of his analysis, Justice Holmes reiterated the premise that even a drawing made from life was subject to copyright protection: "Others are free to copy the original. They are not free to copy the copy." He continued:

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

Nor did the fact that the chromolths were prepared for commercial purposes preclude protection, the basis on which the trial court had been initially affirmed. Finally, Justice Holmes addressed the proper ambit of the courts' review in determining copyrightability:

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 from 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. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights.

Sarony and Bleistein require a combined analysis because, viewed in their historical context, they dramatically broadened the availability of copyright protection.

67. 188 U.S. at 249.
68. Id. at 250.
69. Id. at 251. The circuit court's opinion became the basis of the dissent in the Supreme Court by Justice Harlan in which Justice McKenna concurred. Id. at 252-53 (Harlan, J., dissenting).
70. Id. at 251-52.
copyright protection and imposed a circumscribed scope of judicial review. In permitting copyright in the Wilde photograph, Sarony declined to impose a static construction on the term "writings" in the copyright clause of the Constitution. This is increasingly important today in light of continued technological advances which permit expression in ways beyond the contemplation of the drafters. Sarony, from the standpoint of originality, placed emphasis on the creative elements of the art of photography, recognizing that the photograph was in effect a conception of the creator; photography was simply the medium in which that conception was given visible form. "Oscar Wilde No. 18" was effectively selected from among a nearly infinite number of possible variations on the subject. Lighting, background, posing, and facial expression were some of the variables selected by the photographer. Making these selections was a process involving no less creative ability than writing or painting. The photographic medium, instead of displacing the photographer's judgment, simply required artistic decisions to be exercised in the context of a medium of expression that was technologically new.

The guidelines imposed by Sarony on judicial evaluation of copyrighted material are more limited than those contained in Bleistein and their expression is more subtle. But at the same time, Sarony expressed a caution that judicial review of copyrighted material for compliance with the constitutional requirements is limited, and it does not permit judicial second-guessing about Congress's wisdom in extending copyright protection to technologically new methods of expression.

In contrast with the subtle undertones of Sarony, the opinion in Bleistein is thunderous and direct. Justice Holmes addressed in emphatic fashion the proper role of the court in evaluating copyrighted material for originality. At a minimum, Bleistein terminated the erratically applied doctrine that advertising graphics were not protectable because they lacked connection with the "fine arts." In doing so, Justice Holmes placed a particular emphasis on the impropriety of judicial evaluation of copyrighted material outside of strict objective limits. Distilled to its essence, Bleistein commands protection for any work exhibiting a human reaction, however simple and whatever the source of the creator's inspiration. But in so stating the originality rule, Justice Holmes was cautious to couple his statement with an observation on the limited nature of copyright protection, noting that anyone remains free to "copy the original," but not "to copy the copy."  

Bleistein is authority for the other inseparable element of evaluating copyright originality—the function of the judiciary in imposing such a requirement. Since many works will require a factual determination to be made, that aspect of the case is perhaps of more enduring precedential value. Although Justice Holmes appropriately confined his remarks to pictorial works, they are no less applicable to any type of work in which

71. Id. at 249.
72. Id. at 252.
copyright is claimed since the court is effectively terminating any pretensions of the federal judiciary to impose artistic views. This standard has several positive effects. First, the more objective the standard, the more effective copyright is in acting as an inducement to creativity. Given the limited nature of copyright protection, the requirements for copyright protection must be similarly limited or the inducement disappears. Second, the more objective the standard, the less possibility that a federal statutory scheme will be applied erratically, providing protection on a selective basis. Not only does this help to assure that copyright will be truly national in scope, it also should diminish the incentive for challenges to test the perimeters of copyright protection. Since civil litigation tends to be the forum in which originality assessments are made, a creator is subjected to the cost of an infringement action in order to test a copyright's viability. As the standard applied in determining originality becomes more subjective, so does the incentive to infringe works that may be vulnerable to challenge. Taken collectively, these concerns do not suggest that originality should be effectively construed out of the copyright standards. Rather, they emphasize the need for a limited, objective standard of originality.

Much of the federal case law prior to Sarony and Bleistein was insensitive to these concerns. Contemporary federal case law has an improved, if not perfect, adherence to these considerations in applying an originality standard and will be explored in a subsequent section of this Article. Prior to doing so, it is useful to consider the common law standards developed in assessing whether material was protectable under state law.

B. Common Law Copyright

When the 1976 Act became effective on January 1, 1978, the long existence of common law copyright effectively ended. Common law, or state, copyright was merged with statutory, or federal, copyright into one

73. The Copyright Office also makes an evaluation of originality when works are submitted for registration. See 37 C.F.R. §§ 202.1, .10 (1981). The invalidity of a copyright also would be a defense to a criminal infringement action. See United States v. Hamilton, 583 F.2d 448 (9th Cir. 1978); 17 U.S.C. § 506(a) (Supp. IV 1980).

74. See Part II.B.2 infra.


76. Protection for published works existed in the United States only by statute. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). A limited class of unpublished works was protectable by federal copyright at the author's election. 17 U.S.C. § 12 (1976) (repealed 1978). Common law copyright was defined as the right of first publication, and injunctive relief to prevent unauthorized publication or damages calculated to compensate for loss of that right were the remedies available. See, e.g., Birnbaum v. United States, 588 F.2d 319, 327 (2d Cir. 1978). The term "common law copyright" has been criticized as a misnomer since "the exclusive right to make copies [arose] only upon securing statutory copyright" prior to the 1976 Act. Fin-
federal scheme of protection.\textsuperscript{77} This dual system had provided protection for published works under the federal statutory scheme and unpublished works under common law copyright and state law.\textsuperscript{78} Common law copyright, generally defined as a right of first publication, permitted the creator of material to determine if it was to be published. Common law copyright provided for injunctive relief to prevent unauthorized publication and for damages caused by violations of that right.

Prior to the 1976 Act, the general demarcation point between federal statutory protection and common law protection was the act of general publication. Once published, material was divested of its common law protection and was protected, if at all, only by federal statutory copyright. Federal statutory protection was obtained by publishing the material with the requisite notice. The 1976 Act has largely preempted common law copyright by shifting the demarcation point between the two systems from


\textsuperscript{78} The Copyright Act of 1909 reserved state protection for unpublished works. Section 2 provided: “Nothing in this title shall be construed to limit the right of an author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.” 17 U.S.C. § 2 (1976) (repealed 1978). Early federal copyright statutes provided a remedy for unauthorized publication of unpublished manuscripts. See Act of July 8, 1870, ch. 320, § 102, 16 Stat. 198, 215; Act of Feb. 3, 1831, ch. 16, § 9, 4 Stat. 436, 438; Act of May 31, 1790, ch. 15, § 6, 1 Stat. 124, 124. This was not a copyright remedy, however, and was considered simply to provide an additional remedy in an alternative forum which supplemented rather than preempted state protection for unpublished materials. See, e.g., Palmer v. De-Witt, 47 N.Y. 532, 536 (1872). See generally E. Drone, supra note 45, at 125.

An important difference between common law and federal statutory protection was the duration of each; common law protection was perpetual until the work was published, \textit{see} note 76 supra, or abandoned by surrendering the rights in the protected material, \textit{cf.} Dodd, Mead & Co. v. Lilienthal, 514 F. Supp. 105, 108 (S.D.N.Y. 1981), whereas statutory protection is for a limited term. Under the 1909 Act the protection was for an initial 28 year period subject to a renewal period of 28 years. \textit{See} 17 U.S.C. § 24 (1976) (repealed 1978). Under the 1976 Act, copyright is generally for the life of the author plus 50 years. 17 U.S.C. § 302(a) (Supp. IV 1980). Where the author is not identified, as with an anonymous or pseudonymous work, or in the case of a work for hire, the copyright term is 100 years from the date of creation or 75 years after publication. \textit{Id.} § 302(c). Creation is defined in \textit{id.} § 101:

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.
the general publication of material to the point at which material is fixed in a tangible medium of expression.\textsuperscript{79} As a result, common law protection which once extended to a significant class of unpublished materials including plays,\textsuperscript{80} paintings,\textsuperscript{81} and letters,\textsuperscript{82} has been replaced by federal copy-

\textsuperscript{79} Under the 1976 Act, common law copyright is severely reduced. The dividing line between federal and state protection has shifted from a divestitive general publication to the fixation of a work in a tangible medium of expression, which occurs when the material is sufficiently "permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (Supp. IV 1980). State protection remains for works not fixed in a tangible medium of expression, "such as an improvisation or an unrecorded choreographic work, performance or broadcast." \textit{House Report, supra} note 10, at 52, \textit{reprinted in} 1976 U.S. Code Cong. & Ad. News 5659, 5665.

\textsuperscript{80} Performance of a play was not deemed a divestitive publication, \textit{F}erris v. \textit{F}rohman, 223 U.S. 424, 434-35 (1912), and a play retained its common law protection so long as it was not printed and published. See, e.g., \textit{Crowe v. Aiken}, 6 F. Cas. 904, 906 (C.C.S.D.N.Y. 1875) (No. 3441); \textit{Boucicaut v. Hart}, 3 F. Cas. 983, 987 (C.C.S.D.N.Y. 1870) (No. 1692); \textit{Tomkins v. Halleck}, 133 Mass. 32, 45-46 (1882); \textit{Keene v. Kimball}, 82 Mass. (16 Gray) 545, 549 (1860); \textit{Palmer v. DeWitt}, 47 N.Y. 532, 541-44 (1872).


\textsuperscript{82} Many common law copyright cases emphasized the right of a letter writer to prevent unauthorized publication, see cases cited note 84 \textit{infra}, although the recipient of the letter retained the right to physical possession of it, including the right to sell it. See \textit{Baker v. Libbie}, 210 Mass. 599, 607, 97 N.E. 109, 112 (1912). The sender also retains a right to obtain a copy of the letter. See \textit{Johnson v. Johnson}, 34 Ill. App. 3d 356, 368, 340 N.E.2d 68, 76 (1975). The common law letter cases served an additional purpose as they provided useful authority to support the proposition that an individual has a right "to be let alone." See \textit{Brandeis & Warren, The Right to Privacy}, 4 Harv. L. Rev. 193, 205 (1890).

right. Once material is reduced to writing it is subject exclusively to federal protection.\(^{83}\)

Despite its effective replacement by a unified system of protection, common law copyright precedents still retain significant value in identifying how originality should be judicially evaluated. Historically, the common law was less harsh in articulating the originality required for published works. An important distinction is that the state courts were not constrained by the limitations imposed by the copyright clause of the federal constitution. With few deviations, the common law standard of originality was both minimal and objective. On a nearly universal basis, the common law accorded protection against publication to material regardless of any subjective determination as to its literary value. Indeed, early in the development of the originality doctrine, courts applying the common law standard of originality were openly sympathetic to protecting unpublished material without regard to its content or its pretensions to literary merit.

Because common law copyright was limited to unpublished works, many of the cases defining the rights regarding unpublished material involved personal letters.\(^{84}\) During an era when federal courts were commonly arbitrary in distinguishing between works, according protection only to those deemed to be of value as literature, the common law was providing universal protection to unpublished material regardless of its content. The general rule regarding letters was established in broad dictum by Justice


83. The statute refers to fixation in a tangible medium of expression, a broader term than reduction to writing. See note 79 supra.


Two New York cases departed from this general approach and denied protection to letters not exhibiting literary quality. See Wetmore v. Scovell, 3 Edw. Ch. 515 (N.Y. Ch. 1842); Hoyt v. Mackenzie, 3 Barb. Ch. 320 (N.Y. Ch. 1848). They were later overruled by Woolsey v. Judd, 11 How. Pr. 49 (N.Y. Super. Ct. 1855), causing a leading commentator to state that this “doctrine, which is the sound one, may now be regarded as settled.” Drone, Property in Letters, 13 ALBANY L.J. 411, 412 (1876). Even earlier, another commentator stated that the “decisive objection to the supposed distinction between private letters and letters of a literary character [is that] [i]t is impossible to make any such distinction, in point of fact.” G. CURTIS, THE LAW OF COPYRIGHT 95 (1847) (footnote omitted). See generally Cohn, Rights in Private Letters, 8 BULL. COPYRIGHT SOC’Y 291 (1960); Comment, Common Law Protection of Letters, 7 VILL. L. REV. 105 (1961).
Story, who stated that the "true doctrine" permitted the protection "of any letter, . . . whether they are literary compositions, or familiar letters, or letters of business."85 Except for a brief aberrational departure by the New York courts,86 the protection of unpublished letters was effectively universal prior to the 1976 Act, which terminated common law protection for written materials.87

In some respects it is difficult to assess the value of common law copyright in positing the proper role of judicial review, since the common law did not operate under the constraint of an originality requirement. But the cases are of value in emphasizing by analogy the difficult and subjective nature of discrimination based on other than objective criteria. The consistency of the resolution not to impose subjective standards on common law copyright is extraordinary. It at least suggests that, from the standpoint of manageability in developing standards for protection, such an approach may be valuable.

IV. CONTINUING DEVELOPMENT OF THE ORIGINALITY REQUIREMENT

As a consequence of the Supreme Court cases reviewed previously,88 copyright originality standards have largely been quantified so that originality has become little more than a prohibition against copying, a development which surely would have pleased Justice Holmes. Consequently, items of every conceivable description have been held protectable.89 Aberrational cases remain, however, which provide a means of assessing the judi-

86. See note 84 supra .
89. Because copyright protection extends to "original works of authorship fixed in a tangible medium of expression," 17 U.S.C. § 102(a) (Supp. IV 1980), the subject matter is vast. See generally M. Nimmer, supra note 9, §§ 2.01-17. The consequence has been a dramatic expansion of the traditional definition of "writings," which caused Justice Douglas, in his concurrence in Mazer v. Stein, to ask: "Is a sculptor an 'author' and is his statute a 'writing' within the meaning of the Constitution?" 347 U.S. at 219 (Douglas, J., concurring). Justice Douglas concluded:

The interests involved in the category of "works of art," as used in the copyright law, are considerable. The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all "writings" in the constitutional sense. But to me, at least, they are not obviously so. It is time that we came to the problem full face. I would accordingly put the case down for reargument.

Id. at 220-21.
ciary's perceptions of its role in determining copyrightability. Three areas are of particular value: the originality standards for maps, the originality standards for works which are reproductions of material in the public domain, and the contemporary case law on fraud and immorality as traditional barriers to copyright protection.

A. Originality Standards for Maps

Traditionally, maps have been subjected to a requirement that the charted terrain be directly observed in order to invest copyright protection in a map otherwise synthesized from a compilation of public domain materials.\(^90\) Although the traditional elements of selection, synthesis, skill, and judgment have also been applied to cases involving maps, the direct observation rule has been superimposed as a further requirement for obtaining copyright protection, despite the fact that there is no statutory authorization for imposing such requirements.\(^91\) The leading case on the direct observation rule, \textit{Amsterdam v. Triangle Publications},\(^92\) extracted the requirement from the district court's assumption that originality in maps was confined to field observations.\(^93\) Combining and synthesizing information in the public domain was deemed insufficient since "[a]lmost anybody could combine the information from several maps onto one map, but not everybody can go out and get that information originally and then transcribe it into a map."\(^94\) The United States Court of Appeals for the Third Circuit concurred, holding that "there is no doubt in order to be copyrightable its preparation must involve a modicum of creative work."\(^95\) The direct observation rule has received substantial adherence.\(^96\)

A recent case, however, has rejected the direct observation requirement, holding that maps are to be subjected to the same requirements as other works in assessing copyrightability and delineating the scope of pro-

\(^{90}\) See generally A. Latman, \textit{The Copyright Law} 59-60 (5th ed. 1979).
\(^{91}\) See M. Nimmer, \textit{supra} note 9, § 2.08[A][3][b], at 2-79.
\(^{92}\) 189 F.2d 104 (3d Cir. 1951).
\(^{94}\) Id.
\(^{95}\) 189 F.2d at 106.
tection. In *United States v. Hamilton*, a criminal conviction for copyright infringement was appealed on the ground that a map composed or synthesized from existing public domain materials was not copyrightable unless the direct observation requirement imposed in *Triangle Publications* was satisfied by field observations. Squaringly rejecting the direct observation requirement, the United States Court of Appeals for the Ninth Circuit found no persuasive reason for treating maps differently from other types of copyrightable property. The court reasoned that "[r]ecording by direct observation is only one measure of a cartographer's skill and talent, and originality should not be made synonymous with a requirement that features of a copyrighted map be observed and recorded directly before they will be entitled to copyright protection."  

In rejecting the direct observation requirement, the Ninth Circuit reaffirmed its adherence to traditionally applied principles of measuring copyright originality. The court also acknowledged that the scope of protection was limited to the significant element of compilation, since originality "may be found in taking the commonplace and making it into a new combination or arrangement." Trivial elements are excluded; a color scheme or an outline is not protectable. Rather, only those elements of compilation which require more than a trivial selection "either alone or when taken into consideration with direct observation, support a finding that a map is sufficiently original to merit copyright protection."  

At the same time, however, the court emphasized that the special nature of cartography required that protection be vested not only in the "depiction of a previously undiscovered landmark or the correction or improvement of scale or placement, but also in selection, design, and synthesis." Since the map in issue was synthesized from various maps and other information in the public domain, it was protectable and direct copying was an infringement. The conviction was affirmed.  

Rejection of the direct observation rule is clearly the better side of the issue. No reason exists to support imposition of the rule, and substantial reasons support its rejection. Treating maps differently from other protect-

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97. 583 F.2d 448 (9th Cir. 1978).
98. 17 U.S.C. § 506(a) (Supp. IV 1980) provides criminal penalties for infringement committed "wilfully and for purposes of commercial advantage or private financial gain." Hamilton was fined $700. 583 F.2d at 449.
99. 583 F.2d at 449-50.
100. Id. at 451.
101. Id.
102. Id.
103. Id. See also Perris v. Hexamer, 99 U.S. 674, 675-76 (1878) (color coding not protectable); Christianson v. West Publishing Co., 149 F.2d 202, 203 (9th Cir. 1945) (outline of continental United States not copyrightable).
104. 583 F.2d at 452.
105. Id. (footnote omitted).
106. Id.
able materials first requires a segregation on the basis of subject matter. While this is not a complicated process in the case of a map, it is not required, since well established rules outline the scope of protection in any work synthesized from the public domain and extend protection only to new material. Anyone remains free to copy the original unprotected material.

The Ninth Circuit identified a stronger reason for rejecting the direct observation rule: it simultaneously complicates and makes more subjective the determination that a map is protectable. Since the direct observation must be sufficiently substantial to invest the map in which protection is claimed with more than a synthesis of public domain materials, the trial court is required to segregate the contributions made to the map by the drafter through direct observations and measure the contribution made by those observations to the overall map. A simpler approach—that taken in other areas of copyright—is to confine protection of the protected map to direct copying. This limits the protection given to the synthesizer of public domain materials to the contribution provided by the effort of selection. If the original effort is minimal, so is the scope of protection.

The direct observation rule is not in accord with the standards applied in other areas. Absent a reason to identify maps as requiring separate treatment, there is no support for the direct observation rule. Triangle Publications did not identify such a basis. Rather, the court refused to accord sufficient weight to the traditional criteria of skill, judgment, and labor, which can be exercised in direct field observations or in a synthesis of unprotected materials. No special qualities attach to direct field observations and no special protection attaches to maps; there is no justification for the departure from traditional standards. With the emphasis that the direct observation rule places on judicial review by clouding the boundaries, the certainty of protection for any particular work is necessarily diminished as the originality requirements become more complex. The consequences of this process are more fully observed in L. Batlin & Son, Inc. v. Snyder, an important Second Circuit case dealing with another area of confusion for the standards of copyright, those applicable to reproductions of works of art.

B. Reproduction of Works in the Public Domain

Works in the public domain are among the classes of works the 1976 Act expressly states are unprotectable. The 1909 Act contained a similar provision. However, because variations of works in the public domain are protectable where the variation is sufficiently original, a series of cases has addressed the amount of originality required for creating a new protect-
able work that reproduces an existing unprotected work. These cases are important because they vividly represent the area where the issue of originality is most likely to arise, since most other types of work exhibit originality, however limited, from their creation by the copyright proprietor. In the cases dealing with reproductions of works in the public domain, however, the starting point is an unprotected work; the court is assessing the quantity and quality of original effort that has gone into producing a variation of a public domain work.

Two cases decided by the United States Court of Appeals for the Second Circuit illustrate the complexity and confusion surrounding the standards for a protectable variation of a public domain work. The first of these, Alfred Bell & Co. v. Catalda Fine Arts, Inc.,110 a 1951 case, involved a copyright claimed in reproductions of old masters created through the mezzotint process of engraving, a process that produces a fairly realistic reproduction of the texture of the copied old paintings. The defendant had copied the plaintiff's mezzotints, raising invalidity of the copyrights as a defense to the plaintiff's infringement action.

An understanding of the mezzotint engraving process is central to an appreciation of the court's affirmation of the validity of the copyright on the reproductions.111 The first step in creating a mezzotint requires preparation of a copper engraving plate by creating a roughened surface, a process which is performed by hand. The outline of the original old master is then transferred to the plate by a tracing process. Working within the outline, the engraver "scrapes with a hand tool the picture upon the plate, obtaining light and shade effects by the depth of the scraping of the roughened plate or ground."112 Trial prints are pulled from a completed plate which may be modified to suit the engraver. Before printing, the copper plate is treated with a steel coating to preserve the printing surface. Before each print is made the color is applied by hand to the plate, usually by a printer following a guide prepared by the engraver. This cumbersome method produces a print which, unlike photographic reproductions, preserves the "softness of line which is characteristic of the oil painting."113 However, the process does not create a duplicate of the old master but rather an interpretation. As described by the district court:

The work of the engraver upon the plate requires the individual conception, judgment and execution by the engraver on the depth and shape of the depressions in the plate to be made by the scraping process in order to produce in this other medium the engraver's concept of the effect of the oil painting. No two engravers

110. 191 F.2d 99 (2d Cir. 1951).
111. The facts of the case are incorporated from the district court's opinions. See 86 F. Supp. 399 (S.D.N.Y. 1949); 74 F. Supp. 973 (S.D.N.Y. 1947).
112. 74 F. Supp. at 975.
113. Id.
can produce identical interpretations of the same oil painting.\textsuperscript{114} The defendant created printing plates to reproduce the plaintiff's mezzotints by lithographic printing process.

In affirming the validity of the copyright on the mezzotints, the Second Circuit began its analysis by defining "original" in uncomplicated terms; it meant, "in reference to a copyrighted work . . . that the particular work 'owes its origin' to the 'author.'"\textsuperscript{115} The court emphasized the humble tones of its definition by stating that not only is it "clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel" but that a "distinguishable variation" of a work in the public domain will support a copyright.\textsuperscript{116} "No matter how poor artistically the 'author's' addition," said the court, "it is enough if it be his own."\textsuperscript{117} The mezzotints were "versions" of a work in the public domain, and the variations were subject to copyright simply because the version originated with the engravers who produced them.\textsuperscript{118} Further, the mezzotints were not imitations of the old masters but rather interpretations, and the source of the variations that caused the mezzotints to be interpretations rather than exact copies was irrelevant so long as it was traceable to the engraver.

But even if their substantial departures from the paintings was inadvertent, the copyrights would be valid. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the "author" may adopt it as his and copyright it.\textsuperscript{119}

The approach established in Alfred Bell is wonderfully uncomplicated. It permits protection of a work to the extent that original material is added to otherwise unprotected material; the scope of protection is coextensive with those additions. The underlying public domain work is unaffected by the copyright in the reproduction. This permits rewarding of the copyright proprietor for the effort, however minimal, invested in creating a version of the public domain work while not removing anything from the public domain. From the standpoint of limiting judicial review of competing forms of expression, this approach admirably circumscribes the subjective nature of the court's review. But, despite the striking advantages of this approach, the Second Circuit's rule was not to remain uncomplicated.

Twenty-five years after the decision in Alfred Bell, the Second Circuit returned to the issue of the appropriate test for defining copyrightable variations on public domain works. But the test the court used, while semantically similar, was operatively very different. It imposed requirements for

\textsuperscript{114} Id.
\textsuperscript{115} 191 F.2d at 102 (footnote omitted).
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 103.
\textsuperscript{118} Id. at 104.
\textsuperscript{119} Id. at 105 (footnotes omitted).
finding originality that are not supported by the extensive case law or by a logical formula premised on the reach of copyright protection. *L. Battin & Son, Inc. v. Snyder* 120 involved a plastic reproduction of an antique metal bank. The mechanical bank was a statue of Uncle Sam, about eleven inches tall, dressed in appropriate attire, leaning on his umbrella, and standing on a four- or five-inch-wide base on which rested his carpetbag. When a coin was placed in Uncle Sam's extended hand and a lever pressed, the coin dropped into the carpetbag accompanied by an approving motion of his whiskers. 121

The plaintiff arranged for a Hong Kong manufacturer to produce the antique bank in quantity in plastic as a bicentennial item. In order to fit within the required resale price range, the bank was shortened from eleven to nine inches, the base shortened and narrowed, and the carpetbag and umbrella modified to fit within a one-piece mold. Sketches incorporating these changes were made by a representative of the plastic molder while looking at the metal bank. A clay model incorporating these changes was produced, and from it were made production molds to produce the Uncle Sam bank in quantity. Imbedded in the mold was a proper notice of copyright. The defendant, also a novelty importer, had its own plastic Uncle Sam banks manufactured for import. After the Customs Service notified the defendant that its banks were covered by the plaintiff's copyright, the defendant brought a declaratory judgment action to have the copyright voided. 122

The Second Circuit began its analysis by reiterating the familiar maxims of copyright law, acknowledging that "[o]riginality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying," but that the "test of originality is concededly one with a low threshold." 123 The majority also reaffirmed the test, articulated in *Alfred Bell*, that the author need not contribute anything more "than a 'merely trivial' variation, something recognizably 'his own.' " 124 The court also repeated its 1927 statement that "[w]hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will." 125 Through these prefatory citations the court was reaffirming that the basic premises of copyright originality were unchanged. At the same time, however, the court cautioned, as it began to apply these statements to the plaintiff's Uncle Sam bank reproduction, that "[w]hile the quantum of originality that is required may be modest indeed, we are not inclined to abandon that requirement, even if

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120. 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976).
121. *Id.* at 488.
122. *Id.* Metal copies of the banks were also impounded.
123. *Id.* at 490.
124. *Id.* (citing *Alfred Bell*, 191 F.2d at 103).
125. 536 F.2d at 490 (quoting Gerlach-Barklow Co. *v. Morris & Bendien*, Inc., 23 F.2d 159, 161 (2d Cir. 1927)).
... we could do so" consistent with statutory, constitutional, and precedential requirements.126

While repeating the traditional statements of copyright originality, the court was disinclined to find even "merely trivial" variations present in the plastic Uncle Sam bank. Noting that its focus was to identify the distinct features added by the reproducer that brought the reproduction of a work of art to something beyond a mere copy of the underlying public domain work, the court began by rejecting, appropriately, the notion that a simple change in medium—from metal to plastic—could supply that variation.127 Expanding its analysis, the court also found that the skill required to produce the production molds was insufficient:

Nor can the requirement of originality be satisfied simply by the demonstration of "physical skill" or "special training" which, to be sure, . . . [the trial judge] found was required for the production of the plastic molds that furnished the basis for appellants' plastic bank. A considerably higher degree of skill is required, true artistic skill, to make the reproduction copyrightable. . . . Here on the basis of appellants' own expert's testimony it took the Unitoy [production molder] representative "[a]bout a day and a half, two days work" to produce the plastic mold sculpture from the metal Uncle Sam bank. If there be a point in the copyright law pertaining to reproductions at which sheer artistic skill and effort can act as a substitute for the requirement of substantial variation, it was not reached here.128

The variations introduced into the plastic bank in which copyright was claimed by the appellant were found insufficient to support copyright. In distinguishing the case from Alva Studios v. Winger,129 an earlier district court decision involving a scale reduction of Rodin's "Hand of God," the court emphasized the difficulty surrounding the production of an exact scale reduction of a monumental original sculpture. Originality in Alva Studios was found in the fact that a skilled sculptor required many hours to create a scale reproduction. That, in turn, "distinguishes that case amply from the one at bar" since the plastic bank was not an exact reproduction of the antique metal bank.130 Further comparison between the two underlying works provided an additional basis for distinguishing the "Hand of God" reproduction from the Uncle Sam bank. In making its comparison, the court concluded:

Nor is the creativity in the underlying work of art of the same order of magnitude as in the case of "Hand of God." Rodin's sculpture is, furthermore, so unique and rare, and adequate public access to it such a problem that a significant public benefit accrues

126. 536 F.2d at 490 (citation omitted).
127. Id. at 491.
128. Id.
130. 536 F.2d at 492.
from its precise, artistic reproduction. No such benefit can be imagined to accrue here from the "knock-off" reproduction of the cast iron Uncle Sam bank. Thus appellant's plastic bank is neither in the category of exactitude required by Alva Studios nor in a category of substantial originality; it falls within what has been suggested by the amicus curiae as a copyright no-man's land. 131

Any analysis of Batlin should begin with the dissent filed in that case. 132 That dissent emphasized the consistency of holding the plaintiff's copyright valid with the extensive case law developed by the Second Circuit holding that variations on a work in the public domain are protectable when they are more than trivial. As Alfred Bell permitted even inadvertent variations to be protectable, the plaintiff's reasons for modifying the public domain work—whether aesthetic or functional—should not be relied upon as the basis for the decision. Since a copyright would only protect the plaintiff's figurine from a slavish copy, the protection would be minimal; only actual copying would be prohibited. Exact versions of the original bank or versions not copied from the plaintiff's would be unaffected. 133

The contrast between the Alfred Bell and Batlin standards is striking. It is difficult to accommodate a comparison of standards which differ so dramatically; the two cases represent different efforts to evaluate the doctrine defining the protection required for variations on public domain works. Despite Batlin's efforts to blend its test with that of Alfred Bell, the two approaches are very different. The major element of that difference is the court's unwillingness in Batlin to acquiesce in copyright protection for works it considered inartistic.

While a work of art must demonstrate the added requirement of creativity to be protectable, 134 a reproduction must only be original; the element of creativity is supplied by reproducing the underlying work of art.

131. Id.
132. Id. at 492-94 (Meskill, J., dissenting).
133. Id. at 494 (Meskill, J., dissenting).
134. A work of art requires an element of creativity as a matter of definition. "That is, unless a work evidences some creative authorship, it cannot by definition be regarded as a work of art." M. Nimmer, supra note 9, § 2.08[B][1], at 2-83 (footnotes omitted). The element of creative authorship required is, in itself, limited. See, e.g., Gardenia Flowers, Inc. v. Joseph Markovitz, Inc., 280 F. Supp. 776, 781 (S.D.N.Y. 1968). What is "art" is in no way confined by the copyright law, however. "Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste. . . . And to allow them to assume such authority would be to risk stultifying the creativity and originality the copyright laws were expressly designed to encourage." Esquire v. Ringer, 591 F.2d 796, 805 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979). Although the Copyright Office's function is limited and it does not determine conclusively that a work is original, the certificate issued is prima facie evidence of the validity of the copyright for the first five years after registration; after that time the
Original simply means that the work has not been copied. In the context of reproduction of a work in the public domain, this means that a work must demonstrate a distinguishable variation that rises above the trivial. All of this is well settled law. But Battin imposes an additional standard—one that requires the work to demonstrate aesthetic excellence as well. This is clear from the court’s elaborate efforts to distinguish the Uncle Sam banks from the reproduction of Rodin’s “Hand of God” in Alva Studios. Although the efforts required to reduce the Rodin sculpture exceeded those required to shrink the Uncle Sam bank, that was merely a difference imposed by the nature of the underlying work and the interest to be served by the reproduction.

The plaintiff in Battin sought to produce affordable American art. The Second Circuit found that effort to be unprotectable. In doing so, the court was necessarily reacting to the plaintiff’s intended market. Had the banks been more painstakingly reproduced in metal, by a method calculated to retain the bank’s distinctive elements, it is clear they would have been protectable. But in distinguishing between variations introduced on the basis of the underlying motivation, the Battin court is propounding a massively subjective test. It is also unnecessary since, as the dissent noted, to permit a copyright on the plastic bank would only prevent a slavish imitation of the protected work. The defendant remained free to mass produce banks from its own reproduction molds. The plaintiff’s copyright would have been as minimal as the variations introduced into the Uncle Sam bank by his plastic molding technician.

The holding in Battin is troublesome; the implications are awesome since the court has moved directly away from a standard of originality linked to the degree of protection. The court has also seemingly introduced a subject matter limitation by its unpersuasive distinction between cheap reproductions of art and expensive reproductions. The bright line test of Alfred Bell has been superseded by an unnecessarily complex and subjective standard for determining originality in works that originate in the public domain. Such an approach is not only inconsistent with historical standards but with contemporary trends as well. The trend toward a content-neutral review of copyrighted works is best illustrated by the rejection of obscenity or fraud as an infringement defense.

C. Immoral or Fraudulent Works

Historically, copyright protection has been denied to works deemed inappropriate because of their content for legal protection. Sir James Ste-
phen, in his famous *Digest of the Law of Copyright*, summarized the traditional proscription against such works in these terms: "No copyright can exist in anything which copyright would otherwise exist in if it is immoral, irreligious, seditious, or libellous, or if it professes to be what it is not, in such a manner to be a fraud upon the purchasers thereof."

A similar doctrine has long existed in the United States, both at common law, which required works to be "innocent," and under the federal copyright statute, reflecting a requirement presumed to be imposed by the constitutional provision authorizing copyright protection for works that contribute to the "progress of Science and Useful Arts." Perhaps reflect-

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138. *Id.* at lxix.

139. *See* Palmer v. DeWitt, 47 N.Y. 532 (1872). Whether a work was moral varied with the period in which it was under consideration. In Keene v. Kimball, 82 Mass. (16 Gray) 545 (Suffolk Dist. Ct. 1860), *overruled on other grounds*, Tompkins v. Halleck, 133 Mass. 32 (1882), the court rejected the argument that a play was not subject to common law protection because dramas were deemed immoral by the Puritans:

Notwithstanding the ingenious and interesting argument for the defendant, derived from the principles and ideas of the Puritan founders of the Commonwealth, we can entertain no doubt that a dramatic composition is equally under the protection of law with any other literary work. Courts will not interfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production; but the particular application once made of this rule of the common law, in conformity with the peculiar opinions, sentiments or prejudices of one generation of men, will not control its application in a state of society where different views prevail. If our ancestors prohibited all scenic exhibitions, it was because they regarded them as immoral and pernicious. If we do not so regard them, the reason ceasing, the rule ceases with it.


ing a greater degree of democratic idealism, even early American cases confined the bar against protection to immoral or fraudulent works; those deemed irreligious seem never to have been barred from protection.\textsuperscript{141} Despite the nearly universal acceptance of these proscriptions, however, the sparse modern case law has largely abrogated any obscenity or fraud limitations on works otherwise subject to copyright protection and has adopted a content-neutral approach to assessing copyrightability.\textsuperscript{142}

The traditional fraud and immorality restrictions add a negative third condition to the requirements that a work be original and fixed in a tangible medium of expression to be copyrightable. A work may be original even though immoral—however defined—or fraudulent. The value of examining the case law on this subject is the strong analogy between judicial review of a copyrighted work for innocence and the examination for originality, since both reflect a qualitative approach to judicial examination of copyrighted materials.

Recent cases have abandoned both of these bars in persuasive opinions useful in quantifying the requirements for originality. The allegedly fraudulent content of an otherwise validly copyrighted work was held irrelevant in Belcher \textit{v.} Tarbox,\textsuperscript{143} a Ninth Circuit opinion that rejected any content examination of the copyrighted material. In responding to the leading case precluding protection for fraudulent material, \textit{Stone} \& Mccarrick \textit{v.} Dugan Piano Company,\textsuperscript{144} the court stated:

\begin{itemize}
  \item \textsuperscript{142} See Jardeth Inc. \textit{v.} Clancy, 666 F.2d 403, 405-06 (9th Cir. 1982); Mitchell Bros. Film Group \textit{v.} Cinema Adult Theater, 604 F.2d 852, 864 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980); Belcher \textit{v.} Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973).
  \item \textsuperscript{143} 486 F.2d 1087 (9th Cir. 1973), noted in 16 B.C. IND. \& COMM. L. REV. 132 (1974).
  \item \textsuperscript{144} 220 F. 837 (5th Cir. 1915). \textit{Stone} must be read critically, however, since the lower court dismissed the action on the ground that copyrighted material containing an advertising plan for piano retailers was not infringed. Stone \& Mccarrick, Inc. \textit{v.} Dugan Piano Co., 210 F. 399, 400 (E.D. La. 1914). The court cited Baker \textit{v.} Selden, 101 U.S. 99 (1879), a case in which the Supreme Court articulated the rule that copyright protection extends only to the expression of an idea and not the idea itself, a basic premise reiterated in the 1976 Act. See 17 U.S.C. § 102(b) (Supp. IV 1980); note 48 supra. The Fifth Circuit, however, viewed the case as one involving a claim of copyright protection for false advertising material since the pamphlet in which copyright was claimed contained a suggested advertising plan, which, in turn, contained specific factual statements. The court viewed the material as being recommended for use as written and without regard for whether or not the factual statements were necessarily true when used in the context of a specific advertising campaign. The conclusion that the pamphlet was not subject to copyright protection, however, must be viewed in conjunction with the court's additional statements that the advertising contained misleading claims in the nature of extravagant puffing of merchandise. 220 F. at 842. A fair reading of \textit{Stone} suggests that the court was reacting as much to the fact that the subject matter of the case involved adver-
We think that decision unsound. There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it. 145

The Fifth Circuit has taken a similar approach in an opinion described by Professor Nimmer as "the most thoughtful and comprehensive analysis of the issue." 146 Mitchell Brothers Film Group v. Cinema Adult Theater 147 involved an infringement action brought against a theater showing a pirated copy of the plaintiff's copyrighted motion picture, "Behind the Green Door." At trial, the district court found the film obscene and permitted obscenity as an affirmative defense to the infringement action. The court of appeals held that obscenity was not a bar to an infringement claim and reversed without evaluating the content of the motion picture. 148

The Fifth Circuit, analyzing the defense under the 1909 Act, began its analysis by disagreeing with the district court's view that the statute was silent on the standards to be applied to works subject to copyright protection. The court held that the controlling statutory provision, which provided that "[t]he works for which copyright may be secured under this title shall include all the writings of an author," 149 was not silent:

Rather, the statutory language "all the writings of an author" is facially all-inclusive, within itself admitting of no exceptions. There is not even a hint in the language of § 4 that the obscene nature of a work renders it any less a copyrightable "writing." There is no other statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted. 150

Further, the court noted, both logic and the history of content based restrictions in the copyright, patent, and trademark statutes suggested that


146. M. NIMMER, supra note 9, § 2.17, at 2-194.2.

147. 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980).


150. 604 F.2d at 854 (footnote omitted).
no content restrictions were to be implicitly imposed on otherwise copyrightable works. In the related areas of patents and trademarks, Congress has expressly imposed content restrictions; a trademark may not be registered if it contains "immoral, deceptive, or scandalous matter"\textsuperscript{1151} and to be patentable, an invention must be "useful," a concept which includes a notion of legality.\textsuperscript{1152} In contrast, the copyright statute is almost universally free of content restrictions, and none have been imposed since the 1909 Act.\textsuperscript{1153} This content-neutral approach has been incorporated in the corresponding section of the 1976 Act which extends copyright protection to original "works of authorship fixed in any tangible medium of expression," regardless of "esthetic merit."\textsuperscript{1154}

The court found further support for its conclusion in Justice Holmes' admonition in \textit{Bleistein} on the limitations of the judiciary in assessing the artistic merits of otherwise protectable works. Given the fluctuating nature of what is deemed to be immoral, and the fact that it varies not only by time but by place under the prevailing obscenity doctrine, an obscenity bar would frustrate the statute's "invitation to creativity" by imposing content limitations:

The purpose underlying the constitutional grant of power to Congress to protect writings is the promotion of original writings, an invitation to creativity. This is an expansive purpose with no stated limitations of taste or governmental acceptability. Such restraints, if imposed, would be antithetical to promotion of creativity. The pursuit of creativity requires freedom to explore into gray areas, to the cutting edge, and even beyond. Obscenity, on the other hand, is a limiting doctrine, constricting the scope of acceptability of the written word.\textsuperscript{1155}

Imposition of an obscenity bar to otherwise protectable material, in addition to creating the severe logistic problems identified by the court in \textit{Mitchell Brothers}, does not necessarily have the effect of suppressing such materials.\textsuperscript{1156} It may instead increase their availability by removing the infringement action as one limitation on distribution. As an early English

\textsuperscript{1151} 15 U.S.C. § 1052(a) (1976). \textit{See In re McGinley}, 660 F.2d 481, 486 (C.C.P.A. 1981) (picture of nude couple embracing not registrable as trademark for use on newsletter; action not an effort to legislate morality but congressional judgment that scandalous marks not "occupy the time, services and use of funds of the federal government."); \textit{In re Riverbank Canning Co.}, 95 F.2d 327, 328-29 (C.C.P.A. 1938) (standard to be applied is to be ascertained in context of goods on which mark is to be used).


\textsuperscript{1153} 604 F.2d at 855 n.4.


\textsuperscript{1155} 604 F.2d at 856 (footnote omitted).

\textsuperscript{1156} Id. at 858 n.12.
commentator aptly noted, the "immoral character of a work should not therefore deprive it of copyright; its immorality can safely be left to the criminal law."157

Similar reasoning was found persuasive by the Ninth Circuit in Jartech Inc. v. Clancy,158 a 1982 case in which the court cited both its own decision in Belcher and the Fifth Circuit's decision in Mitchell Brothers as authority for rejecting any content restrictions, including obscenity, in an infringement action. The reasoning was bolstered by the court's view that pragmatism further required such a conclusion. Since obscenity is premised on a variable community standard, "[a]cceptance of an obscenity defense would fragment copyright enforcement, protecting registered [copyrighted] materials in a certain community, while, in effect, authorizing pirating in another locale."159

An analysis of this sparse modern authority reflects an understanding of the limitations of the judicial process in evaluating the content of material in which copyright protection is claimed. The limited case law on both obscenity and fraud suggests that neither has proved to be a true barrier to copyrightability except in isolated situations. The cases do reflect a judicial inability to meaningfully assess, in most cases, the content of the material in which protection is claimed in a reasonable and consistent fashion. In addition, given that content barriers generally are raised only in infringement actions, only a limited amount of material is ever subject to content scrutiny; protection remains unaffected in the remainder. Obscenity and fraud limitations diminish the consistency of protection and single out works for content evaluation, imposing a form of selective censorship.160 In return, it is hard to identify what values are served by imposing content restrictions. Although it may seem anomalous, as it did to the trial court in Mitchell Brothers, to lend judicial aid to a sexually explicit and perhaps obscene motion picture, a focus on any individual work obscures the values served by a content-neutral standard of evaluation.

The lessons applicable to a study of judicial evaluation of originality from these cases are also apparent, even though originality is mandatory for copyright protection. The standard of review is necessarily different; a court cannot decline to evaluate the material as the Fifth Circuit did in

158. 666 F.2d 403 (9th Cir. 1982).
159. Id. at 406.
160. The following observation on the nature of copyright emphasizes its objective character:

Because the right to secure copyright is available to every author or creator of a literary or artistic work on an equal basis, it is not subject to censorship, and is a concomitant of the right of freedom of speech not inconsistent with, or antagonistic to, the rights guaranteed under the First Amendment to the Constitution.

Schulman, supra note 31, at 402.
Mitchell Brothers. But a court evaluating material for originality can identify its own limits and the complexities of any subjective evaluation test that it formulates. The obscenity and fraud cases provide only analogous, indirect authority for formulating originality tests. The basic lessons of consistency of treatment among copyright owners and a sharp awareness of the limitations of the court in making content assessments are directly helpful.

V. CONCLUSION

Copyright is a minimal protection; it prevents against no more than actual copying. As a minimal protection, the originality standards required for copyright protection should be minimal as well. That objective is best served by a standard of copyright originality that recognizes the narrowness and the nearly universal nature of copyright protection for written material under the 1976 Act.

The choices are limited and essentially require an election between objective and subjective standards. The objective standard identifies those portions of the work that have originated with the author and, while according copyright protection to the work, carefully limits copyright protection to the additions made by the creator. Where there is a slavish copying, as with a purely mechanical reproduction, the copyist has added nothing; the work does not originate with him and he is entitled accordingly to no protection.

A subjective standard, as applied by the Second Circuit, is not only statuteully and constitutionally unwarranted, it is effectively unmanageable. It complicates what should be a simple standard of review. The judiciary is not qualified, as Justice Holmes so aptly noted, to make judgments about a work’s literary or artistic merit. For the court to impose its own subjective judgment not only on the reproduction but on the underlying work as well is to twice violate that basic premise. As originality standards move from being erratic as a consequence of subject matter assessments to being unpredictable because of judicial assessments of the creator’s skill, the consistency of standards required by a national copyright statute will necessarily diminish.

Copyright is intended as an encouragement for the creation of all types of works. The values that it is intended to promote are best served by a content-neutral, objective standard of originality.