
**ON THE PROSPECTS OF RAISING THE ORIGINALITY
REQUIREMENT IN COPYRIGHT LAW: PERSPECTIVES
FROM THE HUMANITIES**

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*In 1903, in *Bleistein v. Donaldson Lithographing*, Justice Holmes famously concluded that judges are ill-suited to make merit judgments when determining the eligibility for protection of works. Subsequent courts and commentators have generally followed his caution. Yet, no one has thought through how the copyright system would work were Justice Holmes not heeded. What if courts were called upon to determine the aesthetic merit of a work? How would they go about it? And would they be able to separate the gold from the dross by drawing upon an aesthetic evaluation of such kind?*

These questions inevitably arise upon reading some recent proposals to raise the originality threshold. Though it is rarely explicitly recognized, the reconfiguration that these proposals entails would effectively bring originality's meaning in copyright law more into line with how the term is used in aesthetics, where it is considered a function of the work's level of creativity, measured by its degree of departure from conventional expression.

Drawing on the concept of domain from sociocultural studies of creativity, we explain just why it would be so enormously problematic for courts to identify and to apply a stricter originality criterion that would require them to make decisions on the basis of merit. By comparing the domain of copyright law to the domain of patent law, we argue that it is the latter's relative coherence and orderliness that enables patent examiners to get traction when assessing an invention's degree of non-obviousness. The cultural domain, by contrast, is less rule-bound, and therefore non-obviousness is much harder to establish and validate. Aesthetics — both as a set of cultural practices and products and as an academic discipline — are simply too het-

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erogeneous to provide adequate toehold for the legal analysis of higher degrees of originality.

Exploring the reasons and reasoning behind the ban on aesthetic merit in copyright law from a humanities perspective, this article offers a more detailed and nuanced account of Justice Holmes' conclusion. Contrary to conventional wisdom we argue that the inherent subjectivity of aesthetic preferences does not in itself make it any harder to pinpoint an objective standard of aesthetic merit, though it does make it harder to provide justification for any such standard. Furthermore, the article questions the premise on which the proposal to raise the originality threshold rests, namely that it will cause the undeserving bottom of works to fall out, leaving only aesthetically worthy and socially valuable works protected. Before introducing a stricter originality criterion we need a more careful and empirically based analysis of just what the problems are, what areas of copyright law are affected, and exactly how and why a higher threshold would improve the situation.

INTRODUCTION

The vast majority of scholarly efforts to reform copyright start from the supposition that the scope of protection for works of authorship has become overbroad.¹ However, while there is general consensus on the broad contours of the problem, there is far less agreement on how to solve it.

The attraction of the proposal to raise the originality threshold is that it promises to nip the problem in the bud, at the level of the subject matter definition. That is, rather than struggling to regulate innumerable and wildly varying works that all meet the minimum requirement for copyright protection, raising the originality threshold restrains the amount of works eligible for copyright in the first place. Thus, Joseph Scott Miller notes that many other proposals to restrict the scope of copyright have an “enforcement focus” and therefore “do not reduce the sheer number of copy-

¹ See generally NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 80 (2008) (“Copyright began as a narrowly tailored, short-term prerogative designed to promote the printing of original expression. It now threatens to metamorphose to a rotund, Blackstonian property right Copyright's untoward expansion betrays copyright's core principles rather than faithfully translating those principles to new conditions.”); with respect to copyright's requirement of originality and the concept of the work, see Sir Hugh Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated*, 18 EUR. INTEL. PROP. REV. 253, 257 (1996) (asserting that copyright currently seems to spring up “to protect nearly every creation of the human mind, be it ever so trivial”).

righted works.”² Miller recommends looking to patent law’s criterion of non-obviousness to raise the threshold of originality in copyright law. As we will see, this strongly recalls how originality tends to be understood in aesthetics.

It is important to note, however, that not all suggestions to reinforce and refocus the originality standard in copyright law treat it as a threshold requirement pure and simple. Gideon Parchomovsky and Alex Stein, for example, regard it instead as a continuum, and they seek to correlate the degree of copyright protection for works to their degree of originality.³ This is a major difference, of course, and this suggestion seems to us somewhat more practicable.⁴ Still, what this proposal seeks to accomplish is clearly similar, for while it does not exclude minimally original works, the protection it grants them is very thin.⁵ It is not clear, however, that this would significantly change current practices, as low-original works already receive “thin” protection in the sense that only the original elements of such works attract copyright, and the work as a whole will therefore not be infringed unless it is copied (almost) entirely.

² Joseph Scott Miller, *Hoisting Originality*, 31 *CARDOZO L. REV.* 451, 459-60 (2009). One category of proposals that would reduce the number of copyrighted works is the proposals to reinstate compulsory formalities as thresholds for copyright protection. *See, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *STAN. L. REV.* 485 (2004); STEF VAN GOMPEL, *FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE* (2011). Because the analysis in this article concentrates solely on existing proposals to raise the originality requirement in copyright law, however, we do not treat proposals that seek to restrict the scope of copyright in another way.

³ *See* Gideon Parchomovsky & Alex Stein, *Originality*, 95 *VA. L. REV.* 1505, 1507 (2009).

⁴ Parchomovsky and Stein’s proposal is also considerably more comprehensive. We do not aim to address the finer details of their scheme for copyright reform, but concentrate mostly on the more general premise it shares with Miller’s text: that it is possible to distinguish levels of originality above the current threshold with adequate degrees of accuracy and consistency. Although we have tried to specify differences when relevant, in oscillating between the two proposals in order to focus on general similarities, readers should be aware that there is a danger that we do one or the other some disservice by conflating the two proposals and treating them as more alike than they actually are.

⁵ In Germany, the courts in practice also correlate the degree of copyright protection for works to their degree of originality, granting thin protection to those of little creative value (the so-called *Kleine Münze*, i.e., “small change”) and broader protection to works with a higher degree of originality. *See* Ulrich Loewenheim, in GERHARD SCHRICKER & ULRICH LOEWENHEIM, *URHEBERRECHT: KOMMENTAR* 123-24 (§ 2 nn.73-74) (4th ed. 2010).

This immediately brings us to a pertinent question that underlies the proposals to raise the originality criterion: what works are causing the problem that these proposals wish to cure in the first place? The effort to raise the originality threshold does not seem to concern highly creative works, but works situated towards the very low end of the originality spectrum which are unlikely to cause many problems in practice, given that their protection is limited. Because the proposals are quite ambiguous about the kinds of works that are creating the perceived problem, the question arises whether the current originality threshold actually endangers the flourishing of art. This is a vital question, which will be critically addressed in the last part of this article.

Another important concern, which takes up the first part of our analysis, is the general premise shared by these and other proposals to raise the originality criterion: that it is possible to distinguish levels of originality above the current threshold with adequate degrees of accuracy and consistency. This article takes issue with this premise. It argues that the effort to identify higher degrees of originality would inevitably bring copyright into the ambit of aesthetics, which is unable to provide sufficiently well-defined and coherent principles and procedures for decision makers. In addition, were courts authorized to grant protection on the basis of what they find valuable, decisions about copyrightable subject-matter would also serve an unfortunate legitimizing function.

The article consists of five parts. In Part I we briefly outline the main rationale for establishing a stricter originality standard, either by raising or recalibrating the current originality requirement. In Part II we explain that, in terms of internal coherence and orderliness, the domain of copyright law is so distinct from the domains of patent law and aesthetic theory that introducing a higher originality standard along the lines of patent law's criterion of non-obviousness or the threshold of originality in aesthetics is highly problematic and therefore undesirable.

Part III further analyzes the key conceptions of creativity and originality in copyright law and in aesthetics. We will demonstrate that the denotations of the terms are quite different in the two domains: where copyright law starts from a minimum condition, the threshold in aesthetics is very high. We argue that fixing a threshold somewhere in between these opposite poles would be very difficult. Part IV discusses the concept of taste and the problems that aesthetic evaluations pose in legal decision-making. We explain that, while the subjective nature of aesthetic evaluation does not make it either harder or easier to settle on a consistent and predictable originality standard, determining the level at which to set the bar is arbitrary for reasons related to variations in taste and the function of aesthetic works in free and open societies.

Part V examines some other questionable premises upon which the proposals to raise the originality threshold rest. We argue, *inter alia*, that the current standard does not seem a major concern for the kinds of works that we usually think of as aesthetically valuable; that the basic premise that there is a strong correlation between degrees of originality and social benefit is unfounded; and that raising the threshold of originality is not the only way to grant future creators the benefits of a more robust public domain. The article ends with a short conclusion synthesizing our main findings.

I. RATIONALE FOR RAISING THE ORIGINALITY REQUIREMENT

Proposals to raise the originality requirement in copyright law spring from the observation that the current originality standard is too easily met. That a work is original simply means that it was independently created, *i.e.*, not copied, and that it contains a modicum of creativity.⁶ In the U.S., a work needs not be novel, but must only possess a “creative spark,” *i.e.*, a minimal degree of creativity, to be protected by copyright.⁷ In the EU, copyright protection extends to works that are an “author’s own intellectual creation.”⁸ This implies that the author must have made “free and creative choices” and that “the author’s personality” is reflected in the work.⁹

Because “the requisite level of creativity is extremely low,”¹⁰ the most frequently stated reason to introduce a stricter originality criterion is that the generous protection afforded by copyright law is eroding the public

⁶ Originality is similarly conceptualized in national legal frameworks and international agreements. See Elizabeth F. Judge & Daniel Gervais, *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27 *CARDOZO ARTS & ENT. L.J.* 375, 403, 404 (2009) (arguing that different originality standards “are more properly understood as constellations, rather than silos, where the surface differences in wording mask similarities in both concepts and results”).

⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁸ See *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 ECR I-6569, paras. 33-37 (E.C.J.); Case C-393/09, *Bezpečnostní softwarová asociace (BSA) v. Ministerstvo kultury*, para. 44-47 (E.C.J. Dec. 22, 2010); Joined Cases C-403/08 and C-429/08, *Football Ass’n Premier League, Ltd. v. Murphy*, paras. 96-99 (E.C.J. Oct. 4, 2011); Case C-145/10, *Painer v. Standard VerlagsGmbH*, paras. 87-94 (E.C.J. Dec. 1, 2011); Case C-604/10, *Football Dataco v. Yahoo! UK*, paras. 37-39 (E.C.J. Mar. 1, 2012); Case C-406/10, *SAS Inst., Inc. v. World Programming, Ltd.*, paras. 45, 65-68 (E.C.J. Mar 2, 2012).

⁹ See *Infopaq*, 2009 ECR, para. 45; *BSA*, paras. 48-50; *Painer*, paras. 88-93; *Football Dataco*, paras. 38-39; *SAS*, para. 67.

¹⁰ *Feist*, 499 U.S. at 345.

domain. The public domain consists not just of copyrightable works whose term of protection has expired, but also of resources that are collectively owned. Such things as titles, phrases, stock characters, plots, ideas, methods, and facts are unprotectable because they are the building blocks of expression. Likewise, all works that are not sufficiently original are free for anyone to reuse in new creative efforts. Authors do not create ex nihilo, but necessarily draw on these raw materials of creation and communication that no single individual or corporation can have and hold. A generous reservoir of unprotected resources serves as a liability shield whenever authors dip into this communal pool, as they invariably do.

When the originality threshold is very low, there is a danger that too many items become eligible for copyright protection, so that the public domain shrinks.¹¹ This is potentially problematic for several related reasons. Fencing off the commons restricts access to the means of expression, thus limiting the scope of debate¹² and — arguably — encumbering the quality of creative endeavours. In other words, the worry is that the low originality standard makes it harder for copyright law to serve its utilitarian purpose optimally. While it is supposed to incentivize individuals to create works that are beneficial to society as a whole,¹³ advocates of a more rigorous originality requirement contend that setting the bar scarcely above ground level is counterproductive. This argument rests on two assumptions. First, that “the more original works generate a greater benefit to society”;¹⁴ and second, that bestowing practically the same privileges to slightly original works and to highly original works, offers inadequate encouragement to create truly original works.¹⁵

¹¹ See Ryan Littrell, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193, 217 (2002) (arguing that “by extending copyright protection to any work that evidences the production of an individual, the originality doctrine has increased the number of protected works As this expansion has occurred, the number of works in the public domain has necessarily shrunk.”).

¹² *Id.* at 216, 217. On the relationship between copyright and freedom of expression, see NEIL WEINSTOCK NETHANEL, *COPYRIGHT’S PARADOX* 30-53 (2008).

¹³ The Intellectual Property Clause in the U.S. Constitution grants Congress the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” See U.S. CONST. art. I, § 8, cl. 8.

¹⁴ See Parchomovsky & Stein, *supra* note 3, at 1517. See also Miller, *supra* note 2, at 464 (“We also receive a greater benefit from inducing investment in unconventional expression: Such expression does more to advance knowledge and learning than does pedestrian, convention-bound expression.”).

¹⁵ Parchomovsky & Stein, *supra* note 3, at 1506 (arguing that “by rewarding minimally original works and highly original works alike, the law incentivizes authors to produce works containing just enough originality to receive pro-

Stated negatively, then, raising the originality threshold should offset some of the adverse consequences of copyright's expansion. Stated positively, it could work as a policy lever, "focus(ing) copyright's protection on those who succeed by taking the greater risk of investing in unconventional, unorthodox expression. These boundary-breaking creators, dissenters of a sort, do more to foster progress."¹⁶

In sum, the main rationale for petitions to raise or recalibrate the originality standard is the prospect that it can mitigate the problems of copyright's overbreadth and "has the potential to . . . enrich the domains of art, culture, and technology."¹⁷ Part V questions the notion that the low threshold in fact severely restricts artistic and cultural blossoming. First, however, we need to examine the practical feasibility of any effort to raise the originality bar in copyright law.

II. THE ORDERLINESS OF DOMAINS: COPYRIGHT, PATENT, AND AESTHETICS

As observed in the Introduction, a number of proposals to raise the originality threshold have looked to patent law's non-obviousness criterion, which is effectively how originality is understood in aesthetics. In this Part, we contend that such efforts run into severe problems. To explain our position, we first discuss why the creativity threshold in patent law is so much higher than in copyright law (Part II.A). Next, we introduce the concept of *domain*, which draws on sociocultural studies of creativity (Part II.B).

The concept of domain is critical to our analysis, first, to highlight the distinctiveness of aesthetic works and of aesthetic inquiry, and second, to emphasize that originality is not simply some intrinsic, independent, and immutable property that objects simply possess or lack. Rather, we argue that it requires an infrastructure of rules, procedures, and professional authorities to recognize and validate which innovations truly count. The difficulty of this task — i.e. how relatively hard or easy it is to single out a non-obvious contribution, and to agree on whether or not it is valuable — depends on the domain's degree of internal coherence and orderliness.

We assert that, in general, the kinds of objects that are regulated by patent law are more structured than the kinds of objects that are protected by copyright law. The former are closer to hard science, where utility and progress are much easier to gauge (Part II.C). This means that it is relatively easier to establish a reasonably distinct non-obviousness threshold

tection — but no more"). See also Littrell, *supra* note 11, at 217 ("It is uncertain whether the policy goal of fostering art is furthered by protecting works that many observers regard as marginally original, at best.").

¹⁶ See Miller, *supra* note 2, at 494.

¹⁷ See Parchomovsky & Stein, *supra* note 3, at 1516.

in patent law. Nevertheless, we show that the criterion does not currently produce coherent and predictable decisions on the patentability of inventions. We believe this raises grave concerns about the viability of introducing a similar criterion in the more disorganized domain of copyright law (Part II.D).

We further show that the academic study of aesthetics is not really geared towards the kinds of inquiries that might assist courts in these matters. Humanities scholars do not necessarily seek resolution, and a number of incompatible methods, theories, and epistemological goals co-exist, so there is virtually no consensus to guide judges in distinguishing degrees of originality or non-obviousness (Part II.E).

A. *The Different Creativity Thresholds for Copyrights and Patents*

Both copyright law and patent law have creativity thresholds, but the levels at which they have been set differ greatly. In copyright law, all that is required is a minimal degree of creativity. In the landmark *Feist* case — which many commentators found controversial due to the fear that it set the standard too high — the Supreme Court stated that: “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.”¹⁸ In patent law, by contrast, the so-called non-obviousness doctrine denies protection for innovations that “would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains.”¹⁹

There are several weighty reasons why the threshold is so much higher in patent law. Part of it has to do with the fact that patentable inventions are awarded a significantly broader scope of rights. For example, copyright only prevents others from copying the protected work; it does not grant the author rights to authorize, prohibit, or otherwise control other authors’ independent creations of similar or identical works. Copyright only extends to the particular expression of ideas, whereas patented inventions are protected on a conceptual level. As John F. Duffy explains:

[T]he first writer to describe a telephone in an engineering treatise, or the first fiction writer to use a telephone as a crucial element in a story, cannot prevent other writers from describing the function of a telephone or from using the telephone as an important element in advancing a plot. A patent on the telephone, however, can — and in fact did — grant rights

¹⁸ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08 [C][1] (1990)).

¹⁹ 35 U.S.C. § 103(a) (2006).

covering all practical uses of telephone technology during the term of the patent.²⁰

But while it makes intuitive sense to correlate the broadness of protection to how hard or easy it is to attain, this observation alone does little to account for why patent rights are so much stronger to begin with. We get closer to the heart of the matter if we consider that patentable inventions generally call for different incentives than copyrightable works. As Duffy observes, a narrower patent right — one that permitted independent creation and safeguarded only the exact details of an invention's incarnation — would be unlikely to provide sufficient protection to motivate individuals and companies to invest the time, effort, and money required to bring many patentable utilities into being.²¹ But this statement, too, is in fact not so much an explanation as a symptom of a more deep-seated cause, for it merely begs the further question: Why are patents in need of stronger incentives?

To get at the underlying reason we must recognize that patent law and copyright law are made up of objects that are for the most part inherently different, and furthermore, that these objects enter into different domains where creativity is established and validated according to different rules.

B. The Sociocultural Concept of Domain

Sociocultural studies typically emphasize that creativity is not simply an attribute of gifted individuals, but something that requires an infrastructure. According to Mihaly Csikszentmihalyi “creativity does not happen inside people's heads, but in the interaction between a person's thoughts and a sociocultural context. It is a systemic rather than an individual phenomenon.”²² The system is composed of three elements: a culture containing symbolic rules, an individual who introduces novelty into the symbolic domain,²³ and a field of experts to recognize and sanction the innovation.²⁴

The notion of a symbolic domain — a field with certain implicit or explicit norms, understandings, and conventions that lay down possibilities

²⁰ John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEXAS L. REV. 1, 8 (2007).

²¹ *Id.* at 7.

²² MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY AND DISCOVERY OF INVENTION* 23 (1996). For a brilliant account of the environmental role in the creation and dissemination of ideas, see STEVEN JOHNSON, *WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION* (2010).

²³ These go by other names as well. See MARGARET A. BODEN, *THE CREATIVE MIND: MYTHS AND MECHANISMS* (2004) (using the terms “conceptual space” and “generative system”).

²⁴ CSIKSZENTMIHALYI, *supra* note 22, at 6.

and constrictions — is crucial, for obviously not all novelties are creative. Some are simply nonsensical. They become meaningful only when they are endorsed by authorities in the domain, which may take time in the case of highly unorthodox efforts. Thus, for an idea, a product, or a discovery to count as a creative contribution — whether in the arts, in science, in business, or any other domain — it must be appropriate. That is, it may bend or break the rules, but it cannot simply ignore them. Typically, creators have to internalize the symbolic domain first, which is why even groundbreaking creative accomplishments are rarely genuine eureka moments: “[U]sually insights tend to come to prepared minds, that is, to those who have thought long and hard about a given set of problematic issues.”²⁵

The key point for our purposes is that symbolic domains are constructed in very different ways, sometimes for somewhat arbitrary reasons, other times because of the inherent features of the activities and objects that they accommodate. Some domains, like chess and mathematics, are highly structured, with clearly defined rules, problems and standards; others, like continental philosophy or performance art, are more loosely organized.

Tightly ordered domains with strong internal coherence tend to recognize and reward progress efficiently and emphatically. Because principles and procedures are clear-cut, it is possible to absorb the domain’s key insights and to identify the important questions that remain unanswered. As Csikszentmihalyi explains, this is why researchers in the natural sciences, unlike in the humanities, often make major contributions early in their careers. One of his interviewees, German physicist Heinz Maier-Leibnitz, recounts an incident at one of his seminars, where a student suggested a new way to represent the behavior of a subatomic particle on the blackboard. The professor agreed that the proposal was an improvement and commended the student. Soon Maier-Leibnitz got calls from physicists at other German universities, asking if the rumor was true that one of his students had come up with this new idea, and within two weeks he was getting the same question from foreign colleagues.

Csikszentmihalyi points out that this scenario would be inconceivable in his domain, psychology, simply because “with the exception of a few highly structured subdomains, psychology is so diffuse a system of thought that it takes years of intense writing for any one person to say something that others recognize as new and important.”²⁶ The same is true of any branch of aesthetics. In comparative literature, musicology, art history, and so on, the kind of immediate impact that a brilliant physicist can make

²⁵ *Id.* at 83.

²⁶ *Id.* at 40.

is exceedingly rare. The rules of these domains are simply not sufficiently stringent and transparent, and the epistemological aims tend to be less widely shared and less teleological, so continuous involvement and experience makes more of a difference.

The point we want to make is that, for the most part, patentable inventions belong to a fairly structured domain, whereas copyrightable works belong to a fairly unstructured domain (or set of sub-domains). As we will see, this circumstance has important implications for how feasible it is to raise the originality threshold in copyright law.

C. *Patents and Copyrights: Hard vs. Soft Science?*

Descriptions of the kinds of items and processes that fall within patent law and copyright law reveal important differences between the two intellectual property regimes. Patents protect inventions of “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”²⁷ Copyrights, meanwhile, protect original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.²⁸ On the basis of this, it would be fair to say that patent law for the most part lies in the vicinity of hard science, whereas copyright law tends to concern itself with objects that are the province of softer sciences.

The boundary line is not absolute, of course, as there are exceptions on both sides. Still, this characterization captures a general tendency that adds context to the observation that patent law constitutes a more structured domain than copyright law. After all, at a certain level of abstraction, it is common to explain the differences between the hard and soft sciences precisely by reference to their degree of internal order and consistency. Researchers in the natural, physical and computing sciences — with their rigorous standards for hypothesis formulation and testing — seem to be engaged in a unitary, coherent enterprise, where results from one domain are liable to fold fairly seamlessly into those of another (the most famous exception being the failure to reconcile the discrepancies between general relativity and quantum mechanics). By contrast, in the social and, especially, the human sciences, it is far harder to conjure up the image that scholars from different departments and disciplines are gathering pieces of the same puzzle.²⁹

²⁷ 35 U.S.C. § 101 (2006).

²⁸ 17 *id.* § 102(a).

²⁹ We realize that this statement can be qualified in any number of ways, as it clearly builds on a highly idealized notion of the differences between hard and soft science. At least since the publication of Thomas Kuhn’s *The Structure of Scientific Revolutions* in 1962, it has become increasingly difficult to think of science as some neat, disinterested, and gradual disclosure

of truth, or of reality as it really is. As Philip Kitcher bluntly puts it: “The Unity of Science Movement is dead. If philosophers ever believed that science could be organized as a hierarchy of theories founded on general principles with the basic generalizations of ‘higher level’ theories derivable from those of more ‘fundamental’ theories, then they do so no more.” Philip Kitcher, *Unification as a Regulative Ideal*, 7 PERSPECTIVES ON SCI. 337 (1999). We agree with Kitcher that even the hard sciences cannot be fully horizontally integrated to the extent that principles from different theories will inevitably coalesce and create a coherent network of links among disciplines. There will remain, he writes, “a number of autonomous disciplines — the ‘parents’ of the interfield theories — that offer distinct perspectives on nature.” Still, Kitcher’s “modest unificationism” “recommends the ideal of unified individual perspectives, integrated as far as possible, but denies that there is any fixed number to which the ‘fundamental incomprehensibilities’ can be reduced.” *Id.* at 345. Scientists, then, will sometimes have to rely on non-integrable concepts, theories, and perspectives, but nevertheless treat integrability as a regulative ideal: “the ideal of finding as much unity as we can by discovering perspectives from which we can fit a large number of apparently disparate empirical results into a small number of schemata. They echo T. H. Huxley’s remark that ‘the aim of science is to reduce the fundamental incomprehensibilities to the smallest possible number.’” *Id.* at 339. Reality, of course, is far more complex. Parts of the humanities clearly subscribe to this ideal. As Kitcher has noted in another context:

The contrast between the methods of the two realms, which seems so damning to the humanities, is a false one. Not only are the methods deployed within humanistic domains — say, in attributions of musical scores to particular composers or of pictures to particular artists — as sophisticated and rigorous as the techniques deployed by paleontologists or biochemists, but in many instances they are the same.

Philip Kitcher, *The Trouble with Scientism: Why History and the Humanities are also a Form of Knowledge*, NEW REPUBLIC, May 4, 2012. Of course, the examples of humanities scholarship Kitcher lists here are by and large fairly uncontroversial, and are not typically victims of ire. Other parts of the humanities, however, are less amenable to unification as a regulative ideal, and consequently often trigger indignation and aggression from natural scientists, more scientifically-minded colleagues in other humanities departments, and significant portions of the public at large. Most notably, perhaps, poststructuralism, postmodernism, and parts of neo-pragmatism are based on the principle of epistemological anti-foundationalism. They seek to highlight contradictions, discontinuities, and the importance of perspectives rather than internal coherence; and have (in)famously and persistently challenged the firmness of alleged distinctions between the study of nature and the study of culture (see, e.g., Richard Rorty, *Texts and Lumps*, 17 NEW LITERARY HIST. 1 (1985)). Aesthetics straddles this divide: Genre theory, for example, may be predominantly descriptive, a form of taxonomy largely analogous to the efforts of biologists to define groups of organisms on the basis of pertinent similarities and differences. Some hermeneutic practices, by contrast, are more freeform, and not appreciably constrained by conventional scientific method and logic. The aim is not so much to pin down what

Consequently, John Shepard Wiley Jr. gets to the crux of the matter when he contrasts authorship with “the necessarily incremental character of patentable innovation.”³⁰ The objects protected by patent law tend to build more methodically and straightforwardly on shared norms and general laws. Invention frequently means connecting pre-existing parts. As Steven Johnson explains: “Some of those parts are conceptual: ways of solving problems, or new definitions of what constitutes a problem in the first place. Some of them are, literally, mechanical parts.”³¹ This is why “the hard work society is attempting to encourage in the patent system . . . is much more likely to be independently created by multiple parties.”³²

is “objectively there” in a work of art, as to wring from it, by any means necessary, whatever compelling meanings it can yield.

We acknowledge that it is possible to chip away at any criterion aimed at separating science from non-science, and that whatever fuzzy borderline remains will cut across the aesthetic domain. We also agree with Kitcher that it makes more sense to think of the epistemological and methodological differences between the humanities and the natural sciences as differences of degree rather than kind. But for our purposes nothing really hinges on the disputes among philosophers of science. There is no need to take sides in the debates between foundationalists and anti-foundationalists, essentialists and anti-essentialists, realists and anti-realists, to hold on to the idea that some domains are more orderly than others. Thomas Kuhn, for example, deeply admired the achievements of so-called “normal science,” but doubted the notion that it brings us closer to some complete, objective, and true account of nature. He was, as Ian Hacking puts it in the introduction to the fiftieth anniversary edition of *The Structure of Scientific Revolutions*, “a fact lover and a truth seeker” (at 130), yet he questioned the idea that science progresses towards some preestablished goal (*the truth about the universe*); rather, he believed that scientific revolutions simply “progress *away from* previous conceptions of the world that have run into cataclysmic difficulties It is progress away from what once worked well, but no longer handles its own new problems” (*id.* at 476).

Just as the differences between scientific and non-scientific practices are blurry and cut across academic disciplines in more unpredictable ways than we tend to presume, so the differences between orderly and disorderly domains crisscrosses various practical and intellectual spheres — including patent law and copyright law. Certainly, it is simple enough to amass examples that complicate the differences we strive to highlight. The construction of maps, for example, is highly structured scientific endeavor, yet maps are the province of copyright law. Similarly, not all patentable inventions build on previous efforts in a systematic, sequential, and deliberate manner. But again, the fact that there is no absolute boundary should not lead us to conclude that they are on a par; there are still important general differences.

³⁰ John Shepard Wiley Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 182 (1991).

³¹ JOHNSON, *supra* note 22, at 419.

³² Duffy, *supra* note 20, at 9.

Indeed, when we trace the origins of major inventions throughout history, a recurring theme emerges: “A brilliant idea occurs to a scientist or inventor somewhere in the world, and he goes public with his remarkable finding, only to discover that three other minds had independently come up with the same idea in the past year.”³³

Of course, novelists, filmmakers, painters, and so on also build on and combine previous works, but the problems they set out to solve are rarely so well-defined. As Richard Rorty puts it, scientists “have criteria for success laid down in advance,” whereas artists “by their own confession . . . are not sure of what they want to do before they have done it. They make up new standards of achievements as they go along.”³⁴ Because the combinatorial possibilities are infinite in the arts, and because creation is less clearly goal-driven, Samson Vermont has a point when he notes that patents typically have to do with repeatable subject matter whereas copyrights involve unrepeatable subject matter.³⁵ Certainly, in some cases — when the necessary preconditions are in place, and all that remains is the final ingredient or the right combination — it is merely a matter of time before someone comes up with a particular invention. There are trends in aesthetics too, of course, but they tend to stem from imitation rather than duplicate independent creation, and they do not appear nearly as inevitable.³⁶ As Vermont puts it: “Had the Wright Brothers not invented the powered airplane, someone else would have and soon. In contrast, had Lewis Carroll not written *Alice in Wonderland*, no one would have ever written it.”³⁷

³³ JOHNSON, *supra* note 22, at 398. See also Robert K. Merton, *Singletons and Multiples in Scientific Discovery: a Chapter in the Sociology of Science*, 105 PROC. AM. PHIL. SOC'Y 470 (1961) (arguing that inventions by solitary individuals are rare, and that the more typical scenario consists of groups of people working to solve the same problem, and coming up with the same or a similar solution at approximately the same time). One possible objection to the relevance of such studies to patent law more generally is that they tend to focus on fairly renowned inventions. It is not obvious that this pattern would be quite as noticeable if we included all the hundreds of thousands of patents that are issued each year in the U.S. alone. Still, a recent study maintains that “what evidence there is suggests that simultaneous invention is a characteristic of smaller inventions as well.” See Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 713 (2012).

³⁴ Richard Rorty, *Science as Solidarity*, in OBJECTIVITY, RELATIVISM, AND TRUTH, 36 (1991).

³⁵ Samson Vermont, *The Sine Qua Non of Copyright Is Uniqueness, Not Originality*, 20 TEX. INTEL. PROP. L.J. 327 (2012).

³⁶ Indeed, the main title of one of the classic studies of separate but simultaneous invention is “Are Inventions Inevitable?” See William F. Ogburn & Dorothy Thomas, *Are Inventions Inevitable? A Note on Social Evolution*, 37 POL. SCI. Q. 83 (1922).

³⁷ Vermont, *supra* note 35, at 32.

An invention usually has a precise purpose, and the preconditions that have to be satisfied for it to come into being are apt to be well-defined and limited in number. It would be an overstatement to say that the course of development for patents is predetermined, but in general they are much more constrained by circumstances than copyrightable works. We might say that if inventions are reminiscent of puzzles, then works of authorship are more like collages, in that they are more open-ended both at the level of conception and execution. In the case of film, for example, some very specific conditions had to be in place for its invention to happen: First, scientists had to discover that the human eye perceives continuous motion when presented with a sequence of marginally different images;³⁸ second, it required a device to project a rapid series of images on a surface; third, the exposure time of photography had to be drastically reduced; fourth, photographs needed to be printed on a base elastic enough to be passed through a camera at high speed; and fifth, it required an intermittent mechanism in both the camera and the projector that let at least sixteen frames slide into place, stop, and then move on every second. Once all the preconditions were met, the invention of motion pictures was, so to speak, in the air, and it was just a matter of time before one of the many experimenters in different countries put the necessary elements together.³⁹ By contrast, it was not at all inevitable that the new invention would go on to become a popular storytelling medium and an art form.⁴⁰

To be sure, even the creative arts evolve cumulatively, to a certain extent. Steven Johnson's acute description is worth quoting at length here:

Flaubert and Joyce needed the genre of the bildungsroman to con-
tort and undermine in *Sentimental Education* and *A Portrait of the Artist
as a Young Man*. Dylan needed the conventions of acoustic folk to elec-
trify the world with *Highway 61 Revisited*. Genres supply a set of implicit
rules that have enough coherence that traditionalists can safely play in-
side them, and more adventurous artists can confound our expectations
by playing with them. Genres are the platforms and paradigms of the
creative world. They are almost never willed into existence by a single

³⁸ Various theories have been proposed to explain the phenomenon. See, e.g., Nick Redfern, *Constructing Movement in the Cinema*, 5 *NEW REV.FILM & TELEVISION STUD.* 173 (2007).

³⁹ For a more detailed account, see DAVID BORDWELL & KRISTIN THOMPSON, *FILM HISTORY: AN INTRODUCTION* 13-32 (2d ed. 2003).

⁴⁰ Indeed, to begin with the attraction of motion pictures was the technology itself rather than the content. In one famous story from this novelty period, future filmmaker Georges Méliès made an exorbitant offer to the Lumière brothers for their invention, the Cinématographe. Their alleged reply was that he should be grateful that the machine was not for sale, for though it could perhaps be exploited for a short time as a scientific curiosity, it was clear that it had no commercial future. See Jacques Queval, *Three French Histories of Film*, 3 *HOLLYWOOD Q.* 454 (1948).

pioneering work. Instead, they fade into view, through a complicated set of shared signals passed between artists, each contributing different elements to the mix. The murder mystery has been coherent as a novelistic genre for a hundred years, but when you actually chart its pedigree, it gets difficult to point to a single donor: it's a little Poe, a little Dickens, a little Wilkie Collins, not to mention the dozens of contemporaries who didn't make the canon, but who nonetheless played a role in stabilizing the conventions of the genre. The same is true of cubism, the sitcom, romantic poetry, jazz, magical realism, cinema verité, adventure novels, reality TV, and just about any artistic genre or mode that has ever mattered. The creative stack is deeper than genres, though. Genres are themselves built on top of more stable conventions and technologies.⁴¹

As Johnson shows, aesthetic conventions enable as much as they restrict the freedom to create. There are no severe external constraints: no strict rules or essential ingredients (only loose and voluntary guidelines), or any single or explicit goal or function. In industrial design, the utility of an object tends to impose stricter limits upon expression and therefore encroaches considerably more upon its maker's license to create.⁴² Someone who sets out to create a new mousetrap or chair enjoys less elbowroom than someone who sets out to make a road movie. A novelist can write a wholly conventional spy novel that is nevertheless unmistakably unique. Even in more rule-bound genres like the sonnet there is no danger that the form will ever be exhausted or overcrowded by near-identical works; there is always room to write one more sonnet that is clearly separable from every other one.

D. The Difficulty of Raising Copyright's Originality Threshold

The point of showing that copyright law is a more loosely organized domain than patent law is that it helps explain why it is so problematic to raise the originality threshold. In the more structured realm of patent law, the well-defined function and utility of inventions provides quite expedient evaluative criteria. Except for the non-obviousness criterion, the two other bedrock requirements for patentability are utility and novelty.⁴³ The United States Patent and Trademark Office notes that the requirement that "the subject matter must be useful" means that it must have "a useful purpose and also includes operativeness, that is, a machine which will not operate to perform the intended purpose would not be called use-

⁴¹ JOHNSON, *supra* note 22, at 2194.

⁴² This is no doubt why it is so hard to distinguish one piece of furniture, say, from another of the same kind, and to distinguish the functional and artistic elements in each individual case.

⁴³ 35 U.S.C. §§ 101–102 (2006).

ful, and therefore would not be granted a patent.”⁴⁴ These stipulations secure patent law’s “ordinary experts” at least some foothold in determining what is obvious and non-obvious. If we are handed an object whose usefulness and purpose is unfamiliar to us, it is hard to get the analysis of the ground. One reason it is more difficult to recognize non-obviousness in the realm of copyright is precisely that the usefulness and purpose of works of authorship are unknown, vague, or highly heterogeneous.

Moreover, an invention must be novel in the sense that it was not known or used by others. Here too it is the domain’s tidiness that underwrites the procedure of a prior art search before filing a patent application.⁴⁵ As Landes and Posner explain, this “is feasible because it is possible to describe an invention compactly and to establish relatively small classes of related inventions beyond which the searchers need not go.”⁴⁶

This is not to say that all is well in the domain of patent law; on the contrary, there are several acute problems.⁴⁷ We will focus on two connected difficulties that bear directly on the feasibility of distinguishing moderate (or higher) degrees of non-obviousness in the aesthetic domain with sufficient accuracy and predictability. The first has to do with the low level at which the threshold is set; the second concerns the problem of coming up with workable criteria for measuring degrees of non-obviousness.

Gregory Mandel puts these interrelated problems as follows: “A loud, nearly universal, chorus contends that decision makers apply the nonobviousness standard too leniently, allowing patent monopolies on trivial innovations with devastating effects.”⁴⁸ His analysis reveals that the problem

⁴⁴ *All About Patents*, USPTO.GOV, <http://www.uspto.gov/smallbusiness/patents/filing.html><http://www.uspto.gov/smallbusiness/patents/filing.html> (last visited Feb. 28, 2013).

⁴⁵ The United States Patent and Trademark Office states: “A search of all previous public disclosures (prior art) including, but not limited to, previously patented inventions in the U.S. should be conducted to determine if your invention has been publicly disclosed and thus is not patentable. While a search of the prior art before filing of an application is not required, it is advisable to do so.” *Id.*

⁴⁶ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 345 (1989).

⁴⁷ For example, there is a massive, ever-growing backlog of patent applications and the United States Patent and Trademark Office “cannot seem to increase its staffing fast enough to keep up with an explosion of applications.” See Michael J. Meurer, *Patent Examination Priorities*, 51 WM. & MARY L. REV. 675, 676 (2009).

⁴⁸ Gregory Mandel, *The Non-Obvious Problem: How the Indeterminate Nonobviousness Standard Produces Excessive Patent Grants*, 42 U.C. DAVIS L. REV. 57, 59 (2008).

stems from the inconsistent and indeterminate application of the non-obviousness requirement. He goes so far as to say that “[i]t may be that no legal term as significant as ‘nonobviousness’ is as poorly defined.”⁴⁹ A number of scholars and examiners have echoed the concern that non-obviousness assessments are highly subjective and unpredictable.⁵⁰ This raises serious questions about the viability of hoisting the originality threshold in copyright law. The difficulties in patent law of identifying a distinct non-obviousness standard and developing criteria and guidelines for assessing whether the invention involves an inventive step will be drastically more challenging in a less ordered domain like copyright law.

The main reason non-obviousness is so hard to specify and quantify in patent law is that different inventions can be non-obvious in different ways. The following description by Gregory Mandel is instructive:

Some inventions are non-obvious in their conception, though once conceived are easy to achieve. Post-It notes provide an example. Other inventions are obvious to conceive of, but identifying operative means for carrying them out is non-obvious — an HIV vaccine, for instance. A third category comprises inventions where potential operative means are obvious, but the field is uncertain enough that actually reducing the invention to practice is non-obvious. For example, several inventors developed incandescent light bulbs before Thomas Edison, but their filaments burned out quickly; Edison was the first to reduce a long-lasting filament to practice. Differentiating nonobviousness would improve the content and specificity of nonobviousness decisions by sharpening their focus and producing more tractable analyses.⁵¹

In copyright, too, different creations are original for different reasons, but here the problem is compounded, especially for artistic works, which tend to be more multifaceted than patentable inventions. In a film, for example, the cinematography, the editing, the plot, the dialogue, or the acting — to name just some features — may be more or less accomplished or innovative. Consequently, the challenge is not only to ascertain how

⁴⁹ *Id.* at 88.

⁵⁰ See Benjamin H. Graf, *Prognosis Indeterminable: How Patent Non-Obviousness Outcomes Depend Too Much on Decision-Makers*, 9 *CARDOZO L. POL’Y & ETHICS J.* 567, 568, 605 (2011) (arguing that “the non-obviousness inquiry is uniquely and overly indeterminate and subjective,” and that “No patentability requirement is both as critical and as subjective as non-obviousness”); Michelle Ernst, *Reforming the Non-Obviousness Judicial Inquiry*, 28 *CARDOZO ARTS & ENT. L.J.* 663, 666, 678 (2011) (arguing that “the non-obviousness judicial standard of patentability remains in flux”, and thus generates black box verdicts that obscures the jury’s reasoning and analysis in patent assessments, thereby thwarting effective review); ROBERT P. MERGES & JOHN F. DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 712 (4th ed. 2007) (arguing that “non-obviousness analysis is famous for creating divisions of opinion among skilled judges”).

⁵¹ Mandel, *supra* note 48, at 61.

successful or novel the film is along any number of dimensions, but also to determine which ones to give the most weight to, and to consider how well all the component parts come together in the work as a whole. In addition, movies are not just valued for their formal features, but can be deemed more or less original, creative, unconventional, complex, or nuanced along political, ideological, philosophical, and moral lines as well. The key question — Original in what respect? — is thus far more complex in copyright law.

It is the orderliness of patentable inventions that allows Mandel to differentiate certain main types of non-obviousness that includes, if not the whole domain, then at least the greater part of it. In the messier realm of aesthetics it seems inconceivable that anyone could come up with a similarly inclusive, yet neat and compact, typology of forms of non-obviousness. Inventors typically rely on technical know-how, an understanding of natural laws in science, reliable regularities, and causal relationships, in the pursuit of solutions to specific problems, or better solutions to old problems. This means that it is often possible to provide precise explanations of how and why an invention works, and to identify its relevant component parts and their interrelations.

Of course scholars, critics, and artists seek to understand what makes aesthetic objects “work” too, but the creative process is simply much more mysterious, and their conclusions far more tentative. There are, obviously, certain loose guidelines — canons, traditions, styles, genres, forms, conventions, textbooks, etc. — but the general consensus is that there is no formula for aesthetic accomplishment. There are not really any clear-cut and universally agreed-upon desiderata to guide evaluation, so even experts frequently disagree among themselves on what actually works in the first place. And, at any rate, a work of art cannot be broken down into constituent parts and then repeated or recombined by others with predictable results.⁵²

⁵² Due to the massive investments involved, Hollywood has probably pursued predictability more resolutely than any other industry. When a movie becomes a breakaway hit, studios seek to unlock the secrets of its success, to identify the elements that made it a winner — the stars, the genre, the period, the special effects, the theme, and so forth — in order to replicate its fortune (without infringing on any intellectual property rights). In recent years, Hollywood has clearly tried to cash in on the success of comic book adaptations (especially since the release of *Spiderman*), and on high fantasy and contemporary fantasy adaptations after the remarkable box office performance of the *Lord of the Rings* and *Harry Potter* franchises. But despite their best efforts, screenwriter William Goldman’s famous maxim — “Nobody knows anything,” because “Not one person in the industry knows for a certainty what’s going to work. Every time out it’s a guess” — holds sway. See WILLIAM GOLDMAN, *ADVENTURES IN THE SCREEN TRADE* 39 (1983).

When in 1998 Gus van Sant created a virtual shot-by-shot remake of *Psycho*, the Alfred Hitchcock classic from 1960, the result was nearly universally derided by film critics.⁵³ The few who found something worthwhile tended to construe it as a kind of meta-argument about the non-replicability of great art. Roger Ebert, for example, found it “an invaluable experiment in the theory of cinema, because it demonstrates that a shot-by-shot remake is pointless; genius apparently resides between or beneath the shots, or in chemistry that cannot be timed or counted.”⁵⁴ He explained that he “was reminded of the child prodigy who was summoned to perform for a famous pianist. The child climbed onto the piano stool and played something by Chopin with great speed and accuracy. The great musician then patted the child on the head and said, ‘You can play the notes. Someday, you may be able to play the music.’”⁵⁵ Aesthetic objects, we might say, do not lend themselves very well to reverse engineering.

By contrast, inventions are more straightforwardly and reliably reproducible; they can be separated into constituent parts, which in turn can be recreated in different contexts in satisfactorily similar and foreseeable ways. But just because it is relatively easier to provide a breakdown of the inner workings of patentable inventions does not in itself make it a straightforward task to make out precise degrees of non-obviousness. That is a separate issue. The point is that even though non-obviousness analysis is far from easy in patent law,⁵⁶ it is nevertheless relatively easier than in copyright law.

Generally, other risk management strategies — test screenings, advertising campaigns, release dates, release patterns, marketing tie-ins, etc. — have proven somewhat more efficient. Whatever field Hollywood draws on to handle uncertainty, whether it is aesthetics, economics, marketing, copyright law, or even neuroscience, box-office performance usually takes precedence over aesthetic achievement. That is no doubt because it tends to be more important for studio executives to attract viewers than to please critics, but it would also seem that it is easier to predict a film’s destiny as a commercial object than as an aesthetic object by (quasi-)scientific means.

⁵³ The film review aggregator *Rotten Tomatoes*, for example, shows an approval rating of only 36%. See *Psycho (1988)*, ROTTEN TOMATOES, <http://www.rottentomatoes.com/m/1084964-psycho> (last visited Feb. 28, 2013).

⁵⁴ Roger Ebert, *Psycho*, ROGER EBERT.COM (Dec. 6, 1998), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19981206/REVIEWS/812060301>.

⁵⁵ *Id.*

⁵⁶ Identifying relevant points of comparison, for example, is still a challenge. Thus Mandel notes that “[P]recedent, a common mechanism for lending greater definitional precision to legal standards, is less useful [in nonobviousness decisions] than in many other circumstances. Because nonobviousness decisions are so intensely fact-specific, prior nonobviousness holdings are rarely comparable to a specific case at hand.” See Mandel, *supra* note 48, at 92.

The reason is that when the significant component parts can be specified in advance, when their interrelations are clearly understood, and when the purpose is clear-cut, there is more toehold for legal analysis. The greater relative orderliness of the domain of patent law makes it more practicable to isolate inventive steps, to specify the inventor's contribution, and to identify analogies and make comparisons across the field, either by reference to the process or purpose of invention.

In the domain of copyright, the process of creation is less patterned, so parallels are harder to come by. Moreover, while the sheer number of inventions is daunting, the amount of copyrightable expressions is simply inestimable. Coupled with the bulk of unprotectable ideas that copyrightable works draw upon and the multidimensionality and complexity of many aesthetic works, it makes it exceedingly difficult to delimit the relevant background context against which to assess degrees of originality.

Cinema can illustrate the complexity of assessing the originality of aesthetic works. While cinematographic works are certainly not examples of low original works in the copyright sense, they may contain various uncopyrightable elements, such as "scènes à faire" or extremely original ideas, or capture images taken from pre-existing works, including not only any number of earlier film productions, but potentially also (parts of) novels, philosophical writings, paintings, plays, and so on. Because there are no strictly right answers, no particular ingredient upon which a film's artistic or commercial performance completely rests, it is often hard to determine exactly what has been lifted from prior art and which elements are built upon unprotectable ideas, themes and "scènes à faire." By contrast, at least some inventions absolutely require a particular constituent element — a small molecule, say — and that component can be isolated, and it may or may not have a singular, identifiable owner.

Also, when some small part of one work is very alike some small part of another work such that it is highly improbable that the similarities are accidental, we have to take into account the context and character of the second expression in order to ascertain whether or not it infringes upon the first. Distinguishing between unlawful theft and socially and legally accepted forms of appropriation like homage, pastiche, collage, and parody often depends on aesthetic intuition and interpretation. Such considerations are not on patent examiners' agenda.

Because the mechanics of aesthetic products and processes are relatively harder to itemize and explain, and because works of authorship are less obviously functional, separating legal from illegal resemblances is somewhat more of a judgment call, and more often ambiguous. As Barton Beebe writes, "we have no well-developed sense of what aesthetic progress — in contrast to technological, economic, or even political progress

— might entail.”⁵⁷ Once again, this observation bears only indirectly on our ability to recognize degrees of non-obviousness, but it does make it more feasible to align patent examinations with the intent of the law. The plain functionality of inventions provides at least something to hold on to when decision-makers contemplate whether something is patentable on the grounds that it contributes to the progress of science and useful arts. As we will argue later, such a baseline is extremely awkward to recover for aesthetic works, because we can rarely pin down their exact purpose, utility, or social benefit.

E. The (Cross-)Purposes of the Aesthetic Domain

More generally, unlike the harder sciences, the humanities are not necessarily geared towards the pursuit of definite solutions and ultimate answers in the first place. As Richard Rorty suggests, they tend to be concerned with ends rather than means: “If we thought we knew the goals of culture and society in advance, we would have no use for the humanities — as totalitarian societies in fact do not.”⁵⁸ Rorty offers a thought experiment: Suppose the newspapers one day reported that philosophers have made a sudden breakthrough and now unanimously agree on all the age-old issues, and have adopted universal standards of rationality, morality, and aesthetic value. He concludes that: “Surely the public reaction to this would not be “Saved!” but rather “Who on earth do these philosophers think they *are*?””⁵⁹ Moreover, he insists that this is a healthy response, for though we bemoan the chaos and confusion of the philosophical scene, we do not really wish it were different.

Certainly, in many forms of aesthetic inquiry, most notably in the area of hermeneutics, the aim of the field of experts as a whole is not to narrow down, but rather to expand the list of potential purposes that works of art can serve. Hence, in aesthetics, the point of saying something about a work’s degree of originality may not be so much to submit a final answer, *quod erat demonstrandum*, as to offer a perspective that may start and maintain a worthwhile conversation.

The point of specifying that the exchange be worthwhile is to stress that the aim is not to literally multiply perspectives maximally, and that all contributions are not considered equally valuable. Some efforts are discarded out of hand as simply nonsensical. That the rules of the domain are not clear-cut does not mean that there are no rules whatsoever. For example, some works are generally considered more worthy of certain kinds of

⁵⁷ Barton Beebe, *Bleistein*; or, Intellectual Property Law and the Problem of Aesthetic Progress 41 (2011) (unpublished paper presented at the UCLA Entertainment, Media & IP Workshop, Los Angeles, CA).

⁵⁸ RORTY, *supra* note 29, at 36-37.

⁵⁹ *Id.* at 44.

attention than others (so analyses extolling the writing skills of Dan Brown or the political and moral sagacity of Hitler's *Mein Kampf* are unlikely to be taken seriously); to count as persuasive, an argument ought not be self-contradictory; and some sources have more cash value than others (citing authorities in the field adds prestige and credibility, while an account that solely enlists non-academic references is likely to be dismissed or ignored). So while there may not be a single correct answer, or a craving for one, some answers are still plain wrong, in the sense that they are not regarded as valid additions to the conversation, at least for now, and for the foreseeable future.

We might say, then, that the aesthetic domain frequently seeks a kind of bounded plurality. It does not strive for absolute certainty or closure, but this does not mean that anything goes. At any time there are certain protocols in place that underwrite a process of continuous self-regulation, rendering contributions to the domain more or less acceptable.

The problem, of course, is the deep-seated disunity and tribalism in the domain. It only makes sense to speak of the practices and conventions in "the humanities" or "the aesthetic domain" when they are contrasted with opposing domains, especially the hard sciences. But even then there are likely to be glaring exceptions, and even descriptions pitched at a high level of abstraction tend to call out for qualification. For example, some corners of the humanities strive to model themselves on hard science, so that epistemological and methodological differences are not so severe.⁶⁰ At the same time, other corners of the humanities are highly skeptical of scientific rationality, and may even deliberately violate the ostensibly axiomatic rule that an argument ought not to be self-contradictory.⁶¹ Clearly, it is hard to come up with meaningful accounts of *the* aesthetic domain that accommodate both of these extremes.

To the extent that it makes sense to think of aesthetics as a domain at all, then, it is one that is far from stable and uniform, and that is composed of many, and frequently conflicting, sub-domains. Such disciplinary borders are never given, of course, but can be drawn in a multitude of ways depending on one's purpose, for example by object of study (theater, literature), theoretical approach (semiotics, rhetorics), or politics (Marxism, feminism).

⁶⁰ See Erlend Lavik, *Theory's Pyrrhic Victory*, in HUNTING HIGH AND LOW 526-28 (Karl Knapskog & Jan Fredrik Hovden eds., 2012).

⁶¹ The "irrationality" of postmodernism has been endlessly debated. For critical accounts, see DAPHNE PATAI, *THEORY'S EMPIRE: AN ANTHOLOGY OF DISSENT* (2005); HERMAN RAPAPORT, *THE THEORY MESS: DECONSTRUCTION IN ECLIPSE* (2001). For more sympathetic accounts, see COLIN DAVIS, *AFTER POSTSTRUCTURALISM* (2004); GARY GUTTING, *THINKING THE IMPOSSIBLE: FRENCH PHILOSOPHY SINCE 1960* (2011).

In general, the more finely detailed the classification, the more homogenous each sub-domain will appear (so, for example, the domain of “comparative literature” is likely to be less coherent and unified than the sub-domain “postcolonial studies of nineteenth-century British literature”). But at the same time there are practically always one or more sub-domains that disagree on basic issues. For example, some traditions strive towards objectivity and seek to bracket personal opinion and politics; others think the pursuit of objectivity is deluding, hubristic, and political in itself. Some think of aesthetics as an autonomous domain that can be studied in relative isolation; others are interested primarily in how art and popular culture shape identities and ideologies. Some theories are descriptive; others are normative, or even activist. Some are bothered by these differences; others find them quite unstressful, perhaps even healthy and gratifying.

We might say, then, that it is possible to split the aesthetic domain into many specialized enclaves that, in isolation, are reasonably ordered, because the rules, conventions, values, predispositions, and criteria for success are quite widely known and well calibrated internally. But if we look at the aesthetic domain from a bird’s eye view, it is readily apparent that the truisms, perspectives, and goals of the various territories are habitually thoroughly incompatible.

Moreover, the aesthetic domain lacks mechanisms to settle disputes because, unlike researchers in the hard sciences, humanities scholars do not necessarily deal with issues that can be decided once and for all by reference to evidence outside of human influence. As Mark Bauerlein observes, in the humanities there is no scientific method, no single standard to dependably filter out errors and misunderstandings until the correct explanation remains, so disciplinary norms and ideals tend to vary from scholar to scholar. Consequently, disagreements in humanities journals tend to play themselves out differently than in science journals. In the typical scenario:

Someone writes an essay, another responds critically, then the first gets the last word, and no outside authority is called in to decide which one is right. When university presses receive two divergent reader’s reports on a manuscript, the press solicits a third report on the manuscript, not a report on the merits of the previous reports. This is how disagreements in the humanities are staged: as contests of opinion, not determinations of truth.⁶²

All things considered, then, there is not sufficient disciplinary consensus in aesthetics to provide legal certainty. If courts relied on the testimonies of

⁶² Mark Bauerlein, *Disagreements in the Humanities*, 15 KNOWLEDGE, TECH. & POL’Y 193 (2002).

authorities in the domain, there is good reason to think that they would find themselves continuously locked in expert battles.

But of course not all issues are equally epistemologically contentious, even in aesthetics. While absolute certainty and total agreement may often be either beyond reach or beside the point, some notions, ideas and explanations are “true” in the sense that they are held to be relatively uncontroversial across the various sub-domains. In the following, we examine more specifically the status of the key concepts of this article: originality and creativity. As in copyright law, the terms are closely related, but their denotations are nevertheless quite different in the aesthetic domain.

III. ORIGINALITY AND CREATIVITY: COPYRIGHT LAW VS. AESTHETICS

Because the proposals to raise the originality threshold effectively bring originality’s meaning in copyright law more into line with how the term is used in aesthetics, we analyze in this Part the different conceptions of creativity and originality in copyright law (Part III.A) and in aesthetics (Part III.B). By drawing comparisons and making contrasts (Part III.C), we demonstrate that the meaning of the terms is more varied in aesthetics, and that originality comes most clearly into focus in the case of highly accomplished works. Here, however, the threshold is so high that it would exclude countless works that undoubtedly deserve copyright protection. We argue that aesthetics’ maximum definition of originality and copyright’s current minimum definition provide at least some fixed reference points, but that it is very difficult to get much traction when we try to fix a threshold somewhere in between these opposite poles.

A. Originality and Creativity in Copyright Law

In the context of copyright law, originality and creativity are fairly narrowly defined, although the two conceptions are, by legal definition, interrelated and thus hard to separate. Originality, as we have seen, relates to the requirement that the work was independently created and that it contains a modicum of creativity, a requirement that is easily satisfied in most cases (*supra* Part I). The condition of independent creation primarily concerns the work’s point of origin, in the sense that it must not be copied from elsewhere, but emanate from the person or persons who created it. Inevitably, there will be borderline cases that challenge the distinction between originality and copying or plagiarism, but the point of origin condition is theoretically possible to detach from considerations of aesthetic merit, as the issue of whether or not a work was independently created is logically distinct from its cultural value.

The condition of creativity, on the other hand, is harder to separate from evaluation, for while originality concerns the work's point of origin, creativity has to do with the manner in which the work was brought into being, and this, in turn, constitutes it as a work of a certain kind. Before delving into the term's specifically legal meaning, it should be noted that we intuitively tend to transpose characteristics of the *process* of creation into the *product* of creation. To say of a work of authorship (as opposed to of its author) that it "is creative" or "displays creativity" is, strictly speaking, nonsensical, as inanimate artifacts lack the powers of imagination and cognition that creativity demands. Rather, such statements are metaphorical tokens of our deep-seated intuition that the process of creation somehow manifests itself in the finished work.

Since creativity tends to be considered as inherently valuable, and since we instinctively assume that it expresses itself in the work, it is hard to separate considerations of what constitutes a modicum of creativity in copyright law from sentiments about aesthetic merit. Indeed, in *Feist Publications Inc. v. Rural Telephone Service Co.* the creativity criterion is at times reminiscent of the non-obviousness doctrine in patent law. The decision to deny copyright to a white pages book of residential phone numbers arranged alphabetically by surname was based on a number of clearly value-laden observations. The court did not set out to define the modicum of creativity positively, but rather by negation. Thus it itemized the reasons why Rural's white pages listings failed to meet the minimum requirement: they are "entirely typical," "obvious," "commonplace," "garden-variety," "devoid of even the slightest trace of originality," and result from "an age-old practice, firmly rooted in tradition."⁶³

In practice, however, the criterion is easily met, as evidenced by another telephone listing case. In *Key Publications v. Chinatown Today Publishing Enterprises*, the court found that the plaintiff's annual directories of businesses in New York City of interest to Chinese Americans were copyrightable.⁶⁴ In both *Feist* and *Key* the contents of the works consisted of facts, which are nonprotectable. But even though none of the component parts of a work are eligible for copyright protection, the way in which the underlying elements are combined may be, provided that their selection and arrangement is deemed creative.

In the *Feist* case, Rural's white pages did not satisfy the minimum requirement, however, as the court found that organizing data alphabetically was "mechanical" and "practically inevitable."⁶⁵ *Key Publications*, by contrast, grouped its selection of business names, addresses, and phone

⁶³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362-63 (1991).

⁶⁴ *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc.*, 945 F.2d 509 (1991).

⁶⁵ *Feist*, 499 U.S. at 362, 363.

numbers into descriptive categories. While this arrangement is entirely pragmatic, and hardly involves creativity in the everyday sense of the word, it does at least imply some exercise of judgment. This indicates how little creativity is called for to satisfy copyright law's modicum amount.⁶⁶

B. *Originality and Creativity in Aesthetics*

Notions of originality and creativity in aesthetics are closer to those of patent law than copyright law, though their meanings are more fluctuating. This is no doubt partly because there is no requirement outside of the legal sphere to make a sharp distinction between original and non-original, creative and non-creative. Moreover, instead of applying the same either-or standard to all creative works, non-legal scholars can devise more fine-grained taxonomies depending on context and the nature of the work. Also, creativity exists in all walks of life, and has been studied extensively by scholars from several disciplines, such as psychology, biology, and sociology.⁶⁷

A number of typologies have been proposed to distinguish between different forms and degrees of creativity.⁶⁸ One basic distinction pertinent to the present discussion is the one between Big-C Creativity and little-c creativity. The latter term refers to “everyday problem solving — how to revise a favorite recipe when one required spice is absent from the kitchen cabinet; how to plan a surprise party for a special someone when it requires that every one assemble simultaneously at an exotic locale.”⁶⁹ It is this type of creativity that is most relevant for legal scholars, as it typically

⁶⁶ We might say that, in the *Feist* case, Rural's preparation of the information was so customary that anyone tasked with arranging the same data for public use would be likely to replicate the outcome exactly. By contrast, in order to arrive at their descriptive categories, *Key Publications* did not simply follow some self-evident, routine formula, but made certain choices and deliberations, however trivial. Other people tasked with creating such a directory would be highly unlikely to come up with identical categories. As such, the latter case might be said to express or reflect the personality of the author (however trivially). For a more detailed discussion of the creativity requirement in copyright law, see Katherine L. McDaniel & James Juo, *A Quantum of Originality in Copyright*, 8 CHI.-KENT J. INTELL. PROP. 169 (2009).

⁶⁷ Scholarship on creativity has flourished in the past couple of decades. One estimate has it that some 10,000 papers, as well as hundreds of books, have been published on the topic since 1999. See THE CAMBRIDGE HANDBOOK OF CREATIVITY, at xiii (J.C. Kaufman & R.J. Sternberg eds., 2010).

⁶⁸ For some basic distinctions, see Margaret A. Boden, *What Is Creativity*, in DIMENSIONS OF CREATIVITY 75 (Margaret A. Boden ed., 1994).

⁶⁹ Dean Keith Simonton, *Creativity in Highly Eminent Individuals*, in THE CAMBRIDGE HANDBOOK OF CREATIVITY 174 (James C. Kaufman & Robert J. Sternberg eds., 2010).

centers on phenomena that resemble the borderline cases in copyright law: non-professional artistic efforts, or works that lie outside the province of aesthetics entirely.⁷⁰

Aesthetics, however, has primarily been concerned with the Big-C variety, where creativity serves as a mark of distinction. Philosopher Berys Gaut's account is fairly typical. He offers a three-part definition of creativity: the work produced must be saliently new; it must have considerable value; and the making of it must involve flair.⁷¹

Sometimes creativity consists in combining a domain's familiar elements in new or unfamiliar ways. Other times, and far more rarely, it revolutionizes the domain. Typically, it is in such cases — when someone transforms the generative rules of the domain in a way that is sanctioned by the experts — that *originality* is introduced as the highest form of praise in aesthetics.⁷² While change always bears some relation to what went before, it can be plausibly argued that artists like Marcel Duchamp, Arnold Schoenberg, James Joyce, and Jean-Luc Godard, while building on the work of others, were instrumental in bringing to light certain latent possibilities in their domains, thus opening up new avenues for other artists to explore.

While this has come to be the prototypical meaning of originality in aesthetics,⁷³ it is just one of several denotations. Many scholars have

⁷⁰ Of course, while the Big C/little c dichotomy recognizes that creativity comes in various guises, it is still a rather crude distinction. Consequently, several scholars have offered more graduated categories. For example, Kaufman and Beghetto submit two additional levels: mini-c creativity, which is inherent to the learning process when children discover something for the first time; and Pro-c, which describes professional but routine efforts in a creative domain. See James C. Kaufman & Ronald A. Beghetto, *Beyond Big and Little: The Four C Model of Creativity*, 13 REV. GEN. PSYCHOL. 1 (2009).

⁷¹ Berys Gaut, *Creativity and Imagination*, in THE CREATION OF ART: NEW ESSAYS IN PHILOSOPHICAL AESTHETICS 149-51 (Berys Gaut & Paisley Livingston eds., 2003). Notice that the condition that creativity must involve flair means that the criteria are stricter than in patent law. Gaut is not prepared to see Charles Goodyear's invention of the vulcanization of rubber as creative, since he arrived at it by adding to liquid rubber any substance he could think of until he came across one that was successful. Even though his invention was both valuable and new, it does not count as fully creative for Gaut, as it came about as a result of trial and error rather than flair.

⁷² Dean Keith Simonton calls this highest level of creativity **BOLDFACE-C Creativity**. See Simonton, *supra* note 69, at 175.

⁷³ See for example Sharon Bailin, *On Originality*, 16 INTERCHANGE 9 (1985) (noting that it is in cases involving "a radical break with existing frameworks that originality seems most striking, and it is such cases that frequently serve as the model for discussions of originality").

sought to delineate the concept's various shades of meaning,⁷⁴ but for our purposes one basic distinction that most commentators have made will suffice. To clarify the relationship between the term's function in aesthetics and in copyright law, we can sort these more finespun categories into two main types. On the one hand are those meanings that designate an empirical fact about authorship. Originality in this sense includes the definition familiar from copyright law, as a point of origin,⁷⁵ where the term's antonym is copy. In the aesthetic realm, however, this side of the equation includes a number of related antonyms as well, like forgery, plagiarism, and inauthenticity. These terms may intersect with copyright issues in various and complex ways, though important distinctions are often conflated in the legal realm. Marilyn Randall, for example, insists that there is a difference between plagiarism and copyright, as they "invoke two different realms — the deontic and judicial, respectively"⁷⁶

To the extent that originality's historical-empirical meanings are relevant in the humanities, it is typically in cases involving renowned artists. Often, though, they are construed as peripheral in humanistic investigations of originality. Thus, Sharon Bailin notes that while all works exhibit originality in the sense that they are necessarily distinctive products of

⁷⁴ For a helpful overview of various meanings of originality, see Francis N. Sibley, *Originality and Value*, 25 BRIT. J. OF AESTHETICS 169 (1985); see also John Hoaglund, *Originality and Aesthetic Value*, 16 BRIT. J. OF AESTHETICS 46 (1976).

⁷⁵ Sibley's second category, for example, is defined as follows: "[S]omething is original if, though possibly qualitatively identical with another production even in relevant respects, it was the producer's own invention and produced in ignorance of each other." *Supra* note 74, at 170. This is clearly reminiscent of Judge Learned Hand's famous clarification that ties copyrightability to independent creation:

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.

Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936). This hypothetical example is highly contrived, of course. As we have seen, duplicate independent invention is common in patent law, but not in aesthetics.

⁷⁶ MARILYN RANDALL, PRAGMATIC PLAGIARISM. AUTHORSHIP, PROFIT, AND POWER 76 (2001). As plagiarism usurps authorship credit, irrespective of whether or not a work is (still) protected by copyright, she points out that "one can be guilty of plagiarism without falling foul of the law, and suffer important sanctions outside of the courts. Often, of course, the two 'crimes' are indistinguishable, and the same misappropriation can be subject to both legal and ethical sanctions. The point is that while plagiarism and infringement of copyright sometimes coincide, they are not the same phenomenon, nor do they have the same historical development." *Id.* at 77-78.

someone's imagination, "it certainly seems to be more than mere spatio-temporal uniqueness or individual execution that is being asserted in claims to originality of works of art. Indeed, the ascription of originality is used as a means to distinguish among works, and so cannot, in this sense, be something equally manifested in all works."⁷⁷

In aesthetics, then, originality is not principally a matter of settling an historical fact of authorial conception. Rather, it designates a property of artworks, which derive from their divergence from previous works. At this point, two qualifications are routinely made. First, complete originality is impossible.⁷⁸ It always bears — or must bear, to be legitimate or meaningful — some relation to previous works or traditions. As David

⁷⁷ Bailin, *supra* note 73, at 13. Sibley, meanwhile, ignores the concept's meaning in phrases such as "an original Rembrandt," and disregards all uses where it is synonymous with "first" or "prototype," as in "the original Model T Ford." Nor is he concerned with questions of the value of copies in relation to originals, which is another much-debated issue in aesthetics. Sibley, *supra* note 74, at 170.

⁷⁸ The most famous and radical assault on Romantic notions of originality came from poststructuralist thinkers Julia Kristeva and Roland Barthes, who developed theories about intertextuality in the late 1960s. The term was coined by Kristeva in *Bakhtine, le mot, le dialogue et le roman*, which was published in *Critique* in April 1967. This essay, as well as some of her other key texts on intertextuality, can be found in English in *Desire in Language: a Semiotic Approach to Literature and Art* (1980). Barthes's notion of intertextuality is most explicitly formulated in *Theory of the Text*, originally an entry in the *Encyclopedia Universalis* from 1973. For the text, see *UNTYING THE TEXT: A POST-STRUCTURALIST READER* (Robert Young ed., 1981). Intertextuality is a highly complex term, and in the work of Kristeva and Barthes it enters into much broader political-philosophical projects. The part of their theory that is relevant for the present discussion, however — the observation that all texts are compiled from chunks of previous texts — was far from novel (and, indeed, Kristeva draws on the earlier work of Mikhail Bakhtin). Certainly, the idea is easily found in previous discussions of originality. For example, in 1927 Daniel Gregory Mason wrote that "Lowell's definition of originality seems in the light of these considerations a good one. 'The notion of an absolute originality,' he says, 'as if one could have a patent right in it, is an absurdity. A man cannot escape in thought, any more than he can in language, from the past and the present. As no one ever invents a word, and yet language somehow grows by general contribution and necessity, so it is with thought Originality consists in power of digesting and assimilating thoughts, so that they become part of our life and substance.'" See Daniel Gregory Mason, *Artistic Ideals IV. Originality*, 13 *MUSICAL Q.* 9 (1927). Mark Twain, meanwhile, wrote in a letter from 1903 that:

The kernel, the soul — let us go further and say the substance, the bulk, the actual and valuable material of all human utterances — is plagiarism. For substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources, and daily used by the garnerer with

Hare observes: “Pure originality belongs to the child and to the insane. Adult originality is based on limits.”⁷⁹ Second, then, not just any divergence from prior art will do. As with Big-C Creativity, original works must be different in relevant respects. Which differences count must be settled on a case-by-case basis: “A dress or a car made exactly like another except, respectively, for size or colour will not count as original designs. A theory giving the same explanation of a phenomenon as an earlier but differently worded theory lacks the originality under consideration. Yet obviously, in other cases, size, colour, or wording might be relevant indeed.”⁸⁰

This is where the experts come in, which brings us back to the holistic and systemic nature of the aesthetic domain. As we have seen, critics and commentators serve an important function in that they keep a fruitful conversation about art going. Their continuous effort to classify, historicize, and evaluate confers meaning and significance upon works of art, and ensures that they do not exist in a vacuum. Identifying salient originality — i.e., contending that a work, or part of a work, is novel or different in some aesthetically relevant sense — is usually akin to paying it a compliment. For Paul Crowther, for example, an original work “is one which, in its particular configuration, goes beyond customary levels of accomplishment.”⁸¹ Consequently, in aesthetics originality is principally an evaluative label applied to works that are inventive or unusual in some aesthetically interesting way. The opposite of originality in this sense, then, is not *copied*, but *conventional* or *cliché*.⁸²

a pride and satisfaction born of the superstition that he originated them

... ..

Letter from Mark Twain to Helen Keller (Mar. 17, 1903), *quoted in* SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS. THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 64 (2001). The basic idea was even expressed in legal rulings on copyright law in the 19th century. In 1845, Justice Story observed that: “In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

⁷⁹ David Hare, *The Myth of Originality in Contemporary Art*, 24 *ART J.* 139, 140 (1964).

⁸⁰ Sibley, *supra* note 74, at 170.

⁸¹ Paul Crowther, *Creativity and Originality in Art*, 31 *BRIT. J. OF AESTHETICS* 301, 304 (1991).

⁸² See also Sibley, *supra* note 74, at 173 (“The contrast is with works which differ, but not appreciably, from what has gone before; which have a close affinity or resemblance to previous work, no notable individuality, are stereotypes, predictable, routine, follow a formula, are all of a kind, mere modifications, even rehashes, etc.”); Bruce Vermazen, *The Aesthetic Value of Originality*,

It should be noted, though, that originality — as an aesthetic value — does not exist independently. A work is always original *in some respect*, and unless it is independently aesthetically valuable in this other respect, the domain is unlikely to pay tribute to its originality. As Bruce Vermazen puts it: “The aesthetic goodness of an original work, its other valuable aspects aside, seems to come from the goodness of the original property (a goodness it has even in later cases, where it has no claim to novelty [i.e., after other artists have begun adopting the property in their own work]) and not from originality *per se*.”⁸³

Generally, originality is more frequently invoked as a term of praise in practical criticism than in purely theoretical and philosophical explorations of the concept. The former, after all, typically focuses on a single work (or a relatively small group of works), and is frequently geared towards the attribution of value. The latter, on the other hand, is geared towards exploring originality’s ontological status, which involves making finer distinctions and unpacking the concept’s complexities and contradictions. Thus, especially in the twentieth and twenty-first centuries, theoretical investigations tend, as we have seen, to challenge and deconstruct both the impulse to equate originality with newness and with artistic merit.⁸⁴

16 MIDWEST STUDIES IN PHIL. 266, 268 (1991) (“[Originality’s] counterpoise is derivativeness or rule-governedness.”).

⁸³ Vermazen, *supra* note 82, at 272. For some finer distinctions on this point, see Christopher Bartel, *Originality and Value*, 10 HERMENEIA 66 (2010). We might say that highly original works — i.e., those works that, in Bartel’s words, broaden the domain’s “functional scope” (*id.* at 74) — sometimes introduce new criteria by which to assess art. Of course, it may take time for critics to come up with new analytical, interpretive, and evaluative frameworks that accommodate and appreciate the novelty — probably one reason why groundbreaking artworks sometimes go unrecognized in their creators’ lifetime. Here we can certainly speak of novelty but, once again, it is hardly created from nothing. As Bailin writes, even highly innovative artworks have a history:

Even works that break some of the rules of an existing framework will still adhere to many of them and will, thus, have numerous connections with that framework. Such new works are not simply manifestations of arbitrary novelty but have grown out of attempts to grapple with certain problems, and their value is connected, partly at least, with the defining of these new problems as well as with the attempts at solving them.

Bailin, *supra* note 73, at 10.

⁸⁴ Many others have sought to refine common presumptions about originality as the highest form of artistic achievement. David Hare for example, writes that “[Painter Arshile] Gorky’s was not as original as the work of [Jackson] Pollock, but much more interestingly so, since Gorky became original in the face of art history, which he loved. Pollock became so at a time when he spit in the face of art history. Pollock’s [sic] was an easier originality since it attempted to surpass the hero through negation, while Gorky’s attempted to surpass it through understanding, a more difficult task.” Hare, *supra*

R.G. Collingwood summed up both arguments bluntly in 1938: “Originality in art, meaning lack of resemblance to anything that has been done before, is sometimes nowadays regarded as an aesthetic merit. This, of course, is absurd”;⁸⁵ and: “All artists have modeled their style upon that of others, used subjects that others have used, and treated them as others have treated them already. A work of art so constructed is a work of collaboration.”⁸⁶

Now that we have outlined notions of creativity and originality in law and in aesthetics, we must ask a two-step question: First, how can we sum up and make sense of the differences? And, second, how does this analysis bear upon the effort to limit the amount of works that fall within copyright’s subject matter definition by raising the originality threshold?

C. Comparisons and Consequences

There is a basic similarity between the legal and aesthetic conceptions, as both make a rough distinction between “a work’s being *an* original and a work’s being *original*.”⁸⁷ The former meaning is largely non-evaluative⁸⁸ and refers to an historical-empirical fact, while the latter is largely evaluative⁸⁹ and refers to a work’s degree of difference from previous art. Originality is more narrowly (more technically, we might say) defined in copyright law, as — rather counter-intuitively for non-legal scholars — it is only used in the former sense, i.e., as designating works that are not copies of other works (there is also, of course, the modicum of creativity requirement, though in practice that is so easily satisfied that it is

note 79, at 140. Bailin makes a similar point in relation to Bach, whose compositions do not break free of constraints, but is rather a form of “originality within constraints — achieved through a striking use of existing elements and an exploration of their complexity.” Bailin, *supra* note 73, at 13.

⁸⁵ ROBIN GEORGE COLLINGWOOD, *THE PRINCIPLES OF ART* 43 (1938).

⁸⁶ *Id.* at 318.

⁸⁷ Bartel, *supra* note 83, at 70.

⁸⁸ It is not quite so straightforward, of course. The question of a work’s history, which in itself is non-evaluative, may still have some bearing on its evaluation. For example, the manner in which it was brought into being, or the reputation of its creator, may influence its worth (both in an economic and an aesthetic sense). See also Bartel, *supra* note 83, at 69.

⁸⁹ Typologies of originality in aesthetics typically include a distinction between evaluative and non-evaluative uses of originality *within* the originality-as-difference definition (see, e.g., Sibley, *supra* note 74, at 170). For the purposes of the present discussion, though, this is basically a matter of separating works that are new in aesthetically salient ways from works that are new in aesthetically non-salient ways. Essentially, this corresponds to a distinction between true originality (the core meaning of originality in aesthetics) and mere novelty (a peripheral meaning that tends to be mentioned in passing purely to complete the typology).

not really relevant for our discussion of aesthetic works). In aesthetics, by contrast, originality has a much broader set of meanings, as it serves as a foil both for works that are copies and for works that are conventional.

Also, both in copyright law and in aesthetics, originality is closely tied to creativity. As we have seen, to qualify for copyright protection, a work must contain a modicum of creativity, whereas in the aesthetic domain, the core meaning of originality can be defined, in Crowther's words, as "the creative factor in a highly successful artifact which cannot be arrived at merely by the logical extension of existing ideas."⁹⁰ Bartel offers an analogous argument to the one we make here: "[W]hen taken evaluatively, 'originality' is usually concerned with some act of creativity; and when taken non-evaluatively, 'originality' is usually taken to be an issue of authenticity."⁹¹

The main difference — which makes all the difference — is that originality's definition in copyright law is heavily slanted towards the little-c pole of the creativity continuum (and seems regularly to concern works that creativity scholars would likely deem too trivial to qualify even for this category), whereas aesthetics is mostly oriented towards the Big-C variety. Of course, the concept enjoys greater elasticity in the aesthetic domain, not least in practical criticism, where it may serve as a loose synonym for "refreshing." Still, even if originality in aesthetics is a highly flexible term, "the evaluative use of 'original' only makes sense if we take it to be making a strong claim about the work: all works of art are the result of some creative activity, in a weak sense, but this obviously cannot be what is meant when 'original' is being used as a term of praise."⁹² This need not entail Big-C Creativity, though that, it seems fair to say, would be the prototypical meaning of originality in aesthetics.

The important point here is that it is far more feasible — though by no means straightforward — to arrive at fairly explicit, consistent, and intelligible notions of what originality is when the concept is defined in relation to the outer limits of creativity, because the extreme poles on the continuum provide at least some points of reference. Thus copyright law strives to establish a *minimum* level of creativity required for protection by way of a negative definition. As we have seen, *Feist* does not describe

⁹⁰ Crowther, *supra* note 81, at 303.

⁹¹ Bartel *supra* note 83, at 69. Note, however, that authenticity, just like originality, contains an ambiguity. On the one hand, it can refer to a fact about a work's origination, which is how Bartel uses it (as in "x is a Picasso," as he specifies). On the other hand, it can refer to an elusive — and predominantly evaluative — quality that inheres in the work. In this sense, authenticity has to do with truthful self-expression, i.e., with the degree to which the artist's honesty or integrity manifests itself in the work.

⁹² Bartel, *supra* note 83, at 70.

creativity as such, but arrives at a cutoff point by specifying how a work may fall short of the modicum amount if it is too commonplace.⁹³

In aesthetics, meanwhile, originality is defined positively, in relation to considerable creative efforts, and the concept comes most sharply into focus when it is aligned with *maximum* levels of creativity. Prototypical instances of originality unearth new possibilities for others to explore and thus are, as Bartel points out, “a sort of origin,” since they represent “the first clear exhibition of some idea, the repetition of which does not quickly exhaust its utility, but rather provides a new direction for future works.”⁹⁴ He narrows down the term’s meaning in this strong sense further by contrasting the originality of John Coltrane’s work to the novelty of Damien Hirst’s.

Coltrane’s improvisational saxophone style displayed originality in its use of modal harmonic phrasing, creating “the freedom to imply greater harmonic variety than might be available in a tune’s harmonic structure.” This was more than mere novelty: “it was a contribution to jazz improvisation rich enough to inspire other performers to take up his technique and use it with further great effect.”⁹⁵ Aesthetically novel works, by contrast — like Hirst’s *Away from the Flock*, which consisted of a sheep in a tank of formaldehyde — are more specific, and unlikely to get much mileage. Bartel stresses that such a work may contain interesting ideas, but also that “whatever value it has as an innovation, it is the passing value of an idea whose realisability is quickly exhausted, whose functional scope is limited to just that very work (or, Hirst’s case, a set of works towards that end).”⁹⁶

Wedding originality to a combination of artistic achievement and historical influence in this manner throws the concept into sharp relief. But at the same time, it means that originality may be difficult to recognize instantly. To be sure, some works make an immediate impact in their domain, but just as often artistic significance is something that fades into view and becomes apparent retrospectively. From a legal perspective, it

⁹³ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362-63 (1991) (stating that “[t]he selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever,” holding however that Rural’s white pages were “entirely typical” and “could not have been more obvious,” because arranging names alphabetically “is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course”).

⁹⁴ Bartel, *supra* note 83, at 74.

⁹⁵ *Id.* at 74.

⁹⁶ *Id.* at 74-75.

would not be beneficial to adopt an originality criterion whose objectivity only emerges with the benefit of hindsight.⁹⁷

⁹⁷ Bartel states that his definition of originality is not limited to works that actually force further developments. It is enough that we are able to recognize that a work “*may* be, or perhaps *ought* to be [the inspiration for future work].” *Id.* at 74. However, it is highly unlikely that we would be able to pronounce such works — i.e. works that are hypothetically influential — original with the same confidence as those that have, in fact, left their mark on the domain. Also, to fully understand why some works are elevated instead of others, we must acknowledge that chance plays a part. Csikszentmihalyi notes that, when he asked highly creative and recognized individuals to explain their success, “one of the most frequent answers — perhaps the most frequent one — was that they were lucky. Being in the right place at the right time is an almost universal explanation.” CSIKSZENTMIHALYI, *supra* note 22, at 46. One highly successful artist “admitted ruefully that there could be at least a thousand artists as good as he is — yet they are unknown and their work is unappreciated. The one difference between him and the rest, he said, was that years back he met at a party a man with whom he had a few drinks. They hit it off and became friends. The man eventually became a successful art dealer who did his best to push his friend’s work. One thing led to another: A rich collector began to buy the artist’s work, critics started paying attention, a large museum added one of his works to its permanent collection. And once the artist became successful, the field discovered his creativity.” *Id.* at 46. While the inherent worthiness of highly acclaimed artworks appears self-evident once it has been established, the discovery of their superiority over other works is inevitable largely in the tautological sense that — when it comes to aesthetic value — history is always right. The most authoritative and accurate yardstick for artistic merit is the domain’s (admittedly hardly unanimous) verdict at any given moment. The critical consensus, such that it exists, cannot fail to be accurate, for the aesthetic value of an artwork is necessarily made up of all *actualized* responses to it, not all *possible* responses. The works considered to be masterpieces are those that are seen to provide the most rewarding experiences, yield the most interesting interpretations, and exert the most influence. But such determinations are not based on absolutes. For example, the discovery of lost works, or of plagiarism, or the emergence of new interpretive and evaluative frameworks, or disputes over who gets to decide what is valuable in the first place, may affect the judgment. Obviously, the common consensus is rarely, if ever, radically transformed, but certain adjustments take place very gradually over time. And, of course, to say that any snapshot in time reflects the actual value of artworks is not to say that value is assigned completely arbitrarily. All artworks are not equally capable of generating the same quantity and quality of critical response. Value is an upshot both of the intrinsic properties of artworks and historical contingencies. To recognize that the aesthetic hierarchy could have been different is not to suggest that it could take any form whatsoever. It merely implies that we have no way of knowing whether or not the canon provides a “true” historical record of aesthetic worth that is independent of all the things we have said, written, and thought about the works of which it consists.

But in practice all of this is irrelevant to copyright law, for the effort to raise the originality threshold simply does not concern works situated towards the high end of the continuum we have described. This fact is oddly suppressed in the literature proposing to limit the subject matter definition. On the one hand, the authors invoke a rather grandiose rhetoric that seems to suggest that the bid to set the bar higher is going to yield more great art: Ryan Littrell recommends “restricting the realm of proper-tized works to those that are truly original,” for this would “reinvigorate the public domain” and “foster the flourishing of the arts.”⁹⁸ Parchomovsky and Stein note that: “If society wishes to encourage authors to produce highly original works and not settle for the bare minimum necessary to secure protection, it must reflect this preference in the design of the law.”⁹⁹ Miller, meanwhile, proposes to limit protection to expressions that are “demonstrably atypical or unconventional in some respect, compared to common expression that dominated the genre when the author authored the work.”¹⁰⁰ This “focus[es] copyright’s protection on those who succeed by taking the greater risk of investing in unconventional, unorthodox expression. These boundary-breaking creators, dissenters of a sort, do more to foster progress They are the worthier claimants to copy-right’s protective power.”¹⁰¹

On the other hand, the limit cases called upon to indicate the whereabouts and the implications of the new threshold are hardly relevant to the flourishing of art, and they barely even belong in the realm of aesthetics. Miller mentions three cases where the new originality criterion of non-obviousness could be put to good use: the first concerns Chinese restaurant menus, the second management training workbooks, and the third a CT scan photo of a rubber duck squeak toy. Clearly, the intention is not to raise the bar by a lot. The problem with this, as we have been at pains to demonstrate, is that originality is much easier to recognize and to delimit at the top and bottom of the cultural pyramid. It is extremely difficult to get any kind of traction when we try to fix a boundary somewhere in the middle.

Moreover, the aesthetic domain is simply not geared towards establishing a negative cutoff point, and so is unlikely to provide any guidelines for copyright scholars. Studies of originality tend to home in on the upper

⁹⁸ Littrell, *supra* note 11, at 225-26.

⁹⁹ Parchomovsky & Stein, *supra* note 3, at 1517. As we have noted previously, this proposal is different in that Parchomovsky and Stein’s proposal does not involve raising the threshold, but rather adjusts the level of protection to a work’s level of originality. But as we will see, this recommendation runs into a related set of problems.

¹⁰⁰ Miller, *supra* note 2, at 486.

¹⁰¹ *Id.* at 494-95.

echelons of the cultural hierarchy and, to be sure, at the very top there is widespread agreement, so the concept's meaning is suitably distinct and stable. It seems virtually inconceivable, for example, that Picasso's *Guernica* or Joyce's *Ulysses* are going to lose their status as groundbreaking masterpieces. But the vast majority of works tends to be treated more offhandedly in studies of artistic originality. There is no particular need to define non-original, non-obvious art carefully, so it largely serves as a kind of undifferentiated leftover category, or as the all-purpose background from which truly original efforts stand out.

This means that, from the point of view of aesthetics, it makes perfect sense to say that most standard fare — the bulk of Hollywood romantic comedies, say, or any number of detective novels — is wholly unoriginal and obvious. From a legal perspective, however, raising the threshold to this level would be highly controversial, to say the least, as it would deny copyright protection to countless works that probably no one wishes to exclude.¹⁰² If non-obviousness — framed, as Miller puts it, “as the degree of departure from orthodoxy” — were to be introduced as a criterion for copyright protection, then surely works of fine and popular art would have to be treated as special categories, exempt from this kind of legal analysis.

That would throw up a whole set of new problems, however. For one thing, it would require courts to make additional distinctions that are hugely problematic. Obviously, it is far from easy to decide which works “actually” belong in the realm of aesthetics and which do not. Certainly, it seems peculiar to grant copyright protection to trivialities like emails or absentminded doodles. But what about the private correspondence between two great authors that might be of literary or historical value? What if a famous painter did the napkin drawing? What about all the artists who, following in the footsteps of Marcel Duchamp's *Fountain*, seek through their work to challenge the notion that we can, or should, separate art from non-art. Should we also distinguish those works that happen to have been sanctioned by the “artworld” from those that have not? Or differentiate between professional and amateur efforts? Should the creative intention of the creator — which is notoriously hard to verify — be part of the examination?

It is not necessarily futile to speculate about these matters, but it makes more sense to do it in the aesthetic domain, where there is less pressure to draw clear-cut boundaries, and where the analyses carry less severe consequences for creators and creative practices. To introduce such deliberations into copyright law's subject matter definition would seem to create far more problems than it solves.

¹⁰² There are of course those who want to abolish copyright law itself, but that is a whole other matter, and not pertinent to the present discussion.

Despite all this, there is a slight possibility that a higher originality threshold based on the non-obviousness criterion is viable even in the mid-range area, but *only for similar kinds of works*. How similar they would have to be, and in what respect, is hard to specify, of course. No doubt, basic categories like “literature,” “film,” or “computer games” would be far too general, as each heading comprises works so unlike that it would make no sense to compare their level of (non)conventionality. Genre classifications, though, would be more useful. Terms like “western film,” “fantasy novel,” or “first-person shooter game” — or, more pertinently: “restaurant menu” or “automobile advertisement” — single out a more restricted, coherent, and relevant background that offer at least some footing in the struggle to establish what counts as non-obvious. Eventually, it is conceivable that courts, relying on expert testimony, could arrive at moderately consistent and predictable rulings — not because objective standards are available, but rather because over time a certain consensus might surface through legal precedent.¹⁰³ Having said that, expert opinions tend to be notoriously manipulable and for that reason judges may well be anxious to rely on such testimony in legal proceedings.

There are a number of other problems with this approach, too. First, while the new non-obviousness standard would have to appeal to credible arguments, there is clearly considerable room for interpretation. The key question is: How strictly or literally should we take the requirement that a work must deviate from orthodox expression, and which features of the work should we take into account?¹⁰⁴ Once again, we are not suggesting

¹⁰³ Obviously, we are hardly overly confident that this would work in practice. As we have seen, it has proven difficult to bring about consistent legal precedent even in the more structured domain of patent law. Benjamin H. Graf, who has conducted interviews with patent examiners, concludes that “each determination is unique to its examiner (or judge) and the invention in question.” Graf, *supra* note 50, at 596. As we have explained, we believe that it will be more difficult to establish dependable precedent in the less orderly domain of copyright. It might well be possible to improve the current system, however. Graf suggests creating a publicly accessible database of previous non-obviousness determinations which would be persuasive but not binding on examiners. “Over time,” he writes, “the system would improve by feeding itself more and more consistent precedent.” *Id.* at 599.

¹⁰⁴ This is not at all self-evident. Steven Spielberg’s *Jaws* (1975) — while not a film that anyone would consider ineligible for copyright protection — is a case in point. In the wake of the film’s exceptional commercial success it has come to be seen as a watershed moment in Hollywood history, prompting a shift from the unorthodox, art cinema-inspired films of the so-called New Hollywood to the blockbuster era. However, by customary aesthetic criteria it is quite conventional. For example, it is filmed in the classical Hollywood style, and the narrative is very much a modern version of Henrik Ibsen’s 1882 play *An Enemy of the People*. The film’s novelty lay in how it fused the marketing strategies and the generic framework of the culturally

that one answer would do as well as any other, but even after nonsensical and improbable options have been eliminated, we would still be left with highly incompatible, yet intellectually legitimate, lines of reasoning. In other words, the decision of how high or low to set the new bar for originality/non-obviousness comes with a fair amount of leeway. It is not merely a matter of discovering the inherent unconventionality of a work; the firmness of the threshold must, to a large extent, be willed into existence in due course. Expert opinion will no doubt diverge, offering courts little steadfast guidance. The initial stage is thus likely to be highly confusing, before legal precedent — hopefully — provides adequate stability and predictability.

But even if this obstacle should turn out to be surmountable, a larger problem yet looms on the horizon. This is the problem of taste, which we will deal with in the next Part. As we have seen, the rationale for raising the originality threshold is to cultivate truly valuable expression, and to exclude works that do not really merit copyright protection. Moreover, in the cultural domain, originality (defined as non-obviousness) is inextricably bound up with aesthetic quality. There can be no doubt that raising the bar makes evaluation, and hence taste, much more of an issue than it is today in copyright law.

IV. *THE (REAL) PROBLEM OF TASTE*

As the motive for raising the originality threshold is precisely to foster the flourishing of the arts, the problem of taste inevitably becomes an issue. Discussing the difficulty of aesthetic evaluation in legal decision-making (Part IV.A), we assert that, contrary to common perception, the subjective nature of aesthetic evaluation does not make it either harder or easier to settle on a consistent and predictable originality standard, but the higher the threshold is set, the more difficult will it be to provide justification for its exact location. Since aesthetic preferences are not random but correlated to factors such as class, gender, and age (Part IV.B), and be-

reviled exploitation cinema of the post-war period (*Jaws* is essentially a horror story with the shark cast as the monster) with the production values of a studio feature. This is certainly a kind of non-obviousness, but one that is trickier to recognize and relate to traditional debates about aesthetic originality. It could even be said that *Jaws* opened up new avenues for others to explore, but many film scholars would argue that it ultimately — and in light of the present discussion, paradoxically — represented a return to, or even an intensification, of highly formulaic filmmaking conventions, namely so-called high concept cinema. See Justin Wyatt, *HIGH CONCEPT: MOVIES AND MARKETING IN HOLLYWOOD* (1994). For a discussion of contrasting accounts of *Jaws*'s legacy, see Erlend Lavik, “*Not the Obstacle but the Means*”: *Film History and the Postmodern Challenge*, 13 *RETHINKING HIST.: J. THEORY & PRAC.* 371 (2009).

cause of the function aesthetic works serve in democratic societies (Part IV.C), we argue that it would be unwise to grant courts the authority to award or deny protection on the basis of higher degrees of originality. The current standard, by contrast, is so low that we would hardly say that judges presently engage in aesthetic evaluation and, hence, discrimination (even though some might appear in infringement analyses).

A. *Aesthetic Evaluation in Legal Decision-Making*

Courts themselves have repeatedly warned against the dangers of opening the door to aesthetic evaluation.¹⁰⁵ We agree that there are good reasons to strive to minimize considerations of artistic merit in legal rulings, even if we find that the reasons offered — first, that courts lack the required competency to make sound artistic judgments and, second, that aesthetics is subjective — fail to get to the heart of the matter. As we have strived to demonstrate, there simply is not much critical consensus on aes-

¹⁰⁵ The most widely cited admonition appeared in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (“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.”). See also *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (“Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.”); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 805 (D.C. Cir. 1978) (“Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste. These officials have no particular competence to assess the merits of one genre of art relative to another.”); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (“That undemanding requirement [i.e. originality] is satisfied in this case; any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make.”). Responses to a proposed adjustment of the copyright law in the 1960s voiced the same concern. When a report by the Register of Copyright from May 1961 recommended that a revised standard “should mention that any work, in order to be copyrightable, must be fixed in some tangible form and must represent the product of original creative authorship,” HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, PT. 1, at 10 (Comm. Print 1961), quoted in Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 180 n.30 (1990), commentators were overwhelmingly against the insertion of the word “creative,” due to worries that it would make copyright protection dependent on subjective evaluations of artistic merit. One stated that “If courts were required to provide a definition for [creativity], a wide range of criteria could develop depending upon the personal tastes of particular judges,” quoted in *id.* at 181 n.30, while the Writers Guild of America noted that: “The word ‘creative’ is subject to too many interpretations.” Quoted in *id.*

thetic originality and merit, except when it comes to the very highest achievements (and even then, agreement is often not instantaneous, but tends to consolidate over time).

Thus, it is not clear that it would solve anything if judges *were* trained art critics. Admittedly, it would not be advisable to try to establish a new originality threshold somewhere in the mid-range area without any knowledge whatsoever about aesthetics. But it is also misguided to think that greater aesthetic expertise automatically generates more sure-footed, coherent, and predictable verdicts. Indeed, the most sophisticated historical and philosophical studies of aesthetic judgment often complicate matters more than clarify them; they regularly seek to challenge, rather than obtain, certainty; and their conclusions tend to be tentative and provisional, highlighting the contingencies upon which apparent certitudes rest.

The second reason why courts are unwilling to deal with questions of merit hits closer to the mark. It is true that aesthetics is inherently subjective,¹⁰⁶ but the real problem is not that this would free judges to make decisions based on personal taste. In fact, it is not at all obvious that aesthetics pose unique problems in the legal sphere in this respect. There are many areas of law with considerable room for interpretation where judges are liable to have strong personal opinions.¹⁰⁷ This does not, however,

¹⁰⁶ The most influential account of the objectivity of aesthetic judgments is Immanuel Kant's *Critique of Judgment* from 1790. But as Noël Carroll has pointed out, Kant's so-called subjective universals are judgments "made on the basis of what everyone has in common — cognitive and perceptual faculties; the understanding and the imagination — without the interference of any idiosyncratic interests." See NOËL CARROLL, *A PHILOSOPHY OF MASS ART* 92 (1998). For an object to evoke the same sense of beauty in everyone, we must factor out all interests that might put individuals' judgments at variance. In practice, that means focusing our attention strictly on the form of the object rather than on its content. The emotional and sensuous pleasures that an object stirs up, as well as any political or philosophical ideas it may suggest, must be set aside. From a modern-day vantage point this is a highly circumscribed vision of aesthetic value. But we must keep in mind that Kant was putting forward a metaphysical account of different forms of judgment, and not a theory of art. Of course, elements of his work have later on been extrapolated into such theories, especially of the formalist variety, which in turn have often been criticized for sealing off art from everyday life by insisting that art exists for its own sake and not for some utilitarian purpose. But Kant clearly recognized that in regard to what is pleasurable — which, it seems fair to say, is a key component of contemporary aesthetics, as we do not tend to make such sharp distinctions between form and content — everyone has their own tastes.

¹⁰⁷ See Andrei Marmor, *Varieties of Vagueness in the Law* 3, 18 (2012) (University of Southern California Legal Studies Working Paper Series, Working Paper 89), available at <http://law.bepress.com/usclwps-lss/art89>, giving various examples where the law uses "words that seem to be obviously very

mean that judges can decide cases purely on a whim, since legal precedent imposes certain limits. As we have intimated, an effort to raise the originality threshold somewhat would probably lead to some uncertainty at first, but there is little reason to think that the introduction of a stricter originality standard would plunge copyright law into pure anarchy (provided, as we have suggested, the same analysis concerns works that belong in the same category).

Strictly speaking, the objectivity of a merit-based originality standard does not depend on conformity of taste, but on the degree to which we can come up with useful criteria in the decision-making process. The prospects are hard to assess in advance, but our intuition is that it seems easier for courts to arrive at, and to explain, their rulings when the threshold is either extremely high or low, and that it would call for different standards for different kinds of works (which in turn would require courts to make other difficult distinctions). If, for example, we decided to adopt Miller's proposed originality criterion — “the degree of departure from orthodoxy” — and applied it equally rigorously to all works that currently belong to the domain of copyright, we might end up protecting unconventional emails, but not standard novels, sculptures, paintings, or films that stay faithful to generic conventions.

But these are practical challenges that have nothing to do with the diversity of aesthetic preferences. In theory, a multiplicity of tastes — in society and in courtrooms — can coexist with legal certainty. That, as Justice Holmes put it, “the religion of taste is polytheistic”¹⁰⁸ only poses a

vague, even extravagantly so” and that require legal interpretation, including “reasonable care,” “due process,” “neglect,” “unconscionable,” considerations of “equity,” protection of “privacy” and so forth. Although Marmor found few “contestable evaluative concepts that admit of conflicting conceptions” in statutory language, he names the frequent use of the term “reasonable” as one notable exception. He observes: “People can have different and incompatible conceptions of what reasonableness consists of in various contexts.” *Id.* at 18. Nevertheless he admits that the contestability of the term is somewhat misleading: “‘Reasonable’ in law usually designates the application of an objective standard to the issue at hand, meaning that the relevant considerations should be viewed from the standpoint of an ordinary, detached person, and not from the standpoint of the actual person whose actions or decisions are under legal scrutiny. Still, there is a famous ambiguity here that lawyers are well aware of, whether this objective standard, the viewpoint of “the ordinary or reasonable person,” is meant in a quasi-statistical sense as the viewpoint of the average fellow in the street, so to speak, or is partly a normative standard, inviting the courts to form a view about what the law should require in the circumstances.” *Id.* at 18. This remark clearly shows that, even though the law pursues objectivity, it cannot be ruled out that judges are called upon to give their own personal opinion about the law's objective.

¹⁰⁸ Cohen, *supra* note 105, at 190.

practical problem if we think that courts should refrain from ruling in matters where people's beliefs and predilections fail to coincide. But that would of course be unreasonable. That judges, as well as the public at large, hold very different opinions in important matters that fall within some area of the law does not mean that we absolve them of the obligation to make decisions.

The trouble is that, even if it were possible to come up with a higher originality standard that is objective and unbiased in the sense that it offers clear and unambiguous criteria, so that outcomes were predictable and unaffected by the personal tastes of judges, the exact location of that new threshold could not be unbiased, as it would be bound to discriminate against some creators, works, and tastes. In other words: The heterogeneity of aesthetic preferences does not necessarily lead to arbitrary rulings, but it means that the question of where to set the bar is arbitrary. That tastes vary does not make it more straightforward or difficult to pinpoint an objective standard based on aesthetic merit, but it makes it harder to provide justification for any such standard.

B. The Relationship Between Taste and Social Power

The difficulty of determining the level at which to set the new originality threshold becomes apparent when we bear in mind that aesthetic likes and dislikes not only vary from person to person. Variations in taste are also patterned, so that people from the same social groups are predisposed to share aesthetic sensibilities. Education, vocation, income, gender, and age do not determine taste, of course, but make people more or less inclined to favour some art forms, artists, genres, or styles rather than others. Sociologists of culture have examined the means by which the ruling classes have their cultural preferences validated as more legitimate and refined, so that taste serves as an instrument of social distinction. The most famous study is Pierre Bourdieu's *Distinction*,¹⁰⁹ but several scholars of the nineteenth century too noted that aesthetic value judgments are not simply innate and innocent responses to built-in artistic qualities, but also reflections of social status.¹¹⁰

What this means is that taste is inextricably tied to power. It is in the vested interests of elites to hide from view the mechanisms by which cultural legitimacy is produced and reproduced, so that differences in taste

¹⁰⁹ PIERRE BOURDIEU, *DISTINCTION : A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1979). For another key work, see HERBERT J. GANS, *POPULAR CULTURE AND HIGH CULTURE* (1974) (disputing the notion that the aesthetic standards of high culture are universal, seeing them instead as reflections of educational training and social standing).

¹¹⁰ See THORSTEIN VELBLÉN, *THE THEORY OF THE LEISURE CLASS* (1899) (introducing the concept of conspicuous consumption).

serve to legitimize social and economic differences as well. That is why it is considered valuable to lay bare the theoretical and historical contingencies of various taste formations, and why feminism, poststructuralism, and queer studies have sought to challenge, or at least expand, the Western canon, which mostly consists of works by white, heterosexual men. As J.J. Wolff has observed: “The great tradition is the product of the history of art, the history of art history, and the history of art criticism, each of which, in its turn, is the social history of groups, power relations, institutions and established practices and conventions.”¹¹¹

The intimate relationship between taste and social power offers weighty reasons why judges should avoid making determinations of artistic merit, and these reasons are recognized, at least implicitly, by the courts. There is, for example, in Justice Holmes’ *Bleistein* opinion an awareness that the aesthetic sensibilities of judges are unlikely to be either boorishly lowbrow or cutting-edge highbrow, so there is a dual risk of discrimination. On the one hand he recognized that judges are likely to have more refined tastes than other demographics, so he worried that:

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.¹¹²

There is an acknowledgement here that judges share a certain background that sets them apart from other social groups, and that it would be wrong for them to impose their own aesthetic standards on everyone else. It is impossible, after all, to intuit first-hand what others find aesthetically pleasing, or to predict what will be of value for future generations.

On the other hand, Justice Holmes warned that “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.”¹¹³ Justice Holmes’ examples were the etchings of Goya and the paintings of Manet, though his observation is perhaps even more pertinent to the avant-garde of the twentieth century. Such works are frequently highly controversial — politically, morally, or aesthetically — yet valued precisely because of their potential to break new ground and challenge entrenched ways of thinking. In democratic societies, it is the task, so to speak, of some art to test conventional wisdom, or to suggest unusual perspectives. But precisely because they are novel and contentious, the legitimacy of alternative artistic practices is often hard-won, if won at all. Still, that is for history, not judges, to decide.

¹¹¹ JANET WOLFF, *AESTHETICS AND THE SOCIOLOGY OF ART* 16 (1983).

¹¹² *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

¹¹³ *Id.* at 251.

C. The Function of Aesthetic Works in Democratic Societies

The intuition that the diversity of aesthetic tastes constitutes a problem in copyright law is warranted, but not because it inevitably produces legal uncertainty if courts were obliged to take merit into consideration. That may well be the case, but that is a separate issue. The more pertinent reason has to do with the nature of the objects that lie at the heart of copyright law, and their function in free and open societies. They are, simply, not the kinds of objects that we want courts to police too carefully. Democracies depend on expressive diversity, and while copyright law does not have the authority to ban expression, it functions as a form of economic subsidy that influences cultural production.

Also, if courts were explicitly authorized to grant protection on the basis of what they find valuable, then legal rulings would very much have a culturally legitimizing function that we find perilous. The higher we raise the threshold — i.e., the more works we seek to exclude to solve the problems of copyright law's promiscuous subject matter definition — the more dangerous it is to have courts decide which works truly deserve protection and which do not. One reason it makes sense to have a very low threshold is that it is better to err on the side of caution in such matters.

Another reason is that it renders the problem of aesthetic evaluation largely irrelevant. As we have seen, there is a basic similarity in how copyright law and aesthetics define originality. They do so by reference to the author's creative effort, though admittedly in relation to opposite poles on the continuum. But in both cases the concept of originality emerges in contradistinction to obviousness: in copyright law the kind of non-obviousness that affords positive meaning to originality is "that which is not practically inevitable"; in aesthetics, it is "that which is not conventional." The principle is the same, so we cannot really say that copyright law has hit upon a fundamentally different procedure. Still, it seems counterintuitive to say that courts currently engage in aesthetic evaluation, since creativity kicks in so early and easily in the subject matter definition that the question of value simply does not enter into the equation. The limit cases — the kinds of works that only just make the grade, or that only just fall short — are simply not the kinds of works that we tend to think of in terms of aesthetic merit, or have aesthetic preferences about, or to which it makes much sense to apply aesthetic theory.¹¹⁴ Raising the threshold, then, risks embroiling courts in awkward evaluative analyses at the level of the subject matter definition.

Today, it is in infringement cases that the problem of aesthetic evaluation crops up: "When a court needs to determine whether a second work

¹¹⁴ On the role of aesthetic theory in copyright law, see Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

infringes the copyright in the first work, the court must compare the works in order to determine the scope of copyright protection to be afforded the first work. The way judges evaluate art inevitably affects the determination.”¹¹⁵ However, cases that end up in court tend to raise a different set of issues, which have mainly to do with more abstract features of works that are non-protectable in the first place. For example, copyright extends to expressions, but not ideas. Styles, genres, standard plot elements, and stock characters are beyond protection. In distinguishing ideas from expression, some kind of aesthetic evaluation tends unavoidably to find its way into legal analyses.¹¹⁶ But it is important to note that these difficulties appear across the cultural spectrum, and affect works that rank both high and low in the cultural hierarchy. Consequently, there is little reason to think that a stricter originality standard would make it any easier for courts to distinguish ideas from expressions.

V. ADDITIONAL DIFFICULTIES AND DUBIOUS PREMISES

The proposal to raise the originality threshold also rests on a few other questionable premises, which are examined in this Part. First, while we would not deny that the current standard can have adverse effects, it does not seem a major concern for the kinds of works that we usually think of as aesthetically valuable. Artists do not typically take as raw materials of creation the kinds of minimally original works that would be denied protection if the threshold were set moderately higher (Part V.A). Moreover, we take issue with the basic premise that there is some strong correlation between degrees of originality and social benefit (Part V.B). Lastly, we disagree with the statement that the only workable way to allow future creators to enjoy the benefits of a richer public domain is to raise the threshold of originality (Part V.C).

¹¹⁵ Cohen, *supra* note 105, at 178.

¹¹⁶ *Id.* at 230 (“In most cases, . . . there are no defined, objective criteria for deciding whether a particular detail is dictated by the subject matter or a common way of expressing the basic idea and therefore unprotected. A review of the cases has revealed that this critical determination is little more than a determination of what is considered meritorious in a given work, based on particular judges’ assessments of the artistic value of works, including their assessment of the style, novelty and commercial value of those works and the reputation of their creators. This assessment, in turn, is a reflection of what a particular judge knows about and values in such works. Thus, the determination of the line between an idea and its expression in a given work is a determination that reflects the values of the particular judge who is judging the works at issue.”).

A. The Relative Impact on the Flourishing of the Arts

A fundamental difficulty with the proposal to define copyright's originality standard as "departure from orthodoxy" rather than as "involving a modicum of creativity" is that it renders the threshold a moving target. Originality is defined in relation to a background of convention that tends to change over time. What counts as unorthodox expression at one point in history may come to seem orthodox if others decide to imitate it.¹¹⁷ Vermazen offers the example of *ostranenie*, or defamiliarization, a key term for Russian formalists, who sometimes saw it as the essence of art.¹¹⁸ It literally means "making strange" and refers to the process of renewing or refreshing our perception of everyday language and everyday life through artistic means. Its key proponent, Victor Shklovsky, believed that the world tends to become jaded to us, but that art can energize it. "Habitualization," he wrote, "devours works, clothes, furniture, one's wife, and the fear of war Art exists that one may recover a sensation of life; it exists to make one feels things, to make the stone *stony*."¹¹⁹ He noted that the language of 19th century poet Alexander Pushkin was "roughened," and that he "used the popular language as a special device for prolonging attention."¹²⁰ As Vermazen points out, though, "the power of the original work to defamiliarize the object is relative to the background against which it is produced."¹²¹

It is tricky, of course, to gauge just how much of a problem this would pose in the area of copyright law. Generally, though, it seems reasonable to say that an absolute criterion is preferable to one that is context-dependent and thus changes over time, as it is easier to implement and generates more consistent and predictable rulings to guide creators. The departure-

¹¹⁷ This is somewhat analogous to the problem of hindsight bias in patent law, where there is a risk that examiners draw on knowledge obtained after an invention has been made in assessing its patentability. See Graf, *supra* note 50, at 580 ("Once people grow accustomed to an invention, it becomes more difficult to imagine the world without it, and easier to proclaim that its discovery was obvious. Hindsight bias should be avoided because it is unfair to an inventor to hold his own invention or subsequent progress against him.").

¹¹⁸ Vermazen, *supra* note 82, at 272-76.

¹¹⁹ Victor Shklovsky, *Art as Technique*, in *RUSSIAN FORMALIST CRITICISM: FOUR ESSAYS* 12 (Lee T. Lemon & Marion J. Reis trans., 1965).

¹²⁰ *Id.* at 22.

¹²¹ Vermazen, *supra* note 82, at 273. Shklovsky too seemed aware of this, as he reminded his readers of the original context of Pushkin's poetry: "The usual poetic language for Pushkin's contemporaries was the elegant style of Derzhavin, but Pushkin's style, because it seemed trivial then, was unexpectedly difficult for them. We should remember the consternation of Pushkin's contemporaries over the vulgarity of his expressions." See Shklovsky, *supra* note 119, at 21.

from-orthodoxy standard makes originality more slippery and relational. By contrast, the current standard, whereby originality is defined as point of origin plus a minimum amount of creative effort, provides a stable criterion that is independent of cultural developments.

Advocates of a higher standard would probably reply that making the originality criterion conditional on works' divergence from orthodox expression is precisely the point in using the threshold as a policy lever to promote creativity. At the very least we hope to have shown that there are a number of trade-offs that must be taken into consideration. Apart from that, though, we find the analysis of the problems that the currently very low threshold supposedly creates both insufficient and deficient. We have already noted the discrepancy between the rhetoric invoked (the ambition to help boundary-breaking creators to foster artistic thriving) and the examples amassed to illustrate the benefits (such as management training manuals and restaurant menus). We do not want to suggest that the low threshold does not create any problems whatsoever, but they would seem to have little to do with the flourishing of the arts. Before introducing a stricter originality criterion we need a more careful and empirically based analysis of just what the problems are, what areas of copyright law are affected, and exactly how and why a higher threshold would improve the situation.

Parchomovsky and Stein's proposal, in particular, is based on a number of dubious assertions. Among other things, their statement that "The problem with the current design is that by rewarding minimally original works and highly original works alike, the law incentivizes authors to produce works containing just enough originality to receive protection — but not more"¹²² seems to us unfounded. They do not provide any empirical evidence or examples to substantiate their claim, but considering how low the minimum requirement for copyright protection actually is, we fail to detect any deluge of works that narrowly satisfy the legal originality standard.¹²³

¹²² Parchomovsky & Stein, *supra* note 3, at 1506.

¹²³ Miller, for his part, makes a similar — and similarly questionable — claim that unorthodox expressions are in greater need of protection against imitative copying. See Miller, *supra* note 2, at 464. He too fails to back up his assertion with proof or examples, but if we subscribe, for example, to the common notion that most avant-garde works are more unorthodox than most generic fare, there is good reason to take issue with such a sweeping statement. Surely popular music and popular cinema are more attractive targets of piracy than more erratic and experimental efforts.

B. No True Correlation Between Originality and Social Benefit

Another basic premise that we take issue with is that there is some strong correlation between degrees of originality and social benefit. Parchomovsky and Stein write that: “Presumably, the more original works generate a greater benefit to society.”¹²⁴ We do not think such a sweeping claim is justified. It is not at all clear what originality refers to here, but there is no reason to think that the level of originality of works (whether the term refers to novelty, creativity, or unconventionality) and their public benefit are proportional in any meaningful sense, even if we ignore the obvious fact that some forms of originality can be purely nonsensical. On the one hand, some of the most unconventional works in the artistic domain come from the avant-garde, but their radicalism often calls into question their social value. For example, *Un Chien Andalou* (1929) is widely held to be one of the most original films ever made, though one of its co-directors, Luis Buñuel, described it as “essentially, nothing less than a desperate, passionate appeal to murder.”¹²⁵ On the other hand, it can make sense in some cases to protect trivial works, such as directories and databases, precisely because they are useful.¹²⁶

Of course, it is also quite possible to argue that *Un Chien Andalou* is actually socially valuable, or that it is socially harmful to grant copyright protection to databases, but the point is merely that such issues are highly contentious. Both originality and social benefit are complex, hard-to-define terms, making it impossible to bring the relationship between them under a general description. As we have seen, works can be original in different senses of the word: it may be taken to mean “authentic” or “non-obvious,” for example, and the latter meaning can be interpreted strictly

¹²⁴ Parchomovsky & Stein, *supra* note 3, at 1517.

¹²⁵ Quoted in PHIL POWRIE & ÉRIC REBILLARD, PIERRE BATCHEFF AND STAR-DOM IN 1920S FRENCH CINEMA 140 (2009). See also Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009) (discussing many examples of art with destructive aspects in relation to moral rights).

¹²⁶ Of course, Parchomovsky and Stein’s claim is reasonable in a trivial sense, if by originality they refer to a work’s point of origin. We take it that this is not the meaning of the term they have in mind, however, as independent creation is already part of the current standard, and it is not a concept that we can easily render, as they do, in degrees. But for the sake of argument, we could perhaps say that Margaret Mitchell’s *Gone with the Wind* (1936) is more original than Alice Randall’s *The Wind Done Gone: A Novel* (2001), as the latter plainly builds on and reinterprets the former. It is not obvious which work is more socially beneficial, though. To a great extent Randall’s novel tells the same story, only from the perspective of the slaves, who are more peripheral in the “original” book, effectively offering a counterweight to the racial stereotypes that pervaded Mitchell’s work. Thus even if “more original” is taken to mean “greater level of independent creation,” Parchomovsky and Stein’s assertion is not so straightforward.

or loosely. Moreover, works can be non-obvious in various degrees, and in relation to different particulars: plot, style, subject matter, and so on. Social benefit, too, is a multidimensional concept. It may, for example, involve the generation of useful information, knowledge, artistic quality, aesthetic pleasure, economic growth, or expressive diversity. Needless to say, it also raises thorny practical questions: Just who stands to benefit in particular cases, and how? Whose benefit should courts seek to sponsor — and on what grounds — when the interests of different individuals, businesses, or social groups inevitably come into conflict?

The bewildering array of potential benefits and beneficiaries, coupled with the many senses and ways in which works can be said to be original, casts doubt on the premise of Parchomovsky and Stein's analysis: that there is a straightforward correlation between originality and social benefit. It might also be instructive to look at the same relationship in the more structured domain of patent law, where it is easier to determine degrees of originality and degrees of progress or usefulness. Clearly, it would be absurd to take for granted that more non-obvious inventions are automatically more beneficial. It might be, for example, that developing a vaccine for a dangerous, highly contagious disease is a fairly straightforward matter, whereas coming up with the remedy to some benign virus is much more of a challenge for the medical community. Here the solution to the former problem is more obvious, yet also considerably more valuable to society. Similarly, it is not at all hard to think of inventions that are highly complex and non-obvious, but that are of limited value. There is no reason, we suspect, to think that a work's degree of non-obviousness is a significantly better predictor of its social value in the domain of copyright law, which raises doubts about the effectiveness of the originality criterion as a policy lever in the first place.

We want to emphasize that we do not seek to challenge the utilitarian principle upon which the Intellectual Property Clause is founded. But it is one thing to state that the broad aim of copyright law is to promote the progress of science and art, as such a general proviso comes in handy in deliberations of whether a work, or class of works, ought to receive copyright protection. It is something else entirely to make utilitarianism the focal point at all levels on the basis of the hypothesis that there is a tidy, symmetrical relationship between a work's degree of originality and its degree of social benefit. We believe, first, that their interrelation is far messier, and that providing greater rewards for more original works is not necessarily going to yield more socially beneficial works or verdicts.

Second, we do not think there are any tools at hand to accurately compute and compare amounts of originality in individual works. Parchomovsky and Stein propose to divide all works into one of three categories: exceptionally original works; works that display regular or av-

erage originality; and works that are nearly or wholly unoriginal.¹²⁷ Works in the first category can invoke what they call “the doctrine of inequivalents,” which exempts the defendant from copyright infringement liability due to the work’s exceptional level of creativity, though she must establish its exceptionality (or inequivalence) by clear and convincing evidence.¹²⁸ Consequently, they assert that “if Anna, a film producer, incorporated expressive elements from a short story by Bill in a path-breaking movie she produced, our doctrine of inequivalents will shelter her from liability.”¹²⁹ From our perspective this suggestion seems overly positivistic, and would require courts to carefully weigh a number of factors for which there can hardly be said to be any precise standard of measurement.¹³⁰

Third, we agree with Barton Beebe that although aesthetic progress or usefulness is extremely difficult to define, it would be prudent to revise common notions of what constitutes advancement in the aesthetic domain. He believes it is impracticable to equate improvement of aesthetic conditions with more and greater artistic achievements: “These conditions, even those within the limited ambit of copyright law, are far too variable to admit of general standards of excellence, and in any event, a pluralist, lib-

¹²⁷ Parchomovsky & Stein, *supra* note 3, at 1524.

¹²⁸ *Id.* at 1525.

¹²⁹ *Id.* at 1526.

¹³⁰ Nor do we find Parchomovsky and Stein’s claim that their framework would not require adjudicators to make evaluative determinations that they do not already make very convincing. *Id.* at 1509. They cite Justice Holmes’s remark, in response to the argument that advertisements should be denied copyright as they are not art, that “[i]t would be a dangerous undertaking for persons only trained to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903). It is true that their proposal does not involve determining what is or is not art. But their following assertion — that “[w]e merely assign courts the task of determining an expressive work’s level of originality” (Parchomovsky & Stein, *supra* note 3, at 1523) would seem to be the very definition of the kind of decision-making that Holmes warned against. It is true that courts currently already make similar, tricky determinations, as when a defendant invokes fair use and judges are called upon to make out the allegedly infringing work’s level of transformativeness. But that does not involve comparing the level of originality in both works. That seems to us to add to the complexity of the task. Moreover, we find the factors that courts currently take into consideration — giving more leeway to copy from factual and published works than from fictional and unpublished works, for example — more relevant than Parchomovsky and Stein’s criteria. The important point is whether or not the defendant’s work has added something significantly new. It is not clear to us what is to be gained by staging an originality contest between the defendant and the plaintiff’s works.

eral society would likely retreat from imposing such standards in the face of charges of elitism, paternalism, or censorship, and for good reason.”¹³¹ Instead, drawing on the work of pragmatist philosophers, primarily John Dewey, Beebe suggests that we would do better to shift our attention from art as objects to art as experience,¹³² and to relate the aim of copyright law to the process rather than the products of creation. From this perspective, the improvement of aesthetic conditions is not measured so much by the quantity and quality of cultural expression as by the extent to which our culture facilitates meaningful participation.¹³³ Again, the reasoning springs from unique characteristics of the aesthetic domain:

In this sense (as in many others), aesthetic progress is fundamentally different from scientific or technological progress. We would not typically say that enhanced popular participation in the production of scientific and technological progress itself constitutes progress in those fields, unless we assume that this participation would itself help to further greater progress. Our focus is always on the ends of these forms of progress, not on any intrinsic value in the means by which those ends are achieved. By contrast, it is conventional to observe across various approaches to aesthetics that the process of aesthetic creation may be and usually is its own reward.¹³⁴

This seems to us a more discernible and discerning benchmark for aesthetic progress than degree of originality, and as such throws further doubt both on the feasibility and advisability of raising or recalibrating copyright’s originality requirement.

C. Other Workable Solutions

It is not clear, however, how relevant Beebe’s observations are to copyright’s subject matter definition, but they clearly have implications for the scope of protection,¹³⁵ which brings us to a third dubious premise: That “the only workable way to afford elbow room for future creators is by narrowing copyright protection based on the originality criterion.”¹³⁶

¹³¹ Beebe, *supra* note 57, at 41.

¹³² See JOHN DEWEY, *ART AS EXPERIENCE* (1934).

¹³³ Beebe, *supra* note 57, at 42.

¹³⁴ *Id.* at 42.

¹³⁵ Beebe is somewhat vague on this point, though he does at least indicate which of the two is more significant: “[T]he subject matter definition, the binary question of going to grant or denial of protection, is only half the copyright story, and not the most important half. Copyright scholars will recognize that if our goal is to promote the progress of everyday aesthetic experience, rather than simply the stockpiling of artistic achievements, then the focus of our concern should be on how aesthetic discrimination may impact on the *scope* of protection provided to copyrighted works as against the uses others might seek to make of those works.” *Id.* at 43.

¹³⁶ Parchomovsky & Stein, *supra* note 3, at 1520.

This is a curious claim. As Parchomovsky and Stein themselves note, scores of scholars have made the point that copyright protection has become too broad.¹³⁷ They have also come up with many alternative solutions. Justin Hughes, for example, thinks the copyright system should be reformed for the same reason put forward in Part I, namely that too many objects have fallen into copyright, and that this shrinks the public domain and weighs down the efforts of subsequent creators. However, he thinks the problem stems from the law's notion (or lack of notion) of what constitutes a work, not from its conception of originality. He thus finds it "disingenuous to use the originality requirement as the doctrinal bar against copyright protection of titles, names, and short phrases," as "[m]any very small expressions positively leap over the small threshold of originality we have established in copyright law. The real issue is not lack of originality; the real issue is size."¹³⁸ For Hughes, then, the solution is not to raise or recalibrate the yardstick for originality, but to establish a minimum standard for what counts as a work.

More generally, other proposals can help to mitigate the overbreadth of copyright. The (re)introduction of formalities as a *sine qua non* for copyright would surely reduce the amount of works eligible for protection.¹³⁹ Also, shortening the copyright term — currently lasting for the author's life plus an additional seventy years in the U.S. and many other countries¹⁴⁰ — would return works to the public domain quicker.¹⁴¹ Another

¹³⁷ They write that "there is virtual consensus among theorists that copyright law offers excessive protection to existing authors and does so at the expense of future creators." *Id.* at 1515.

¹³⁸ Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 578 (2005).

¹³⁹ See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 251-52 (2001); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 *U. CHI. L. REV.* 471 (2003); Sprigman, *supra* note 2; James Gibson, *Once and Future Copyright*, 81 *NOTRE DAME L. REV.* 167 (2005); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, *UTAH L. REV.* 551, 562-63 (2007); Van Gompel, *supra* note 2; WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 203-09 (2011).

¹⁴⁰ 17 U.S.C. § 302(a) (2006). In case of a "work made for hire", the copyright endures for a term of ninety-five years from the year of its first publication, or 120 years from the year of its creation, whichever expires first. *Id.* art. 302(c) (2006). In the EU, the copyright term is harmonized at life plus seventy by Article 1 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372/12 of 27.12.2006.

¹⁴¹ See, e.g., Rufus Pollock, *Forever Minus a Day? Some Theory and Empirics of Optimal Copyright*, in *SHOULD WE GIVE EVERY COW ITS CALF? MONOPOLY, COMPETITION AND TRANSACTION COSTS IN THE PROMOTION OF INNOVATION AND CREATIVITY* 108, 133 (2008) (finding an optimal copyright

way to foster creativity and improve copyright law is to introduce measures counterbalancing “statutory protections for copyright . . . with affirmative protections for the public domain.”¹⁴² It has been proposed that such measures aim to prevent copyright owners from overreaching and making either deceitful or dubious intellectual property claims that block legitimate uses of their creations.¹⁴³ Meanwhile, the Center for Social Media of the School of Communication at American University has developed best practices guidelines for several groups of practitioners — documentary filmmakers, online video creators, and poets, for example — who often draw on previous works in their creative endeavors, effectively making it easier for them to rely on fair use.¹⁴⁴

Although these proposals also have their own specific advantages and disadvantages and will certainly engender criticism from one or another side,¹⁴⁵ our point is that, given the difficulties of raising the threshold of originality, other possible solutions must not be overlooked, as they may well provide good alternatives.

CONCLUSION

Although we agree that the current copyright system is flawed and in need of reform, we are not convinced that the introduction of a stricter originality standard focusing on a work’s degree of non-obviousness is the

term — a term that maximizes creative production and social welfare — of around fifteen years. This leads Pollock to suggest policymakers would improve social welfare by reducing the copyright term.)

¹⁴² JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* 228 (2011).

¹⁴³ Mazzone’s solution, for example, is “not to change the scope or content of intellectual property rights, but to create mechanisms to prevent people and organizations from asserting legal protections beyond those they legitimately possess.” *Id.* at 74. He makes a number of suggestions. For example, he wants to introduce a symbol (similar to the © which indicates what is copyrighted) to specify that a work is in the public domain. He also points out that there ought to be a downside to interfering with fair use, and that there should be a federal agency expressly charged with safeguarding the public domain. Agency regulation could fight overreaching by spelling out what constitutes fair use, thus keeping copyrights within their appropriate boundaries. Such an agency would have much more flexibility than Congress to adopt regulations quickly, to make revisions and updates when needed, as industries and technologies evolve, or novel practices develop.

¹⁴⁴ See *Fair Use Codes & Best Practices*, CENTER FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/best-practices/fair-use-codes-best-practices> (last visited Mar. 4, 2013).

¹⁴⁵ See, e.g., Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 *COLUMBIA J.L. & ARTS* 311 (2010) (providing a “reality check” in response to proposals to reintroduce mandatory copyright formalities).

way to go. As we have shown in this article, the aesthetic domain, which comprises many of the works that lie at the heart of copyright law, is simply too unstructured. There is no universal benchmark or any widely shared norms or procedures that allows us to recognize originality with much precision, and theoretical explorations in the humanities are simply not geared towards drawing sharp distinctions that apply to all works. Most studies concern works situated at (or very near) the top of the cultural hierarchy, far removed from the limit cases in copyright law.

Assessments of originality in aesthetic disciplines are also anchored in analyses of comparable works. In our opinion, it is only feasible to make reasonably objective decisions on the basis of works' degree of difference from conventional expression when we are dealing with similar kinds of objects. This means that the domain of copyrightable works would have to be divided into different sub-categories with separate standards, as we all tend to think of some types of works as inherently more valuable or creative than others. There are no absolutes, of course, but clearly there are certain general tendencies and widely held assumptions. Most of us instinctively treasure novels more than advertisements, for example, so to apply the same criterion — degree of difference from convention — to both would be sure to produce results that most of us would find entirely unfair.

This raises a whole new set of issues: Where should we draw the boundaries between different classes of works? What criteria should apply in different categories? What happens when the cultural standing of groups of works changes? The aesthetic value and potential of cultural forms and practices is not given, after all, but shifts over time: film, television, computer games and comics, for example, all enjoy considerably more prestige today than at previous moments in time. Given these fluctuations, and the function of cultural expressions in democratic societies, do we really want to outsource such deliberations to courts of law? The current originality threshold is by no means perfect, but it does at least sidestep all of these awkward questions.

Finally, we would like to see a more rigorous and empirically based analysis of the problems the current originality requirement causes for contemporary culture, and of how raising or recalibrating the standard solves them. Specifically, it is not clear to us that it appreciably affects the flourishing of the arts, as the proposals suggest, since artists do not typically use as raw materials of creation the kinds of trivial works that would be excluded if the bar were set somewhat higher. There might be examples, of course, such as — arguably — the well-known *Rogers v. Koons* case, in which famous artist Jeff Koons instructed his assistants to make a sculpture of a man and a woman with their arms full of puppies guided by

a black-and-white postcard photograph taken by Art Rogers.¹⁴⁶ Although it is not clear whether or not the latter would actually flunk a higher originality test, we can at least not rule out the possibility that some works of art might appropriate or feature entirely trivial component parts that enjoy copyright protection on their own. But even if there might be examples where aesthetically original art suffers because of the low originality threshold, it does not seem reasonable to say that this constitutes a vital obstacle to the flourishing of art in contemporary culture. Nor is it clear that the originality criterion is an effective tool for dealing with such cases. If the aim is to promote the flourishing of the arts, we agree with Jason Mazzone that:

The principal defect of intellectual property law is not, as many observers have maintained, that intellectual property rights are too easily obtained, too broad in scope, and too long in duration. Rather, the primary problem is the gap that exists between the rights that the law confers and the rights that are asserted in practice.¹⁴⁷

It is also debatable whether modifying or recalibrating the originality criterion is an effective tool if the aim is to shape or redirect creative efforts in the cultural sphere. As William Patry writes: “Copyright is neither the basis for creativity nor for culture. Copyright’s actual role is more limited: it ensures that works once created and successful can be protected against free riding.”¹⁴⁸ Scholars who have studied the creative industries, conclude that “[t]here has been virtually no research that demonstrates the case one way or the other or that shows the responsiveness of the production of creative goods and services to the strength of copyright protection.”¹⁴⁹

The proposal to raise the originality threshold, or to make works’ degree of copyright protection commensurate with their degree of originality, holds intuitive appeal. However, we find it impracticable, and have reservations about the presuppositions on which it is based: It is unclear exactly which practices and areas of culture and society stand to benefit, and in what way, and modifying the originality criterion seems to us a rather blunt tool to advance or redirect creative efforts. Other measures are more feasible, proficient, and relevant to the problems that so many creators face as a result of deficiencies in the current legal framework.

¹⁴⁶ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

¹⁴⁷ MAZZONE, *supra* note 142, at 68.

¹⁴⁸ PATRY, *supra* note 139, at 16.

¹⁴⁹ Ruth Towse, *Creativity, Copyright and the Creative Industries Paradigm*, 63 *KYKLOS* 461, 463 (2010); see also Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 *THEORETICAL INQUIRIES IN L.*, 29 (2011) (arguing that “the empirical foundation for the copyright-as-incentive story is seriously suspect”).

