

COPYRIGHT AS A RULE OF EVIDENCE

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Copyright commentators rarely focus on issues of evidence. They typically interpret the originality requirement as if there is some principled reason why creative works should be protected whereas less inspired works should not. Many likewise read the merger doctrine and the fixation requirement as if these are substantive distinctions sensibly drawn between various types of expression. But evidence? Rarely if ever do conventional accounts acknowledge that copyright doctrines might serve this less noble master—responding to unavoidable problems of proof rather than announcing fundamental copyright principles.

As I will argue below, however, the originality requirement, the merger doctrine, and the fixation requirement can all be justified only on these very functional grounds. These doctrines do not further the lofty normative goals with which they are typically associated. These are instead practical doctrines that are best understood as tools that exclude from the copyright regime cases for which the costs of litigation would be intolerably high. In short, these are rules about evidence. And, because modern law fails to recognize that fact, courts today routinely and wrongly invoke these doctrines to deny protection even in cases where there are in fact no plausible evidentiary concerns.

To unpack all this a bit, let me begin by focusing on just one copyright doctrine—the originality requirement. It is today well established that, in order to qualify for copyright protection, a work of authorship must show at least a modicum of creativity.¹ This requirement might at first seem intuitive. After all, novels, plays, and musical compositions are the core stuff of copyright, so naturally some bit of creativity is required. It is nevertheless helpful to ask the question of why, as a legal rather than an artistic matter, a well-designed copyright regime would exclude ordinary, or what I call “banal,” expression.

One typical response in the literature is to say that copyright favors creative over banal work because banal work is not valuable to society.²

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¹ The origins of this requirement are discussed *infra* Part I.

² See *infra* notes _ and accompanying text.

Obviously copyright excludes banal expression, these scholars explain; why incur the costs of administering a complex legal regime with respect to worthless work? This argument quickly unravels, however, since many works are both banal and valuable. The phone book lacks any creative spark, but telephone listings certainly serve an important function in society. In fact, a creatively organized phone book—say, one organized by the named party’s height—would likely be less valuable than a traditional, alphabetical one. Databases similarly are often banal but valuable. *The Kelley Blue Book*, for example, greatly assists purchasers of used cars by gathering information about the market value of various vehicles, but the result is definitely not the kind of book that makes for exciting bedtime reading.³ *The American Bone Marrow Registry* is similarly an utterly uncreative but nonetheless valuable work.⁴

Rejecting the idea that creativity is a filter for social value, a competing theory put forward in the literature is an argument about costs.⁵ Maybe copyright excludes banal work because banal work is inexpensive to create. No point in incurring the costs of the copyright regime with respect to works that are inexpensive to create, this argument points out; even without protection, firms and individuals would still find it worthwhile to produce inexpensive work. This argument falls as quickly as the first, mainly because the same examples that debunked the social value theory serve to undermine the cost theory, too. There are significant up-front costs associated with compiling new phone books and researching new databases. So, while it is true that banal expression is sometimes cheap to produce, this is not true across the board, and, overall, there is no reason to think that a lack of creativity is a good proxy for a lack of production costs.⁶

More sophisticated arguments are also on occasion put forward. For example, perhaps copyright excludes banal work as a way of encouraging authors to focus on creative work. Increasing the reward for banal work might distract authors, this argument suggests, causing them to spend more time developing dictionaries and databases and less time writing *Moby Dick* and *Canterbury Tales*. This distraction argument has some appeal at first, but it ultimately proves too much. For starters, it is hard to

³ For more information, see <<http://www.kbb.com>>. The Second Circuit addressed issues related to the copyright-eligibility of this sort of database in *CCC Information Services v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994).

⁴ The registry is a non-profit organization that maintains a database of information about possible bone marrow donors. For more information, see <<http://www.abmdr.org>>.

⁵ See *infra* notes ___ and accompanying text.

⁶ Interestingly, this sort of error is common throughout the intellectual property literature. Even Judge Posner makes this mistake when he asserts that the “functional meaning of [unpatentable] is discoverable at low cost.” Richard A. Posner, *Economic Analysis of the Law* 39 (4th ed., 1992).

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imagine that Mark Twain was torn between either working on the phone book or penning American classics; so, when we talk about marginal incentives, we really are thinking about the decisions made by investors, publishers, and similar business entities, but not authors themselves. If our focus is on these sorts of business entities, however, the argument does not just argue against protecting banal work; it actually expands to argue against almost any legal protection. That is, if we were to change the law so as to make any business less attractive—from restaurant management to, yes, database production—that would, at the margin, slightly increase the allure associated with investments in creative expression. Yet surely no one argues against food safety standards on the grounds that a more precarious restaurant industry would lead to better Hollywood scripts. Just the same, the argument is not compelling as applied to banal expression, unless (again) we think banal expression either is of extremely low social value or is extremely inexpensive to produce.⁷

Consideration of these various theories begins to make clear not only how difficult it is to justify the creativity inquiry but also how precarious the inquiry itself must be. Is there really any consensus as to what is, and what is not, creative? And, even if there is consensus, are judges capable of divining it? As Justice Holmes said in an earlier era, it is “a dangerous undertaking for persons trained only [in] the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”⁸

But now consider an explanation tied to something that judges are quite competent to evaluate: evidence. If the copyright system were to recognize rights in banal work, courts would be overwhelmed by difficult evidentiary disputes. Two parties would come forward with remarkably similar banal works, and the court would find it virtually impossible to determine whether one copied from the other (impermissible infringement) or whether instead any similarity between the works was just a natural outgrowth of the fact that both works were banal. Ask four workers to create a directory of Asian restaurants in Chicago and, whether they copy or not, the four will likely produce markedly similar directories. A creativity requirement, then, empowers courts to exclude from the copyright system a particularly messy class of cases: cases where courts would not be able to use similarity as the basis for even a weak inference as to the likelihood of impermissible copying.

⁷ For further elaboration on this point but in the patent context, see Doug Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 *Minnesota L. Rev.* 693, 717-18 (1997).

⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

In this Article, I set out to more rigorously examine this evidentiary perspective on copyright law. My goal is to bring to bear on copyright what is elsewhere an increasingly accepted proposition; namely, that the only way to understand any set of legal rules is to first recognize that legal rules must be implemented by imperfect and sometimes costly institutions.⁹

I proceed as follows. In Part I, I pick up on the discussion begun in this Introduction and thus consider the combined constitutional and statutory requirement that a work be original to its author. This is one of the two main prerequisites to federal copyright protection, and it is today interpreted to mean not only that the work was not copied from another source, but also that the work demonstrates at least a modicum of creativity. I argue that requiring creativity makes sense only to the extent that it is a proxy for the evidence rule. That is, a sensible copyright system might distinguish between banal and creative work, but it would do so only in cases where that distinction helps to identify and exclude cases that would otherwise present extreme problems of proof. This is perhaps the boldest claim of the Article given that many courts and commentators seem to believe that a sensible copyright regime would value creativity in and of itself. One important implication here is the identification of two categories of works that are today routinely denied protection on grounds of insufficient originality even though neither category raises plausible evidentiary concerns.

In Part II, I turn attention to the second of the two main prerequisites to federal copyright protection: the requirement that a work be fixed in a tangible medium of expression. Under current law, a work qualifies for protection only after it has been captured in some stable form, for example a typewritten manuscript, a video or audio tape, or even sufficiently detailed handwritten notes. I argue that the evidence theory offers an intuitive explanation; unfixed expression—say, oral remarks—would quite obviously introduce extraordinary problems of proof. I consider a variety of competing rationales, however, and I also point out some tensions between current practice and the way the doctrine should be implemented if evidence really is its prime concern.

Part III offers a survey of several other copyright doctrines on which the evidence theory sheds light. In particular, I consider the merger doctrine, the doctrine of *scènes à faire*, the federal registration procedure, issues relating to joint authorship, and the definition of a copyright holder's exclusive rights under section 106 of the Copyright Act. In some of these instances, I use the evidentiary theory to criticize current practice as illogical. In others, I argue that the evidentiary theory explains current practice

⁹ On this theme, see Lon Fuller; Adrian Vermeule; others.

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and thus can guide courts in knowing when to invoke that particular provision or doctrine.

Part IV briefly concludes, discussing broader implications of this view of copyright and mapping out possible future projects in the area.

I. The Creativity Requirement

In copyright, works that demonstrate a modicum of creativity are eligible for protection, but works that lack creativity are not. Works typically denied protection due to a lack of creativity include phone books,¹⁰ food recipes,¹¹ databases,¹² and computer protocols.¹³ The question I address in this section is whether these sorts of exclusions are justified. That is, I ask whether there is any good reason for federal copyright law to distinguish creative from banal work.

The section proceeds in four parts. In the first, I trace the origins of the creativity requirement. As I explain, it is today widely accepted that creativity is a constitutional requirement, although this interpretation did not take hold until the 1991 Supreme Court decision in *Feist Publications v. Rural Telephone Service Company*. The second subsection considers standard explanations of, and justifications for, this line between banal and creative work. For example, some commentators believe that creative work should be favored because it is more valuable to society. The third subsection articulates the evidence theory and analyzes several criticisms thereof. A handful of courts have indicated that evidentiary concerns drive the distinction between creative and banal work. Those opinions have been sharply—and I argue unfairly—criticized by copyright commentators. Finally, the fourth subsection concludes with implications, focusing in particular on cases where the modern creativity requirement denies protection even though there is no reason to do so on evidentiary grounds.

A. Foundations

Article 1, Section 8, Clause 8 of the United States Constitution recognizes in Congress the power to “promote the Progress of Science and the Useful Arts, by securing for limited Times, to Authors and Inventors, the

¹⁰ See, e.g., *Illinois Bell Telephone Co. v. Haines & Co., Inc.*, 932 F.2d 610 (7th Cir. 1991); *BellSouth Advertising & Pub. Corp. v. Donnelley Information Pub., Inc.*, 999 F.2d 1436 (11th Cir. 1993).

¹¹ See, e.g., *Publications Intern., Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996); *Sassafras Enterprises, Inc. v. Roshco*, 889 F. Supp. 343 (N.D. Ill. 1995).

¹² See, e.g., *Warren Pub., Inc. v. Microdos Data Corp.* 115 F.3d 1509 (11th Cir. 1997); *Cooling Systems & Flexibles v. Stuart Radiator*, 777 F.2d 485 (9th Cir. 1985).

¹³ See, e.g., *Secure Serv. Tech., Inc. v. Time & Space Processing, Inc.*, 722 F.Supp. 1354 (E.D. Va. 1989); *Superchips Inc. v. Street & Performance Electronics Inc.*, 58 U.S.P.Q. 2d 1849 (M.D. Fla. 2001).

exclusive Right to their respective Writings and Discoveries.”¹⁴ The clause is today interpreted to authorize both copyright and patent law, with “authors” and “writings” referring to copyright and “inventors” and “discoveries” referring to patent. Congress has frequently invoked this power to promulgate federal copyright statutes. The current one is the Copyright Act of 1976,¹⁵ although that statute has been significantly amended in the years since 1976, in particular in 1989 by the Berne Convention Implementation Act,¹⁶ in 1998 by both the Sonny Bono Copyright Term Extension Act¹⁷ and the Digital Millennium Copyright Act.¹⁸ Nowhere in all this statutory and constitutional language does their appear any explicit reference to creativity, however. The closest language comes from section 102(a) of the 1976 Act which states that only “original works of authorship” are eligible for protection.¹⁹ That phrase was left undefined in the 1976 Act, and the legislative history suggests that it was “intended to incorporate without change the standard of originality” that had been previously developed by the courts.²⁰

Just what was this previously developed standard? Unfortunately, courts had not really developed a clear standard at the time of the 1976 Act. All that was clear, in fact, was that, at a minimum, an eligible work had to derive in some way from the would-be copyright claimant. A work slavishly copied from another source was not eligible for protection. Copyright was reserved only for “originator[s]” and “maker[s]”; “he to whom anything owes its origin.”²¹ This was an originality requirement not in the sense of requiring “freshness of aspect, design, or style,”²² but rather in the more literal sense of requiring that the work at issue originate with the author in question. Originality of this sort was a foundational principle. As the Second Circuit put it in 1976, “the one pervading . . . prerequisite to copyright protection . . . is the requirement of originality—that the work be the original product of the claimant.”²³ Originality was generally understood to be a constitutional obligation. The Constitution authorizes

¹⁴ United States Constitution, Art. 1, Sec. 8, Cl. 8.

¹⁵ Copyright Act of 1976, Pub. L. No. 94-553, 101, 90 Stat. 2541, 2542 (1976).

¹⁶ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 (1988).

¹⁷ The Sonny Bono Copyright Term Extension Act, Act of Oct. 27, 1998, Pub. L. No. 298, 105th Cong., 2d Sess., 112 Stat. 2827.

¹⁸ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

¹⁹ 17 U.S.C. § 102(a).

²⁰ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 138, at 51 (1976) [hereinafter “House Rep.”].

²¹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

²² *Miriam-Webster Collegiate Dictionary* (2001) (entry for “originality”).

²³ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 489-90 (2d Cir.) (quoting *M. Nimmer, Nimmer on Copyright* § 10 (1975)), cert. denied, 429 U.S. 857 (1976).

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Congress to protect the writings of “authors”; and an author, courts reasoned, was necessarily someone who independently creates an expressive work.

Beyond this one aspect, however, the originality standard as of 1976 was murky at best. The trouble came in articulating what it meant to say that a work originated with a particular author. No expression is completely the independent work of its author; every author to some degree builds on the work of those who have come before. Thus courts had to further define originality such that it distinguished permissible from impermissible evolution. Was it enough if an author made significant contributions of time, skill, or expense? Did originality presuppose a minimum level of artistic achievement or creative effort? These questions were not easily resolved, and it was in the struggle to answer them that courts first began to distinguish banal works from works that exhibited some degree of imagination, vision, or spark.

One of the earliest and most influential opinions on this point was the Supreme Court opinion in the *Trade-Mark Cases*.²⁴ The opinion was a consolidated response to several appeals, all asking that specific trademark violations be excused on grounds that federal trademark law was beyond Congress’ constitutional powers. In analyzing the case, one of the arguments the Court had to address was the government’s contention that the constitutional language authorizing copyright law could be read to authorize trademark law as well. The Court rejected this argument.

The Court’s analysis on point is only a paragraph in length and it contains no citations to any history, document, or lower court decision. But the thrust of the passage is that there are important distinctions to be drawn between constitutional “writings” on the one hand and mere trademarks on the other. Writings, the Court tells us, are “founded in the creative powers of the mind” and are the “fruits of intellectual labor.”²⁵ Trademarks are “often the result of accident rather than design” and can be “something already in existence.”²⁶ A writing results from “novelty, invention, discovery, or any work of the brain.”²⁷ A trademark, by contrast, requires “no fancy or imagination, no genius, no laborious thought,” just the use of a word or symbol in commerce.²⁸

What all this meant for copyright’s creativity requirement was unclear. In some sentences, the Court seemed to be saying nothing more than

²⁴ 100 U.S. 82 (1879).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

what other courts had said and would continue to say about “authorship”: copyright requires, at a minimum, that a would-be author make a non-trivial contribution to the work at issue. This was the difference between writings and trademarks; writings had to be the work of their authors, but trademarks could be plucked from existing words and symbols. In other sentences, however, the Court seemed to require something more, distinguishing trademarks on the ground that they lack “imagination” and “genius” and thus seemingly implying that copyright-eligible works must demonstrate these qualities. If this was what the Court had in mind, note that these extra requirements were being tied to the constitutional word “writings” and not either to the constitutional word “authors” or to any language from the copyright statute in effect at the time of the case.

The Supreme Court would further clarify its position a few years later in *Burrow-Giles Lithographic v. Sarony*.²⁹ At issue there was a photograph of the playwright Oscar Wilde. The photographer had posed Wilde, adjusted the background lighting, chosen Wilde’s wardrobe, and ultimately operated the camera that captured Wilde’s image. Defendant—in court because he had made an unauthorized lithograph based on the photo—argued that these many activities did not amount to authorship for constitutional purposes:

[A] photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought, or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.³⁰

The implication was that photographers were not authors, and Congress therefore did not have the constitutional authority to protect photographs.³¹

As a technical matter, the *Burrow-Giles* Court did not address this argument. The photograph of Wilde was not some mechanical rendering completely devoid of “originality of thought” or “novelty in the intellectual operation.” Quite the opposite, the trial court had found as a matter of fact that the photograph was “useful, new, harmonious . . . and that [] plaintiff made the same . . . entirely from his own original mental conception.”³² Some photographs might lack these indicia of originality and those would pose a more difficult question. But that was not the case before the

²⁹ 111 U.S. 53 (1884).

³⁰ *Id.* at 59.

³¹ Defendant also argued that a photograph could not be a “writing” for constitutional purposes; that term, defendant argued, was limited to include only items like books and pamphlets that are literally written by an author. *Id.* at 57. The Court rejected this argument, stating that the term should be read broadly and noting, further, that photographs did not even exist at the time the constitutional language was written. *Id.* at 58.

³² *Id.* at 54 (discussing, but not formally citing, trial court findings).

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Court, and the Court therefore refused to speak to the issue. “On the question as thus stated we decide nothing,” wrote Mr. Justice Miller for a unanimous Court.³³

In dicta, however, the *Burrow-Giles* Court did express doubt that any fair interpretation of the constitutional language could make creativity or artistic accomplishment a prerequisite to copyright protection. As the Court pointed out, the first Congress of the United States, “sitting immediately after the formation of the Constitution,” had passed a copyright act that explicitly included within its purview maps and charts as well as books.³⁴ By any definition, these were works of negligible creativity, yet in 1790 they were deemed eligible for copyright by Congress. “The construction placed upon the Constitution . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.”³⁵

In 1903, the Supreme Court again spoke to the issue of what an author had to contribute in order to produce work eligible for copyright protection, this time in the case of *Bleistein v. Donaldson Lithographing Company*.³⁶ Plaintiff had produced a series of lithographs representing images from the circus. There was some dispute as to how similar the images were to the various real-life circus acts depicted, but, importantly, the Court held that this detail was not relevant to the issue of copyright eligibility. “Even if [the lithographs] had been drawn from the life,” wrote the majority, the resulting images would still be the “personal reaction” of the individual who created them and, as such, eligible for protection.³⁷ Explained the Court:

Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the [federal statute].³⁸

Thus, while the *Trade-Mark Cases* and many lower court opinions had seemed to flirt with the idea that the Constitution requires more than mere origination—“fancy,” “imagination,” “genius,” “laborious thought”—in

³³ Id. at 59.

³⁴ Id. at 56. The word “charts” likely referred to navigational charts, the creation of which was obviously a priority during the early years of the nation’s development.

³⁵ Id. at 57. Jane Ginsburg offers a rich account of this history and its implications in her piece, Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865 (1990).

³⁶ 188 U.S. 239 (1903).

³⁷ Id. at 249-50.

³⁸ Id. at 250.

Bleistein, as in the dicta of *Burrow-Giles*, the Supreme Court seemed ready to accept almost any authorial contribution as sufficient.

Lower courts over the next many years understandably wavered between requiring creativity and suggesting that any non-trivial contribution could suffice. Consider, for example, two prominent and contemporaneous Second Circuit decisions: *Chamberlin v. Uris Sales Corp.*³⁹ and *Alfred Bell & Company v. Catalda Fine Arts*.⁴⁰ In *Chamberlin*, the Second Circuit evaluated a game board similar to that used for the game backgammon. The court focused on creativity, explicitly stating that “the Constitution does not authorize [copyright] to one whose product lacks all creative originality.”⁴¹ The opinion was light in terms of its detail or reasoning, but it did seem to follow the language of the *Trade-Mark Cases* rather than the looser requirements articulated in *Burrow-Giles* and *Bleistein*.

Just six years later, however, the Second Circuit changed course. The new case was *Alfred Bell*, and at issue there were a set of engravings designed to mimic several preexisting oil paintings. The engravings had been carved with great skill and meticulous care, but still their basic purpose and effect was simply to reproduce the original images. The question was whether, on balance, this was adequate originality for copyright purposes. The Second Circuit held that it was:

All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably his own. Originality in this context means little more than a prohibition of actual copying.⁴²

The Second Circuit went on to say that the aforementioned more-than-trivial variation could be completely accidental. Bad eyesight or “a shock caused by a clap of thunder” could yield authorship in the constitutional sense, despite the obvious lack of any intentional mental process.⁴³ The contrast between *Chamberlin* and *Alfred Bell* was thus shocking. In *Chamberlin*, it was “obvious” to the Second Circuit that the “Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality.”⁴⁴ A scant six years later, copyright was available no

³⁹ 150 F.2d 512 (2d Cir. 1945).

⁴⁰ 191 F.2d 99 (2d Cir. 1951).

⁴¹ 150 F.2d at 513.

⁴² *Id.* at 102-03.

⁴³ *Id.* at 105. Cf. *Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 305 (D.C.N.Y. 1968) (“The accidental or laboriously contrived creation, if it qualifies objectively, is doubtless enough.”).

⁴⁴ 150 F.2d at 513.

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“matter how poor artistically the 'author's' addition,” so long as “it be his own.”⁴⁵

Other courts took different routes in trying to articulate what the Constitution implicitly required. Labor, for example, was one popular metric by which some courts measured originality. These cases found that the constitutional demand could be satisfied by significant effort—“sweat of the brow”—even in the absence of other touchstones. Thus, in *Toksvig v. Bruce Publishing, Inc.*,⁴⁶ for example, plaintiff had published a biography of storyteller Hans Christian Andersen. Plaintiff had invested considerable effort researching the book: there were flights to Denmark, interviews with people who knew Andersen at various stages of life, translations of information from Danish to English, and so on. After plaintiff’s biography came out, defendant also wrote a biography of Andersen. But, instead of researching Andersen herself or negotiating a license with plaintiff, defendant just took what she needed from plaintiff’s book and used it as her own. This, to the *Toksvig* Court, was copyright infringement. Plaintiff’s significant efforts gave him rights in his resulting research. Another biographer could re-discover those facts or strike a bargain with the original biographer, but unauthorized copying was not to be permitted.

Not all courts judged labor to be sufficient to meet the constitutional requirement, however. An influential opinion on this side of the debate was the Fifth Circuit’s opinion in *Miller v. Universal City Studios*.⁴⁷ At issue this time were the facts associated with the 1968 kidnapping of a college-aged girl. Plaintiff had worked with the victim to gather the facts of her story and had written a book revealing those details. Defendant allegedly used the book without permission to develop a made-for-television movie. Assuming for the purposes of appeal that the book did indeed require significant effort in its production, the *Miller* Court asked whether significant research efforts alone could make a work eligible for copyright. The court held that they could not.

The *Miller* Court was very careful to note that it was not basing its decision on policy but was, instead, simply following what it thought were unavoidable limitations inherent to copyright law.⁴⁸ Specifically, the court read *Burrow-Giles* to require that “an ‘author’ is one ‘to whom anything owes its origin; originator; maker; one who completes a work of science or

⁴⁵ 191 F.2d at 103.

⁴⁶ 181 F.2d 664 (7th Cir. 1950).

⁴⁷ *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

⁴⁸ *Id.* at 1369 (“The issue is not whether granting copyright protection to an author’s research would be desirable or beneficial, but whether such protection is intended under the copyright law.”).

literature.’”⁴⁹ And the *Miller* Court refused to believe that a fact could “originate” with a person, even one who put in significant efforts to uncover it. “The discoverer merely finds and records. He may not claim that the facts are ‘original’ with him.”⁵⁰ Note that the panel did seem to understand the possible argument on the other side. The majority opinion explicitly points out that the court below had focused on “time and money” as the basis for the plaintiff’s claim.⁵¹

Debates about the various metrics for measuring authorship might have continued indefinitely but for the Supreme Court’s 1991 ruling in *Feist Publications v. Rural Telephone Service Company*.⁵² There, the Supreme Court held that creativity was an absolute prerequisite to copyright protection. Time, effort, and expense were not enough, nor was skill, nor, presumably, those random variations caused by bad eyesight or claps of thunder. The necessary element—implicit in the use of the words “authors” and “writings” in the constitutional provision—was creativity.

The facts in *Feist* were straightforward. Rural was a local telephone company and, in the course of providing telephone service, it had assigned telephone numbers to its various subscribers. Rural published that information in the form of two telephone directories, an alphabetically organized White Pages and a Yellow Pages that was organized by category. Feist, meanwhile, was not a telephone company but it, too, published telephone directories. For one of them, it wanted to list Rural’s customers in addition to listing telephone customers served by other local companies. Rural refused to license this use of its directory, however, so Feist sent employees to gather the relevant information by going door-to-door. Feist ultimately independently confirmed approximately 3,600 of the 4,935 entries it needed, but it then copied the remaining entries directly from Rural’s telephone books. Rural sued for copyright infringement.⁵³

The Supreme Court rejected Rural’s copyright claim on grounds that what Feist took was not protected expression. To qualify for protection, the Court explained, a work had to be original. And original, “as that term is used in copyright, means . . . that the work was independently created by the author . . . and that it possesses at least some minimal degree of

⁴⁹ Id. at 1368 (quoting *Burrow-Giles*, 111 U.S. 53 at 58).

⁵⁰ Id. at 1368 (quoting 1 M. Nimmer, *Nimmer on Copyright* 2.03(E), at 2-34 (1980)).

⁵¹ Id. at 1369.

⁵² 499 U.S. 340 (1991).

⁵³ More specifically, Rural presented two related theories. First, Rural argued that it had created each listing in isolation and thus held copyright in each name/number pair standing alone. Second, Rural argued that it had created the White Pages and the Yellow Pages and thus had earned protection for those compilations (each taken as a whole) above and beyond its rights in the individual entries.

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creativity.”⁵⁴ The first half of the Court’s definition echoed well-established doctrine. For two hundred years courts had been saying that under federal law an eligible work must in some sense derive from the would-be copyright claimant. But, as the discussion above makes clear, the second half of the Court’s definition had previously been in considerable dispute. The Court ended that dispute with its holding, and it did so by primarily relying on two preexisting Supreme Court decisions: the *Trade-Mark Cases* and *Burrow-Giles*.

The Court read the *Trade-Mark Cases* to support the proposition that the constitutional term “writings” includes only such works as “are founded in the creative powers of the mind” and “are the fruits of intellectual labor.”⁵⁵ Those are of course accurate quotes; but in the context of the *Trade-Mark Cases*, they are subject to two alternative readings. They can be read to require creativity, or they can be read along with other passages in the case to simply require that authors make some non-trivial contribution to the work at issue. Without discussion, the *Feist* Court adopted the creativity interpretation—interestingly, adding that only a “minimal degree” of creativity is necessary, even though the *Trade-Mark Cases* opinion itself contains no such qualifying language.

The *Feist* Court similarly read *Burrow-Giles* to require creativity, albeit this time because of the constitutional word “authors.” *Feist* does not quote any of the contrary language from *Burrow-Giles*, for example the passage where the *Burrow-Giles* Court explicitly refuses to decide this issue,⁵⁶ or the discussion where the *Burrow-Giles* Court notes that the first federal copyright statute had extended protection to (arguably) uncreative works like maps and charts.⁵⁷ Instead, *Feist* simply quotes a passage from *Burrow-Giles* that describes copyright as applying to “original intellectual conceptions,”⁵⁸ and then quotes a later section where copyright is said to require “intellectual production . . . thought, and conception.”⁵⁹ These passages, according to the *Feist* Court, “emphasize[] the creative component of originality.”⁶⁰

With the rule thus established, the *Feist* Court did dutifully search the telephone listings for the required creativity. Understandably, the Court did not find it. When considering each telephone entry in isolation, the

⁵⁴ Id. at 345.

⁵⁵ Id. at 346 (citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

⁵⁶ See supra note ___.

⁵⁷ See supra notes _.

⁵⁸ 499 U.S. at 346 (citing *Burrow-Giles*, 111 U.S. at 58).

⁵⁹ Id. at 347 (citing *Burrow-Giles*, 111 U.S. at 59-60).

⁶⁰ 499 U.S. at 346.

Court put forward the argument set out in *Miller*—the idea that “facts do not owe their origin” to any particular party and thus cannot satisfy the constitutional language.⁶¹ When considering the telephone books each as a whole, the Court recognized that, in some cases, the selection and arrangement inherent in a compilation would constitute authorship for constitutional purposes, but held that the alphabetical listings at issue here were not sufficiently creative.⁶²

B. Rationales

Many commentators point out that, when analyzing copyright cases, courts tend to adopt a “Romantic” view of authorship. On this view, creative authors are a special class, in some sense morally superior to laborers who merely contribute hard work to a project or technicians whose contributions come in the form of a heavily practiced skill. As Mark Lemley puts it, the Romantic view pictures the author as a “mythical, idealized figure who creates ‘original’ works from whole cloth.”⁶³ Jamie Boyle similarly explains that under this view an “author is presumed to have an almost transcendental insight,” one that “cuts beneath the mundane world of everyday appearance.”⁶⁴ Courts taking this perspective would naturally favor creative over banal work. Thus, as a positive theory of the law, the Romantic view offers one explanation for what has ultimately become the creativity requirement.

Consider two examples drawn from the cases introduced in the previous section. In *Miller*—the case about the 1968 kidnapping of a college-aged girl—a Fifth Circuit panel rejected the argument that hard work is enough to constitute authorship for federal copyright purposes. The court emphasized that an author is someone “to whom anything owes its origin”⁶⁵; a discoverer, by contrast, “merely finds and records.”⁶⁶ In *Feist*, too, there are undertones of the Romantic view. Facts do not “owe their origin” to any particular party, explained the Court.⁶⁷ No matter how much effort it takes to gather them or how valuable they might be, “raw facts

⁶¹ *Id.* at 347.

⁶² *Id.* at 362-63. Even if the phone books had been deemed sufficiently original, there would still have been some dispute over whether Rural took those original elements or, instead, merely took the name/number pairs independent of any original arrangement that Rural might have superimposed.

⁶³ Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *Texas L. Rev.* 873, 877 (1997).

⁶⁴ James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 *American Univ. L. Rev.* 625, 629 (1988).

⁶⁵ 650 F.2d at 1368 (citing *Burrow-Giles*, 111 U.S. 53 at 58).

⁶⁶ *Id.* at 1368 (quoting 1 M. Nimmer, *Nimmer on Copyright* 2.03(E), at 2-34 (1980)) (emphasis added).

⁶⁷ 499 U.S. at 347.

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may be copied at will.”⁶⁸ In the Court’s eyes, the distinction again was “between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has *merely* discovered its existence.”⁶⁹

The Romantic theory is not a normative rationale, of course; indeed, even its proponents are quick to question the underlying policy justifications. Jamie Boyle, for example, argues that, across a wide range of intellectual property settings, the Romantic view has led courts to recognize “too many intellectual property rights” and “to confer them on the wrong people.”⁷⁰ In particular, Boyle thinks that the Romantic author is often an illusion, and that the illusion causes courts to undervalue the interests of the many preexisting authors on whose work the Romantic author actually builds. Peter Jaszi, too, is both a proponent of the positive theory and a skeptic when it comes to normative payoff. At the start of his careful and well-researched article on Romantic authorship,⁷¹ he explicitly warns readers that his research “says little about what the content of copyright law should be.”⁷² Even the *Miller* Court could not help but distance itself from the normative implications of Romantic authorship, noting in the opinion that the issue at hand was not “whether granting copyright protection to an author’s research would be desirable or beneficial” but instead only “whether such protection in intended under [current] copyright law.”⁷³ One reason why the Romantic view of authorship falls short as a normative theory is that it explains only half the puzzle. The theory extols the virtues of creative authorship and, if one finds that convincing, the theory thereby provides good reason to protect creative work. What the theory does not do is tell us anything about why banal work should be denied protection. For that argument, some other theory is required.

One such alternative theory argues that banal work is not sufficiently valuable to society to warrant the administrative costs associated with copyright protection. Running a copyright regime is costly. The resources that the government invests in copyright disputes could surely be used in more productive ways, as could the resources invested by private parties.

⁶⁸ Id. at 350.

⁶⁹ Id. at 347 (emphasis added).

⁷⁰ Jamie Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* x-xi (1996). For an earlier articulation of these same ideas, see Jamie Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 Cal. L. Rev. 1413 (1992).

⁷¹ Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 Duke L.J. 455.

⁷² Id. at 456.

⁷³ 650 F.2d at 1369.

After all, the fact that private parties invest in litigation only to the extent that their private benefits exceed their private costs tells us nothing about whether those investments are in society's interest as well.⁷⁴ Without copyright protection, many of these resources would be beneficially redirected.⁷⁵ Thus, if banal work were valueless as a class—or even less valuable than creative work—one could reasonably argue that society would be better off excluding these costly, low-value works from the copyright regime.

This turns out to be a difficult position to champion because examples of banal but valuable work are pervasive. The Introduction, for example, identifies a used car guidebook and the *American Bone Marrow Registry*, two valuable but relatively unimaginative works. Telephone listings are similarly valuable but uncreative, as are legal databases like Westlaw and Lexis. That said, some commentators have made this argument. Judge Kaplan, for example, wrote in his popular copyright monograph that the creativity requirement is justified because it ensures that an author must “deposit more than a penny” before the “copyright turnstile” will revolve.⁷⁶ Marshall Leaffer has similarly explained that the creativity requirement might be a “quid pro quo for the copyright monopoly.”⁷⁷

Note that, even if banal work did tend to lack value, that would still be a surprising reason to deny it copyright protection since copyright neither encourages the creation of valueless work nor encourages litigation over it. The insight here is simple: copyright is not a government-sponsored cash prize; it is instead a legal right that makes it easier for an author to sell his intellectual wares without falling victim to free-riding rivals. Were copyright a cash prize, worries about valueless work would make sense. The cash prize would be an incentive to create and litigate over this work—a bad deal for society if banal work were indeed valueless. But copyright is not cash and, as such, it does not have this effect. If a work turns out to lack value, copyright or no, the relevant author will earn only the pittance he deserves. There is no built-in reward for copyright ownership; value, even for copyrighted work, is determined by market forces. This market check is particularly strong for banal work since, almost by definition, markets for banal work are vulnerable to entry. If the work is obvious, or if it can be created with just an investment of time,

⁷⁴ Two parties might fight over a \$100 bill found on the street, but for society that effort is pure waste since nothing useful is produced by the struggle, its effects are only distributional. More generally, private payoffs often lead to investments that are wasteful from a social perspective.

⁷⁵ Some, of course, would likely be devoted to extra-legal self-help, for example encryption and secrecy more generally.

⁷⁶ Benjamin Kaplan, *An Unhurried View of Copyright* 46 (1967).

⁷⁷ Marshall Leaffer, *Understanding Copyright Law* 58 (3d ed. 1999).

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labor, or skill, rivals typically will be able to make those investments and come up with substitute, competing goods. Even with copyright protection, then, there would not be much of an incentive to create valueless work, let alone to litigate ownership rights with respect to it.

A related justification for the distinction between banal and creative work is the assertion that banal work is relatively inexpensive to produce and therefore does not require legal protection. Professors Patterson and Joyce make this claim, arguing that “by correlating protection with creativity, [modern law] makes the rewards of copyright commensurate with the type of effort each author puts forth.”⁷⁸ This intuition might also have influenced Copyright Office regulations, one of which provides that “short phrases” including “slogans” and “mere variations of typographical ornamentation, lettering or coloring” are not eligible for protection.⁷⁹ This regulation is not binding on courts, but courts have nevertheless followed it and refused copyright on, for example, the arguably creative slogan “most personal sort of deodorant” for a feminine hygiene product⁸⁰ and the phrase “Priority Message: Contents Require Immediate Attention” printed on the outside of a mailing envelope.⁸¹

The low-cost rationale is no more satisfying than was the low-value rationale, however, since banal work is not systematically inexpensive. As the “sweat of the brow” cases make plain, effort and skill themselves can come at a hefty price. In fact, a critical similarity between banal and creative work is that both are subject to the public goods problem now routinely associated with information products.⁸² That is, in both cases the cost to the author of producing the first embodiment can be high, but the costs to anyone of producing additional copies based on that first em-

⁷⁸ L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. Rev. 719, 808-09 (1989). Robert Denicola has similarly argued that creativity is supposed to filter out works where little effort was involved, although Denicola recognizes that creativity is probably not very good at accomplishing this task. See Robert C. Denicola, *Copyright in Collections of Facts*, 81 Columbia L. Rev. 516, 522 (1981).

⁷⁹ 37 C.F.R. 202.1(a).

⁸⁰ *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972).

⁸¹ *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986).

⁸² Public goods are goods for which one consumer’s consumption does not in any way diminish another consumer’s ability to consume. Information is a public good, and much of intellectual property law is an attempt to harness this natural benefit while at the same time ensuring that there are adequate incentives to create and disseminate information products in the first place. For a general introduction to the logic and implications of public goods, see Ronald Coase, *The Lighthouse in Economics*, 17 J. Law & Econ. 357 (1974). For a copyright-specific discussion, see Landes & Posner, *supra* note ____.

bodiment are often low. The high startup cost might be an investment in creativity, as is likely the case when Tom Clancy sets out to write a new spy thriller or when an advertising agency attempts to come up with a new slogan for a client. But the high startup cost might have nothing to do with creativity, as was surely the case when Westlaw set out to capture electronic versions of all federal opinions ever published, or doctors began to gather what ultimately became the bone marrow registry's life-saving data.

The point here is that, without copyright, both banal and creative authors would be systematic losers. They would incur the relevant first-copy costs only to then see their rivals make and sell competing copies based on the first. That competition would drive prices down toward marginal cost, and these authors would never be able to earn revenues sufficient to offset their first-copy costs. This public goods problem is the traditional economic justification for copyright, and it applies equally well to creative and banal work. It is no wonder, then, that cost-based arguments do not help to justify a distinction between these two categories. The cost-related arguments turn out to be identical in the two settings.⁸³

Another popular theory for why copyright refuses to protect banal work holds that such a refusal is justified by the public's strong interest in making use of banal information. This argument most often comes up in cases like *Toksvig* where an author is attempting to protect facts that the author has discovered through significant expense. Courts sometimes deny protection in these cases, explaining that the public interest is best served by a legal regime where facts are free for all to use. As one court put it, "to grant copyright protection [to banal work] would risk putting large areas of factual research material off limits and threaten the public's unrestrained access to information."⁸⁴ Another court similarly stated that the "public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright" in banal work.⁸⁵ The Supreme Court

⁸³ It is of course true that, in both settings, there are certain advantages to being first even without copyright protection. The first party to put out an information good might enjoy benefits to his reputation, for example, or might be able to sell the information product at a high price during the time that rivals gear up to compete. The point in the text is only that all of these arguments apply with equal force to creative and banal work. Long ago, Justice Breyer famously argued that first-mover advantages might be so substantial that copyright is unnecessary. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970). It is unclear whether he was right back then, and it is unclear how his argument might change given today's new technologies for distribution and duplication.

⁸⁴ *Financial Information v. Moody's Investment Service*, 808 F.2d 204, 207 (2d Cir. 1986).

⁸⁵ *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) (citations omitted).

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has also made this sort of argument, asserting that the “very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains,” but that “this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”⁸⁶ And, importantly, this was the rationale put forward in *Feist*, too: “[R]aw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”⁸⁷

This sort of argument is at first compelling, but further reflection reveals it to be deeply flawed. Copyright protection simultaneously increases and decreases the amount of information available to the public. It increases the available information to the extent that it gives authors an added incentive to develop and disseminate useful work. It decreases the available information to the extent that it allows authors to charge a non-zero price for information they reveal. If a court’s purpose is to increase the free flow of a particular type of information, then, it is not by any means clear that the best option is to deny copyright protection to that class of works. Instead, the best option might be to increase protection and in that way increase the incentive to gather and share the desired information. It all depends on which of the two above-referenced effects dominates.⁸⁸

This is of course not to say that banal work raises exactly the same incentive/access tradeoff that is raised by creative work. Quite the opposite, one can easily distinguish banal from creative work along this dimension. For example, one might reasonably argue that the public has a stronger need for access to factual information than it does to fictional information because important public policy decisions often turn on factual data. On this argument, former President Ford deserves less protection for the facts presented in his autobiography than George Lucas deserves for the creative elements inherent in his *Star Wars* movies. Ford’s memoir, after all, tells us important details about Watergate and the Nixon pardon.⁸⁹ One might reasonably argue the opposite point, too, namely that the public has a weaker need for access to factual information since in most cases a sec-

⁸⁶ *Baker v. Selden*, 101 U.S. 99, 103 (1880).

⁸⁷ 499 U.S. at 350.

⁸⁸ Incentives versus access is a familiar tradeoff in intellectual property law. See, e.g., Rebecca Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. Chi. L. Rev. 1017, 1024-46 (1989) (sketching trade-off as applied to patent law).

⁸⁹ Compare *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (analyzing copyright claim in Nixon memoirs and noting that there is a “greater need to disseminate factual works than works of fiction or fantasy”).

ond author can invest his own time, money, and energy and in that way independently gather any factual information that is of interest. On this argument, it might be harder to create a substitute for *Star Wars* than it would be to reinvestigate the facts that led to the downing of Germany's airship, the Hindenburg.⁹⁰ Overall, then, there is no reason to believe that, for banal work, the incentive/access tradeoff is skewed completely to one side. The scope of protection might vary depending on the nature of a given work, but the fact that the public often values banal information certainly does not explain why banal work should be left unprotected.

C. The Evidence Theory

Up to this point, we have considered a number of possible explanations for, and justifications of, copyright law's distinction between creative and banal goods. In particular, we have considered the argument that the distinction results from an implicit adoption of the Romantic view of authorship; the argument that banal work is of particularly low social value and hence not worth protecting; the related argument that banal work tends to be inexpensive to produce and hence not worth protecting; and the argument that denying protection to banal work increases societal welfare by making important information free for all to use. None of these arguments turns out to have much normative appeal. That is, while any of these might have been the intuition that motivated courts to create the legal regime in effect today, none answer the question of why a sensible regime would distinguish banal from creative work. The theory that does answer that latter question, I submit, is the evidence theory.

The basic theory is simply this: a sensible copyright regime might distinguish between banal and creative work because banal work introduces extraordinary problems of proof. Were two litigants to step forward with remarkably similar banal works, a court would find it virtually impossible to determine whether one copied from the other (impermissible infringement) or whether instead any similarity between the works was just a natural outgrowth of the fact that both works were banal. As I mention in the Introduction, if we were to ask four workers to create a directory of Asian restaurants in Chicago, the four would likely produce markedly similar directories whether they copied or no. An originality requirement, then, empowers courts to exclude from the copyright system a particularly messy class of cases: cases where courts would not be able to use similarity as the basis for even a weak inference as to the likelihood of impermissible copying.

A few courts have articulated this sort of explanation for copyright's creativity requirement. The first was the Second Circuit in its 1976 deci-

⁹⁰ Compare *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (analyzing copyright claim regarding facts of Hindenburg downing).

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sion in *L. Batlin & Son v. Snyder*.⁹¹ At issue in the case was a toy bank made in the shape of the fictional American patriot, Uncle Sam. Banks of this sort had long been available to the public, but those were always made out of cast iron, whereas the one in this case was made out of plastic. Plaintiff put on evidence designed to show that changing from a cast iron to a plastic medium was a difficult and time-consuming process; and the lower court ultimately found that “a degree of physical artistic skill” was indeed necessary for the transformation.⁹² The question on appeal, then, was whether a demonstration of this sort of “physical” skill would suffice for copyright purposes, or whether artistic accomplishment was the touchstone of authorship.

Surveying prior cases (including *Bell*, discussed above), the *Batlin* Court found that, in comparable instances, works had previously been found eligible for copyright only when they exhibited more than “merely trivial variation[s]” from preexisting works.⁹³ In this case, such variations were not present. The plastic bank was extraordinarily similar to the conventional cast iron bank in terms of its shape and detail. And, while there were some minor differences, the court found that any differences were “functional”—that is, they were changes made to accommodate the use of plastic.⁹⁴ Thus, to find originality here, the court would have needed to say that physical skill sufficed even in the absence of non-trivial variations. This it would not do. “If there be a point in the copyright law pertaining to reproductions at which sheer artistic skill and effort can act as a substitute for the requirement of substantial variation, it was not reached here.”⁹⁵

The *Batlin* Court’s rationale was, I think, an early articulation of the evidence theory:

Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts—indeed, the constitutional demand—could hardly be served. To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.⁹⁶

Admittedly, it does take some unpacking—but the last line in the court’s analysis seems to say that the evidentiary issues would be too complex if

⁹¹ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

⁹² *L. Batlin & Son, Inc. v. Snyder*, 394 F. Supp. 1389 (S.D.N.Y. 1975).

⁹³ 536 F.2d at 490 (quoting *Bell*, 191 F.2d at 103).

⁹⁴ *Id.* at 489.

⁹⁵ *Id.* at 491.

⁹⁶ *Id.* at 492.

courts were to allow copyright in minuscule variations. Courts would find it difficult to distinguish permissible copying of the underlying work from impermissible copying of the nearly identical copyrighted work. That would indeed put “in the hands of mischievous copiers” a dangerous power: the power to interfere with permissible copying of the unprotected underlying work.

The Second Circuit talked more clearly about evidence four years later in *Durham Industries, Inc. v. Tomy Corporation*.⁹⁷ In that case, the court made explicit reference to the “practical” difficulties associated with distinguishing between permissible copying from one source and impermissible copying from a virtually identical source.⁹⁸ But the most famous and complete articulation of the evidence theory would not come from the Second Circuit; instead, it would come from Judge Posner, who interpreted the *Batlin* logic in the Seventh Circuit’s 1983 decision in *Gracen v. Bradford Exchange*.⁹⁹

Like the *Batlin* dispute, the *Gracen* dispute concerned the copyright eligibility of a derivative work—that is, a work based on a preexisting work. This time, the preexisting work was a copyrighted movie, and the derivative work under consideration was a collectors’ plate featuring a likeness of the film’s lead actress as she appeared while portraying the film’s central character. The question presented was whether the artist who painted the plate could acquire rights in the likeness and ultimately wield those rights against a second artist also hired to make a line of collectors’ plates. Writing for the Seventh Circuit, Judge Posner worried about evidence:

[A]s applied to derivative works, the concept of originality in copyright law has as one would expect a legal rather than aesthetic function—to prevent overlapping claims. Suppose Artist *A* produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. *B* also makes a reproduction of the Mona Lisa. *A*, who has copyrighted his derivative work, sues *B* for infringement. *B*’s defense is that he was copying the original, not *A*’s reproduction. But if the difference between the original and *A*’s reproduction is slight, the difference between *A*’s and *B*’s reproductions will also be slight, so that if *B* had access to *A*’s reproductions the trier of fact will be hard-pressed to decide whether *B* was [impermissibly] copying *A* or [permissibly] copying the Mona Lisa itself.¹⁰⁰

⁹⁷ 630 F.2d 905 (2d Cir. 1980).

⁹⁸ *Id.* at 911.

⁹⁹ 698 F.2d 300 (7th Cir. 1983).

¹⁰⁰ *Id.* at 304. Note that *Gracen* could have been resolved by better contracting, since the film production company enjoyed superior rights to both plate artists. See 17 U.S.C.

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Interestingly, in *Gracen*, Posner explicitly limited his articulation of the evidence theory to apply only to those cases where the work at issue is based on a specific preexisting work. “We are speaking . . . only of the requirement of originality in derivative works,” he wrote. “If a painter paints from life, no court is going to hold that his painting is not copyrightable because it is an exact photographic likeness.”¹⁰¹ This latter statement is in error. As discussed above,¹⁰² *Alfred Bell* specifically required some non-trivial variation as a prerequisite to eligibility. The decision in fact extolled “bad eyesight” and claps of thunder as mechanisms for making authorship clear.¹⁰³ The Supreme Court took a similar position in *Bleistein*, also discussed above.¹⁰⁴ There, the Court held that a work would be eligible for protection so long as it evidenced the “personal reaction” of the artist who created it.¹⁰⁵ That reaction could be captured in a modest way—“handwriting” was the Court’s example—but one could easily imagine the Court similarly endorsing a photographer’s particular choice of perspective or, in the spirit of Bell’s bad eyesight, even the inclusion of an inadvertent thumb. But an exact photographic likeness that bears no hallmark of the author’s individuality? Courts might indeed deem such works ineligible, and for exactly the reasons Posner articulates in *Gracen*.¹⁰⁶

Gracen has been subject to sharp criticism from several copyright authorities, the most damaging likely being the comments put forward by Melville and David Nimmer in their dominant copyright treatise.¹⁰⁷ The

§103(a) (author of derivative work does not enjoy protection for “any part of the work in which [copyrighted] material has been used unlawfully”).

¹⁰¹ *Id.* at 305.

¹⁰² See supra note ___ and accompanying text.

¹⁰³ 191 F.2d at 150.

¹⁰⁴ See supra notes __ and accompanying text.

¹⁰⁵ 188 U.S. at 249-50.

¹⁰⁶ There is reason to believe that, since *Gracen*, Posner has expanded his view of how broadly the evidence theory applies. Take, for example, Posner’s opinion in *Ty, Inc. v. GMA Accessories*, 132 F. 3d 1167 (7th Cir. 1997). One part of that litigation concerned two beanbag stuffed animals, both described by their firms as stuffed pigs. Posner points out that, if either stuffed pig at all resembled a real pig, the copyright issue would be a difficult one. In such a case, a court would have a hard time determining whether one pig was copied from the other or whether, instead, any similarity derived from the fact that both were meant to resemble a real pig. Fortunately, neither stuffed pig looked anything like a real pig (whimsically, Posner includes a picture of two real pigs) and thus the evidence issue in this case was straightforward. See also *Pickett v. Prince* 207 F.3d 402 (7th Cir. 2000) (Posner, J.) (similar issues in context of dispute over guitar designed in shape of copyrighted symbol).

¹⁰⁷ 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.01 (2001).

Nimmers describes a setting where two derivative works both have been made from the same underlying work. They suggest that the only time there will be an evidence problem is when those two derivative works are similar. They then assert that this is an unlikely outcome—in their words, it is a “rare circumstance where the nature of the underlying work dictates that any slight change made by one copier must be the same as that made by another copier”¹⁰⁸—and thus, they reason, Posner’s concerns are overblown.

The treatise’s initial statement of the problem is flawed, however, and that error fully undermines this objection. Posner’s evidence worry arises not only in cases where two derivative works are similar (the Nimmer hypothetical), but also in cases where the first derivative work is similar to the original, underlying work. In such a case, the maker of the second derivative work might be permissibly borrowing from the original work but, due to the similarity between the first derivative work and the original work, might nevertheless be plausibly accused of copying from the first derivative. Almost by definition, a first derivative work is similar to its associated original work and, hence, Nimmer is wrong; Posner’s concern is actually quite likely to arise.

Professor Peter Jaszi’s criticisms strike more firmly, although they should be cast more as refinements than objections. One of Jaszi’s concerns is semantic. In *Gracen*, Judge Posner held that a derivative work must be “substantially different from the underlying work” to avoid the evidence quagmire.¹⁰⁹ Jaszi worries that, taken out of context, this language might lead courts to demand too much from derivative work, and so Jaszi prefers earlier court language requiring only that a derivative work be “distinguishable” from its predecessor.¹¹⁰ This is a fair point as far as it goes, but certainly not a refutation of Posner’s basic theory.

Another Jaszi objection is that any evidence problem can be solved through the use of expert testimony.¹¹¹ This seems to miss the mark on several dimensions. First, it might not be true that experts can readily determine the lineage of a given derivative work or, more important, that a finder of fact can evaluate dueling expert claims reliably. Second, even if it were true, this is consistent with Posner’s theory. Posner’s claim, after all, is that certain categories of copyright cases are so expensive to litigate that society might be better off excluding them from copyright’s purview. Jaszi helpfully identifies one culprit for those high costs—experts—but that in no way undermines Posner’s argument. In certain cases, litigants

¹⁰⁸ 1 Nimmer at 3.01.

¹⁰⁹ 698 F.2d at 305.

¹¹⁰ Jaszi, *supra* note ____, at 461 & 461 n.18.

¹¹¹ *Id.* at 461 n.20.

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will find it in their private interest to incur significant litigation expense (including the hiring of experts) even though those expenses are unjustified from a societal point of view. Originality works to exclude some of these pricey cases from the system.¹¹²

Professor John Wiley is the third prominent copyright commentator to criticize *Gracen*. Here again, however, his disagreement does not seem to refute the underlying logic of the evidence theory. Wiley's concern is with cases where the would-be author's purpose is to create a work that accurately mimics an existing work. On the evidence theory, these works might not be protected; to Wiley, this sounds absurd. He writes:

In sum, the copyright requirement of originality [as interpreted in *Gracen*] makes no sense because it claims variation as a virtue, while authors of many objects of copyright protection rightly regard variation as a vice.¹¹³

In *Gracen*, for example, the artist's purpose in creating the plates was to create an image recognizable to anyone who saw the movie on which the plates were based. "Yet . . . faithful accuracy doomed *Gracen*'s copyright suit," Wiley complains, "for Judge Posner thought her painting looked hardly different from the movie."¹¹⁴

Wiley is right, of course: the evidence theory will at times lead courts to deny protection to works that are intentionally designed to be faithful reproductions. But that is not an unforeseen consequence. This is one type of case that the evidence theory means to exclude. The claim is not that faithful reproductions are less valuable to society than other, more distinctive works, nor is the claim that they are easier to accomplish or in any other way less deserving of protection. The claim is only that these cases are typically too costly to litigate, and so copyright law excludes them from consideration.¹¹⁵

¹¹² Interestingly, Jaszi ultimately applauds the result in *Gracen*, arguing that Posner's real motivation was an "implicit recognition of a hierarchy of artistic productions." *Id.* at 462. "In the Romantic sense," writes Jaszi, "it is easier to recognize and reward as an 'author' one who paints on canvas with inspiration from nature than one who paints on china with inspiration from old movie stills." *Id.*

¹¹³ Wiley, *supra* note ____, at 136.

¹¹⁴ *Id.* at 136-37. Judge Posner himself was not blind to this objection. In a 1989 law review article co-authored with Bill Landes, Posner expressed concern over cases where "the creativity [or did he mean value?] of the derivative work consists precisely in the fidelity with which it reproduces the impression created by the original." Landes & Posner, *supra* note ____, at 356-57.

¹¹⁵ Elsewhere in his analysis, Wiley argues that evidentiary problems should not lead to exclusion but should, instead, be resolved by a higher standard of proof. "If difficult questions of proof indeed arise in future cases, the appropriate solution is a high standard of proof for plaintiffs—not a definition of originality that punishes them for successfully

D. Implications

To understand the implications of this analysis, it is helpful to begin by identifying cases where the modern creativity requirement yields one result but an explicit focus on evidence would yield another. Fortunately, this does not happen very often. For example, the evidence theory supports current law to the extent that current law protects creative work. Where creativity is involved, odds are low that two authors will come up with works so similar as to mistakenly suggest impermissible copying. Banal work will also often be treated the same under both approaches. *Feist* excludes such work across the board, and the evidence theory would often exclude such work on grounds that innocent similarity is too likely where a work is more the result of effort or skill than even a drop of inspiration. The evidence theory supports current law to the extent it is skeptical of short phrases and slogans, too. The length of these works makes it all too likely that two independent authors will innocently hit upon identical expression. Even works produced with great skill that nonetheless exhibit no distinguishing variation would be excluded under both approaches, with the creativity requirement excluding these works on grounds that technical skill is not creative, and the evidence theory reaching the same result on grounds that two independent skilled technicians could too easily end up with identical works.

Divergence comes in cases where creativity may or may not be present, but evidentiary issues are clear anyway. For example, before *Feist*, works that showed a distinguishing variation—even one caused by bad eyesight, a clap of thunder, or a misplaced photographer's thumb—were eligible for protection. After *Feist*, this rule presumably is no longer valid;¹¹⁶ but the evidence theory suggests it should be, since these sorts of distinguishing features diminish the chance of any evidentiary confusion. Similarly, before *Feist*, many courts deemed “sweat of the brow” to be one sufficient basis for copyright eligibility. *Feist* explicitly rejects this position,¹¹⁷ but, on evidence grounds at least, it is very defensible. After all, in nearly every case, one by-product of all that perspiration will surely be some form of credible evidence that the work was indeed done by its purported author and not simply plagiarized from a rival. On evidence grounds, then, there is no reason to exclude these cases.

achieving a goal that is socially deserving and efficient.” Wiley, *supra* note ___, at 140. That is another possible approach in that it would discourage litigation in these instances but still leave open the possibility of litigation in cases like, for example, the faithful reproduction cases that bother Wiley so.

¹¹⁶ See *Godinger Silver Art Co. v. International Silver Co.*, 37 U.S.P.Q.2d 1453, 1454 n.6 (S.D.N.Y. 1995).

¹¹⁷ 499 U.S. at 352-54.

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Summarizing another way, if the evidence theory is correct—and if all the other rationales for why federal law favors creative over banal work are rightly rejected—then the key implication of this analysis is that there exists a class of cases where current law needlessly denies protection: cases where the work is banal but evidentiary issues are nonetheless straightforward. Modern law errs in these instances because courts today take the question of whether a given work “originates” with a particular author as an invitation to evaluate the author’s creativity *carte blanche*. Instead, a lack of creativity or artistic merit should come up in copyright analysis only to the extent that it is helpful in identifying those cases where similarity is a poor proxy for impermissible copying.

Feist itself was wrongly decided on this logic. Telephone entries might not be creative, but Rural had planted in its telephone directories a handful of fictitious listings, there for the very purpose of detecting unauthorized copying. Had Feist compiled its own telephone listings, or had it even simply confirmed the listings provided by Rural, it would have detected all of the false entries and eliminated them. Feist did not. Four fake listings thus survived in Feist’s directory, testifying to Feist’s copying and also suggesting its approximate extent.¹¹⁸

This is not to say that Rural should have won its copyright case. There are many ways to argue the merits of the dispute in *Feist* and only one of them turns on this question of evidence. For example, one might argue that Feist should have been allowed to copy Rural’s directories because that information was a by-product of Rural’s state-sanctioned local telephone service monopoly. An implicit obligation of being a state-sanctioned telephone company might be to make telephone subscriber information available to rivals—or so one could reasonably argue.¹¹⁹ In the alternative, one

¹¹⁸ The use of fictional listings is only possible for certain types of work, of course. Fictional entries on maps, for example, would be problematic. See, e.g., <<http://www.mapquest.com>>. Note, too, that in *Feist* an independent copyright claim could have been raised with respect to the false listings. They were creative, after all, and thus one could argue that at least those entries should have been protected by copyright. Lawyers likely did not advance this argument since (1) the copying would likely have been deemed de minimis and (2) Rural would have had a hard time showing that any damages flowed from this copying anyway.

¹¹⁹ This would be consistent with other obligations currently in place. For example, the Telecommunications Act of 1996 requires incumbent local exchange carriers to make available to new entrants certain parts of the incumbent firms’ telephone networks, including switches and call-related database facilities. See Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq. (1996), especially 47 U.S.C. §251(c)(3). There is no policy reason why intellectual property could not be treated similarly. See also 47 U.S.C. §251(b) (obligating telecommunications carriers “to provide, to the extent technically feasible, number portability,” which in essence means that telephone customers can take their telephone numbers with them when they change local telephone companies).

could reasonably argue that Rural should have been granted intellectual property rights in its telephone listings and allowed to wield those rights profitably. After all, local telephone companies must earn revenues sufficient to cover the substantial fixed costs of the telephone plant; and it might be in the public interest to have local telephone companies earn those revenues through sales of Yellow Page advertisements instead of, say, higher telephone rates.¹²⁰ To disagree with the Court's creativity requirement, then, is not at all to say that Rural should have won or lost its copyright claim. The point is only that nothing in the case should have turned on creativity.

The current focus on creativity is particularly problematic if it turns out that banal works not only are ineligible for copyright protection but, more broadly, are ineligible for any form of federal intellectual property protection. Congress, for example, has considered using its authority under the Commerce Clause to pass legislation that would protect databases from certain types of unauthorized duplication.¹²¹ Many such databases are today left unprotected by federal copyright law because of the creativity requirement. Opponents of that legislation argue that the Commerce Clause cannot be read to authorize this sort of legal protection since that would allow Congress to skirt the constitutional limitations announced in *Feist*. Proponents of this position recognize that Article 1, Section 8, Clause 8 is an affirmative grant of congressional authority and not an explicit limit thereto; but they argue that, if the affirmative grant really is limited so as to apply only to creative work, by negative implication the

¹²⁰ Judge Greene adopted this position in *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983), the decision that accepted, with modifications, a consent decree that settled the government's antitrust case against the Bell Telephone Company. One issue at play was the question of whether post-divestiture local telephone carriers should be allowed to continue producing Yellow Page directories. Judge Greene thought they should, on grounds that "the Yellow Pages provide a significant subsidy to local telephone rates" and that the "loss of this large subsidy" would lead to higher rates, a result "clearly contrary to the goal of providing affordable telephone service for all Americans." *Id.* at 193-94.

The broader question here is the question of how to recover the fixed costs of the telephone network. Such costs can be recovered through a flat charge, but they can also be recovered by raising the prices associated with any number of regulated telephone services. Whether those fixed costs should be funded through local telephone rates, long distance rates, Yellow Page advertisement fees, and so on—or through some combination thereof—is a difficult question on both policy and economic grounds. For some discussion, see Benjamin et al., *Telecommunications Law and Policy* 621-23 (2001); Keneth Train, *Optimal Regulation* 117-40 (1991) (discussing Ramsey pricing).

¹²¹ See, e.g., H.R. 3531, 104th Cong. (1996) ("Database Investment and Intellectual Property Antipiracy Act of 1996"); H.R. 2652, 105th Cong. (1998) ("Collections of Information Antipiracy Act"); H.R. 354, 106th Cong. (1999) ("Collections of Information Antipiracy Act").

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Commerce Clause must similarly be constrained.¹²² If that argument holds, then *Feist* will have the effect of completely denying banal goods of all forms of federal protection.

What is really at stake here? One important category of work in danger of being rendered both unprotected and unprotectable is work based on factual research. Factual work might be uncreative, but evidence issues can typically be resolved either through subtle tricks (like Rural's phony listings) or more directly through the evidence that is naturally created whenever considerable labor is put into a project. Recalling *Toksvig*, for example, flights to Denmark and tapes of her own first-person interviews would have yielded ample evidence that the second biographer had gone out and done her own research on Hans Christian Anderson's life instead of copying from the original biographer.

Not only does factual work not present problems with respect to proof, then; it also presents a very sympathetic case for some form of intellectual property protection. As I discussed above, facts can be extremely expensive to uncover, yet they are subject to free-rider problems the moment they are revealed to the public. Leaving facts unprotected therefore diminishes the incentive to discover and disseminate facts, as the first party to do so will always be at a disadvantage vis-a-vis later parties that can avoid the up-front costs by copying. This might on balance significantly decrease the flow of factual information in society, an effect that could be reversed via intellectual property protection.¹²³

Courts have in the past worried that, by recognizing copyright in facts, copyright law would be creating monopolies in factual information.¹²⁴ But that is not the case. Copyright stops only unauthorized borrowing. So, even if one party were to hold copyright in some particular fact it discovered, another party could always go back to primary sources and re-gather that same information. Recognizing copyright in *Toksvig* would not have meant that there would be only one book about Hans Christian Andersen; it might simply have meant that the second author would have had

¹²² For one particularly helpful piece, see Paul J. Heald, *The Extraction/Duplication Dichotomy: Constitutional Line-Drawing in the Database Debate*, 62 *Ohio St. L.J.* 933 (2001).

¹²³ A lack of copyright protection might also lead to wasteful (and possibly even more limiting) self-help, for example encryption.

¹²⁴ See, e.g., *Moore Pub., Inc. v. Big Sky Marketing, Inc.*, 756 F. Supp. 1371, 1379 (Id. 1990) ("By placing ideas and facts beyond copyright protection, while allowing protection for the expression of those ideas or the arrangement of those facts, the Copyright Act prevents monopolization of facts or ideas"); *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 204 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985) (worrying that copyright might inadvertently allow an individual to be "the owner of an important political event merely by being the first to depict that event in words").

to either confirm the various factual claims herself or cut a deal with the first author. The exact scope of permissible borrowing would need to be worked out—it would be hard, for example, to negate all the benefits that a second researcher inevitably enjoys—but, no matter how the nuances are resolved, it is clear that one can recognize copyright in these instances without creating monopolies in factual material.

Courts have also worried that, in certain settings, a second-comer might not be able to re-confirm a first author’s factual claims. That is admittedly an important special case, and it might be that a doctrine like the fair use doctrine should be available to excuse unauthorized borrowing in such circumstances.¹²⁵ It would be impossible, for example, for a second videographer to capture footage of the Kennedy assassination, and certainly that fact is relevant when considering the appropriate scope of protection for the original video images.¹²⁶ Similarly, some factual research might be so expensive as to exhibit natural monopoly properties.¹²⁷ The costs of sending an unmanned vehicle to explore the Titanic wreckage are exorbitant even given modern technology; so, while it is technically feasible for a second exploration, the economics might cause us to think about the Titanic example in exactly the same way we think about the Kennedy example. But, again, these are special cases that would likely justify special exceptions. In most situations, however, facts can be independently gathered by multiple parties and thus copyright would not yield monopoly.

Another concern that must be accounted for is the worry that protection of factual information will lead to wasteful duplication of research.¹²⁸ The possibility of Coasian bargaining calls that claim into question; the fact that the second-comer can re-gather the information should set up a

¹²⁵ The fair use doctrine excuses infringement in instances where leniency seems appropriate on policy grounds. The doctrine was codified in 1976, but it nevertheless remains a free-wheeling policy inquiry, perfect for allowing flexible responses to exceptional situations like those identified in the text. See 17 U.S.C. §107 (offering non-exclusive list of factors to consider).

¹²⁶ Cf. *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) (rejecting argument that Kennedy footage “could not be the subject of copyright because . . . to allow copyright would result in the appropriation of the subject matter” but nevertheless finding unauthorized copying to be fair use).

¹²⁷ A market exhibits the properties of a natural monopoly in instances where a single firm can satisfy market demand at a lower total cost than can two or more firms. Among the policy implications are: (1) competition in such a market is wasteful since total costs are greater than they could be in its absence; and (2) there is some danger that only one firm can survive economically, and thus natural monopoly markets might in the long term tend to become monopolized. For a general discussion, see Benjamin, *supra* note ___, at 374-80.

¹²⁸ See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (“it is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent.”).

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dynamic where the first party licenses to the second and thereby avoids any wasteful duplication. But many respected commentators worry that transaction costs will block the bargain and, in cases where that seems plausible, again intellectual property rules could be tailored accordingly.¹²⁹

The insight of the evidence theory, then, is not that all factual work should be protected or that factual work should be accorded exactly the same scope of protection that is accorded creative work. Instead, the insight is only that a lack of creativity per se is not a good reason to deny these works protection. False facts and sweat both operate in this context to minimize any evidentiary concerns. And, given that, there are strong arguments to be made in favor of protection. Such a conversation is prematurely cut off by the *Feist* holding, and the result may very well be an information economy where too little is spent gathering and disseminating facts.

Focusing on creativity instead of evidence also precludes thoughtful analysis with respect to another class of cases, cases that involve what might best be described as protocols. A famous example would be the part numbers used by the Toro Company to identify replacement parts for its line of lawnmowers. Toro once sued an unaffiliated service firm for using Toro part numbers to identify replacement parts that were not officially licensed by Toro.¹³⁰ Defendants in the case explained that they were using the official part numbers not to trick consumers, but merely as a convenient vocabulary. This way, if a customer saw that the blade on his lawnmower was damaged, he could ask for a replacement part by number instead of having to describe the part explicitly. Protocols are of significant modern importance given that numeric codes of this sort are routinely used in computer hardware and software to identify specific functions and trigger particular responses.¹³¹

¹²⁹ Jane Ginsburg, for example, questions the viability of market forces in this setting and thus she advocates the use of compulsory licenses. See Ginsburg, *supra* note ___, at 1916-37.

¹³⁰ *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208 (8th Cir. 1986).

¹³¹ See, e.g., *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807 (1st Cir. 1995) (software interface protocol); *Mitel v. Iqtel*, 124 F.3d 1366, 1373-74 (10th Cir. 1997) (hardware/software protocol); *American Dental Ass'n v. Delta Dental Plans*, 126 F.3d 977 (7th Cir. 1997) (protocol for insurance information); *Atari Games Corp. v. Nintendo of Am.*, 975 F.2d 832 (Fed. Cir. 1992) (hardware/software protocol); *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335 (5th Cir. 1994) (same); *CMAX/Cleveland, Inc v. UCR, Inc.*, 804 F. Supp. 337 (M.D. Ga. 1992) (same).

Understandably, these cases have attracted significant scholarly attention. Most scholars seem ready to deny protection in all cases, despite the fact that protocol protection is in some cases clearly in the public interest. See, e.g., Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of*

Because of *Feist*, protocols can almost never be protected under copyright and, arguably, cannot be protected under the Commerce Clause either. One might reasonably argue that this is a good result, but certainly no one would argue that this is a good result because protocols lack creativity. To see this, imagine that Toro had hired writers Tom Clancy, Toni Morrison, and Stan Lee to develop its system of part numbers and that the resulting codes had therefore demonstrated creative spark. Would that at all change anyone's view of the case? Of course not. The policy rationale for denying protection in this instance has nothing to do with creativity.

Nor does it have anything to do with evidence. In *Toro*, for example, that unaffiliated service provider did not and could not claim that it looked at a particular lawnmower blade and just so happened to choose the same part number that Toro did. Copying is not an issue in protocol cases; it is always clear that the second-comer adopted the first party's naming convention.

Free of the focus on creativity and without any evidentiary concerns, protocol cases would in fact turn out to be difficult cases. Consider again the part numbers at issue in *Toro*. In markets like those for lawnmowers and snow-blowers, original parts and replacement parts are substitutes. A company like Toro can produce more expensive original parts that last longer without replacement, or the company can produce less expensive original parts and expect that their customers will purchase replacements as needed. In terms of customer well-being, it is not clear which is the better approach. Some customers might use lawn equipment rarely and so they would rather the less expensive parts. Other customers use lawn equipment frequently and thus might prefer better parts at the outset. If Toro could control its part numbers, it could hamper competition from rival replacement part suppliers and in that way enjoy greater freedom to choose its own strategy with respect to this tradeoff. Rival makers of original lawn equipment would be free to choose their own preferred strategies, too, and the competition between these various providers of lawn equipment would in theory yield the most efficient array of options. One can reasonably argue, then, in favor of recognizing intellectual prop-

"Lock-Out" Technologies, 68 S. Cal. L. Rev. 1091 (1995); Dennis S. Karjala, Copyright Protection of Computer Documents, Reverse Engineering, and Professor Miller, 19 U. Dayton L. Rev. 975 (1994); Maureen A. O'Rourke, Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms, 45 Duke L.J. 479 (1995); David A. Rice, Sega and Beyond: A Beacon for Fair Use Analysis—At Least as Far as It Goes, 19 U. Dayton L. Rev. 1131 (1994). A few scholars have taken the position that, sometimes at least, protection should be recognized. See, e.g., Anthony Clapes, Confessions of an Amicus Curiae: Technophobia, Law and Creativity in the Digital Arts, 19 U. Dayton L. Rev. 903 (1994); Douglas Lichtman, Property Rights in Emerging Platform Technologies, 29 J. Leg. Stud. 615 (2000).

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erty protection in this case. Intellectual property protection would here be used to create a market structure that would not obtain in its absence.¹³²

Opposing arguments are also plausible. For instance, one might argue that the best market structure is one where there is competition at every level. So, yes, firms should compete with respect to the original provision of lawn equipment. But firms should also be free to compete on the provision of replacement parts and service. One benefit of such competition would be that it would diminish Toro's ability to harm existing customers by raising the price of replacement parts—although reputation effects might similarly constrain such behavior. On these arguments, Toro should be denied intellectual property protection since any such protection hampers competition in the service and replacement part markets.

Overall, the point here is simply that there are a lot of worthwhile issues to pursue in protocol cases. Should computer software protocols be left under the control of their original proprietor in markets where there is competition between software platforms? Should firms instead be required to share their protocol information, indeed perhaps even pressured to do so under the threat of the antitrust-inspired doctrine of copyright misuse?¹³³ Federal law today cannot address any of these questions because copyright analysis stops at the irrelevant question of whether protocols are creative. This gives us a blanket rule denying protection and precludes the more careful analysis that the topic deserves.¹³⁴

¹³² These sorts of arguments have been considered in significant detail in scholarship related to two well-known antitrust actions: one arguing that, as applied to its photocopiers and micrographic equipment, Kodak impermissibly tied the market for service with the market for replacement parts (see *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992)), and the other arguing that Xerox similarly tied the service and parts markets as applied to its photocopier equipment (see *In Re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000)). The particular argument sketched in the text, above, is explained more fully in Kenneth Elzinga & David Mills, *Independent Service Organizations and Economic Efficiency* (unpublished manuscript, available from author) (2000).

¹³³ Modeled after the doctrine of patent misuse, the doctrine of copyright misuse is an equitable “unclean hands” defense that denies a remedy in instances where the copyright holder can be shown to have elsewhere used his copyright in a way deemed impermissible by the court. The alleged bad behavior can be completely unrelated to the case in which the doctrine is invoked, and the doctrine can be invoked in any case until such time as the misuse has been discontinued and its harmful effects have been eliminated. On copyright misuse and protocol rights, see Marshall Leaffer, *Engineering Competitive Policy and Copyright Misuse*, 19 *Dayton L. Rev.* 1087 (1994).

¹³⁴ One of the most cited cases on protocol protection seems to support my basic claim that protocol cases deserve real analysis and should not simply be discarded on the threshold issue of creativity. In *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), the court considered copyright issues related to a protocol used in a video

It should be noted that many copyright commentators seem to think of protocol cases as completely outside the purview of copyright¹³⁵ and these commentators will likely be tempted to dismiss the arguments presented here. Frankly, I do not understand why. True, one could reasonably argue that the 1976 Copyright Act does not by its terms extend protection to protocols and, on that argument alone, one could say that protocols should be excluded from copyright. But this only goes so far. After all, if the *Feist* constitutional interpretation is read to infect the Commerce Clause as well as the Copyright Clause, we are not just talking about copyright any longer. *Feist*'s creativity requirement might stop all federal attempts to protect protocols, including new statutes that Congress might choose to consider in the future. Saying that copyright is not about protocols therefore unfairly dodges the issue; the issue here is whether federal law can recognize intellectual property rights in protocols.

Moreover, copyright protection for protocols is not as outlandish as it might at first seem. Instead, it is the next step in the development of a sophisticated understanding of the relationship between antitrust and intellectual property law. The conventional view of the antitrust/intellectual property overlap focuses on cases where the law recognizes intellectual property rights for some traditional reason (say, to encourage innovation) but then constrains the exercise of those rights because otherwise the resulting market structure would be unappealing. Microsoft might provide a good case study of this view; on policy grounds it might make sense to trim back the standard bundle of rights recognized in computer software in this instance since, as applied to Microsoft's Windows operating system, these rights seem to support an overall market structure that at times squelches innovation.

Protection of protocols is just the inverse of this standard case. Instead of recognizing intellectual property rights for a conventional reason and

game platform. Plaintiff did not argue that the protocol itself was protected. Instead, plaintiff buried the protocol inside a copyrighted computer game and then argued that, in reverse engineering the computer game to acquire the protocol, defendant had infringed the copyright in the game. The court could have quickly dismissed this argument, excusing the infringement under the fair use doctrine on the theory that defendant ultimately took only the unprotected protocol. Instead, however, the Ninth Circuit conducted a painstaking analysis of the policies at stake in allowing plaintiff to protect the protocol, albeit indirectly. The court's analysis is of course open to criticism; but it does seem to reveal that even the Ninth Circuit understood that there were difficult policy choices at stake, policy choices that warranted more careful consideration than would have been possible had the case been framed as a pure protocol case.

¹³⁵ I think Peter Menell and Julie Cohen would both likely take this position, at least based on their writings in this area. See, e.g., Peter S. Menell, An Epitaph for Traditional Copyright Protection of Network Features of Computer Software, 43 *Antitrust Bull.* 651 (1998); Cohen, *supra* note ____.

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then constraining them because of issues related to market structure, in cases like *Toro* courts would not recognize intellectual property rights for conventional reasons but would then extend additional rights for reasons related to market structure. That is, no one is advocating copyright protection in *Toro* because copyright will improve the incentive to create part numbers, but we might recognize copyright because we like the way the market will evolve under a rule where suppliers of new lawn equipment enjoy significant influence over replacement parts as well. This sort of argument may or may not be convincing at the end of the day. Again, my only point here is that a lack of creativity is a poor reason to abandon its analysis.¹³⁶

II. Fixation

NOTE: For purposes of my talk at Berkeley, I have cut this section of the paper and in that way made the reading a bit more manageable. The most interesting parts of this work are those discussed in the first and third sections, anyway, and so I hope we can focus on those during the workshop. I am happy to send the full paper to anyone who might be interested, however; please just email me at dgl@uchicago.edu.

III. Other Copyright Doctrines

The previous sections combined to take an in-depth look at the two main prerequisites to copyright protection: the requirement that a work be original, and the requirement that a work be fixed in tangible form. This section changes gears and offers instead a survey of several copyright doctrines on which the evidence theory sheds light. In particular, I consider the merger doctrine, the doctrine of *scènes à faire*, the federal registration procedure, issues relating to joint authorship, and the definition of a copyright holder's exclusive rights under section 106 of the 1976 Copyright Act. I argue that the evidence theory explains and clarifies the first of these doctrines, that it at least in part explains the second and the third, and that it calls into question current practice with respect to the fourth and perhaps also the fifth.

¹³⁶ Antitrust and intellectual property law interrelate in a third way: sometimes possible antitrust violations are excused on the argument that the resulting business structures are good for innovation. See, e.g., Antitrust Guidelines for Collaborations Among Competitors (April 2000); Suzanne Scotchmer, <her article on this very point>.

A. *The Merger Doctrine*

One basic principle of copyright law is that copyright protects only the expression of an idea but not the idea itself.¹³⁷ An author who writes a book on how to lose weight, for example, can invoke copyright to protect her particular turns of phrase, but she cannot invoke copyright to protect the actual weight loss strategy itself. Similarly—and this is an example I used earlier in the Article—J. K. Rowling’s copyright in the book, *Harry Potter and the Sorcerer’s Stone*, recognizes in Rowling certain exclusive rights with respect to her specific language, her particular characters, her particular settings, and so on; but the copyright does not give her any protection for the broad concept of a story where a young protagonist learns magic and grows up while exploring a mystical world.

The merger doctrine supplements this basic distinction between idea and expression. It states that copyright protection will be denied in instances where there are only a few ways to express a given idea.¹³⁸ That is, contrary to the general rule, in these cases even expression will not be protected. So, if there is only one way to articulate a given idea,¹³⁹ or if there are only a handful of ways to articulate that idea, no one can protect any of the available alternatives.¹⁴⁰ Expression and idea are said to “merge.” Courts typically explain that protection is denied in order to “prevent an author from monopolizing an idea merely by copyrighting a few expressions of it.”¹⁴¹

¹³⁷ This distinction is today codified at 17 U.S.C. §102(b), but it was an integral principle long before. See, e.g., *Baker v. Selden*, 101 U.S. 99, 103 (1880).

¹³⁸ See, e.g., *Arica Institute, Inc. v. Palmer et al.*, 970 F.2d 1067 (2d Cir. 1992); *Allen v. Academic Games League of Am.*, 89 F.3d 614 (9th Cir. 1996).

¹³⁹ In cases where there is only one way to express the idea, some copyright authorities identify the doctrine as “the doctrine of *Baker v. Selden*,” in that way reserving the term “merger” for cases where there are only a few, but more than one, ways of expressing the idea. See, e.g., 1 *Nimmer*, supra note __, at 2.18[B]-[D].

¹⁴⁰ There is an on-going circuit split over whether merger is a bar to copyright eligibility in the first instance or, instead, an affirmative defense that must be raised against a specific charge of infringement. Compare *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1460 (5th Cir. 1990) (because the idea and its expression merge, “the maps at issue are not copyrightable”) with *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) (merger doctrine is used in “determining whether actionable infringement has occurred, rather than whether a copyright is valid”). While practical implications do attach to this distinction, none are relevant to the discussion here.

¹⁴¹ *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). Several courts have picked up this exact language. See, e.g., *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir. 1992); *Financial Control Assoc., Inc. v. Equity Builders, Inc.*, 799 F. Supp. 1103, 1118 (N.D. Kansas 1992); *Hart v. Dan Chase Taxidermy Supply Co.*, 884 F. Supp. 71, 76 (N.D.N.Y. 1995).

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The merger doctrine originated with the First Circuit decision in *Morrissey v. Procter & Gamble Co.*¹⁴² In dispute there was the copyright associated with the rules for plaintiff's "sweepstakes" promotional contest. Defendant attempted to conduct the same basic promotion, and plaintiff sued on grounds that defendant had copied plaintiff's rules. The claim was plausible. Defendant, for example, had published a rule stating that entrants "should print name, address and Social Security number on a box-top, or plain paper," whereas plaintiff's rule had required that entrants "should print name, address and social security number on a Tide boxtop, or on plain paper."¹⁴³

A traditional copyright response to the case would have been to recognize copyright in plaintiff's expression but to announce that defendant was free to copy the underlying idea. This would have made it impermissible for defendant to copy the rules but perfectly acceptable for defendant to run a similar or identical contest. The court refused to take this approach, however, worrying that protecting the expression in this instance would inevitably protect the idea, too. Wrote the court:

When the uncopyrightable [idea] is very narrow, so that the topic necessarily requires, if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the [idea].¹⁴⁴

This the court would not allow. Copyright, the court explained, was not "a game of chess in which the public can be checkmated."¹⁴⁵

In the years since *Morrissey*, the merger doctrine has been frequently invoked. In *Allen v. Academic Games League of America*, for example, it was applied to limit the protection offered a variety of educational board games on grounds that the rules for the games and the ideas behind the games would in certain instances merge.¹⁴⁶ In *Computer Associates v. Altai, Inc.*, it was similarly applied to limit the protection offered to computer programs, the argument being that there are only a limited number of ways to efficiently code particular functions and concepts.¹⁴⁷ And in *Tensor Group, Inc. v. Global Web Systems, Inc.*, the court struggled to decide whether merger should be invoked to deny copyright to engineering drawings, the logic this time being that there are just a limited number of ways

¹⁴² 379 F.2d 675 (1st Cir. 1967).

¹⁴³ *Id.* at 678.

¹⁴⁴ *Id.* (internal citations and quotations omitted).

¹⁴⁵ *Id.* at 679.

¹⁴⁶ 89 F.2d 614 (9th Cir. 1996).

¹⁴⁷ 982 F.2d 693 (2d Cir. 1992).

to faithfully represent a complicated machine.¹⁴⁸ In all of these cases, the same concern drives the analysis. Where there are only a few ways to express a given idea, courts worry that “rigorously protecting the expression [will] confer a monopoly over the idea itself,” a result directly contrary to the fundamental principle that copyright does not protect ideas.¹⁴⁹

This standard account of the merger doctrine says nothing about evidence. Yet I submit that the merger doctrine is in fact entirely motivated by an evidentiary concern. Think again about *Morrissey*. Why was the court in that case so reluctant to recognize copyright in plaintiff’s expression? The court says that “by copyrighting a mere handful of forms, [plaintiff] could exhaust all possibilities of future use” of the sweepstakes idea. But that is not true. Copyright would not have stopped defendant from hearing about plaintiff’s sweepstakes promotion and coming up with its own rules. Copyright would only have stopped defendant from copying plaintiff’s rules. Indeed, just as readers of the Harry Potter book are allowed to write their own stories about mystical lands, defendant would have been perfectly free to conduct an identical contest promotion. All that defendant would not have been allowed to do was copy plaintiff’s expression.

But the court rejected this approach on grounds that there were only a few ways to express the sweepstakes idea. Why did this matter? Evidence. If defendant in *Morrissey* had done exactly what traditional analysis would have allowed him to do—if he had borrowed the idea but then written his own expression—he would still likely have ended up with expression that looked an awful lot like plaintiff’s expression. As the court pointed out, there are only a few ways to express this basic idea. That would have led to an evidentiary quagmire. Defendant’s expression would have looked similar to plaintiff’s, and the court would have been hard-pressed to determine whether that similarity was evidence of impermissible copying or, instead, innocent happenstance given the limited number of options available.

This is the problem that drives the merger doctrine. In merger cases, courts cannot reliably distinguish permissible from impermissible behavior because, no matter what, the resulting expression will typically look the same. So of course courts worry that protection of expression in these

¹⁴⁸ 1998 U.S. Dist. Lexis 19596 (1998).

¹⁴⁹ *Marshall & Swift v. BS & A Software*, 871 F. Supp. 952, 961 (W.D. Mich. 1994) (quoting 3 *Nimmer*, supra note __, at 13.03[B][3]); *Financial Control Assoc., Inc. v. Equity Builders, Inc.*, 799 F. Supp. 1103, 1118 (D. Kansas 1992) (same). See also *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 146 n.6 (2d Cir. 1997) (merger operates when “protection of the expression would effectively accord protection to the idea itself”) (citations omitted); *Warren Publ. v. Microdos Data Corp.*, 115 F.3d 1509, 1518 n.27 (11th Cir. 1997) (same).

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cases will “effectively accord protection” to the relevant underlying ideas. Without the merger doctrine, courts in some number of cases would accidentally find impermissible copying where, in truth, only the unprotected idea was taken. As a practical matter, that would restrict the use of ideas in these settings. Merger thus denies protection in cases where there are only a limited number of expressive options.

Understanding the merger doctrine in this light helps to clarify two current ambiguities in the law. First, there is some confusion over whether the merger doctrine should take into account the complexity of the expression at issue. That is, should trivial expression—expression that is easy to articulate once the underlying idea is known—be excluded more readily than complicated expression, even if in both instances there are only a limited number of ways to express the relevant idea? ¹⁵⁰ *Morrissey* likely represents a case of trivial expression given that contest rules are so easy to construct once the basic idea of the contest is known. *Tensor Group* likely represents a case on the opposite extreme since accurate engineering drawings are difficult to accomplish even if, in the end, they all will identify the same machine.

The evidentiary perspective helps make clear that, yes, merger should be more readily applied in cases like *Morrissey* than it should in cases like *Tensor Group*. There are two reasons. First, in cases of complex expression, it might be worthwhile to incur the added expense of addressing evidentiary issues. In trivial cases, the benefits of copyright protection are small since trivial expression will likely be created regardless; but in complex cases copyright is likely more valuable and, hence, the benefits of economizing on administrative costs might be outweighed by the benefits of increased incentives to create in the first place. Second, in cases of complex expression, the evidentiary issue itself will typically be less contentious. In these cases, the process of creating expression should yield (as a by-product) good evidence of whether the second-comer impermissibly copied or, instead, invested his own energies in creating expression. If it takes great effort to reflect on paper the components of a complicated machine, anyone who puts in that effort should be able to show some evidence documenting their hard work. Cases with complex

¹⁵⁰ Nimmer introduced this ambiguity into the law, arguably by misreading an opinion that he then discussed in the treatise. Compare 1 Nimmer, *supra* note ___, at 2.18 n. 42 (pointing out that the *Telex* opinion appears to limit merger to cases where there is both de minimis copying and only a limited number of expressive options) with *Telex Corp. v. International Business Mach. Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *aff'd in part, rev'd in part*, 510 F.2d 894 (10th Cir), cert. dismissed, 423 U.S. 802 (1975) (seemingly discussing these two concepts separately, and indeed citing separate cases for each). That said, the Nimmer treatise is so influential that the issue must now be addressed regardless of the accuracy of Nimmer’s reading.

dence documenting their hard work. Cases with complex expression, then, mitigate the evidentiary difficulty and thus diminish the need for merger.

The second ambiguity in current law that the evidentiary perspective helps to resolve is the question of whether merger should be applied from an ex ante or ex post perspective. In *Veck v. Southern Building Code Congress International*,¹⁵¹ for example, a nonprofit organization asserted copyright in a model building code that it developed for possible adoption by local government. Several Texas towns adopted the code and thus the question arose as to whether the code could still be protected by copyright given its status as part of the official law of the relevant towns. With respect to merger, there were two possible approaches. One was the ex post approach, arguing that merger applies since, after adoption, “there was no other correct way to express the building code of, for example, Anna, Texas.”¹⁵² The other was an ex ante approach, reasoning that merger does not apply since “at the time of [its] creation” this was only one of several possible articulations of the building code.¹⁵³

While the copyright eligibility of building codes is a difficult issue when taken as a whole,¹⁵⁴ the evidentiary perspective makes the merger aspect straightforward. If merger really is just a shorthand for the evidentiary issue identified above, merger should be applied only from an ex ante perspective. After all, in cases like *Veck* there is no question as to who copied whom. There were a million possible articulations of the building code and the second-comer copied because one of those articulations ultimately achieved disproportionate importance thanks to its selection by local government. Such copying might be justified, but not because of any evidentiary concerns. Merger is an ex ante doctrine that attempts to identify cases where a second party attempting to express the same idea as an earlier rival might innocently come up with expression incriminatingly

¹⁵¹ 241 F.3d 398 (5th Cir.), rehearing granted, 2001 U.S. App. Lexis 21291 (2001). Other opinions addressing this same basic issue include *Practice Mgt. Info. Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir.), cert. denied, 522 U.S. 933 (1997), opinion amended by 133 F.3d 1140 (9th Cir. 1998) (American Medical Association did not lose copyright when its coding system was required by government regulations); *Building Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (same for building code adopted by state).

¹⁵² 241 F.3d at 407.

¹⁵³ *Id.*

¹⁵⁴ Many of the issues here are similar to those raised earlier in my discussion of *Feist*. For example, to the extent that state governments will have to pay outside parties for use of their model codes, one can argue that the state is better off paying implicitly through the continued recognition of copyright rather than paying explicitly through a cash transfer. Both are burdens imposed on the government and citizenry, but at least copyright minimizes the dangers of waste and abuse that are inherent in any government cash transfer.

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similar to that of his rival. That is not a worry in cases like *Veeck*, and hence merger should be not be invoked ex post to excuse unauthorized duplication.

B. *Scènes à Faire*

Copyright does not protect “stock” or standard literary devices. For example, no one can claim protection in the character of a shadowy private investigator who wears a trenchcoat, smokes cigarettes, and enjoys a certain rapport with female clients, nor can anyone claim protection for stereotypical dramatic elements like the use of military slogans, flags, and armored vehicles as a backdrop for a motion picture about war. Courts refer to these unprotected elements as “*scènes à faire*,” a French term that literally translates to mean “scenes which must be done.”¹⁵⁵ A common definition states that these are “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”¹⁵⁶ This is a court-made doctrine, typically explained by the observation that “it is virtually impossible” to write about certain “historical era[s] or fictional theme[s]” without sometimes employing standard characters and motifs.¹⁵⁷

No court has ever explained the logic behind denying protection to *scènes à faire*, but several possible justifications readily come to mind. For example, by making it easy for authors to rely on familiar and well-worn elements, the doctrine helps authors communicate basic information to their readers quickly. An author does not need to invest any energy coming up with his own background characters or suggestive details; an author can borrow familiar elements from other sources and thereby readily set the stage for whatever new material the author wishes to contribute. Relatedly, by making incidental details ineligible for protection, the doctrine increases the scope of information available in the public domain. That change could certainly be defended, especially if one believes that copyright law commodifies information more than is necessary on incentive or natural law grounds.

More relevant to this Article, however, the doctrine also can be explained by reference to an evidentiary concern. If authors were allowed to

¹⁵⁵ *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945).

¹⁵⁶ E.g., *Wright v. Warner Books, Inc.*, 953 F.2d 731, 742 (2d Cir. 1991); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Churchill Livingstone v. Williams & Wilkins*, 949 F. Supp. 1045, 1052 (S.D.N.Y. 1996).

¹⁵⁷ See, e.g., *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (“Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain ‘stock’ or standard literary devices, we have held that *scènes à faire* are not copyrightable as a matter of law.”).

copyright stock characters and settings, courts would frequently find themselves facing the by-now familiar evidentiary puzzle: upon seeing two works with similar expressive elements, courts would find it difficult to determine whether there was impermissible copying of those elements or whether, instead, any similarities innocently derive from the fact that the overlapping details flow naturally from the setting at issue in both works.

C. Registration

Sections 408 through 412 of the 1976 Copyright Act combine to offer authors the option of registering their works with the Copyright Office.¹⁵⁸ Registration involves the payment of a modest fee, the deposit of usually two copies of the work, and the submission of an application that reveals some basic information about the work such as the name of its author and the date on which it was completed.¹⁵⁹ Registration is not an evaluative process. While the Register of Copyright can deny registration in instances where the Register believes the work is ineligible for protection,¹⁶⁰ in general the Register just archives copyright applications and defers to the courts any serious evaluation of copyright claims.

For authors, there are two primary benefits to registration. First, an author who registers his work within five years of its first publication enjoys certain evidentiary presumptions as to the validity of his copyright and the accuracy of the information supplied on his application.¹⁶¹ This makes it easier for the author to win any later infringement action. Second, registration qualifies an author to pursue additional remedies with respect to infringements that take place after registration.¹⁶² For example, an author who has registered his work has the option of pursuing statutory damages instead of actual damages, and such an author can also recover attorney's fees.¹⁶³ These expanded remedies are particularly valuable in cases

¹⁵⁸ 17 U.S.C. §§408-12.

¹⁵⁹ These requirements are set out in the statute. For example, 17 U.S.C. §409 lists the categories of information that an applicant must disclose on a registration form, and 17 U.S.C. §408 explains the deposit requirement as it applies in the context of registration.

¹⁶⁰ 17 U.S.C. §410(b).

¹⁶¹ 17 U.S.C. §410(c).

¹⁶² 17 U.S.C. §412. Note that, in certain instances, these additional remedies are available with respect to infringements that occurred before registration. In particular, a work that is registered within three months of its first publication enjoys the full protection of a registered work even if the infringement at issue occurred prior to registration. 17 U.S.C. §412(2).

¹⁶³ 17 U.S.C. §412.

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where actual damages would be difficult to prove with sufficient specificity.¹⁶⁴

As it was with the doctrine of *scènes à faire*, there are a number of possible explanations for the registration procedure. For example, I pointed out earlier that copyright law might want to distinguish authors whose expressive activities are motivated by copyright from authors for whom copyright was an afterthought.¹⁶⁵ Drawing this sort of distinction is desirable since, while copyright is likely worth its costs in instances where it encourages expressive production, copyright might not be worthwhile in cases where the promise of protection does not increase the incentive to create. Registration partially accomplishes this goal by offering expanded remedies to authors who signal, through registration, that copyright is important to them. Registration is not the extreme approach in that even unregistered works are protected, but registration does distinguish between the two categories of authors and thus it does further the goal of calibrating the level of protection to the likely incentive effect.

Similarly, registration might be explained by the observation that registration increases the nation's cultural archive. By offering various advantages to registration, modern law encourages authors to submit copies of their works to the Copyright Office. From there, many of these works are passed along to the Library of Congress and, in turn, made available to the public. True, registration could accomplish this even more effectively by requiring that all works be registered; but, as was noted earlier, modern copyright law is reluctant to impose strict requirements for fear that they will just trip up foreign authors and authors who are not well versed in the nuances of the law. Most of copyright law is thus implemented through carrots, not sticks, and on this view registration is consistent with the overall approach of copyright law.

Registration can also be at least in part explained by reference to evidentiary issues. The evidentiary presumptions that take hold if a work is registered within five years of its first publication make it easier for these copyright holders to litigate their cases. Cases where the work was not registered within five years of publication, conversely, are much harder to win. The presumptions thus have the effect of discouraging litigation in

¹⁶⁴ Although not discussed in the text, note that registration is, as a technical matter, a precondition to the filing of almost any infringement action. 17 U.S.C. §411. This is not discussed, however, because it is in reality just a formality. Right before a litigant files suit, he can submit the appropriate materials to the Copyright Office. Thus, in practical effect, copyright litigation begins with the submission of a form to the Copyright Office and then proceeds with the normal progression of filings to the appropriate court.

¹⁶⁵ See *supra* notes ___ and accompanying text (offering this as a possible rational for the fixation requirement).

cases where there is not good evidence—namely, cases where either (a) no copy of the work was deposited or (b) a copy was deposited but only after a long time had passed since the work was first made public. Note that, unlike all of the previous copyright doctrines considered, registration does not exclude cases that lack good evidence. Instead, registration just sets the evidentiary burdens so as to discourage litigation in these instances.

Some courts and commentators have argued that registration does not serve an evidentiary purpose since the Copyright Office is not obligated to preserve copies of all registered works.¹⁶⁶ Section 704(d) explicitly states that copies of published works need only be maintained for “the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress,”¹⁶⁷ and in 1983 the Copyright Office announced that, due to a lack of storage space, published works would typically be discarded after five years.¹⁶⁸ These limitations do admittedly lessen the evidentiary value of the registration procedure, but that effect should not be overstated. First, an archive for published works is only so important since, by definition, copies of published works are widely available and thus there is naturally good evidence of their contents. Second, none of the above-quoted text refers to unpublished works. For these works, the evidentiary value of registration is greater, and the statute correspondingly requires that copies of unpublished works not be “knowingly or intentionally destroyed” during the copyright term unless a duplicate copy is archived.¹⁶⁹

D. Joint Authorship

Many expressive works are created by teams of authors. Rodgers and Hammerstein, for example, are famous for their Broadway musicals, just as Elton John and Bernie Taupin are well known for their collaborative efforts at popular music. Cognizant of this possibility for collaboration, the 1976 Act recognizes as “joint work” any work “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁷⁰ Absent other arrangements, co-authors own joint work as tenants in common, which means that each can license or use the work without the consent of the others, but any profits that result must be shared.

¹⁶⁶ See, e.g., *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

¹⁶⁷ 17 U.S.C. §704(d).

¹⁶⁸ See Policy Statement on Deposit Retention Schedule, Library of Congress, 48 Fed. Reg. 12,862 (1983).

¹⁶⁹ 17 U.S.C. §704(d).

¹⁷⁰ 17 U.S.C. §101 (definition of “joint work”).

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Joint authorship has proven to be a difficult issue for modern copyright law, in part because the statutory definition is unworkably broad. Consider a motion picture. Motion pictures result from the collaboration of hundreds of individuals, including screen writers, directors, producers, actors, casting agents, lighting directors, and a variety of creative individuals responsible for costumes, makeup, scenery, and the like. Under a literal reading of the statutory definition, every one of these individuals is a co-author of the resulting picture, free to license its use, produce sequels, and otherwise enjoy the trappings of copyright ownership. That, of course, is a result best avoided. A diffuse, one-size-fits-all ownership right would under-reward key contributors to the project and would also lead to an inefficient race to use the shared intellectual property first. In theory, contract law could be used to avoid these outcomes and redistribute ownership rights, but in settings where transaction costs are high, that process would be both wasteful and difficult. Moreover, any contractual solution would be vulnerable to strategic misbehavior, with, for example, each individual owner being tempted to hold out and in that way maneuver for a disproportionate share of the profits.

To solve these sorts of problems, courts have attempted to limit the concept of joint authorship by superimposing additional requirements on top of those listed in the statutory definition. One of these additional requirements demands that each would-be author contribute to the collaboration something that is itself copyrightable. The leading case on point is *Childress v. Taylor*.¹⁷¹ Defendant in the case had researched the life of a famous comedienne and had asked plaintiff to take that research and write a play about the comedienne's life. Defendant made specific suggestions to plaintiff as to particular scenes that might work well in the play, and the two communicated frequently during the authorial process, but, overall, defendant contributed ideas and research to the project while plaintiff was solely responsible for writing the actual script. When a dispute over copyright ownership arose, defendant argued that this set of facts was sufficient to qualify the play as a joint work.

The court disagreed, and one reason given was that defendant had not contributed anything that could itself be protected by copyright.¹⁷² True, defendant's contributions were valuable. The play itself was her idea and her research was of considerable importance to the success of the project. But the court was convinced that joint authorship should be recognized only with respect to authors whose contributions are original works of authorship fixed in tangible media. According to the court, any lesser re-

¹⁷¹ 945 F.2d 500 (2d Cir. 1991).

¹⁷² *Id.* at 506-07.

quirement would introduce a substantial risk that a “sole author [will be] denied exclusive authorship status simply because another person rendered some form of assistance.”¹⁷³ In other words, the court was worried about claims based on trivial contributions, and the court thought that the standard obligations with respect to creativity and fixation would filter those claims out.¹⁷⁴ The court did recognize that this rule would exclude some potentially substantial contributions that just so happened to not come in the form of original, fixed expression. But the court thought that this was “consistent with the spirit of copyright law” since copyright, too, protects only original, fixed expression.¹⁷⁵ The court also seemed to take comfort in the fact that parties other than joint authors can still share in the control of a collaborative work by negotiating those rights via contract.¹⁷⁶

The *Childress* court’s analysis has been widely adopted in the years since the opinion was handed down. Indeed, it has been explicitly adopted in the First,¹⁷⁷ Fifth,¹⁷⁸ Seventh,¹⁷⁹ and Ninth¹⁸⁰ Circuits, in addition to the Second Circuit where it originated and has since been routinely followed.¹⁸¹ The former drummer for the popular band “Better than Ezra” thus lost his claim at co-authorship of the band’s songs because, in the court’s view, he had not fixed his specific contributions in tangible form prior to their inclusion on the band’s album.¹⁸² And an arguable co-author of the Broadway musical *Rent* had to prove that her contributions were original works of authorship fixed in a tangible medium of expression before her claim at co-authorship would even be considered.¹⁸³

My response to all this is perhaps predictable at this point in the Article: if creativity and fixation can only be justified as tools that identify and exclude cases where courts would otherwise face significant problems of proof, the *Childress* court erred when it invoked these doctrines as if they

¹⁷³ *Id.* at 504.

¹⁷⁴ *Id.* at 507 (“The insistence on copyrightable contributions by all putative joint authors might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work.”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Cabrera v. Teatro del Sesenta, Inc.*, 914 F. Supp. 743, (D.P.R. 1995).

¹⁷⁸ E.g., *BTE*, *infra* note __; *Clogston v. American Academy of Orthopedic Surgeons*, 930 F. Supp. 1156 (W.D. Tex. 1996).

¹⁷⁹ *Erickson v. Trinity Theatre*, 13 F.3d 1061 (7th Cir. 1994).

¹⁸⁰ *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

¹⁸¹ E.g., *Thomson*, *infra* note __; *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, (S.D.N.Y. 2000).

¹⁸² *BTE v. Bonnecaze*, 43 F. Supp. 2d 619 (E.D. La. 1999).

¹⁸³ *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). She ultimately lost on grounds that there was no mutual intent to create a joint work.

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could be used to distinguish trivial from substantial contributions. Simple examples make this mistake plain. A television actor makes an original and fixed contribution when he offers up one new line of dialogue that is then included in the script, yet surely that is a minor contribution that should not be sufficient to support a claim of joint authorship. Conversely, the research at issue in *Childress* might have lacked creative spark and was not necessarily recorded in any stable form, yet this research was directly responsible for the creation of the play and thus was a substantial contribution to the project.

The *Childress* court is correct, of course, when it points out that incorporating these doctrines into the definition of joint authorship yields a certain consistency between the joint authorship inquiry and copyright's threshold questions. But of what value is surface consistency? The threshold inquiry is meant to filter out works that should not be protected. The joint authorship inquiry takes as given that a work is eligible for protection and asks only who should enjoy the trappings of copyright ownership. The issues raised by these inquiries are radically different; a consistent response has no intuitive appeal.

Indeed, think specifically about evidence. If the joint authorship inquiry were attempting to allocate with specificity exactly what proportion of the collaborative work should be attributed to which joint author, evidence issues would abound. Every mundane sentence would be claimed by every potential joint author, and the court would be hard-pressed to determine which author actually contributed which sentence. Unfixed expression would similarly cause problems, again leaving each putative co-author free to plausibly claim that the disputed element came from him. But, in fact, joint authorship is not attempting this sort of detailed attribution. The only question is whether a would-be joint author actually made a substantial contribution to the project. Once that hurdle is crossed, every joint author enjoys identical rights, and the sorts of evidentiary details that complicate copyright's threshold inquiry become entirely irrelevant. There was thus no evidence issue in *Childress*, for example, since there was considerable evidence not only that defendant had put significant energy into gathering research but also that she had communicated frequently with plaintiff. This evidence was more than sufficient to evaluate the issues presented with respect to joint authorship.

The *Childress* court is also correct when it points out that any imperfections in its analysis can be rectified by contract law. Collaborators are always free to allocate ownership rights via contract, and through contract they can almost perfectly mirror any allocation that would otherwise be

established under the rubric of joint authorship.¹⁸⁴ But the court is adopting a default rule, and default rules have significant influence in cases where transaction costs are high or the parties lack foresight and/or legal sophistication. This would suggest that the court's rule should be designed to at least come close to a sensible distribution of the ownership right.

Can the court's rule be defended as some sort of penalty default, an intentionally illogical rule designed to encourage parties to contract? Perhaps. But even there it would seem odd to import the concepts of originality and fixation to serve this purpose when so many other penalty defaults would be equally arbitrary and yet would have the added virtue of coming with considerably less doctrinal baggage. Might the court's rule be designed to deny even valid claims in the hopes of minimizing the number of cases where multiple authors share intellectual property rights? Again, perhaps. But, again, why import creativity and fixation given that there are so many other limiting concepts that could more reliably accomplish that goal? All in all, it seems that creativity and fixation were first imported into the joint authorship inquiry because courts did not understand what these doctrines were about. If the evidence interpretation is correct, creativity and fixation should not be prerequisites to joint authorship status.

E. Exclusive Rights under Section 106

The joint authorship inquiry is not the only inquiry in copyright law to import the creativity and fixation requirements. When articulating the specific exclusive rights that copyright owners enjoy, Congress also invoked these concepts. For example, one of the rights listed in section 106 of the 1976 Act is the exclusive right "to reproduce the copyrighted work in copies."¹⁸⁵ The term "copies" is defined in section 101 to mean any material

¹⁸⁴ Contract law can be used to imitate the control and profit-sharing features of joint authorship. It cannot, however, mimic features related to copyright duration since joint work enjoys a term based on the life of the last surviving author (17 U.S.C. §302(b)) whereas the duration of all other work is measured by the life of the one legally recognized author (17 U.S.C. §302(a)). Contract cannot mimic features related to copyright termination, either. Federal law grants to authors an inalienable right to cancel almost any contractual obligation made with respect to a copyrighted work effective only at specific, predetermined times in the life of the work (see, e.g., 17 U.S.C. §203); contract law cannot similarly create an inalienable right, nor can it defeat that right as it would be enjoyed by the legally recognized author. All that said, however, these are typically understood to be relatively minor benefits since both have relevance only many years after the work was first created. Termination, for example, first kicks in 35 years after the relevant contract was signed. See 17 U.S.C. §203(a)(3). And differences with respect to duration can at the earliest come into play seventy years after the work was first created (and, at that, only if the author dies immediately after creating the work.) Compare 17 U.S.C. §302(a) with §302(b).

¹⁸⁵ 17 U.S.C. §106(1).

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object “in which a work is fixed.”¹⁸⁶ Thus the only reproductions that are impermissible under this particular provision are reproductions captured in stable form.¹⁸⁷ Similarly, another of the rights listed in section 106 is the exclusive right “to prepare derivative works based on the copyrighted work.”¹⁸⁸ There is a long definition for the term “derivative work” given in section 101, but one part of that definition demands that the resulting work in certain instances be “an original work of authorship.”¹⁸⁹ In cases where this part of the definition is relevant, courts have therefore held that copyright owners can stop rivals from producing creative variations on their underlying works but cannot stop rivals from producing banal variations on those same works.¹⁹⁰

Before considering all this from an evidentiary perspective, it is worth noting that it is difficult to argue that any of the rights listed in section 106 are illogically defined. Without empirical evidence, almost any definitions can be justified given how many factors must be weighed in defining what is and what is not a sensible right to recognize. The results turn on educated guesses about the relative benefit to the author of having a certain right recognized as compared to the harm to society from losing access along that dimension, and even that balance must be tempered by a virtually endless list of secondary considerations such as the likelihood that copyright holders will be able to use self-help mechanisms to simulate unrecognized rights anyway and thus restrict public access by operating outside the confines of copyright law per se. Thus, attempting to criticize the use of originality and fixation as part of section 106’s definitions is to some degree a hopeless project.

That said, if these doctrines really are about evidence, it is certainly easier to justify the use of the fixation requirement in this setting than it is to justify the use of the creativity requirement. After all, it would be difficult for courts to determine whether an impermissible reproduction took

¹⁸⁶ 17 U.S.C. §101 (definition of “copies”).

¹⁸⁷ Unauthorized reproductions made in unstable form might be addressed by other provisions of section 106, for example section 106(2). However, as is discussed later in this section, that provision has its own limitations. Moreover, the Ninth Circuit has held that section 106(2) applies only in instances where the derivative work “physically incorporate[s] the underlying work or works,” (*Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 968-69 (9th Cir. 1992)), an ambiguous limitation that seems both to limit the use of this provision with respect to unfixed work and to contradict the legislative history associated with the provision (see House Rep. at 62 (“the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form”).

¹⁸⁸ 17 U.S.C. §106(2).

¹⁸⁹ 17 U.S.C. §101 (definition of “derivative work”).

¹⁹⁰ See, for example, the cases cited *infra* notes ___ and ___.

place in cases where there was no stable evidence of it. Reproductions made when a painting is scanned into the temporary memory of a computer, for example, are hard to prove up. Limiting the reproduction right to apply only to fixed violations, then, might avoid some difficult evidentiary issues. At the same time, depriving authors of protection in only these rare instances does not seem to significantly undermine the value of copyright protection. Denying authors the right to control unfixed performances would represent a significant narrowing of copyright protection, especially for playwrights; but denying unfixed reproductions seems a more modest sacrifice, one that might very well be justified on grounds that the costs of litigating those cases outweigh their benefits.

Creativity, on the other hand, seems utterly irrelevant on evidence grounds. The famous cases on this point all involve relatively trivial modifications to copyrighted works. So, in *Lee v. A.R.T. Co.*, for example, defendant purchased plaintiff's copyrighted notecards and, without permission, proceeded to mount them on ceramic tiles for ultimate commercial sale.¹⁹¹ In *National Geographic Society v. Classified Geographic, Inc.*, defendant had similarly removed articles from the National Geographic magazine and then resold them to the public in book form.¹⁹² In each of these cases there are good arguments for why the relevant defendant should not have been held liable as an infringer; but in neither case was there any dispute about evidence. Indeed, the fact that defendants did not much change the underlying work made the evidentiary issues that much more obvious. There was no doubt that the defendant in *Lee* had used the copyrighted images, just as there was no doubt that defendant in *National Geographic* had used articles from the magazine. If creativity is just a proxy for evidence, the proxy makes no sense in these sorts of derivative work cases.¹⁹³

¹⁹¹ 125 F. 3d 580 (7th Cir. 1997).

¹⁹² 27 F. Supp. 655 (D. Mass. 1939).

¹⁹³ Interestingly, one can defend the use of creativity in these settings by arguing that creativity serves a different purpose here than it does when applied as a threshold requirement. Think about it this way: one intuitive reason to excuse the defendants in *Lee* and *National Geographic* is that they have already paid for the use that is now being challenged. As Judge Easterbrook comments in *Lee*, it would be shocking if museums violate the derivative work right every time they reframe a painting (125 F.3d at 581); and it would be shocking because it seems reasonable to assume that museums purchase the right to frame, display, and reframe a painting when they buy the painting itself. If this is the intuition, creativity is a nice proxy for it. Banal, predictable uses of a copyrighted work are very likely built into the original price. A consumer buys a book, for example, and the author knows that he likely intends to read it, perhaps share it with his family, and then maybe resell it as a used book or donate it to a nearby library. Creative, unpredictable uses, by contrast, are hard to build into the initial bargain. So, if a consumer takes that same book, cuts out the pages, and then makes wall hangings, perhaps that

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IV. Conclusion

I set out in this Article to explore an evidentiary perspective on copyright law and, most importantly, to argue that copyright's threshold inquiries into creativity and fixation can only be justified on evidentiary grounds. Along the way, I have commented on several other copyright doctrines—for example, the doctrines of merger and *scènes à faire*—and I have also pointed out two major implications to this work: first, that copyright needlessly denies protection to facts and protocols; and, second, that the modern fixation requirement should either be eliminated or fortified.

In conclusion, I would like to raise a broader implication to the evidentiary theory, namely that the theory increases the importance of the many copyright doctrines not discussed here. After all, if I am right about evidence, then a good many copyright cases that are today barred on grounds of creativity and fixation should instead be allowed to progress further into copyright analysis. These cases will have to be resolved on other grounds, for example the idea/expression dichotomy, fair use analysis, and perhaps the doctrine of copyright misuse. This is not an unintentional ramification of my work. Quite the opposite, my motivation here is to reallocate the burdens of copyright analysis such that the right doctrines are doing the heavy lifting in the right cases. To decide those protocol cases by asking if part numbers are creative is ridiculous. The right copyright tools to apply in that instance are fair use, copyright misuse, and perhaps *scènes à faire*. My hope is that the evidentiary theory will begin to move copyright law in this direction, not necessarily recognizing copyright in all of these cases, but at least deciding the cases on more sensible grounds than those typically used today.

should be considered a derivative work. Such a surprising, creative use could not possibly have been built into the original price, so anyone using the book in that way should be forced (by the threat of an action for infringement) to go back to the copyright holder and negotiate for permission to put the book to that unusual use.

Creativity is not a perfect proxy here, however, since it is still difficult to price banal but infrequent uses. For example, if it turns out that most people purchase postcards for the purpose of writing messages to others but one person in every hundred buys postcards with the intent of framing them and using them as wall hangings, a seller of postcards will not be able to build both uses into the price of his original postcards even though both uses are, in this hypothetical, known uses. The seller can either charge a high price aimed at the consumers who want to make wall hangings, or charge a low price aimed at consumers who want to send messages to others; but the seller will find it difficult to set a price that reflects the value to both groups. This is a difficulty not caused by creative/unexpected uses, but instead caused by infrequent uses.