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Worth a Thousand Words: The Images of Copyright Law
Rebecca Tushnet[†]

Abstract:

Copyright starts with the written word as its model, then tries to fit everything else into the literary mode. It oscillates between two positions on non-textual creative works such as images—they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that the meaning of an image is so obvious as to admit of no serious debate and that the image is a mere representation of reality. When they treat images as opaque, they deny that interpretation is possible, pretending that images are so far from being able to be discussed and analyzed using words that there is no point in trying. This oscillation between opacity and transparency has been the source of much bad law.

This article explores the ungovernability of images in copyright, beginning with an overview of the power of images in the law more generally. The article then turns to persistent difficulties assessing copyrightability and infringement for visual works. In assessing copyrightability, courts draw lines between artistic choice and mere reproduction of reality, but also treat the artist as a person with a special connection to reality, a way of seeing that ordinary mortals lack. Infringement analysis repeats this doubling, using the representation/reality divide to separate protected elements of a specific work from unprotected ones while simultaneously insisting that works are indivisible gestalts. Current doctrine makes impossible, self-contradictory demands on factfinders. It should be replaced with a true “reproduction” right against exact or near-exact copying.

Despite this radical proposal, much of my argument is critical and diagnostic. I therefore turn to more specific problems in authorship questions for multimedia works and fair use that highlight the instabilities in current approaches to nontextual works. Greater epistemic humility, recognizing that images make multiple meanings in multiple ways, could combat the judicial tendency to presume that images are nothing more than what they seem.

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Copyright is literal. It starts with the written word as its model, then tries to fit everything else into the literary mode. Protections for photographic, musical, audiovisual, and other modes of expression were added to the U.S. code slowly and haphazardly, following economic rather than conceptual demands.¹ Taking words as the prototypical subject matter of copyright has continuing consequences for copyright law, which often misconceives its object, resulting in confusion and incoherence.

An introductory example comes from one of the most significant copyright developments of our time, Google Book Search. Book Search involves the scanning and digitization of millions of volumes of books in library collections. Its current status is uncertain, given the recent rejection of a proposed settlement that went far beyond Google's initial activity of scanning the books in order to provide "snippets" in response to searches.² Under the proposed settlement, U.S. users would have been able to get free access to significant portions of the scanned works, and to pay for greater access.

But the proposed settlement excluded most of the images in those books, the same way Google's voluntary Partner Program does. Owners of copyright in images were not as such members of the settlement class (or the Partner Program). Images are being scanned, but would not be present in the versions available to users, with limited exceptions.³ Google and the plaintiffs figured out how to manage rights in books and in articles or other written contributions to books, including how to look for the rightsholders of those works where they had not opted into the settlement. Images, by contrast, were too hard to deal with.⁴ By all indications, any opt-in settlement that ultimately emerges will not revise this basic bargain.

Not only did the proposed settlement enact the prominence of text over other methods of communication—despite copyright's formal medium neutrality—almost all public discussions of the settlement proceed as if the Google database would give users access to the "books."⁵ The

¹Cf. Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368, 372-73 (2002) ("One of the most remarkable features of copyright's historical development has been the piecemeal and particularistic manner in which its reach has extended over time to accommodate new kinds of intellectual entity. This is especially evident in relation to the visual arts. . . . These legal developments have evidently not been motivated by systematic thinking about the arts in general, or the visual arts in particular: new categories of protected subject matter have not been derived by deduction from a broad concept of 'Art', or even 'Visual Art', but have been added incrementally by way of analogy with what had already received the protection of the law.")

² *Authors' Guild v. Google*, -- F. Supp. 2d -- (S.D.N.Y. Mar. 22, 2011) (rejecting settlement as beyond the proper scope of a class action).

³ Google Book Settlement, FAQs,

<http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704#q7#> (last visited Oct. 19, 2010).

⁴ See Objections of Class Members The American Society of Media Photographers, Inc., et al., *The Authors Guild v. Google, Inc.*, No. 05 CV 8136-DC (S.D.N.Y. filed Sept. 2, 2009) available at

<http://thepublicindex.org/docs/letters/asmp.pdf>; Order Denying Motion to Intervene, *The Authors Guild v. Google Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y. filed Nov. 4, 2009) available at

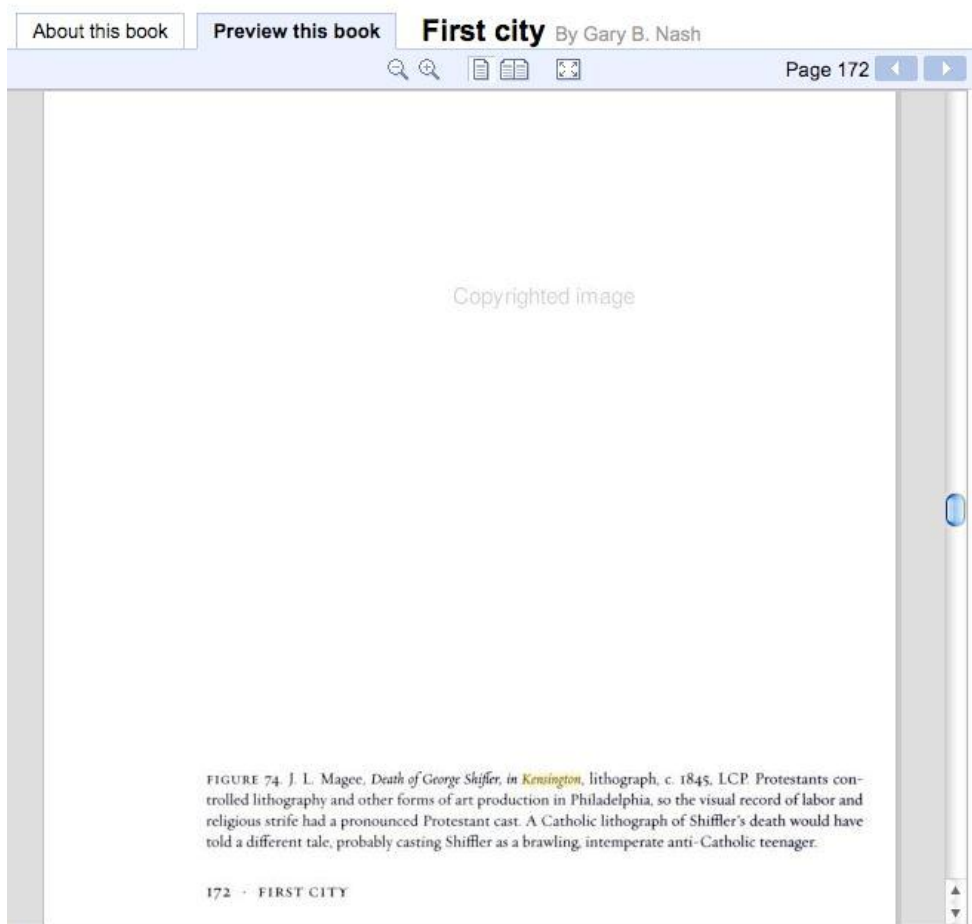
http://thepublicindex.org/docs/case_order/ASMP%20denied.pdf (denying motion of American Society of Media Photographers to intervene); see also Complaint and Demand for Jury Trial, *Am. Soc'y of Media Photographers, Inc. v. Google, Inc.*, 10-cv-2977 (DC) (S.D.N.Y. filed Apr. 7, 2010) available at

http://asmp.org/pdfs/Google_classaction_20100407.pdf (putative class action by owners of copyrights in

illustrations against Google's scanning).

⁵ See, e.g., Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L.S. L. REV. 77, 106 ("Google Books could be the technological bridge traversing the Digital

parties to the settlement, for example, issued a joint press release explaining that the settlement “[o]ffers individual users the ability to purchase access to view an *entire* in-copyright book online. . . . [Members of academic, corporate, and government organizations will have] *full* access to in-copyright, out-of-print books.”⁶ But what users will really get in most cases is access to the *words* in the books, even if in the actual work itself images were integral to the expression or discussed in the text as if they were present.



Divide: books would be available not only to those who enjoy the privilege of access to elite libraries, e.g., Harvard University’s library, but to anyone with access to a computer and the Internet.”); Mary Minow, Google Book Search Settlement: A Publisher’s Viewpoint, Sept. 2009,

http://fairuse.stanford.edu/commentary_and_analysis/2009_09_oxford_google_settlement.html (quoting Tim Barton, president of Oxford University Press: “[W]hat made it in the end straightforward for us to support the settlement was the almost unimaginable access that it will enable to millions of works that were lost to readers and scholars and which, without the settlement, were likely to remain so.”).

⁶ Authors Guild, Joint Public FAQ, <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/press-faqs/Press%20FAQs%2010.28.08.pdf> (emphasis added). It’s not in any way surprising that discussions of the settlement focus on the text, or even inappropriate to discuss the benefits of digitizing text; my point is simply that the images drop so quickly out of the discussion that the physical books are routinely equated with their digitized, image-redacted versions despite this significant difference.

⁷ See Rebecca Tushnet, *Google Books and Visual Culture*, REBECCA TUSHNET’S 43(B)LOG (May 11, 2009), <http://tushnet.blogspot.com/2009/05/google-books-and-visual-culture.html>. This particular omission has since been

As shown above, images in the corpus and the voluntary Partner Program are replaced by blanks.⁸ This provides a perfect if unintentional demonstration of how copyright, like much of law, thinks about images, which is to say it doesn't think much about them at all, privileging the text when the two come into conflict. Even in a culture saturated with images, video and music, our default when we talk about knowledge, and thus about the benefits and dangers of copyright, is text.

The blank space, image replaced by the self-contradictory words “copyrighted image,” can serve as a metaphor for the overall law of copyright. Copyright oscillates between two positions on non-textual creative works such as images—they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that images merely replicate reality, so that the meaning of an image is so obvious as to admit of no serious debate. When they treat images as opaque, they deny that interpretation is possible, because images are so far from being able to be discussed and analyzed using words that there is no point in trying. Either way, the image itself can seem beside the point: a “copyrighted image.” This oscillation between opacity and transparency has been the source of much bad law.

This Article explores the ungovernability of images in copyright, beginning in Part I with an overview of the transparency/opacity problem in the law generally. Part II turns to persistent difficulties assessing copyrightability and infringement for visual works. In assessing copyrightability, courts draw lines between ineffable artistic choice and mere reproduction of reality, but also treat the artist as a person with a special connection to reality, a way of *seeing* that ordinary mortals lack. Infringement analysis repeats this doubling, using the representation/reality divide to separate protected elements of a specific work from unprotected ones while simultaneously insisting that works are indivisible gestalts. Our current treatment of infringement, which asks whether there is “substantial similarity” between two works, makes impossible, self-contradictory demands on factfinders, and should be abandoned in favor of a true “reproduction” right against exact or near-exact copying.

Despite this radical proposal, much of my argument is critical and diagnostic. I therefore turn to more specific example in Part III. The trouble with images is compounded when text and nontext come together to form a work and courts reflexively privilege the text. Part III.A devotes special attention to protectability and authorship questions in multimedia works such as comic art. The judicial tendency to collapse the multi into something singular, picking a single person responsible for the valuable elements of a work, highlights the instabilities in current approaches to nontextual works. Likewise, as Part III.B explains, fair use, a crucial limit on copyright's breadth, is presently hampered by the model of textual criticism, which makes visual fair uses harder to identify or explain. The baseline expectation that text will be the unit of analysis confounds our ability to work with other creations.

corrected, because the images in the book were so old that they were in the public domain. The settlement, however, contemplates omitting images by default.

⁸ Barbara Quint, *The Google Book Search Settlement: “The Devil’s in the Details,”* INFORMATION TODAY, INC. (Nov. 3, 2008), available at <http://newsbreaks.infotoday.com/nbReader.asp?ArticleId=51429>.

By confronting our preconceptions about the relationship of images to reality, we may be able to proceed more predictably—to do what law promises in terms of giving reasons for its rules and reasons for its results in specific cases. Understanding images can also give us insight into how copyright law should work generally, including in its application to textual works. Copyright repeatedly poses hard questions, likely unanswerable in any permanent way, about what exactly an idea is and how it can be distinguished from the form (expression) in which it appears. Careful attention to images could lead us to greater epistemic humility in making such difficult and contestable judgments about creative works.

I. The Difference That Images Make⁹

A. Nothing To See Here: The Transparency of Images

“Who are you gonna believe, me or your own eyes?”¹⁰

Because courts don’t like to think about images, and have few tools to deal with them,¹¹ the temptation is to treat them as not requiring (or being able to sustain) the interpretive energy the law devotes to words. As Neil Feigenson and Christina Spiesel summarize, “Law, like most other disciplines or practices that aspire to rationality, has tended to identify that rationality (and hence its virtue) with texts rather than pictures, with reading words rather than ‘reading’ pictures, to the point that it is often thought that thinking in words is the only kind of thinking there is.”¹² Because images do require interpretation, however, the mismatch between expectations and reality leads to incoherent results.

⁹ I will focus throughout this article on representational images, because those are what the relevant cases are about and because this allows fruitful comparisons between the treatment of words and images, both of which are generally taken to stand for (represent) some idea, entity, or the like. Nonrepresentational art presents significant puzzles of its own, particularly as to why it might be protected by the First Amendment, but that question is beyond the scope of this article.

¹⁰ Chico Marx, *Duck Soup*, quoted in Fred Shapiro, *THE YALE BOOK OF QUOTATIONS* 497 (2006)

¹¹ NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* xi (2009); cf. Jacqueline D. Lipton, *Digital Multi-Media and the Limits of Privacy Law*, CASE W. J. INT’L L. (forthcoming Mar. 2010) available at <http://ssrn.com/abstract=1584737> (arguing that the drafters of the European Union Data Protection Directive worked from a model of text-based information, with very little idea of how to apply their principles to sounds and images even though they knew that problems would arise in those formats).

¹² FEIGENSON & SPIESEL, *supra* note 10, at 4; see also, e.g., Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1704 (1997) (“Written opinions have an aura of dignity, and offer an opportunity for explication and reflection, that helps to elevate the High Court above the soundbite-driven arena in which the political branches often do battle. Even the Court’s cherished reputation as the ‘least dangerous’ governmental branch is arguably attributable, at least in part, to the unprepossessing medium on which its members so heavily rely.”); Costas Douzinas & Lynda Nead, *Introduction to LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW*, 1, 3 (Costas Douzinas & Lynda Nead eds., 1999) (“Art is assigned to imagination, creativity, and playfulness, law to control, discipline, and sobriety. There can be no greater contrast than that between the open texts and abstract paintings of the modernist tradition and the text of the Obscene Publications Act, the Official Secrets Act, or indeed any other statute.”).

Consider the famous visual pun, Magritte's *The Treachery of Images*, which consists of the words *Ceci n'est pas une pipe* below a picture of a pipe. The caption is both true and false: this is not a pipe (it is a picture of a pipe), and yet if we asked someone "what is this?" while pointing to the picture we would readily accept the answer "it's a pipe." The truth of the image is its falsity. *The Treachery of Images* is the inverse of Google's "copyrighted image," which is not an image at all, although we are meant to understand that it takes the place of an image.

We are vulnerable to the treachery of images because we tend to read images using naïve theories of realism and representation. Unless we are primed to be wary of them, and regularly reminded to maintain our skepticism, pictures appear to us to resemble unmediated reality more than words do—they seem to be caused by the external world without "human mediation or authorial interpretation," and are thus easily accepted as highly credible evidence, especially when they fit with or fail to challenge our preconceived ideas of how the world works.¹³ Images coupled with argument are especially persuasive, seeming to vouch for the truth of the argument even when they are open to interpretation or depict a phenomenon too complex for average viewers to comprehend.¹⁴

This is not to say that pictures are unchallengeable, but that we routinely fail to challenge them. Images are more vivid and engaging, decreasing our capacity to assess them critically because we are more involved in reacting to them. And, because we process images so quickly and generally, we may stop looking before we realize that critical thought should be applied to them.¹⁵ Pictures are perceived more as a gestalt, while texts appear to the reader in a set

¹³ FEIGENSON & SPIESEL, *supra* note 10, at 8; *see also id.* at 9 ("People tend (again, initially and unreflectively) to conflate representations with direct perceptions of reality, to 'look through' the mediation at what is depicted. To see the picture is to see the real thing, unmediated. What a picture depicts just seems to have presence, a kind of being in the world. As a consequence, the meaning of the picture is understood to be identical to its content.") (footnote omitted); FARHAD MANJOO, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY 79 (2009) ("Images transform statistics and anecdotes into fact."); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 1-2 (1998) ("Maxims that urge the power of images are cultural commonplaces with which we are all too familiar Seeing a photograph almost functions as a substitute for seeing the real thing.") (footnotes omitted); Allan Sekula, *On the Invention of Photographic Meaning*, 13 ARTFORUM, (Jan. 1975), at 36, 37 ("Put simply, the photograph is seen as a re-presentation of nature itself, as an unmediated copy of the real world. The medium itself is considered transparent. The propositions carried through the medium are unbiased and therefore true. In nineteenth-century writings on photography we repeatedly encounter the notion of the unmediated agency of nature."); Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in CONTEMPORARY ISSUES IN THE SEMIOTICS OF LAW 231, 237 (2005) ("[V]isual stories use a different code for making meaning than do written texts or oral advocacy. . . . They are also rich in emotional appeal, which is deeply tied to the communicative power of imagery. This power stems in part from the impression that visual images are unmediated. They seem to be caused by the reality they depict.").

¹⁴ *See* David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision Making*, 30 LAW. & HUM. BEHAV. 183 (2006); Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 BEHAV. SCI. & L. 85 (2008); D.P. McCabe & A.D. Castel, *Seeing is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, 107 COGNITION 343 (2008) (people find scientific arguments more compelling when accompanied by an image showing brain activation rather than a bar graph showing the same information; Deena Skolnick Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 J. COGNITIVE NEUROSCIENCE 470 (2008).

¹⁵ FEIGENSON & SPIESEL, *supra* note 10, at 8; *see also id.* at 9 ("Our brains process direct sensory inputs more quickly than they do the kinds of language-mediated thoughts that lead to reflection, critique, and suspicion").

sequence, most or all of which needs to be processed for the whole to be understood.¹⁶ The lightning and the lightning bug, to use Mark Twain's example of the difference between the right word and the nearly right word, would be very far apart as images. In addition, pictures can trigger emotions more reliably than words.¹⁷ For one thing, pictures are generally processed more quickly in the brain,¹⁸ and they are easier to remember than (roughly equivalent denotational) words.¹⁹ Images can even shape our perception of words: using pictures emphasizing one side of a balanced news report, for example, biases readers' perceptions of contested issues in favor of the pictured side, even though they have generally poor conscious recall of the content of the images.²⁰

Controversial documentary filmmaker Errol Morris, who has reason to know, argues that photographs "stop us from thinking" because they are so immediately persuasive.²¹ Randall Bezanson likewise contends that the emotional power of visuals defeats cool reason: we can think rationally about burning crosses when we read about them, but seeing a burning cross—either firsthand or in pictures—is different: inciting, irrational.²² For the same reasons, Manet's nude *Olympia* "challenges and undermines social conventions more efficiently and effectively than any essay or book on the subject could have done."²³ (Note that I am deliberately bracketing here the implicit racial and gender identity of the "we" who only read about burning crosses and avoid visceral responses, but that too is significant.)

The power of images comes not just from their emotion but from the linked feature that they are hard to see as arguments: they persuade without overt appeals to rhetoric. Though every image has a purpose, "the most general claims of the discourse are a kind of disclaimer, an assertion of neutrality; in short, the overall function of photographic discourse is to render itself transparent."²⁴

¹⁶ FEIGENSON & SPIESEL, *supra* note 10, at 7 ("As with reading words, we are primed when we look at pictures by what we have already seen But we can enter a picture anywhere we want to, drawn to any feature of it that catches our eye, whether the attraction is based on our own interests and predilections, formal qualities of the picture itself, or some combination thereof. With words, we can't get the idea without getting to the end of the spoken or written thought. With pictures, by contrast, we can stop 'reading' when we think we recognize the subject matter, although we may then fail to decode other meanings that the picture may be intended to convey or be capable of conveying.") (footnotes omitted).

¹⁷ FEIGENSON & SPIESEL, *supra* note 10, at 7-8.

¹⁸ FEIGENSON & SPIESEL, *supra* note 10, at 7.

¹⁹ See, e.g., Julie A. Edell, *Nonverbal Effects in Ads: A Review and Synthesis*, in NONVERBAL COMMUNICATION IN ADVERTISING 11, 13 (Sidney Hecker & David W. Stewart eds., 1988) (research shows that "pictorial stimuli frequently were remembered better than were their verbal equivalents"); cf. D. Zillmann et al., *Effects of Photographs on the Selective Reading of News Reports*, 3 MEDIA PSYCHOLOGY 301 (2001) (finding that the presence of photos substantially increased attention to, and information acquired from, the accompanying text, arguably because of greater emotional resonance).

²⁰ See D. Zillmann et al., *Effects of Photographs in News-Magazine Reports on Issue Perception*, 1 MEDIA PSYCHOLOGY 207, 223-24 (1999).

²¹ Michael Meyer, *Recovering Reality: Errol Morris Takes on Abu Ghraib*, COLUM. JOURNALISM REV., Mar.-Apr. 2008, at 53, 54 available at www.crj.org/q_and_a/recovering_reality.php.

²² RANDALL P. BEZANSON, ART AND FREEDOM OF SPEECH 252 (2009).

²³ *Id.*

²⁴ Sekula, *supra* note 27, at 37.

As a result of these characteristics, images have the power to override other forms of knowledge. As Hany Farid recounts, “[d]ays before the 2004 U.S. presidential election, a voter was asked for whom he would vote. In reciting his reasons for why he would vote for George W. Bush, he mentioned that he could not get out of his mind the image of John Kerry and Jane Fonda at an anti-war rally. When reminded that the image was a fake, the voter responded ‘I know, but I can’t get the image out of my head.’”²⁵

The apparent reality of images obscures the fact that meaning always comes from interpretation.²⁶ To take one recent example, a white American’s politics affect his or her judgment about whether an artificially lightened or artificially darkened image is a more accurate picture of now-President Barack Obama.²⁷ Such effects on perception also work across different senses: In another study, the audio track of videotaped performances by different musicians was replaced with a single performance. Thirty different musicians, none of whom noticed the switch, rated the performances. Ratings for technical proficiency and musicality were higher for performers in formal concert dress than for performers in jeans or club dresses—even though the raters were supposedly evaluating only what they heard.²⁸ Even though there is both historical and cross-cultural evidence that perceptions of the correspondence of images with reality vary depending on the viewer’s background and knowledge,²⁹ the default is to treat images as real,

²⁵ Hany Farid, *Digital Doctoring: Can We Trust Photographs?*, in DECEPTION: FROM ANCIENT EMPIRES TO INTERNET DATING (2009). Farid also cites research showing that doctored photographs can alter subjects’ memories of their own lives, whether the false events are from childhood or from adulthood. See D.L.M. Sacchi et al., *Changing History: Doctored Photographs Affect Memory for Past Public Events*, 21 APPLIED COGNITIVE PSYCHOLOGY 1005 (2007); K.A. Wade et al., *A Picture Is Worth a Thousand Lies*, 9 PSYCHONOMIC BULL. & REV. 597 (2002). Nondoctored photos can also affect memory; people who see images may later believe they directly experienced the things in the pictures. See Marita Sturken, *The Image as Memorial: Personal Photographs in Cultural Memory*, in THE FAMILIAL GAZE 178, 179 (ed. Marianne Hirsh 1999) (“[S]urvivors of historical events often report that, after time, they cannot sort out what is personal memory, what the memories of others, and what derived from the images of news media and popular culture. Hence, the public image, often marked as historical, can change and produce personal memories as well.”). Certainly, as Farid notes, false verbal narratives can also affect memory. See *infra*; M. Garry & K.A. Wade, *Actually, a Picture Is Worth Less Than 45 Words: Narratives Produce More False Memories Than Photographs*, 12 PSYCHONOMIC BULL. & REV. 359 (2005). While images and words can both be unreliable, as I will discuss further *infra* Part III, my focus here is on the ways in which images *seem* different from words in legal contexts, or are treated differently without sufficient justification for the difference.

²⁶ See Rudolf Arnheim, *The Images of Pictures and Words*, 2 WORD & IMAGE 306, 309-10 (1986) (“[Photographs in newspapers and short clips on television] show with immense authenticity what actually happened and what significant personages actually look like, but they remain neutral as far as true meaning is concerned. Even the most dramatic images of violence and suffering, of utmost happiness or victory evoke only our direct compassion. The interpretation of their significance has to be added from elsewhere.”); WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* 40, 83-84, 192 (1992) (explaining how photography’s claims to truth are dependent on context, including captions, which can structure our understanding of what the picture represents).

²⁷ See Marc Ambinder, *Lighter Skin, More Like Me*, THE ATLANTIC, (Nov. 23, 2009, 3:03 PM) available at http://politics.theatlantic.com/2009/11/_reply_reply_to_all.php, (discussing a study by E.M. Caruso et al., published in Proceedings of the National Academy of Sciences, which shows that political partisanship influences the perception of candidates’ skin tone).

²⁸ See N.K. Griffiths, *‘Posh Music Should Equal Posh Dress’: An Investigation into the Concert Dress and Physical Appearance of Female Soloists*, 38 PSYCHOLOGY OF MUSIC 159 (2010).

²⁹ See, e.g., Linda M. Scott, *Images in Advertising: The Need for a Theory of Visual Rhetoric*, 21 J. CONSUMER RES. 252, 261 (1994) (“Although newly devised styles of representation are often seen as arbitrary, awkward, cryptic, and even frightening, the conventions are learned until, in time, they look self-evident . . . The style of impressionism

with corresponding difficulty analyzing them as images, distinct from that which they (purport to) represent.³⁰

B. Transparency in Law

“A picture is a fact.”³¹

Judges and scholars are powerfully motivated to disavow “judging” visual art because the artistic enterprise seems so opposed to the legal enterprise: irrationality versus rationality, subjectivity versus objectivity, fantasy (or Truth) versus facts, and so on.³² Images seem especially dangerous because their power is irrational. “[B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.”³³ One way to deal with the problem is to ignore the gap between the image and the reality, converting nontextual works into words while not recognizing the ways in which the translation is flattening and distorting.

Is such translation possible, given the cognitive and emotional processes discussed in the previous section? The argument of this article takes as a given that there are certain features of human perception that work in predictable ways depending on the perceptual input. But what *follows* from those features is neither fixed nor universal. To the contrary, cultural factors are vital in determining what, if anything, those perceptual tendencies will mean, both generally and as a matter of law. The intuitive lines judges and lawyers often draw between images and words are not mistaken in positing distinctions. The problem with judges’ and lawyers’ unexamined intuitions is that they then take for granted the social and legal consequences of the differences between text and image, often in conflicting ways.

was at first jarring and unintelligible to viewers of the late nineteenth century. Now, few of us have trouble seeing dancers, children, or gardens in the works of Degas, Renoir, or Monet. Contrariwise, it is well documented that judgments of what looks lifelike varies a great deal over time and across cultures.”) (citations omitted).

³⁰ See, e.g., Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 393 (2004) (“It is precisely this seeming transparency of the photograph that is its most powerful rhetorical device.”) (footnote omitted); LINDA HAVERTY RUGG, PICTURING OURSELVES: PHOTOGRAPHY AND AUTOBIOGRAPHY 5 (1997) (“While we know on one level that photographs are the products of human consciousness, they also can (have been, are, will) be taken as ‘natural’ signs, the result of a wholly mechanical and objective process, in which the human holding the camera plays an incidental role in recording ‘truth.’”); W.J.T. MITCHELL, *ICONOLOGY* 37 (1986) (“The effect of [the invention of artificial perspective] was nothing less than to convince an entire civilization that it possessed an infallible method of representation, a system for the automatic and mechanical production of truths about the material and the mental worlds. . . . And the invention of a machine (the camera) built to produce this image has, ironically, only reinforced the conviction that this is the natural mode of representation. What is natural is, evidently, what we can build a machine to do for us.”).

³¹ LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 2.141.

³² See, e.g., Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005) (“Other jurists and commentators have similarly expressed the view that legal and artistic determinations should not be merged and that judges should refrain from indulging in subjective aesthetic determinations. Although never fully unpacked, these views are usually premised on the following conventional understanding. First, art and law belong in separate cognitive and intellectual spheres. Second, art and law exist in polarity where law is objective and art is subjective. Third, law is about precedent whereas art is about the evolution of ideas.”).

³³ Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 213 (2000); cf. Barron, *supra* note 2, at 400 (noting that Kant argued that only words deserved treatment as expression of the author’s self).

Vision is encoded in American legal culture, and more broadly, as equivalent to truth in myriad ways.³⁴ We equate vision with reality constantly, including in numerous ingrained metaphors: we see (meaning “understand”), demonstrate (from a root meaning “show”), clarify the obscure, and numerous other words, including many employed in this article. I won’t stop and identify those terms, but it’s worth noting that they structure our thinking because they are so deep-seated and naturalized.³⁵ Indeed, because our dependence on nonanalytic, split-second judgments is so profound, recognizing our vulnerability to them in the area of images may also help us attend to the way in which intuition works more generally, and how aesthetic theory, sociology, psychology, and other fields may challenge courts to test their intuitions.³⁶

Christopher Buccafusco points out that linear perspective makes a viewpoint seem disembodied, rational, and objective, so that jurors looking at standard perspectival images “may be unwilling or unable to decipher alternative meanings or at least to recognize that the meaning of the image is in constant flux.”³⁷ Images are dangerous precisely because they seem so real. The following sections explore these tensions between the truth value of images and their power to create illusions and to inject emotion into the supposedly rational domain of the law, including a discussion of how obscenity law conflates images with reality, a theme that recurs in copyright with similarly negative effects. Underlying the legal discomfort with images is the fear that they make people feel rather than think.

C. Images as Legal Tools

The communicative power of images can, when recognized, be leveraged by law. Requirements that tobacco manufacturers refrain from using images and rely only on words to sell their products, for example, rest on the idea that anyone forced to *think* about smoking would

³⁴ As Diane Zimmerman has pointed out, when vision and other senses conflict, we regularly prioritize vision. *See* Diane Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364, 411-12 n.268 (1989); *see also* Irvin Rock & Jack Victor, *Vision and Touch: An Experimentally Created Conflict Between the Two Senses*, 143 SCI. 594, 595-96 (1964) (finding that subjects shown a square in a distorted way so that it looked like a rectangle still believed the shape was a rectangle even when they were allowed to hold it); James J. Gibson, *Adaption, After-Effect and Contrast in Perception of Curved Lines*, 16 J. EXP. PSYCHOL. 1, 5 (1933) (finding a similar result for straight lines distorted to look curved).

³⁵ To take an easy example, Justice Stewart’s famous phrase “I know it when I see it,” of which more *infra*, has been picked up by numerous courts as a justification for conclusions that are unlikely to rely on visual evidence: when what the court is saying is “I know it when I know it.” *N.L.R.B. v. Lovejoy Indus., Inc.*, 904 F.2d 397, 402 (7th Cir. 1990) (how much coercion spoils a unionization election and requires a re-run); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir.1986) (citing *Papai v. Cremonnik*, 635 F.Supp. 1402, 1410 (N.D.Ill.1986)) (what counts as a “pattern of racketeering activity”); *UBS Painewebber, Inc. v. Aiken*, 197 F.Supp.2d 436, 440 (W.D.N.C. 2002) (what counts as “solicitation” for purposes of a non-compete agreement); *Hickey v. Hickey*, No. FA000162519S, 2008 WL 5220779, at *2 (Conn. Super. Ct. Nov. 18, 2008) (what counts as a “parent-like relationship” sufficient to give standing in a custody dispute); *People v. Williams*, 910 N.E.2d 1272, 1286 (Ill. App. Ct. 2009) (police dispatcher’s alert to drug dealer that the police were after him was “official misconduct”); *Pagotto v. State*, 732 A.2d 920, 925 (Md. 1999) (difference between depraved-heart murder and gross-negligence manslaughter); *Rosiny v. Schmidt*, 587 N.Y.S.2d 929, 942 (N.Y. App. Div. 1992) (violation of fairness in contracts case sufficient to trigger judge’s “sense of injustice”).

³⁶ *See* John Darley, *Realism on Change in Moral Intuitions*, 77 U. CHI. L. REV. 1643, 1649 (2010).

³⁷ Buccafusco, *supra* note 26, at 650.

see what a stupid idea it is.³⁸ Using the same logic in the opposite direction, antiabortion legislators are forcing women seeking abortions to view ultrasound images, on the theory that seeing the ultrasound will deter women because of the unique effects vision has on decisionmaking, effects that can't be produced with informational pamphlets.³⁹

These legal uses of images rely on the ability of images to persuade without seeming to persuade. It is probably not accidental that, dissenting from a ruling upholding limits on antiabortion protests near clinics, Justice Scalia repeatedly invoked scenarios involving the use of words—cool, rational, traditionally persuasive words—rather than the bloody images that are the dominant feature of most actual antiabortion protest. “My dear, I know what you are going through”⁴⁰ is an invitation to dialogue; a picture of a dismembered fetus is not. Imagined scenarios involving words made it much easier for Justice Scalia to explain, in terms consistent with the First Amendment’s preference for reasoned debate, why the protesters had First Amendment rights to approach women seeking medical care at clinics. Activists, by contrast, are well aware that images are their best forms of argument because they appeal so effectively to emotion.

Images, by not making their appeal to emotion explicit, provide a way to bring emotion to law despite law’s expressed discomfort with emotions.⁴¹ Thus, for example, victim impact statements used at criminal sentencing now may incorporate video, sometimes set to haunting music, with resulting controversy over whether such presentations irrationally influence sentencing juries.⁴² This link between images and emotions means that images’ immediacy, combined with Western law’s general emotion/reason opposition, can switch valence quickly, from truth—in the form of pure reason and logic--to falsity or unreliability--connected to ideas about excess and the untrustworthiness of emotion.⁴³ Hamilton Dellinger, attacking the use of

³⁸ See, e.g., Tobacco Act, S.C. 1997, c. 13, s. 15 (Can.) (regulating images that cigarette brands can use); *Commonwealth Brands, Inc. v. U.S.*, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (rejecting certain limits on use of images in cigarette ads and on packaging); Alberto Alemanno & Enrico Bonadio, Do You Mind My Smoking? Plain Packaging of Cigarettes under the TRIPS Agreement, <http://ssrn.com/abstract=1751583> (discussing various nations’ attempts to decrease smoking by regulating visuals, including images, colors, and fonts used on packs).

³⁹ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 361 (2008) (noting the connection between the general importance of visuality and the new requirements).

⁴⁰ *Hill v. Colorado*, 530 U.S. 703, 757 (2000) (Scalia, J., dissenting).

⁴¹ David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275 (clarifying legal thinking about emotion in decision making); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003) (attempting to understand the scope and limits of protection for emotional expression); Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609 (2007) (discussing the place of emotion in the courtroom); Laura R. Bradford, *Trademark Dilution and Emotion*, BERKELEY TECH. L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334925.

⁴² See *People v. Zamudio*, 181 P.3d 105, 136-37 (Cal. 2008), cert. denied, 129 S.Ct. 567 (2008) (holding that a trial court did not err in admitting a victim impact statement consisting of a 14 minute video montage depicting the lives of the two victims from early childhood, narrated in court, by the victim’s daughter and ending with three photographs of the victims’ grave markers); *People v. Kelly*, 171 P.3d 548 (Cal. 2007), cert. denied, 129 S.Ct. 564 (2008).

⁴³ See, e.g., Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 U. MIAMI L. REV. 609, 616 (2004) (“[A]ttitudes towards [vision and visuality] have rarely been unambiguous. ... Statements such as ‘Seeing is believing,’ and ‘A picture is worth a thousand words’ indicate the value our culture places on vision, but there also exists a distinct countervailing notion that images can be deceptive

images in Supreme Court opinions, thus argues that images should be avoided by courts because they *feel* so true but *are* deceptive and overly emotional.⁴⁴

Justice Jackson, writing to strike down a requirement that schoolchildren salute the flag, referred to images as working “a short cut from mind to mind.”⁴⁵ As Amy Adler elucidates, this is both a positive and a negative characterization: in this view, images are “forceful, but crude. They’re a cheat, a short cut.”⁴⁶ In *Virginia v. Black*,⁴⁷ likewise, the power of a burning cross—a symbol—was understood to constitute essentially an explicit threat, allowing the state to ban crossburning carried out for the purposes of intimidation. Words, however vicious, would have had difficulty carrying the same threatening power as the flaming cross.⁴⁸

Because images and other nonverbal media don’t work like words, courts have often been cautious in recognizing them as “speech,” that is, as communication protected by the First Amendment. Each new mass medium has recapitulated the struggle for First Amendment recognition. Given that the post-Founding Era new mass media have been predominantly nontextual, the fear that a new form of communication was too emotional or irrational has been a major driver of courts’ initial hesitance to extend the First Amendment.⁴⁹ Consider Randall Bezanson’s account of why video is so dangerous: it goes beyond “the rational and domesticated medium of spoken or printed words,” engaging in “more direct appeal to emotional or non-reasoned ways of perceiving, ... without the constraints of distance and time.”⁵⁰ Video makes

and misleading. These concerns are particularly strong in the legal culture, where certainty and reliability are paramount.” (footnotes omitted); Douzinas & Nead, *supra* note 11, at 7 (“The history of law’s attitude toward images follows this tortuous dialectic, the deeply paradoxical combination of truth and falsity, of blindness and insight. The claim that image is truth implicates the theme of resemblance, similarity, or mimesis, a key metaphysical concept of Western philosophy But image is also false. . . . Images are sensual and fleshy; they address the labile elements of the self, they speak to the emotions, and they organize the unconscious. They have the power to short-circuit reason and enter the soul without the interpolation or intervention of language or interpretation.”).

⁴⁴ See Dellinger, *supra* note [], at 1706-08; see also CHUCK TRYON, REINVENTING CINEMA: MOVIES IN THE AGE OF MEDIA CONVERGENCE 42 (2009) (mentioning the “belief that digital media produce more realistic—and therefore deceptive—representations”).

⁴⁵ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

⁴⁶ Adler, *supra* note 13, at 214; see also *id.* at 214-15 (“Furthermore, there is a certain treachery to images. The Court’s opinion reveals a nagging uncertainty about how to account for the flag’s meaning. Consider what Justice Jackson says next: ‘A person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.’ This passage portrays visual symbols as a potentially hazardous form of communication. If the meaning of a visual symbol rests in the mind of the person who sees it, then a speaker who uses a symbol to convey a message runs a risk that the symbol will mean something other than what he intended. . . . The visual symbol is so powerful that it may overpower the speaker.”).

⁴⁷ 538 U.S. 343 (2003).

⁴⁸ Randall Bezanson argues that *Black* is about the burning cross as a type of art that “communicates at a sensual, non- or pre-rational level, appealing to emotion and noncognitive understanding or interpretation.” BEZANSON, *supra* note 28, at 239.

⁴⁹ BEZANSON, *supra* note 28, at 1 (“[W]ith newly emerging aural and visual technologies, the U.S. Supreme Court has most often declined to apply the full force of constitutional protection, at least for a time, proceeding cautiously and in small steps with the mediums of radio, television, and film, and, most recently, electronic forms of communication. The Court’s caution has been particularly evident with the more artistic and emotionally powerful genres of expression such as dance, film, or video. Ideas about freedom of speech have been shaped by the cool, detached, and reasoned medium of print. They are poor fits for the emotional, involved, sensory mediums spawned by twentieth-century technologies.”).

⁵⁰ Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 313 (1998).

the viewer into a participant, “called to action by the combined force of reason and emotion.”⁵¹ Video is thus more like an inciter exhorting a mob than it is like a book.⁵² And yet visual and audiovisual media’s very effectiveness in eliciting reactions eventually provided reason to bring them within the First Amendment’s scope.

Even outside the First Amendment context, law has often struggled with images’ mixture of danger and power. Jennifer Mnookin has investigated the ways in which the development of photography was both the apotheosis of evidence and a threat to the legal system: The photograph’s apparent power to replicate, rather than simply represent, reality made it persuasive. But photography also threatened law because there wouldn’t seem to be a need for legal judgment if photography made a universal truth apparent to everyone.⁵³ In response, courts treated photographs as support for testimony, like other objects, but refused to acknowledge what happened in fact—that photos served as independent confirmation of testimony (evidence in themselves) because they seemed veridical in ways that sketches didn’t.⁵⁴ The power of the image was a threat to the judicial system’s prioritizing of the word.⁵⁵

The use of film in law follows the same pattern: film’s “obvious” correspondence to reality makes its rhetorical or persuasive effects invisible. As Jessica Silbey has shown, in judging filmed confessions, and elsewhere, courts perceive film as transparent and thus proceed with absolute self-confidence in interpreting a particular piece of film.⁵⁶ In fact, however, the choice of angle and frame affects audiences’ perceptions of the voluntariness of a confession and the degree of a suspect’s guilt, because the camera’s focus influences viewers’ judgments about causation. Confessions are more likely to be judged voluntary when they are shown on videotape rather than reported by transcript, and even more likely to be judged voluntary when the camera focuses on the suspect rather than giving equal prominence to the interrogator. But at the same time, audiences are absolutely sure they are reacting to suspects’ statements and not to presentation.⁵⁷ Low angles make the people portrayed look sinister;⁵⁸ shots of people with their heads angled slightly away from the camera and their chins raised make them look dynamic and presidential.⁵⁹ The same phenomenon in which observers trust the film more than the person who was filmed occurs with pornography: women who appear to be participating voluntarily, even if

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See Mnookin, supra* note 27, at 18-20.

⁵⁴ *See id.* at 43-54.

⁵⁵ *See id.* at 54-55.

⁵⁶ *See* Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493 (2004); Jessica M. Silbey, *Criminal Performances: Film, Autobiography, and Confession*, 37 N.M. L. REV. 188 (2007) [hereinafter Silbey, *Criminal Performances*]; Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107 (2005).

⁵⁷ *See, e.g.,* Jennifer J. Ratcliff et al., *The Hidden Consequences of Racial Salience in Videotaped Interrogations and Confessions*, 16 PSYCHOL. PUB. POL’Y & L. 200 (2010).

⁵⁸ DAVID BORDWELL & KRISTIN THOMPSON, *FILM ART: AN INTRODUCTION* 158 (2d ed. 1986) (“[E]xpressive qualities can be suggested by lenses which distort objects or characters; we can hardly see the man [portrayed in wide-angle close-up] as anything but sinister.”); *see also* ENCYCLOPEDIA OF PHOTOGRAPHY 29 (1984) (“A low angle of view looking up at a subject tends to exaggerate its height and therefore its assumed importance.”).

⁵⁹ *See* H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706262 (recounting the aesthetic strategies used in political posters to make candidates seem presidential, including angle, coloring, lighting, etc.).

they were coerced, lose credibility in speaking about the coercion. Their appearance has an authority that their own words lack.⁶⁰

These are not problems of blatantly false post-production editing. Indeed, by distinguishing between manipulated and unmanipulated photos and film, we reinscribe the idea that there is some Platonic unretouched representation of reality, such that a non-Photoshopped photo would show us the truth.⁶¹ New generations of “digital natives” may be more aware of certain potential operations that may be performed on images,⁶² but they will still be no more likely than earlier generations to recognize how framing, style, and other visual elements affect them. Actual photomanipulation plays a relatively small role in the distorting effects of images: there is always a story outside the frame.

A recent Supreme Court case, *Scott v. Harris*, highlights the power of images to make judges think that they have direct access to reality. In *Scott*, eight members of the Court found that a videotape of a high-speed police chase so clearly displayed the truth of a police-citizen encounter that no jury should be allowed to assess whether the police behaved unreasonably, even though the chase ended with the target paralyzed. Notably, the majority posted the film of the chase on the Supreme Court’s website as part of its opinion, believing that the opportunity to see for oneself would make its decision more convincing. The majority concluded that the visual evidence could only be interpreted one way: the image was transparent.

The majority’s understanding, however, was itself shaped by visual codes learned in other fora. Without noting the contradiction, Justice Scalia at oral argument referred to the tape both as equivalent to a Hollywood movie chase scene (that is, an entirely constructed encounter) and as unmediated reality.⁶³ By conflating the realistic with the real, the Court poured meaning into the images and then identified the images as the source of that meaning.

Subsequently, Dan Kahan et al. showed people the tape and found that demographic characteristics strongly affected whether viewers found the police’s actions unreasonably

⁶⁰ See CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 147-48 (1987); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); cf. Tim O’Neil, *Mo. Woman Loses Lawsuit over ‘Girls Gone Wild’ Video*, July 23, 2010 12:02 am, http://www.stltoday.com/news/local/metro/article_30865bcc-95eb-11df-9734-00127992bc8b.html (discussing a case in which a woman whose top was pulled off by another woman at a *Girls Gone Wild* filming lost her lawsuit; “an 11-member majority [of the jury] decided that Doe had in effect consented by being in the bar and dancing for the photographer” although she was also on tape saying “no” to a request to show her breasts).

⁶¹ See WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* 19 (1995) (“[B]y virtue of the [digital photograph’s] inherent manipulability, it always presents a temptation to duplicity.”); TRYON, *supra* note 26, at 12 (discussing film’s “ostensibly unique status in representing reality” and cultural anxiety about the role of digital effects in manipulating images); *id.* at 42-43 (arguing that modern movies often play both on the appearance of realism and the audience’s knowledge that sophisticated digital techniques produce that appearance).

⁶² Maybe. Confident in our unique, end-of-history sophistication, we tend to forget the ways in which previous generations were also savvy. See DASTON & GALISON, *supra* note [], at 133 (“Historians of science note that nineteenth-century photographers and scientists and their audiences were perfectly aware that photographs could be faked, retouched, or otherwise manipulated.”).

⁶³ See FEIGENSON & SPIESEL, *supra* note 10, at 42.

dangerous.⁶⁴ The results were consistent with other research into perception—for example, whether you see fouls being committed in a football game regularly depends on which team you favor.⁶⁵ This isn't a matter of lying or conscious unfairness. Instead, we see it when we know it.⁶⁶ In other words, “picture” is more of a verb than a noun, and the *Scott* Court's assumption that the videotape communicated a single meaning to all reasonable perceivers was wrong.

The alternative to direct access to reality is not complete uncertainty. Unfortunately, courts that don't treat images as transparent often regard them as opaque, mysterious in their power and meaning, and thus not subject to the analysis at the heart of legal enterprise. This doesn't work well either.

D. Opacity

“A book seems to have a different and preferred place in our hierarchy of values [than a picture], and so it should be.”⁶⁷

As Sheldon Nahmod observes, “[v]ery often, artistic communication is not capable of ‘relatively precise, detached explication.’ Indeed, if such an explication could be given, one might legitimately wonder why the painting had to be painted”⁶⁸ The very excessive, worth-a-thousand-words quality of pictures may make them too unstable for courts used to looking for meaning in words. With texts, by contrast, courts often feel more in control: courts have many standardized tools to interpret text, not least all the rules of statutory and contractual construction. Those rules might be, in fact, indeterminate and manipulable, but they feel predictable and rational. For example, Judge Learned Hand's classic statement of copyright's idea/expression dichotomy acknowledged that the distinction between the two is inherently arbitrary, but he was nonetheless perfectly comfortable applying it to written texts such as plays and screenplays.⁶⁹ Even when courts recognize the varying interpretations made possible by a single text, they consider nonverbal communication even more indeterminate. So, for example, when the Supreme Court reassured citizens that a religious monument was not a government

⁶⁴ Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

⁶⁵ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129 (1954) (finding that, shown a film of a rough football game, Princeton students saw the Dartmouth team make over twice as many rule infractions as Dartmouth students saw in the same game).

⁶⁶ See also Dellinger, *supra* note [], at 1714-16, 1718-20 (arguing that pictures in various Supreme Court opinions, viewed correctly, undermine the Justices' claims about the facts portrayed by those pictures; I offer Dellinger's interpretation to show how people can read the same picture in opposite ways).

⁶⁷ Kaplan v. California, 413 U.S. 115, 119 (1973).

⁶⁸ Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 245 (1987); see also Rob Kasunic, *The Problem Of Meaning In Non-Discursive Expression*, J. Copyright Soc'y U.S.A 801, 808 (2010) (arguing that translating nonverbal expression into words is necessarily subjective and incomplete).

⁶⁹ Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930). As John Shepard Wiley noted, Hand's “confident judgments bespeak both familiarity with literary tradition and the judge's faith in his own powers of literary analysis.” John Shepard Wiley Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 162 (1991); see also Graeme B. Dinwoodie, *Refining Notions of Idea and Expression Through Linguistic Analysis*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 9 (Lionel Bentley et al. eds., 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601234, (“[C]ourts, who work daily with words, perhaps instinctively believe they understand the nature of literary works.”).

endorsement of religion, it commented that while monuments using words are often susceptible to multiple interpretations, the communicative effects of purely visual monuments are likely to be “even more variable.”⁷⁰

Judicial determinations of the opacity and transparency of images, though opposed, are also linked: both the assumption that the image is the thing it represents and the conclusion that the image lacks independent meaning that could be analyzed are refusals to deal with the image as a separate thing, an entity with a complicated relationship to the real. One obvious problem with this treatment is that it’s hard to predict when any particular court is going to give up the pretense that the image is a faithful representation of reality and switch to the position that the image has no meaning in itself. One might think that “realistic” representations are likely to be put in the former category and that “unrealistic” representations would be treated as ineffable art, but, as this section will show in the context of obscenity law, that is not what happens in practice.

Part of the trouble is that, because images implicate First Amendment considerations, it is important to understand whether images are meaningless or whether they have a meaning that can’t be reduced to words. The answer determines their constitutional status, but that determination is extremely difficult. In one recent privacy case, for example, the Eleventh Circuit treated nude pictures of a former wrestler as distinct from the story accompanying them, devoid of content: “the nude photographs ‘impart[] no information to the reading public.’”⁷¹ And yet this is so blatantly false that it has to mean something else, something like “no worthwhile information,” since the pictures do provide otherwise absent details—the fleshy reality that, as discussed above, is so persuasive (pictures or it didn’t happen).⁷² But to judge the worth of those details in this case would be to foreground the First Amendment problem with regulating the images, and not descriptions of those images. It was only by declaring the image worthless—and “worthless” for First Amendment purposes means “meaningless”—that the court distinguished between words and images.

By contrast, other privacy cases, especially outside the United States, treat photographs as more dangerous than words because they provide *more* information than words could.⁷³ This greater amount of content becomes a reason to regulate photographs more heavily than words.

⁷⁰ *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1135 (2009).

⁷¹ *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201, 1209 (11th Cir. 2009); see also *Montefusco v. Nassau County*, 39 F. Supp. 2d 231, 242 n.7 (E.D.N.Y. 1999) (photographs captured by a voyeuristic hobbyist contained “no identifiable message sought to be communicated” and therefore were without First Amendment protection); *Porat v. Lincoln Towers Cmty. Ass’n*, No. 04-3199, 2005 WL 646093, at *4 (S.D.N.Y. Mar. 17, 2005) (“[I]t is well established that in order to be protected under the First Amendment, images must communicate some idea.”); cf. Diane Zimmerman, *I Spy: The News-Gatherer Under Cover*, *Allen Chair Symposium Issue*, 33 U. RICH. L. REV. 1185, 1208 (2000) (noting the higher First Amendment protection given to text than to pictures in cases involving privacy and newsgathering torts).

⁷² See Clay Calvert, *Every Picture Tells a Story, Don’t It? Wrestling With the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 369 (2010) (identifying various items information conveyed by the relevant photographs).

⁷³ See *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal.1998) (recognizing that the images in a celebrity sex tape conveyed particular information distinct from words describing the content of the sex tape); David Rolph, *Looking Again at Photographs and Privacy: Theoretical Perspectives on Law’s Treatment of Photographs as Invasions of Privacy*, available at <http://ssrn.com/abstract=1752658>, manuscript at 17-19 (Feb. 2011) (examining recent cases).

Images are different, courts agree. They just can't agree what that difference is or whether it makes images uniquely valuable or worthless.

Pornography and obscenity law provide useful lessons in the way images confuse legal thought. The oscillation between the abject and the ineffable in legal treatment of images drives incoherence in obscenity law, especially in the treatment of cartoon or comic drawings, whose basis in the imaginary turns out to be insufficient to resist courts' certainties that images are in some sense *really* what they represent. As it happens, cartoon and comic characters play equally important and incoherent roles in copyright law, as further detailed in Part III, and so obscenity provides a fruitful example of an area of law devoted to images, and yet still confused about how to think about them.

The modern theory of pornography, which partly overlaps with American obscenity law, is fundamentally a theory of the harm done by images, not words.⁷⁴ As Catharine MacKinnon recognizes, the word-centric model is a great part of the power of assimilating pornography/obscenity to prototypical protected "speech." In response to this, MacKinnon's project attempts to flip the polarities of the debate, drawing attention to the emotive and assaultive power of words in order to argue that we should think of words as more like acts (or more like images) than legal rules generally allow. In addition, she emphasizes the role of visuals in constructing women's oppression; if the default when we think about "sexual speech" is really an image instead of words, increased regulation becomes more palatable.⁷⁵

Like antipornography theory, modern obscenity law is all but exclusively targeted at images or, these days, video.⁷⁶ In practice, obscenity prosecutions based on words are limited to what would be described by nonlawyers as "child pornography."⁷⁷ The residual prosecution of

⁷⁴ *E.g.*, ANDREA DWORKIN & CATHERINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* app. D (1988). The anti-pornography Meese Report, too, focused on images, despite its condemnation of sexual explicitness in general, and indeed its recommendation for increased prosecutions suggested that either a blanket exemption for text or a general presumption against prosecuting text would be appropriate. MEESE REPORT 383-85 (1986).

⁷⁵ *See, e.g.*, MacKinnon, *supra* note 55, at 19 ("Pornography defines women by how we look according to how we can be sexually used. ... Gender is an assignment made visually, both originally and in everyday life. A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking--the quality of the gaze, including its point of view--and the definition according to use become eroticized as part of the sex itself. .. One could say men have sex with their image of a woman. It is not that life and art imitate each other; in this sexuality, they are each other.").

⁷⁶ *See* Adler, *supra* note 13, at 210 ("[T]he difference between text and image within the First Amendment has significant real world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material. . . .") (footnotes omitted); Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 404 n.126 (2009); *see also* Clay Calvert & Robert D. Richards, *A War over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law*, 16 J.L. & POL'Y 177 (2007) (arguing that the obscenity prosecution of a writer of stories about children was misguided).

⁷⁷ *See* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 708-10 (2007) (discussing the use of obscenity law to go after depictions of children); Gabrielle Russell, *Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1467, 1486-87 (2008) (discussing how new laws have been written to redefine obscenity focusing on depictions of children not produced using actual children). The formal doctrine allows for the possibility of prosecuting words that aren't about children, *see* *Kaplan v. California*, 413 U.S. 115 (1973); it just doesn't happen.

the occasional written text is thus itself a side effect of the rule that *only* images can be child pornography under the legal definition, which requires exploitation of actual children.

When it comes to free speech claims, courts are reluctant to condemn texts because, having a sense of how words operate, courts believe that words alone rarely do harm unless they represent a direct address to the recipient, in the form of threats, harassment, or the like. Images are more confusing. Courts have upheld convictions for “morphed” images whose creation involved no sexual exploitation of an actual child, because the fact that an image of a child’s head on a body engaged in sexually explicit conduct was out there in the world was enough to harm the child in a constitutionally significant way.⁷⁸ If you still doubt the power of the “magical relation between a picture and what it represents,” try this experiment: take a picture of your mother and cut out the eyes.⁷⁹ Images feel as if they have a mystic connection to the reality they represent, inducing in us the feeling that they will operate to cause harm at a distance.

Sometimes the power of the image goes even further. In *United States v. Whorley*, a Fourth Circuit obscenity case involving both text and comic-style images depicting fantasized sexual encounters with children, the dissent accepted that pictures could constitute obscenity, but objected that the First Amendment barred prosecution of text-only emails. The dissent defended its distinction on the ground that “[t]he ability to consider and transmit thoughts and ideas through the medium of the written word is an attribute unique to humans.”⁸⁰ (Representational drawing, by contrast, is of course widely practiced in the animal world.)

The *Whorley* dissent maintained that the text of the emails contained protected ideas, without any recognition that the images might have done so as well. “Imagining” and “fantasy” were words the dissent used about the texts.⁸¹ Yet those terms are equally applicable to drawings. Giving the two media different levels of First Amendment protection needs some other justification. Once again, the images seemed to the dissenting judge to have a closer relationship

⁷⁸ See, e.g., *U.S. v. Hotaling*, -- F.3d --, 2011 WL 677398, at *4 (2d Cir. 2011) (“We agree with the Eighth Circuit that the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts. . . . [H]ere we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.”); *United States v. Stevens*, 533 F. 3d 218 (3d Cir. 2008) (“[C]hild pornography should be banned, in part, because the pornographic material continues to harm the children involved even after the abuse has taken place. . . . [C]hildren can be harmed simply by knowing that their images are available or by seeing the images themselves”), *aff’d*, 559 U.S. --, 130 S.Ct. 1577 (2010); see also *State v. Komisarjevsky*, 2011 WL 1032111 (Connecticut Superior Court 2011) (reasoning that broadcasting or photographing a sexual assault trial would subject a sexual assault victim to the “indignity of having his or her ordeal vividly conveyed to the world by the use of actual voices and photographic or televised images projected from the courtroom,” whereas reporting the victim’s actual words would not inflict the same injury); *Douglas v Hello! Ltd* (No 3) [2006] QB 125 at 163 (holding that, unlike a verbal report of celebrity activity, whose damage is done all at once, a photograph causes new harm to the celebrity each time it is seen by a new person).

⁷⁹ See MITCHELL, *supra* note [], at 9; cf. SUSAN SONTAG, ON PHOTOGRAPHY 4 (1977) (“To photograph is to appropriate the thing photographed. It means putting oneself into a certain relation to the world that feels like knowledge—and, therefore, like power.”).

⁸⁰ *United States v. Whorley*, 550 F.3d 326, 343 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).

⁸¹ *Id.* at 350, 353.

to reality than words do, more than “fantasy” or “thoughts,” relevantly akin to acts, even though they were cartoons.⁸²

In *McEwen v. Simmons*,⁸³ an Australian case about Simpsons cartoon pornography, the judge likewise concluded that “all persons depicted in written works are necessarily imaginary” because their images exist only in the reader’s mind, whereas an image can present an actual person or an imaginary one. This reasoning conflates images of people (whether on paper or in the viewer’s mind) with the people themselves,⁸⁴ and the result is that images of unreal children can be prosecuted in the same way as images of real children. Cases of this sort demonstrate how representation and reality merge, even when it is inarguable that there is no reality being represented: *there is no Lisa Simpson* whose person could be brought before the court. But the logic of imagery is so persuasive and automatic that her nonexistence, like the nonexistence of the anime characters depicted in *Whorley*, becomes the one thing the court doesn’t see.⁸⁵

Yet this visceral power, this feeling of realism, also drives the opposite conclusion: many First Amendment scholars have offered spirited defenses of the First Amendment value of sexually explicit images. Because they communicate so directly, nonrationally, and persuasively, they need to be protected, just as the First Amendment protects “Fuck the Draft!” and flagburning because of the emotional impact they have on audiences. Images, like shocking language, have a persuasiveness that can’t be replicated by alternate words or means of expression.⁸⁶ The extra oomph of the visual seems to many theorists to be an extra reason for protection.

It is crucial to recognize that the image’s special power and directness is also what allows the first, regulatory reaction: treating images as fundamentally less important than words,

⁸² Cf. ALISON YOUNG, JUDGING THE IMAGE 35-36 (2005) (describing the vigorous, extended, and destructive popular conflation of a portrait of Myra Hindley (notorious murderer of children) with Hindley herself; “it was as if the woman herself were standing in the Royal Academy, as young and vital and present as she was in 1966”) (footnote omitted); *id.* at 42 (noting that disgusting art feels like it’s touching the viewers, making them interact with the disgusting objects represented or displayed). Young argues that it is precisely our knowledge that “it’s just a picture” that increases the sense of threat—we react as if we are confronted with the real thing, and our simultaneous understanding that we are seeing a picture creates a kind of aesthetic vertigo. *See id.* at 43-44.

⁸³ *McEwen v. Simmons*, (2008) 73 N.S.W.L.R. 10 (Austl.), available at <http://www.lawlink.nsw.gov.au/scjudgments%5C2008nswsc.nsf/2008nswsc.nsf/WebView2/EF4625A9DB3003F1CA25751500066D48?OpenDocument>.

⁸⁴ Cf. W.J.T. MITCHELL, WHAT DO PICTURES WANT? THE LIVES AND LOVES OF IMAGES 2 (2005) (“[Images have a peculiar tendency] to absorb and be absorbed by human subjects in processes that look suspiciously like those of living things. We have an incorrigible tendency to lapse into vitalistic and animistic ways of speaking when we talk about images. It’s not just a question of their producing ‘imitations of life’ . . . , but that the imitations seem to take on ‘lives of their own.’”).

⁸⁵ Cf. Roland Barthes, CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY 6 (trans. Richard Howard 1981) (“A photograph is always invisible, it is not it that we see.”).

⁸⁶ *See, e.g.*, Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005); cf. Lipton, *supra* note 10, at 6 (arguing that the drafters of the European Union Data Protection Directive, like British judges in recent cases, perceived a greater potential for clash between privacy and free speech when audiovisual material were concerned than when text-only records were at issue, such that more protection for free speech was required in the former case).

because their impact is gestalt-like, irreducible to words.⁸⁷ Just as it's easy to think of a picture of a pipe as a pipe, it's easy to think of pictures of sex as sex.⁸⁸ Arguments that pornography is essentially a sex toy, object-like rather than communication-like, follow from this attitude toward images (and movies; the discussion never concerns written pornography).⁸⁹ The idea is that images of sex are essentially a transmission of sex rather than a record or representation of sex. As sex itself, pornography can be regulated under the more forgiving post-*Lochner* standards used for activity rather than the stringent limits required when the government regulates speech.⁹⁰

Images, then, are greater and lesser than words.⁹¹ Given these conflicting reactions, it is no surprise that the law of obscenity struggles for coherence, just as First Amendment theory does more generally with the question of why art is (as almost everyone seems to agree) protected by the First Amendment.⁹²

⁸⁷ See Adler, *supra* note 13, at 210 (“One reason that art is particularly hard to fit within the marketplace [of ideas] model stems from art’s visual rather than verbal form. . . . [T]he First Amendment offers greater protection to speech that is verbal rather than visual. The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and rarely explained. I know of no scholarship that addresses it directly.”) (footnotes omitted).

⁸⁸ The Meese Commission’s report condemning pornography quoted critic André Bazin’s statement that “[t]he objective nature of photography confers on it a quality of credibility absent from all other picture-making. . . . The photographic image is the object itself, the object freed from the conditions of time and space that govern it.” André Bazin, *The Ontology of the Photographic Image*, 13 *FILM Q.*, No. 4. (Summer 1960), at 4, 7-8 (tr. Hugh Gray). To the Meese Commission, “[t]he filmic representation of an ‘actual person’ engaged in sexual acts is exactly the same as if witnessed ‘in the flesh.’ Thus, the reasoning goes, film audiences bear ‘direct’ witness to any abuse or perversion therein enacted.” LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 185 (1989); see also *United States v. Stevens*, 533 F. 3d 218 (3d Cir. 2008) (“Part of what locates child pornography on the margin as an unprotected speech category is the conflation of the underlying act with its depiction. By criminalizing the depiction itself, [c]hild pornography law has collapsed the “speech/action” distinction that occupies a central role in First Amendment law[,]” and “is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime.”) (citing Amy Adler, *Inverting the First Amendment*, 149 *U. PA. L. REV.* 921, 970, 984 (2001)), *aff’d*, 559 *U.S.* --, 130 *S.Ct.* 1577 (2010).

⁸⁹ See, e.g., Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity:” An Exercise in the Interpretation of Constitutional Language*, 67 *GEO. L.J.* 899, 923 (1978-79) (arguing that “hard-core” pornography is equivalent for purposes of regulation to “rubber, plastic or leather sex aids,” that “the mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same,” and that “the use of pornography may be treated conceptually as a purely physical rather than mental experience”); see also Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 *MICH. L. REV.* 1564, 1594 (1988) (critiquing Schauer for collapsing the distinction between perceiving and doing); David A.J. Richards, *A New Paradigm for Free Speech Scholarship*, 139 *U. PA. L. REV.* 271, 283 (1990) (“Of course, a hard-core pornographic depiction is a communicative symbol; it is neither a dildo, nor a prostitute. It is surely confused to equate the stimulation of erotic and sensual imagination by use of pornography with sexual devices or partners; that is the same kind of confusion, so transparently inimical to legitimate free speech interests, that led the Puritans to equate the imaginative pleasures of an evening at the theatre of Hamlet with actual fratricide, incest, and revengeful murder.”).

⁹⁰ See Adler, *supra* note [] [*Inverting the First Amendment*] (exploring merger of representation and reality in child pornography law and in feminist anti-pornography theory).

⁹¹ See MITCHELL, *supra* note 73, at 77 (“Images are all-powerful forces, to blame for everything from violence to moral decay—or they are denounced as mere ‘nothings,’ worthless, empty, and vain.”).

⁹² See Mark Tushnet (in progress); cf. MITCHELL, *supra* note 73, at 128 (“[I]mages are one of the last bastions of magical thinking and therefore one of the most difficult things to regulate with laws and rationally constructed

Legal audiences would be much more savvy about the possible meanings of what's shown, the relevance of framing decisions, the point of view, and the significance of what didn't get shown if they were dealing with text, which has its own well-known strategies for shaping point of view and choosing what to include or exclude. Film disarms lawyers. Right when interpretation is most needed, courts abandon interpretation, or at least think they have no need to engage in it.⁹³ The brilliant and generally world-wise Judge Kozinski, for example, recently coauthored an article expressing total confidence that, unlike biased word-based reporting, cameras provide "an impartial voice, capable of truthfully and authoritatively recounting the events of trial for the absent public in order to set the record straight."⁹⁴ The authors wrote this paean mere pages after pointing out that the camera angles in the O.J. Simpson case had profound effects on public perception of the verdict.⁹⁵

As Judge Kozinski's self-contradictory account suggests, the magic of the visible shows up in judicial treatment of cameras in the courtroom itself.⁹⁶ Transcripts are unremarkable and indeed considered necessary to the cause of justice, so as to produce a reviewable record. But cameras are intrusive, potentially hostile to witnesses; some judges have taken it for granted that they will change the behavior of all but the hardiest of participants in the judicial process.⁹⁷ More generally, unlike a transcript, the image is widely supposed to have a powerful effect both on the audience and on the portrayed, whether the picture depicts a witness or your mother with her eyes cut out.

I do not think the oscillation between opacity and transparency can easily be resolved, but judicial treatment of images can be improved. Courts could consider images as arguments, neither ineffable nor re-presentation of reality. My specific proposals are confined to copyright law, considered in the remainder of the article, but my call for epistemic humility has a broader reach.

II. Copyright Protection and the Contradictions of Similarity

policies—so difficult, in fact, that the law seems to become infected by magical thinking as well, and behaves more like an irrational set of taboos than a set of well-reasoned regulations.") (footnote omitted).

⁹³ See, e.g., Silbey, *Criminal Performances*, *supra* note 53, at 194 ("Film, it is advised in legal opinions and legislative enactments, gives us the most direct access to the person Film's illusion of immediacy and its manifestation of the experience of bearing witness often overpower our analytical resources.") (footnote omitted).

⁹⁴ Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1107, 1127 (2010).

⁹⁵ See *id.* at 1122. Kozinski and Johnson attempt to resolve this problem by suggesting that cameras should be controlled by the court and fixed, "presented in as boring and straightforward a fashion as you please: no close-ups, no moving camera and no filming of the defense table or the gallery," without editing. *Id.* at 1128. This would certainly mean that the effects of film would be more standardized, but it would not make them disappear.

⁹⁶ See, e.g., Diane Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641 (1980).

⁹⁷ See, e.g., *Estes v. Texas*, 381 U.S. 532, 570 (1965) (Warren, C.J., concurring) ("[T]he evil of televised trials . . . lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised."); Kozinski & Johnson, *supra* note [], at 1110 ("Critics also worry that cameras disrupt the status quo and cause lawyers, judges, witnesses and jurors to alter their behavior. And that's undoubtedly true.") (footnote omitted).

Copyright might seem like a relatively easy subject where images are concerned, because the factfinder in a copyright case need only compare two works to each other, rather than judging them in some independent fashion. Unfortunately, however, the treachery of images continues even in that situation.

As noted in the introduction, copyright begins with text: the Constitution speaks of the “Writings” of “Authors.” Conceptual maneuvers were required to allow copyright to cover all media.⁹⁸ The official story is now one of media neutrality, except where specified otherwise. In the Copyright Act of 1976, Congress changed the definition of copyrightable works from “all the *writings* of an author” to “original *works* of authorship.”⁹⁹ Nonetheless, the written text remains the prototypical copyrighted work. Perhaps judges, whose output is written, have a particularly easy time seeing the worth and creativity of writing, and analogizing other types of creation to words.

In practice, as the balance of power in creative works shifted, copyright cases regularly, even primarily, had to apply principles developed for text to nontextual works.¹⁰⁰ At this point, non-software literary works are a small fraction of the economic value of the copyright industries.¹⁰¹ Law’s word-centrism is inconsistent with the real impetus for most copyright fights: audiovisual works now generate most copyright controversies, and anticopying technology is mostly directed at protecting images and music rather than at printed works.¹⁰²

⁹⁸ *Sarony v. Burrow-Giles Lithographic Co.*, 111 U.S. 53, 54, 56 (1884) (interpreting “writings” loosely enough to cover visual images).

⁹⁹ 17 U.S.C. § 102(a) (2006) (emphasis added). The current statute lists categories of works, but does not purport to be exclusive. *Id.* (“Works of authorship include the following categories”); *see also* H.R. REP. NO. 94-1476, at 53 (1976) (“[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.”); *see also id.* at 51 (“Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.”).

¹⁰⁰ To take one example, the concept of “publication,” designed with text in mind, has more often been litigated to determine the scope of protection for nontextual works. Deborah Gerhardt, *An Empirical Study of U.S. Copyright Publication Cases* (“The idea of publication as a copyright term of art developed historically in the context of text, and therefore seems particularly suited to questions involving textual works. However, courts more often confront publication questions on non-textual works. In fact, cases involving two or three dimensional art alone amount to approximately the same number of cases as those involving text.”) (footnote omitted) (draft, pp. 27-28); *id.* at 28-29 (reporting 165 cases involving text, 129 involving art, 49 music, 33 film, and 77 “other”; though textual works outnumber each other group individually, they account for only slightly over a third of the cases).

¹⁰¹ STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003 - 2007 REPORT* (2009), *available at* <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>; LESSIG, *supra* note [], at 68 (“It is through text that we elites communicate (look at you, reading this book). For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of ‘writing’ are the vernacular of today.”).

¹⁰² *See, e.g.,* Nika Aldrich, *An Exploration of Rights Management Technologies Used in the Music Industry*, 2007 B.C. INTEL. PROP. & TECH. F. 1 (2007) (tracing the history of digital rights management (DRM) in the music industry). DRM for texts certainly exists, but has generated far less controversy than DRM for music and movies. In fact, at the recent DMCA exemption hearings, not a single publisher or other entity turned up to oppose an exemption to the law banning circumvention of DRM on texts in order to make them accessible to people with visual impairments, as contrasted to other proposed exemptions for audiovisual materials, which generated thousands of pages of comments. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201). Book publishers apparently don’t see protecting DRM in all instances as the life-or-death matter that it is for audiovisual copyright owners.

Copyright is therefore permeated by the dynamics identified in the previous part. The twist is that images' presumed special access to truth—their transparency—has to somehow be held in abeyance in order to protect an image under copyright, because copyright only protects expression. Facts and ideas are in the public domain. One might think that copyright would thus of necessity focus its attention on the ways in which images are not the same as the things they depict. And yet copyright still relies on naïve theories of representation, sometimes elevating images and sometimes denigrating them.

The following sections address copyright's conflicting treatment of images. First, I discuss the rationales courts have given for finding images copyrightable, relying on their opacity—here, the extent to which images do something other than re-present reality, which the author can claim as his or her unique property. Infringement analysis then picks up on the problem by positing an unsustainable dichotomy between unprotectable idea and protectable expression as part of the current substantial similarity test for when a defendant's work infringes an earlier work. Ultimately, I suggest that the current test should be rejected and replaced with a system that factfinders might actually be able to use in a consistent and reviewable manner.

It is important to keep in mind that, while my argument focuses on images, many of copyright's problems with images regularly affect text-based works as well.¹⁰³ What the image cases can teach us for copyright in general is that we might want courts to stop analyzing authorship and infringement in the ways to which they have become accustomed.

A. Opacity in Copyrightability

Copyright tells us that authors create, and therefore own, expression: something more than mere idea or fact, whose status as extra allows its private appropriation. As this section explains, expression seems unique and unpredictable. Courts identifying copyrightable elements of images have appealed to their opacity, their irreducibility to description and their distinction from reality in granting exclusive rights to their authors.

The Supreme Court's classic statement that the standard for copyrightability is low addresses pictures specifically, but has been read to cover all forms of creativity. The Court considered circus posters featuring drawings of performers, and rejected the argument that commercial illustration didn't deserve copyright protection. Justice Holmes wrote:

[The pictures] seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. . . .

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of *pictorial* illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss

¹⁰³ See, e.g., *Salinger v. Colting*, 607 F. 3d 68 (2d Cir. 2010).

appreciation. . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.¹⁰⁴

Most readings of Holmes’s “dangerous undertaking” sentence take it to establish a broad nondiscrimination principle, such that copyright should not make judgments about artistic value.¹⁰⁵ I don’t think that a general nondiscrimination principle within genres is mistaken,¹⁰⁶ but I want to focus on Holmes’s unwillingness to judge the worth of pictures specifically, and his reference to other pictorial artists, as well as to handwriting—a means of visually presenting words rather than words themselves. This brings back the theme of the opacity of images, their irreducibility to anything else. To Holmes, law must grant images copyright protection as externalized expressions of the artist’s individual consciousness; they are not unprotectable fact even if they are also representational.

Holmes’ mention of handwriting also invites us to compare how the law actually treats the presentation of letters. Typeface and font are important to understanding and even shaping meaning (look at the absolute hatred of many people for Comic Sans, or for messages transmitted in all capital letters),¹⁰⁷ yet the Copyright Office has long refused to register copyrights in “mere” typographic variation. Only the linguistic content of the words counts, overwhelming the other visual elements of the text. This rule is useful in avoiding granting any monopoly over text because of its presentation—if someone publishes a public domain work, even in a new font, anyone can copy that exact work rather than having to typeset their own version. And yet there is a sharp contrast between the legal treatment of literary works presented in a new and creative font versus that of candid photographs, which are fully protected because of the presentation choices made by the photographer, even when the value of the photo comes

¹⁰⁴ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (emphasis added).

¹⁰⁵ Interestingly, of the cases in the Westlaw database in which courts quote *Bleistein*’s “pictorial” language or cite its nondiscrimination principle and apply it to nonvisual works, only one—not a copyright case, but a trademark/right of publicity case—even acknowledges that to do so is an extension rather than a pure application of the general rule. See *Parks v. LaFace Records*, 329 F.3d 437, 463 (6th Cir. 2003) (quoting Holmes and then stating that “[t]he same is no less true today and applies with equal force to musical compositions”). Some cases edit out “pictorial.” See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (song); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (novel); *American Dental Ass’n v. Delta Dental Plans Ass’n*, No. 92 C 5909, 1996 WL 224494 (N.D. Ill. May 1, 1996) (dental office billing code system; *Bleistein* quote edited to cover all “art”). Others simply quote *Bleistein* and then apply the principle to any “work” without further discussion. See, e.g., *Drop Dead Co. v. S. C. Johnson & Son, Inc.*, 326 F.2d 87 (9th Cir. 1963) (label for aerosol furniture wax); *Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC*, 560 F.3d 53 (1st Cir. 2009) (workplace communication and negotiation workbook); see also Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 188 (1990) (generalizing *Bleistein* to “artistic merit”).

¹⁰⁶ Given that nondiscrimination was developed in the context of images, it’s not obvious how to apply the principle to literary works. I would argue that nondiscrimination does not entail treating a piece of software (deemed a literary work) the same as a novel. Indeed, literary works are generally only challenged on originality-type grounds in software cases, where the issue is what elements of a piece of software are standard or otherwise functionally required, or when elements of the work are purely factual. These aren’t problems of *worth*, but problems of copyright’s appropriate scope.

¹⁰⁷ See John R. Doyle & Paul A. Bottomley, *The Massage in the Medium: Transfer of Connotative Meaning from Typeface to Names and Products*, 23 APPLIED COGNITIVE PSYCHOL. 396 (2009) (finding that consumer perceptions of meaning are affected by typeface style).

from what is portrayed instead of from its style.¹⁰⁸ In this area, creators of images get treated better than creators of words.

The treatment of any image, no matter how generated, as a unique expression of a particular artistic imagination comes out in other classic copyright cases as well. The Second Circuit held in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* that copyright's standard for originality is so low that even accidental authorship caused by a hand jolted by "a clap of thunder" suffices. The court retold Plutarch's anecdote that "A painter, enraged because he could not depict the foam that filled a horse's mouth from champing at the bit, threw a sponge at his painting; the sponge splashed against the wall--and achieved the desired result."¹⁰⁹ This accident, the court declared, would suffice to constitute the painter's own, original expression. The minimalist author here is a visual artist. A jolt of the hand is unlikely to produce a word, and even glossolalia will often be taken to represent some underlying psychological state of the author, not the mechanical derangement that can nonetheless be claimed as the artist's own work.¹¹⁰ The opacity of images makes any source of a visual effect seem equally mysterious and equally available for private appropriation.

The history of the law of photography contains numerous conceptual maneuvers allowing claims of copyright in what would otherwise seem non-creative or non-authored works. In order to find that photographs are copyrightable, courts had to identify photographers as authors, adding expression rather than just copying facts from the world. They did this by emphasizing particular choices made by the photographers, especially timing, angles, and similar decisions: *selection* of how to frame and present images. Christine Haight Farley notes that these were far from the only manipulations available to photographers, but focusing on those characteristics allowed courts to maintain that photographs were also pure representations of reality, which was important for other areas of the law in which photographs were increasingly used as evidence.¹¹¹ It is extremely useful for us to be able to treat photographs as transparent windows on reality in certain circumstances, and expressions of the artistic soul in others, but that doesn't make those characterizations consistent.¹¹²

¹⁰⁸ See, e.g., *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp 130 (S.D.N.Y. 1968) (accepting that film of the Kennedy assassination by an amateur cameraman was protected by copyright, though the cameraman's choices had nothing to do with the value of the work).

¹⁰⁹ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 n.23 (2d Cir. 1951); see also *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) ("[N]o photograph, however simple, can be unaffected by the personal influence of the author.") (Learned Hand, J.).

¹¹⁰ Where a court finds that copyright law protects small bits of text, by contrast, it often emphasizes how carefully the author chose his or her words and how non-accidental the creation was. See, e.g., *Cook v. Robbins*, 232 F.3d 736 (2000), *withdrawn*, 232 F.3d 736 (9th Cir. 2001).

¹¹¹ Farley, *supra* note 49, at 390 ("The Court [in *Burrow-Giles*, finding photographs to be copyrightable subject matter,] does not acknowledge ways in which a photographer can manipulate the image by intervening at other points in the process. For instance, surprisingly, there is no discussion of the possibilities for retouching, reworking, cropping, framing, redeveloping, coloring, etc. These activities, which the then-technology enabled, had definite analogies in the world of artistic production. . . . Moreover, the so-called 'art photographers' at the time were using these techniques for precisely these reasons. Instead, the Court focuses only on the pre-shutter actions and processes. . . . The significance of this privileging of the pre-shutter activity means, of course, that the other reading of photography—the one simultaneously being advanced in other courts of law—could easily be maintained.")

¹¹² See Farley, *supra* note 49, at 393 ("[V]iewers may uncritically accept one meaning of a photograph when it hangs on a museum wall, and just as easily a very different meaning of the same photograph when it is used as evidence of a crime. In both cases, the viewer assumes that the meaning that they read into the photograph is in fact contained

Currently, there is almost no lower bound on copyrightability of photographs. Whereas it is settled doctrine that words and short phrases, including titles, are uncopyrightable,¹¹³ only a (successful) photographic attempt to reproduce an existing two-dimensional work will be considered to add so little original to the world as to be uncopyrightable.¹¹⁴ *Mannion v. Coors Brewing Co.*, the most extensive judicial discussion of photographic copyright in recent years, concluded that the idea of a photograph is often its expression. This would seem to defeat copyright protection for photographs, since ideas are excluded by statute and policy from the subject matter of copyright.¹¹⁵ But the court reached the opposite conclusion that all photos are copyrightable:

In the visual arts, the [idea/expression] distinction breaks down. For one thing, it is impossible in most cases to speak of the particular “idea” captured, embodied, or conveyed by a work of art because every observer will have a different interpretation. Furthermore, it is not clear that there is any real distinction between the idea in a work of art and its expression. An artist’s idea, among other things, is to depict a particular subject in a particular way. ... [A] number of cases from this Circuit have observed that a photographer’s “conception” of his subject is copyrightable... But the word “conception” is a cousin of “concept,” and both are akin to ‘idea.’¹¹⁶

However, the same problem of being unable to separate idea from expression occurs in nonvisual creative works, particularly poetry. Readers will have very different interpretations of what the “idea” of any given poem is, meaning that there is no single idea to be extracted from expression, and that the idea-effect is produced by the precise words the poet chooses, that is, by the expression. Thus, the poet should have the same monopoly over her “idea” as the photographer. *Mannion*, however, explicitly limits its analysis to the visual arts, and it does so with a fairly transparent evasion: the court compares a photograph to a description of the theory of special relativity, where it considers the idea and the expression easily distinguishable. But an explanation of special relativity would be a classic factual work, not a novel or poem.¹¹⁷ Moreover, if the idea of a photograph really is its expression and vice versa, then a different photograph should have a different idea, and yet *Mannion*’s analysis is performed in the service of finding that the defendant’s photograph might be similar enough to infringe the plaintiff’s.

In the end, what courts protect as original in photography, as Eva Subotnik has observed, are the elements of a photograph that simply indicate that it *is* a photograph: it was taken at some angle, it was taken under some lighting conditions, and so on.¹¹⁸ There certainly are original

with it and not derived from external cues. Thus, photographs are at once able to be seen as the expression of the photographer who made [them], but also as a direct transcription of nature. In other words, photographs are accepted both as a window on the world and also as a mirror on the soul of the artist.”)

¹¹³ Cf. Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005)(arguing that “microworks” are properly denied copyright protection because even if original, they are never “works”).

¹¹⁴ See *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

¹¹⁵ See 17 U.S.C. § 102.

¹¹⁶ 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005).

¹¹⁷ See *id.*

¹¹⁸ Subotnik, *supra* note [] (discussing the “proxy of ontology” in which courts decide copyrightability by the nature of the category into which the work falls). Cf. *BellSouth Advertising & Pub. Corp. v. Donnelley Information Pub.*,

photographs, and originality may sometimes even lie in the techniques of production. But, perhaps because of their discomfort with visual art, courts have gone well beyond nondiscrimination and crossed the line into protecting that which would be readily recognized as unprotectable in a literary work.

B. The Substantially Similar Test

Once a work meets the low standards for copyrightability, it can be infringed. If the defendant didn't make an exact copy, the current test asks whether the accused work is substantially similar to the original. Unfortunately, instability in the definition of substantial similarity, as well as in the tests courts use to distinguish ideas (unprotectable, and thus copyable) from expression (protectable), is a hallmark of this core function of copyright law, and trouble with images is a major driver of the problem.

1. “Look and Feel” Suffers from the Same Problems as Copyrightability

The substantial similarity test is notoriously confusing and confused, perplexing students and courts alike.¹¹⁹ The substantial similarity standard affects more than just images,¹²⁰ but it was developed in the past century as audiovisual materials came to dominate infringement cases, and partakes of courts' contradictory assumptions about images.

If images are short cuts from mind to mind, it seems reasonable to conclude that substantial similarity in the visual field just *is*; there is no way to break it down or describe it.¹²¹ Learned Hand's classic statement of the non-test for substantial similarity is forthright that, no matter how hard it is to tell when nonliteral copying infringes a literary work, matters are even worse when it comes to pictures:

The test for infringement of a copyright is of necessity vague. In the case of *verbal* 'works' it is well settled that although the 'proprietor's' monopoly extends beyond an exact reproduction of the words, there can be no copyright in the 'ideas' disclosed but only in their 'expression.' Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc. In the case of *designs*, which are addressed to the aesthetic

Inc., 999 F.2d 1436, 1441 (11th Cir. 1993) (holding that elements that were required for a phone directory to *be* a directory, such as a cutoff date for inclusion and a geographic scope, were not original in the constitutionally required sense; “Any useful collection of facts . . . will be structured by a number of decisions regarding the optimal manner in which to collect the pertinent data in the most efficient and accurate manner. If this were sufficient, then the protection of copyright would extend to census data, . . . a paradigmatic example of a work that lacks the requisite originality Just as the Copyright Act does not protect ‘industrious collection,’ it affords no shelter to the resourceful, efficient, or creative collector”).

¹¹⁹ Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661434 (August 18, 2010) (explaining the troubled state of the doctrine).

¹²⁰ *Cf.* *Salinger v. Colting* (discussing the literary character Holden Caulfield as a “portrait in words” who was “delineated” by the words of the novel in which he appears, thus using visual language to justify its conclusion that a later work infringed *The Catcher in the Rye*), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010).

¹²¹ Similar things happen in music, but it seems that courts are much more willing to accept testimony about musical components than about visual components.

sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement.¹²²

In theory, copyright only protects expression, which means that similarities resulting from shared ideas or facts do not bear on infringement. Courts therefore state that they take a two-step approach: figure out what elements of plaintiff's work are protectable, then see if defendant's work takes too much of them.¹²³ As one district court has said, the doctrine is "ambivalent" at best about whether factfinders should really ignore the unprotectable elements.¹²⁴ The case law indicates that, in the second step, the works should be considered as a whole; "dissection" into component parts is "irrelevant," implying that unprotectable ideas, tropes, and facts do come back into consideration.¹²⁵ A case will caution that the relevant similarity has to be based on the protectable elements of a work, and then immediately state that the factfinder can't just compare the copyrightable elements in its evaluation.¹²⁶

Modern copyright cases, especially in the Ninth Circuit, express this contradictory conclusion by using a "look and feel" test.¹²⁷ Courts warn against missing the forest for the trees by dissecting the parties' works and instruct factfinders to compare their overall feel or gestalt. There is a sort of magic by which unprotectable parts together become protected. In *Roth Greeting Cards*,¹²⁸ for example, the court of appeals reversed a district court's findings and found infringement of a combination of simple drawings and trite, unprotectable phrases even

¹²² Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (emphasis added).

¹²³ Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1475-76 (9th Cir. 1992).

¹²⁴ Mannion.

¹²⁵ Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1947).

¹²⁶ Boisson v. Banian, 273 F.3d 262 (2d Cir. 2001).

¹²⁷ See, e.g., Apple Computer, Inc., v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994).

¹²⁸ Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

though the copier only copied the phrases:



Roth is misguided. The original elements (the art) were not copied, and the copied elements (the words and the font) weren't original. The gestalt approach expands protection unpredictably, leading to cases in which, for example, courts find that one fantasy island populated by puppets infringes another despite substantial changes in configuration, because the works just felt similar.¹³⁰ That two works produce the same emotional state in a viewer does not mean that they are the same. Even a believer in T.S. Eliot's objective correlative who believed that all reasonable viewers should react the same way to a particular artwork would not make this mistake. It's basic logic that the proposition if P, then Q does not imply that if Q, then P.

Logic, however, is not the strength of infringement doctrine. Results in infringement are deliberately opaque: the factfinder is directed to the gestalt, but a gestalt can't be broken

¹²⁹ Images from court record (on file with author).

¹³⁰ *Sid & Marty Krofft Television Prod., Inc. v. McDonalds Corp.*, 562 F.2d 1157 (9th Cir. 1977); *see also* Lemley, *supra* note [], draft at 28 (“[Under current standards,] judges and juries are more likely to find infringement in dubious circumstances, because they aren't properly educated on the difference between protectable and unprotectable elements. Courts that apply an ordinary observer test are more likely to find infringement using a broad 'look and feel' test.”) (footnote omitted).

down.¹³¹ As with obscenity, courts have great difficulty determining what is sufficient for infringement. The problem is especially acute when the amount of material that is copied is hard to quantify: in our law-and-economics-influenced legal culture, anything that cannot be stated in percentage terms may seem sloppy, imprecise, and thus not law-like.¹³² Saying simplistic things about “look and feel” and punting to factfinders may seem like the best way to avoid embarrassment. Yet images also give rise to the impulse to override those factfinders’ judgment.

2. The Difficulty of Judging Images

In the previous Part, I argued that the intensity of the car-chase video in *Scott* allowed the Court to substitute its judgment for everyone else’s, because the images so plainly had only one meaning to the majority Justices.¹³³ This pattern is apparent in copyright as well, where courts believe they can *see* the truth.

As a result, visual copyright cases can seem to involve not interpretation, but simple announcement of the obvious: the image is as transparent a window on truth as the film in *Scott v. Harris*. Courts even feel free to disregard ordinary rules of factfinding, such as the standards of review governing facts found by a district court. In *Boisson v. Banian*,¹³⁴ the Second Circuit reviewed the facts of an infringement case involving alphabet quilts de novo, because the court of appeals was just as well-positioned to see the truth as the district court, which had held a three-day bench trial.¹³⁵ The court of appeals therefore reversed a finding of noninfringement, holding that the similarities between two quilts were sufficient to constitute infringement, notwithstanding that many elements of the quilts were in the public domain.

¹³¹ See Lemley, *supra* note [], draft at 29 (noting that one result of the situation is to produce effectively unreviewable decisions).

¹³² I thank David Super for pressing this point with me.

¹³³ See FEIGENSON & SPIESEL, *supra* note 10, at 43 (“The immediacy and intensity of seeing the video gave Justice Scalia the confidence to override the lower court’s findings of fact, communicated in mere written form.”).

¹³⁴ 273 F.3d 262 (2d Cir. 2001).

¹³⁵ *Id.* at 265 (“In reviewing this decision, we find plaintiffs’ copyrights cover more elements than were recognized by the trial court, and that though the trial court articulated the proper test when comparing the contested works, its application of that test was too narrow. It failed not only to account for the protectible elements we identify, but also to consider the overall look and feel brought about by the creator’s arrangement of unprotectible elements.”).



In *Boisson*, the court of appeals was especially convinced by the similarities in color choices for most of the letters, including uses of different shades of the same color. By equating shades, the court was able to increase the similarities it found, even though the pictures show some significant shade variation (note, however, that the pictures are affected by the lighting conditions under which they were taken and later processing of the image). The court's evaluation was ultimately based on the overall look and feel, including the layout, even though the layout was not original to the plaintiff. *Boisson*, in its departure from ordinary rules about appellate review of factfinding, reveals epistemic hubris. The court thought that it understood the images, regardless of the trial court's discussion of the protectable and unprotectable elements. The court of appeals may also have been influenced by the association between images and emotion discussed in Part I: we trust our own (natural-seeming and immediate) reactions to images, but we worry that other people's reactions to images may be irrational—especially if they don't see the same things we do.

Another example of excessive judicial self-confidence in judging images involved a fair use case, *Rogers v. Koons*, in which the court found infringement in a satirical sculpture by art world darling/provocateur Jeff Koons that was based on a photograph by commercial photographer Arthur Rogers. The photograph was the size of an ordinary postcard; the sculpture was larger than life and garishly colored. But the Second Circuit ruled on the basis of postcard-size black and white photographs of both works, enhancing their similarities and preventing the court from appreciating the aesthetic impact of the sculpture.¹³⁷ The court was willing to treat a

¹³⁶ Green quilts from record in *Boisson v. Banian*, the second found by the court of appeals to infringe the first, reversing the district court's finding of noninfringement. On file with author.

¹³⁷ See Martin Garbus, *Law Courts Make Lousy Art Critics*, *NEWSDAY*, Apr. 22, 1992, at 46; Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 *U. Miami Ent. & Sports L. Rev.* 195, 225 (1993) (citing a telephone interview with curator John Caldwell, who reports that audiences' experiences of seeing the Koons sculpture are far different than those they expect based on reading about it or seeing pictures of it).

small, colorless picture of the sculpture as conveying all the relevant meaning, literally flattening its judgment.

Intriguingly, Judge Posner, one of the most influential judges of our era, performed the neat trick of using images to prove the correctness of his judgment while also impugning their reliability. His opinion in *Ty v. GMA*¹³⁸ reproduced a picture of the stuffed pigs at issue in the case as evidence while disavowing them as inaccurate:

A glance at the first picture shows a striking similarity between the two bean-bag pigs as well. The photograph ... actually understates the similarity (the animals themselves are part of the record). The “real” Preston is the same length as Squealer and has a virtually identical snout. The difference in the lengths of the two animals in the picture is a trick of the camera. The difference in snouts results from the fact that the pictured Preston was a manufacturing botch. And GMA put a ribbon around the neck of the Preston in the picture, but the Preston that it sells doesn't have a ribbon.¹³⁹



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Thus, the photo supported the court's conclusion that the defendant's pig was too similar to the plaintiff's. Posner's language is notable, among other things, for its reference to the “glance”—the image enables easy and immediate judgment, and indeed the court readily found infringement. Posner thus calls attention to the photographer's choices as affecting perception, yet still appeals to shared perceptions of the reality of the picture: the photo is both transparent (giving access to underlying reality) and a frame whose intervention in the construction of reality requires interpretation.

If images are so treacherous, can theory help us navigate them? Alfred Yen and Christine Haight Farley have persuasively argued that courts make aesthetic judgments while disavowing any such intent. Yen points out that “[d]eciding copyright cases without knowledge of aesthetics seems as implausible as deciding antitrust cases without knowledge of economics.”¹⁴¹ Yen posits

¹³⁸ *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

¹³⁹ *Id.* at 1169.

¹⁴⁰ *Id.* at [] (reprinting photo from record).

¹⁴¹ Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 247 (1998) (footnote omitted); see also Farley, *supra* note 12, at 809 (“Indeed, it is a curiosity that law has neglected [aesthetics] for the assistance it so obviously might lend. In numerous other areas of the law, outside disciplines are turned to for assistance in

that judges are eager to fix the meaning of works, because the alternative to a single fixed meaning seems to be the postmodern nightmare in which nothing is certain and communication is impossible.¹⁴² Courts in visual copyright cases, then, have trouble with the excluded middle—the possibility that images might have multiple plausible meanings.¹⁴³

Farley also documents how courts engage in various techniques to deny they're making artistic judgments, displacing the issue to other questions such as the definition of parody, relying on the standard of proof or the weight of evidence, or simply stating a conclusion without any supporting analysis.¹⁴⁴ Eva Subotnik adds that, in deciding that photographs are copyrightable, courts use the “proxy of narrative”—that is, unable to identify in words how a photograph is creative, they instead turn to the photographer's words describing his process of creation, privileging text above the image itself.¹⁴⁵

All three scholars point to a gap between expressed principle and results in many copyright cases. I would add that it is the interaction between aesthetics and truth or reality that generates so much of the difficulty, which is why the problems are worst for images. That is, because we understand how pictures work so badly yet experience them so powerfully, aesthetic choices unpredictably appear either as creative (non-reality-based) or as simple transmission of truth or facts.

3. Naïve Theories of Representation and the Idea/Expression divide

One question courts ask about substantial similarity is whether the defendant copied only ideas or facts, which are supposed to be free to everyone, or instead copied expression. As Julie Cohen has written, the focus on the “idea” as the basic thing that copyright doesn't protect means that “disputes about copyright scope become disputes about identifying those expressions that should be treated ‘like’ ideas.”¹⁴⁶ But images create “special difficulties for judges and juries unaccustomed to parsing nonverbal expression in these terms,” the current solution to which is that they proceed on an “‘I know it when I see it’ basis”¹⁴⁷—even though “seeing” is precisely

understanding the terrain that these disciplines have made their business to study. . . . If psychology can assist criminal law in deciding how to determine whether a defendant is insane, why should aesthetics not be used to assist a court in determining whether something is art?”) (footnote omitted).

¹⁴² See *id.* at 260-61.

¹⁴³ Such difficulties can also occur in text-based cases. Copyright plaintiffs have not generally offered courts extrinsic evidence of how ordinary observers perceive the meaning of a particular work. The Ninth Circuit explicitly rejected reliance on a consumer survey to determine whether a particular accused work was a parody. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002). My argument is certainly not that copyright laws need more surveys—that would just mean more words to fight about, since surveys can always be contested—but that copyright's epistemology is sharply limited by courts' attempts to fix a singular meaning without interrogating their own assumptions about *how* images, music, and so on make their meaning.

¹⁴⁴ See Farley, *supra* note 12, at 836-38.

¹⁴⁵ Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOKLYN L. REV. (forthcoming 2011).

¹⁴⁶ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1172 (2007) (footnote omitted).

¹⁴⁷ *Id.* at 1173. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know [obscenity] when I see it.”); see also MacKinnon, *supra* note 55, at 2 (arguing that this statement about epistemology has to be understood in conjunction with his position of power; “I have to wonder if he knew what I know when I see what I see, given what's on the news-stands--and that's not a personal comment about him”).

the problem. It is unsurprising that courts therefore often manage their difficulties in assessing specific artistic characteristics of works by baldly stating their conflicting conclusions about protectability and infringement.¹⁴⁸

For visual works, Amy Cohen argues, courts draw the line between idea and expression, and thus between actionable and non-actionable similarity, by using subject matter and conventional representational techniques for that subject matter to identify ideas. What's left over after convention is filtered out is denominated protectable expression.¹⁴⁹ As a result, courts treat certain visual styles as more protectable than others.

Application of the idea/expression dichotomy to images fails because styles are neither true nor false, neither fact nor expression. I will spend substantial time on the fallacies of realism in visual representation because our perceptions of realism, while historically and culturally contingent, feel very powerfully like bedrock truth. This section is designed to make you at least pause before you conclude that one type of representation *really is* realistic and another *really isn't*. Conventional applications of the fact/expression divide to images fail to account for the variety of ways to represent what "is" in the world, and courts should generally not be in the business of elevating one form of realism over another. But first we must recognize that they are doing so.

In an illuminating case involving two highly similar pictures of birds and flowers created by the same artist, for example, the Third Circuit in *Franklin Mint v. National Wildlife Art Exchange* held that each work produced by an artist was entitled to only very limited protection. Near duplication was acceptable. At the core of the court's reasoning was the untheorized, and untrue, idea that there was only one mode of realistic representation, and thus one inevitable or necessary depiction. The first picture below shows the work to which the plaintiff held copyright. The second shows the work to which the defendant held copyright. The final picture shows a painting produced by the artist in court without direct reference to either of the previous paintings.



¹⁴⁸ See Farley, *supra* note 12, at 838 (identifying such cases).

¹⁴⁹ Cohen, *supra* note 99, at 211.

¹⁵⁰ Cardinals on Apple Blossom, The Cardinal, and painting produced in court by Albert Earl Gilbert, reproduced in Arthur H. Seidel, *A Case of Variations on a Theme: Cardinal Paintings and Copyright Laws Clash in Court*, THE PHILA. LAWYER, Spring 2001, at 46, 47 (photos by Jeff Lyons).

The court of appeals reached the right result for the wrong reason, distinguishing between less-protectable realism and more-protectable styles:

[I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist's style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique. A copyright in that circumstance may be termed 'weak,' since the expression and the subject matter converge. In contrast, in the impressionist's work the lay observer will be able to differentiate more readily between the reality of subject matter and subjective effect of the artist's work.¹⁵¹

But, as the previous section detailed, photographers have in fact had substantial success making infringement claims against others who copied their distinctive subject matter and presentation choices. The court's claims about the difficulty of proving an infringement case against a realist are unsupported by the actual case law.¹⁵² Even more important here is the concept of the reality (one is tempted to say the treachery) of images: once again, certain types of visual representation appear so connected to the represented objects—even though those objects might actually be imaginary—that the pictures disappear into the objects, leaving very little for copyright to protect.

This concept of transparent access to reality structures the court's reasoning, even though several features of the paintings at issue argue strongly against any such concept. First, the paintings were in a style popularized for the depiction of birds by John J. Audubon, which among other things abstracts the birds and the fragments of plants on which they rest from any background, and configures the arrangement very carefully. By art world standards both at his time and now, Audubon was far from a realist.¹⁵³ To some contemporaries, his work looked as

¹⁵¹ *Franklin Mint Corp. v. Nat'l Wildlife Art Exch.*, 575 F.2d 65, 66 (3d Cir. 1978). Following the court's lead, Seidel's discussion of the case focuses on "realism" in the representation of the birds in the picture, casually dismissing the background and failing to discuss arrangement of picture elements. Seidel, *supra* note 109, at 46-47 ("Bird art is judged by the accuracy of the reproduction, which includes coloring, details of plumage, bodily attitude, bird positioning, and accuracy of background (if present). . . . An ornithologist or a bird lover can tell in an instant whether the attitude of a particular species of bird is accurately represented.").

¹⁵² *E.g.*, *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005) (protecting photographer's choice of subject matter and angle); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (protecting photographer's "inventive efforts" of posing a group of puppies for a photograph); *Gross v. Seligman*, 212 F. 930, 931-32 (2d Cir. 1914) (finding infringement where an artist, after assigning the rights to his first photograph of a nude model, took another nude photograph of the same model with only trivial variations). Interestingly, Seidel also dismisses photography, as compared to painting, as a means of accurately representing birds, because photographs capture only a moment and might not reflect the typical position of the species. *See* Seidel, *supra* note 109, at 47. This equates truth with typicality and individuals with their species, as if there were a Platonic ideal of a bird whose representation was more accurate than an image of any actual bird.

¹⁵³ *See, e.g.*, Linda Dugan Partridge, *By the Book: Audubon and the Tradition of Ornithological Illustration*, 59 HUNTINGTON LIBR. Q. 269 (1996) (arguing that Audubon's claims to draw solely from nature are contradicted by the historical record and by his drawings themselves); Adam Gopnik, *A Critic at Large: Audubon's Passion*, THE NEW YORKER, Feb. 25, 1991, at 96, 96 (noting "the uncanny intensity of his art—its haute-couture theatricality and ecstatic animation, its pure-white backgrounds and shadowless, cartoonish clarity—which still proves so unexpected

ridiculous as a Manet or a Monet did at first.¹⁵⁴ Even now, when artists represent other subject matter in a similar style, the pictures seem quite unlike the “real” images on which they’re based.¹⁵⁵

Audubon’s naturalist style is “realist” in the way that the Hollywood car chase scene is realist, which is to say not at all,¹⁵⁶ even though the representational conventions are common enough in Western ornithological art that it is easy to *perceive* this style as realist.¹⁵⁷ Thus, immediately after distinguishing strongly realist from less realist art and suggesting that the litigated paintings fell on the more realist side, the court noted that numerous conventions in ornithological art determined many features of those very paintings.¹⁵⁸ The artist was using Audubon’s style, one that he’d learned—a word that here means copied, as is standard for painters. Rather than representing reality, the painter was representing Audubon’s style. As with the cartoon obscenity discussed in Part I, the ideology that collapses representation and reality made the court unable to appreciate that the very things it was saying about style and genre meant that the paintings were not pure copies of an underlying reality.

The *Franklin Mint* court’s fuzzy thinking about realism is not unusual. Conventions are regularly invisible, and highly manipulable, in supposedly realist productions.¹⁵⁹ Our standards

that we are inclined either to explain it away as technique or write it off as naïveté”); Laurie S. Hurwitz, *AMERICAN ARTIST*, Feb. 1994, at 8 (“John James Audubon . . . has long defied art-historical classification Executed in the traditional manner of 18th-century naturalist, these images are also characterized by a graphic energy and flattened-out space that make them indisputable precursors of modern painting, from Picasso’s Cubist still lifes to Matisse’s cutouts.”).

¹⁵⁴ The preeminent publisher and engraver at the time “took one look at Audubon’s drawings and decided that the signature inclusion of flora and the depiction of the birds as lively, acrobatic creatures constituted embellishment and inaccuracy. ‘I will not engrave them. . . because ornithology requires truth in the forms and correctness in the lines. Here are neither,’ Lawson wrote. . . . “Nick Obourn, *Call of the Wild*, 32 *ART & ANTIQUES* 68 (2009); see also LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* 79 (2007) (Audubon’s “elegantly symmetrical and sometimes anthropomorphized compositions of birds . . . were sharply criticized by some contemporary naturalists as falsifications of nature”) (citing ANN SHELBY BLUM, *PICTURING NATURE: AMERICAN NINETEENTH-CENTURY ZOOLOGICAL ILLUSTRATION* 92-106 (1993)).

¹⁵⁵ See Karen Rosenberg, *Authorship or Translation? Notes Toward Redefining Creativity*, Feb. 24, 2011, N.Y. *TIMES*, <https://www.nytimes.com/2011/02/25/arts/design/25drawn.html>.

¹⁵⁶ Cf. Aaron Copland, *Tip to Moviegoers: Take Off Those Ear-Muffs . . .*, N.Y. *TIMES*, Nov. 6, 1949, reprinted in *THE HOLLYWOOD FILM MUSIC READER*, 317, 318 (2010 ed. Mervyn Cooke) (“Those bassoon arpeggios that hammer at your spine while the hero climbs the fire escape gun in hand are heard by 90,000,000 people every week. These same people, who would run in terror if music materialized in the air of their backyards, will comment on the stark realism of such a scene.”).

¹⁵⁷ Cf. Michael J. Lewis, *Rara Avis*, *NEW CRITERION*, Jan. 2005, at 66, 67 (reviewing RICHARD RHODES, JOHN JAMES AUDUBON: THE MAKING OF AN AMERICAN (2004)) (describing Audubon’s style as “an unchallenging, easily digestible realism”). Audubon’s perceptions, like those of any artist, were formed by the art to which he’d been exposed, and how he saw shaped how he drew. Partridge, *supra* note 112, at 278 (“Any number of French and English illustrated waterbirds are comparable [to Audubon’s drawing]. The critical point here is that on the spot, in the Mississippi flatboat where he was examining his specimen, writing, and recording this quick sketch, Audubon was also working—and seeing—in the old illustrational format.”).

¹⁵⁸ *Franklin Mint*, 575 F.2d at 66; cf. Cohen, *supra* note 99, at 212 (“The determination that a particular work is life-like and, thus, less an original work of the artist than one that has a distinctive style, is a value judgment that reflects the judge’s view as to what is ‘life-like’ and as to what constitutes a distinctive, and therefore copyrightable, ‘style.’”).

¹⁵⁹ See, e.g., Roman Jakobson, *On Realism in Art*, in *LANGUAGE IN LITERATURE*, 19-27 (1987) (“The methods of projecting three-dimensional space onto a flat surface are established by convention; the use of color, the

for realism change over time. A partial list of visual realisms from the last century alone includes: Soviet socialist realism, French Poetic Realism, Italian neorealism, new realism (1950s), new realism (1980s), and even Cubism in its attempts to represent the true restlessness of the human eye; all these realisms had different concerns and produced markedly stylistically distinct works.¹⁶⁰ As Joel Snyder has written, that which we consider realistic in photography is “remarkably elastic,” including images made in accordance with the rules of linear perspective as well as images violating those rules even to great degrees; images made from a perspective that no human could ever actually have; and images made in contradiction to human vision, such as pictures in which all elements in and across planes are in sharp focus, an impossibility for the eye.¹⁶¹ Reality, that is, is itself a style (or series of styles), whose great success comes when we don’t notice the stylizing operations performed on the image.

Second, the initial painting and the accused work were created by the same artist, working from his imagination and combination of sketches, photos, and slides, such that the image he was painting only existed in his head.¹⁶² The jury returned a verdict of noninfringement, aided by the painter’s recreation of a third version of the same scene, produced in court without looking at either of the first two. However, copyright law recognizes “unconscious” copying as infringing.¹⁶³ In the ordinary case, the painter’s memory of the first

abstracting, the simplification, of the object depicted, and the choice of reproducible features are all based on convention. It is necessary to learn the conventional language of painting in order to “see” a picture, just as it is impossible to understand what is said without knowing the language. This conventional, traditional aspect of painting to a great extent conditions the very act of our visual perception.”); Aaron Scharf, *The Representation of Movement in Photography in Art*, in *ART AND PHOTOGRAPHY* (1986) (Eadweard Muybridge’s photos of horses demonstrated that the “flying gallop” depicted in many paintings didn’t exist, showing that “what was true could not always be seen, and what could be seen was not always true. Once again the photograph demonstrated that for many artists truth had really been another word for convention.”).

¹⁶⁰ MARITA STURKEN & LISA CARTWRIGHT, *PRACTICES OF LOOKING: AN INTRODUCTION TO VISUAL CULTURE* (2d ed. 2009) 148-49, 166-67, 171, 173; see also MITCHELL, *supra* note [], at 161 (“As [successive masters found ways to render effects of light on surfaces with increasing exactitude], expectations changed: the works of Francia and Perugino seemed, at first, to be miracles of realism; but those of Leonardo later made them seem quite naïve and unconvincing.”).

¹⁶¹ Joel Snyder, *Picturing Vision*, 6 *CRITICAL INQUIRY* 499, 501-02 (1980); cf. Tom Gunning, *An Aesthetic of Astonishment: Early Film and the (In)Credulous Spectator*, in *VIEWING POSITIONS: WAYS OF SEEING FILM* 114, 116-17 (Linda Williams ed., 1997) (arguing that the supposed realism of early films existed in a dialectic relationship with spectators’ simultaneous awareness of their unreality; the pleasure came from encountering both aspects).

¹⁶² The third painting used his sketches, photos, and stuffed cardinal references. See Seidel, *supra* note 109, at 48. This practice fit the Audubon style. See Gopnik, *supra* note 112, at 99 (“[Audubon] eventually placed on his drawings and watercolors the notation ‘Drawn from nature,’ but that was shorthand for a long and contrived process. Audubon would shoot his birds—sometimes hundreds at a time—and then skin them and take them home to stuff and paint. . . . [H]e began to make flexible armatures of bent wire and wood, and he arranged bird skins and features—sometimes even whole, uneviscerated birds—on them in animated poses.”).

¹⁶³ See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff’d sub nom. ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (D.N.Y. 1924). Actually, this rule is almost entirely limited to music cases, with the sole exception from 1926, and even in music findings of unconscious copying are rare. See *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35, 37 (7th Cir. 1926) (suggesting unconscious copying as an explanation in a case finding infringement of a time teller, apparently a written compilation for use by bankers); Carissa L. Alden, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 *CARDOZO L. REV.* 1729, 1736 (2008) (finding that, since *Fred Fisher*, only three cases have been decided under the subconscious copying doctrine). It may be that courts’ incomprehension of music makes them believe that musical similarities are more likely to come from copying, even good-faith, unconscious copying, than

painting would clearly be enough to find infringement. The court's reasoning, like the jury verdict it upheld, most plausibly rests on an implicit theory that the painter was copying a purely intangible mental construct all three times, rather than copying the first painting when he returned to the same subject matter. But all painting is mentally mediated, making its relationship to reality more complicated than pure reproduction.¹⁶⁴

One might argue that realism (or a particular style of realism) is a useful consideration when similarity between the works is used as circumstantial evidence of copying. As in *Ty or Bouchat v. Baltimore Ravens*,¹⁶⁵ involving two highly similar stylized logos for the Baltimore Ravens, similarity between two representations of animals that doesn't stem from real features of the animals might lead us to conclude that the second-comer copied the first rather than creating its own image of the animals. This may well be true, but realism is only one kind of explanation, and not a very useful one in many cases. Sometimes apparently realistic images are nonetheless the product of deliberate copying.¹⁶⁶ Conversely, some similar "unrealistic" images shouldn't trigger infringement findings: if two painters painted in the style of Seurat, one's choice of subject matter shouldn't prevent the other from painting the same subject.

Indeed, what counts as mimesis is contingent even when unconnected to ordinary "realism": certain forgeries of Vermeer were completely visually convincing to their audiences because they incorporated then-current visual codes, but strike modern viewers as obvious fakes because we are no longer familiar with those codes.¹⁶⁷ Inverting this phenomenon, Sherrie Levine's series of photographs "after" famous photographers, which were mechanical reproductions of those artists' works, seemed to many art-world observers highly original because Levine's ownership/authorship claims changed the works irrevocably in the eyes of those observers.¹⁶⁸ As with the cartoon "child" pornography cases discussed in Part I, reactions to images depend more on a sense of realism than an indexical relationship between image and reality, or image and copy.

The Third Circuit's expressed rationale, however, gives subsequent works by a non-"realist" artist no safe harbor from a successful infringement suit because they lack external referents.¹⁶⁹ An artist who painted cartoonish blue dogs as his signature subject and style would have found no comfort in the decision if he continued to paint in the same way after transferring the copyright in an earlier work. If we think painters, writers, and other artists should be able to continue in their own style despite transferring one or more copyrights, we need to revisit this

they are from the ordinary generic similarities judges recognize more easily in detective stories, *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954), resurrected-dinosaur-island stories, *Williams v. Crichton*, 84 F.3d 581 (2nd Cir. 1996), and the like.

¹⁶⁴ As Pablo Picasso said, "I paint objects as I think them, not as I see them." JOHN GOLDING, *CUBISM* 60 (rev. ed. 1968).

¹⁶⁵ 241 F.3d 350 (4th Cir. 2000).

¹⁶⁶ See, e.g., *Dyer v. Napier*, 2006 WL 2730747 (D. Az.) (involving image of mountain lion and cub).

¹⁶⁷ See JONATHAN LOPEZ, *THE MAN WHO MADE VERMEERS: UNVARNISHING THE LEGEND OF MASTER FORGER HAN VAN MEEGEREN* 6, 245-46 (2008).

¹⁶⁸ See, e.g., Gerald Mazorati, *Art in the (Re)making*, *ARTNEWS*, May 1986, at 97.

¹⁶⁹ The court suggested that copying Monet's style would be "difficult," as if realism were easy to achieve, *Franklin Mint Corp. v. Nat'l Wildlife Art Exch.*, 575 F.2d 65, 66 (3^d Cir. 1978); but if a painter did succeed in copying the style of a painter whose work is under copyright (or if a future Monet transferred the copyright in one work and continued to paint in the same style), the court's reasoning would support finding infringement more readily.

conclusion. Both abstract ideas (styles) and specific representations thereof may be necessary for subsequent creators, because representing the internal (such as the ideal bird, even if the ideal was formed with reference to earlier paintings) is a key way of representing (the artist's understanding of) the world.

Underlying the Third Circuit's confusion is equivocation about what reality is—whether it is individual or general. The term “scenes a faire” is used to identify unprotectable ideas or tropes such as the good cop/bad cop interrogation scene. Such ideas, being typical, are simply an overall species, and the individual good cop/bad cop scene is not sufficiently distinguishable from the others of its species to receive a separate legal existence. Likewise, what the painter in *Franklin Mint* painted was the *idea* (or ideal) of a bird, not any particular bird—a species, not an individual. By contrast, the concept of realism in visual representation formally expressed by the courts in cases such as *Franklin Mint* contemplates that there is a specific external referent whose accurate depiction will sharply limit, if not defeat, copyright protection for a visual work.¹⁷⁰ It is the individual referent, not the general idea, that supposedly limits copyright protection. Part of the unpredictability of copyright cases comes from this conflation of reality in specific with realism in general—facts (specific instances of reality) and truisms (ideas and tropes), we might say.

Lorraine Daston and Peter Galison's work on the concept of objectivity in science provides a better understanding of realisms: there are competing concepts of what it means for an image to be objective and realistic. They identify three major standards for scientific images: truth-to-nature, mechanical objectivity, and trained judgment.¹⁷¹ Truth-to-nature, like Audubon-style bird paintings, attempts to portray an underlying type rather than any individual specimen.¹⁷² Mechanical objectivity, by contrast, requires “minimizing intervention, in hopes of achieving an image untainted by subjectivity.”¹⁷³ Trained judgment focuses on intervention to

¹⁷⁰ See, e.g., *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1265 (10th Cir. 2008) (refusing to grant copyright protection to digital wire-frame computer models that depicted the defendant's vehicles without any individualizing features because the models were designed to emulate the actual car); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (refusing to allow plaintiff to prevent other artists from depicting jellyfish with tendril-like tentacles, rounded bellies, bright colors, or swimming vertically because those are common characteristics of actual jellyfish).

¹⁷¹ DASTON & GALISON, *supra* note [], at 18, 104, 318, 363 (discussing persistence and interaction of competing understandings of realism/objectivity over time).

¹⁷² See *id.* at 42 (“[Proponents of truth-to-nature took the position that] what the image represented, or ought to represent, was not the actual individual specimen before them but an idealized, perfected, or at least characteristic exemplar of a species or other natural kind. To this end, [scientists] carefully selected their models, ... and smoothed out anomalies and variations They defended the realism ... of underlying types and regularities against the naturalism of the individual object, with all its misleading idiosyncrasies. ... [They intervened] in every stage of the image-making process to ‘correct’ nature’s imperfect specimens.”); 60 (“The Linnean illustration aspired to generality—a generality that transcended the species or even the genus to reflect a never seen but nonetheless real plant archetype: the reasoned image.... The type was truer to nature—and therefore more real—than any actual specimen.”). Though it is now out of fashion, some literary critics used to argue that literary realism required portrayal of “typical” characters—a type of truth-to-nature in literature. See JOHN TAGG, *THE BURDEN OF REPRESENTATION: ESSAYS ON PHOTOGRAPHIES AND HISTORIES* 178 (1988).

¹⁷³ DASTON & GALISON, *supra* note [], at 43; see also *id.* at 256 (“[C]ertain kinds of images were ... central to mechanical objectivity, because they seemed to promise direct access to nature, unmediated by language or theory.”).

enhance the image to make sure it conveys the right—the true and useful—information.¹⁷⁴ From the perspective of trained judgment, the concept of the “realistic” can be opposed to that of the “natural,” when the undifferentiated aspects of a natural image would obscure the factual information that the scientist desires to convey to the audience.¹⁷⁵

Each variety of scientific objectivity could be read either as copyrightable creativity or as transmission of unprotectable facts. Truth-to-nature demands careful selection and editing of examples, something that might look like rejecting realism and exercising creative judgment from the perspective of mechanical objectivity.¹⁷⁶ But, as in *Franklin Mint*, it can also look like unprotectable realism. As for mechanical objectivity, the selection of what to portray can be considered inherently subjective, and some proponents of objectivity argued that there was no such thing as an objective image, meaning that all images have sufficient originality to be copyrightable—the courts’ usual position on photography.¹⁷⁷ But mechanical objectivity makes its own claims to unmediated realism, and that disavowal of creative intervention can also lead to uncopyrightability.¹⁷⁸ As for trained judgment, it is precisely the kind of intervention into the organization and presentation of data that many courts have held copyrightable.¹⁷⁹ But taken on its own terms—accepting its claim to produce better versions of truth than other kinds of objectivity—it should not be protectable, as other courts have found.¹⁸⁰

Realism, then, is a matter of perspective. This provides a strong rationale for refusing to protect style, prefiguring my more general rejection of current infringement tests in the next sections. Rather than picking one particular kind of realism, law should allow artists to choose their own—even if others have made the same choice. There is not simply one kind of unprotectable “idea.”¹⁸¹

¹⁷⁴ See *id.* at 46.

¹⁷⁵ See *id.* at 355.

¹⁷⁶ See *id.* at 41 (“Scientific practices judged laudable by the measure of truth-to-nature—such as pruning experimental data to eliminate outliers and other dubious values—may strike proponents of objectivity as dishonest.”); *id.* at 247, 250 (truth-to-nature came to seem artistic rather than scientific to believers in mechanical objectivity); see also *Cariou v. Prince*, Mar. 18, 2011 (S.D.N.Y.) (treating plaintiff’s claims of truth-to-nature as evidence of a highly creative, copyrightable work).

¹⁷⁷ See *DASTON & GALISON*, *supra* note [], at 45, 254.

¹⁷⁸ See *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001); *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

¹⁷⁹ See *DASTON & GALISON*, *supra* note [], at 46 (“[P]ractitioners of trained judgment professed themselves unable to distinguish between work and play—or, for that matter, between art and science... instead surrendering themselves to the quasi-ludic promptings of well-honed intuitions.”); *id.* at 307 (“In the twentieth century, scientists still committed to knowledge of the eye produced atlases on everything from stellar spectra to ganglia that proudly proclaimed their subjectivity. In explicit defiance of the canons of mechanical objectivity, they championed judgment and intuition. Neither genius nor labor would reveal the right image; what was needed was self-confident expertise. This was a scientific persona openly guided by unconscious intuition and perceptual habit.”).

¹⁸⁰ See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1265 (10th Cir. 2008) (refusing to recognize copyright in the results of a complicated, choice-based process whose description strongly resembles that of *Daston & Galison*’s trained judgment).

¹⁸¹ See, e.g., Peter Decherney, *Gag Orders: Comedy, Chaplin, and Copyright*, in *MODERNISM AND COPYRIGHT* (Paul Saint-Amour ed., 2010) (“At times, the distinction between ideas and expression can seem meaningless or arbitrary. We can, for example, imagine paraphrasing another author’s words to express the same idea differently. But how can anyone decouple the underlying idea of an image or a musical phrase from its expression?”).

4. Infringement Analysis and Verbal Overshadowing

The previous section made a historical and cultural argument that courts have mistaken the fundamental nature of their endeavors in assessing visual ideas and expressions. This prompts the question of whether there are good rules out there for evaluating images that judges just don't know about, or whether the enterprise of judging infringement is so difficult that, even if such rules might exist in theory, we can't expect the system to apply them in any rigorous or predictable way. My answer combines elements of both: We start with a vague and difficult concept; we then proceed to apply it in a formal legal context which is foundationally inhospitable to the kinds of contextual judgments infringement doctrine asks factfinders to make.

As with *Scott v. Harris*, we don't know infringement when we see it, but see it when we know it. That is, being sensitized to visual similarities by lawyers' arguments may make factfinders more likely to find substantial similarity than if they were encountering the works on their own. Researchers have established that verbal cues can lead subjects to find features in images that they would otherwise not see: "Hearing a word made otherwise invisible objects visible."¹⁸² Seeing is always selective, always shaped by context, and once we see some image (the face of Jesus on a piece of toast, for example, or similarities carefully separated out and identified by a plaintiff's counsel), we may be unable not to see it.¹⁸³ Providing the structuring concept of substantial similarity then may make it easier to find infringement when comparing two images, just as providing test subjects a term to use to describe an unfamiliar visual shape makes it easier for them to find that shape.¹⁸⁴

Non-textual works are especially tricky because lawyers, judges, and jurors by necessity direct their attention to words. This focus on definitions and verbal arguments can distort factfinders' memories and perceptions of the nonverbal subjects of litigation, changing their responses from those found in the more natural conditions of normal perception. Such alterations in perception are particularly important for copyright cases, where the question of infringement is supposed to be judged from the perspective of an ordinary observer, who is not going to be asking himself or herself the questions asked in litigation—who is unlikely to be producing separate descriptions of the works at all, in most cases. "[T]o describe [a photograph]

¹⁸² Gary Lupyan & Michael J. Spivey, *Making the Invisible Visible: Verbal But Not Visual Cues Enhance Visual Detection*, 5 PLoS ONE issue 7, July 2010, e11452. doi:10.1371/journal.pone.0011452, at 1; see also *id.* at 7 ("Currently ongoing experiments indicate that similar results can be obtained for pictures of everyday objects and animals: hearing common nouns can facilitate the detection of pictures from the named category.") (citing G. Lupyan, *Beyond Communication: Language Modulates Visual Processing*, PROCEEDINGS OF THE 8TH INTERNATIONAL CONFERENCE ON THE EVOLUTION OF LANGUAGE (2010)).

¹⁸³ See CAROL M. ROSE, *Seeing Property*, in PROPERTY AND PERSUASION, at 267, 278 (1994) (footnotes omitted) ("[I]n visual perception the viewer's imagination organizes and embellishes the mass of sensations that appear to come from 'out there' to 'in here,' as the viewer persuades herself of the meaning of various features of the object she is seeing. . . . [I]n one set of experiments, viewers of simplified or blurred computer images, once having 'found' the face, added detail to the coarse images presented to them; moreover, they were unable to "un-see" the face after it was perceived. . . .").

¹⁸⁴ See Gary Lupyan & Michael J. Spivey, *Perceptual Processing is Facilitated by Ascribing Meaning to Novel Stimuli*, 18 CURRENT BIOLOGY 18 R410 (2008) (finding that providing respondents verbal labels to use for unfamiliar shapes improved the efficiency of visual search for these shapes).

is thus not simply to be imprecise or incomplete, it is to change structure, to signify something different to what is shown.”¹⁸⁵

The phenomenon in which producing verbal descriptions decreases the accuracy of a memory of a nonverbal stimulus is known as verbal overshadowing.¹⁸⁶ Though most of the research has focused on facial recognition and misrecognition, verbal overshadowing has shown up in other tasks, such as remembering the tastes of wine, the sound of a person’s voice speaking or singing, and straight-line map distances, though not in recognizing an image of a car.¹⁸⁷ While experts in a field, who are used to producing verbal descriptions, can resist verbal overshadowing, nonexperts cannot, basically because they are better at perceiving than at talking about what they’re perceiving.¹⁸⁸ Verbal overshadowing doesn’t decrease subjects’ confidence, only their accuracy, and, since others often mistake a person’s confidence for her accuracy, these misjudgments may have profound effects.¹⁸⁹

¹⁸⁵ Roland Barthes, *The Photographic Image*, in IMAGE, MUSIC, TEXT, 15, 18-19 (1977, trans. Stephen Heath).

¹⁸⁶ See, e.g., M.A. Meissner et al., *The Influence of Retrieval Processes in Verbal Overshadowing*, 29 MEMORY & COGNITION 176 (2001). One important caveat: Though many have replicated these results, the magnitude of the effect may be less than initially reported. Jonah Lehrer, *The Truth Wears Off: Is there something wrong with the scientific method?*, NEW YORKER, December 13, 2010,

http://www.newyorker.com/reporting/2010/12/13/101213fa_fact_lehrer?currentPage=all

(noting that Schooler’s attempts to replicate his results produced declining effects over time). Verbal overshadowing occurs even when the verbal description is of something other than the target image that the subject later tries to remember. See D.L. Westerman & J.D. Larsen, *Verbal-Overshadowing Effect: Evidence for a General Shift in Processing*, 110 AM. J. PSYCH. 417 (1997).

¹⁸⁷ See Stephen M. Fiore & Jonathan W. Schooler, *How Did You Get Here from There? Verbal Overshadowing of Spatial Mental Models*, 16 APPLIED COGNITIVE PSYCHOLOGY 897 (2002) (maps); Joseph M. Melcher & Jonathan W. Schooler, *The Misremembrance of Wines Past: Verbal and Perceptual Expertise Differentially Mediate Verbal Overshadowing of Taste Memory*, 35 J. MEMORY & LANGUAGE 231 (1996) (wine); T.J. Perfect et al., *Verbal Overshadowing in Voice Recognition*, 16 APPLIED COGNITIVE PSYCHOLOGY 973 (2002) (sound of a voice speaking); Helen F. Mitchell & Raymond A. R. MacDonald, *Linguistic Limitations of Describing Sound: Is Talking About Music Like Dancing About Architecture?*, INTERNATIONAL SYMPOSIUM ON PERFORMANCE SCIENCE (2009) (sound of a voice singing); W. Parr et al., *Demystifying Wine Expertise: Olfactory Threshold, Perceptual Skill and Semantic Memory on Expert and Novice Wine Judges*, 27 CHEMICAL SENSES 747 (2002) (wine); T. Vanags et al., *Verbal Overshadowing: A Sound Theory in Voice Recognition?*, 19 APPLIED COGNITIVE PSYCHOLOGY 1127 (2005) (voice); M.A. Brandimonte et al., *Attenuating Verbal Overshadowing Through Visual Retrieval Cues*, 23 J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 915 (1997) (abstract figures); J.W. Schooler & T.Y. Engstler-Schooler, *Verbal Overshadowing of Visual Memories: Some Things Are Better Left Unsaid*, 22 COGNITIVE PSYCHOLOGY 36 (1990) (colors); but see Westerman & Larsen, *supra* note [] (showing no effect for verbal description of an image of a car).

¹⁸⁸ See Melcher & Schooler, *supra* note []; Bretton H. Talbot et al., *The Verbal Overshadowing Effect: Influence on Perception*, 4 INTUITION 12, 12 (2008) (“[The verbal overshadowing effect] normally occurs when participants describe a non-verbal stimulus, ... or when one’s perception exceeds one’s ability to describe it verbally. In other words, it’s difficult to explain in words but easily recognized.”); but cf. Bruce Bower, *Words Get in the Way: Talk is Cheap, But It Can Tax Your Memory*, SCIENCE NEWS, April 19, 2003, at 250 (describing another experiment in which verbal overshadowing occurred for white observers looking at white faces, but not for white observers looking at black faces, which the experimenter hypothesized came from white observers’ rapid gestalt conceptualization of white faces and more feature-by-feature study of black faces).

¹⁸⁹ See Mitchell & MacDonald, *supra* note [], at 5; see generally CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US (2010) (discussing how others misjudge confidence as accuracy).

Crucially, verbal overshadowing affects not just memory but qualitative evaluations. One study showed that verbalizing perceptions of a face's attractiveness shifted subjects' ratings towards extremes.¹⁹⁰ As the authors explained, when participants attempt to articulate the *reasons* for their perceptions, "their thoughts about the perception are disrupted. A shift occurs from a normal cognitive process to a more analytical procedure and thus affects the outcome."¹⁹¹ Giving reasons can diminish the quality of decisionmaking when the decision is resistant to analysis, such as a taste preference or other emotional judgment.¹⁹² The phenomenon is not just about pictures, but also about sequence: contesting narratives change the meaning of images from that which a person not exposed to the litigation narratives would see.

Marketers have also recognized this phenomenon in attempting to explain the failure of focus groups and other research methods to predict the actual success of products.¹⁹³ Just as people asked to explain their judgments make different judgments, people asked to explain their reasoning do worse on problems that require insight, though their ability to engage in mathematical or logical reasoning is unaffected.¹⁹⁴ This is important because copyright infringement is supposed to be a gestalt reaction, rather than an analytic dissection, and yet the very tools we have for identifying infringement are likely to destroy that which they seek to use. As one researcher concludes, "Various forms of inexpressible knowledge may be best served by avoiding the application of language."¹⁹⁵

The research on verbal overshadowing suggests that how people talk about a work will affect their perceptions of the work itself.¹⁹⁶ But the problem is worse than that: *other people's* descriptions can change subjects' memories and even their sensory perceptions.¹⁹⁷ That is,

¹⁹⁰ See Talbot, *supra* note []; see also Toby J. Lloyd-Jones et al., *Verbal Overshadowing of Perceptual Discrimination*, 13 PSYCHONOMIC BULL. & REV. 269 (2006) (finding that verbal descriptions of faces interfered with subjects' subsequent ability to distinguish different faces from nonfaces).

¹⁹¹ Talbot, *supra* note [], at 17 (citation omitted).

¹⁹² See, e.g., CHABRIS & SIMONS, *supra* note [], at 236 (writing reasons for liking or disliking jams led to inconsistent results in taste tests, whereas rating without giving reasons led to greater consistency); T.D. Wilson & J.W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, J. PERS. SOC. PSYCHOL. 181 (1991) (describing the jam experiment).

¹⁹³ See, e.g., GERALD ZALTMAN, HOW CUSTOMERS THINK 10-11, 53, 121-23 (focus groups fail for many reasons related to the difficulty of getting people to understand or explain their own reactions, especially in theoretical or unfamiliar contexts); Tjaco H. Walvis, *Avoiding Advertising Research Disaster: Advertising and the Uncertainty Principle*, 10 J. BRAND MANAGEMENT 403 (2003) (arguing that focus groups often work badly because the design influences the results).

¹⁹⁴ See Bower, *supra* note [].

¹⁹⁵ Bower, *supra* note [] (quoting Schooler); see Jonathan W. Schooler et al., *Thoughts Beyond Words: When Language Overshadows Insight*, 122 J. EXPERIMENTAL PSYCHOLOGY: GENERAL 166 (1993).

¹⁹⁶ This is most obvious with non-word-based works, where the medium shift increases the cognitive demands on factfinders trying to think about images or sounds, but the research suggests that the same phenomenon may occur even with word-based works because the presentation surrounding those works may "prime" respondents to think in certain ways. See, e.g., H. Shanker Krishnan & Dipankar Chakravarti, *Memory Measures for Pretesting Advertisements: An Integrative Conceptual Framework and a Diagnostic Template*, 8 J. CONSUMER PSYCHOL. 1 (1999) (explaining and testing priming effects); Douglas L. Nelson & Leilani B. Goodmon, *Experiencing a Word Can Prime Its Accessibility and Its Associative Connections to Related Words*, 30 MEMORY & COGNITION 380, 380 (2002) (noting that priming has been observed under a wide variety of conditions).

¹⁹⁷ See Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 251 (2005) (judgment of line length); Matthew J. Salganik et al., *Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market*, 311 SCIENCE 854, 854-55

verbal overshadowing from an external source is also extremely powerful. One possibility is that people suffer failures of source attribution: people are much better at remembering first-order information (the jam was tasty) than at remembering the source of that information (*the ad said the jam was tasty*), so they conflate direct experience with statements about the experience, even when they have tasted the jam themselves.¹⁹⁸

As a result, in an infringement case, how the witnesses and lawyers talk about the works at issue and direct factfinders' attention to specific features will quite literally change how the factfinder sees the work.¹⁹⁹ The fact that the court of appeals in *Boisson* saw the quilts differently than the district court did, then, may well have followed from the differing ways in which the parties' words surrounded the quilts. Given the role of language in shaping perception, it might be more accurate to say that the appellate court and the trial court *saw different works*.

Certain interventions designed to direct factfinders away from analysis might limit these effects,²⁰⁰ but they would likely run contrary to courts' desire to fence in factfinders and review their decisions, and would certainly lead to further complaints about the unpredictability of infringement cases. If "visual perception depends not only on what something looks like, but

(2006) (knowledge of others' music ratings affects listeners' own ratings); GERALD ZALTMAN, *HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET* 12–13, 166–67, 180–83 (2003) (citing studies and experiments demonstrating advertising's ability to "infiltrate memory" and even to create memories of events that never occurred, usually through verbal descriptions); Kathryn A. Braun & Elizabeth F. Loftus, *Advertising's Misinformation Effect*, 12 *APPLIED COGNITIVE PSYCHOL.* 569, 586 (1998) ("[M]isinformation received following a direct experience with a product altered the recollections respondents made about that product."); Kathryn A. Braun et al., *Make My Memory: How Advertising Can Change Our Memories of the Past*, 19 *PSYCHOL. & MARKETING* 1, 17, 17–18 (2002) (discussing research finding that "featuring impossible events in autobiographical advertising can cause people to believe they had experienced the events"); Kathryn A. Braun, *Postexperience Advertising Effects on Consumer Memory*, 25 *J. CONSUMER RES.* 319, 332 (1999) (finding that advertising making verbal claims about good taste can induce consumers to change taste judgments from negative to positive); Bruce F. Hall, *A New Model for Measuring Advertising Effectiveness*, *J. ADVERTISING RES.*, Mar.–Apr. 2002, at 23, 26 ("[E]xposure to advertising can transform 'objective' sensory information, such as taste, in a consumer's memory, prior to the judgment process, and after the consumer had tasted the product.").

¹⁹⁸ See Sacchi et al., *supra* note [] at 1008; see also Arun Lakshmanan & H. Shanker Krishnan, *How Does Imagery in Interactive Consumption Lead to False Memory? A Reconstructive Memory Perspective*, 19 *J. CONSUMER PSYCHOL.* 451, 452–53 (2009) (discussing source misattribution).

¹⁹⁹ Cf. CHARLES SEIFE, *PROOFINESS: THE DARK ARTS OF MATHEMATICAL DECEPTION* [] (2010) (explaining how supposedly expert guidance can induce people to see patterns in randomness: "Drawing a line or curve through a clot of data is a very powerful method of shaping the way people interpret it. The line is a symbol of order; it shows that a pattern has been found within the raw scattershot chaos of points in the graph. Even if our eyes are unable to see the line directly, the line tells us what we *should* be seeing—even when it's not there."); GISELE FREUND, *PHOTOGRAPHY AND SOCIETY* 149 (1979) ("[F]ew people realize that the meaning of a photograph can be changed completely by the accompanying caption, by its juxtaposition with other photographs, or by the manner in which people and events are photographed.").

²⁰⁰ See, e.g., Christian A. Meissner & Amina Memon, *Verbal Overshadowing: A Special Issue Exploring Theoretical and Applied Issues*, 16 *APPLIED COGNITIVE PSYCHOL.* 869, 870 (2002) (suggesting that the nature of the instructions is important to the extent of verbal overshadowing; meta-analysis shows that overshadowing is more likely when subjects are given an elaborative instruction instead of a free recall instruction) (citing C.A. Meissner & J.C. Brigham, *A Meta-analysis of the Verbal Overshadowing Effect in Face Identification*, 15 *APPLIED COGNITIVE PSYCHOLOGY* 603 (2001)).

also on what it means,²⁰¹ then we should demand more rigor in judicial definitions of what infringement means.

C. Solutions

How should we make sure that we don't find liability when two works are only similar in unprotectable elements such as idea, plot, or standard tropes, and thus "feel" similar? Mark Lemley has proposed allowing analytic dissection and expert testimony into both parts of the current two-step test, copying and improper appropriation, in order to provide defendants better protection against liability for copying standard elements.²⁰² This would regularly involve significant expense and uncertainty, and it would preserve or even heighten the problem of transferring similarity judgments into verbal opinions. Taking a different tack, Jeanne Fromer worked through some complicated and, in her own estimation, likely-to-fail ways to make substantial similarity inquiries easier using *more* words: written claims describing the essential elements of a work.²⁰³

In the interests of fairness, predictability, and conforming judicial standards to actual perceptions, we should make a more radical move: abandon substantial similarity entirely. The concept is mainly applied to non-textual works, where it is least coherent.²⁰⁴ Copyright didn't always cover nonidentical copying, especially not as a violation of the reproduction right, and vestiges of a tougher standard still exist. For works whose expressive content is minimal and whose copyright is thus "thin," infringement can be found only if the works are virtually identical.²⁰⁵ Courts should expand this standard for the reproduction right generally.

A reproduction right that is truly a *reproduction* right would cover only pure copying and copying so nearly exact that observers would be inclined to see the two works as the same. This would require a factfinder to focus on differences between the works, not similarities, contrary to current doctrine. The stuffed pigs, quilts, greeting cards, and other examples discussed in the previous sections are not exact copies, and thus would not be subject to the reproduction right. Exact copies, at the core of the copyright industries' fight against commercial piracy and unauthorized downloading, would remain subject to the reproduction right.²⁰⁶

²⁰¹ Lupyan & Spivey, *supra* note [], at R412.

²⁰² See Lemley, *supra* note [], draft at 32.

²⁰³ See Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHICAGO L. REV. 719, 781-94 (2009).

²⁰⁴ Visual works are the usual subjects of substantial similarity cases. Textual cases are more rare. Moreover, unless a text-only case involves substantial verbatim quoting, for example, *Harper & Row v. Nation Enter.*, 471 U.S. 539 (1985) and *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), it is often a loser for the plaintiff, who generally can only identify similarities in ideas and scenes a faire. See, e.g., *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996); *Scholastic Inc. v. Stouffer*, 221 F. Supp. 2d 425 (S.D.N.Y. 2002). Even when the litigation focuses on words, multimedia (in the form of performance) often lurks in the background, since the works at issue are often plays and screenplays. See, e.g., *Anderson v. Stallone*, No. 87-0592(WDKGX), 1989 WL 206431, at *7; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

²⁰⁵ See, e.g., *Satava v. Lowry*, 323 F.3d 805, 808-13 (9th Cir. 2003); *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994); *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980).

²⁰⁶ One could argue that clever potential defendants would make nearly unnoticeable changes; truly unnoticeable changes would still be reproductions, while noticeable changes should, as I suggest immediately below, be evaluated as potential derivative works, which might or might not be infringing.

Debates over works that are merely substantially similar would then shift to the aegis of the derivative works right. This is a distinct right provided in the Copyright Act that allows copyright owners to control translations, movie versions, novelizations, and so on. While the law defining derivative works is hardly a model of clarity, other scholars have proposed interventions that could make the derivative works right more predictable in ways that would not require nearly as many aesthetic/look and feel judgments as current doctrine does.²⁰⁷ We could then avoid many of the problems detailed in this Part, though not all.²⁰⁸ Instead of asking factfinders about aesthetic appeal or similarity in ways that inevitably trigger verbal overshadowing, we would ask about the proper market definition for derivative works. There would be no copyright protection for a striking or successful style, even when the defendant's work competed with the plaintiff's. Applying Lemley's proposal to derivative works as an extra safeguard for noninfringing uses would also make sense: if a defendant copied only minimal or unprotectable elements of a work, then there should be no violation of any right conferred by copyright.

Such a significant change is superior to tweaking a multifactor test because analytic dissection is fundamentally incompatible with a gestalt evaluation. We are really bad at understanding our own reactions. The reasons we give for our decisions tend to be wrong or easily manipulable without our awareness. We therefore can't have both analytic dissection and gestalt "feeling," and we should stop pretending that we can. Further, because it is unlikely that reviewing courts will accept an unanalyzed gestalt judgment without further analysis, and probably undesirable for them to do so, the better choice is to recognize that the reproduction right has been stretched beyond its capacity.

In some situations, we may have no better alternatives to a test whose results will be distorted by the litigation context. Law produces lawyers, who will advocate for clients and attempt to shape verbal narratives to best serve their clients. But we need not concede the field to whoever can hire the better storyteller. We have a fair amount of freedom to define the scope of copyright law; there is no natural law of substantial similarity. We should look for alternative methods of furthering the relevant interests that don't require impossible and incoherent decisions.

III. Privileging Text in Copyright Conflicts

²⁰⁷ See, e.g., Christina Bohannon, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669 (2010); Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701 (2010); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 Brook. L. Rev. 1213, 1267 (1997) (suggesting a new definition of derivative works as "either (1) a work based significantly upon one or more pre-existing works, such that it exhibits little originality of its own or that it unduly diminishes economic prospects of the works used; or (2) a translation, sound recording, art reproduction, abridgement, and condensation").

²⁰⁸ I do not address here problems of implementation. There would be issues defining how much reprographic copying would be enough to constitute infringement of the reproduction right, and there would be cases in which the copying was neither so extensive that it did not violate the reproduction right nor so transformative that it violated the derivative works right; this proposal does anticipate a contraction in the scope of rights conferred by a copyright over subsequent works.

The previous Part showed that copyright's core doctrines don't work for images, which means that they don't work for copyright. This Part examines smaller but still illuminating problems within copyright where text rules, often to the detriment of authors who aren't writers, or who are creating new works involving fair use of images. In Part III.A, I discuss the privileging of the writer in multimedia works, while Part III.B discusses the incommensurability between the textual model of fair use and the fair use of images. In both instances, the failure to consider images, whether as worthy products of authorship or as significant ways to communicate, harms both the law itself and its ultimate goal of encouraging a diverse and robust expressive culture.

A. Comic Art: A Case Study of Words and Pictures

Works mixing text and images, or words and music, have repeatedly posed challenges to legal regulation, especially in the area of intellectual property. Courts have been able to position themselves with respect to words alone or images alone using various theories about the power, or lack thereof, of particular forms of communication. But with harder-to-define works like modern comic art, those aesthetic theories seem especially unpredictable.

Comic art may be particularly troublesome for courts because it is in many ways uncanny, boundary-crossing, which is related to its culturally devalued status. Comics aren't novels, so they don't get understood as high-status and inherently meaningful. They aren't pure visual art, so they don't get the insulation of the transcendent power of nonverbal art. They are mixed, not purebred, and they get treated as such.²⁰⁹ Copyright has often favored the photographer or visual artist against later visual imitators, but in comic art, the visual is the source of protection, and yet somehow the writer is still on top. The denigration of images thus plays an important role in allocating authorship and value in comic cases.

Comics are a collaborative medium, with different people often supplying words and drawings. Ownership disputes are, at least today, often avoided with work-for-hire agreements. When those agreements aren't in place, it can become necessary to figure out who owns what, and the unitary work of art has to be dissected. In *Gaiman v. McFarlane*, about the comic book *Spawn*, Judge Posner was explicit that copyright law should treat mixed media such as comics and motion pictures separately from more respectable works.²¹⁰ The key issue in the case was whether popular fantasy writer Neil Gaiman jointly authored, and thus jointly owned, the characters of Cogliostro, Angela, and Medieval Spawn. He had described some basic elements of these characters, including their names and basic backstories, while artists and scripters thereafter created their images and actual roles in the narrative. The court ruled that Gaiman was an author of these characters.²¹¹

²⁰⁹ See, e.g., SCOTT MCCLOUD, UNDERSTANDING COMICS: THE INVISIBLE ART 140-41 (1993) (“Words and pictures together are considered, at best, a diversion for the masses, at worst a product of crass commercialism. . . . [T]his widespread feeling that the combination is somehow base or simplistic has become a self-fulfilling prophecy.”).

²¹⁰ 360 F.3d 644 (7th Cir. 2004).

²¹¹ Gaiman described Medieval Spawn to McFarlane as “[Olden Days] Spawn rides up on a huge horse. He's wearing a kind of Spawn suit and mask, although the actual costume under the cloak is reminiscent of a suit of armour.” *Id.* at 657 (quoting Gaiman). Cogliostro was an “old man, who starts talking to Spawn and then telling him all these sort of things about Spawn's super powers that Spawn couldn't have known. . . . [A] really old bum, a

It is not unusual for text to beat out nontext in joint authorship disputes involving multimedia. In several leading joint authorship cases, the writer is seen as the master mind compared to others whose contributions were less purely textual, often performance-related.²¹² It's relatively easy, however, to characterize most of these cases as factual disputes in which X really was the author and Y really wasn't. *Gaiman* is particularly illuminating for two reasons: First, unlike the uniform results in the leading cases, the person *without* final decisionmaking authority won.²¹³ It's no accident that he was the writer. Second, Judge Posner is entirely forthright about the ideological underpinnings of his definition of authorship.

The problem Posner feared from holding that Gaiman wasn't an author was that a writer—implicitly, the person who *deserves* to be treated as the author/owner—might simply tell an artist what to do in such an abstract way that his contribution wouldn't be copyrightable alone, because copyright does not protect abstract ideas. Then the artist might comply in such a noncreative way that *his* contribution wouldn't be copyrightable. Because one must contribute something copyrightable in order to claim authorship, neither would qualify as authors for purposes of copyright law.²¹⁴ And yet the resulting work, Posner was certain, would be copyrightable: a protected work without a protected author.²¹⁵ That result would be silly, and so

skinny, balding old man, with a grubby greyish-yellow beard, like a skinny santa claus.” *Id.* at 657 (quoting Gaiman).

²¹² See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (finding that dramaturg, a hard-to-define role involving extensive collaboration with a playwright to rewrite his original script, was not a joint author of *Rent* even though she rewrote about half of the script); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1993) (holding that playwright was sole author as against performers who couldn't identify what specifically they'd contributed, though play was developed through collaboration between playwright and performers); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (holding that actress was not joint author with playwright whom she hired to write play and to whom she provided numerous scene and character suggestions); see also *Aalmuhammad v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (“It is relatively easy to apply the word ‘author’ to a novel. It is also easy to apply the word to two people who work together in a fairly traditional pen-and-ink way, like, perhaps, Gilbert and Sullivan. . . . But as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word is harder to apply.”); *Clogston v. American Academy of Orthopaedic Surgeons*, 930 F. Supp. 1156 (W.D. Tex. 1996) (finding that photographer was not joint author of book for which photos were taken because author of text did not intend co-authorship); Brent Salter, *Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship*, 56 J. COPYRIGHT SOC'Y U.S.A. 789, 834-35 (describing the “writer is king” phenomenon in Australian copyright).

²¹³ See Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193 (2001) (analyzing and criticizing the case law's focus on the dominant author).

²¹⁴ *Gaiman*, 360 F.2d at 658-59 (“[W]here two or more people set out to create a character jointly in such mixed media as comic books and motion pictures and succeed in creating a copyrightable character, it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim copyright.”).

²¹⁵ *Id.*; see also *id.* at 659 (“The contents of a comic book are typically the joint work of four artists — the writer, the penciler who creates the art work . . . , the inker . . . who makes a black and white plate of the art work, and the colorist who colors it. The finished product is copyrightable, yet one can imagine cases in which none of the separate contributions of the four collaborating artists would be. The writer might have contributed merely a stock character . . . that achieved the distinctiveness required for copyrightability only by the combined contributions of the penciler, the inker, and the colorist, with each contributing too little to have by his contribution alone carried the stock character over the line into copyright land.”).

it could not be right. Instead, the writer gets special consideration. Wordsmiths are to be protected even without a protectable contribution.²¹⁶

There are a number of problems with Posner's reasoning. In his nightmare scenario, Posner seems to have imagined a very odd multimedia work, entirely composed of scenes a faire components that together were more than that. Even if such a work existed and needed an identifiable author, that would not logically mean that the writer should be that author. In *Gaiman* in particular, there was no contention by anyone that the *drawings* were stock or otherwise uncopyrightable. Indeed, if the artist had just done a painting of Cogliostro, the image would have been copyrightable.²¹⁷

Many writers produce full scripts for comic books, but that writers *can* make specific contributions doesn't make Gaiman's particular suggestions to the artist copyrightable. Nonetheless, Posner clearly favored words over images. For example, he distinguished one classic case, which found that Sam Spade was not a copyrightable character and thus allowed Dashiell Hammett to write further adventures for the character despite Hammett's transfer of the copyright in an earlier Sam Spade story. Sam Spade was different because "the description of a character in prose leaves much to the imagination, even when the description is detailed."²¹⁸ Posner argues that even Dashiell Hammett's detailed prose description of Sam Spade leaves readers "hardly know[ing]" what Sam Spade looked like, but "everyone knows what Humphrey Bogart looked like."²¹⁹ It's not clear what this is supposed to prove, given that Humphrey Bogart was not Sam Spade. To conclude that Sam Spade became copyrightable when, and only when, played by Humphrey Bogart would be to allow the Sam Spade character to incorporate into itself features not provided by the author and even inconsistent with the character's original description.

Consider another oft-litigated character: What does Superman look like? Well, which one—Joe Shuster's Superman? John Byrne's Superman? Alex Ross's? Superman, who even in live-action has been portrayed by a number of actors (most recently, Christopher Reeve, Dean Cain, Tom Welling, and Brandon Routh), is not embodied by any of them, although of course various audience members are likely to have individual favorite versions. Anyone who "knows" what Superman looks like also "knows" what Sam Spade looks like—even if that knowledge is specific, individualized, and difficult to transmit in photographic detail to someone else.

²¹⁶ See *id.* at 659 (explaining that the multimedia creation represents an exception to the general rule that, to be an author, one must contribute something copyrightable to the work). This is tied into overall problems with authorship of multimedia or performance-based works that often reflect the creative contributions of multiple authors. See, e.g., Roberta Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 60 (2001) (criticizing judicial discomfort with multiple-author, usually multimedia works).

²¹⁷ McFarlane actually changed the depiction to that of "an old man with a long grey beard who faintly resembles Moses — McFarlane had been dissatisfied with Gaiman's verbal description, which made Cogliostro sound like a wino." *Gaiman*, 360 F.3d at 658.

²¹⁸ This is not the basis on which the Sam Spade case was decided. There, Hammett's words were enough to render his story copyrightable, but not his character independent of the specific story.

²¹⁹ *Gaiman*, 360 F.3d at 660-661.

If the character does have independent, copyrightable existence as a form of expression, then that existence has to be in some way removable from a single actor's physical features—it has to exist even if there is no identifiable human reference. The error here is the same as in the *McEwen* cartoon pornography case discussed in Part I: the idea that portrayals in written works are necessarily imaginary, whereas images present actual people. Images—even comic images—then become concrete objects, less authorial and more natural.

In *Gaiman*, the consequence of considering images closer to reality than words was that images were easily dismissed as nothing more than images. This occurred even though the images were defiantly unreal: they depicted angels and demons. In Posner's view, words have a connection to something more abstract than images do, something that is somehow not quite contained in the words and thus grants an author of a text greater rights than those of someone who works in images.²²⁰ Posner says, "A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive. That is why kids lose a lot when they don't read fiction, even when the movies and television that they watch are aesthetically superior."²²¹ (Compare that to Bezanson's claim that video is so direct in its address to the viewer that it can easily arouse him to action, more like an inciter than a book.²²² Images are worse than text, but the theorists can't agree on whether that's because images turn us into couch potatoes or into rioters.)

Posner presents images as so active and powerful as to not require any interpretation or elaboration (which is of course empirically false), with the surprising consequence that their transparency makes them less authorial, less qualified for the core of copyright protection. In fact, other cases have used the concreteness of the image to grant greater rights, illustrating the way that treatment of images flips back and forth as needed: in *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*,²²³ the court found that a car ad infringed the character of

²²⁰ Cf. *Shaw v. Lindheim*, 919 F.2d 1353, 1360 (9th Cir. 1990) ("By creating a discrete set of standards for determining the objective similarity of literary works, the law of this circuit has implicitly recognized the distinction between situations in which idea and expression merge in representational objects and those in which the idea is distinct from the written expression of a concept by a poet, a playwright, or a writer. A high degree of similarity is 'inevitable [in visual representations of similar objects].' As a result, the scope of the copyright protection afforded such works is necessarily narrow. In contrast, there is an infinite variety of novel or creative expression available to the author of a book, script, play, or motion picture based on a preexisting idea.") (citations omitted).

²²¹ *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004). Judge Posner is calling on Marshall McLuhan's distinction between "cool" and "hot" media: images and video are "hot" and displace or preempt thought; words are "cool" and audiences thus think through them, generating meaning in dialogue with speakers. It should be noted that the "hot" and "cool" are contingent concepts. Marshall McLuhan himself wrote that "TV is a cool medium. It rejects hot figures and hot issues. Had TV occurred on a large scale during Hitler's reign he would have vanished quickly." MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 326 (Routledge Classics 2001) (1964). Posner, however, puts TV, with its images, on the "hot" side, reflecting his own understanding of how the world works. More strikingly, McLuhan claimed that actual cartoons were "cool" compared to "hot" photographs, inviting the audience's imaginative participation. MARSHALL MCLUHAN, *Media Hot and Cold*, in *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 22-23 (1994) ("A hot medium is one that extends one single sense in 'high definition.' High definition is the state of being filled with data. A photograph is, visually, 'high definition.' A cartoon is 'low definition' simply because very little visual information is provided.... Hot media are, therefore, low in participation, and cool media are high in participation or completion by the audience."); see also McCloud, *supra* note [], at 59 (adopting McLuhan's characterization of comics).

²²² See *supra* note [] and accompanying text.

²²³ 900 F. Supp. 1287 (C.D. Cal. 1995).

James Bond as well as various James Bond movies. The court reasoned that similarities in “mood, setting, and pace” between screenplays might have been scenes a faire, but because the ad and the James Bond movies could be “visually compared, as opposed to merely compared in the abstract,” the same similarities contributed to an infringement finding.²²⁴ In *MGM*, words are abstract, whereas visuals are concrete and thus grant the plaintiff copyright owner greater rights, at which point infringement may then be found in “look and feel” rather than in exact similarity.

Even if *MGM* is wrongly decided, there is a larger body of law that conflicts with Posner’s rationale. Copyright recognizes “thick” and “thin” copyrights, the former highly creative and the latter minimally so. Minimal information to which audiences would have to add their own creative inferences and imaginings should be entitled to thinner protection than more information-rich works where the creativity is already presented to the audience. Posner’s reasoning thus creates a special rule for writer-artist conflicts not applicable to other copyright questions.

Doctrine aside, Posner’s argument also has problems with reality. Among the phenomena Posner’s distinction between visually complete and textually incomplete can’t explain is why generations of supposedly passive fans of audiovisual material have been inspired to write, draw, and otherwise create works extending the initial stories, “completing” the works not just in their minds but on their pages and screens.²²⁵ Visuals are at least as productive in audiences’ minds as the texts Posner prefers for the youth of America. Note here also Posner’s dismissal—his literal *failure to see*—the techniques that distinguish film and comics from reality. A viewer routinely “completes the work in his mind” because comics move from panel to panel²²⁶ and because film *cuts*: a character gets in a car, and then is elsewhere. But this technique is so naturalized to a modern viewer that it is invisible.²²⁷ Rather than one type of media being

²²⁴ *Id.* at 1298 n.12. Watching the commercials makes the court’s decision much more persuasive: the horn-driven *music* of the commercials powerfully evokes the James Bond films. See *ibpimin*, *Honda Del Sol Commercial*, June 7, 2006, <http://www.youtube.com/watch?v=gqa-b3assCA>. Unfortunately, the court does not highlight the role of the music in forming the James Bond character.

²²⁵ See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651 (1997). A professor who taught a course on Harry Potter and philosophy, for example, predicted that the film versions of the books would suppress creative responses, warning that “‘It will take a strong individual indeed to say, ‘No, that’s not what it looked like inside my head,’ and set the movie version aside’ Worse yet, ‘Those who see the movie before reading the books will never have the chance to make their own vision’ to the point that ‘for many people it will replace their own imaginations.’” Manohla Dargis & A. O. Scott, *The Fans Own the Magic*, *N.Y. Times*, July 1, 2011, available at <https://www.nytimes.com/2011/07/03/movies/the-fans-are-all-right-for-harry-potter.html?pagewanted=all>. In fact,

Many millions of movie tickets, innumerable fan sites, wizard rock bands and conferences later, it’s indisputable that for many if not most Harry Potter lovers the movies didn’t replace their imaginations but instead enlivened and even fired them up. On deviantart.com, for instance, you can download work from a database of thousands upon thousands of fan-generated images of Harry, his friends and enemies from the photorealistic to the broadly caricatured, including anime-style creations with saucer eyes and heart-shaped faces, and what the Japanese call *kawaii* or cute, for a kind of Hello Kitty Harry confection. Elsewhere there are dirty-girl Hermiones aplenty and surprisingly, er, friendly Harry and Draco liaisons.

Id.

²²⁶ See McCloud, *supra* note [], at 66-67.

²²⁷ See generally WALTER MURCH, *IN THE BLINK OF AN EYE: A PERSPECTIVE ON FILM EDITING* (2d ed. 2001); KAREN PEARLMAN, *CUTTING RHYTHMS: SHAPING THE FILM EDIT* 188, 217, 222-23 (2009) (pointing out that cutting “allows us to surmise things that in fact are not part of the plot; it gets us to, in a sense, tell ourselves the story by giving us the opportunity to make a connection between two things”; editing creates story, emotions, and cause-

more complete than another, different genres simply leave different things out.²²⁸ And we don't notice because we see it when we know it.²²⁹

Below are some images of Cogliostro and Angela in action. Query whether they leave so much less to the imagination than a vivid novel as to deserve categorical differentiation:



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effect relations that may not be present in initial footage). Final versions of films are often made up of selections from dozens of different takes. Beyond this, flashbacks, instant scene changes, slow motion, distorted lenses, competing points of view as in *Rashômon*, combinations of live-action and animation as in *Who Framed Roger Rabbit?*, acting against a green screen for later insertion of special effects, and numerous other film techniques have no real-world correspondence. Cf. Eric D. Barry, *High-Fidelity Sound as Spectacle and Sublime, 1950-1961*, in *SOUND IN THE AGE OF MECHANICAL REPRODUCTION*, 114, 118 (David Suisman & Susan Strasser eds., 2010) (“[N]ew media are not only reproductive, but productive. ... [T]he careful crafting of films using editing techniques such as jump cuts and montage means that the sense of reality portrayed by film is actually ‘the height of artifice,’ a property of reproducible objects that have no single antecedent original.”).

²²⁸ I thank David Shapiro for this point: Novelizations of movies are often so very bad because modern novels generally have to narrate interior thoughts, but fidelity to the action of the movie generally means that the reported thoughts are incredibly banal. This is also why a book-to-film adaptation requires so much care in switching verbal codes to visual.

²²⁹ Cf. Ulric Neisser & Robert Becklen, *Selective Looking: Attending to Visually Specified Events*, 7 *COGNITIVE PSYCHOLOGY* 480 (1975) (exploring the phenomenon in which people ignore things they aren't looking for); Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattention Blindness for Dynamic Events*, 28 *PERCEPTION* 1059 (1999) (finding that many people don't see a person in a gorilla suit walk directly across the screen when they're busy counting the number of passes made by basketball players on screen).

²³⁰ *Gaiman*, 360 F.3d at 666 (Cogliostro) and Neil Gaiman et al., *Spawn: Angela* np (1997) (on file with author).

Taken on their own terms, these images leave various gaps in our understanding, among other things: What’s going on in the rest of the scene during those close-ups? What are the characters doing in between panels? How *does* Angela’s costume even stay on?

Posner concludes that the stock character description of Cogliostro provided by Gaiman became copyrightable *by Gaiman* when he was drawn and named *by the visual artist*.²³¹ Gaiman’s contribution made Cogliostro a character and not a drawing. Gaiman’s contributions were “quite equal” to McFarlane’s,²³² even though they were just ideas. When there’s a conflict between words and artwork, words get priority, even when they’re stereotypical, just because they’re words.²³³ What we are really protecting in visual characters, it turns out, is words instantiated in images.

This is true even though courts claim that visual characters are easier to protect than literary characters:²³⁴

[I]t is difficult to delineate distinctively a literary character. When the author can add a visual image, however, the difficulty is reduced. Put another way, while many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.²³⁵

Note the concept that the author has “added” a visual to the underlying nonvisual attributes of the character, at which point those attributes become protectable. Gaiman’s description was vague and uncopyrightable until given visual expression: something was added in translation, but it was encoded in rather than contributed by the visual. Likewise, one recent case, *X One X*, had complicated facts involving public domain publicity stills and posters advertising copyrighted movies. The court held that the pictures didn’t capture the characters’ distinctive mannerisms, movements, and so on. As a result, the public domain photos didn’t allow anyone to create new

²³¹ *Gaiman*, 360 F.3d at 660 (“Gaiman could not copyright a character described merely as an unexpectedly knowledgeable old wino, that is true; but that is not his claim. He claims to be the joint owner of the copyright on a character that has a specific name and a specific appearance. Cogliostro’s age, obviously phony title (“Count”), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright.”).

²³² *Gaiman*, 360 F.3d at 661; *see also id.* (“Although Gaiman’s verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable. Gaiman’s contribution may not have been copyrightable by itself, but his contribution had expressive content without which Cogliostro wouldn’t have been a character at all, but merely a drawing.”).

²³³ Compare the *Roth Greeting Cards* case discussed in Part II: in that case, the drawings were not similar to each other, but the court held that the combination of unprotectable words and protectable-but-not-copied drawings was substantially similar—again, the words were driving the outcome.

²³⁴ *See, e.g., Titan Sports, Inc. v. Turner Broad.Sys.*, 981 F. Supp. 65 (D. Conn. 1997); *Anderson v. Stallone*, No. 87-0592(WDKGX), 1989 WL 206431, at *7 (stating that “[a]s a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out in sufficient detail so as to warrant copyright protection,” but also concluding that “this fact does not warrant the creation of separate analytical paradigms for protection of characters in the two mediums”).

²³⁵ *Air Pirates*, 581 F.2d at 755 (9th Cir. 1978) (citations omitted); *see also Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988) (adopting the same reasoning); *cf. Preston v. 20th Century Fox Canada Ltd.* 33 CPR (3d) 242 (finding written description of furry Ewoks insufficient to protect them as characters under Canadian copyright law).

works based on the photos because any reuse would evoke the still-copyrighted characters.²³⁶ Character copyright stems from the image but goes beyond it, so a public domain image turns out not to mean a public domain character.

Character copyright's intimate relationship with incompletely articulated theories of the visual image may help explain why the nature of copyright in characters has puzzled courts and commentators for so long.²³⁷ "Character" is not a type of work listed in the Copyright Act, and to have a copyright in a character seems both detached from and necessarily grounded in a copyright in some more conventional medium such as a literary work or an audiovisual work.²³⁸ The following explanation of why the character of Tarzan is copyrightable, separate from the book *Tarzan of the Apes* or any other specific book, movie or comic in which he had appeared, is nothing more than a judge throwing up his hands:

It is beyond cavil that the character "Tarzan" is delineated in a sufficiently distinctive fashion to be copyrightable. . . . Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.²³⁹

Comic art is, in formal characteristics and in the market, connected to the general rise of transmedia entertainment, in which characters migrate from one form of media to another,²⁴⁰ creating further challenges for the definition of a work protected by copyright. The trouble law has with interpreting *Simpsons* characters presented as pornography, as well as the difficulty law has defining copyright in Medieval Spawn, suggests that the incoherent condition of the law surrounding comics will be replicated in new transmedia environments. This is likely to make our difficulties with integrating words and images even more salient.²⁴¹

However we divide up authorship, we need to stop pretending that writers are the core creatives in any endeavor. Images too involve creativity and imagination on both sides of the creator/audience divide.

²³⁶ Warner Bros. v. X One X Prods., -- F.3d --, 99 U.S.P.Q.2d 1153 (8th Cir. 2011) (holding that film versions of books had additionally copyrightable characters--that is, that Rhett Butler of the film version of *Gone With the Wind* was distinctly copyrightable compared to his book version--based "solely on [their] visual characteristics," but also holding that photos from the film versions didn't capture what was distinctly copyrightable about those characters).

²³⁷ Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429; Brief for Public Citizen, Inc. as Amici Curiae Supporting Appellant, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878-cv) (laying out the argument for why there is really no such thing as copyright in character, only substantial similarity).

²³⁸ This poor fit creates serious practical problems: suppose one infringes the character of Batman. Statutory damages are calculated on the basis of the number of registered works infringed; there are thousands of registered works featuring Batman. So how many of them has the infringer infringed? The impulse is to answer "one," but the character as such isn't registered, only the works in which he appears, so the logic is difficult.

²³⁹ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981).

²⁴⁰ See Henry Jenkins, *Transmedia Storytelling 101*, CONFESIONS OF AN ACA-FAN: THE OFFICIAL WEBLOG OF HENRY JENKINS (March 22, 2007), http://www.henryjenkins.org/2007/03/transmedia_storytelling_101.html.

²⁴¹ See FEIGENSON & SPIESEL, *supra* note 10, at 20 ("One feature of our picture-laden digital visual environment is that we increasingly see composite pictures—not just words and pictures juxtaposed . . . but hybrids in which the conventional codes of various kinds of pictures may be combined or in which a picture from one kind of discourse winds up in another.").

B. Fair Use

It should come as no surprise that copyright's problems with images extend to fair use, a general defense to infringement claims. This is troubling because fair use is one of the key limits that keeps copyright from unconstitutionally suppressing speech and harming the very cultural richness it aims to promote. Questions of the interests of non-owners in reusing, responding to, or otherwise interacting with existing works are often framed as questions of fair use.²⁴²

The primacy of the written word in the legal imagination helps explain some of the dismissiveness with which many courts and commentators have considered the interests of the audience—without whom, of course, an expressive work has very little meaning or value. We respect readers; we even talk about a right to read.²⁴³ Yet most valuable and litigated-over copyrighted works today are not read. They are watched, listened to, or seen: practices we often group together as “use.” But we also use toothpaste, so the special free-speech status of reading becomes submerged into the broader category of action. People who don't think much of the audience's interests thus tend to call audience members “users,”²⁴⁴ and people who want to defend those interests repeatedly invoke the “reader” to stand in for other types of use.²⁴⁵

Reflecting this lower status of “users,” even though today's fair uses routinely involve images and video,²⁴⁶ copyright's fair use doctrine has traditionally been much more likely to choke on nontextual works. To return to Google Book Search, this difficulty undoubtedly helps explain why Google had no plans to show scanned pictures at all without the consent of the copyright owner, while it simultaneously argues that fair use justifies showing “snippets” of text.

In another recent example, a court found that an appropriation artist's use of a photograph was not fair use in part by treating the photograph both as a transparent representation of external truth and as an instance of the artist's unique vision. The court found that the second artist chose the photos for what he “perceives to be their truth.” Because the second artist shared “a desire to communicate to the viewer core truths about Rastafarians and their culture,” his purpose was the same as that of the original photographer, who got to control this instance of truth because the

²⁴² See Tushnet, *Copy This Essay*.

²⁴³ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

²⁴⁴ See, e.g., Jane Ginsburg (“[T]he perspective of user rights, albeit important, should remain secondary. Without authors, there are no works to use.”); Niva Elkin-Koren, *User-Generated Platforms*, Working Within The Boundaries Of Intellectual Property (Rochelle C. Dreyfuss et al., eds. forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648465, manuscript at 16-17 (discussing the implicit determination in the phrase “user-generated content” that there are users and then there are real creators who provide the content to the users).

²⁴⁵ See, e.g., Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" In Cyberspace*, 28 CONN. L. REV. 981 (1996); Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y USA 325, 331 n.22 (2011) (discussing Litman's rhetoric of readers as opposed to users); cf. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008) (using the concepts of “read/write culture” and “read-only culture” to describe his preferred and deprecated outcomes; though the terminology is ostensibly taken from computer lingo, it gains appeal from the special status of reading and writing among modes of experiencing and creating culture).

²⁴⁶ Textual uses represent only a plurality of litigated fair use cases. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 573 (2008) (reporting that 36.6% of fair use opinions addressed text only, with much smaller percentages involving a shift between text and another medium).

photographs were also “highly original and creative artistic works.” The underlying idea seems to be that the photographs are not factual, even if they are instances of Truth, and that the second-comer has to find the Truth without copying.²⁴⁷ Here, unlike in *Franklin Mint*, the photograph’s truth-to-nature justified making the photographer’s findings/creations private property, showing how different understandings of realism contribute to the unpredictability of fair use.

Larry Lessig has eloquently written about how freedom to quote is the foundation of textual fair use; quotation is the foundation of scholarship, news reporting, and many other important endeavors.²⁴⁸ While courts have begun to recognize that copying an entire picture may be necessary to critique or analyze it, freedom to quote has historically been far less likely to be recognized for music or video, creating a significant gap between good educational and scholarly practice and the law.²⁴⁹ Literary analysis often proceeds quite well with quotations, but art history and criticism routinely require whole pictures, not fragments, to make their points. As Lessig points out, it is bizarre that freedom to quote a Hemingway novel is the baseline, but not freedom to quote the filmed version.²⁵⁰

Standard fair use analysis, with its prototype of the text, favors partial and limited quotations. The amount of the work used is even an enumerated factor in the statutory definition of fair use. In order to protect critical, news-reporting, and similarly fair uses of images. Yet with images, paraphrase is often insufficient to achieve a legitimate objective. In a case from the 1960s, *Bernard Geis*, the fear of liability led a commentator analyzing the Kennedy assassination to redraw frames of the Zapruder film rather than reproducing them mechanically—and he still got sued, because he’d reproduced the features of the film that made it valuable.²⁵¹ Mechanical reproduction would have been better because it would have been more persuasive.

Later copiers recognized this need for accurate reproduction in their fair uses. The influential Second Circuit has started to accept the need for the special veridical power of images, both in works of fiction²⁵² and nonfiction,²⁵³ as has the Ninth Circuit.²⁵⁴ A district court,

²⁴⁷ *Cariou v. Prince*, Mar. 18, 2011 (S.D.N.Y.).

²⁴⁸ LESSIG, *supra* note [], at 51-54.

²⁴⁹ Respondents to a survey by the International Communication Association, for example, were quite clear about their pedagogical and scholarly needs for complete copies of certain nontextual works:

- “It’s fairly impossible to critique an advertisement or a photograph without including the image in the critique.”
- “I needed to present a complete narrative, as portrayed in a video.”
- “Commentary on visual materials such as photographs and advertisements would be impossible without inclusion of the entire work. There is no logical way to excerpt just part of a magazine advertisement, for example.”

AD HOC COMM.ON FAIR USE AND ACADEMIC FREEDOM, INT’L COMM’N ASSOC., CLIPPING OUR OWN WINGS: COPYRIGHT AND CREATIVITY IN COMMUNICATION RESEARCH 5 (March 2010), *available at* http://www.centerforsocialmedia.org/sites/default/files/documents/pages/ICA_-_Clipping.pdf.

²⁵⁰ *See id.* at 53.

²⁵¹ *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp 130 (S.D.N.Y. 1968).

²⁵² *Blanch v. Koons*, 485 F. Supp.2d 516 (S.D.N.Y. 2007)

²⁵³ *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

²⁵⁴ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (holding that it was necessary for a search engine to copy an entire image in order to allow the users to recognize it; thus the usual fair use calculus weighing use of the entirety against the defendant was not highly significant); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,

attempting to show those aspects of Superman that had been established as of *Action Comics #1* (which was important because one creator's heirs had been able to recapture the copyright in that issue, but not in aspects of the Superman character subsequently developed), even reproduced the entire issue of the comic book as an appendix to its opinion, apparently confident that this was legitimate because it was the best way to show what aspects of Superman the respective parties owned.²⁵⁵

Producers of audiovisual works are also taking matters into their own hands, establishing codes of best practices for specific genres that make clear the relevance of using existing images, music, and video in subsequent works.²⁵⁶ In the recent DMCA exemption proceedings, the Copyright Office recognized that video remix is often fair use, and specifically accepted artists' testimony that high-quality reproductions are often necessary to make critical points.²⁵⁷ This is in sharp contrast to earlier judicial expressions of doubt that fair use ever required images of a certain quality.²⁵⁸

But there is still much work to be done in improving fair use's sensitivity to images: these precedents generally depend on a visual artist's ability to explain his purpose in words,²⁵⁹ or on images appearing beside explanatory text, serving as support for the words.²⁶⁰ This means that

1167 (9th Cir. 2007) (same); *see also* Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) (finding reproduction of entire photograph to be fair use); Ty, Inc. v. Publications Int'l Ltd., 292 F.3d 512 (7th Cir. 2002) (finding that collectors' guides with photos of copyrighted stuffed animals were likely to be fair use).

²⁵⁵ Siegel v. Warner Bros. Entm't., Inc., 690 F. Supp.2d 1048, Addendum A (C.D. Cal. 2009) available at <http://www.scribd.com/doc/2386369/Superman-Jerome-Siegel-Copyright-Decision>.

²⁵⁶ *See* Center for Social Media, American Univ. Washington College of Law, *Documentary Filmmakers Statement of Best Practices in Fair Use* (2005), available

at http://www.centerforsocialmedia.org/sites/default/files/documents/fair_use_final.pdf; Center for Social Media, American Univ. Washington College of Law, *Code of Best Practices in Fair Use for Media Literacy Education*, available at <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>;

Center for Social Media, American Univ. Washington College of Law, *Code of Best Practices in Fair Use for Online Video*, available at

http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf. Jennifer Rothman has critiqued the best practices statements, particularly those of documentary filmmakers, as (among other things) blurring the descriptive and the normative, *see* Jennifer Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y 371 (2010), but for my purposes the contribution of these documents is their emphasis on the particular needs of different media, which decenter the usual text-based model of fair use.

²⁵⁷ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed.Reg. 68,472 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201).

²⁵⁸ Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

²⁵⁹ *See* Kasunic, *supra* note 15, at 802, 816. As Peter Jaszi has observed, that Jeff Koons convinced a court that his use of a fashion photograph was transformative, after notable previous losses where the same explanations failed for him, suggests more about the current attitude of the courts towards appropriation art than it does about Koons. Peter Jaszi, *Is There a Post-Modern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 114 (2009); *see also* Randy Kennedy, *The Koons Collection*, N.Y. TIMES, Feb. 28, 2010, at AR1, available at <http://www.nytimes.com/2010/02/28/arts/design/28koons.html?pagewanted=all> (pointing out that Koons' statements about his own work are hard to take seriously); *cf.* Rebecca Tushnet, *My Fair Ladies: Sex, Gender and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 283-86 (2007) (arguing that the expressed rationales don't explain the differing outcomes of the Koons cases).

²⁶⁰ *See* *Dorling Kindersley*, 485 F. Supp.2d at 609. Another example comes from the court in *Warren Pub. Co. v. Spurlock*, 645 F. Supp.2d 402, which found fair use in reproductions of covers of pulp fiction magazines in a book about the artist who'd painted the cover pictures. The defendant's lawyer in *Warren Publishing* said "the book's

results may be unpredictable or idiosyncratic, depending on whether the judge has—in Holmes’s text-focused words—“learned the new language in which [the artist engaged in fair use] spoke.”²⁶¹

Were we to explicitly acknowledge copyright law’s text-based default, we could make similar moves more consistently. Indeed, fair use as set out in §107 of the Copyright Act has an explicit hook: factor two, the nature of the original work. This factor could support consideration of the medium in assessing how transformation might be achieved and how much may permissibly be taken. Congress is unlikely to change fair use, but courts can refine the doctrine to take into account that non-text works should be approached differently because of their specific cultural uses and because of our persistent difficulties understanding how little we understand them.

IV. Conclusion: Imaging/Imagining the Future

“One might say of photography what Hegel said of philosophy: ‘No other art of science is subjected to this last degree of scorn, to the supposition that we are masters of it without ado.’”²⁶²

Returning to the example with which this article began, the contours of the now-in-limbo Google Book Settlement were not directly shaped by the doctrinal incoherence described above, but they emerged out of the same background. Key actors—Google, publishers, libraries—considered the corpus valuable enough to spend tens or even hundreds of millions of dollars on even without its images, because of the way we value and manipulate texts compared to the way we value and manipulate images. And in the public discourse about the settlement, most people assume that the Google versions would be equivalent to the books with the images, even as Google literally erased their content, replacing each image with the same two words, “copyrighted image.”

The industry structure that made it possible to reach settlement without the images itself reflects the ideology of the word versus the image: Among other things, holders of image copyrights are not as well organized as holders of textual copyrights. The settlement made sense on the assumption that publishers’ contracts have generally secured all necessary rights to reuse

purpose was ... to merely illustrate some of the work of the artist over the years, so that it could be explained and discussed in the context of his life, times, industry, development as an artist, etc. Thus, this ... transformed the original art into examples, illustrations of the artist’s works so that readers would understand and appreciate the *text* and the other non-claimed works in the context of his life, times and career.” Stanford University Libraries Copyright and Fair Use, *Using Magazine Cover Images in Book about Monster Art—an Important Fair Use Ruling: An Interview with M. Kelly Tillery*, Sept. 2009,

http://fairuse.stanford.edu/commentary_and_analysis/2009_09_tillery_warren_v_spurlock.html (emphasis added).
²⁶¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). See Kasunic, *supra* note 15, at 811 (arguing that translating a “nondiscursive” use into narrative/word-based terms to determine fair use is inherently problematic, because “such a test for protection is wholly devoid of any objective criteria and, as a practical matter, is really no test at all. If the discursive meaning of non-discursive expression is subjective, relative, or a fiction, protection is solely dependent on the perspective, bias, or creativity of the interpreter or fact-finder rather than objective standards.”).

²⁶² PIERRE BOURDIEU, *PHOTOGRAPHY: A MIDDLEBROW ART* 5 (1990).

texts incorporated into the books they publish,²⁶³ but have not predictably done so with respect to images. Publishing contracts reflect the elements of a book the publishers felt the need to acquire full rights for and the ones they felt they could more easily do without—what really mattered in the book. This primacy of text is traditional in publishing of all kinds, where images are considered secondary at best: servants of the words rather than partners. In journalism, for example, images are regularly selected, arranged and captioned by text-based editors, rather than by photographers, “with often ill effect.”²⁶⁴

The result of this legacy industry structure is that, as everyone agrees, rights in images are hard to clear, but the key point is this: *so are rights in text*. Indeed, the difficulty of clearing rights in text was the primary public policy justification for the settlement, since otherwise so many books are functionally “orphan works”; it’s a little odd then to say that the difficulty of clearing rights in images was *also* a reason to keep images out of the settlement. Moreover, the settlement had many provisions for dealing with non-image “inserts” (primarily written parts of a compilation, such as short stories or poems, along with musical works), where tracking rights would be more difficult than tracking rights in entire books. Even aside from inserts, publishers’ and authors’ rights are still deeply in conflict, and the settlement provided extensively for how to deal with cases in which the author claimed to be the sole holder of electronic rights and the publisher disagreed. The settling parties determined that the costs of resolving such disputes were worth incurring in order to produce the corpus—but they weren’t worth resolving for images.

Making the treatment of images more consistent in copyright law would not tell us what to do with Google’s scanning. It would, however, orient us to how significant a loss the “Google Book” represents compared to the physical artifact. If books are widely digitized in text-only form—as they have often been in Google’s voluntary partner program and in older books converted to Kindle format—the digitized books of the twentieth century will be largely stripped of their images, further distancing traditional print culture from today’s multimedia environment.

But maybe the failed settlement is the last gasp of the old order, and we know the value of images better now. Certainly current publishing contracts are more likely to ensure that images are cleared for digital publication. Is it possible that the problems courts have with images are just transitional, and that as culture becomes more visual our factfinders and lawmakers will demonstrate increased visual competence without deliberate attention to the problem? I doubt it. We’ve had an increasingly visual culture at least since the beginning of the twentieth century, but the law hasn’t improved, because general awareness that an image might be Photoshopped is completely different from understanding—and being able to combat—the

²⁶³ Or at least the publishers think so, and are willing to proceed on that basis unless challenged, *see* Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490 (2d Cir. 2002), because the money is good enough, whereas it’s not good enough to do the same for images.

²⁶⁴ BARBIE ZELIZER, ABOUT TO DIE: HOW NEWS IMAGES MOVE THE PUBLIC 3 (2010); *see also id.* at 4 (“This disregard for the image has buttressed a default understanding of news as primarily rational information relay that uses words as its main vehicle and implicitly frames images as contaminating, blurring, or at the very least offsetting journalism’s reliance on straight reason.”); Howard S. Becker, *Visual Sociology, Documentary Photography, and Photojournalism: It’s (Almost) All a Matter of Context*, in 2 VISUAL RESEARCH METHODS 321, 334 (ed. Peter Hamilton 2006) (in journalism, photos are selected to support the story the writer wants to tell, not the opposite).

ways in which framing of all kinds changes the meaning of an image. Skepticism and epistemic humility dissipate easily.²⁶⁵

It is extremely unlikely that courts will give up the illusion that images and moving images transparently represent reality. “[N]aïve realism [about images] cannot simply be transcended. It is a fundamental part of our psychological makeup and hence a default mode of response to our mediated world.”²⁶⁶ Only conscious attention to different modes of representation offers any hope for acknowledging, much less surmounting, the problems of nonverbal media. We cannot assume that images can be reduced to words. At the same time, our factfinders need a substantial dose of epistemic humility to avoid the *Scott v. Harris* mistake of treating images as if they obviously mean the same thing to everyone. It’s often said that we don’t want our judges to be literary critics. But we do want them to be economists, engineers, risk managers, and so on. It’s no more unreasonable to ask them to learn some art theory to resolve a case in which that theory provides useful analytical tools than it is to ask them to learn some economics to resolve an antitrust case. Entire disciplines rest on analyzing, historicizing and comparing non-word genres.

We must reject the prevailing assumption that images are so transparent (or so meaningless) that judges don’t need any guidance from theory to evaluate them. Help can come from beyond literary theory, the conventional model for analyzing text. Film theory, music theory, performance theory, as well as insights from behavioral psychology and neuroscience, can contribute to our understanding of what copyrighted works do in the world and how they do it. Theorists working on storytelling, for example, could help courts identify the differences between story (what happens) and narrative (how what happens is conveyed to the audience), which are of profound importance to audience reception and interpretation, such that two similar stories may be received as very different works.²⁶⁷

We may start with a one-size-fits-all reproduction right, but when we start to ask inherently fact-specific questions about substantial similarity, fair use, and authorship, we need to broaden the ways in which we examine those facts, capturing the contexts of genre and media. Trying to treat images exactly as if they were words leads to anomalies, is descriptively inaccurate from the audience’s point of view, and has proven impossible for courts to hold to. Especially if we abandoned the self-contradictory substantial similarity test, we could move beyond two unproductive approaches: the one that uses the textual model against which to judge everything else, and the other that, recognizing that tools shaped for text work badly on images, throws up its hands and declares them beyond judgment.

²⁶⁵ Similar phenomena occur with advertising. Though Americans are blasted with persuasive ads, and though when we stop to think about any particular ad we are often skeptical, ads have their most powerful effects when we’re not thinking that hard. Our default assumption, even in a pervasively commercialized world, is that claims are true, and we readily return to that assumption. See, e.g., Sarah C. Haan, Note, *The “Persuasion Route” of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281 (2000); Ian Skurnik et al., *How Warnings about False Claims Become Recommendations*, 31 J. CONSUMER RESEARCH 713 (2005).

²⁶⁶ See FEIGENSON & SPIESEL, *supra* note 10, at 102; see also MITCHELL, *supra* note 73, at 8 (“[D]ouble consciousness about images is a deep and abiding feature of human responses to representation. It is not something that we ‘get over’ when we grow up, become modern, or acquire critical consciousness.”); Yen, *supra* note [].

²⁶⁷ See, e.g., H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 19 (2008).

It may prove most effective to use images to argue back against images.²⁶⁸ In my experience teaching, for example, students' initial reaction to the copyright infringement case *Steinberg v. Columbia Pictures*²⁶⁹ is to find two "New Yorker's eye" views of the world similar enough that the second infringes the copyright in the first, as they have read that the trial court ruled. But when I present a variety of similar "myopic" worldview pictures, showing the ways in which the general idea can be executed, their opinions tend to change towards finding the pictures similar only in unprotectable style, not in protectable expression.²⁷⁰ People do not as readily or reflexively argue with themselves about the meaning of images as they do with texts, but focused attention to the specific characteristics of images can lead them to do so.

It will be difficult for the law to treat images better than the culture at large does. We can expect continued unease with art that produces nonrational responses or that crosses high/low cultural boundaries. Still, conscious attention to the features of nontextual media has to be the starting point for coherent legal doctrine.²⁷¹ Images aren't mystical, even though they are powerful. The law should not accept the reflexive intuition that cutting out a picture's eyes is an assault on the picture's subject; it should insist on a distinction between representation and reality. Going beyond our assumptions, we can see what the image itself has to offer.

²⁶⁸ See FEIGENSON & SPIESEL, *supra* note 10, at 11. The Rodney King case is an oft-cited legal example of this tactic, in which slow-motion replay and constant repetition of the tape of police officers beating a motorist allowed the defense to reframe the officers' actions from unlawful violence to justified use of force. See Mnookin, *supra* note 27, at 2 n.5 (citing a number of discussions of the tape and the effects of its repetition); Jennifer L. Mnookin & Nancy West, *Theaters of Proof: Visual Evidence and the Law in Call Northside 777*, 13 YALE J.L. & HUM. 329, 380 n.157 (2001) (noting that frame-by-frame readings disrupted the apparently clear initial meaning of the tape); Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in CONTEMPORARY ISSUES IN THE SEMIOTICS OF LAW 231, 237 (2005) (explaining how the prosecutors' assumption that the tape's meaning was transparent was defeated by the defense, which used repetition to reverse apparent causation).

²⁶⁹ *Steinberg v. Columbia Pictures Indus. Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

²⁷⁰ See Rebecca Tushnet, *Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials*, 52 ST. LOUIS U. L.J. 891 (2008).

²⁷¹ Cf. Farley, *supra* note 12, at 808-09 ("[T]he law should acknowledge aesthetics (the field within philosophy that has concerned itself with the conceptual analysis of art) and its approaches for assistance in resolving cases in which the determination of an object's art status is necessary.") (footnotes omitted); Yen, *supra* note 96, at 251 ("The inevitable aesthetic bias of copyright decisionmaking can only be controlled if those who exercise bias are aware of it and take affirmative steps to counter it.").