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## The Enigma of Photography, Depiction, and Copyright Originality

Terry S. Kogan

*University of Utah S.J. Quinney College of Law*

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# The Enigma of Photography, Depiction, and Copyright Originality

Terry S. Kogan<sup>\*</sup>

*Photography is an enigma. The features that distinguish it most from other art forms—the camera’s automatism and the photograph’s verisimilitude—have throughout its history also provided the basis for critics to claim that a photographer is not an artist nor the photograph a work of art. Because every photograph is the product of an automatic, mechanical device, critics argue that a photographer is a mere technician relegated to clicking a shutter button. Moreover, because every photograph displays an exact likeness of whatever happened to be sitting before the camera, critics consider that image to be a factual document devoid of creativity. Looking to the technology’s automatism and verisimilitude, modern legal skeptics have joined this chorus by arguing that most photographs are inevitably uncreative facts—in the words of one scholar, the “automated representation of reality”—and thereby undeserving of copyright protection.*

*This is the first Article to propose that borrowing the concept of depiction from art theory can shed considerable light on photographic originality. As a depiction, a photograph has what philosopher Richard Wollheim has described as “two folds.” The “first fold” refers to the design markings on the surface of the photographic paper. The “second fold” refers to the real world object or scene that a viewer perceives in those design markings. This Article’s fundamental thesis is that, for purposes of copyright law, a photograph’s originality inheres primarily in a photographer’s creative choices that result in the placement of surface design markings. In contrast, the object or scene that a viewer sees in a photograph rarely impacts the image’s originality. Accordingly, the claim by legal skeptics that most photographs are uncreative facts locates photographic originality in the wrong place—in the object or scene that a viewer sees in the picture (depiction’s second fold). If, instead, a photo-*

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<sup>\*</sup> Professor of Law, S.J. Quinney College of Law, University of Utah. B.A., 1971, Columbia College; B.Phil., 1973, Oxford University; J.D., 1976, Yale University.

*graph's originality depends primarily on a photographer's creative choices in placing surface design markings (depiction's first fold), the attack on originality based on automatism and verisimilitude—on a photograph's inevitably being an uncreative fact—collapses.*

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*The camera, in all its manifestations, is our god, dispensing what we mistakenly take to be truth. The photograph is the modern world.*

Thomas Lawson, *Last Exit: Painting*<sup>1</sup>

## INTRODUCTION

Photography is an enigma. The features that distinguish it most from other art forms—the camera’s *automatism* and the photograph’s *verisimilitude*—have throughout its history also provided the basis for critics to claim that a photographer is not an artist nor the photograph a work of art. From the moment that the Supreme Court first considered photographic originality in the 1880s to the present day, copyright law has been infected by the enigma of photography.

Every photograph is the product of an automatic device—the camera. Unlike a painter whose every brushstroke is mediated through her mental vision, critics cast a photographer as a mere technician relegated to clicking a shutter button. Her creative intentions play little part in the appearance of the final image.<sup>2</sup> Moreover, every photograph is infused with verisimilitude—perfect truthfulness. Because that image inevitably displays an exact likeness of whatever happened to be sitting before the camera, critics assert that a photograph merely records facts about the world and

<sup>1</sup> Thomas Lawson, *Last Exit: Painting*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* 162 (Brian Wallis ed., 9th ed. 1999).

<sup>2</sup> See discussion *infra* Part III.A; see also MARY WARNER MARIEN, *PHOTOGRAPHY: A CULTURAL HISTORY* xiv (4th ed. 2015) [hereinafter MARIEN, *PHOTOGRAPHY*] (“The camera seemed to have the unique ability to soak up large quantities of visual detail. Therefore, its images were judged to be far less subjective than those made by other methods.”).

thereby lacks even the minimal creativity necessary to be considered an artwork.<sup>3</sup>

In fact, during the first decade after photography's appearance in 1839, these two features were the source not of denigration but of high praise. Described by one of its pioneers as "impressed by Nature's hand,"<sup>4</sup> "not a process invented by humans,"<sup>5</sup> photography's automatic nature captured the public's imagination.<sup>6</sup> Moreover, the image's utter truthfulness led many to view the technology as providing an externalized, ideal human vision.<sup>7</sup> "[P]hotography was said to be a wonder, a freak of nature, a new art, a threshold science, and a dynamic instrument of democracy."<sup>8</sup>

As photographs became commonplace after the mid-nineteenth century, the public's fascination with photography gave way to more critical views.<sup>9</sup> Though photography was establishing itself as a powerful tool for scientists, critics attacked the camera's automatism as cheapening the photographer's relationship to nature,<sup>10</sup> and considered the image's verisimilitude to be "too truthful" to be art.<sup>11</sup>

When in 1884, in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>12</sup> the Supreme Court first considered whether the photographer could be considered an *Author* and the photograph a *Writing* for purposes of the Constitution's Copyright Clause,<sup>13</sup> the debate over photogra-

<sup>3</sup> See discussion *infra* Part III.B.

<sup>4</sup> W.H.F. TALBOT, THE PENCIL OF NATURE, *Introductory Remarks* 2 (Da Capo Press ed., 1969); see also 2 SAMUEL F.B. MORSE, HIS LETTERS AND JOURNALS 144 (Edward Lind Morse ed., 1914) ("Nature . . . has taken the pencil into her own hands, and she shows that the minutest detail disturbs not the general repose.").

<sup>5</sup> MARY WARNER MARIEN, PHOTOGRAPHY AND ITS CRITICS—A CULTURAL HISTORY 3 (1997) [hereinafter MARIEN, CRITICS].

<sup>6</sup> See *infra* note 53 and accompanying text.

<sup>7</sup> See *infra* note 59 and accompanying text.

<sup>8</sup> MARIEN, CRITICS, *supra* note 5, at 2.

<sup>9</sup> See *infra* note 65 and accompanying text.

<sup>10</sup> MARIEN, CRITICS, *supra* note 5, at 94.

<sup>11</sup> Francis Frith, *The Art of Photography*, 5 ART J. 72 (1859), *quoted in* MARIEN, PHOTOGRAPHY, *supra* note 2, at 77.

<sup>12</sup> 111 U.S. 53 (1884).

<sup>13</sup> The basis for granting copyright protection lies in Article I, Section 8 of the U.S. Constitution, which grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to

phy's art status had been raging for four decades. It was therefore not surprising that, in appealing the lower court's determination that it had infringed on Napoleon Sarony's copyright in a photograph of Oscar Wilde, Burrow-Giles attacked that image's originality based on the camera's mechanics and the photograph's truthfulness.<sup>14</sup>

The story is now oft told of how in *Burrow-Giles* the Supreme Court sidestepped these thorny issues by grounding photographic originality in pre-shutter choices of the photographer related to posing and staging the tableau.<sup>15</sup> Over the past 125 years, courts have expanded the range of a photographer's pre-shutter choices on which a photograph's originality can be based.<sup>16</sup> As a result, courts now find that "[a]lmost any photograph 'may claim the necessary originality to support a copyright.'"<sup>17</sup>

Nonetheless, contemporary legal scholars remain highly skeptical of photographic originality.<sup>18</sup> Several argue that most photo-

their respective Writings and Discoveries." U.S. CONST. art. I, § 8. *See Burrow-Giles*, 111 U.S. at 53, 55.

<sup>14</sup> For example, Burrow-Giles argued that, because a photograph is the result of the "chemical forces of light," Statement and Brief for Plaintiff in Error at 15, *Burrow-Giles*, 111 U.S. 53 (No. 1071) [hereinafter *Burrow-Giles's* Brief], the photographer contributes "no intellectual labor," only "mechanical skill." *Id.* at 10. It further argued that a "photograph . . . is *always* a reproduction true to nature," *id.* at 21 (emphasis in original), and therefore devoid of the creativity required for copyright protection; *see also* discussion *infra* Part II.B.

<sup>15</sup> *See, e.g.*, Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 427 (2004) ("The Court located this human trace in the pre-shutter activities."); Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 356 (2011–2012); Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1499 (2011).

<sup>16</sup> *See, e.g.*, *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."); *see also* discussion *infra* Part II.B.2.

<sup>17</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (citing MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08[E][1] (Matthew Bender ed., rev. ed.)).

<sup>18</sup> *See, e.g.*, Hughes, *supra* note 15, at 374 ("[A] large percentage of the world's photographs are likely not protected by American copyright law because the images lack even a modicum of creativity . . ."); Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM.

graphs run afoul of the fundamental axiom that copyright law protects only creative expression, not facts or ideas.<sup>19</sup> Not surprisingly, this attack is based squarely on the enigmatic features of the technology, the camera's automatism and the image's verisimilitude. For example, viewing a photograph as the "automated representation of reality,"<sup>20</sup> Professor Justin Hughes asserts that, as "information-laden nature of photographs"<sup>21</sup> and "simple conveyors of truth,"<sup>22</sup> most photographs are uncreative facts not entitled to copyright protection.<sup>23</sup>

This Article proposes that introducing the concept of *depiction* from art theory into copyright law can cast significant light on photographic originality and help to make sense of the roles that the camera's mechanics and the image's veracity play in the law's treatment of photography.<sup>24</sup>

To depict an object is to represent the object visually, to give meaning to the object through a picture.<sup>25</sup> In this Article, I rely upon the "seeing-in" approach to depiction introduced by philosopher Richard Wollheim,<sup>26</sup> the approach that dominates the work

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& ENT. L.J. 55, 103–14 (1998); Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1594–1600 (1963); Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 HOFSTRA L. REV. 853, 898–904 (2004); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 818–19 (2010); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 456–57 (2009).

<sup>19</sup> See, e.g., Hughes, *supra* note 15, at 381 ("[I]t seems that the claim that many—perhaps most—of the world's photographs are completely unprotected by copyright arises simply because '[i]n most uses of the camera, the photograph's naive or descriptive function is paramount.'" (quoting SUSAN SONTAG, ON PHOTOGRAPHY 132–33 (1977))); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 714–16 (2012).

<sup>20</sup> Hughes, *supra* note 15, at 343.

<sup>21</sup> *Id.* at 349.

<sup>22</sup> *Id.* at 344.

<sup>23</sup> See *id.* at 398; see also discussion *infra* Part III.B.

<sup>24</sup> The concept of depiction is absent from the Copyright Act of 1976. The word depiction appears twice in Section 106A(c)(3) of the Visual Artist's Rights Act of 1991, 17 U.S.C. § 106A *et seq.*, in a context unrelated to originality.

<sup>25</sup> See, e.g., PHILOSOPHICAL PERSPECTIVES ON DEPICTION 1 (Catharine Abell & Katerina Bantinaki eds., 2010) [hereinafter PHILOSOPHICAL PERSPECTIVES]; see discussion *infra* Part II.A.

<sup>26</sup> See, e.g., RICHARD WOLLHEIM, *Seeing-As, Seeing-In, and Pictorial Representation, in ART AND ITS OBJECTS* 205, 213–14 (2d ed. 1980) (introducing the "twofold thesis").

of contemporary art scholars. Wollheim argues that what is unique to pictures as representations is that they cause a viewer to have a “twofold” visual experience: the viewer perceives design markings on the surface of the picture (the “first fold”) and, at the same time, perceives a real world object or scene in those design markings (the “second fold”).<sup>27</sup>

The arguments presented herein flow from a simple observation: a photograph of a real world object or scene is a depiction and, as such, has two folds. The first fold consists of the design markings on the surface of the photographic paper. The second fold consists of the object or scene that a viewer perceives in those design markings.

Introducing the concept of depiction into copyright law can offer important insights into photographic originality. In *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>28</sup> the Supreme Court set forth two criteria for originality: “[T]he work [must have been] independently created by the author (as opposed to copied from other works), and . . . it [must] possess[] at least some minimal degree of creativity.”<sup>29</sup>

The fundamental thesis of this Article is that in the realm of the graphic arts—painting, etching, photography, etc.—the requisite minimal degree of creativity is based primarily on an artist’s choic-

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<sup>27</sup> Katerina Bantinaki, *Picture Perception as Twofold Experience*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 25, at 128 (“The notion of twofoldness has been one of Richard Wollheim’s important contributions to the study of depiction. By means of this notion Wollheim aimed to highlight the fact that in seeing a picture the viewer can be visually aware of both the object that is being depicted and the medium in a single perceptual act.”)

<sup>28</sup> 499 U.S. 340 (1991).

<sup>29</sup> *Id.* at 345. I will refer to *Feist*’s requirements as the “non-copying” criterion and the “minimal creativity” criterion. What I refer to as the “non-copying” criterion has been referred to by others as the “independent creation” criterion. *See, e.g.*, Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 99–100 (1998). Some commentators collapse the two requirements. *See, e.g.*, Hughes, *supra* note 15, at 340 n.3 (“Strictly speaking, under current U.S. doctrine, ‘[o]riginality is a constitutional requirement’ for copyright protection and ‘originality requires independent creation plus a modicum of creativity.’ . . . I use the two interchangeably. Assuming that ‘independent creation’ will not occur without ‘creativity,’ establishing creativity establishes originality.” (quoting *Feist*, 499 U.S. at 346)). *Contra* Hughes, I argue that it is critical to consider these two requirements to be independent of one another. *See infra* note 195 and accompanying text.



es and actions that result in design markings being placed on the surface of the work, the first fold of depiction. Thus, a painting's originality inheres primarily in the painter's choices that result in brushstrokes being arrayed on the canvas' surface. Similarly, a photograph's originality inheres primarily in the photographer's choices that result in design markings being arrayed on the surface of the photographic paper (or pixels on a computer screen).<sup>30</sup>

What is the relevance of the second fold of depiction—the object that a viewer perceives in a picture—to photographic originality? Assuming that her choices in placing surface design markings *do* satisfy *Feist*'s minimal creativity criterion,<sup>31</sup> the photographer's choice of an object or scene to photograph can, *on occasion*, either enhance or defeat originality.

In instances in which a photographer also poses or stages the subject matter that is to appear in the picture, such acts enhance the level of creativity she infuses into the picture. Thus, prearranging a still life or posing a person for a photograph can enhance minimal creativity for purposes of *Feist*.<sup>32</sup>

Nonetheless, irrespective of how creative the choices related to placing surface design markings, if a photographer *copies* another work, the picture will run afoul of *Feist*'s non-copying criterion. Thus, it is doubtful that postmodern artist Sherrie Levine's renowned and extremely valuable photographs that merely re-photographed images of depression-era photographer Walker Evans are original under *Feist*.<sup>33</sup>

Understanding photographic originality in this way helps to clarify the relationship between the enigmatic features of photography and copyright law. Given the primacy of choices concerning the placement of surface design markings, the major challenge to pho-

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<sup>30</sup> These decisions include, among others, choosing a particular camera and film, adjusting the camera's settings, adjusting artificial lighting and shadows, and choosing an angle from which to shoot the picture. *See infra* note 187 and accompanying text.

<sup>31</sup> Unless minimal creativity is established with respect to the first fold of depiction, no visual image (photographic or otherwise) can be original. Thus, photographs taken randomly by a drone flying over the Alps, despite their beauty, would in all likelihood not satisfy *Feist*'s minimal creativity criterion because there is no "personality" infused into the image.

<sup>32</sup> *See infra* note 191 and accompanying text.

<sup>33</sup> *See infra* note 196 and accompanying text.

tographic originality is the camera's *automatism*. Do the mechanics of that device so constrict the range of a photographer's choices with respect to marking the image's surface that most photographs are inherently unoriginal?<sup>34</sup> Recent scholarship by philosophers of photography suggests that attacks on the art status of the photograph based on automatism are somewhat confused and significantly overstated.<sup>35</sup>

In great contrast, I will argue that the recent assault by legal scholars on photographic originality based on *verisimilitude*—the photograph's being a "fact" in the world—is fundamentally misconceived. A photograph of an object or scene is no more a fact in the world than is a painting of that same object or scene. This misconception results from the failure to understand where to *locate* photographic originality.

Attacks based on the photograph's truthfulness assume that the object or scene that a viewer perceives in the image—depiction's second fold—plays a major role in determining the image's originality. But this is rarely the case. If a photograph is original, it is because the photographer's choices in placing surface design markings meet *Feist's* minimal creativity standard. A photograph of the Grand Canyon is no more a *fact* in the world than a realistic painting of the Grand Canyon is a *fact* in the world. Rather, both are *pictures* composed of surface design markings that *depict* objects and scenes in the real world.

Part I explores the conflicting social and legal reactions to photography from the moment of its appearance in the late 1830s. I first examine the cultural debate that revolved around the enigmatic features of the technology—the camera's automatism and the photograph's verisimilitude.<sup>36</sup> I then explore how this debate entered the courthouse when the Supreme Court first considered

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<sup>34</sup> See discussion *infra* Part III.A.

<sup>35</sup> See, e.g., Diarmuid Costello & Margaret Iversen, *Introduction: Photography Between Art History and Philosophy*, 38 *CRITICAL INQUIRY* 679, 685 (2012) ("By now, nearly all philosophers have rejected the claim that their underlying assumptions about photography preclude the possibility of fully fledged photographic art. Nonetheless, dominant conceptions of photography as an automatic recording mechanism within philosophy arguably still face difficulties doing full justice to artistic uses of the medium."). See *generally infra* note 206.

<sup>36</sup> See discussion *infra* Part I.A.

photographic originality in *Burrow-Giles*, and the aftermath of that decision on later courts' treatment of photography.<sup>37</sup> Part I concludes by introducing the ongoing skepticism that contemporary scholars harbor toward photographic originality, a skepticism based on the enigmatic features of photography.<sup>38</sup>

Part II turns to art theory, introduces the philosophical concept of *depiction*, and explores Wollheim's proposal that every representational picture has two folds.<sup>39</sup> I then apply the insights drawn from art theory to understanding photographic originality.<sup>40</sup>

Part III explores in greater depth the challenge of contemporary legal scholars to photographic originality based on the camera's automatism<sup>41</sup> and the image's verisimilitude.<sup>42</sup> I conclude that photography survives both challenges and, accordingly, courts are correct in their assumption that "[a]lmost any photograph 'may claim the necessary originality to support a copyright.'" <sup>43</sup>

#### I. THE CULTURAL AND LEGAL ATTACKS ON PHOTOGRAPHY'S ENIGMATIC FEATURES

From the moment of its appearance in the 1830s, two features of photography have been at the vortex of both cultural and legal debates over whether or not the technology is an art form or mere information:

1. The Camera's *Automatism*—The photograph is the product of a mechanical device, the camera. In contrast to a painter whose every brushstroke is mediated through a mental vision, a photographer seems a mere technician relegated to clicking a shutter button. Her creative intentions seem to play virtually no role in the appearance of the image.<sup>44</sup>

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<sup>37</sup> See discussion *infra* Part I.B.

<sup>38</sup> See discussion *infra* Part I.C.

<sup>39</sup> See discussion *infra* Part II.A.

<sup>40</sup> See discussion *infra* Part II.B.

<sup>41</sup> See discussion *infra* Part III.A.

<sup>42</sup> See discussion *infra* Part III.B.

<sup>43</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (internal citations omitted).

<sup>44</sup> See Diarmuid Costello & Dominic McIver Lopes, *Introduction*, 70 J. OF AESTHETICS & ART CRITICISM 1 (2012). ("At the core of the classic arguments in the philosophy of

2. The Photograph's *Verisimilitude*—In the words of nineteenth century photographer Henry Peach Robinson, every photograph appears to display “the absolute reproduction of some scene or person that has appeared before the camera.”<sup>45</sup>

Throughout its history, these two features of photography have confounded critics, providing grounds for both high praise and bitter condemnation.<sup>46</sup> The fact that the same features of the technology have fueled such conflicting reactions is the basis for what I term “the enigma of photography.” This contest of understandings moved into the courtroom in the late nineteenth century.

### A. *The Enigma of Photography and Cultural History*

During the first decade after photography's disclosure in 1839,<sup>47</sup> the public responded to the new technology with utter wonderment, many considering the photograph to be miraculous and magical.<sup>48</sup> Seen as having great potential for both science and

photography is the belief, expressed in a variety of ways, that photography is special because it is at bottom an automatic recording mechanism that ensures that what one sees in a photograph is causally determined by the photographed scene, rather than intentionally determined by the photographer.”).

<sup>45</sup> HENRY PEACH ROBINSON, PICTURE-MAKING BY PHOTOGRAPHY 114 (1884).

<sup>46</sup> The camera's automatism and the photograph's verisimilitude are often seen as working in tandem. See, e.g., Diarmuid Costello & Dawn M. Phillips, *Automatism, Causality and Realism: Foundational Problems in the Philosophy of Photography*, 4 PHIL. COMPASS 1, 2 (2009) (“The realism of photographs, in some sense, depends on the automatism of the photographic process.”). A third feature of photography, its infinite reproducibility, has also been the subject of both praise and scorn. See, e.g., WALTER BENJAMIN, *The Work of Art in the Age of Its Technological Reproducibility: Second Version*, in THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY, AND OTHER WRITINGS ON MEDIA 19, 20–22 (Michael W. Jennings et al. eds., Edmund Jephcott et al. trans., 2008). The earliest photographs, however, were not reproducible and the technology to reproduce photographs did not come about until the 1850s. See MARIEN, CRITICS, *supra* note 5, at 42 (“The discourse in photography's early years was so focused on the medium's originality that it tended to exclude discussion of photography's capacity to produce multiple copies.”).

<sup>47</sup> Because many people claim to have invented photography, Mary Warner Marien refers to the year 1839 as the year of photography's *disclosure*, not *discovery*. See MARIEN, PHOTOGRAPHY, *supra* note 2, at 1; see also MARIEN, CRITICS, *supra* note 5, at 2 (“[P]hotography's origins had not one story but many conflicting stories. . . . Today, these contradictions continue to pack its history or, one should say, its histories.”).

<sup>48</sup> See MARIEN, CRITICS, *supra* note 5, at 1–2 (“Those who witnessed the advent of photography in 1839 discussed its debut in the language of exceptions. Long before it could effect significant social change, photography was confidently described as a

art,<sup>49</sup> photography was referred to an “art-science,”<sup>50</sup> a label that survived into the 1850s. “The term recognized that photographic images were not only generated by a mix of science and art, but also applied in both activities,”<sup>51</sup> Mary Warner Marien explains, “[e]specially in the early years ... photography was flexible and experimental, neither a sharply delimited art form nor only the province of science and technology.”<sup>52</sup>

Much of the early excitement over photography hovered around the two distinctive features of the new technology, the camera’s automatism and the photograph’s verisimilitude.

The automatic nature of the camera captured the public’s imagination, in part because of a mythos promoted by the technolo-

transformational technology.”). Edgar Allen Poe described the new technology as “miraculous beauty.” Edgar Allen Poe, *The Daguerreotype*, ALEXANDER’S WEEKLY MESSENGER (Jan. 15, 1840), cited in MARIEN, CRITICS, *supra* note 5, at 12 (“Even commentators who knew exactly how photography worked wrote about it as a wonder.”)

<sup>49</sup> In his 1839 essay, William Henry Fox Talbot “conceived the photographic image as a kind of ‘natural magic’ with potential for science and art.” MARIEN, PHOTOGRAPHY, *supra* note 2, at 28 (quoting William Henry Fox Talbot, *Some Account of the Art of Photogenic Drawing, or the Process by which Natural Objects May Be Made to Delineate Themselves without the Aid of the Artist’s Pencil* (1839)).

<sup>50</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 23–24; see also *id.* at 71 (“In the first years after photography’s presentation to the world ... the medium was not sharply defined as either art or science, but frequently termed an art-science.”); *id.* at 24 (“The ambiguous character of photography in its early years was fostered by the equally uncertain definitions of art and science. Art could mean a skill or a craft, as well as specific media such as painting, sculpture, and engraving. Science referred to areas of knowledge such as biology and geology, and also to techniques for making experiences and observations, such as objective scrutiny and recording.”). In fact, many early photographers viewed themselves as artists. *Id.* at 85 (stating that French photographer Nadar “maintained that he was not a simple operator of photographic equipment but an artist, sensitive to the nuances of personal character as well as rules of composition”).

<sup>51</sup> *Id.* at 23–24.

<sup>52</sup> *Id.* at 23. Mary Warner Marien’s cultural histories of photography cast doubt on the assertions of legal scholars that, early in its history, photography was not considered to be an art form. See, e.g., Hughes, *supra* note 15, at 351 (“The very characteristics that made the photograph seem like ‘truth itself’ initially made photography seem to be only a technology and outside the realm of artistic works, both to artists and to mid-nineteenth century minds conversant with copyright.”); see also Farley, *supra* note 15, at 397 (“Initially, photographers made no claims to be artists. Photographers stressed the mechanical nature of the process. The opportunities and possibilities that the camera presented for artistic creation were absent from the discourse. Even artists who took up photography had trouble articulating the value of creative, as opposed to documentary, photography.”)

gy's pioneers, Louis Daguerre, William Henry Fox Talbot, and Joseph Nicéphore Niépce.<sup>53</sup> Despite the fact that early photographs required “lengthy preparation of materials prior to exposure . . . and a cumbersome development process,”<sup>54</sup> these individuals “shied away from explaining photography as an invention that makes images through human agency. Each insisted that photography originated in nature and was disclosed by nature.”<sup>55</sup> Talbot explained that the image was “impressed by Nature’s hand.”<sup>56</sup> Niépce described his image as “spontaneous reproduction, by the action of light.”<sup>57</sup> Stressing its apparent spontaneity, the pioneers referred to the new technology as “‘auto-graphy,’ . . . nature’s automatic writing.”<sup>58</sup>

Coupled with the public’s amazement over the technology’s automatism was excitement over the photograph’s verisimilitude—its inherent truthfulness. Viewing the photograph as nature’s product easily transmuted into viewing it as neutral vision—an externalized, ideal human vision<sup>59</sup> that offered transparent knowledge,<sup>60</sup> an objective view of the world.<sup>61</sup> The photograph was a “replica of original experience”<sup>62</sup> and an “infallible representa-

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<sup>53</sup> See MARIEN, PHOTOGRAPHY, *supra* note 2, at 72.

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Id.* at 72.

<sup>56</sup> MARIEN, CRITICS, *supra* note 5, at 3 (citing W.H.F. TALBOT, *supra* note 4); see also MORSE, *supra* note 4, at 144 (“Nature . . . has taken the pencil into her own hands . . .”).

<sup>57</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 72–73 (quoting MARIEN, CRITICS, *supra* note 5, at 3 (internal citations omitted)).

<sup>58</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 73.

<sup>59</sup> MARIEN, CRITICS, *supra* note 5, at 5–6.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> In 1840, Edgar Allen Poe noted that “all language must fall short of conveying any just idea of the truth . . . but the closest scrutiny of the photogenic drawing discloses only a more absolute truth, a more perfect identity of aspect with the thing represented.” He further noted that photography was a “positively perfect mirror” that “is infinitely more accurate in its representation than any painting by human hands.” MARIEN, PHOTOGRAPHY, *supra* note 2, at 26 (quoting Edgar Allen Poe, *The Daguerreotype*, ALEXANDER’S WEEKLY MESSENGER (Jan. 15, 1840), available at <http://www.eapoe.org/works/misc/dgtypea.htm>).

<sup>62</sup> MARIEN, CRITICS, *supra* note 5, at 40.

tion”<sup>63</sup> that surpassed any previous form of handmade iconography.<sup>64</sup>

The cultural excitement that marked photography’s first decade soon gave way to a more critical view: “[W]ith the continued spread of photography, the development of new applications, and the intense commercialization of the medium in the late 1850s, amazement at its ability to capture appearances declined. As photography became more commonplace, the medium’s societal and artistic impact was more frequently debated.”<sup>65</sup>

The early wonderment over photography transformed after mid-century into concern over its debasing effects on mass culture: “By 1850 photography was immersed in societal debates and deeply at odds with itself. It was conjectured to be variously an art, a danger to art, a science, a revolutionary means of education, a mindless machine for rendering, and a threat to social order.”<sup>66</sup> This debate was often shrouded in a narrower debate over whether photography should or should not be considered an art form.<sup>67</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> The photograph’s surface appearance contributed to the perception that the image captured perfect truth:

Unlike painting and engraving, photography left relatively few visible traces of its manufacture. Compared with brushstrokes and a network of lines, the daguerreotype seemed like a smooth mirror that did not betray how it was made. As a result, the photograph was seen as an automatic recording device that required no interpretation. Increasingly the photograph was believed to be what the average person would have seen standing in the same spot at the same time as the photographer.... The fact that photographers ... manipulated and retouched negatives did not significantly affect the public’s belief in photographic truth.

MARIEN, PHOTOGRAPHY, *supra* note 2, at 69.

<sup>65</sup> *Id.* at 75; *see also id.* at 139 (“[The] proliferation of photographs proved to be a mixed blessing; seeing many images eventually reduced the impact of each of them....”).

<sup>66</sup> *Id.* at xiii.

<sup>67</sup> *See, e.g., id.* at 95 (“As photography lost its novelty, it gained both adherents and detractors, and they often focused on the relationship of photography to art and culture. On the one hand, the medium was the most exact way of creating art reproductions that could be viewed by more people than could travel to see the originals. . . . On the other hand, critics were quick to point out that the passion for optical exactitude suppressed the public’s appreciation for nuance and opportunities for quiet rumination on images. The transcription of visual appearances, however adeptly rendered, did not seem capable of conveying higher sentiments and moral example.”)

No surprise, attacks on photography focused on the technology's verisimilitude and automatism. Mary Warner Marien observes that "photographic verisimilitude became a bludgeon in the hands of photograph's critics."<sup>68</sup> In deriding the objectivity of the image, in 1859 art critic Francis Frith described photography as "too truthful. It insists upon giving us 'the truth, the whole truth, and nothing but the truth.' Now, we want, in Art, the first and the last of these conditions, but we can dispense very well with the middle term."<sup>69</sup> Critics feared that the photograph's "intractable verisimilitude"<sup>70</sup> could not express the personality and soul of the artist and would deaden the imagination.<sup>71</sup> Art critic John Ruskin is said to have expressed concern that the growing use of photographs "implied the substitution of vulgar verisimilitude for higher truths."<sup>72</sup>

Concern over the photograph's truthfulness was intermixed with concern over the camera's automatism. Some believed that "[p]hotography's apparent automatism simultaneously cheapened the photographer's relationship to nature and to the traditions of fine art... The ease of photography took away its character-building challenge."<sup>73</sup> Others believed the new technology's "automatism threatened to make the public weary of the work required in art making and to instigate a chic indifference to painstakingly acquired human skill."<sup>74</sup> In the view of critics, the camera was yet another machine that "tamped down human imagination, replacing creativity, observations and insight with mediocre readymade goods."<sup>75</sup>

Stung by these attacks, professional photographers sought to create a divide between the burgeoning availability of low-priced

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<sup>68</sup> *Id.* at 73.

<sup>69</sup> Frith, *supra* note 11, at 72, *quoted in* MARIEN, PHOTOGRAPHY, *supra* note 2, at 77.

<sup>70</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 73.

<sup>71</sup> *See, e.g.*, NAOMI ROSENBLUM, A WORLD HISTORY OF PHOTOGRAPHY 210 (4th ed. 2007) (internal citations omitted) (arguing that critics derided photography, declaring that the new medium "'copies everything and explains nothing, it is blind to the realm of the spirit'").

<sup>72</sup> MARIEN, CRITICS, *supra* note 5, at 107.

<sup>73</sup> *Id.* at 94.

<sup>74</sup> *Id.* at 59.

<sup>75</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 159.



photographs and the realm of “High Art” photography, deemed to have the potential to elevate public morality.<sup>76</sup> Other photographers, known as Pictorialists, counteracted the attack on photographic objectivity by encouraging photographers to render their subjects slightly out of focus.<sup>77</sup>

At the same time, supporters of the new technology saw great potential in the truthfulness of the photograph to further the progress of science. “Photographic realism, so extensively employed as an indicator of cultural decline during photography’s early decades, was redrafted in the 1880s in scientific, not artistic, terms.”<sup>78</sup> Moreover, many considered photography’s power to create exact art reproductions to be an educational tool that could introduce fine arts to the masses.<sup>79</sup>

Unfortunately, as the nineteenth century progressed, the early view that photography could be both an art and a science diminished.<sup>80</sup> Rather, the late-century contest over the status of photography as art form or mere information took on a broader significance:

For better or worse, [photography] was associated with the technological changes sustained by an urban middle-class society. As a new kind of verisimilitude, not quite a copy, not quite an actuality, photography defined modern vicarious experience. It teetered between authenticity and artificiality, knowledge and deceit. As both an idea and an imaging system, photography enhanced the tension between art conceived as the secular agency of truth

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<sup>76</sup> *Id.* at 75.

<sup>77</sup> *Id.* at 170; *see infra* note 270 and accompanying text.

<sup>78</sup> MARIEN, CRITICS, *supra* note 5, at 142.

<sup>79</sup> *See id.* at 68, 114; *see also id.* at 124 (“The photographic reproduction of art treasures promised to transmit aristocratic high culture to the lesser classes.”).

<sup>80</sup> *See, e.g.,* MARIEN, PHOTOGRAPHY, *supra* note 2, at 159 (“As photography emerged as scientific and social evidence, it was also increasingly labeled counterfeit in art. The link between art and science in the popular phrase “the art-science of photography” weakened. In the last decade of the nineteenth century and the early years of the twentieth century, art and science would be painstakingly disconnected.”).

and art conceived as the mirror of transient effects  
in nature and in society.<sup>81</sup>

This contest of meanings would enter the courtroom in the 1880s when the Supreme Court first considered the issue of photographic originality in *Burrow-Giles*.

### B. *The Enigma of Photography in the Courts*

#### 1. *Burrow-Giles Lithographic Co. v. Sarony*

When *Burrow-Giles* came before the Supreme Court in 1884,<sup>82</sup> the cultural debate over the photograph's status as an artwork or mere information had been waging for several decades. The litigants brought this debate into the courthouse and, in so doing, challenged the Court to grapple with the camera's automatism and the photograph's verisimilitude.

In that case, Napoleon Sarony, a well-known New York City portrait photographer, alleged that Burrow-Giles Lithographic Co. infringed on his copyright in a photograph of Oscar Wilde by making 85,000 unauthorized reproductions of the picture.<sup>83</sup> Underlying these allegations lay the momentous question of whether the Constitution permitted Congress to extend copyright protection to photographs in its Act of 1865.<sup>84</sup> The answer turned on whether, under the Copyright Clause,<sup>85</sup> a photographer could be considered an "Author" and a photograph a "Writing."<sup>86</sup>

<sup>81</sup> MARIEN, CRITICS, *supra* note 5, at 111.

<sup>82</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>83</sup> *Id.* at 54.

<sup>84</sup> See Act of Mar. 3, 1865, ch. 126, 13 Stat. 540; see also Act of Mar. 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198 ("[The Act's provisions] shall extend to and include photographs and the negatives thereof ... and shall ensure to the benefit of authors ... in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings."); CONG. GLOBE 981 (Feb. 22, 1865).

<sup>85</sup> Article I, Section 8 of the U.S. Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, §8, cl. 8. To implement that provision, Congress enacted the first Copyright Act in 1790, followed by major revisions in 1909, Act of Mar. 4, 1909, ch. 320, § 1(a), 35 Stat. 1175, and in 1976, Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 (2012)).

<sup>86</sup> The lower court avoided both issues entirely by relying on the presumption of constitutionality afforded to acts of Congress. See *Sarony v. Burrow-Giles Lithographic*

In determining that a photograph could be deemed a Writing, the Court rejected *Burrow-Giles*'s contention that the Constitution limited that term to books.<sup>87</sup> Noting that Congress had extended copyright protection to "maps, charts, designs, engravings, etchings, cuts and other prints,"<sup>88</sup> the Court concluded,

it is difficult to see why congress cannot make [photographs] the subject of copyright as well as the others. . . . The only reason why photographs were not included in the extended list in the act of 1802 is, probably, that they did not exist, as photography, as an art, was then unknown . . . .<sup>89</sup>

In determining whether a photographer could be considered an Author, the court reached two conclusions. First, it established a broad originality requirement for copyright law, defining an "author" as "he to whom anything owes its origin; originator; maker."<sup>90</sup> Turning to photography, the Court also concluded: "We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author."<sup>91</sup>

Accordingly, it was incumbent on the Court to explain exactly how photographs are the "original intellectual conceptions"<sup>92</sup> of a photographer. Its solution to photographic originality was to ground authorship in the photographer's pre-shutter acts related to

Co., 17 F. 591, 592 (C.C.S.D.N.Y. 1883). On appeal, the Supreme Court also considered whether Saroni had placed adequate notice of copyright on his photograph, an issue the court dispensed with in a brief paragraph:

[I]t is enough to say that the object of the statute is to give notice of the copyright to the publish by placing upon each copy, in some visible shape the name the author, the existence of the claim of exclusive right, and the date at which this right was objected. This notice is sufficiently given by the words 'Copyright, 1882, by N. Saroni' found on each copy of the photograph."

*Burrow-Giles*, 111 U.S. at 55.

<sup>87</sup> *Burrow-Giles*, 111 U.S. at 57.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 57-58.

<sup>90</sup> *Id.* at 58. Modern courts look to this determination in *Burrow-Giles* as "the touchstone of copyright protection today." See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

<sup>91</sup> *Burrow-Giles*, 111 U.S. at 58.

<sup>92</sup> *Id.*

posing or staging the tableau to be photographed.<sup>93</sup> At the same time, the court suggested that less artful images—“the ordinary production of a photograph”<sup>94</sup>—that were “the mere mechanical reproduction of the physical features or outlines or some object”<sup>95</sup> might not be protected by copyright law. On that issue, the court stated, “[W]e decide nothing.”<sup>96</sup> Nonetheless, that non-decision established a distinction between two types of photographs—an “original work of art,”<sup>97</sup> on the one hand, and those deemed “ordinary,” on the other.

But there’s a white elephant in the midst of the Supreme Court’s *Burrow-Giles* decision. The paragraph that sets forth the Supreme Court’s solution to photographic originality<sup>98</sup>—described by one commentator as “remarkable”<sup>99</sup>—is taken virtually verbatim from Napoleon Sarony’s Complaint.<sup>100</sup> Moreover, the likely

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<sup>93</sup> In concluding that Sarony had proven “the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author,” *id.* at 59–60, the Court relied upon the lower court’s finding:

[I]n regard to the photograph in question, that it is a “useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.” These findings, we think, show this photograph to be an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell, as it has done by section 4952 of the Revised Statutes.

*Id.* at 60 (quoting Findings of the Circuit Court ¶ 3, *in* Transcript of Record at 14, *Burrow-Giles*, 111 U.S. at 53 (No. 1071) [hereinafter Transcript]).

<sup>94</sup> *Burrow-Giles*, 111 U.S. at 59.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 60.

<sup>98</sup> *See supra* note 93.

<sup>99</sup> Farley, *supra* note 15, at 425.

<sup>100</sup> Two separate paragraphs in Sarony’s Complaint state:

And this plaintiff further says that the said photograph, the title of which is “Oscar Wilde, No. 18,” and which is the subject of this suit, is a new, useful, harmonious, characteristic, and graceful picture, and

inspiration for the Court's distinction between art photographs and ordinary photographs can be found in Sarony's Brief.<sup>101</sup> Accordingly, what is remarkable is that no scholar has yet to focus on the parties' briefs as a way to gain deep insight into the Supreme Court's decision.<sup>102</sup> I will venture the bold claim that Sarony's Brief, heretofore virtually ignored by scholars, offers insights into photographic originality that are as important as the Supreme Court's *Burrow-Giles* decision itself. I turn to the parties' briefs.

Given the controversy over photography whirling outside of the courthouse, it is unsurprising that Burrow-Giles's Brief invites the Supreme Court to become directly embroiled in the debate over the camera's automatism and the photograph's verisimilitude. The genius of Sarony's responsive brief was to suggest a way for the court to sidestep that debate, a suggestion the court embraced with open arms.

Burrow-Giles's Brief is structured around two constitutional questions: "Are Photographers 'Authors?'"<sup>103</sup> and "Are Photo-

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that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by this plaintiff, producing the picture which is the subject of this suit; and that the terms "author," "inventor," "designer," as used in this complaint and in the art of photography mean the person who so produces the photograph.

*See* Complaint, *in* Transcript, *supra* note 93, at 4, 6-7. This paragraph from Sarony's Complaint is quoted virtually verbatim in the findings of the trial court. *See* Findings of the Circuit Court ¶ 3, *in* Transcript, *supra* note 93, at 14. Sarony also adopts the language from his Complaint in his Brief filed in the Supreme Court. *See* Brief on the Part of the Defendant in Error at 11-12, *Burrow-Giles*, 111 U.S. at 53 (No. 1071) [hereinafter Sarony's Brief].

<sup>101</sup> *See* Sarony's Brief, *supra* note 100, at 12-14.

<sup>102</sup> Two scholars have recognized that the Court's critical language has its origin in Sarony's filings. *See* Farley, *supra* note 15, at 411 n.92 ("Although the Court states that this quote is from the lower court's findings of fact, this language is also in Sarony's brief."); Subotnik, *supra* note 15, at 1500, n.52 ("Professor Farley identifies Sarony's brief as the source of the language. In fact, the origin of the language can be traced back further still, nearly word for word, to Sarony's complaint in the lower court.").

<sup>103</sup> Burrow-Giles's Brief, *supra* note 14, at 9.

graphs ‘Writings?’”<sup>104</sup> To answer both questions, Burrow-Giles sets out its basic legal premise: “To obtain a copyright upon any article whatever, the party claiming this protection must be the *author of the visible article on which the copyright is granted*. That is to say, that he must be the person through whose *intellectual labor* the article we see is produced.”<sup>105</sup>

Burrow-Giles asks, “Does [the Photographer] apply his own intellectual labor to the materials of his composition?”<sup>106</sup> The answer is no: “[I]n photography no intellectual and original labor is required.”<sup>107</sup>

To support this assertion, Burrow-Giles first attacks the technology’s automatism. In so doing, it borrows the very tropes that photography’s pioneers used to describe the new technology—photographs are the products of nature and light, not of human hands.<sup>108</sup> Burrow-Giles argues that the “camera[] act[s] by UNCHANGEABLE LAWS OF NATURE,”<sup>109</sup> and the image results from the “chemical forces of light on prepared plates.”<sup>110</sup> Accordingly, “the true author is the sun—not the photographer.”<sup>111</sup> “The light and shade in any picture varies with every painter, his *own mental originality* determining the same; but in the case of a photographer the lights and shades are beyond his power; his camera will reflect only the effect of the sunlight on the scene.”<sup>112</sup>

Burrow-Giles then attacks the photograph’s verisimilitude as undermining originality. A photograph is “but an absolute repro-

<sup>104</sup> *Id.* at 17.

<sup>105</sup> *Id.* at 12. Burrow-Giles looks to a painter as an example of a person who invests such labor into his product: “[T]he painter’s mind is actively engaged; the choice of the correct colors, the mixture of colors, the correct light and shade, the drawing of the outlines—all are acts of an intellectual kind, and it is *his work* which transforms the blank canvas into a thing of beauty.” *Id.* at 14.

<sup>106</sup> *Id.* at 10.

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* notes 53–58 and accompanying text.

<sup>109</sup> Burrow-Giles’s Brief, *supra* note 14, at 16.

<sup>110</sup> *Id.* at 10; *id.* at 19 (The photograph “is solely the work of the chemical forces of light; no brain work is required, no originality, no creative power of the mind.”).

<sup>111</sup> *Id.* at 8; see also *id.* (“If it is true that, ‘AFTER ALL, IT WAS THE SUN WHICH DREW THE PICTURE,’ then the sun alone is the author of the [photograph]. . .”).

<sup>112</sup> *Id.* at 16.

duction of something already extant, *without change of any kind.*”<sup>113</sup> Elsewhere it asserts: “[T]he very object of photography is to represent truthfully an object already extant, without any deviation at all from the subject. . . .THE BETTER THE PHOTOGRAPH, THE TRUER IS THE LIKENESS; THE LESS IS THE ORIGINALITY OF THE DESIGN.”<sup>114</sup>

In its attack on photographic originality, Burrow-Giles’s Brief often intermixes arguments based on automatism with arguments based on verisimilitude: “*A photograph, surely, is the reproduction by natural means of something already existing.... A photograph ... is always a reproduction true to nature—a variation from the original is impossible by the very laws of nature which govern its production.*”<sup>115</sup> “[T]he camera, acting by UNCHANGEABLE LAWS OF NATURE, represents the scene AS IT IS; *nothing is added, nothing omitted.*”<sup>116</sup>

In responding to Burrow-Giles’s Brief, Napoleon Sarony’s challenge was clear-cut. The protagonists in Burrow-Giles’s drama were Nature, the Sun, and the Camera, none of which qualify as an “Author.” Moreover, the product of these non-authors is a photograph that, as a mechanical copy of reality, is not a creative “Writing.”

In crafting his argument, Sarony’s goal was twofold. First, he had to reinstate the photographer at center stage as an Author who exercised “his own intellectual labor.”<sup>117</sup> Second, he had to deflect attention away from the automatic, mechanical nature of the camera and the imitative nature of the photograph. Burrow-Giles had attempted to draw a clear distinction between photography and other arts. Sarony needed to counter this by aligning photography with arts indisputably protected by copyright law.

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<sup>113</sup> *Id.* at 20.

<sup>114</sup> *Id.* at 18; *see also id.* at 21 (“The very essence of photography denies the possibility of fancy or imagination—truthful representation of existing objects is what it aims at. No genius and no laborious thought is required; nothing but mechanical skill.”).

<sup>115</sup> *Id.* at 21.

<sup>116</sup> *Id.* at 16; *see also id.* at 11 (“[T]he true object sought after is a truthful representation of the subject.”); *id.* at 5 (“That photographs and negatives are not original works of art, but reproductions of existing objects by application of physical laws, has been recognized by the Courts.”).

<sup>117</sup> Burrow-Giles’s Brief, *supra* note 14, at 10.

Accordingly, Sarony's Brief sets forth two critical premises. The first is that copyright law sets out to protect an artist's mental conception, but this can only be accomplished indirectly by protecting the "materialization" of that conception: "It is evident that what the law really seeks to protect is *the ideal invention or creation of the mind*, but as it is not practicable to give protection to that directly, the protection is given indirectly to certain materializations, or conventional and intelligible expressions thereof . . . ."<sup>118</sup>

The second premise—and the more important for Sarony—is that the particular form in which an artist "expresses, manifests, or discovers"<sup>119</sup> that materialization of his mental creation is not important, assuming that it is within the statutory subject matter of copyright law:<sup>120</sup>

[T]he conceptions, inventions and creations of the mind may be manifested, expressed, or discovered in many ways and according to various arts. Every art has its own peculiar methods and forms of such expressions, manifestation or discovery . . . . For the purpose of securing the right, the particular form of manifesting, expressing or discovering is *not important*, if it is one of those which the Legislature has seen proper to provide for . . . .<sup>121</sup>

The thrust of his strategy is clear. The artist and his mental creation—whether painter, etcher, engraver or photographer—are brought front and center. A photographer is no different from any other artist in having such a mental creation, and it is the primary goal of copyright law to protect that creation.

It is "not important," however, how that mental creation is "manifested," whether in a painting, a sculpture, an engraving or a photograph. Sarony proposes a broad non-discrimination principle

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<sup>118</sup> Sarony's Brief, *supra* note 100, at 6–7; *see also id.* at 13 ("[O]f necessity the law can only attach protection to the material thing which discovers, fixes, makes permanent, or serves as a vehicle of communicating that ideal.").

<sup>119</sup> *Id.* at 11.

<sup>120</sup> A photograph was within the statutory subject matter of copyright law by reason of Congress' Act of 1865. *See* Act of Mar. 3, 1865, ch. 126, 13 Stat. 540; *see also* Act of Mar. 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198.

<sup>121</sup> Sarony's Brief, *supra* note 100, at 9–10 (emphasis supplied).



with respect to how a particular art form “expresses, manifests, or discovers” the artist’s mental creation:

The painter cannot claim that the sculptor is not an author, inventor or designer because he does not discover his invention by means of color; nor can the sculptor claim that the dramatist is not an author, inventor or designer because he does not discover his inventions in the form of sculpture; each one in his particular art expresses, manifests or discovers his invention according to the rules, requirements or limitations of his own art.<sup>122</sup>

Sarony then addresses directly Burrow-Giles’s attack on photographic originality: “But it is claimed that [art of photography] is not the subject of copyright protection because it is ‘discovered’ in the form of a photograph.”<sup>123</sup> In responding to this attack, Sarony sets forth his pivotal argument, the one that the Supreme Court ultimately adopts:

It is conceded that no such picture or scene as is depicted in [the photograph of Oscar Wilde] existed until Sarony placed the same in order, “invented it,” that prior to making the negative, Sarony had had the conception of this invention in his mind, but he had not stopped there; he had designed and set in order the whole scene or picture which he desired to discover or express or manifest . . .<sup>124</sup>

The creative acts that matter most to photographic originality are the photographer’s *designing and setting* the “whole scene” to be photographed—in modern parlance, staging or posing the tableau. For Sarony, these “various acts constitute an author, inventor and designer in the art of photography”<sup>125</sup> because they, in effect, construct in the real world a visible incarnation of the photograph-

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<sup>122</sup> *Id.* at 11. See Hughes, *supra* note 15, at 356 (“*Sarony* was the first great copyright-meets-technology decision of United States copyright law and sets a tone of technological neutrality that is still with us.”).

<sup>123</sup> Sarony’s Brief, *supra* note 100, at 12.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

er's "mental conception, invention, or creation."<sup>126</sup> The constructed tableau is an embodied reflection of the photographer's mental creation.

It is critical to note that a photographer's acts in designing and setting the tableau are *not* the same acts that "express, manifest or discover" the photographer's mental conception, acts that Sarony has already suggested are "not important." Rather acts of designing and setting *precede* the unimportant acts of "discovering." A photographer's mental conception—now embodied in the staged tableau—is "discovered" through the act of clicking the shutter button on the camera and developing the photograph,<sup>127</sup> acts that Sarony equates to a painter's using a paintbrush or a sculptor's using a chisel<sup>128</sup>:

[H]aving ["designed and set in order the whole scene"] [Sarony] might have selected various forms of making it permanent, "discovering" it; he might have given it a permanent form, as an oil painting . . . ; or as a drawing in chalk or charcoal . . . ; or if he were an engraver or etcher, he might have engraved or etched it; if a sculptor, he might have made a statue of it; in any of these forms, it is conceded, his right to protection could not be questioned.<sup>129</sup>

Sarony's brilliant move is complete. First, he refocuses attention on the photographer as an Author with a mental conception. Second, by instilling special importance in staging the tableau to be photographed as the embodiment of the photographer's mental

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<sup>126</sup> *Id.* at 7.

<sup>127</sup> For Sarony's argument, it is particularly important that the act of clicking the shutter button not be invested with much importance for it appears that Sarony did not actually operate the camera. See Farley, *supra* note 15, at 434 ("Sarony was not a photographer in the modern or technical sense. He was not interested in the camera work. Instead, he regularly employed a cameraman, Benjamin Richardson, to work the camera.").

<sup>128</sup> See, e.g., Sarony's Brief, *supra* note 100, at 13 ("[T]he picture or scene from which [the Oscar Wilde photo] was made, had no existence until invented, created, or set in order by Sarony. And [Burrow-Giles] admits that up to the point of fixing or making permanent the picture or scene which is the subject of this suit, putting it into permanent, salable form, the author or inventor took all the steps which the painter, engraver, or sculptor would have taken.").

<sup>129</sup> *Id.* at 12.

conception, Sarony diverts attention away from both the camera's automatism and the photograph's verisimilitude. The camera is merely the tool for manifesting the photographer's mental conception, now embodied in the staged tableau. The photograph is but the object in which the staged tableau is manifested. In making this argument, Sarony equates photography to the other visual arts.

Sarony carefully avoids dealing with instances in which a photographer *doesn't* stage the tableau, but instead snaps a photograph of a pre-existing object or scene. Sarony finesses this issue by saving it for another day:

Having admitted all this, [Burrow-Giles] still urge[s] that all a photographer does is to take his camera, get his focus, and produce his picture, just as the hunter aims his gun, pulls the trigger, and lodges a bullet in the mark. Of course it is possible that there may be such cases, and such photographs, and when one of them comes up for adjudications doubtless the Court will consider that view.<sup>130</sup>

It is hard to imagine a more eloquent way to describe what in modern parlance would be referred to as "point-and-shoot" photography. It is these two sentences, I suggest, that inspired the Supreme Court to distinguish between art photographs and ordinary photographs, and to defer considering whether the latter are protected by copyright until a future case.

Given the document's major influence on the Supreme Court, I read *Burrow-Giles Lithographic Co. v. Sarony*<sup>131</sup> through the lens of Sarony's Brief. Accordingly, the formula for photographic originality emerging from that case was as follows:

1. Copyright Law protects as original the mental vision of an Author, as manifested in a Writing.
2. In the case of photography, that mental vision is directly mirrored and embodied in the real world

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<sup>130</sup> *Id.* at 12-13. Sarony vigorously argues that his photograph falls into the artful category: "But . . . [Burrow-Giles] ignore[s] or overlook[s] the fact that the picture or scene from which [the photograph of Oscar Wilde] was made, had no existence until invented, created, or set in order by Sarony." *Id.* at 13.

<sup>131</sup> 111 U.S. 53 (1884).

through the photographer's staging or posing the tableau to be photographed. Therefore, a photograph's originality is based on such staging or posing.

3. The acts through which the photographer "manifests" that mental vision in a Writing—using a camera to shoot a photograph of the staged tableau—are "not important." Those acts are necessary only to meet the constitutional requirement that the photographer's mental vision be fixed in a Writing.

By elevating the photographer's pre-shutter acts of staging the tableau to the position of central importance for photographic originality, the Supreme Court effectively extricated copyright law from the broader cultural debate over the camera's mechanics and the photograph's veracity—in no small measure thanks to Napoleon Sarony's litigation strategy.

## 2. Post *Burrow-Giles* Cases—The Expansion of Pre-Shutter Acts Relevant To Photographic Originality

Within a decade after *Burrow-Giles*, lower courts would lose sight of the Supreme Court's narrow grounding of photographic originality in acts of staging the tableau, and apply that case to find un-staged, point-and-shoot photographs original. In so doing, they began to expand the range of a photographer's pre-shutter actions deemed relevant to copyright originality, an expansion that has continued to the present day.

The first cases after *Burrow-Giles* to raise issues of photographic originality were brought by Benjamin Falk, a professional portrait photographer who, like Sarony, posed his subjects in his studio. Accordingly, these cases fit easily within the principles set forth in *Burrow-Giles*.<sup>132</sup> Though in at least one instance Falk invited a court

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<sup>132</sup> Falk brought a series of cases alleging that others had infringed on his copyright in photographs taken in his studio. *See, e.g.*, *Falk v. T.P. Howell & Co.*, 37 F. 202 (S.D.N.Y. 1888); *Falk v. Brett Lithographing Co.*, 48 F. 678 (C.C.S.D.N.Y. 1891); *Falk v. Donaldson*, 57 F. 32 (C.C.S.D.N.Y. 1893); *Falk v. Schumacher*, 48 F. 222 (C.C.S.D.N.Y. 1891); *Falk v. Curtis Pub. Co.*, 98 F. 989 (C.C.E.D.Pa. 1900); *Falk v. Heffron*, 56 F. 299 (C.C.E.D.N.Y. 1893).

to consider camera-related acts,<sup>133</sup> courts in these cases tended to follow the Supreme Court's lead by focusing narrowly on Falk's staging the tableau as the basis for photographic originality. Typical is *Falk v. Brett Lithographing Co.*<sup>134</sup> In defending against infringement, Brett Lithographing Co. argued that "the plaintiff is not sufficiently shown to have been the author of the photograph."<sup>135</sup> Relying on *Burrow-Giles*, the court found originality based on Falk's posing the scene: "[E]nough was done here by placing the persons in position, and using the position assumed by the child at the proper time to produce this photograph. . . . He is, and no one else can be, the author of this."<sup>136</sup>

By the mid-1890s, however, courts began to look to camera manipulations alone as the basis for photograph originality. The first such case was *Bolles v. Outing Co.*, decided in 1897.<sup>137</sup> The plaintiff snapped a photograph of a yacht—an un-staged, point-and-shoot image. In responding to the defendant's argument that "no original, intellectual conception was involved in the production of the original photograph,"<sup>138</sup> the Circuit Court of Appeals stated:

Whether a photograph is a mere manual reproduction of subject-matter, or an original work of art, is a

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<sup>133</sup> In *Falk v. Donaldson*, Falk testified at trial that he not only posed the model, but also "did the mechanical work of attending to the camera, focusing, and exposing the image." 57 F. at 33. The court concluded:

An examination of the photograph shows that it is the work of an artist.... [Falk] was an artist before he became a photographer. He had had a large experience in taking photographs, and on this occasion he appears to have availed himself thereof, and by the use of lights and shadows, and various devices, to have produced a most satisfactory result.

*Id.* It is possible that the ambiguous reference to "various devices" could be interpreted as referring to camera-related actions.

<sup>134</sup> 48 F. 678 (C.C.S.D.N.Y. 1891).

<sup>135</sup> *Id.* at 679.

<sup>136</sup> *Id.* The reference to the "proper time to produce this photograph" can be interpreted as basing originality, at least in part, on Falk's choosing the right moment to depress the shutter button—a camera-related action.

<sup>137</sup> 77 F. 966 (2d Cir. 1897), *aff'd*, 175 U.S. 262 (1899); see also Teresa M. Bruce, *In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography*, 115 W. VA. L. REV. 93, 112 (2012) (marking *Bolles* as the first case).

<sup>138</sup> *Bolles*, 77 F. at 970.

question of fact; and there is certainly sufficient evidence in the present record to justify, if not to compel, the conclusion that the one in question embodies an exceptional degree of artistic conception and expression. It required the photographer to select and utilize the best effects of light, cloud, water, and general surroundings, and combine them under favorable conditions for depicting vividly and accurately the view of a yacht under sail.<sup>139</sup>

The court clearly adopts *Burrow-Giles*'s distinction between art photography and ordinary photography. In doing so, however, it is not at all clear that the court understood the Supreme Court to have limited the former category to staged or posed photographs. For the first time, a court found a photographer's point-and-shoot image to be original based on its "conception and expression" by relying entirely on camera-related acts: choice of perspective, camera adjustments and timing in capturing "the best effects of light, cloud, water, and general surroundings."<sup>140</sup>

Expansion of copyright protection for photographs beyond posed images was reinforced by the Supreme Court in its 1903 de-

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* Later courts relied on *Bolles* to extend copyright protection to point-and-shoot photographs based on camera-related manipulation. For example, in *Edison v. Lubin*, 122 F. 240 (1903), Thomas Edison sued the defendant for infringing on photographs taken from a film Edison created of the christening and launching of a ship. As explained by the court, Edison created the film by combining a series of point-and-shoot photographs involving no staging. *Id.* at 240–41. In responding to the defendant's challenge that Edison's photographs were not original, the court looked to *Bolles* and relied entirely on the photographer's manipulating the camera:

We are further of opinion the photograph in question met the statutory requirement of being intended to be perfected and completed as a work of the fine art. It embodies artistic conception and expression. To obtain it requires a study of lights, shadows, general surroundings, and a vantage point adapted to securing the entire effect. In [*Bolles*] . . . depicting a yacht under full sail was held to constitute an original work of art . . . ; and in view of the recent decision of the Supreme Court [*Bleistein v. Donaldson Company*] in reference to the character, in that regard, of a circus poster, we have no question that the present photograph sufficiently fulfills the character of a work of the fine arts.

*Id.* at 242–43.

cision in *Bleistein v. Donaldson Lithographing Co.*<sup>141</sup> In upholding the copyrightability of a poster advertising a circus, Justice Holmes lowered the bar for originality, stating that an artwork “is the personal reaction of an individual upon nature. Personality always contains something unique.”<sup>142</sup> Thus, even a “very modest grade of art has in it something irreducible, which is one man’s alone” and “[t]hat something he may copyright” unless barred by statute.<sup>143</sup> At the same time, the Court expressed a strong admonition against courts making judgments of aesthetic quality.<sup>144</sup>

On the one hand, *Bleistein* seconded the approach in *Burrow-Giles* by not basing copyrightability on a judgment of a photograph’s aesthetic attributes. On the other hand, by lowering the bar for copyright protection, *Bleistein* undermined *Burrow-Giles*’s distinction between art photographs and ordinary photographs. Looking to *Bleistein*, that distinction was most seriously challenged in *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*,<sup>145</sup> where Judge Learned Hand noted that *Burrow-Giles* “left open an intimation that some photographs might not be protected. . . . I think that, even as to these, *Bleistein v. Donaldson Lithographing Co.* rules, because no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”<sup>146</sup>

Accordingly, by the early twentieth century, lower courts expanded the scope of a photographer’s pre-shutter choices that could ground originality from staging the tableau to camera manipulation and choice of perspective. In the well-known case of *Pavano v. Charles Beseler Co.*,<sup>147</sup> the plaintiff took a point-and-shoot photograph of the New York Public Library, of which the defendant allegedly made an “exact reproduction.”<sup>148</sup> Though involving no

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<sup>141</sup> 188 U.S. 239 (1903).

<sup>142</sup> *Id.* at 250.

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 251–52 (“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.”).

<sup>145</sup> 274 F. 932 (1921).

<sup>146</sup> *Id.* at 934.

<sup>147</sup> 234 F. 963 (S.D.N.Y. 1916).

<sup>148</sup> *Id.* at 964.

posing or staging, the plaintiff's pleadings mimicked language from *Burrow-Giles* to describe the photograph:

In paragraph V of the complaint plaintiff's allege that the picture is—"from his own original conception, to which he gave visible form . . . by selecting the position and place from which to take said picture, and the moment when the light, shade, cloud, and sky effects upon said New York Public Library and its surroundings combined to make a new harmonious and artistic picture."<sup>149</sup>

The court found the point-and-shoot photograph to be original based on camera-related choices including the timing of when to press the shutter button:

The question is not, as defendant suggests, whether the photograph of a public building may properly be copyrighted. Any one may take a photograph of a public building and of the surrounding scene. It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc. The photograph in question is admirable. The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done.<sup>150</sup>

*Pagano* provides clear evidence that the lower courts' revisionist reading of *Burrow-Giles* had taken serious hold by the early

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<sup>149</sup> *Id.* at 963.

<sup>150</sup> *Id.* at 964. The court appears to ignore *Bleistein*'s admonition not to make judgments as to the aesthetic quality of the image when it describes the positions of the people as "artistic," the background as "most pleasing," and the lights and shades as "exceedingly well done." *Id.*



twentieth century.<sup>151</sup> Based on these early cases, contemporary courts now look well beyond staging the tableau to a broad range of photographer choices and actions to ground originality. Typical is the Second Circuit Court of Appeals' decision in *Rogers v. Koons*.<sup>152</sup> Though citing *Burrow-Giles*, the court states that "[e]lements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."<sup>153</sup> As a result of this expansion of the grounds for photographic originality, courts now accept that "[a]lmost any photograph 'may claim the necessary originality to support a copyright.'"<sup>154</sup>

### 3. Scholarly Skepticism Over Photographic Originality

In *Burrow-Giles*, the Supreme Court cleverly deflected attention away from concerns over the camera's automatism and the photograph's verisimilitude by grounding photographic originality in pre-shutter acts of the photographer. This approach continues to the present day, albeit embracing a broader range of pre-shutter acts on which to ground a photograph's copyrightability. Accordingly, one might assume that concerns over the camera's mechanics and the image's truthfulness no longer plague copyright law.

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<sup>151</sup> See Hughes, *supra* note 15, at 363 ("Over time, courts—like critics and commentators—became comfortable moving beyond the idea of extra-machine composition to increasingly recognize personal expression in the process of using the machine.").

<sup>152</sup> 960 F.2d 301 (2d Cir. 1992).

<sup>153</sup> *Id.* at 307.

<sup>154</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (quoting NIMMER & NIMMER, *supra* note 17, § 2.08[E][1]). In *Mannion*, Judge Lewis Kaplan summarized contemporary copyright law by identifying three "not mutually exclusive" respects in which a photograph can be original—rendition, timing, and creation of the subject. 377 F. Supp. 2d at 452. Rendition includes technical aspects that do "not depend on creation of the scene or object to be photographed . . . and which resides [instead] in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques, etc.'" *Id.* (quoting 1 HON. SIR HUGH LADDIE, ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGNS § 4.57, at 229 (3d ed. 2000) (alteration in original)). Timing includes the photographer's decision as to when to shoot the picture "by being at the right place at the right time." *Mannion*, 377 F. Supp. 2d at 452–53 (quoting 1 LADDIE § 4.57, at 229). Creation of the subject is implicated in photographs in which the photographer poses the subject matter before snapping the picture, *Mannion*, 377 F. Supp. 2d at 453–54, the grounds upon which the Court in *Burrow-Giles* relied.

In fact, copyright scholars continue to express deep skepticism over photographic originality,<sup>155</sup> and this skepticism is grounded in the enigmatic features of photography that fueled the nineteenth century debate—the camera’s automatism<sup>156</sup> and the photograph’s verisimilitude.<sup>157</sup>

Relying on the device’s automatism, Professor Kathleen Connolly Butler has challenged the copyrightability of photographic reproductions of artwork based on the mechanics of the camera. Mirroring Burrow-Giles Lithography Co.’s attack on Napoleon Sarony’s photograph, she states:

In a photographic reproduction, the camera, not the photographer, mimics the art. The mechanical process involved, rather than decisions by the photographer about composition, contour, and texture, insures that the photograph will look like the painting. The photographer may decide how to position, light, and focus the artwork to ensure the quality of the likeness, but every photographer will obtain a likeness of some quality.<sup>158</sup>

Other legal critics base their skepticism toward photographic originality on the photograph’s verisimilitude. These attacks look to the fundamental tenet that copyright law protects only creative expression, not facts or ideas.<sup>159</sup> The staunchest such critic is Professor Justin Hughes. For Hughes, the “information-laden nature of photographs”<sup>160</sup> leads to the conclusion that for purposes of copyright law, most photographs should be deemed unprotected facts, not creative expression. In his view, “a large percentage of

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<sup>155</sup> See, e.g., Hughes, *supra* note 15, at 345–51 (expressing concern over the factual nature of most photographs); Butler, *supra* note 18, at 104–13 (expressing concern over the camera’s mechanical nature); Gorman, *supra* note 18, at 1594–1600 (expressing concern over the factual nature of photographs); see also Harrison, *supra* note 18, at 898–904; Madison, *supra* note 18, at 818–19; Miller, *supra* note 18, at 456–57.

<sup>156</sup> See discussion *infra* Part III.A.

<sup>157</sup> See discussion *infra* Part III.B.

<sup>158</sup> Butler, *supra* note 18, at 113.

<sup>159</sup> See 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>160</sup> Hughes, *supra* note 15, at 349.

the world's photographs are likely not protected by American copyright law because the images lack even a modicum of creativity."<sup>161</sup>

Before addressing these attacks by contemporary critics on the photograph's originality based on the camera's automatism and the image's verisimilitude, I introduce the concept of *depiction* from art theory into copyright law.

## II. DEPICTION AND COPYRIGHT ORIGINALITY

Introducing the concept of *depiction* into copyright law can shed considerable light on photographic originality. Equally important, the concept can help to unravel confusion that has plagued both cultural and legal critics in their attempts to make sense of the camera's automatism and the photograph's verisimilitude.

### A. *The Concept of Depiction*

What is depiction? The world is filled with objects that can be represented in different ways. Let's consider one such object, a hippopotamus. The following representation is from a poem by T.S. Eliot:

The broad-backed hippopotamus  
Rests on his belly in the mud;  
Although he seems so firm to us  
He is merely flesh and blood.<sup>162</sup>

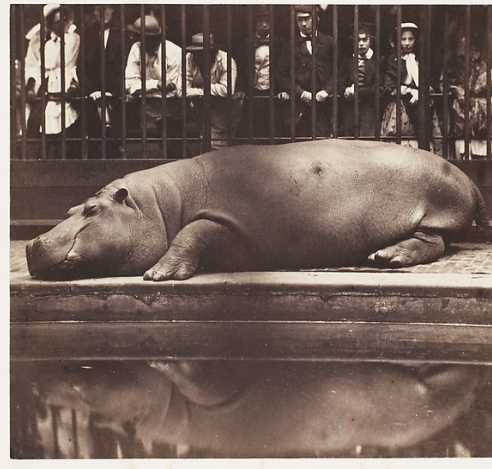
This is a verbal representation of a hippopotamus, employing words as the medium of expression; such a representation is referred to as a *description*.

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<sup>161</sup> *Id.* at 374.

<sup>162</sup> T.S. ELIOT, THE HIPPOPOTAMUS, POEMS, PLAYS AND PROSE 82-83 (1995).

Now consider another representation of a hippopotamus, this one by nineteenth century French photographer, Juan de Borbón:



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This is a visual representation of the animal, one that employs a picture rather than words as the medium of expression: such a representation is referred to as a *depiction*.

Notice that a description of a hippo and a depiction of a hippo have the following in common: both represent the animal by utilizing a collection of marks on a flat surface. The description uses words printed on a surface—language—to represent the hippo; the depiction uses marks arranged in a particular design to represent hippo.

We have a general understanding of how language represents. Through linguistic conventions, words are arbitrarily assigned to objects in the world. There is no necessary connection between the word “hippopotamus” and the object that word represents. The words “ippopotamo” (for Italian speakers) and “Nilpferd” (for German speakers) equally represent a hippopotamus.

Depiction is more puzzling. In order to represent a hippopotamus pictorially, we do not have the same freedom to mark the flat

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<sup>163</sup> Juan de Borbón, *The Hippopotamus at the Zoological Gardens, Regent's Park* (1852), available at <http://www.metmuseum.org/collection/the-collection-online/search/283086>.

surface in any way convention might come to adopt. The surface must be marked in the *correct* way. But what is that correct way?<sup>164</sup>

To understand depiction, one must examine the relationship among three things: a picture's *design markings*—the marks, lines, shadings, boundaries, contours, shapes, colors, textures, etc., that are laid down on the picture's surface in paint, ink, charcoal, photographic chemicals, or perhaps digital pixels on a computer screen; a picture's *content*—the real world object or event that a viewer perceives in looking at the picture; and a picture's *subject*, the real world object itself.<sup>165</sup> One thing is clear: we do not see a hippopotamus in a picture in the same way that we see the real life animal in a zoo. When looking at the picture, we perceive the animal in the design markings on the surface. We never confuse those markings for a real hippopotamus.

Though in the past, art theorists attempted to explain how a picture depicts a real world object by asserting that the picture *resembles* the object, the resemblance approach to depiction has been largely abandoned.<sup>166</sup> Instead, most contemporary philosophers accept some version of the “seeing-in” approach to depiction proposed by philosopher Richard Wollheim in the 1980s.<sup>167</sup>

For Wollheim, the seeing-in approach attempts to capture what distinguishes visual representation—depiction—from other types of representation.<sup>168</sup> Unlike other types of representation such as verbal description, for Wollheim a picture has the unique ability to trigger what he refers to as the *twofold* experience of *seeing-in*.<sup>169</sup> In looking at a picture, a viewer sees both a marked two-dimensional surface and, at the same time, *sees* an object or scene *in* that marked

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<sup>164</sup> See R.D. HOPKINS, DEPICTION, CONCISE ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 202–03 (2000) (establishing a conceptual framework).

<sup>165</sup> DOMINIC LOPES, UNDERSTANDING PICTURES 3–4 (1996).

<sup>166</sup> DOMINIC LOPES, SIGHT AND SENSIBILITY 26 (2005) (“Fatal difficulties have made resemblance theories historical curiosities.”).

<sup>167</sup> See, e.g., ANTHONY SAVILE & RICHARD WOLLHEIM, IMAGINATION AND PICTORIAL UNDERSTANDING, 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 19–60 (1986).

<sup>168</sup> See *id.* at 46; see also Bantinaki, *supra* note 27, at 128 (“By means of [the] notion [of twofoldness] Wollheim aimed to highlight the fact that in seeing a picture the viewer can be visually aware of both the object that is being depicted and the medium in a single perceptual act.”).

<sup>169</sup> See WOLLHEIM, *supra* note 26, at 214.

surface. It is by virtue of a picture's ability to trigger such a twofold perceptual experience that makes it a depiction.<sup>170</sup> Though Wollheim's scholarship has triggered considerable discussion and criticism,<sup>171</sup> most modern scholars agree that linking depiction to a twofold perceptual experience is a major advance in understanding how pictures operate in our lives.<sup>172</sup>

The insights offered by this Article flow from a simple observation: a photograph of a real world object is a *depiction*. Accordingly, such a photograph has two folds. The first fold consists of the design markings on the surface of the photographic paper (or pixels on a computer screen). The second fold consists of the picture's content—the real world object or scene that a viewer perceives in the design markings. Consider de Borbón's photograph of a hippopotamus.<sup>173</sup> It depicts the animal. In looking at the photograph, a viewer is aware that she is looking at design markings on a picture's surface (and not at the animal itself). At the same time, the viewer is aware that she is *seeing* a real world object *in* those surface design markings—a hippopotamus.

### B. *The Two Folds of Depiction and Copyright Originality*

The fundamental thesis of this Article is that, for purposes of copyright law, what makes a picture original are first and foremost the artist's choices and actions that result in the placement of design markings on the picture's surface. The picture's content—the object or scene that a viewer perceives in those markings—is, at

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<sup>170</sup> See WOLLHEIM, *supra* note 26, at 217–18; see also Robert Hopkins, *Inflected Pictorial Experience: Its Treatment and Significance*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 25, at 152 (“If I go to the British Museum and look at [a Rembrandt drawing of a pastor], I see ink marks on a piece of yellowed paper. But I also (in some sense) see a man, holding his left hand outward, as if engaged in conversation. My experience of the picture thus has two dimensions to its content. It represents what is before me, a marked surface; and it represents something else, a man with certain features. When I see one thing as a picture of something else, my experience has this double content. This is how I know that a picture is before me, and how I know what the picture's own content is, what it depicts.”).

<sup>171</sup> See Bantinaki, *supra* note 27, at 129 n.3 (discussing objections to Wollheim's seeing-in approach to depiction).

<sup>172</sup> See, e.g., *id.* at 128 (describing Wollheim's notion of twofoldness as an “important contribution[] to the study of depiction”).

<sup>173</sup> See *supra* note 163.

most, secondary to a determination of originality. This thesis applies to *any* graphic work that depicts an object or scene—a painting, a lithograph, an etching, or a photograph.<sup>174</sup>

1. The First Fold of Depiction—Photographic Originality is Based Primarily on Choices and Actions Related to Placing Design Markings on a Picture’s Surface

Consider an 1887 work by Van Gogh, *Self-Portrait with a Straw Hat*:



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What makes this painting original?

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>176</sup> the Supreme Court set forth two criteria of originality: “[T]he work [must have been] independently created by the author (as opposed to copied from other works), and . . . it [must] possess[] at least some minimal degree of creativity.”<sup>177</sup> As noted above, I refer to

<sup>174</sup> Throughout this Article, I am considering *figurative representational* pictures, pictures that are intended to depict real world objects or scenes. The remarks herein do not apply, for example, to abstract paintings, though some philosophers suggest that one could view such paintings as representations. See, e.g., LOPES, UNDERSTANDING PICTURES, *supra* note 165, at 5–6 (explaining that abstract paintings might be considered to be representational).

<sup>175</sup> Vincent Van Gogh, *Self-Portrait with a Straw Hat* (1887), available at <http://www.metmuseum.org/collection/the-collection-online/search/436532>.

<sup>176</sup> 499 U.S. 340 (1991).

<sup>177</sup> *Id.* at 345.

these as the “non-copying” and the “minimal creativity” criteria.<sup>178</sup>

There is little doubt that the painting satisfies the non-copying criterion. It originated from Van Gogh and did not copy another artist’s work. Commentators agree that determining whether a work of art satisfies the non-copying criterion is rarely difficult.<sup>179</sup>

Though few would question that the painting satisfies *Feist*’s minimal creativity criterion, explaining how it does so is more challenging. Viewing the painting as a depiction aids in this endeavor.

We first confront a stumbling block in copyright law. It may seem obvious that determining whether a picture is minimally creative must turn on assessing the aesthetic quality of how the design markings are arrayed on the picture’s surface—depiction’s first fold. In fact, in *Burrow-Giles*, the Supreme Court did refer to the photograph of Oscar Wilde as a “useful, new, harmonious, characteristic, and graceful picture.”<sup>180</sup> In so doing, it appeared that the Court was in fact making a judgment of the image’s aesthetic quality. Nonetheless, the Court then went on to locate originality in pre-shutter acts of the photographer.<sup>181</sup> Most commentators agree that the Court’s passing reference to the aesthetics of Sarony’s image carries little precedential weight in determining photographic originality.<sup>182</sup>

Any doubts as to whether courts should make judgments of aesthetic quality in determining originality were laid to rest by *Bleis-*

<sup>178</sup> See *supra* note 29.

<sup>179</sup> See, e.g., Robert Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001–2002) (“The most common understanding of authorship—a word whose root is in the Copyright Clause of the Constitution—is that a work must ‘originate’ with the putative author, and that it not be slavishly copied from another. Whether a work is copied or is a product of independent origination usually invites a straightforward and objective factual determination, even though proof is typically circumstantial. Courts rarely have to make value judgments.”).

<sup>180</sup> *Burrow-Giles Lithography Co. v. Sarony*, 111 U.S. 53, 60 (1884).

<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., Farley, *supra* note 15, at 431 (“The Court could have focused on the photograph itself, evaluating originality as measured by aesthetics, but instead it focused on how the photographer created the subject of the photograph. That is, it does not evaluate the final product for signs of the author, but rather evaluates the practice as authorial.”).



*tein*'s strong admonition against doing so.<sup>183</sup> Some courts and commentators continue to argue that, in the end, originality must adhere in aesthetic attributes of the picture itself, not in the artist's actions in creating the picture.<sup>184</sup> Nonetheless, following *Bleistein*, most courts now look solely to the photographer's pre-shutter choices and actions to ground originality, not aesthetic attributes of the picture.<sup>185</sup> After *Feist* the relevant inquiry for determining originality is whether such choices and actions evidence a minimally creative input of the artist's personality into the work rather than mere "sweat of the brow," a mindless exertion of effort.<sup>186</sup>

Accordingly, determining whether Van Gogh's painting is original becomes a question of whether the artist's choices and actions related to marking the canvas's surface evidence an input of Van Gogh's creative personality. Such choices and actions include decisions that were made well before the artist picked up a brush such as mixing paint (or some other medium) on a palette and choosing which tools to use. Perhaps most importantly, relevant to originality are the choices and actions the artist makes while brushing paint onto the canvas. Few would argue that Van Gogh's choices and actions do not far exceed the minimally creative standard.

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<sup>183</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

<sup>184</sup> See, e.g., *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) ("[C]ourts have not always distinguished between decisions that a photographer makes in creating a photograph and the originality of the final product. . . . Decisions about film, camera, and lens, for example, often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original. . . . Protection derives from the features of the work itself, not the effort that goes into it."); see also *Hughes*, *supra* note 15, at 409 ("It is . . . acceptable to say that 'the creative decisions involved in producing a photograph may render it sufficiently original to be copyrightable,' but originality must be in the visible effects in the work itself, not in the means of achieving those effects.").

<sup>185</sup> See *Hughes*, *supra* note 15 at 409 ("[A]s soon as a judge starts assessing originality in the visual image, it is easy to slip into the murky zone of artistic judgments that *Bleistein* warns judges to avoid. . . . But a jurist who takes to heart Holmes's admonition to avoid judging 'the worth of pictorial illustrations, outside of the narrowest and most obvious limits' will quickly become uncomfortable trying to describe the nuanced elements of a photograph. The simplest solution is to focus on creative choices and decisions.").

<sup>186</sup> See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352-53 (1991) (enumerating the flaws of "sweat of the brow" as a doctrine).

How do we determine whether de Borbón's photograph of a hippopotamus is original? We do so in the exact same way that we determined whether Van Gogh's painting is original. We look to the photographer's choices and actions that resulted in design markings being arrayed on the photographic paper. These include de Borbón's first coating that paper with salt and silver nitrate; choosing a camera and lens; adjusting the camera settings; choosing a perspective from which to aim the camera at the animal; adjusting artificial lighting and screens to change the light and shadow on the animal; and finally choosing the exact moment at which to click the shutter button.<sup>187</sup> If those choices and actions—all related to the first fold of depiction—evidence de Borbón's infusing a minimally creative degree of his personality into the image, the photograph is original.

Of course, in looking at a photograph, a viewer sees both surface design markings and the content of the photograph at the same time.<sup>188</sup> That's Wollheim's whole point<sup>189</sup>—a depiction is characterized by its ability to cause that twofold experience in the viewer. In de Borbón's photograph we see the image's content—the hippo—knowing all the while that we are looking at a picture composed of design markings on photographic paper. With effort, however, a viewer can consciously focus on one of the two folds of de-

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<sup>187</sup> Throughout this Article, I do not consider post-shutter manipulation of the photograph in the darkroom or on a computer ("photoshopping") to be relevant to originality. Both legal commentators and art theorists agree that such manipulations undermine the conventional bases on which we understand an image to be a "photograph." See, e.g., Hughes, *supra* note 15, at 366 ("[In discussing originality], [c]ourts and law commentators almost never mention airbrushing, photomontage, or 'composition' techniques involving multiple negatives, although such techniques have been in limited use since the mid-nineteenth century and the results of such techniques would support a finding of originality. Why? We can conjecture that the main reason is that these have not been seen as proper photography among photography professionals and cognoscenti. . . . [A]s long as most photographers accepted these conventional limits of the medium—that is, the exclusion of optical or chemical manipulations—then the disputes that would come before courts would be so limited.").

<sup>188</sup> See, e.g., Dominic McIver Lopes, *The Aesthetics of Photographic Transparency*, 112 MIND 433, 440 (2003) ("In normal circumstances, seeing through a photograph happens simultaneously with seeing the photographic surface itself and is consistent with the belief that what is before one's eyes is a photograph, not the photographed object. Photographic transparency is not photographic invisibility.").

<sup>189</sup> See WOLLHEIM, *supra* note 26, at 213–14.

piction—what has been described as “separation seeing-in.”<sup>190</sup> Determining whether a picture is original for copyright purposes mandates that a viewer engage in separation seeing-in and focus mainly on the design markings on the image’s surface and the artist’s relationship to those markings.

## 2. The Second Fold of Depiction—The Object or Scene Perceived By a Viewer in a Photograph is Only Secondarily Related to Copyright Originality

What is the relevance of the picture’s subject—the real world object or scene that a photographer chooses to shoot and that a viewer perceives in the photograph—to the image’s originality?

Generally, the object or scene a viewer perceives in a painting or a photograph has little impact on the image’s originality. Every representational painter chooses *something* to paint. Every photographer chooses *something* at which to point the camera. It is impossible to judge the creativity of either choice apart from the artist’s success or failure in placing design markings on the surface of the canvas or photographic paper. A painting is original not because the painter creatively chose a particular object or scene to paint. Rather, its originality results from the painter’s choices and actions in translating his intellectual vision onto the surface of the canvas. Similarly, a photograph’s originality does not generally relate to the choice of an object or scene at which to point the camera. Rather the resulting image will be original because of the photographer’s creative choices and actions related to marking the surface of the photographic paper. Accordingly, the choice of an object or scene to paint or photograph rarely has significance for copyright protection.<sup>191</sup>

<sup>190</sup> See John H. Brown, *Seeing Things in Pictures*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 25, at 208, 210–14 (explaining separation seeing-in); see also Bantinaki, *supra* note 27, at 143 (“[In separation seeing-in] the material elements on the picture’s surface are seen as forming a meaningful whole ....”).

<sup>191</sup> See, e.g., WILLIAM PATRY, 2 PATRY ON COPYRIGHT § 3:118 (2010) (“The nature of photographic authorship is not at all dependent upon or influenced by the uniqueness or even protectability of the objects photographed. An original photograph of a common flower (think of Georgia O’Keeffe) is entitled to protection no differently from an original photograph of an original sculpture. Photographic authorship lies not in the object captured by the photographer (although elements of layout or placement of that object or objects may form a basis of protection), but rather in the creative choices made by the

On occasion, however, the object or scene that a viewer perceives in a painting or photograph may impact copyright originality.

In instances in which the artist stages or poses the scene that she ultimately paints or photographs, those actions enhance the completed work's originality because they evidence an additional input of personality into the work. Thus, an artist's arranging fruit on a table for a still life prior to painting or photographing that tableau enhances the resulting image's originality for copyright purposes. Nonetheless, there is no requirement that a photographer stage the tableau in order for the resulting picture to be original.

On rare occasion the choice of an object to paint or photograph can undermine the completed work's originality. This occurs when the graphic image runs afoul of *Feist's* non-copying criterion.<sup>192</sup> Commentators generally agree that an artwork runs afoul of this

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photographer about how to capture the object, as well as postphotographic choices made in developing and printing the work.”).

<sup>192</sup> It is important to distinguish copying for purposes of originality from copying for purposes of infringement under Section 106(1), the Reproduction Right. 17 U.S.C. § 106(1) (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords ...”). Consider a photograph of a copyright protected sculpture. Assume first that the photograph is licensed. Irrespective of whether the photograph is properly characterized as a derivative work, *see, e.g.,* *Schrock v. Learning Curve Int.*, 586 F.3d 513, 518 (7th Cir. 2009) (“Whether photographs of a copyrighted work are derivative works is the subject of deep disagreement among courts and commentators alike.”), it is now generally accepted that for such a photograph to be original, “the relevant standard is whether [it] contains a ‘nontrivial’ variation from the preexisting work.” *See id.* at 520 (quoting *NIMMER & NIMMER*, *supra* note 17, §§ 3.01, 3.03[A]). If such a variation exists, the photograph does not run afoul of *Feist's* non-copying requirement.

Now assume the same photograph to be *unlicensed*. Whether or not it *copied* the depicted sculpture for purposes of *infringement* analysis would be determined by the more protective “substantially similar” test. Pursuant to that standard, it might well be found to infringe despite a nontrivial variation from the preexisting work. *See, e.g.,* *Gentieu v. Tony Stone Images*, 255 F. Supp. 2d 838, 848 (N.D. Ill. 2003) (“Substantial similarity is determined by applying the ordinary observer test: ‘whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible [sic] expression by taking material of substance and value.’”) (quoting *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 509 (7th Cir. 1994)).

requirement only when it slavishly copies another work, copies it “outright in its entirety.”<sup>193</sup>

In the realm of the graphic arts, what constitutes slavish copying?<sup>194</sup> Let’s begin with painting. An artist who paints an exact, brushstroke-for-brushstroke copy of a Grand Master in a museum will, in all likelihood, run afoul of *Feist*’s non-copying criterion and her painting will not be deemed original. This example illustrates the importance of viewing *Feist*’s two criteria as independent of one another.<sup>195</sup> It does not follow that because the painter has slavishly copied the existing work, her actions lack minimal creativity. Creating an exact copy of another painting entails an extensive array of creative choices and actions related to mixing paints and imitating brushstrokes, actions that far exceed the threshold of minimal creativity. For copyright purposes, the problem with the finished work is copying, not lack of minimal creativity.

How can a photograph run afoul of *Feist*’s non-copying criterion and thereby be unoriginal? There are three ways in which this can occur.

1. A photograph of another photograph (such as those created by postmodern artist Sherrie Levine)<sup>196</sup> will run afoul of the non-copying criterion because such an image slavishly appropriates each and every creative action and decision made

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<sup>193</sup> See Subotnik, *supra* note 15, at 1504 (noting that *Feist* prohibits only a “work [that] has been copied outright in its entirety”); see also *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (“‘Originality . . . means little more than a prohibition on actual copying’ . . . any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make.” (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir. 2000))).

<sup>194</sup> See Terry S. Kogan, *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J.L. & ARTS 445, 476–93 (2012) (exploring the meaning of “slavish copying”).

<sup>195</sup> See PATRY, *supra* note 191, § 3.31 (“There is thus no nexus between independent creation and the amount of creativity required for the work to be copyrightable.”).

<sup>196</sup> Diarmuid Costello and Margaret Iversen describe Sherrie Levine’s “interest in the photograph as a kind of pictorial readymade that can be appropriated and repurposed in ways that limit authorial control. . . . [Levine was interested] in photography as a resource for art precisely insofar as it might be thought to *relieve* [her] of certain burdens of artistic control.” Costello & Iversen, *supra* note 35, at 686–87.

by the first photographer that resulted in design markings being placed on the image's surface.<sup>197</sup>

2. A photographer who restages in minute detail the tableau that another photographer created for a pre-existing a photograph will run afoul of *Feist's* non-copying criterion. In such a case, the later photographer will have slavishly copied the first photographer's creative acts in staging the tableau to be photographed, the one instance in which the second fold of depiction impacts copyright originality.<sup>198</sup>
3. There is a third way in which a new photograph might run afoul of *Feist's* non-copying criterion, one that relates to the first fold of depiction. Since photographic originality is based primarily on the photographer's pre-shutter choices and actions, completeness requires that we consider the possibility of a photographer's slavishly copying those choices and actions of another photographer.

Imagine the following: a professional photographer, Photopro, hikes to the top of a cliff in a national park to photograph the sunset. He situates his tripod, points his camera, and adjusts the camera settings. Assume he chooses a complex combination of settings to exaggerate the intensity of the sunset. He then presses the shutter button at the moment of sunset.

Assume further that another professional photographer, Hiker, followed Photopro to the top of the cliff. He carefully notes each and every camera and tripod setting utilized by Photopro. Moreover, he casually inquires of Photopro what type of film he is using.

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<sup>197</sup> In all likelihood, a photograph that slavishly re-photographs an existing copyright protected photograph would also infringe on that protected image. *See, e.g., Hughes, supra* note 15, at 393. ("It is important to understand that unauthorized, non-transformative, and slavish reproduction of [an] entire photograph by a newspaper, news service, or television station is—and should be—an infringement of copyright.").

<sup>198</sup> This is effectively what occurred in *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914). A photographer took a picture of a nude model entitled "Grace of Youth." *Id.* at 931. He sold both the photograph and its copyright to the plaintiff. *Id.* Two years later, the photographer recreated the tableau of his earlier work using the same model in an identical pose, and took a new photograph he entitled "Cherry Ripe." *Id.* at 930. The Court found that the later image infringed on the earlier image. *Id.* at 931–32. As a slavish copy of the tableau that was staged for the first photograph, the later photograph would also run afoul of *Feist's* non-copying criterion.

The next evening Hiker returns to the cliff bringing with him the identical type of camera, film and tripod used by Photopro. Hiker places his tripod in the dirt markings that indicate the exact location from which Photopro snapped his photo the previous evening. Choosing the identical camera angle and settings, Hiker snaps a picture at the moment of sunset. (Assume that atmospheric conditions on the two days are identical.) Given the centrality to photographic originality of actions related to choosing a camera, film, camera angle, and camera settings, one might well conclude that Hiker has slavishly copied that which is original to Photopro's image. If so, Hiker's photograph runs afoul of *Feist's* non-copying criterion and is not original.<sup>199</sup>

It is important to point out that a photographer's doing no more than pointing her camera at the exact same object or scene previously photographed by another photographer does *not* run afoul of *Feist's* non-copying criterion. In the realm of the graphic arts no one has a monopoly over depicting a pre-existing object or scene.<sup>200</sup> The first tourist to take a photograph of the Grand Canyon from a newly opened scenic overlook in a national park has no greater copyright over her image of that natural wonder than the hundredth tourist who takes a photograph from the same overlook. Nonetheless, the first photographer's work is entitled to "thin" protection: "The nature of this thin copyright may mean that the photograph is effectively protected from slavish, reprographic copying, but has little protection against unauthorized copying of most elements in a derivative work."<sup>201</sup>

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<sup>199</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>200</sup> See, e.g., *NIMMER & NIMMER*, *supra* note 17, § 13.03[B][2][b] ("Liability . . . cannot arise to the extent that the similarity between plaintiff's and defendant's work is that both graphically reproduce an object exactly as it occurs in nature.").

<sup>201</sup> *Hughes*, *supra* note 15, at 392; see also *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) (stating that photographs of pre-existing objects are "only protected from verbatim copying").

III. THE ENIGMA OF PHOTOGRAPHY: THE CAMERA'S  
AUTOMATISM AND THE PHOTOGRAPH'S  
VERISIMILITUDE DO NOT UNDERMINE  
COPYRIGHT ORIGINALITY

We come full circle to the enigma of photography. Throughout its history, cultural and legal critics have focused on the two most distinctive attributes of the technology—the camera's automatism and the image's verisimilitude—to challenge photography as an art form.

If, as argued above,<sup>202</sup> photographic originality inheres primarily in a photographer's choices and actions that result in the placement of design markings on the image's surface, the major challenge to photographic originality is *automatism*. Do the mechanics of the camera so over-determine the appearance of the resulting image that the photographer is left with little opportunity to inject her own personality into the photograph, irrespective of her choices and actions related to marking the surface?

In contrast, because the choice of an object to photograph is, at most, secondarily related to a photograph's originality, the claim of critics that most photographs are unoriginal because of their *verisimilitude*—their facticity—is misconceived. A photograph of a hippopotamus is no less original because of its asserted factual nature than is a realistic painting of the same animal.

The attacks on photographic originality based on automatism and verisimilitude are not unique to legal critics. Art theorists Diarmuid Costello and Dawn Phillips describe “[t]hree widespread and contentious intuitions [that] play a role in most discussions of photography,” intuitions that link the camera's automatism with the image's truthfulness:<sup>203</sup>

- 1) The photographic process is, in some sense, automatic.
- 2) The resultant images are, in some sense, realistic.

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<sup>202</sup> See *supra* Part II.B.1.

<sup>203</sup> Costello & Phillips, *supra* note 46, at 2.



3) The realism of photographs, in some sense, depends on the automatism of the photographic process.<sup>204</sup>

They explain:

In these formulations the term “automatic” stands proxy for a variety of notions used to characterise the photographic process, such as: mechanical, mind-independent, agent-less, natural, causal, physical, unmediated. The term “realistic” could be replaced by an equally large variety of terms, used to characterise the status of photographs, such as: authentic, faithful, objective, truthful, accurate.<sup>205</sup>

Separating issues of the camera’s automatism from issues of the image’s verisimilitude can shed light on the confusion that has arisen in both art theory and legal commentary over the artistic nature of the photograph. Accordingly, in Part III.A. below, I confront the challenge based on automatism that the mechanical nature of the camera precludes most photographs from satisfying copyright law’s threshold requirement of minimal creativity. In Part III.B. below, I confront the challenge based on verisimilitude that, because of their inherent factual nature, most photographs do not satisfy *Feist*’s requirements for originality.

*A. Automatism—The Mechanics of the Camera Do Not Defeat Copyright Originality*<sup>206</sup>

Philosopher Dawn Wilson explains the challenge that the camera’s automatism poses to considering a photograph an artwork:

“Automatism” is the notion that a photograph is the product of a nonconscious, natural, or mechanical process. This being so, it is supposed that a photograph is not primarily the product of an agent’s conscious control, and it is inferred that an artistic

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Photography and automatism were the subjects of a 2012 Symposium, *Agency and Automatism: Photography as Art Since the Sixties*, 38 CRITICAL INQUIRY 679 (2012), and a 2013 Symposium, 70 J. OF AESTHETICS & ART CRITICISM 1 (2013).

agent can have only a limited or inhibited responsibility for the salient features of a photograph. The idea that scope for artistic intentionality is diminished by automatism has been a basis for treating photographs as inferior to other art forms and remains a hurdle for evaluations of photography in the philosophy of art.<sup>207</sup>

The mechanics of the camera have also grounded the attack of legal critics on photographic originality from the moment that Burrow-Giles Lithographic Co. asserted in its 1884 Supreme Court brief that “in photography no intellectual and original labor is required.”<sup>208</sup>

In this attack, cultural and legal critics inevitably compare photography to painting. Carol Armstrong caricatures this comparison:

[A photograph supposedly captures] unwilling facts caught willy-nilly, automatically, and all at once by the camera without any intervention of the photographer’s agency save for the quick gesture of raising the camera and clicking the shutter. This supposed automation stands in marked contrast to how Renaissance fresco painters must have painted the Passion cycles, with or without the aid of a team of workshop assistants: stroke by intentional stroke ....<sup>209</sup>

A painting is perceived as having an *intentional* relationship to the subject that appears in the painting. Because every brushstroke is intentionally placed onto the canvas, the resulting image is the direct result of the painter’s creative mental vision. In contrast, a photograph has but a *causal* relationship to its subject. Irrespective of how a photographer may perceive the subject to be photographed, the mechanics of the camera assure that the resulting im-

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<sup>207</sup> Dawn M. Wilson, *Facing the Camera: Self-Portraits of Photographers as Artists*, J. OF AESTHETICS & ART CRITICISM 55 (2012).

<sup>208</sup> Burrow-Giles’s Brief, *supra* note 14, at 10.

<sup>209</sup> Carol Armstrong, *Automatism and Agency Intertwined: A Spectrum of Photographic Intentionality*, 38 CRITICAL INQUIRY 705, 706–07 (2012).

age “is causally determined by the photographed scene, rather than intentionally determined by the photographer.”<sup>210</sup>

In thinking about photography, art theorists have recently challenged the supposed opposition between intentionality and causality and, in so doing, have questioned whether the mechanical nature of the camera necessarily diminishes the creativity of the photograph. Costello and Phillips explain:

The intuition that the photographic process is in some sense automatic is supposed to imply that the process takes place independently of human agency. It is *possible* for a photograph to be produced “automatically”—if, say, a curtain blown by the wind knocks a Polaroid camera onto the floor and trips the shutter. The process in cases of “accidental photographs” seems automatic precisely because it occurs without any human intervention or action: if any human agency were involved, the process would be only partly automatic. However, treating “automatism” and “agency” in general as a zero-sum opposition is incoherent.<sup>211</sup>

The cultural and legal attacks on photographic originality based on automatism are the direct result of investing overwhelming importance in a single act—clicking the camera’s shutter button. But why should this act alone be the only act of significance to determining whether a photograph is original? Expanding the time frame surrounding the moment of snapping the picture reveals a much broader range of choices and actions that impact the image’s creativity. In fact, art theorists locate such creativity in the very same acts on which courts historically have relied to ground photographic originality. For example, Carol Armstrong notes that a photographer maintains control over

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<sup>210</sup> Costello & Lopes, *supra* note 44, at 2; *see also* Scott Walden, *Objectivity in Photography*, 45 BRIT. J. OF AESTHETICS 258, 259 (2005) (“A photographer who is hallucinating that a red apple is green will nonetheless produce an image that depicts the apple as red. The exclusion of the photographer’s mental states renders photographs objective . . .”).

<sup>211</sup> Costello & Phillips, *supra* note 46, at 15.

the selection and arrangement of subject matter, lighting, framing, depth of field, width of aperture, speed of film and shutter, choice of lens, and positioning of the camera—to which can be added the many developing, cropping, and printing choices that must then be made, not to mention captioning, text, and other kinds of contextualization—as determining the meanings that a viewer of the image would take away from it.<sup>212</sup>

At the same time, scholars point out that, because an artist's painting a canvas involves rote brush movements learned over many years, the caricatured vision that a painter's every brushstroke is intentional and mediated through the artist's mind is subject to serious challenge.<sup>213</sup>

Perhaps the strongest response to the attack on photographic originality based on automatism is that it is the element of chance—the giving up of total control over the final image—that embodies what is most unique to photography as an art form. “[T]here is something within the photographic itself that calls for notions of the automatic, the arbitrary and the unwilled, the accidental and the random, chance and contingency, more than other media such as painting.”<sup>214</sup> Were copyright law to insist on total control as a necessary indicium of originality, it would be at odds with the contemporary art world's embracing the creative potential of chance in photography. Costello and Iverson observe: “An adequate conception of photographic art should provide scope for both highly skilled photographic practices that follow in the tradition of the fine arts, and for chance-inflected practices that aspire, by

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<sup>212</sup> Armstrong, *supra* note 209, at 707–08.

<sup>213</sup> *Id.* at 710–11 (“[T]he paintbrush has its own automatism, and no author of a painting is fully in conscious control of everything he or she does with that brush. . . . [T]he intentionality of the process of painting . . . can be seen to be riven with the obduracy of materials and the mechanicalness of applying stroke after stroke to the canvas in a learned routine become second nature. It is surely a different process from the decision making of the street photographer—more tactile than purely optical—but not because it is all agency and no automatism.”).

<sup>214</sup> *Id.* at 706.

means of the camera's automaticity, to short-circuit artistic convention and habits of mind alike."<sup>215</sup>

*B. Verisimilitude—A Photograph Is Not a Fact*

We come to the major argument that contemporary legal critics level against photographic originality: most photographs are uncreative *facts* that run afoul of the fundamental tenet that copyright law protects only creative expression, not facts or ideas.<sup>216</sup>

This argument is neither new nor unique to legal critics. Based on the image's verisimilitude—its accuracy and utter truthfulness—mid-nineteenth century critics questioned whether a photograph could be considered fine art. For example, in 1859, art critic Francis Frith claimed that photography was “. . . too truthful. It insists upon giving us ‘the truth, the whole truth, and nothing but the truth.’”<sup>217</sup> Professor Justin Hughes argues that little has changed in 150 years: “This understanding of photographs as simple conveyors of truth is still very much alive, not just in our grocery store tabloids (yes, that’s what she looks like without make-

<sup>215</sup> Costello & Iverson, *supra* note 35, at 693.

<sup>216</sup> See, e.g., *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (“This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works.”). Some courts and commentators have questioned whether copyright law’s distinction between fact and expression even makes sense when applied to graphic works. See, e.g., *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005). Noting that “[i]t is true that an axiom of copyright law is that copyright does not protect ‘ideas,’ only their expression,” the court continues:

In the visual arts, the 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.

*Id.* at 458. See also *id.* at 461 (“In the context of photography, the idea/expression distinction is not useful or relevant.”); see also Teresa M. Bruce, *In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography*, 115 W. VA. L. REV. 93, 97, 127 (2012) (“In fact, a photograph’s facts and expression are, arguably, inseparably wed. . . . For photographic works, especially straight photographs, the problem of untangling facts and expression is particularly thorny.”).

<sup>217</sup> Frith, *supra* note 11, at 72, in *MARIEN PHOTOGRAPHY*, *supra* note 2, at 77.

up), but also in much of twentieth century intellectual discourse on photography.”<sup>218</sup>

Looking to the photograph’s “fact bearing capacity,”<sup>219</sup> “information laden nature,”<sup>220</sup> and “fact-recording nature,”<sup>221</sup> Hughes launches a head-on assault on photographic originality. He concludes that “a large percentage of the world’s photographs are likely not protected by American copyright law because the images lack even a modicum of creativity. . . . [W]e have probably already crossed a threshold beyond which most of the world’s photographic images are not truly protected by copyright.”<sup>222</sup> Because Hughes is the most articulate skeptic who challenges photographic originality based on the factual nature of photographs, I will focus on his arguments.

For Hughes, most photographs fail to satisfy *Feist*’s minimal creativity criterion because they merely capture a “preexisting reality.”<sup>223</sup> Hughes analogizes photographs to databases and, as such, argues that they are entitled at most to thin protection for the selection and arrangement of the facts that appear in the image.<sup>224</sup>

Hughes grants that a few photographs are entitled to full copyright protection as original creative art works. In the spirit of *Burrow-Giles*, he would extend protection to images that result from the photographer’s “arranging the tableau.”<sup>225</sup> “[C]reating the scene or subject captured in the photograph, should be the first category of originality in a photograph because it occurs before any photographic processes and is independent of any decisions concerning photographic equipment. . . . [C]omposing and posing can form a significant basis for copyright.”<sup>226</sup>

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<sup>218</sup> Hughes, *supra* note 15, at 344.

<sup>219</sup> *Id.* at 348.

<sup>220</sup> *Id.* at 349.

<sup>221</sup> *Id.* at 355.

<sup>222</sup> *Id.* at 374.

<sup>223</sup> *Id.* at 361.

<sup>224</sup> *See, e.g., id.* at 350 (“Seeing the parallel between photographs and databases has great dividends for those working in copyright law. It is no accident that the strongest, most stable bases for copyright protection of a photograph are *selection* and *arrangement*—the *Feist* foundation for copyright in compilations of data.”).

<sup>225</sup> *Id.* at 412.

<sup>226</sup> *Id.* at 402.

With respect to the vast majority of photographs that merely capture an “independent reality,” however, Hughes argues that photography is being used only for a “naïve or descriptive function,”<sup>227</sup> not a creative one. There is “an insufficient ‘trace of the personal vision of whoever is behind the camera’” for such images to be considered original.<sup>228</sup>

Hughes’s arguments echo in important respects those of art theorist Roger Scruton. In a seminal work published in 1983,<sup>229</sup> Scruton asserts that, because of the mechanical nature of the technology, any aesthetic interest in a photograph “appl[ies] to features of the object photographed, not to features of the photograph itself. . . . Photographs may serve as conduits for aesthetic interest, but they cannot be objects of aesthetic interest in their own right . . . .”<sup>230</sup> Scruton argues that “if one finds a photograph beautiful, it is because one finds something beautiful in its subject.”<sup>231</sup> In a similar vein, Hughes believes that the vast majority of photographs merely document factual information about their content. Most photographs *qua* photographs have no aesthetic value that is worthy of copyright protection.

The core of Hughes’s argument that most photographs are uncreative facts unworthy of copyright protection is encapsulated in the following statement: “It is important to recognize that where the content of the photograph has an independent reality, and the photographer seeks only to achieve and does in fact achieve an accurate representation of that independent reality, there is a good chance that the photograph has no copyright protection at all.”<sup>232</sup>

I will respond to Professor Hughes by arguing first that the *content* of a photograph—what a viewer perceives in the image—rarely impacts photographic originality.<sup>233</sup> I will then argue that a photograph of any real world object that has an “independent reality” is

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<sup>227</sup> *Id.* at 367, 381.

<sup>228</sup> *Id.* at 381.

<sup>229</sup> Roger Scruton, *Photography and Representation*, in *THE AESTHETIC UNDERSTANDING: ESSAYS IN THE PHILOSOPHY OF ART AND CULTURE* 102 (1983).

<sup>230</sup> Dominic McIver Lopes, *The Aesthetics of Photographic Transparency*, 112 *MIND* 433, 435 (2003) (discussing Scruton’s theory of photography).

<sup>231</sup> Scruton, *supra* note 229, at 114.

<sup>232</sup> Hughes, *supra* note 15, at 374.

<sup>233</sup> *See infra* Part III.B.1.

no more a fact than a painting of the same object.<sup>234</sup> I will then suggest that, *contra* Hughes and Scruton, a photograph of a real world object—“an independent reality”—can hold an aesthetic interest independent of any aesthetic interest in the actual object itself.<sup>235</sup> Finally, I will suggest that a photograph’s accuracy does not detract from its creativity for purposes of photographic originality.<sup>236</sup>

### 1. Attacking a Photograph’s Copyrightability Based on the Image’s Content Locates Originality in the Wrong Place

I return to this Article’s fundamental premise: a photograph is a depiction with two folds, the first relating to the image’s surface design markings and the second relating to the content a viewer perceives in the image. Photographic originality inheres primarily in the first fold. What is perceived in the image, its content, rarely impacts copyright originality.

Hughes claims that, because their content “has an independent reality,” most photographs are mere facts unworthy of copyright protection.<sup>237</sup> But focusing on a photograph’s content—the second fold of depiction—locates copyright originality in the wrong place. That argument ignores entirely the importance of a photograph’s surface design markings to assessing originality.

Given Hughes’s focus on a photograph’s content, it is clear why he limits copyright protection to instances in which the photographer stages the tableau that a viewer perceives in the image. Those are the rare instances in which the second fold of depiction affirmatively impacts originality. But overlooking the photograph’s surface design markings and the photographer’s relationship to those markings keeps Hughes from appreciating the most important way in which a photographer infuses her image with creative personality.<sup>238</sup>

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<sup>234</sup> See *infra* Part III.B.2.

<sup>235</sup> See *infra* Part III.B.3.

<sup>236</sup> See *infra* Part III.B.4.

<sup>237</sup> Hughes, *supra* note 15, at 374.

<sup>238</sup> In a previous article, I offered an explanation as to why viewers tend to ignore a photograph’s surface design markings when looking at photographic reproductions of art. Turning to recent art and visual theory, I argued,



Analogizing a photograph to a factual database makes sense only if originality depends on the various objects that a viewer perceives in the image. It is those objects that are the supposed *facts* that the photographer selects and arranges in choosing a perspective from which to shoot the picture. In contrast, if what matters most to copyright originality are the photographer's creative choices and actions related to the placement of surface design markings, there *are* no facts to be selected and arranged. The analogy to a database collapses.

## 2. A Photograph is Not Always More Truthful Than a Painting

Perhaps Professor Hughes would challenge the underlying premise of this Article that one can separate the two folds of depiction when considering photographic originality. He might argue that, in contrast to other graphic artworks, photographs are unique in that they *always* capture truths about the world. A photograph's surface design markings are *inextricably* linked to the image's displaying the facts that a viewer perceives in a photograph. It is this attribute that dooms their creativity.

Art theorists cast this debate in terms of whether a photograph has an *epistemic advantage* over other graphic works. A photograph has an epistemic advantage if it is more likely than other graphic images to lead a viewer to true beliefs about the world.<sup>239</sup> Costello and Phillips note that it is often assumed that, if a photograph has such an advantage, it undermines its artistic nature: "At first blush photography's epistemic and aesthetic value certainly *seem* to be in competition: the more photography is said to be epistemically privileged, in virtue of being an objective, mind-independent record of the facts, the less capacity it seems to have for aesthetic value . . .

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a viewer tends to look *through* [a photograph] as though it were transparent, and see only the [object] depicted.... The viewer erases from his mind the fact that he is actually looking at a photograph with unique photographic attributes—erasing even the existence of the photographer responsible for that image, including the range of artistic judgments and choices that went into producing the photographic reproduction.

Kogan, *supra* note 194, at 447–48 (emphasis added).

<sup>239</sup> See Walden, *supra* note 210, at 261–62.

.”<sup>240</sup> This assumption underlies Professor Hughes’s argument that a photograph’s factual nature undermines its creative nature.

There is little doubt that viewers believe photographs to be more accurate depictions of the world than handmade images such as paintings. This is clearly reflected in the courtroom where a photograph of a crime scene carries greater weight than a police sketcher’s rendering of the same scene. In fact, most photographs *do* have an epistemic advantage over most handmade images. But is it the case that photographs are *always* more truthful—more factual—than handmade images, and thereby inherently less creative?

The answer is no.<sup>241</sup>

The fact that, as a result of the technology’s mechanical nature, we always see some real world object through the photograph (the attribute that Dominic Lopes describes as a photograph’s “transparency”)<sup>242</sup> does not equate to the assertion that every photograph is factually accurate. Lopes explains:

Nor should the claim that photographs are transparent be confused with a claim about their accuracy. A photograph is necessarily accurate in the sense that it carries information by means of a causal process. In another sense, a photograph is inaccurate, since it may cause or dispose one to have false beliefs about the objects photographed. A colour photograph of a red apple carries information about the apple’s redness, though it may carry the information by having a colour indistinguishable from that of an orange seen in ordinary light, with the re-

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<sup>240</sup> Costello & Phillips, *supra* note 46, at 2.

<sup>241</sup> Philosopher Barbara Savedoff explains:

In truth, photographs can be far from objective in how they present a subject; the photographer’s choice of camera angle, lighting, and framing all influence the way in which the subject will be seen. Furthermore, the characteristics of the medium itself—its two-dimensionality, the delimitation of its image, the use of black and white—all contribute to a divergence between what we see in a photograph and what we would have seen in person. Nevertheless, our awareness of all these factors does not change the way we see photographs—as having a special connection to reality.

BARBARA SAVEDOFF, *TRANSFORMING IMAGES* 87 (2000).

<sup>242</sup> Lopes, *supra* note 188, at 438. (“To say that photographs are transparent is to say that we see through them.”).

sult that we are liable to believe falsely that the apple is orange in colour.<sup>243</sup>

Other ways in which a photograph may inaccurately depict an object or scene include: the photographer may choose to use a fish-eye or wide-angle lens that distorts the image; the photographer may choose to use a colored filter that distorts the actual color of the image's subject matter; the photographer may choose to use dramatic lighting to illuminate the subject matter, creating shadows or bright areas that distort appearances; the photographer may choose to take the photograph from an unusual angle that makes it difficult to gain accurate information about the image's subject matter; the photograph may be taken from an airplane, providing little information to the viewer about the subject matter; the photograph may be taken during a snowstorm, obscuring and distorting much of the subject matter's detail. Any of these choices by the photographer decreases the facticity of the photograph—the truthfulness of the information conveyed to a viewer about the content of the image.<sup>244</sup>

In sum, though photographs are generally a more reliable source of accurate information about the world than other graphic images, this is not always or inevitably the case. In other words, there is no necessary connection between photography and truth. On occasion, a photograph is not a *fact* in the sense that Hughes suggests. It can lead a viewer to create false beliefs about the world. In contrast, some handmade images can lead a viewer to develop more truthful beliefs than a photograph of the same subject matter. Examples include drawings of birds by John James Audubon<sup>245</sup> or

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<sup>243</sup> *Id.* at 440.

<sup>244</sup> Once one moves beyond pre-shutter choices to post-shutter manipulation—either in the darkroom or on a computer—the seeming inevitable accuracy of the photograph is cast into further doubt. Were the photographer to use the wrong mix of chemicals in the dark room, to crop the image in a strange way, or to Photoshop the image, obviously the facticity of the photograph would be severely compromised. Scott Walden recounts the case of a *Los Angeles Times* photojournalist who was summarily fired after admitting to digitally combining two images into a single photograph for the front page of the newspaper. Scott Walden, *Truth in Photography*, in PHOTOGRAPHY AND PHILOSOPHY: ESSAYS ON THE PENCIL OF NATURE 91 (Scott Walden ed., 2008).

<sup>245</sup> John James Audubon (1785–1851) was a preeminent wildlife artist for much of the early nineteenth century. Born in Saint Domingue (now Haiti), he was sent to the United States at eighteen, settling in Pennsylvania, where he hunted, studied, and drew birds.

paintings of elevated highways in New York City by photorealist painter Rackstraw Downes.<sup>246</sup> In both instances, because of the distorting effect of shadow, lighting, etc., few photographs capture the exactitude of detail that appears in such handmade images.

Few would claim that a photorealist painting by Downes is unoriginal because it is an uncreative “fact.” A photograph of the same subject matter is no more a fact than the painting. Both are depictions. As such, if either is original it is because of the artist’s creative choices and actions in placing design markings on the picture’s surface—not because the depiction is or is not a fact.

### 3. Point-and-Shoot Photographs of Real World Objects Can Possess Unique Aesthetic Interest Worthy of Copyright Protection

Echoing arguments of art theorist Roger Scruton,<sup>247</sup> Justin Hughes argues that a photograph that merely portrays an “independent reality” has no aesthetic value worthy of copyright protection. The function of such an image is purely “naïve or descriptive”<sup>248</sup> and therefore there is “an insufficient ‘trace of the personal vision of whoever is behind the camera’ for us to grant copyright under the standards in United States and European copyright law.”<sup>249</sup>

This argument assumes that seeing a real world object in a photograph offers no aesthetic value above and beyond seeing that same object face-to-face. The “naïve or descriptive” photograph is

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*John James Audubon*, NAT’L AUDUBON SOC’Y, <http://www.audubon.org/content/john-james-audubon> (last visited Apr. 22, 2015).

<sup>246</sup> Rackstraw Downes (born 1939) is a British-born realist painter and author. His oil paintings, depicting industry and the environment, are notable for meticulous detail accumulated during months of *en plein air* sessions and elongated compositions with complex perspective. *Biographical Summary—Rackstraw Downes*, CROWN POINT PRESS, <http://www.crownpoint.com/artists/rackstraw-downes/biographical-summary> (last visited Feb. 22, 2015).

<sup>247</sup> Scruton, *supra* note 229 and accompanying text.

<sup>248</sup> Hughes, *supra* note 15, at 381 (“[I]t seems that the claim that many—perhaps most—of the world’s photographs are completely unprotected by copyright arises simply because ‘[i]n most uses of the camera, the photograph’s naïve or descriptive function is paramount.’” (quoting SONTAG, *supra* note 19, at 132–33)).

<sup>249</sup> *Id.*

purely documentary and offers no aesthetic interest independent of an aesthetic interest in the object documented.

This argument is based on a flawed assumption. As Dominic Lopes notes, “[s]eeing an object through a photograph is not identical to seeing it face-to-face.”<sup>250</sup> In fact, seeing an object through a photograph may “arouse an interest not satisfied by seeing the same object face-to-face.”<sup>251</sup> What is the unique aesthetic interest that can be aroused by seeing an object through a photograph that is above and beyond seeing the object face-to-face?

Lopes suggests five factors related to seeing an object through a photograph that potentially contribute aesthetic value over and above seeing that same object face-to-face:

1. “[P]hotographs capture their objects fixed at a moment in time. . . . Rudolf Arnheim writes that in photographs ‘the rapid course of events is found to contain hidden moments which, when isolated and fixed, reveal new and different meanings.’”<sup>252</sup>
2. Because the actual object seen in the photograph is generally absent when viewing the image, “photographic seeing through bridges distances, either spatial or temporal. . . . Obviously, nostalgia for an object cannot be evoked by seeing it face-to-face.”<sup>253</sup>
3. Seeing through a photograph “isolates the photographed object from the context it would normally be seen to inhabit. With change of context comes a change in the properties the object itself may be seen to have. . . . Seeing through de-contextualizes.”<sup>254</sup>
4. “[T]he presence of a camera is an essential part of the context in which we see an object photographically—what we see through a photograph is always before a camera. Moreover, the camera sometimes intrudes upon or disturbs what

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<sup>250</sup> Lopes, *supra* note 188, at 441.

<sup>251</sup> *Id.* at 442.

<sup>252</sup> *Id.* at 442–43. (quoting Rudolf Arnheim, *Splendor and Misery of the Photographer*, in *NEW ESSAYS IN THE PSYCHOLOGY OF ART* 118 (1986)).

<sup>253</sup> *Id.* at 443.

<sup>254</sup> *Id.*

it photographs, especially when it is a person, thereby showing it in a way inaccessible to the naked eye.”<sup>255</sup>

5. “[S]eeing photographs is typically twofold in the sense that it melds seeing the photographed object and its properties with seeing the photograph itself and its properties.... Photographic seeing through is always simultaneous with plain vanilla seeing of a photograph.”<sup>256</sup>

He concludes:

An aesthetic interest in a photograph is properly an interest in the photograph itself, not in some other object. Since photographs are transparent, an interest in a photograph as a photograph is an interest in it as a vehicle for seeing through it to the photographed scene. This is not an interest limited to the scene itself; it is an interest in the scene as it is seen through the photograph. Thus our aesthetic interest in a photograph . . . is an interest in the photograph as it enables seeing through. It is an interest that photographs can foster and satisfy and face-to face seeing cannot.<sup>257</sup>

For Hughes, ordinary point-and-shoot photographs are aesthetically empty vessels useful only for carrying information about objects in the world. By suggesting that there is unique aesthetic value to be gained from viewing a real world object through a photograph, value unavailable from simply viewing that object face-to-face, Lopes’s arguments go a long way toward undermining Hughes’s argument.

Of course, given *Bleistein*’s admonition against courts making aesthetic judgments,<sup>258</sup> Lopes’s suggestion that unique aesthetic value can be derived from viewing objects through photographs is

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<sup>255</sup> *Id.*

<sup>256</sup> Lopes suggests that these five features of seeing an object through a photograph lend themselves to supporting what he calls “documentary aesthetics”: “What may be called a documentary aesthetics has two dimensions. One measures the authenticity, accuracy or truthfulness of a photograph; the other measures its promotion of revelatory, transformative or defamiliarizing seeing.” *Id.* at 445

<sup>257</sup> *Id.*

<sup>258</sup> *See supra* note 183 and accompanying text.

entirely beside the point when it comes to determining copyright originality. Under current doctrine, such determinations are founded only in the photographer's pre-shutter choices and actions.<sup>259</sup> Given current copyright law's utter lack of criteria for assessing the aesthetic value of a photograph, this Article seconds the current approach.<sup>260</sup>

Nonetheless, for those (like Hughes) who believe that the bar for copyright originality should be raised,<sup>261</sup> Lopes's analysis offers an intriguing glimpse into how this might be accomplished. To begin with, were the law to base determinations of originality on aesthetic quality,<sup>262</sup> criteria for such determinations would necessarily be unique to each genre of artwork. What makes a photograph aesthetically valuable is fundamentally different from what makes a painting aesthetically valuable, and such differences would have to be integrated into a new doctrine of originality

As an example of how Lopes's factors might aid in assessing a photograph's originality, consider Thomas Mangelsen's well-known photograph, *Catch of the Day*, which depicts a salmon jumping into the mouth of a brown bear in Katmai National Park, Alaska. In *Mannion v. Coors Brewing Co.*,<sup>263</sup> Judge Lewis Kaplan suggests that this photograph is original by virtue of timing: "[A] person may create a worthwhile photograph by being at the right place at the right time."<sup>264</sup> In so doing, he bases originality on the photographer's choices and actions, not on aesthetic attributes of the photograph.

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<sup>259</sup> See *supra* note 185 and accompanying text.

<sup>260</sup> See Subotnik, *supra* note 15, at 1490 ("[A] definitive account of originality as a legal construct is not possible and that, as a result, the current low threshold for originality should be maintained. Under this analysis, most photographs, so long as they comply with certain requirements, should be granted protection, at the very least, against exact copying (for example, through digital copying and pasting).").

<sup>261</sup> See also Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 457-58 (2009) (arguing in favor of heightening the creativity requirement for copyright protection).

<sup>262</sup> See Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) (arguing that, despite *Bleistein's* admonition, aesthetic judgments regularly enter into legal decisionmaking); Alfred C. Yen, *Copyright Theory and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998) (arguing that "judges should be conscious of aesthetics when deciding copyright cases").

<sup>263</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 453 (2005).

<sup>264</sup> *Id.* (quoting 1 LADDIE, *supra* note 154, § 4.57, p. 229).

Lopes's list of factors offers one possible approach for recognizing the attributes of Mangelsen's photograph that make it aesthetically interesting. In accord with Lopes's first factor, by isolating a fixed moment in time, the photograph reveals "new and different meanings" that a viewer watching the live event would inevitably miss—that very moment the fish enters the mouth of a bear. Similarly, along the lines of Lopes's third factor, the photograph decontextualizes the bear, the fish, and the water from their normal movements in time and space and, in so doing, presents an other-worldly frozen image divorced from any imaginable daily experience.

But, alas, we live in a post-*Bleistein* world. Hughes's and the *Mannion* court's protestations to the contrary notwithstanding,<sup>265</sup> modern courts continue to make determinations of photographic originality based solely on choices and actions of the photographer, not on aesthetic attributes of the photograph. Nonetheless, introducing Lopes's factors related to identifying such attributes points to an important lesson. Were copyright law to abandon *Bleistein*'s admonition against aesthetic judgments, determinations of photographic originality would not turn on whether an image is a "fact" or portrays an "independent reality." Rather, such determinations would look to attributes that make particular photographs worthy of aesthetic contemplation. Included within such original images would be point-and-shoot photographs of real world objects as well as photographs of constructed tableaux. The facticity of an image would be irrelevant to a new jurisprudence of photographic originality.

#### 4. Photographic Accuracy Is a Creative Choice

Professor Hughes further challenges photographic originality because most photographs portray only an "accurate representation of [an] independent reality."<sup>266</sup> He is not alone in this challenge,<sup>267</sup> which is grounded in the following assumption: Taking

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<sup>265</sup> See *supra* note 184.

<sup>266</sup> Hughes, *supra* note 15, at 374.

<sup>267</sup> Professor Daniel Gervais similarly argues that "a photographer trying to take a technically perfect picture is not making creative choices." Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 956 (2002).



accurate photographs of real world objects is simply what cameras do by default—there is “no room for creative choices.”<sup>268</sup> As such, the act of pointing and shooting a camera is devoid of even the minimal creativity required for copyright originality. It is only when a photographer actively poses a scene or chooses to move away from mere accuracy through creative camera adjustments or choice of perspective that a photograph enters the realm of originality.<sup>269</sup>

I want to step back into history to challenge the assumption that photographic accuracy is inherently devoid of minimal creativity. Beginning in the late nineteenth century until the 1920s, a photographic movement known as “Pictorialism” became popular among professional and amateur photographers alike, a movement that encouraged the “moving away from faithful depiction toward more evocative and expressive photographs.”<sup>270</sup> In part a reaction against what was viewed as vulgar commercial photography,

Pictorialist photographers favored scenes infused with fog and shadows. In contrast to their simple subjects, they strove for tonal complexity, choosing techniques such as platinum printing, which yielded abundant soft, middle-gray tones.... Their results were in obvious visual opposition to the sharp black-and-white contrasts of the commercial print. Pictorialist photographs were frequently printed on textured paper, unlike the glossy surface of commercial photographs ....<sup>271</sup>

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<sup>268</sup> *Id.* at 978.

<sup>269</sup> Professors Hughes and Gervais both base their skepticism of the originality of accurate photography on the court’s decision in *Bridgeman Art Library v. Corel*, 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998). Judge Kaplan noted,

[O]ne need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. That is not to say such a feat is trivial, simply not original.

*Id.* See Gervais, *supra* note 267, at 979–80; Hughes, *supra* note 15, at 374–75. I have challenged the reasoning of *Bridgeman* in another article. See Kogan, *supra* note 194, at 471.

<sup>270</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at 170 (setting forth the history of Pictorialism).

<sup>271</sup> *Id.*

Responding to the perceived automatism of the camera, “[o]ne Pictorialist asserted that ‘the photographer is not helpless before the mechanical means at his disposal. He can master them as he may choose, and he can make the lens see with his eyes, can make the plate receive his impressions.’”<sup>272</sup> In light of broad interest in Pictorialism, “[c]ommerical producers rushed to make soft-focus lenses and textured photographic papers for amateur use.”<sup>273</sup>

Given the popularity of Pictorialism at the turn of the twentieth century, a photographer wishing to purchase a camera would have to *choose* whether to purchase one with a non-distortive, accurate lens or one with a soft-focus lens. I suggest that *either* decision would properly be described as a creative choice, one that would significantly impact the appearance of the resulting images.

Little has changed today. A photographer’s decision as to the type of image to create—accurate and non-distorted, or artsy—begins at the moment a photographer purchases a camera and one or more lenses. Though most photographers purchase conventional lenses that produce accurate photographs, some purchase fish-eye, wide-angle or other lenses that in some way distort the accuracy of the depiction. To argue that a photographer’s choice to use a distortive lens satisfies *Feist*’s minimal creativity standard,<sup>274</sup> while the choice to use a non-distortive, conventional lens does not, seems entirely arbitrary. Rather, a photographer’s opting for one type of lens rather than another directly impacts how design markings will be laid down on the surface of the image, the issue most relevant to copyright originality. Choosing to shoot an accurate photograph is as much a choice of photographic style as choosing to shoot a distorted picture.<sup>275</sup>

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<sup>272</sup> *Id.* (internal citations omitted).

<sup>273</sup> *Id.* at 171.

<sup>274</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (explaining that the “minimal degree of creativity” standard is “extremely low; even a slight amount will suffice”).

<sup>275</sup> See MARIEN, PHOTOGRAPHY, *supra* note 2, at xiv (“Because photography was thought not to have an inherent style of its own, it quickly became synonymous with the making and collecting of objective images. Yet it is important to remember that the absence of style—stylelessness—is a style in its own right. When it appears, it points to the expectations of the photographer and of the image’s anticipated audiences.”).

Imagine the following: An amateur photographer, having studied Pictorialist photography in an art history class, decides to take photographs of Buckingham Palace on a foggy night. She begins by shooting a very out-of-focus image of the building. She then takes a series of photographs in which she slowly brings the building into focus. In the last photograph of the series, the building is in sharp focus and a viewer can readily detect minute details of the structure. Is the final photograph, “an accurate representation of [an] independent reality,”<sup>276</sup> entitled to less copyright protection than the out-of-focus photographs? Why is that photograph any less the result of the photographer’s creative decision-making than the earlier images?

Perhaps at the end of the day, the brunt of Hughes’s attack is being leveled at the vast majority of today’s photographs taken using autofocus point-and-shoot cameras. In such cases, a photographer’s opportunities to manipulate the camera are greatly restricted and, accordingly, it could be argued that such images slip beneath *Feist*’s threshold of minimal creativity. In fact, the photographer behind a point-and-shoot camera *does* make certain, albeit limited, creative choices. To begin with, she chooses to express herself using a camera rather than, say, a paintbrush.<sup>277</sup> Moreover, she chooses a point-and-shoot camera knowing that it will take accurate, rather than distorted, images. Having done so, she then chooses an object or scene at which to point the camera, and then chooses the moment at which to depress the shutter button. Why is a point-and-shoot photographer any less creative than, say, an untrained weekend painter who attempts to paint landscapes?

Assuming that courts continue to obey *Bleistein*’s admonition against evaluating aesthetic quality, raising the bar for photographic originality would require that courts identify which pre-shutter choices and actions are, alone or in combination, creative enough to satisfy *Feist*’s minimal creativity requirement. In all likelihood there would be unanimous agreement that a photographer’s acts of

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<sup>276</sup> Hughes, *supra* note 15, at 374.

<sup>277</sup> Hughes dismisses amateur photographers as inherently less creative than amateurs engaging in other arts: “Photography . . . allows people untalented in drawing or painting to create visual images they might otherwise imagine but be unable to create.” Hughes, *supra* note 15, at 368.

posing and staging the tableau carry the image over that threshold. But how should courts judge the relevance to originality of the following camera-related choices by a photographer?

- Choosing a distorting fish-eye lens to achieve a special effect;
- Adjusting a telephoto lens to make the subject matter appear closer;
- Adjusting a conventional lens to take an out-of-focus picture;
- Adjusting a conventional lens to take an in-focus picture;
- Using a pink filter over the lens;
- Adjusting the camera's exposure setting to take an over-exposed shot;
- Waiting for a dog to walk in front of the camera's field of vision before clicking the shutter button;
- Choosing to point the camera at one statue rather than another; or
- Choosing an unconventional angle from which to shoot a photograph.

I obviously could go on and on. The point is that trying to identify which pre-shutter choices and actions are or are not creative enough to satisfy *Feist*'s minimal creativity requirement would be an exercise in arbitrariness.

Perhaps we should focus, instead, on the mental profile of a photographer rather than her pre-shutter actions. Hughes suggests that copyright protection might be extended to photographs that merely capture a "preexisting reality" if they are the result of a photographer's "intentional program"<sup>278</sup> involving a photograph-

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<sup>278</sup> Hughes, *supra* note 15, at 416 ("If we eliminate human agency from the preexisting subject of the photograph so that we now have a photograph of something that is natural or random, then we may find another important distinction between photographs that capture slices of reality as part of an 'intentional program' and photographs that are not part of an intentional program. By intentional program, I mean the expeditions of Ansel Adams, the nighttime excursions of Brassai, every time Mannie Garcia goes out on assignment, and every occasion when a photographer wanders around a city in search of interesting imagery.").

er's exerting a "deliberate effort to be creative."<sup>279</sup> But how is a court to determine whether a photographer had the appropriate mindset to deem her resulting image copyright protectable? Many an amateur photographer on vacation lifts her camera with a clear intention to shoot a beautiful and novel photograph of Niagara Falls—and, on occasion, some succeed. As Mary Warner Marien observes, "aesthetic experimentation and self-expression are not limited to art photography, but encompass all genres, including amateur and casual photography, as evidenced on the flourishing Internet-based camera-phone galleries."<sup>280</sup> Looking to a photographer's intentions to ground the originality of un-staged photographs is also an exercise in arbitrariness.

In the end, for lack of workable and non-arbitrary standards, photographic copyrightability should remain open to all photographs taken by a camera behind which is a warm body that can infuse a modicum of personality into the resulting image.<sup>281</sup>

#### CONCLUSION

From the moment that the Supreme Court first considered whether photographs merit copyright protection in 1884, the camera's automatism and the image's verisimilitude—the enigmatic features of photography—have placed roadblocks in the way of understanding how a photograph can be considered a creative artwork. Looking to these two features of the technology, contemporary legal skeptics claim that most photographs are undeserving of copyright protection because they inevitably capture uncreative facts—in Professor Hughes's words, "the automated representation of reality."<sup>282</sup>

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<sup>279</sup> *Id.* at 400–01.

<sup>280</sup> MARIEN, PHOTOGRAPHY, *supra* note 2, at xv.

<sup>281</sup> I agree with Professor Hughes that photographs taken by surveillance cameras, satellite systems, New York taxicab cameras, and similar devices undirected by a human personality should not be protected by copyright law. *See, e.g.*, Hughes, *supra* note 15, at 380. I also agree that photographs accidentally taken by a monkey are probably not protected by copyright law. *Id.* at 373–74.

<sup>282</sup> Hughes, *supra* note 15, at 343.

This Article proposes that understanding a photograph as a depiction with two folds<sup>283</sup> can shed considerable light on the copyrightability of such images and go a long way toward defusing the enigma of photography as it impacts the law. A photograph's originality inheres primarily in a photographer's choices and actions that result in the placement of surface design markings, the first fold of depiction. In contrast, the object that a viewer perceives in the image, depiction's second fold, rarely impacts originality.

Accordingly, the claim of legal skeptics that most photographs are uncreative facts locates photographic originality in the wrong place—in what a viewer sees in the image, depiction's second fold. If, instead, originality is understood as based primarily on the photographer's creative choices and actions in placing surface design markings (depiction's first fold), the attack on a photograph's originality based on its inevitably being an uncreative fact collapses. This Article also argues that, because it lacks workable criteria for judging the aesthetic value of photographs, copyright law should continue to view expansively and generously the range of a photographer's creative choices and actions that can ground photographic originality.

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<sup>283</sup> See generally WOLLHEIM, *supra* note 26, at 213–14.