Rationalizing the Allocative/Distributive Relationship in Copyright

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RATIONALIZING THE
ALLOCATIVE/DISTRIBUTIVE
RELATIONSHIP IN COPYRIGHT

Jeffrey L. Harrison*

I. INTRODUCTION

The language of the 1976 Copyright Act providing protection of “original works of authorship” contains words that should and could very well mean something. After all, it is with these words that Congress permits individuals to create property and to internalize its benefits. One need not look very far to determine how trivial these requirements actually are. In Feist Publications, Inc. v. Rural Telephone Service Co., a 1991 case, Justice O’Connor addressed the issue of originality for a unanimous Court and described the requirement as “minimal,” “slight,” and satisfied by a “modicum of creativity.” The requirement of authorship has been similarly treated. Thus, in Community for Creative Non-Violence v. Reid, Justice Marshall tackled the concept of “author” with the pithy observation that an “author is the party who actually creates the work.”

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4. See id. at 345-46. The originality requirement can be seen as having two components. One is that the work not be copied from another. The other is that there be some element of creativity. This is an important distinction because a work that is not copied is copyrightable even if it turns out to be the same as an existing work. See id.; see also Russ VerSteeg, Rethinking Originality, 34 WM. & MARY L. REV. 801, 805-11 (1993).
5. Feist, 499 U.S. at 345-46.
7. Id. at 737; see also Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104-05 (2d Cir. 1951) (stating that individuals may be authors though they did not intend the outcome produced); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (defining author as

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What seems clear from the emptiness of these definitions is that the copyright system in the United States\(^8\) operates like a huge, publicly-supported lottery system. One enters this lottery for a pittance of creativity and rides the tide of the market toward financial success or failure. Anyone with a smattering of inventiveness can create and lay claim to a piece of "property" and fend off those with similarly wonderful or, more likely, cheesy ideas. Even the talented person may be tempted to engage in "satisficing"\(^9\) creativity. Like a lottery, the process is largely one of distributing the wealth generated by limited creativity rather than encouraging overall growth in wealth or cultural well-being.

What copyright law invites is a process similar to that taking place under conditions that economists call "monopolistic competition.\(^{10}\) Under a monopolistically competitive industry structure, large numbers of competitors sell goods or services for which substitutes are readily available. The distinctions among them are likely to be minor. In economics, this is the land of cheap and short-term thrills. Each competitor attempts to achieve some advantage over other competitors by virtue of relatively small differences. The differences can be minor and involve largely illusory distinctions, like more appealing colors on the label of a can of peas or the image portrayed through an ad campaign.\(^{11}\) The key is to exploit these small advantages without any real hope of achieving the level of market power associated with products or sellers offering goods for which there are few substitutes.\(^{12}\)

\(^{8}\) For some international comparison, see infra notes 76-78.

\(^{9}\) See Herbert A. Simon, Rational Decision Making in Business Organizations, 69 AM. ECON. REV. 493 (1979). Simon describes satisficing behavior like this: "[O]ne could postulate that the decision maker had formed some aspiration as to how good an alternative he should find. As soon as he discovered an alternative for choice meeting his level of aspiration, he would terminate the search and choose that alternative." id. at 503. On one hand, it seems unrealistic to believe that people have in mind the minimal standards of copyright law when engaged in creative activity. On the other hand, if the proposition is stated differently, it does not seem as farfetched. Thus, creative people might aim higher if the right to claim exclusive rights to their work hinged on this. In general, however, the notion of satisficing creative efforts would seem to fit better in the context of business sponsored work for hire. Here, the objective is hardly to be as creative as possible but to satisfy business goals.


\(^{11}\) Some small distinctions may be small, but not trivial like the location of a gas station on one corner of an intersection as opposed to another.

\(^{12}\) Monopolistic competition is discussed in greater detail at infra text accompanying notes 127-47.
In fact, in monopolistically competitive industries profits tend to be low because there is really no way to stem the tide of new entrants once one has found a new recipe or gimmick.\textsuperscript{13} Although it would be unfair to view all copyrighted works as falling into the mold of monopolistic competition, it is the position of this Article that the benefits of a regime of copyright law can be maintained while shedding at least some of the wastefulness of monopolistic competition.

Both copyright lottery and monopolistic competition are characterized by an emphasis on wealth-shifting over wealth-creation. In economic terms, this is the difference between distributive effects and allocative effects. Distributive issues arise when individuals struggle over how a certain amount of wealth is to be divided up. Allocative matters, on the other hand, concern the process of guiding resources into their most valued uses. There is a general sense in this country that our copyright law has a strong allocative emphasis. In fact, Article 1, Section 8 of the Constitution, which authorizes Congress to enact laws pertaining to copyright, reads that the power is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\textsuperscript{14} The end is to benefit the public. The means is to permit creative people to internalize the benefits of their efforts by limiting free riding.\textsuperscript{15} Thus, Justice Hughes wrote for the Supreme Court in the 1932 case, \emph{Fox Films Corp. v. Doyal},\textsuperscript{16} "[t]he sole interest of the United States ... in conferring [a copyright] lie[s] in the general benefits derived by the public from the labors of authors."\textsuperscript{17} Similarly, in 1948, in \emph{United States v. Paramount Pictures, Inc.},\textsuperscript{18} Justice Douglas expressed it as, "[t]he copyright law, like the patent statutes, makes reward to the [author] a secondary consideration."\textsuperscript{19} Finally in \emph{Eldred v. Ashcroft},\textsuperscript{20} decided last term, the Court assessed the rationality of a copyright term extension by reference to incentives for authors.\textsuperscript{21}

\begin{footnotes}
  \item[13] See \textsc{Samuelson & Nordhaus}, \textsl{supra} note 10, at 169-70.
  \item[14] U.S. Const. art.1, § 8, cl. 8.
  \item[15] Free riding occurs when producers are unable to capture, through consumption or sales, the benefits of their efforts. See \textsc{Jeffrey L. Harrison}, \textit{Law and Economics: Cases, Materials and Behavioral Perspectives} 68 (2002).
  \item[16] 286 U.S. 123 (1932).
  \item[17] \textit{Id}. at 127.
  \item[18] 334 U.S. 131 (1948).
  \item[19] \textit{Id}. at 158; \textit{see also} \textsc{Mazer v. Stein}, 347 U.S. 201, 219 (1954).
  \item[21] See id. at 214-17. The distinction, made most clearly by Justice Breyer in his dissent, is between "rewards" for authors and the "end" of social benefit. \textit{Id}. at 246-48 (Breyer, J., dissenting).
\end{footnotes}
Despite this consensus, the Copyright Act itself and judicial interpretations have forced American copyright law to be principally about distributive issues. Specifically, if one examines the Act, the vast majority of its provisions ranging from fair use to compulsory licensing are ultimately about distributive issues. In some respects this makes sense because when difficult distributive issues are resolved, beneficial allocative effects may flow automatically. Distributive battles, however, are almost always about the well-being of private parties, and they are not necessarily connected to ends that result in advancing a generalized societal goal. Whether accruing to the benefit of the public or not, these distribution-determining costs are largely absorbed by the public. Yet no one has suggested that in providing for the development of intellectual property, the Founding Fathers had in mind a public system for resolving disputes between similarly unimaginative people.

The importance of the distinction between allocative and distributive ends and the relevance of the Copyright Act and judicial interpretations can be understood by focusing on copyright law's requirements with respect to creativity and authorship. With respect to creativity, consider the example of Tom Clancy, the popular best-selling author. Without judging the quality of his work as "literature," it is a fact that the public anxiously awaits the latest Tom Clancy novel. Mr. Clancy would doubtless be less likely to write if others were permitted, as soon as his new offering were published, to copy and sell it to others without remitting a royalty fee to him. In short, in order for Tom Clancy to bring his considerable story-telling talents to the table he must be assured of a payoff. Copyright means that he gets the payoff by making it unlawful for others to immediately copy and sell his novels as their own.

Contrast Mr. Clancy with Sherry Manufacturing Co. v. Towel King of Florida, Inc., in which a manufacturer of beach towels claimed its copyrighted but typical palm-tree-with-island-and-water image was

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22. The costs of making these decisions is actually a cost of the copyright system itself. See infra Part II; see also William M. Landes, Copyright, Borrowed Images, and Appropriation Art: An Economic Approach, 9 GEO. MASON L. REV. 1, 7 (2000).

23. See, e.g., 17 U.S.C. § 107 (2000) (fair use limitations on exclusive rights to copyright); § 111(d) (requirement of compulsory license for secondary transmission of primary work); § 115 (requirement of compulsory license for the making and distributing of phonorecords).

24. In other instances, they may be a means to the end of advancing social welfare. See infra text accompanying notes 61-62.

25. It has also been argued that these minimal standards decrease the size of the public domain. See Ryan Littrell, Note, Toward a Stricter Originality Standard for Copyright Law, 43 B.C. L. REV. 193, 225-26 (2001); see also Niels B. Schaumann, An Artist's Privilege, 15 CARDOZO ARTS & ENT. L. J. 249, 249-54 (1997).

26. 753 F.2d 1565 (11th Cir. 1985).
copied by a competitor. The plaintiff had actually reproduced, with very slight variation, its "original" design from an unprotected image. It was in effect a derivative work. The defendant/competitor would be guilty of infringement if the derivative work itself was protected. The trial court held that it was. The appellate court reversed, finding that the changes from the older work to the new were too trivial to warrant protection. This generated a prolonged dispute over attorney's fees including another appeal. The catalyst for this entire exercise was the lack of a serious creativity requirement, a deficiency that leads to the reasonable belief that even a small change in an already trivial piece of artistry would entitle one to the property rights granted by copyright law.

It is hard not to see a case like this as anything other than pure loss. There is no specific demand for what was a generic tropical image on a beach towel. Far more importantly, there is no reason to conclude that, but for copyright law, there would be a shortage of cheesy beach towel designs. The capacity to create images agreeable to sun bathers is abundant. Like toothpicks and salt, beach towel images are commodities. They would likely exist without any copyright protection at all. Thus, copyright law does not give rise to beach towel art, but it does give rise to squabbles over the spoils of beach towel sales. Aside from the cost of solving the distributive question created by a standard-free system of copyright, there may be a more important loss. It seems likely that the current approach to creativity has the impact of "dumbing down" the level of creativity. Why take risks on efforts to be truly creative when,

27. See id. at 1565. By examining the reported opinion, most if not all readers would probably agree that any social or cultural benefit advanced by the towel design is difficult to identify.
28. See id. at 1566.
29. A derivative work is a work based on one or more preexisting works. See 17 U.S.C. § 101 (2000).
30. See 753 F.2d at 1568.
33. For a similar example of reasonable belief, see Gross v. Seligman, 212 F. 930 (2d Cir. 1914), and infra text accompanying notes 116-22. Eden Toys, Inc. v. Florelee Undergarment Co. 697 F.2d 27 (2d Cir. 1982) suggests that courts can be ambivalent and may send conflicting signals about the level of required creativity. In the space of a few pages, the court calls for "substantial, not merely trivial, originality," id. at 34 (quoting L. Batlin & Sons, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (en banc)), then "non-trivial contributions," 697 F.2d at 34, and finds the required level of originality in an artist's efforts to smooth the lines and make minor changes to a previously existing illustration, see id. at 34-35.
34. See infra Part III.A.1.
with only the slightest uninspired effort, one can create property? In short, the current standard may encourage satisficing creativity and underachievement.

The minimal standard is repeated, if not eliminated altogether, when it comes to the question of authorship. Take the example of two photographers. The first is Joel Meyerowitz, perhaps best known for his photos of Cape Cod cottages. Here is his answer to an interviewer's question about a change in his approach to photography:

At the beginning of the 1970s I had been seeking a high quality of description using Kodachrome 35mm, which was an extraordinary material in those days. However, I couldn't get what I wanted on a print—they had to be dye transfers and were too expensive. So there were a number of issues, mechanical and technical, that were interceding. I tried working with a medium-format camera in 1970—a 6 x 9 cm camera using color negative film—because just about that time I began making prints in my darkroom. But that camera was so slow that I began to lose the kind of image that I was making on the street. I decided, "If I'm going to put this camera on a tripod, I might as well put a big camera on a tripod, and get back all the description." Consequently I got an 8 x 10 and began to photograph.

Working with 35mm calls up a specific energy and the freedom of making a gesture with a camera. You hold a small camera in your hand, something happens in front of you, and click, you take a picture. A hand-held camera allows you to react in a split second. With an 8 x 10 camera your approach to things is much more meditative. The basic difference was one of mechanics at first. What you can do with a small camera in your hand you can't do with an 8 x 10 big box on a five-foot high tripod. But for me there was the need to bring one experience to bear on the other. I saw in the 35mm color a kind of quality of description that 35mm black and white didn't have. Something about the way Kodachrome II described things was so cohesive, grainless, smooth, creamy. The color itself added this extra dimension of description. A red coat in yellow sunlight and blue shadows didn't come out medium gray, it came out exciting and stimulating. I thought, "I want to describe that in my photographs too."

Contrast this with the case of Abraham Zapruder, a dressmaker and also an "author," who on November 22, 1963 attempted to film a motorcade carrying President Kennedy. There is no indication that

Zapruder planned for or anticipated that his movie camera would record the images it did. In contrast to Joel Meyerowitz, there was no preconception that could be linked to the images actually fixed by Zapruder. In essence, Zapruder became an author for copyright purposes by turning the camera on and making other trivial choices that were independent of what eventually gave value to his film. As in the case of creativity, the question is whether extending copyright protection to the Zapruder’s of the world has an allocative effect or simply a distributive effect. Put differently, would Zapruder-like “works” exist in the absence of copyright law? The answer is almost certainly yes. In these instances, and perhaps others, there was neither commercial intent nor the promise of the development of any skill or insight that public policy seeks to promote. The wealth from such happenstance is a pure windfall and simply opens the door to distributive battles.

This Article cuts against the grain of modern copyright law by making the case that a more substantive approach to the issues of creativity and authorship would lower costs, streamline the system, and raise the level of socially beneficial creativity. Increasing the creativity requirement is designed to curb what might be called “artistic product differentiation” that has no real impact on economic, cultural, and social development. Infusing an element of substance into authorship by requiring some level of preconception by authors would produce the same result. After all, except in the most unusual instances, when an author does not know until after the fact that he has “created” something, it is hard to make a case that an incentive to create played a role. Raising both of these standards would reduce costly, and perhaps chilling, distributive battles and properly focus copyright on the internalization of efforts that are more likely to advance the public interest by raising the level of creative contribution.
It is probably not realistic to expect these measures to be adopted in the near term. The internationalization of intellectual property law may have fueled something of a race to the bottom. In a system of essentially reciprocal copyright protection and in a time in which each country wants to claim for its citizens as much intellectual property as possible, the trend for standards is likely to be downward for some time. But just as the costs of minimal standards discussed here are part of the American system, these same costs will also become internationalized. Whether countries can agree to limit costs by clearing the underbrush of creativity remains to be seen.

Before addressing creativity and authorship directly, there are two preliminary steps. First, in Section II, I will elaborate on the allocative/distributive distinction and their interconnectedness. In Section III, I will focus on an enhanced creativity standard and argue that an elevated standard is unlikely to cause anything of value to be lost. I make the point that whatever loss we may feel in the form of less “commodity art” likely will be replaced by boosting the efforts of creative people to bring to the market works that would not otherwise exist. In this section, I also address concerns that greater judicial involvement may have an undesirable substantive impact by advancing one view of art or creativity over another. I turn to the matter of authorship in Section IV. Here the objective is to show how preconception is crucial to a system of copyright that places allocative interests ahead of others. In this context, it is important to keep in mind the distinction here between creativity and authorship. Even if a work passes the creativity test, the absence of critical elements of authorship would mean the work does not qualify for protection.

II. THE ALLOCATIVE/DISTRIBUTIVE DISTINCTION IN COPYRIGHT

I have already described how economists tend to divide issues into their distributive and allocative effects. Additional examples may be useful. The most basic one concerns the formation of a contract. If I sell my Silberstein watch to you it is a safe bet, in most instances, that I value it less than you do. Suppose the value to me is $4500 and the value to you is $5500. The exchange of the watch is said to be allocatively efficient because it winds up in the hands of a person who places greater

of different levels of the breadth of protection and the length of the copyright terms. This Article proposes raising the “modicum” standard and providing a thicker level of protection for a shorter period of time. See infra Part III.D.
value on it. In this hypothetical, although we know it makes sense for you to buy the watch, we still have to decide what the price will be. This second issue is the distributive one.

These two issues arise in a virtually endless variety of circumstances. A great chef and a decorator may join to create a unique dining venue (allocative) and decide how to divide the profits if they are successful (distributive). A lyricist and a musician may create a joint work as a theme for a film (allocative), but first decide how to divide any income that is generated. And, obviously, a novelist may decide to create a new work for a publisher (allocative), but not before deciding whether there will be an advance and, if so, how much and what the level of royalties will be (distributive). It is important to see these issues as both separate and intertwined because a decision to engage in an allocative effort almost always requires a solution to the distributive question.

A. Separating Distributive and Allocative Issues

This conceptual separation allows one to make a rough judgment about which interest predominates. The thesis of this Article is that distributive issues dominate all too often in copyright and that these distribution-determining costs can be reduced without having a significant allocative effect. Two specific examples—one legislative and one judicial—illustrate this separateness. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act. The principal impact of the Act was to extend copyright protection from the life of the author plus fifty years to the life of the author plus seventy years. More importantly, the Act applied retroactively. That is, if an author created a work that was scheduled to lose protection in 2000, he or she received a windfall in terms of the extension. It is useful to compare the impact on an author who has already created a work with an author who has yet to create a work. In the second instance, the argument can be made that

43. Assuming the exchange does not make those who are not party to it worse off, the exchange is Pareto Superior to the prior distribution of the watch and money. This is because both parties are said to be better off after the exchange. Total utility is increased. In addition, wealth, another possible measure of efficiency, is also increased. See generally HARRISON, supra note 15, at 50-60.


46. See id. § 102(b)(1)-(2).

47. See id. § 102(c)-(d). The constitutionality of the Act was challenged and upheld by the Supreme Court. See Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).
the twenty-year extension increases the income the author earns for works yet to be created and, therefore, provides an incentive to produce more.\textsuperscript{48} In short, the impact is distributive and allocative. In the case of the work that is already in existence, the impact is strictly distributive and whatever effort the author makes to protect the income associated with the twenty-year windfall cannot be seen as beneficial to the public generally.\textsuperscript{49}

My second example may concern abstract music aficionados, but I think the point remains valid, and it serves to illustrate that the issue of separation is not always as easily resolved as it is in the case of retroactive term extension. John Cage's "composition" 4'33"\textsuperscript{50} consists of a person sitting in front of a piano and not playing for four minutes and thirty-three seconds.\textsuperscript{51} During that time, various sounds may take place—breathing, fabric-rustling, wind, whatever—and this could all be recorded.\textsuperscript{52} Allocatively, I would argue that nothing much and perhaps nothing at all has happened here.\textsuperscript{53} The choice to allow silence to occur or even to record the sounds that break the silence is hardly a creative effort.\textsuperscript{54} Although it may not seem like it at times, there is in fact an infinite supply of silence.\textsuperscript{55} Granted, this may be best viewed as "background silence." There is also an infinite supply of naturally occurring sounds. The process of gathering people into a room to listen to silence in order to record the sounds that may occur is, at best, recording the "performance of others or of nature," which actually could

\textsuperscript{48} This point is at best arguable because the present value of benefits the author will receive fifty years after creating the work is likely to be quite small for the party actually creating the work. The benefits may not be small for those buying the rights to the work, but this is separate from the issue of creation.

\textsuperscript{49} In fairness, the majority in Eldred v. Ashcroft does make a stab at tying the distributive impact to allocative ends. The argument is, in effect, that past authors may have been motivated by knowing that any future term extensions would apply to them. The decision in Eldred, therefore, was comparable to closing that implicit bargain. See 537 U.S. at 214-15.


\textsuperscript{51} The keyboard lid was opened and closed to signify the end and beginning of each movement. See id.

\textsuperscript{52} See id.

\textsuperscript{53} I do not want to suggest that the idea of silence or aleatory art is worthless, but ideas are not protected by the copyright laws. This is a theme to which I return, see infra Part IV.B, where I argue that most, if not all, aleatory art is best placed on the idea side of the idea-expression dichotomy.

\textsuperscript{54} At best, I would say that Cage produced an idea which would not qualify for protection under the Copyright Act.

\textsuperscript{55} For those who prefer their silence recorded, listening to the space between cuts on a CD or record will do the trick. For live performances, the time between movements at a performance of classical music will provide a respectable amount of silence.
violates the rights of those being recorded. The recognition that virtually anything is copyrightable is not a cost-free decision. In the context of 4'33" the question is whether newer efforts to create a pause in a composition during which natural and uncontrolled sound may occur are infringe. This may be far-fetched but, in fact, in the context of 4'33" the issue has arisen. In effect, "creative" effort that produced nothing more than what is in abundant supply has itself led to a distributive question.  

Typically, there are allocative and distributive elements in every work and the importance of each is likely to vary with how novel the work is. For example, it may be that a new fabric pattern consisting of large yellow and blue dots would be copyrightable. Another producer may create a similar pattern setting off a distributive battle. In this case the allocative importance of the second work may exist but is insignificant. On the other hand, a new novel by an accomplished novelist may also set off a distributive battle, but that may be relatively unimportant compared to the fact that there is an addition to the body of creative works. 

B. The Inseparability of Distributive and Allocative Interests 

The two interests, although conceptually separate, are also tied together in a way that makes them inseparable. Take again the example of the new novel by a respected novelist and suppose the novelist is driven to some extent to write by the incentive of collecting royalties on his or her work. The "collecting royalties" part of this assumption automatically brings into play the distributive. In fact, to the extent wealth is a factor in the decision to write, one could say that the desired allocative outcome depends on the author's belief that he or she will win the distributive dispute. Seen in this way, resolution of the distributive issue can be seen as the means to the end of achieving a desired allocative outcome. Justice Breyer captures this relationship in his dissent in Eldred v. Ashcroft when he emphasizes that rewards to authors are a means to an end. Similarly, it is reflected in the
unanimous opinion in *Mazer v. Stein*\(^61\) in which the Court reasoned that “[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.”\(^62\)

In fact, a close look at the Copyright Act of 1976 reveals just how important distributive matters are. The majority of provisions of the Act address distributive questions. These range from the definition of a joint work\(^63\) to fair use\(^64\) and the multiple other exceptions to the author’s “exclusive rights.”\(^65\) Resolution of these distributive matters takes up not only a great deal of the statute but a great deal of public and private resources. Yet, these issues are only a means to an end and the public outlay is unwarranted unless there is a recognizable positive allocative effect.

Although the remainder of this Article is devoted to the idea that a greater creativity requirement and more attention to the process of authorship will make what amounts to a public investment in solving distributive questions more worthwhile, there is no economic or numerical formula that can be used to compare allocative and distributive interests. One could claim to “score” allocative importance versus distribution-determining and other costs and decide whether the allocative gain offsets the distributive costs. This would take the form of comparing the value of the work produced with the costs determining the distributive outcomes much like a traditional cost/benefit analysis in hopes of determining an efficient level of copyright protection.\(^66\) At a narrow theoretical level this seems to make sense but ultimately, and for a variety of reasons, I am not sanguine about the possibility of such an approach.

First, it is not at all clear that the value of an expression can be monetized in preparation for a cost/benefit comparison. The value of the expression may not be recognized or even recognizable by those currently alive or in positions of authority. Second, the concept of value in economic terms means value attached to a willingness and ability to pay. Yet various works may create utility for those who are unable to pay for them. In a standard valuation this benefit would not be counted.


\(^{62}\) *Id.* at 219.


\(^{64}\) See § 107.

\(^{65}\) See §§ 108-122.

Finally, even though it is probably right to view the distribution-determining costs as losses from the point of view of social welfare that may not be absolutely true. Studies indicate that people do derive utility from a sense that justice, including distributive justice, has been achieved. Thus, the distributive determination cannot be written off entirely as an allocative loss.

Three different types of considerations also counsel against a cost/benefit approach by highlighting its complexity. First, it is not clear that distribution-determining costs in the context of trivial levels of creativity are the only "cost" of the "modicum" standard. There may be costs—or at least inherent disadvantages—of a system that awards not creativity per se but "production" of something that is merely different. This facet of the analysis also requires attention to what it means to be a creator rather than a producer. By producer or production, I mean bringing something into existence by being able to harness principally financial resources. By creator, I mean the use of some inherent talent or ability that is the outcome of a cognitive process. A reference to the film industry is useful. Typically, one thinks of the producer as the person who brings together investors and various inputs in order to produce a new film "product." On the other hand, it is the writers and director who bring emotions and creative insight to the project. The point here, then, is that the modicum standard elevates and rewards production perhaps at the expense of creativity. Any conventional cost/benefit analysis is unlikely to allow for this impact.

Second, it is not clear by a long shot that much of that which barely makes the modicum standard will be lost if it falls beneath a new and higher creativity standard. In other words, it may be overstating the case to assume that those works that would fall below a higher standard would not be produced at all. Third, raising the standard may simply mean that creative people aim higher and actually produce more works


68. In his article Copyright, Borrowed Images, and Appropriation Art: An Economic Approach, supra note 22, William Landes seems to approach the issue of whether something should be regarded as "original" by determining whether there would be free riding on the efforts to the artist if the work were not regarded as original. See id. at 12-17. This too involves interpreting copyright from a functional perspective but does not distinguish copyright from any other productive effort. See infra text accompanying note 81.

69. In particular, the model presented by Professor Landes and Judge Posner, see supra note 68, seems not to distinguish between production and creativity as both could be affected by free riding.

70. This may or may not be a good thing.
that reach above the higher standard.71 Below, I flesh out each of these refinements and propose a way to adjust the modicum standard upward.

C. Three Rules

What these complexities mean is that a comparison of allocative gains and distribution-determining costs must be approached with considerable caution. This caution dictates being perhaps overly protective of creative efforts even when possible distributive costs may be substantial and leads to three rules: (1) Copyright protection and the consequent distribution-determining costs are unnecessary when the work would exist without the protection; (2) Copyright protection and the distribution-determining costs are unnecessary when the market produces very close substitutes for the protected works; and (3) Copyright protection should be unavailable where the author’s effort is devoted to method or process rather than expression. This rule may seem consistent with current copyright law but, as the discussion will illustrate, method and process are often protected.

Rule one actually involves two applications. The first is when exclusivity is not the driving factor behind the creation of the work but creates an opportunity for additional income. The second is when there are private means of sufficient internalization available that would result in production of the work without copyright protection.72 In both of these instances, the distributive question is about what economists technically call rents—income in excess of that necessary to bring a factor into production. In actuality, there may be instances in which these circumstances are combined. Going back to the examples given earlier, the first application would apply to instances like the Zapruder film. The second application involves works by known artists or other instances in which ownership of the original is highly valued.

Rule two applies when the new work amounts to product differentiation indistinguishable from that found in the case of run-of-the-mill products in which producers attempt to derive some short-term profit by minimal changes. Rule three applies to aleatory art and other creations that are not the result of a preconception. This includes instances in which the work owes its existence to a plan or idea for

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71. This is another point that I think is missing from conventional analysis as presented by Professor Landes and Judge Posner.

72. This possibility will not be addressed here because it does not directly relate to the concepts of creativity and authorship. The question remains, however, of why the seller of a unique item cannot fully internalize any gains from subsequent copying or display at the time of the first sale.
producing expression, but in which the author is not actually connected to the expression. In all of the cases, the public subsidization of a rent collection process by authors makes little sense. The following heightened standards for creativity and authorship are explored with these rules in mind.

III. CREATIVITY

Although subject to all manner of tweaking, a "modicum-times-2" standard might be articulated as "requiring more than minimal expertise, skill, taste, or judgment" and that the work be "capable of being distinguished from other ordinary objects." This standard is consistent with the first two guidelines described above. An author would be one who expresses a previously conceived notion involving skill, taste or judgment. It is critical to understand the link between these definitions and the allocative role of copyright law. These definitions have three effects. The first is that they require more creativity than currently required under the 1976 Copyright Act. A corollary is that they require authors to aim modestly higher. First, even if satisficing behavior is the norm, the effect is to raise the level of creativity. Second, they increase the risks for some creative people. These are artists who are principally driven by economic gain and who are marginally, if at all, talented. Third, they build in an element of intention and, thus, eliminate much authorship that is largely about production methods and ideas other than creativity.

Before addressing the relationship between the raised standard and allocative goals, it bears noting that the modicum standard does have

73. In other words, what is necessary is something similar to the Japanese requirement that what is produced reflects "the thoughts . . . or emotions . . . [of the author] expressed in a creative way." TERUO DOI, JAPANESE COPYRIGHT LAW IN THE 21ST CENTURY 29-30 (2001).
74. By "rent," I am referring to income above that necessary to call a resource into production. See KENYON A. KNOFF, A LEXICON OF ECONOMICS 88 (1991).
75. This is not to suggest a higher standard is actually subject to quantification.
76. See ALAN S. GUTTERMAN & BENTLEY J. ANDERSON, INTELLECTUAL PROPERTY IN GLOBAL MARKETS 90-94 (1997) (describing Canadian copyright law). Another scholar describes the Canadian standard as "more than negligible." See PAUL E. GELLER & MELVIN B. NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE CAN-13 (2002). In either case, the standard proposed here is one that would eliminate protection for works that evidenced only slight, minimal negligible creativity.
77. GUTTERMAN & ANDERSON, supra note 76, at 203-04 (describing German copyright law).
78. In a literal sense this may be close to French copyright law which limits protection to oeuvre de l'esprit or works of the mind. See GELLER & NIMMER, supra note 76, at FRA16-FRA17 (2002).
79. See infra text accompanying notes 180-83, 187-89.
something to recommend it in that it largely eliminates a host of possibly questionable influences on the determination of what property will be protected and who the beneficiaries will be. For instance, what is sufficiently creative is not determined by the tastes of individual judges or groups of jurors. Any change from the modicum standard requires consideration of possible creative biases and I address those concerns below. Still, a generalized preference for minimizing judicial interference with the allocation of resources for creative purposes means that it is important to think in terms of neutral ways of raising the creativity standard.

In the following sections the case is made that: (1) a raised standard will have no impact on many works that are characterized by low levels of creativity; (2) a raised standard will increase the variety of creative efforts; and (3) any decrease in the production of creative works is likely to come where there are ready substitutes. The issue of neutrality would not appear to exist if the change in the creativity standard had little or no impact on the level of creative effort. It is this possibility that is captured by rules one and two. That is, what is implicit in those rules is that copyright law, when seen in the light of allocative goals, is actually overinclusive.

A. A Higher Standard and the Possibility of Reduced Creativity

1. Commodity Art and Copyright Risk

In order to be effective at lowering distribution-determining costs, a higher creativity standard would have to eliminate copyright protection for many works. This is a different question, though, from whether the works themselves would be eliminated. This leads to the empirical question of whether and to what extent creativity is copyright-dependent. Common and observable market phenomena suggest that a great many works are not dependent on copyright.

Take, for example, a greeting card company preparing to issue its newest line of Valentine cards, some of which contain original expressions. The empirical question is whether the success or failure of the offering is dependent on consumer contact or on protecting the illustrations on the cards. As an intuitive matter, it does not appear that the ability to limit the copying of others will have much of a role. Shelf space, general advertising, point of purchase promotion, mailing lists,

80. See infra Part III.D.
and means of distribution would seem to be the principle determinants of consumer exposure and the most important areas of producer investment. In fact, the most imaginative card possible will go unsold if not properly marketed, while one visit to a card store proves that triteness sells if given sufficient exposure. Second, given the generic nature of the illustrations involved and even required, it is difficult to fathom that the success or failure of the offering will turn on the attractiveness of the artwork itself. In fact, for some products there is probably a narrow range of "acceptable" art, and ventures outside that range, no matter how imaginative, may be unprofitable. It still may be profitable for producers to challenge imitators, but that is a different matter from whether the works will appear at all. In fact, the minimal creative investment routinely observed in this type of product suggests that satisficing creativity is the norm and that producers do not see the investment in the artwork itself as the critical ingredient.

One might argue that the real problem is not with respect to competing card manufacturers but that, without protection, the work is free to users for other purposes. For example, the greeting card company may find its work on a calendar or as a part of the logo for a gift shop. No doubt the free riding in this type of secondary use seems unfair and it may be. But even the question of fairness misses the point of whether the use of the work for those other purposes really threatens the creation of the original work itself. In instances in which the financial incentive is more likely linked to a host of marketing considerations and is not a function of copyright per se, this is unlikely to be the case.  

The proof of copyright-independence is pervasive. It occurs most frequently in the context of useful articles. As copyright students know, § 102 of the 1976 Act lists "pictorial, graphic, and sculptural works" within the category of things to be protected. As a definitional matter, though,

the design of a useful article, . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

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As the cases and commentary on separating the protectable work from the useful article illustrate, this is not an easy task.\textsuperscript{84} The economic impact of the problem of determining when artwork associated with useful articles will be protected can be understood by first thinking of the three possibilities created. Some items, we know, fall well within the protected areas because they involve a modicum of creativity and have no function other than carrying the expression. Other items fall clearly in the unprotected area because they are entirely functional. A basic cube-shaped clothes-washing machine would fall in this category. Finally, there are items that fall in the gray area, examples of which can be found throughout case reporters. Put differently, even though the line between protected works and useful articles is not clear, we do have a rough guideline that allows us and, more importantly, that allows producers, to know what falls into the definitely protected area as opposed to the “maybe” protected and unprotected areas. If creativity is copyright-dependent, one would expect to find a range of creative efforts based on the level of expected protection.

The incentive is for creativity to be highest where there is a potential for high levels of protection and for it to fall off significantly as the risk of no protection enters into the picture. Although uncertainties and market swings may have an affect on investments in creativity, there remains for all useful articles a certain level of what might be termed “copyright risk.” In short, investments here may or may not be rewarded, and the better use of investment dollars would appear to favor different types of product improvements as there is no assurance that the returns from creative efforts will be internalized.\textsuperscript{85} Although it is impossible to verify as an empirical matter, a stroll through any department store or car dealership suggests very powerfully that “copyright risk” has had no obvious effect. There is no discernable lack of interest in product design and decoration in the context of useful articles. No toaster, coffee-maker, or taillight seems to be without a designer’s touch of some kind.

This suggests a number of things. The first is that these efforts are not copyright-dependent. The second is that they are made necessary by the need to distinguish what are essentially the same products from one


\textsuperscript{85} In contrast, the producers who know there will be no gain from copyright protection would be wise to invest as little as possible in artistic creations unless there is some means other than copyright protection to capitalize on that investment.
another in the consumer's mind. Third, there is no logical reason why artistic distinctions made for product differentiation purposes only are limited to functional items. That is, having observed creative efforts in the context of products that are not subject to copyright, there is no reason to think that copyright becomes relevant simply because a product may happen to fall within the realm of the copyrightable. In these vast areas of creativity, moving to a "modicum-times-2" standard for creativity is unlikely to affect the level of effort because copyright is not the motivating force. It may, however, lower distribution-determining costs by decreasing the incidence of opportunistic infringement actions. 86

2. Representational Works

Considerations of creativity lead naturally to the question of how to treat the author whose wish is to duplicate as exactly as possible another work, the appearance of a person, or even a scene. Those who are successful in doing this kind of work may be very skilled. This is not to say they are necessarily creative or that their work will necessarily disappear if greater creativity is required for copyright protection. This question can arise in a number of contexts, the easiest one of which is the photographer who takes a photograph of another photograph in hopes of creating a duplicate. The Nimmers list this as one of two possible types of photographs that should be denied copyright protection due to a lack of creativity. 87 What is critical is the effort of the photographer to capture what has already been created. Another easy case may be one in which an artist places tracing paper over an existing work and follows the lines of that work to create another that is similar. At least as far as the traced elements of the new work, it is difficult to conclude that anything creative has occurred. In fact, the effort that is made appears to be designed to avoid creativity.

More difficult to discount as insufficiently creative are works that fit into the genre of realism—original, as opposed to derivative, works in which the artist has attempted to create an image that looks exactly like the actual subject matter. These works are routinely protected and perhaps should be, but even in the case of these difficult-to-prepare works it is not clear that creativity is involved or that the works will be

86. These are actions for rents or amounts in excess of that necessary to make the creative effort worthwhile.
87. See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08[E][2] (2003). The Nimmers do suggest, however, that a photograph of a drawing or painting might receive different treatment. See id.
lost under a "modicum-times-2" standard. Although these works do not involve literal tracing, the process of creating a painting or drawing of a landscape or a person can be the result of a similar process. Early draftsmen used, and even today artists may use, grid-like devices that are placed in front of the scene to be depicted. The idea is to segment the view of what was to be drawn or painted. Thus, rather than paint a barn or a mountain, one is simply copying a line in one of the segments with the hope that in combination the lines will duplicate the scene in front of the artist. Similarly, one of the more important recent books on drawing touts "[d]rawing on the [r]ight of the [b]rain." A crucial step is to detach oneself from what one thinks he or she is perceiving and draw exactly what is there. Drawing exactly what is there does mean that something is produced but, then again, so is the photographed photograph or the traced drawing. Thus, having produced something is not a useful test of creativity.

An obvious solution is to regard all of these works as sufficiently creative as is now, generally, the case. Another solution would be to deny copyright protection. From the perspective of allocative interests, it is not clear that the second choice is the wrong one. First, consider the copyright protection the original artist has. If the depicted scene is available, it can be painted or photographed by another without infringing. The only protection for the original stems not from creativity but from access that will often be determined by resources available. Having or not having access is hardly what copyright protection turns on; this part of the effort is unrelated to copyright per se. In fact, the difficulty of determining whether the new work is from the original scene or from a copy of the initial work raises distribution-determining costs. In effect, the original author already has very thin protection from competitors. Second, many of these types of works will appear as paintings or drawings. In these instances, the physical embodiment of

89. See BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979).
90. See id. at 3-4, 6-7. A good example of the problem that this avoids might be the effort to draw an arm pointing right at the artist. Most people on the first try will somehow attempt to represent some segment of the arm itself. In fact, one knows the arm is pointing by seeing the end of a finger in the foreground and a shoulder in the background.
91. There may still be good reasons to protect the efforts of one who gains access but this would fall under the question of when we allow an individual to make exclusive use of information they have uncovered.
the work will have a great deal of value independent of copyright law.\footnote{See Landes, \textit{supra} note 22, at 5 \& n.17. Landes also notes that copying of these works may actually create publicity for the producers and enhance the value of his or her work. On the other hand, over exposure may reduce the value. \textit{See id.} at 6.}

Thus, the thinness of current protection and the possibility of value in the physical expression of the work suggest that these types of works are often not motivated by copyright at all. Raising the creativity standard so that these works are not protected by copyright is not likely to affect their availability.

\subsection*{B. The Creativity-Reducing Impact of the Modicum Standard}

Although it is unlikely that an elevated standard would result in any actual or real loss in product variation, it is possible that the modicum standard itself leads to reduced variation and creativity by rewarding small efforts. The logic behind this possibility follows from the special problems presented by derivative works. A derivative work under the 1976 Copyright Act is defined as “a work based upon one or more preexisting works.”\footnote{17 U.S.C. § 101 (2000).} One of the exclusive rights granted to a copyright holder is the right to create derivative works.\footnote{17 U.S.C. § 103. A fair assumption is that “work” means something that was authored or created by someone. It is not yet clear whether the concept of a “work” means that it is copyrighted or that it was ever copyrighted or even copyrightable. Recently, the Ninth Circuit Court of Appeals found, based exclusively on statutory construction, that for a work to be derivative, it must be based on a copyrightable work. \textit{See Ets-Hokin v. Skyy Spirits, Inc.}, 225 F.3d 1068, 1078-80 (9th Cir. 2000). A strong dissent with respect to this point was authored by Judge Nelson. \textit{See id.} at 1083-84 (Nelson, J., dissenting). The majority view in \textit{Ets-Hokin} seems to have been adopted in \textit{SHL Imaging, Inc. v. Artisan House, Inc.}, 117 F. Supp. 2d 301, 305-06 (S.D.N.Y. 2000) (following the \textit{Ets-Hokin} analysis with respect to “preexisting works,” but faulting its misconstruction of the relationship the putative derivative work must have to the underlying work in order to qualify it as derivative).}

Two cases involving derivative works, \textit{L. Batlin & Son, Inc. v. Snyder}\footnote{536 F.2d 486 (2d Cir. 1976).} and \textit{Gracen v. Bradford Exchange},\footnote{698 F.2d 300 (7th Cir. 1983).} are useful in illustrating the allocative/distributive trade-off and the way the modicum standard may decrease creativity. In \textit{Batlin}, a 1976 decision by the Court of Appeals for the Second Circuit, Snyder had produced scaled-down plastic models of an “Uncle Sam” mechanical bank and obtained a copyright registration.\footnote{\textit{See Batlin}, 536 F.2d at 488.} At virtually the same time, Batlin also began producing plastic scaled-down banks.\footnote{\textit{See id.}} Soon thereafter, Batlin was
informed that his banks were covered by Snyder’s copyright. The dispute forced the court to consider the problem of creativity in the context of derivative works. The potential for conflict between producers of two works that are derivative of the same first work led Judge Oakes to conclude that, “[a] considerably higher degree of skill is required, true artistic skill, to make the reproduction copyrightable.”

This theme played out more recently in Gracen, in an opinion authored by Judge Posner for the Court of Appeals for the Seventh Circuit. The plaintiff, Gracen, had entered a competition with other artists to paint scenes from the movie The Wizard of Oz. The artists were provided with stills from the film to work from, but encouraged to create their own interpretations—up to a point. The winner’s painting was to be reproduced on plates manufactured by the Bradford Exchange. Gracen prevailed in the competition but was unable to come to terms with Bradford. Bradford engaged another artist who allegedly copied one of Gracen’s paintings. The paintings by the new artist became the bases for the eventual plates that were manufactured and sold. Gracen brought an action claiming that her copyright had been infringed.

Since Gracen’s work was derivative, the issue of infringement turned on whether she had produced a copyrightable derivative work. Under a modicum of creativity standard, it would be difficult to create a derivative work that was not copyrightable: all but an exact copy would be sufficiently distinguishable to warrant protection. But Judge Posner warned of what he evidently saw as a different problem. He described a distinction between the artistic concept of originality and the legal concept. Accordingly, “[a]rtistic originality” could be the result of “a detail, a nuance, a shading too small to be apprehended by a judge.”

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99. See id.
100. The case originated with Batlin’s request for injunction to restrain Snyder from enforcing his copyright. See id.
101. Id. at 491.
102. See Gracen v. Bradford Exch., 698 F.2d 300, 301 (7th Cir. 1983).
103. See id. The new images were to “evoke all the warm feeling [sic] the people have for the film and its actors.” Id.
104. See id.
105. See id.
106. See id. at 302.
107. See id.
108. See id. at 304. Although expressed in terms of “originality,” the analysis focused on what the author had added to the original in producing the first derivative work; in other words, whether Gracen created something of significance beyond that found in the original. See id. at 305.
109. Id. at 304.
On the other hand, "the concept of originality in copyright law has . . . a legal rather than aesthetic function—to prevent overlapping claims." \(^{110}\)

Judge Posner offered an example similar to this: A group of painters enter a contest to paint the Mona Lisa. The finished products might very well look different due to artistic judgments about shading, color, and other factors. \(^{111}\) But, because they are all derivative of the same work, they will also look alike, creating the potential for multiple copyright claims. \(^{112}\) To avoid this problem, Judge Posner reasoned that "a derivative work must be substantially different from the underlying work to be copyrightable." \(^{113}\)

There are several facets of the Batlin/Gracen analysis that are important to expand upon. First, although neither Judge Oakes in Batlin nor Judge Posner in Gracen expressed the issue in these terms, their analyses ultimately can be seen as a trade-off between allocative and distributive ends. Both the battles between Snyder and Batlin, on the one hand, and Gracen and the Bradford Exchange, on the other, were about distributive matters. In effect, by avoiding "overlapping claims" Judge Posner's opinion amounts to a decision not to enter into the distributive fray unless there is something allocatively worthwhile at stake. Obviously there is more likely to be something allocatively at stake when the work passes Judge Posner's "substantially different" test or Judge Oakes' "considerably higher" standard.

Second, although both cases deal with derivative works, the analysis of the two courts would seem to hold beyond that context. For example, suppose two painters paint Notre Dame at dawn or the white cliffs of Dover at twilight. Further suppose they attempt to paint the scenes to look as realistic as possible. \(^{114}\) In neither case have the parties created derivative works. In both cases the parties are likely to create works that look the same. The same might be true of two photographers employing the same model or engaging in any work that is reality-based. \(^{115}\) The point is that it is not the derivative nature of the work that creates the Batlin/Gracen problem. \(^{116}\)

\(^{110}\) Id.

\(^{111}\) See id.

\(^{112}\) See id. Of course, since access to a work is a critical piece of a successful claim, see, e.g., Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992), the fact that each artist worked independently would mean that there is no infringement.

\(^{113}\) Gracen, 698 F.2d at 305.

\(^{114}\) See supra text accompanying notes 89-91.

\(^{115}\) For more on reality-based art, see infra Part IV.B.

\(^{116}\) As noted earlier, see supra note 95 and accompanying text, eliminating copyright protection may do little to affect the availability of these works.
The problems of similarities and overlapping claims leading to distribution-determining costs result not ultimately from the possibility of derivative works but from the fact that virtually any painter or photographer can, under the modicum standard, raise a colorable copyright claim. It is easy to understand this problem by thinking in terms of two artists each armed with a canvas, one brush, and one color and permitted to mark on the canvas one time. Clearly the variation could be substantial but not as broad as that available if they were armed with a palette of twenty colors and permitted to use as many strokes and as long a time as desired. In effect, the modicum standard legitimizes and awards small efforts, and small efforts are more likely to result in works that look, sound, or read similarly.

If the modicum standard legitimizes small efforts, one would expect that raising the standard would delegitimize and discourage those efforts. That does not mean a net loss in creativity. In fact, the opposite may be true. For example, suppose an artist decides to paint a picture of Edward Munch’s *The Scream*. This would be a derivative work. Compare his or her efforts under the modicum rule and the “substantially different” rule. Under the modicum rule the artist would have a right to claim a property interest by virtue of painting an exact replica of the original. While that might be an admirable outcome, it adds nothing as an allocative matter apart from the actual painting. Under a rule requiring a substantial difference, in order to claim the property right, the painter must make an allocative contribution.

This assumes, of course, that each artist has the choice in the matter of the range of his or her creativity. If this is not true, and it is likely that it is not in many instances, then there is the possibility that the artist who is unable to create a work that is substantially different will, being unable to claim a copyright, not create at all. This simply raises the question of what we have lost. At most it seems we have lost the efforts of someone who likely was in the wrong line of work in the first place.

A simple but intriguing case helps make the point. In *Gross v. Seligman*, the court was faced with a fact pattern best suited for a law class hypothetical. The artist photographed a nude model and sold the photo, *Grace of Youth*, and the rights. Thereafter, he created a second photograph of the same model which the court compared as follows: “The backgrounds are not identical, the model . . . was two years older when the later photograph was taken, and some slight

117. 212 F. 930 (2d Cir. 1914).
118. See id. at 930.
changes in the contours of her figure are discoverable." In addition, in the second photo the model is smiling with a cherry stem in her teeth that was evidently absent in the initial photo. The court reasoned that the photographer’s second effort, even with changes and even if produced strictly from the memory of the first, was infringing. Accordingly, “the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.” The opinion seems correct. The second photo can only be explained in two ways. First, the photographer was out of new ideas. In effect, the artist’s reservoir of “artistic talent” was depleted. Second, the author, though capable of more, attempted to recycle the same expression but was wise to the necessities of the modicum standard. In both cases, there is no net allocative effect and the loss of the work is unimportant. However, in the case in which the artist is capable of a new expression there is an even higher cost. The modicum standard may have “cost” society the benefits of new creativity by siphoning off creative energy into satisficing efforts.

More generally, the modicum standard, in many cases, discourages more adventurous efforts. If this is the case, there are at least two arguments that favor an elevated standard. First, in the case of commodity art, it is unlikely to reduce the amount of creative effort but will decrease distribution-determining costs. Second, a heightened standard requires those with creative potential to aim higher. Ideally, the “modicum-times-2” standard would eliminate a “least necessary” or satisficing analysis whereby the author considers, as in Gross, how little can be done for a work to be copyrightable or to avoid infringing an existing work. This is not to say that the artist will not want to consider these factors at some point, but the beginning point should not be a consideration of how little one must do to produce something copyrightable. Removing the “least necessary” analysis or elevating what “least” means has another important advantage. The creator whose goal is not merely to differentiate his or her product is less likely to copy in the first place and less likely to create an infringing work even if it turns out to be identical to an existing work.

There may be some concern that what I am suggesting goes too far in a specific area of expression. For example, suppose a particular artist

119. Id. at 931.
120. See id. at 930.
121. See id. at 931.
122. Id.
is known for his or her watercolors of flowers and, in fact, produces a series devoted to the tulip. All of these works will, by necessity, be considerably similar. In fact, like the variations found in *Gross*, an argument may exist that each watercolor is not really a new effort but a repeated expression of the same work with minimal variations. This type of problem is presented in *Franklin Mint Corp. v. National Wildlife Art Exchange.* A wildlife artist painted and sold the rights to a work entitled "Cardinals on Apple Blossom." Later he painted a series of birds, one of which was entitled "The Cardinal." The holder of the rights to "Cardinal on Apple Blossom" claimed the subsequent painting was an infringement. In creating both paintings the artist relied on substantially the same materials—photographs, slides, and a working drawing. There was no evidence that the artist worked from the original. Nor did the court rely on the "copied from memory" analysis of the *Gross* court. Instead, it noted that the birds in the second painting were positioned differently, were depicted with different attitudes, and were surrounded by different foliage.

The distinction between the effort in *Gross* and in *Franklin Mint* may seem to be a matter of degree suggesting that the decision could go either way in either case. But this would amount to a very superficial interpretation. In *Gross*, with a subject matter that was amenable to a virtually limitless number of expressions, the photographer selected one that was nearly identical to an existing expression. His desire seems to have been to be as uncreative as permissible. In *Franklin Mint*, the subject matter itself created limitations on the range of expression. One cardinal looks pretty much like another; they are typically found in trees and their relatively small, compact bodies do not allow for a great variety of poses. In short, whatever danger might be created for "specialists" would seem to be minimized as long as the higher standard I am suggesting is contextualized.

This is not to say the danger of having these works fail the "modicum-times-2" test is eliminated or even should be. In terms of allocative interests, there is no doubt a kind of aesthetic-dimining
return that sets in even for the cardinal. Thus, while the painter in *Franklin Mint* may have done all that can be done with the subject matter, there will be a point at which all works depicting cardinals or those derived from depictions of cardinals will look very similar. This gives rise to distribution-determining costs with not much in the way of an allocative payoff. In fact, the cardinal example brings us back to the Batlin/Gracen problem of overlapping works. To the individual artists this may seem harsh but in the context of the overall consideration of societal welfare, it is appropriate. As beautiful as the cardinal is, there is in fact a limit on the extent to which society benefits from yet another depiction.

**C. Monopolistically Competitive and Monopolistic Art**

The analysis thus far has emphasized that raising the creativity requirement, rather than decreasing the amount of creativity, will leave it unaffected or actually increase it. The issue of a higher standard is more controversial when the possibility is that it will decrease some creative efforts. It is important not to overestimate this possibility. As already indicated, many creative efforts are not copyright-dependent. In addition, if there are losses, they may take place “at the margin” and primarily affect areas in which there are good substitutes.

Specifically, many works have a monopolistically competitive character and present us with the question of how much, if at all, they would be missed. Analogies to this possibility are pervasive. Any college town of decent size seems to have a multitude of sources for pizza, each a little different from the other. A walk down any grocery store aisle reveals more brands and variations of each fruit, vegetable, and salad dressing than one can possibly use. On nearly every corner there are gas stations, convenience stores, dry cleaners, or fast food outlets. Although each may have a slight claim to exclusivity, it is not freedom from being copied that drives this variety. Moreover, it is not at all clear that one or two fewer offerings would make a difference in terms of overall social welfare.

The label “monopolistic competition” is misleading because firms in these industries bear little in common with actual monopolists. In the case of monopoly, there is only one supplier of a good or service for which there are no substitutes. Barriers to entry are typically high. If demand conditions are right, a monopolist can earn supra-competitive

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130. There would remain an interest in and a market for the original form of the expression, and this would exist independent of copyright.
profits for extended periods of time. In most instances, competitors eventually will be attracted into the market and the monopolist will lose its market power. Monopolistic competitors, on the other hand, are surrounded by sellers of good substitutes, entry is easy, and the prospect for long-term profits is rather dismal.

There are pros and cons of monopolistic competition. Clearly there is much to be said for variety and the quest to find some product feature that will make one's product more satisfying to consumers than a competitor's product. On the other hand, there are good arguments based on price theory that firms operating under monopolistically competitive conditions operate at inefficient levels of production. In addition, there are significant incentives to create what are ultimately false perceptions of product distinctions. A key element of monopolistic competition seems to be an effort to raise transaction or search costs for consumers. One of the basic ideas is to hide the fact from consumers that different cereals, pizzas, hamburgers, dry cleaning, etc. are essentially the same. The costs to consumers of cutting through the information fog and paying higher than competitive prices for goods and services that may be substantially indistinguishable comes with the territory of permitting the market to operate. The costs and the waste involved can be viewed as the price paid for variety. Like gaining a copyright, the crucial element of monopolistic competition is the ease of entry into the industry. In effect, any firm that enters and profits by its product differentiation is faced with the inevitable entry of competitors who will imitate and ultimately bid down prices so profits disappear.

It is easy to see that much of what falls within the copyright laws is the expressive equivalent of monopolistic competition. Under the modicum standard, small variations among what are ultimately fungible works qualify for copyright protection. In effect, a trivial difference is one's ticket into the fray, and this permits one to claim at least some short-term profit. When one thinks of the "art" in a great many fabric patterns, beach towels, photographs, paintings, and greeting cards, it is hard to see the benefits as different from those created by establishing the tenth pizza delivery service in a college town. Yet copyright law provides the incentive and the forum for the disputes to which these trivial matters lead. In fact, unlike the usual market forces in monopolistic competition that quickly allow substitutes to enter the

132. See id. at 424.
market, copyright—for life plus seventy years—permits the author to invoke public sector assistance in retarding entry.

Consider, for instance, Beaudin v. Ben & Jerry's Homemade, Inc., in which Beaudin, the designer of hats marked by cow-like blotches, claimed that a line of hats offered by the Ben and Jerry's ice cream company infringed. The appellate court ultimately made the right decision in upholding the lower court's view that there was no infringement. It reasoned that the protection for a work containing only a slight level of creation was "thin" and that Ben and Jerry's had not pierced the thin layer of protection. The case seems like an easy one, but even relatively easy decisions are costly. Thus, what the modicum standard suggested to Beaudin was that for life plus seventy years he could claim the exclusive use of depictions of the spots on a cow, at least on hats. The larger question then is whether the trivial, virtually unlimited, and faddish "competitors" copyright produces are worth the cost.

Another case illustrates the monopolistically competitive nature of copyright. North Coast Industries v. Jason Maxwell, Inc. involved a dispute between two clothing manufacturers, both of whom were using fabric designs reminiscent of the work of Piet Mondrian. The plaintiff claimed that the defendant had infringed by creating print that was very similar to its own. The defendant's response was that the defendant's design itself was not copyrightable due to its similarity to the paintings of Mondrian and the fabrics used in the 1960s by designer Yves St. Laurent. The three relevant designs are set out below in Figure 1.

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133. 95 F.3d 1 (2d Cir. 1996).
134. See id. at 1-2.
135. See id. at 2.
136. See id.
137. 972 F.2d 1031 (9th Cir. 1992).
138. See id. at 1032.
139. See id.
140. See id. at 1034.
The crucial issue in the case came down to whether the plaintiff's work was sufficiently original. Or, in the words of the court, "whether the difference between that copyrighted work and the preexisting work is non-trivial."\textsuperscript{144} The lower court had held that the differences between the

\textsuperscript{141} See id. at 1036.
\textsuperscript{142} See id. at 1037.
\textsuperscript{143} See id. at 1038.
\textsuperscript{144} Id. at 1033.
 plaintiff's work and that of Mondrian and St. Laurent were trivial based on the view that the "only variations... were the location of the vertical band and the proportion of the rectangular shapes." The Ninth Circuit Court of Appeals rejected this view, reasoning, in effect, that a finding that the plaintiff's work did not have more than trivial distinctions from the original would be comparable to saying that once Mondrian had painted his first work, none of the rest along the same theme could be viewed as possessing more than trivial distinctions. The court reasoned that "this is not the judgment of art history, and it cannot be the correct judgment of a court as a matter of law."

Traditionally, the Ninth Circuit applies a more lenient view of what is copyrightable as a derivative work than the Batlin/Gracen line of reasoning discussed above. Thus, the decision is hardly surprising, but it does point out the awkward reasoning that may follow from a modicum standard. In particular, the analogy to the Mondrian originals makes little sense for two reasons. First, original works, even in a court following the Batlin/Gracen approach to derivative works, are likely to be subject to a lower standard of creativity. Second, in terms of the role of copyright in providing an incentive, works that are associated with the original embodiment—a painting, sculpture, etc.—have non-copyright protection by virtue of their scarcity. In short, perhaps, some Mondrians would not pass the test of creativity but it likely would not matter with respect to whether they would be prepared in the first place.

This aside, Beaudin and North Coast Industries provide one with a feel for the more generalized problem of monopolistically competitive art. To understand it further, it is useful to note some simple aspects of monopoly. First, although we claim to dislike monopoly, in reality we are ambivalent. In a very real sense, we value it because it is a means of encouraging meaningful investment in research and development. In other words, it enables individuals to recoup and profit from investment. In fact, it is bedrock antitrust law that monopoly per se is beyond the reach of the antitrust laws. Instead, the antitrust laws forbid achieving and maintaining monopoly power through means that do not ultimately benefit consumers. See, e.g., Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S.Ct. 872, 879 (2004).
violation, a monopoly can last until substitute suppliers become available. This is a function of the barriers to entry. Third, the profitability of monopoly is what leads to its ultimate downfall as investors, seeing the profit to be made, attempt to serve the same consumer needs the monopoly responds to.

The monopolistically competitive character of copyright can be traced to the fact that it affords creative people with less than monopoly-type protection. Even a massive creative effort that is fully protected does not guarantee market power in the technical sense. Any author of a failed novel or painter of ignored works can attest to this. Thus, the modicum standard does more than permit monopolistically competitive creative efforts. It also may make these limited efforts seem sensible because the protection afforded other competitors is itself so limited. Although I am not proposing to grant authors monopoly power, I am saying that it may make sense to break copyright out of the monopolistically competitive mold. In terms of conventional markets, the issue is whether the system should encourage a tenth, eleventh, or twelfth pizza delivery service or if it should encourage greater efforts to improve the quality of food more generally.150

Except in rare instances, copyright is probably not capable of providing authors with true market or monopoly power in an economic sense. Copyright can, however, move in this direction by affording those who are responsible for creative advances with more of an entry barrier than currently exists. To understand how, it is useful to understand that an entry barrier has two components. The first is the breadth of the protection. By this I mean how “thick” or “thin” the protection is with respect to the substance of the work or how close another author would have to come to the original to be viewed as infringing. If only very close similarity would amount to copying, then the market power would be greater. For example, the court in Beaudin provided thin protection due to the limited contribution of the artist. The other element of the entry barrier is time. Life plus seventy years creates more potential power than life plus fifty years.

Time and the breadth of protection complement each other. Thus, the same level of protection could be created with very thick protection for a short time period or with very thin protection for an extended time

150. It is still probably not correct to think in terms of copyright holders as monopolists as there are very few, if any, copyrighted works that satisfy a need that cannot be satisfied by other services and products in the market. The existence of these substitutes undermines true monopoly power.
151. See supra text accompanying notes 134-38.
period. For example, if Shakespeare wrote *Romeo and Juliet* today, one might allow him exclusive use of the star-crossed-lovers-from-feuding-families theme for five years. As an investor, Shakespeare might be indifferent between that option and a very thin one—say, on some of the dialogue only—for two hundred years. In theory, there is an infinite range of possible combinations that deliver the same level of protection. In effect, Shakespeare could be a near monopolist for five years or a monopolistic competitor for two hundred.

The analysis works in a more macro sense as well. The copyright laws are structured in a way to channel a given quantum of creativity into a variety of directions. It may seem odd to think in terms of a finite level of creative effort, but to think otherwise is to suggest that we want to maximize creative effort at all times. This would be terribly inefficient in the case of those who are not very creative, to say nothing of leaving all other utility-producing endeavors undone. In any case, whatever that hypothetical level, it could be achieved by a continuum of possibilities ranging from holding out very thin and short-term protection to anyone with a trivial contribution to offering thick and long-term protection to those with far more meritorious works. The people in this latter category might actually be granted something like real economic market power, but only if they produce more than a modicum of creativity.

The response to this may be to ask: why not do all of these things? That is, why not continue thin protection for those with thin works and thick protection for those with more creative efforts? There are two answers to this. The first, as suggested in the preceding section, is that we may not have to make the choice if, as I have suggested, the motivating force for many thin works is not copyright protection at all. The second is that it is a question of priorities. It is a misuse of resources both to encourage talented people into satisficing creative choices and to hold out false hopes to those capable of only uninspired efforts. Put differently, given a finite level of creative energy, how do we want that energy to be directed? Bringing the analysis back to the concepts of monopolistic competition and monopoly, is it preferable to have even more Mondrian-influenced fabric patterns (which may be with us in any case) or more purely original designs?

Given the limited ability of copyright to create actual market power, the next question is whether copyright is equipped at all to

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increase the thickness of protection sufficiently to encourage developmental change over simple variation. There are some obvious possibilities, all of which would require careful consideration but none of which are obviously workable. One is to blur the idea-expression distinction. In short, it may make sense in some instances to permit authors to own a piece of the idea. For example, having written *Romeo and Juliet*, one could say that it is an infringement for future authors to write a play about star-crossed lovers from feuding families that ends tragically at least for some period of time. This would begin to create some monopoly or market power for Shakespeare, although even then there would be substitute forms of entertainment, and even plays, with tragic endings. While attractive in theory perhaps, the complexity of this distinction and of the application of the merger doctrine generally counsel against an effort in this direction beyond affording the creative person some benefit of the doubt.

Another less difficult option includes shorter copyright protection for less creative works. The problem with this proposal is that the rewards for the creative person come at the end of the copyright terms when possible income flows are already discounted at high rates. Just adding even multiple years would not have much impact at the margin. In addition, although this Article argues for a higher creativity standard, this particular proposal would envision a series of creativity levels. The complexity would likely give rise to huge new distribution-determining costs, the very thing this Article seeks to lower.

This leaves one to consider whether simply raising the standard to a "modicum-times-2" alone might provide some element of market power. I have described this standard as "greater than minimal skill, taste or judgment" and "distinguishable from ordinary works." However stated, the goal is to make generic efforts less attractive but, even if they continue, to keep the largely irrelevant distributive issues they raise out of the courts. The proposal also has the advantage of affecting distribution-determining costs at their highest and least productive level. For example, one could think of the results of creative efforts as taking on a pyramid form. The bottom of the creative pyramid is the widest and the most effective measure and would be one that affects this huge bottom layer. In fact, the hoped-for outcome would be to provide an incentive for creative people to avoid the bottom layer by elevating their level of creativity. The element of the proposal that hits hardest at the monopolistically competitive character of currently copyrightable works is the requirement that the work be "distinguishable from ordinary works." The substance of the requirement is to not provide copyright to
works for which there are likely to be many good substitutes. The other half of the process is to provide real protection for works that are distinguishable. These works are the easiest for courts to protect because of their individuality. In effect, the higher standard may channel authors into works that are inherently more likely to afford them market power if properly protected by the courts.

**D. Judicial Values in Copyright**

The initial reaction of some to raising the creativity standard to, say, a “modicum-times-2” may be that judicial value judgments will be brought to bear. These judgments, so the argument would go, would tend to favor the type of art and creative expression with which judges—a predominately white, educated, and affluent group—are comfortable. And, if the market incentives are as economists suppose them to be, one would expect more of the favored expression and less of the disfavored. In more economic terms, judges could guide investment decisions in creativity. As in the case of proving any negative, it is impossible to completely lay these claims to rest. Still, there are a number of reasons to be cautious about overstating the dangers.

First, judicial involvement in the issue of what is a copyrightable expression is not the same as involvement in the expression itself. Presumably those who feel strongly or passionately about a particular point of view will not be deterred that their expression of that view may be copied by others. Clearly it is not copyright per se or the courts that determine the influence of one’s work. It is, instead, the ability to disseminate those ideas through print and over the airwaves that provides the greater concern. In fact, if one’s concern is about decreased diversity in expression and the dissemination of ideas, the focus should be on different levels of access to the media and the resulting anti-democratic influences. In more economic terms, judges could guide investment decisions in creativity. As in the case of proving any negative, it is impossible to completely lay these claims to rest. Still, there are a number of reasons to be cautious about overstating the dangers.

Second, if one thinks about the impact of a “modicum-times-2” standard at more than a barely superficial level, it becomes clear that rather than decreasing diversity in expression it should increase it. Again, putting it in terms of investment decisions, the risk to the author of little or no return is increased to the extent the work is similar to existing works. One way to decrease this risk is to ratchet up one’s creative efforts.

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Finally, a concern that a “modicum-times-2” standard will alter the copyright landscape misses the point that courts are already in the process of making this deserving/undeserving decision and there is little sign that it is substance-based. In fact, a convincing case can be made that the “modicum-times-2” standard is already applied, but that it enters the analysis at a variety of points. This is true with respect to three separate areas of analysis, two of which relate to fair use. For example, the first step of the fair use test involves an examination of whether the otherwise infringing work is “transformative.” Being transformative is necessary but not sufficient to bring a work under the fair use exemption. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court articulated a standard that clearly requires an assessment of value. Thus, the question was seen as “whether the new work merely ‘supercede[s]’ the objects’ of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” Similarly, in *SunTrust Bank v. Houghton Mifflin Co.*, the court noted that the transformative use standard involved an assessment of “the value generated by the secondary use and the means by which such value is generated.” In short, certainly something akin to a “modicum-times-2” standard is applied when determining whether the second work is transformative.

At least ideally, the issue of transformativity is not substance-based. A recent case, *Mattel, Inc. v. Pitt*, illustrates this. The court addressed the fair use defense raised by a party who took the heads from Barbie dolls and painted and adorned them to create dolls (Dungeon Dolls) with a sado-masochistic theme. According to the court, the “[d]efendant’s ‘touch-ups’ of the dolls plus the setting she creates for them transform, to put it mildly, the original doll to an extent beyond merely ‘supplanting’ it.”

Value and a “modicum-times-2”-like standard also enters into the fair use analysis at the second of the four steps: “the nature of the copyrighted work.” In effect, by Congressional mandate, courts are

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155.  *Id.* at 579 (citations omitted).
157.  *Id.* at 1372 (quoting American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 923 (2d Cir. 1994)).
159.  *See id.* at 318, 321.
160.  *Id.* at 322.
already thrust into the position of distinguishing works with existing copyrights from others. Some works are less available for fair use than others. Thus, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court noted that “[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others.” The Court quoted *Folsom v. Marsh*, in which Justice Story noted the inescapable truth that courts must “look to the . . . quantity and value of the materials used.” Although Justice Story in *Folsom* and the Court in *Acuff-Rose* applied their reasoning in the context of a fair use analysis, the analysis has important implications for the issue of copyrightability itself. A finding that a work is more available for fair use is one that lowers its value just as a finding might be that the work fails the “modicum-times-2” test. Conversely, a finding that the work is close to the core value of copyright is one that raises its value by insulating it from others. In effect, those works that are more creative have more powerful copyright protection.

Most of the cases addressing the “nature of the copyrighted work” question have focused on whether that work could be seen as principally a creative effort or more fact-oriented. For example, in *Sony Corporation of America v. Universal City Studios, Inc.*, the Court distinguished between a news broadcast and a motion picture, with the former deserving less protection. Similarly, in *Stewart v. Abend*, the distinction was between a fictional short story and factual works. More generally, the Ninth Circuit Court of Appeals in *Brewer v. Hustler Magazine, Inc.* distinguished between “informational works of general interest to the public” and “works [that] are creative products.” This informational, as opposed to creative, distinction can also be seen at the heart of a “modicum-times-2” standard. For example, a work that involves minimal creativity is one that is common, easy to come by, and, thus, quasi-factual in nature and further from the core interests of copyright.

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163. Id. at 586.
164. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).
165. Id. at 348.
167. See id. at 455 n.40 (owing to a motion picture’s potential for additional markets beyond its initial purpose and, therefore, its greater susceptibility to “commercial harm”).
170. 749 F.2d 527 (9th Cir. 1984).
171. Id. at 529.
Finally, relatively recent legislation requires courts to make very clear choices based on merit. Under the Visual Artists Rights Act of 1990 ("VARA"), artists may prevent the destruction of their works that are of "recognized stature." Although the statute has been applied infrequently and judicial discussion is sparse, its existence suggests that slightly higher standards for creativity and authorship would hardly shock the system of copyright jurisprudence.

What this suggests is two things. First, applying a "modicum-times-2" standard at the initial phase of copyright would not require a new approach. The type of analysis involved already takes place. Second, these examples indicate that a decision about creativity need not be the same as whether the work is ultimately worthwhile. A judge who is willing to recognize and respect that distinction will be unlikely to change his or her approach depending on the point at which the decision is made.

IV. AUTHORSHIP

The second prong of the detrivializing process addresses the question of authorship. The problem of authorship has received a fair amount of scholarly attention but has not received any serious judicial scrutiny in some time. Judicial interpretations typically focus on the work itself with the author generally defined as the one responsible for the existence of the work. Thus, from Burrow-Giles Lithograph Co. v. Sarony comes the definition of author as "he to whom anything owes its origin." This type of definition has no functional relevance with respect to determining a rational set of copyright goals. The effect of such a definition is essentially to read "author" out of the Copyright Act. In fact, the notion of authorship has been so thoroughly underplayed that


174. See, e.g., Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995); Martin v. City of Indianapolis, 192 F.3d 608, 611-12 (7th Cir. 1999).


176. 111 U.S. 53 (1884).

177. Id. at 57-58 (citation omitted). The rather broad definition is narrowed later in the opinion, see id. at 59-60, and also by Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). In fact, the Feist Court cites Burrow-Giles for the proposition that an author cannot be merely a "discoverer." See id. at 347-48.
one can evidently become an author without intending to do so. At least this is the import of the language in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 178 in which the court argues that copiers of other works may become authors as a consequence of "bad eyesight, or defective musculature, or a shock caused by a clap of thunder" which having created "variation unintentionally," the "author' may adopt it as his and copyright it." 179

Just how seriously one should take the "adopted accident" theory of authorship is not clear. For its proposition, the *Alfred Bell* court cites Kallen's *Art and Freedom* 180 and a story therein about a painter who is unable to achieve a desired effect in a painting and, in anger, throws a sponge at the painting which then leads to the desired result. 181 This is hardly the "clap of thunder" the *Alfred Bell* court suggests in that the critical element in the Kallen example, but missing from the court's "thunderclap," is a preconception of what the desired effect would be. In fairness, the *Alfred Bell* court does note that the issue of intention is not completely clear. 182 Thus it cites an earlier decision by the Court of Appeals for the Second Circuit, *Chamberlin v. Uris Sales Corp.*, 183 which explains the issue: "If one made an unintentional error in copying which he perceived to add distinctiveness to the product, he might perhaps obtain a valid copyright on his copy, although the question would then arise whether originality is precluded by lack of intention." 184

The proposed definition offered here is that an author is one who "expresses a previously conceived notion involving skill, taste or judgment." Preconception is the key because, without preconception, the link between effort and allocative ends is largely lost. Under this standard, it may not be possible to be an "author" of something that is "discovered and adopted" as opposed to something that is created. In fact, "discovered and adopted" seems significantly at odds with a notion of creativity that suggests the expression begins with the author as opposed to existing outside of the author who then puts his or her name on it.

178. 191 F.2d 99 (2d Cir. 1951).
179. Id. at 105.
180. HORACE M. KALLEN, 2 ART AND FREEDOM (2d ed. 1943).
181. 191 F.2d at 105 n.23.
182. See id. at 104-05.
183. 150 F.2d 512 (2d Cir. 1945).
184. 150 F.2d at 513.
The idea that authorship begins with something internal to and about which the author has some consciousness is hardly new. Although initially stating a very broad notion of authorship, the Burrow-Giles Court notes that copyrightable works include “all forms of writing... by which the ideas in the mind of the author are given visible expression.”185 And again, when contrasting copyright law and patent law, the Court notes the importance of “intellectual production, of thought, and conception on the part of the author.”186 Finally, the Court holds that photographs are copyrightable “so far as they are representatives of the original intellectual conceptions of the author.”187

The view proposed here and expressed by the Burrow-Giles Court may be best understood by comparing it to a recent effort to focus on the concept of “author” by Russ VerSteeg.188 In reviewing the 1976 Act, VerSteeg reasons, “[t]o ascertain whether someone is an author, we must ask whether he has communicated original expression.... That is what makes someone a copyright author.”189 VerSteeg continues, “although conceptualization generally may precede the act of communication, it is not a compulsory antecedent to becoming an author under the 1976 Act.”190

I think VerSteeg is probably right as far as the 1976 Act goes. One can evidently become an author after the fact. One could, for example, absentmindedly walk through wet cement and then decide to preserve his or her “creativity” for all time. The problem with this view of copyright is that it seems to protect much more than necessary when the issues are viewed in terms of the allocative and distributive distinction. A functional authorship requirement would be one that awards a deliberate, cognitive effort. It would award people for doing what they intend to do and not for what they “happen” to do nor for producing events that involve creation over which they have no conscious involvement.

This definition is also intended to steer clear of copyright based on the sweat of the brow. For example, a photographer may toss his or her camera in the air with the shutter timed to snap in mid-flight. After a few

186. Id. at 59-60. In addition, the decision to find the photographs in Burrow-Giles copyrightable stems from a finding of fact that the photographer attempted to evoke desired images. See id.
187. Id. at 58.
188. See VerSteeg, supra note 176, at 1365.
189. Id.
190. Id. VerSteeg compares this with the approach of the eighteenth and nineteenth centuries in which the cognitive process of the author was crucial. See id. at 1362-64.
hundred tries, he or she may find an image that is intriguing and claim it as a copyrightable work. One could argue that the photo is the result of a cognitive effort. I would say that the only originality involved goes to the discovery of a method of snapping photos. In addition, the time spent on both failed and “successful” efforts may have constituted sweat of the brow but, there was insufficient connection between the author’s creative impulses, if any, and the eventual intriguing photograph. In short, to be allocatively relevant in terms of drawing forth creativity, there must be a connectedness between the end product and a conception of the author that existed before creation. Connectedness can exist between the individual and an original process but the process is not the same as expression.

In this section, I focus on two types of authorship that seem to fall outside the realm of authorship. The first deals with instances in which the author captures an expression or sequence that is unintentional. The second deals with instances in which the author attempts to create an expression but knows beforehand that he or she does not know what that expression will be. The reasons for eliminating these works from copyright protection vary in how compelling they are and I discuss them in the order of most to least compelling.

A. Unintended Outcomes

There are instances in which a person, perhaps not even trying to act as an author, attempts to make one expression and winds up with another. The problem is that this cannot be motivated by an effort to enrich society more generally since no one “sets out” to do what he or she had no intention of doing. In these instances there may be an argument that, without copyright protection, the fortuitous author would not bother to make his or her creation public. There may be instances in which this argument has some weight but, by and large, it is not very compelling. The author who experiences a windfall can bury it and receive nothing or make it public for a price if the market is so willing. The impact of denying copyright merely lowers that price. This is irrelevant given that the costs incurred in the creation are now sunk, on the one hand, and the opportunity cost of making the work available is zero.

Perhaps the best known example of this copyright problem and a good illustration of the dangers of eliminating an authorship requirement is the famed Zapruder film. As indicated in Part I, Zapruder planned to film the motorcade of President John Kennedy in Dallas on November
22, 1963. In all likelihood, had things gone as planned, he would have
created a film worth very little. As it turns out, he captured the
assassination on film and sold it to Life magazine for $150,000. 191 In
assessing a challenge to the copyright of the film, the court did not
address the issue of authorship directly. Instead, it replied to an
argument that the film contained no "'elements' personal to
Zapruder." 192 While seeming to indirectly raise the authorship issue, the
court then discussed photography more generally and veered off course
in two respects. First, the court relied as a guideline on a quotation by
Nimmer suggesting that photographs were copyrightable owing to the
selection by the photographer of "subject matter, angle of photograph,
lighting and determination of the precise time when the photograph is to
be taken." 193 Zapruder's lack of connection with what actually created
value in the film and which ultimately gave rise to the distribution-
determining costs seemed to be lost on the court.

Second is the court's reasoning that, had Zapruder photographed
what he intended to photograph, he would certainly be entitled to
copyright protection. 194 And, given this, on what basis could copyright
be denied when he captured something different? 195 From a functional or
allocative perspective, the answer seems clear. Zapruder intended to film
the motorcade and possessed an authorial preconception. Had the film
been noteworthy his internalization of the benefits would have been
allocatively sound. Since Zapruder played no role in the selection of the
only element of the film that turned out to be what was allocatively
important, there was no allocatively-based rationale for his exclusive
internalization. More generally, if copyright is viewed as encouraging
authors for the benefit of society, there was no utility in granting
Zapruder a copyright. The film was hardly Zapruder's expression but
was an after-the-fact and windfall outcome of a completely different
intention.

The issue of authorship is forgotten or finessed in the court's
response to the argument that Zapruder had not been creative. The court
reasoned that Zapruder had decided to make a film as opposed to taking
still photos. In addition, he selected the type of film and camera type as

192. Id. at 141.
193. Id. at 142 (quoting NIMMER ON COPYRIGHT).
194. See id. at 143.
195. The court asks, "[o]n what principle can it be denied because of the tragic event it
records?" Id.
well as the time and place. 196 If this is sufficient for copyright then it suggests that two other possibilities would also be sufficient as far as authorship. Suppose a photographer selects a camera and film and lens and puts it all in a camera bag. A dog walks on the bag causing the camera shutter to snap. Using the court’s reasoning the photograph would be copyrightable. 197 More extreme, if the necessary elements are satisfied by collecting various inputs together, it is not clear why the photo has to be taken at all. After all, the only elements for which the photographer is responsible are independent of the image actually produced. 198 That argument, however, would read everything out of the Copyright Act except a requirement that something be fixed. 199

The problem with the court’s reasoning lies not simply in the fact that its authorship analysis focuses on a means to an end when, as it turns out, the desired end did not materialize. What it shows more generally is the danger of the absence of an authorship analysis. More particularly, in terms of Zapruder and the earlier “adopt as your own” analyses of authorship, the authorship requirement seems to be viewed as requiring little more than being present at the birth of a tangible recording. Again, the notion of copyright as principally a means to social benefits would seem to require an incentive or motivational element that can only be captured if the outcome of the effort is linked to the author’s intent. This may be best illustrated by considering the impact on Zapruder-like film events if a cognitive authorship requirement were adopted. Would it mean that works, like the Zapruder film, would not be produced? This seems unlikely if not impossible. If Zapruder cannot anticipate the outcome, it stands to reason that no change in the copyright laws or their interpretation would stop the outcome.

Although it seems fairly clear that an approach to copyright that focuses on social welfare would include a preconception requirement, a series of additional questions are raised. Would the preconception requirement mean that all photographs or sound recording of events over

196. See id.

197. According to Jennifer T. Olsson, as of 1992, the copyrightability of such an image had not been established one way or the other. See Jennifer T. Olsson, Note, Rights in Fine Art Photography: Through a Lens Darkly, 70 Tex. L. Rev. 1489, 1497 (1992).

198. Copyright requires that the expression be fixed. Thus, one could not copyright the non-photograph. Fixing, however, is independent from creativity and authorship, since it principally lowers the cost of administering a system of copyright.

199. See 17 U.S.C. § 102(a). “[T]he concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection.” H.R. Rep. No. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665.
which the author has no control lack the requisite authorship? Seemingly, this would exclude many kinds of news videotapes or photos. And it could exclude the non-professional who sees an event unfolding and has a camera or video recorder handy. Although I will later question whether these types of works should be copyrightable, in the context of a comparison to Zapruder, all of these instances are ones that do involve authorship. Not only would the author have taken the steps listed by the Zapruder court, but there would be the critical element of intent in that the events captured would not be the result of happenstance or luck. 200

A second and similar issue is raised in a scenario in which I carry a video recorder in my car and stop to record a tornado several miles away. As I am filming, a car wreck, unrelated to the tornado, takes place in front of the camera. This is much closer to the Zapruder case and certainly illustrates the line-drawing difficulties a meaningful authorship requirement may present. In this rather stylized case, the logic would be to deny copyright protection for the auto wreck and allow it for the tornado. Creation of the tornado film requires all the factors described by the court in Zapruder as well as decisions about framing the images and the length of the exposure and, most importantly, choice of subject matter. On the other hand, the photos of the car wreck are not authored. Even though creative choices were made, they were made independent of that image. Again, employing this functional approach to authorship will not mean the photo of the car wreck is not preserved. It does, however, assure that the photos of the tornados will be taken in the first place. 201

A final matter to consider is when, if ever, the unintended and unexpected is adopted as one's own for copyright purposes. There are very few examples like Zapruder in which the entire work is an unintended outcome of an effort to produce another work. In fact, this possibility seems to exist primarily when the creative effort is combined with some natural or unnatural influence lying outside the author. On the other hand, if one begins to break down a work, there may be a number of unintended elements. Several elements within a work could be the

200. From this one might reason that Zapruder became an author at the point he realized what was taking place before his camera and chose to continue filming.

201. Granting copyright protection in this case would be very close to protecting the images of someone who simply suspends a running video camera on light post and inspects the images periodically to see if anything “interesting” has been photographed. As I argue in the section below, the creative person here is better viewed as having invented a method of capturing images but has no artistic claim to the images themselves.
result of Alfred Bell’s “clap of thunder.” For example, the artist may intend to draw a straight line and accidentally draws a curved one. There are actually two ways this could occur. First, the artist may be attempting to create a copy of an existing work and simply fail to create an exact copy of the original. Second, the author may be attempting to create an entirely original work but, in the course of execution, fail to accurately communicate what he or she intended. This second case is relatively easy; the fact that the artist does not intend the curved line does not preclude the entire work from copyright protection. There may be many other elements or the author may have chosen to make a compilation of errors.

The difficult case is the first one in which the author’s mistake occurs in the context of a representational or derivative work. In fact, most extreme is the type of situation alluded to by the Alfred Bell Court. As described above, the court held that the originality in a derivative work could be found in an accidental and unintended variation. Whatever import that passage in the opinion has today is questionable given the tendency of some courts to require greater originality in a derivative work than merely a modicum. Still, the sentiment found in Alfred Bell serves again to illustrate the gap in copyright by a failure to focus on authorship. For instance, under the Alfred Bell reasoning, the successful copyist would have no protection because his work would not be original. The bungling copyist, on the other hand, would produce a copyrightable work. At best this is an awkward result and would seem to reward the less talented individual whose efforts are far less likely to be responsive to incentives.

This outcome is the result of focusing on creativity while de-emphasizing authorship and missing its independent importance. In fact, the thunderstruck copyist does produce something original. The thunderstruck copyist is, however, not an author in the sense of communicating an idea, impression, or conception that existed before it was recorded.

202. The matter of representational art was also addressed in the context of creativity. See supra Part III.A.2.
204. See supra text accompanying notes 98-119.
205. In the narrow sense of not having copied the work of another.
B. Aleatory Art and Process

Some creations are the result of imaginative ways of gathering sounds or images. By themselves, the instances in which these “works” are called into question are not significant, but they are worth discussing because there may be a way to connect them to other efforts that are significant. In fact, what I suggest here is that there is a continuum of possibilities in which works come into existence by virtue of “process” as opposed to authorship. As one moves across this continuum, there is both process and authorship and then eventually a predominance of authorship. Works that are purely process-related, as described here, are the sort that unnecessarily raise distribution-determining costs by permitting protection of random outcomes. The question is whether only works that are purely process should be excluded from copyright protection or whether the exclusion should extend to works that are predominately “process” as opposed to authored.206

One example of imaginative gathering and process is the John Cage composition 4’33,” mentioned in Part II.A, in which the performance was silence, and periodic movement of the lid to the piano keys, with the silence broken by whatever occurred. Similarly, a photographer could set up a camera on a street corner and equip it with a timer that would snap the shutter every few seconds or minutes. Or one could set up sound recording equipment in a forest and record naturally occurring sounds.207 In all of these instances the artist essentially gathers images or sounds. He or she is not the author of the sound or images because they did not begin from within. Instead the work is a function of what is found outside the author’s creative capabilities. This does not mean that process-works are necessarily worthless or uninteresting. They may, in fact, turn out to be fascinating and uplifting as many things found in nature are.208

The rationale for not extending copyright protection to these efforts can be understood by first focusing on what the individual did originate and then on the output. What the individual originated is a process of gathering hopefully intriguing, entertaining, or useful sounds or images. Thus, if protection is to be extended to the individual’s creative instincts—something that was preconceived and has the author’s

206. For an argument that process-oriented works are deserving of copyright, see Durham, supra note 40, at 624-34.
207. Among the copyrighted recorded sound collections available commercially are ones that feature birds and other wildlife, waterfall, and automobiles.
208. And as the discussion of creativity suggests, many of these works may come into existence whether or not copyrightable. See supra text accompanying notes 34-38.
personal stamp—it would have to be to this process. The process itself, however, cannot be fixed. More importantly, like ideas in a more conventional setting, the way a process of this type is manifested is by the work it produces. For example, to say that John Cage’s 4’33” is copyrightable is to say that Cage has a monopoly on sitting in front of a piano and listening to whatever sounds occur. Thus, while one might argue (an argument with which I disagree) that a recording, which is fixed, of the sounds occurring during a performance is copyrightable, one cannot take the next step of saying that the process of sitting quietly in order to collect any ambient sounds that may occur is copyrightable. To suggest otherwise would seem to rule that any new effort to collect naturally occurring sounds would be an infringement. One might say that it is not an infringement if one goes to a forest to record wildlife as opposed to the concert hall to collect whatever occurs there, but that would mean infringement would turn on the location of the sound recorder when the gatherer elected to turn it on while remaining silent.

A further reason for not in effect permitting the process to be copyrighted stems from the fact that the process is like a machine that is used in a manufacturing process. In principle it is not distinguishable from machines or processes producing other goods and services. To elevate a process above others simply on the basis of the senses to which its output appeals is a distinction without any underlying basis.

The second element of the rationale for not protecting these efforts has to do with the character of the sounds or images themselves. Being the gatherer of sounds or images does not make one the creator, whether the sounds or images occur in an otherwise quiet concert hall or in a jungle. The sounds recorded are comparable to facts in a more orthodox setting in that they simply exist, waiting to be found. In fact, these images cannot be authored even though they may be original in the sense of being unlike prior works. In effect, the gatherer has captured

209. It can be described, of course, and the expression of that description may be protectable. Whether the process itself is patentable is a different question but, even if it is, there are likely to be numerous ways of gathering the same sounds or images.

210. Nor, as I explain below, see infra text accompanying notes 218-20, is the recording itself protectable.


212. The Nimmers list two instances in which a photograph would be insufficiently original to warrant copyright protection. The first is an effort to photograph another photograph or printed material. The other is an effort to produce a photograph that attempts to use all the elements of a prior photograph. See Nimmer & Nimmer, supra note 87, § 2.08[E][2]. Under the standard suggested here, both cases might involve authorship in the sense that a preconception existed. The problem is that the preconception is not original.
already existing data in the form of a sound or image and over which he or she had no control. The fact that it may have taken substantial effort to find the right image means that the gatherer has taken on a research-like project. But neither the research nor the captured data are the subject of authorship.

Process and uncontrolled sounds or images characterize one end of the authorial continuum. Examples of “works” at this end are not common and even here there are weak arguments for their copyrightability. For example, even though 4'33" comes closest to pure process, one can reason that a decision about the length of time involves an authorial choice. The problem with viewing the timing decision as a type of authorship illustrates the shortcomings of squeezing other gathering attempts into the authorship mold. The length requirement is one imposed by outside factors, including in some cases the hope that the product will be commercially viable. The “author” does not make the decision that the time must be limited, only what the limited time will be. Other choices are also required by the nature of the work itself. While these choices have some authorial element, they do not rank as highly as true creative choices.

Moreover, there is considerable force to the argument that these types of choices should not count at all. For example, if the contribution of the author is timing then, presumably, timing would be protected. If the only contribution of a photographer is the size of the image or its graininess, the same issue arises. Does it make sense to protect contextual elements when the central element is not the subject of authorship? Moving to the examples of the photo machine or forest sounds alluded to above, the possible choices are increased and the work arguably pushed out from the extreme edge of the continuum by virtue of the sheer number of decisions. But this really is not a meaningful change. Obviously, exposures, film choice, lenses, and the like are not independently protectable. They are simply methods or styles for providing a context in which to present the captured information that the author did not create. Without a central copyrightable element, they are like containers with nothing inside.

213. The same analysis would apply to works in the genre of Duchamp’s ready-mades. The underlying image or presentation is not copyrightable due to a lack of authorship, at least by the one who had adopted the item for display. The novel display itself could be copyrighted but only to the extent that it is original. The idea of an authorized reproduction, unless it is verbatim copying, makes little sense. The difference between Duchamp’s ready-mades and someone pointing out an interesting feature of passing scenery is that the former is arguably “fixing.” Fixing alone, however, does not render a work copyrightable. See also GELLER & NIMMER, supra note 76, at SWI-19-SW1-
In both photography and sound reproduction cases, there are two ways of pushing the producer out on the continuum to the point of achieving some element of authorship. Having captured a number of images or sounds, the processor may then choose from the collection and manipulate, alter, or enhance the original in order to create a new expression of the same image. Or, to carry forth the research/fact analogy, having employed a specific research methodology, the producer may choose which facts to present and how to present them. The fact that the processor can have no ownership of the underlying image suggests that the work produced is akin to a derivative work. The original image is free to all. This approach has some appeal because the status of the new work as a derivative work, if treated as suggested here and by the Ninth and Second Circuits, would mean the work is afforded limited protection and thus the potential for creating distribution-determining costs declines.

One might object to this view by arguing that even the most ardently worked-on photograph or sound recording that is not a result of preconception seems to fall into the allocatively-irrelevant Alfred Bell adopt-a-mistake theory of authorship. The answer to this possible conflict can be understood by focusing on the similarity of the original image to a fact and on the treatment afforded historical novels and the like. The author cannot adopt a fact as his or her own, and it does not make any sense from the point of view of allocative interests to permit him or her to adopt the unanticipated photo as his or her own. On the other hand, the photograph that is eventually produced may have elements that are comparable to telling a story that contains those facts. Thus, the candid photo as well as the candid sound recording would move the processor away from the production-only end of the continuum. Still, it makes little sense to offer the processor more than thin protection owing to the absence of authorship of the underlying images or sounds.

20. Geller and Nimmer ask, in the case of ready-mades "whether there is something in this object susceptible of being misappropriated so as to infringe copyright" and conclude that there is not. Id.
214. See generally Olsson, supra note 198.
215. See, e.g., Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) (finding that research involved in uncovering facts is no more protected by the copyright laws than the facts themselves); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980) (same); Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 309-10 (2d Cir. 1966) (same).
216. One could take a more extreme view of this and argue that without a claim to the original image, the photographer is unable to create anything that is copyrightable, no matter what form it is eventually produced in. This, however, seems to deny the existence of authorial input. In any case, I do not think much turns on the view expressed in the text and the view expressed here.
Another approach to these kinds of works stems from the fact that they are oftentimes found in collections. Thus, a group of photographs may be selected and presented in a certain way. Similarly, a collection of sounds may be edited and presented as a collection. Consistent with conventional copyright standards, these works would edge out from the production-only extreme of the continuum. Here again, however, protection would be very thin; extended only to the arrangement of what are essentially facts.

To be sure, there are gray areas of this analysis and specific problems to be addressed. One gray area is the case of candid photographs. In a sense, all or nearly all photographs have an aleatory quality in that the photographer cannot know what will be produced until examining the negative and at that point he or she may accept or reject the work. Still, even in the case of candid snapshots there would seem to be some authorial element. For example, suppose someone takes a series of photographs at a birthday party without giving any one of the photos a great deal of thought. One possibility is that the photographer sees a child eating cake and snaps the shutter without saying a word. In the second, the photographer sees the child and says, “could you look this way” or “hold it.” A variation of this could be moving around the subject in order to get the desired angle or to compose the shot in a certain way. All of these possibilities can be distinguished from the photography machine in that there exists a preconception of the eventual image. Thus, photographers, although perhaps exercising little in the way of choice, are, at least arguably, authors.

On the other hand, has the photographer, especially the one who says nothing, done anything more than record a fact? If so, then the photograph may be grouped along with other representational art and the arguments made earlier with respect to a lack of creativity would apply. See supra text accompanying notes 34-38.

217. If so, then the photograph may be grouped along with other representational art and the arguments made earlier with respect to a lack of creativity would apply. See supra text accompanying notes 34-38.
underlying image, although perhaps not the specific print of that image, would be available to all. 218

The possibility that the photographer of candid images is not an author leads to the issue of whether newsreel footage should be viewed as authored for copyright purposes. 219 As with the parent at the birthday party, the photographer is recording facts, and a lack of participation in the occurrence of those facts actually may be critical to the integrity of the work. Only in a general sense, and even less so than in the birthday party, can the photographer be said to have had a preconception of the work.

In the context of a thesis that copyright standards should be applied to emphasize allocative over distributive goals, this may seem counterintuitive. Newsreels have great historical significance and are important as an allocative matter. It is tempting to go off the tracks here and conclude that something is wrong with the preconception standard for authorship if it does not protect newsreel footage. This, however, misses a critical point. A great deal of what people produce is not covered by copyright but is produced nonetheless. The same may very well be true with newsreels. Although the market value of these efforts may decline, there is no reason to believe that all financial incentive will be removed.

There is, in addition, a more subtle point to be made here and one that is impossible to quantify. The level of newsgathering efforts, and most other productive efforts for that matter, are a function of the profits earned. To suggest that it would be inappropriate to lower available profits and the level of newsgathering presupposes that the existing levels are efficient. The question of what level is the efficient one is not something than can be gleaned from copyright law itself, which is but a means to the end of achieving an appropriate level. For example, while it is true that without copyright, efforts to obtain candid news photos and film might decline, this may not be unequivocally bad. In fact, the current levels may be viewed as artificially high owing to copyright protection. Clearly, when one thinks in terms of creativity, originality, and authorship, the encouragement of those who record current events

218. The distinction here has been made by SHL Imaging, Inc., v. Artisan House, Inc., 117 F. Supp. 2d 301 (S.D.N.Y. 2000), in which the court notes that a photographer is protected only to the extent of his or her "incremental contribution." Id. at 311 (citation omitted). This means that only "verbatim copying" would be an infringement. Id.

219. It seems well settled that newsreels are copyrightable under current law and its interpretation. For an example of such an incident giving rise to distribution determining costs, see Los Angeles News Service v. Reuters Television International, Ltd., 942 F. Supp. 1265 (C.D. Cal. 1996).
does not leap to mind as the central focus of copyright. In any case, copyright law itself cannot provide the answer to the normative question of how much protection is enough.

V. SUMMARY AND CONCLUSIONS

In a general sense, the elevation of distributive issues as an end in themselves as opposed to a means to allocative gains can be traced to the market problem copyright seeks to cure and the imperfect solution copyright law provides. That problem is that creators of intellectual property typically, though not always, are unable to fully internalize or profit by their efforts. If they are unable to internalize due to the copying or free riding of others, the incentive to create will be lost or severely decreased.

The aim of copyright law can be seen as bringing creators of intellectual property into line with the producers of conventional welfare-enhancing goods and services. And it would perhaps be ideal if some kind of parity could be established. The key is to provide an entry barrier for authors—in the form of infringement actions—comparable to entry barriers in conventional markets. Conventional markets automatically distinguish among various producers. Individuals with limited abilities—say a construction worker—find that they must compete with others as a matter of course. And those with special skills—say a star quarterback—are the beneficiaries of their skill and the barriers that keep others from duplicating them. Copyright duplicates this up to a point. Those with little to say or who prepare works based on the works of others should not expect to be able to stem the tide of competitors. Those with a great deal to say should be able to expect to gain from their talents. Copyright law provides the entry barrier that makes this possible, though not inevitable. Barely interesting works get little protection while hugely creative works benefit by a greater entry barrier. In a sense, each author would seem to create his or her own entry barrier by virtue of the quantity and quality of his or her creative efforts.

The system breaks down, however, when virtually anyone can make a claim to exclusivity. This is the case in copyright due to minimal creativity standards and the virtual elimination of an authorship requirement. The lure of entry-barrier-based gains for even modicum-level work means that a great deal of effort may be devoted to satisficing as opposed to maximizing creativity. Satisficing efforts, more than fully creative efforts, are likely to result in barely distinguishable works. In
these instances there are costly disputes over the distribution of income that are unrelated to any allocative gain or generalized benefit to society.

Increased emphasis on allocative interests over distributive ones can be approached by focusing on the now greatly watered-down standards for creativity and authorship. The principle goals are to limit copyright protection for works whose existence is not copyright-dependent, works for which there are likely to be many substitutes, and "works" that are unconnected to the creator’s preconception. The means of achieving these ends is the implementation of a “modicum-times-2” standard of creativity and to provide a link between the work and the intent of the artist. The “modicum-times-2” standard discourages distribution-cost-increasing works that have minor allocative importance. In addition, to the extent satisficing creative behavior takes place, it will increase the level of creativity. The preconception standard for authorship is necessary in order for copyright to have the incentive effect the Constitution and courts require.220

220. Recently, Professor Alan L. Durham wrote, “[i]t is easy to say that works lacking that cognitive element are not works of authorship; it is surprisingly difficult to say why not.” Durham, supra note 40, at 574. The answer, as suggested here, is that without a cognitive element, the justification for public subsidization of a system of copyright becomes extremely weak.
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