WHAT IS A COPY?

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ABSTRACT

Copyright law encourages artistic and literary expression by policing copying and embracing the value of originality. To some degree, however, originality comes into focus only through the lens of copying, its unacknowledged, dark twin. The questions I ask in this inquiry are both "what" and "why"? What is the difference between a work and a copy? If there is a difference, why is the copy less worthy than the original? In my consideration of these questions, I draw upon a body of theory that attempts to explain the unequal status conferred by the art world on perceptually indiscernible objects—authentic artworks, for example, as opposed to perfect forgeries, or genuine works of conceptual art as opposed to physically identical hoaxes or frauds.

After introducing the aesthetic distinction between reproductions, representations and fakes, I apply these concepts to a series of copyright infringement cases that deal with photographs, arguing that the transformation of objects into works, works into copies, and copies back into works is quickened by photography into a routine occurrence and a recurring legal problem. Finally, in conclusion, I reflect on how our understanding of the Janus-faced entity comprised of the work and its copy underscores the inescapable significance of the Romantic authorship paradigm for copyright law.

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> If imitation were the only law of art, it ought to bring about the disappearance of art: the latter would differ in no way from "imitated" nature. For art to endure, the imitation must be imperfect.
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> — Tzvetan Todorov[1]

> The artist makes something that is like something else, and yet, not being the thing that it is like, exudes a magic to which, whatever our sophistication, we can never grow really indifferent.
>
> — Hugh Kenner[2]

INTRODUCTION

The word "copy" is derived from the Latin "copia," which signifies abundance, plenty, and multitude.[3] In English, "copy" is related etymologically to such words as "copious" and "cornucopia," both of which refer to profusion, fullness, and richness. In contemporary usage, "copy" is a synonym for such words as imitate, emulate, reproduce, repeat, reflect, replicate, duplicate, transcribe, as well as for technologically-inspired neologisms such as Xerox, ditto, facsimile, mimeograph and clone.[4] These words are more or less value-neutral. In an even more neutral sense, "copy" sometimes serves as a synonym for "text"—the actual written matter of an author's work (as opposed to paraphrase, annotation or commentary). An author's manuscript was known, under the Statute of Anne, as his or her "copy"; conveyance of the copy to a bookseller conferred the right to reproduce the work itself.[5] Thus "copy" had a dual meaning

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[1] TZVETAN TODOROV, THEORIES OF THE SYMBOL 113 (Catherine Porter trans., Cornell University Press 1982) (1977).

[2] HUGH KENNER, THE COUNTERFEITERS: AN HISTORICAL COMEDY 62 (Anchor Books 1973) (1968).

[3] 3 OXFORD ENGLISH DICTIONARY 915 (2d ed. 1989).

[4] ROGET'S INTERNATIONAL THESAURUS § 785, at 568 (6th ed. 2001).

[5] 8 Ann., c. 19 (1710) (Eng.). The full title was, "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such

both as original text and the right to reproduce that text.[6] Consistent with the first part of this early definition, the terms copy and text are synonymous in such contemporary usages as newspaper and advertising copy, or copyediting.

Frequently, however, "copy" serves as an antonym to such praiseworthy terms as original, creative, authentic, or genuine. In 1711, John Dennis wrote that the poet's task is "not to draw after particular Men, who are but Copies and imperfect Copies of the great universal Pattern; but to consult that innate Original, and that universal Idea, which the Creator has fix'd in the minds of ev'ry reasonable Creature."[7] The designation of something as a "copy" confers upon it the pejorative connotations associated with falseness, such as sham or fakery,[8] just as the word "duplicate" shades into the shameful concept of duplicity. Originality is singular and faithful, while copying is multiple and faithless. Originality is chaste, while copying is promiscuous. When Satan fell through Chaos in *Paradise Lost*, he crossed the border from unity to multiplicity.[9] Similarly, Adam and Eve were sent forth to be fruitful and multiply only after they were expelled from Eden. In secular reality, there is nothing to stop our copies from breeding further copies.[10] As copies proliferate, spreading in concentric rings from their point of origin, we fall more deeply into the realm of infidelity, mutability and illusion.

The apprehension that copying is a prelude to aging and death was reflected in Edward Young's well-known lament:

> [B]y a spirit of *Imitation*, we counteract Nature, and thwart her

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Copies, during the Times therein mentioned." For a discussion, see MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 12 (1993).

[6] A copy . . . could then be represented as comprising all that the work in question *should be*, as well as all a particular manuscript *was*. And around this concept could be built a regime capable of protecting the investment of time and money made by a Stationer in transforming the corrupt, singular manuscript into the printed title. It could be made the center of a system of property, and even, later, of copy 'rights.'
ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING 105 (1998).

[7] JOHN DENNIS, REFLECTIONS UPON A LATE RHAPSODY CALLED AN ESSAY UPON CRITICISM 31 (n.p., 1711), *quoted in* WALTER JACKSON BATE, FROM CLASSIC TO ROMANTIC: PREMISES OF TASTE IN EIGHTEENTH-CENTURY ENGLAND 10 (1946).

[8] ROGET'S, *supra* note 4, § 354.13 at 274.

[9] "Satan in passing through Chaos has picked up the taints of corporeality, and the first of these is number . . . Thus he 'distinguishes' Beelzebub first, then the promiscuous throng of his followers, whom Milton describes, in a series of marvelous similes, as multiplicity itself . . . . " THOMAS E. MARESCA, THREE ENGLISH EPICS: STUDIES OF *Troilus and Criseyde*, *The Faerie Queene*, and *Paradise Lost* 79 (1979). *See id.* at 75-142 for a general explication of Neoplatonic metaphors in *Paradise Lost*. *Id.* at 79.

[10] *See* MULTIPLICITY (Columbia Pictures 1996) (comedy about a man who has himself cloned and whose clones then multiply without his permission, each succeeding clone becoming weaker and less intelligent than its predecessors).

> design. She brings us into the world all *Originals*: No two faces, no two minds, are just alike; but all bear Nature's evident mark of Separation on them. Born *Originals*, how comes it to pass that we die *Copies*?[11]

This sentiment associated copying with conformity, and conformity, in fact, is yet another near-synonym for copying; to conform is "[t]o form, shape, or fashion according to some pattern, model, or instruction; to make of the same form or character, to make like."[12] If there can be just one true, real thing, "copy" must also be synonymous with words that suggest deception and fraud such as phony and counterfeit. From a plaintiff's perspective, at least, imitation by copying is seldom regarded as the sincerest form of flattery. Copying is the wrongful act that gives rise to plagiarism, piracy, forgery, and of course, copyright infringement.

A. *Identity*

To start with the obvious, modern copyright infringement is based on the standard of "substantial similarity." An infringing "copy" need not be literally identical to the protected work; infringement, rather, is a question of degree. Because liability extends beyond literal or "slavish" copying, a contemporary court, before deciding a typical plagiarism case, must determine the scope of protection to which the copyrighted work is entitled.[13] Let us for the moment, however, bracket the complications introduced by non-literal or disguised copying, and concentrate on literal copying. My principal thesis is that this requires an analysis of how the word "copy" relates to its closest associated terms, particularly, to the concepts of *reproduction, representation, and fake.*

In the most elementary case of copying, the one that lies at ground zero of this inquiry, we place two texts or physical artifacts side-by-side. Before we conclude that these two things are identical, we have to decide what comprises their respective identities. We perceive a material object in terms of its physical dimensions (height, depth, and width), color, shape, weight, texture, malleability, translucency, density, and other such

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[11] EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION IN A LETTER TO THE AUTHOR OF SIR CHARLES GRANDISON 42 (London, printed for A. Millar and R. and J. Dodsley, 1759).

[12] 3 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 715.

[13] Courts are required to subtract public domain material from the copyrighted work before determining the scope or "depth" of protection beyond the literal. *See, e.g.*, Computer Associates, Inc. v. Altai, 982 F.2d 693, 706 (2d Cir. 1992).

attributes, such as duration.[14] Similarly, we perceive a written text as an order of words around which we draw boundaries: it begins here, and ends there. The problem is to designate these endpoints.[15]

Suppose we can conclude without controversy that the two works under consideration are identical. Before we can decide that one is a copy of the other, we would have to deal with another question—which came first? To be a copy, or a copyist, is to be something other than the original. To the extent that post-Romantic authors model their careers on a pattern that equates originality with unprecedented novelty,[16] they are also compelled to recognize that the only way for an author to be *entirely* original is to have no predecessors or descendents.[17]

The last issue we would have to settle is causation. Even if two works are identical and one existed before the other, we could not conclude that one is a copy unless we know that the prior work served as the model for the later work. The existence of a copy presumes the act of copying. The first work must have *caused* the second. If not, the two works could be identical, yet equally original.[18]

B. *Copying*

The seminal case, *White-Smith Music Publishing Co. v. Apollo Co.*,[19] considered whether a player piano roll is a copy of the underlying musical composition. In retrospect, the answer to the

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[14] *See, e.g.*, MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) ("[S]ince we find that the copy created in the RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act.").

[15] *Cf.* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, 702 (2d Cir. 1998) ("[A] copyrighted arrangement is not infringed by a CD-ROM disc if a machine can perceive the arrangement only after another person uses the machine to *re*-arrange the material into the copyrightholder's arrangement.").

[16] We could, in fact, argue that the remorseless deepening of self-consciousness, before the rich and intimidating legacy of the past has become the greatest single problem that modern art (art, that is to say, since the later seventeenth century) has had to face, and that it will become increasingly so in the future.

WALTER JACKSON BATE, THE BURDEN OF THE PAST AND THE ENGLISH POET 4 (Replica Books, 2000) (1970).

[17] *Cf.* Richard Shiff, *The Original, the Imitation, the Copy, and the Spontaneous Classic: Theory and Painting in Nineteenth-Century France*, YALE FRENCH STUDIES, 1984, at 27, 28 (arguing that nineteenth-century artists "sought to create or define a style which might insure from the start that any imitation or interpretation by another would be inadequate or simply impossible."). This career pattern disrupts the tradition of apprenticeship in the arts. *See, e.g.*, Gerald L. Bruns, *The Originality of Texts in a Manuscript Culture*, COMPARATIVE LITERATURE, Spring 1980, at 113, 115 ("Originality is a sort of happy accident that disrupts imitation.").

[18] *See* text accompanying notes 66-67, *infra*.

[19] 209 U.S. 1 (1908).

piano roll question seems obvious enough; the term "copy" was expressly defined in the 1976 Copyright Act to overrule *White-Smith* by including machine-readable copies.[20] The problem of determining "[w]hat is meant by a copy,"[21] however, persists today whenever we consider the relationship between works of authorship and the physical objects in which they are embodied.

Copyright law refers to the process through which an artistic or literary work is reduced to a physical object as "fixation" in a tangible medium of expression.[22] A musical score, for example, may be printed in sheet music form, and then a performance of the score may be recorded on audiotape, transcribed onto a vinyl LP record, and later digitized and reissued on a compact disk. The performance is a realization—arguably, a copy—of the score. The analog tape is the original recording—that is, a copy—of the performance, while the vinyl LP record and CD are second and third order copies. None are physically identical to the others, but all are fixations of the same performance,[23] and copies of the same underlying work.

Different material objects, therefore, share the same identity if they are copies of the same work, and this is true even if the copies are physically dissimilar from each other. The common identity shared by the non-identical physical objects in this example illustrates a more general principle in art theory and copyright law. *Works take the form of copies.* Works, that is, can be perceived only to the extent that they are realized or "fixed" in tangible form as copies or potential copies. A work, however, as opposed to a copy

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[20] "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101 (2000); *see also* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 2.4, at 52-53 (3d ed. 1999) ("[U]nder the Copyright Act [of 1976], the White-Smith doctrine is completely overruled, allowing copyrightability for sound recordings, computer programs, motion pictures, and other works embodied on objects which cannot be read without a machine or device").

[21] White-Smith, 209 U.S. at 17.

[22] "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (2000).

[23] *See* 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."); *cf.* Matthew Bender & Co. v. West Pub. Co., 158 F.3d 693, 699 n.9 (2d Cir. 1998) ("[t]he embedding of the copyrightable work in a tangible medium does not mean that the features of the tangible medium are also copyrightable").

in any form, is something *more* than a physical thing. A work embodies an author's expression. A copy, in contrast, represents a work's expressive content, but is otherwise an empty thing. Copies can be authorized, but only works can be authored.

In graphic or sculptural works, the copy is comprised of physical elements—in the case of a painting, for example, canvas and oil-based pigment—but the painting is not debased by this physicality in the same way that a forgery or a mechanical reproduction of the same work is debased by being a soulless, physical object. The physical substance of an "autographic" work,[24] to the contrary, is what gives the work a unique existence and accounts for what Walter Benjamin called, in his famous essay, the "aura" of authenticity.[25]

On the other hand, *all* tangible instances of "nonautographic" (or "allographic") works—specifically, literary and musical works—are copies. When we buy a book, we are buying a *copy* of the book. This copy, however, is not a forgery or a fake even though it is a physical object and was never touched by the author. The lack of an aura does not detract from the copy's authenticity. Indeed, the author's manuscript is a *copy* of the work—"the material object . . . in which the work is first fixed"[26]—rather than a unique instance of the work itself.

I. WORKS, COPIES, AND MERE OBJECTS

> In short, Imitation here will not do the business. The Picture must be after Nature herself.

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[24] The terms "autographic" and "allographic" were coined by Nelson Goodman to explain

> the rather curious fact that in music, unlike painting, there is no such thing as a forgery of a known work . . . . Haydn's manuscript is no more genuine an instance of the score than is a printed copy off the press this morning, and last night's performance is no less genuine than the premiere . . . . In contrast, even the most exact copies of the Rembrandt painting are simply imitations or forgeries, not new instances, of the work . . . . Let us speak of a work of art as *autographic* if and only if the distinction between an original and forgery of it is significant . . . . Thus painting is autographic, music nonautographic, or *allographic.*

NELSON GOODMAN, LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS 112-13 (1976).

[25] Walter Benjamin described how "[t]he presence of the original is the prerequisite to the concept of authenticity . . . . One might generalize by saying: the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions, it substitutes a plurality of copies for a unique existence." WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction, in* ILLUMINATIONS 217, 220-221 (Hannah Arendt ed. & Harry Zohn trans., Schocken Paperback 1969) (1955).

[26] *See* note 20, *supra.*

— Henry Fielding[27]

The process through which objects become works and works become copies would be of little interest to lawyers but for the fact that we need to know what a work is before we can understand what it means to own one. In *The Transfiguration of the Commonplace*, Arthur C. Danto undertook the project of asking "what separates [a] work from a mere object which, though it may resemble it precisely, happens not to be a work at all."[28] My thesis is that this concern illuminates our present one: what distinguishes a work of authorship, a text or object that contains *copyrightable expression*, from an identical text or object that resembles it precisely, but is *not* a work of authorship.

To be more specific, there are two levels to this problem: first, the relationship between objects and works, and, second, the relationship between works and copies. Suppose, to adopt the standard example, the urinal one finds in the men's restroom of the art museum is identical to the urinal that has been entitled "Fountain" and mounted in the museum's exhibition hall.[29] The urinal is not a work of authorship,[30] but "Fountain" purportedly is. What makes the artwork something *more* than a reproduction, or an additional iteration of the utilitarian object?

The answer might be found by imagining that a little boy has two white marbles,

> one a portrait of the other, and the latter the original, the 'real' marble. But for their different histories, and but for the fact that one of them enters into the history of the other, there may be no basis for telling them apart, and so no criterion in observation and comparison for stating that one of them is real and the other is not. . . .[31]

This does not mean, however, that one marble is "fake" and

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27 HENRY FIELDING, THE HISTORY OF TOM JONES, A FOUNDLING, VOL. II 742 (Fredson Bowers ed., Wesleyan Univ. Press 1975) (1749).

28 ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART 39 (1981).

29 Marcel Duchamp, author of the "Fountain," purchased the "Bedfordshire" model flat-back porcelain urinal from the J.L. Mott Ironworks at 118 Fifth Avenue, turned it upside-down, and signed it "R. MUTT," with the date 1917. *See* CALVIN TOMKINS, DUCHAMP: A BIOGRAPHY 181-186 (1996). Duchamp's "readymades" were the forerunners of "appropriation art" in the pop art milieu, such as Andy Warhol's Brillo Boxes and Campbell's Soup cans, Roy Lichtenstein's cartoons, and Jeff Koons's "String of Puppies" sculpture. *See* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

30 *Cf.* J. L. Mott Iron Works v. Clow, 82 F. 316 (7th Cir. 1897) (rejecting authorship claim for catalogue containing illustrations, specifications, and prices of bathroom fixtures).

31 DANTO, *supra* note 28, at 80.

the other "real." They are both real marbles. "But in fact," observed Danto, "'real' has more contrasts than merely with 'fake'—as in 'real money' and 'fake money.'"[32]

> It also contrasts with 'representation' and it is possible to use, say, a real butcher block, as in a famous work by the American sculptor, George Segal, to represent a butcher block. Being a representation in this instance is a role the butcher block is made by the artist to play, but in every other sense it is just like a real butcher block.[33]

In other words, two different oppositions could be easily confused: real versus representation, and real versus fake. Both representations and fakes could be considered "copies" in the sense that neither is "the real thing." Representations, however, unlike fakes, can be authentic as well as "original." The question, then, is how the practice of representation, in contrast to its debased siblings—forgery, plagiarism, and piracy[34]—can yield a work of authorship.

A. *Reproductions, Representations, Fakes*

> To a complaint that his portrait of Gertrude Stein did not look like her, Picasso is said to have answered, "No matter; it will."
> — Nelson Goodman[35]

First, consider the relationship between reproduction and representation. Suppose the artist is painting a bowl of apples. The bowl of apples is the "origin" of this representation. Fidelity to the bowl of apples would presumably require the portrayal to be as close to a reproduction or "copy" of the subject as possible: hence Marcel Duchamp's conceit of representing a urinal by displaying a urinal. The artistic rendering, however, is *not* a bowl of apples. The painting's originality, or the "depth" of the author's copyright protection, arguably rises in inverse proportion to its fidelity to the bowl of apples.[36]

The representation, as a copy of the painting's subject, is

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32 *Id.*

33 *Id.* at 80-81.

34 *See generally* SUSAN STEWART, CRIMES OF WRITING: PROBLEMS IN THE CONTAINMENT OF REPRESENTATION (1991).

35 GOODMAN, *supra* note 24, at 33.

36 Highly "realistic" works only receive legal protection against literal copying and are thus "thinly" protected; less realistic works may be protected at a "deeper" level against similar, but non-identical, competing works. *See, e.g.*, Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) (holding that author of a realistic glass-in-glass jellyfish sculpture "possesses a thin copyright that protects against only virtually identical copying").

"true" not because it claims to *be* the subject or a reproduction of the subject, but because it claims to be *about* the subject. This is so even when the artist's intention is to induce temporary confusion in the viewer between the representation and the object represented as, for example, in the "trompe l'oeil" style of painting. Indeed, as Nelson Goodman explained, representation is quite different from reproduction or the simple-minded pursuit of resemblance. His first objection to the "copy theory" of fidelity was that the relationship between an artwork and what the artwork represents is not one of resemblance because

> unlike representation, resemblance is symmetrical . . . while a painting may represent the Duke of Wellington, the Duke doesn't represent the painting. . . . [I]n many cases neither one of a pair of very like objects represents the other: none of the automobiles off an assembly line is a picture of any of the rest; and a man is not normally a representation of another man, even his twin brother.[37]

Anything *could* represent anything else, but many things that *should* represent something else according to the copy theory of fidelity (like an identical twin representing his sibling) simply don't.

Goodman's second objection was that, as an artistic strategy, the simple-minded pursuit of resemblance is futile because, for example,

> the object before me is a man, a swarm of atoms, a complex of cells, a fiddler, a friend, a fool, and much more. If none of these constitute the object as it is, what else might? If all are ways the object is, then none is *the* way the object is. I cannot copy all these at once; and the more nearly I succeeded, the less would the result be a realistic picture.[38]

Representation, in other words, differs from mere reproduction because it makes an assertion *about* the identity of what it portrays. "A picture never merely represents *x*, but rather represents *x as* a man or represents *x to be* a mountain, or represents *the fact that x is* a melon."[39]

This second objection is based on the notion that representation has a figural or metaphorical structure.[40] What is

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37 GOODMAN, *supra* note 24, at 4.

38 *Id.* at 6-7.

39 *Id.* at 9.

40 It has become commonplace to argue that all representation must be figured . . . . [N]o description or picture can copy its model, its original, without differing from that original; and the difference or distancing is created as if through the deployment of a mode of figuration . . . . What passes for a

magical about the practice of representation is that it shows something *as* something else.[41] A case in point is the fascination of watching a familiar actor playing a role. In a movie, for example, Anthony Hopkins played the role of Richard Nixon.[42] The role did not require an exact look-alike for President Nixon, nor did the audience find it confusing that the same actor had played Hannibal Lecter in a previous movie.[43] The difference between the actor and the role enhanced rather than spoiled the representation.

A representation may imply a proposition about its subject; for example, a painting may represent Theodore Roosevelt *as* a "rough rider" or *as* the President. Simply portraying something in a tangible medium of expression, however, serves to represent it *as* a work in that medium. Representation, in this sense, is the name we give to the metamorphosis of substance into form—the process, that is, through which expression is transformed into a tangible object, or translated between tangible objects. A painting of the White House, for instance, represents the White House *as* a painting or *in the form of* a painting. Works themselves may be replicated and transformed in different media. The White House painting could become a *photograph* of the White House painting (or, to be exact, the White House painting *in the form of* a photograph). The underlying musical composition "Little Cotton Dolly," to invoke the example of the *White-Smith* case,[44] was represented with equal fidelity *as* sheet music and *as* a piano roll.[45]

In what sense, then, can a representation be false without being a fake? Arthur C. Danto explained this possibility in two different ways. It is possible for a representation to be false

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> device of figuration is manifold; we think not only of traditional rhetorical figures such as metaphor and metonymy but also of artistic techniques such as planar projection and contour drawing.

Richard Shiff, *Phototropism (Figuring the Proper), in* RETAINING THE ORIGINAL: MULTIPLE ORIGINALS, COPIES, AND REPRODUCTIONS 161, 162 (National Gallery of Art, Washington, D.C. ed., 1989).

41 *See supra* text accompanying notes 1 and 2.

42 NIXON (Hollywood Pictures 1995).

43 SILENCE OF THE LAMBS (MGM/UA Studios 1991).

44 *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 1 (1908).

45 A musician who transcribes and arranges a musical composition usually does not add enough expressive content to justify the reward of joint authorship. *See, e.g.*, McIntyre v. Double-A Music Corp., 166 F. Supp. 681, 683 (S.D. Cal. 1958) ("[s]uch technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers, are de minimis contributions and do not qualify for copyright protection"); *cf.* Andrien v. South Ocean County Chamber of Commerce, 927 F.2d 132, 135 (3d Cir. 1991) ("[w]hen one authorizes embodiment, that process must be rote or mechanical transcription that does not require intellectual modification or highly technical enhancement").

because it does not portray something real—that is, it lacks an original counterpart in the real world. To pick an example, a picture of a flying saucer landing presents a real picture, but does not depict a real flying saucer. The representation of the flying saucer springs solely from the mind of the artist, but the resulting work is not a "fake"—it's a real work of authorship about a fictitious subject.

It is also possible for a representation to be false because it was not *intended by an author* to be a reflection of something real. "[A] moss stain," for example, "that resembles the profile of George Washington is not really a pictorial imitation of our first president in the medium of moss."[46] The moss stain may remind us of George Washington, but there is no expressive content in the moss stain because it did not originate with an author. The moss stain is not a fake—it's a real moss stain—but it is not a work of authorship either. These examples teach the lesson that a representation does not need to be a "copy" of something "real," but it does need to have an author.

For legal purposes, the primary difference between a representation and a fake is that *a fake is not about what it resembles, but displaces what it resembles.*[47] The fake, in other words, makes the original superfluous and expendable.[48] The fabricator of a fake does not endow the copy with any expressive content except his or her intention to deceive the audience,[49] which the law dismisses from the realm of sanctioned "expression."[50]

The relationship between, on the one hand, reproductions,

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[46] DANTO, *supra* note 28, at 70; *see also* Steven Knapp & Walter Benn Michaels, *Against Theory, in* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11, 13-18 (W.J.T. Mitchell ed., 1985) (arguing that literary interpretation requires an inference of author's intent).

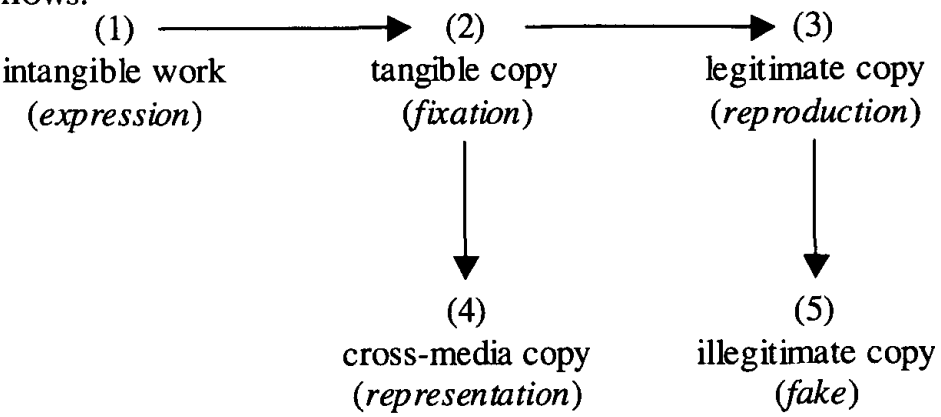
[47] *Cf.* Ty Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 517 (7th Cir. 2002) (Posner, J.). "Copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work . . . is not fair use". *Id.*

[48] *See, e.g.*, INVASION OF THE BODY SNATCHERS (Allied Artists 1956) (science fiction movie about village invaded and repopulated by alien life forms who grow into identical copies of their human victims).

[49] *Cf.* Joseph Margolis, *Art, Forgery, and Authenticity, in* THE FORGER'S ART: FORGERY AND THE PHILOSOPHY OF ART 153, 161 (Denis Dutton ed., 1983) ("The point is that forgery entails the intention to deceive, whereas inauthenticity does not. The inadvertent or innocent or unthinking or even the utterly chance production of the ungenuine is not impossible").

[50] Artistic expression, however, may intentionally take the guise of unauthorized copying. *See* MARILYN RANDALL, PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER 218-251 (2002) (describing postmodern "guerilla plagiarism" as deliberate subversion of property norms).

and, on the other, representations and fakes, can be summarized as follows:



(1) The work is an intangible thing constituted from the author's expression; to the extent it refers to the external world, it is representational as well as expressive. (2) When the work is realized in a tangible form (the process known to copyright law as "fixation" in a medium of expression), the first copy is created. In "autographic" art forms, such as handmade paintings, drawings, and sculptures, this first copy is a unique embodiment of the work; only this original fixation is a genuine instance of the work. In non-autographic ("allographic") art forms, such as literature and music, by contrast, the first copy (that is, the author's manuscript) does *not* uniquely embody the work. Each and every printed copy of a book, for example, is a genuine instance of the work, no less authentic than the author's manuscript. (3) After the first copy of the work is fixed, all subsequent copies are reproductions of the work. (4) When a copy is transformed in a different medium of expression, this cross-media copy is both a copy of the underlying work and a representation of the prior fixation. (5) When a work is reproduced without authorization, this unauthorized or illegitimate copy is a fake—that is, a forged, plagiarized, or piratical copy.

We reserve the term "author" for the person whose original work results in the first tangible fixation, which, in turn, is the source of legitimate reproductions and representations of the work. The author of a "fake" work of authorship receives one of three pejorative designations. The forger reproduces an original textual document or artwork and falsely claims that this copy, a fake, is the original.[51] The pirate multiplies copies of a work

[51] Forgery is a type of hoax. A forgery, as noted, is a reproduction of a preexisting work that the forger falsely claims as original and signs with the true author's name. A hoax, in contrast, involves false attribution, but does not require copying of a preexisting work.

without permission; these copies are not "authorized" by an author and, like forgeries, displace authorized copies in the marketplace. The plagiarist reproduces the ideas and sometimes the expression in an original work of authorship and signs his or her own name in place of the author's. The resulting "work" is a fake, and so is the purported "author."[52]

B. *Fidelity and Originality*

> A portrait is not unoriginal for being a good likeness.
>
> — Richard Posner[53]

Works and copies have at least one quality in common—they should be faithful to their origins. Fidelity, in other words, is a virtuous trait of good works and good copies. Just as works should be faithful to the objects they represent, copies should be faithful to the works they reproduce.

Originality raises more vexing questions in the first instance, the relationship between objects and works, than in the second, the relationship between works and copies. This is because the Romantic authorship paradigm identifies the origin of the work as the expressive purpose behind the work: that is, for example, the artist's mental concept of a bowl of apples and the expressive choices made to realize that concept as a painting. On the other hand, for a wide range of copyrightable works—photographs are a case in point for the way they *mechanically* transform objects into works—the true origin of the work is arguably the object depicted, for example, the bowl of apples itself rather than the person who

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Hans van Meegeren, for example, painted works *in the style of* Vermeer, and falsely attributed them to Vermeer as hitherto unknown originals. *See* Hope B. Werness, *Hans van Meegeren fecit, in* THE FORGER'S ART, *supra* note 49, at 1-53. Another example of a hoax was Clifford Irving's phony autobiography of Howard Hughes. The book was Irving's own work that he falsely attributed to Hughes. *See generally* CLIFFORD IRVING, THE HOAX (1981). The most famous literary hoaxes of the eighteenth century, James Macpherson's *Ossian* poems and Thomas Chatterton's *Rowley* poems, involved "forged" poems that were actually original works by Macpherson and Chatterton which they falsely attributed to ancient authors. *See* JOSEPH ROSENBLUM: PRACTICE TO DECEIVE: THE AMAZING STORIES OF LITERARY FORGERY'S MOST NOTORIOUS PRACTITIONERS 19-105 (2000).

[52] Piracy is the offense closest to copyright infringement—unauthorized copying, or violation of the reproduction right. Forgery is closer to trademark infringement—signing one's own product with someone else's name and "passing it off" as such. Plagiarism, like forgery, involves unauthorized copying, but is closer to the trademark offense of "reverse passing off"—signing one's name to someone else's product. *But see* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35-36 (2002) (rejecting claim for plagiarism under federal trademark law). As noted, plagiarism differs from copyright infringement because it may be committed by the theft of ideas alone, as opposed to the theft of original expression.

[53] Gracen v. Bradford Exchange, 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.).

executes the depiction (or, to be exact, who operates the *machine* that executes the depiction).

If the purpose of the work is to embody the author's unique character, then the more faithful an author is to his or her singular vision, the more original will be the work.[54] Flaws that mar the work's accuracy as a copy or representation thus, paradoxically, may enhance its value as an expression of the author's personality. "Picasso once said: 'Always strive for perfection. For instance, try to draw a perfect circle; and since you can't draw a perfect circle, the involuntary flaw will reveal your personality. But if you want to reveal your personality by drawing an imperfect circle—*your* circle—you will bungle the whole thing.'"[55]

If, on the other hand, the purpose of the work is to convey an accurate representation of a subject external to the author's personality, then a good author is a self-effacing one. The author's eye is an aperture through which is imprinted a picture of the world and any distortion imposed by the author's subjectivity is, to borrow the terminology of information theory, like "the addition of noise to a signal."[56] This is true, for example, in non-fiction literary genres. As Janet Malcolm put it, "[t]he ideal of unmediated reporting is regularly achieved only in fiction, where the writer faithfully reports on what is going on in his imagination."[57]

> We must always take the novelist's and the playwright's and the poet's word, just as we are almost always free to doubt the biographer's or the autobiographer's or the historian's or the journalist's. In imaginative literature we are constrained from considering alternative scenarios—there are none. This is the way it *is*. Only in nonfiction does the question of what happened and how people thought and felt remain open.[58]

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[54] It is possible to suppose that what is important to us in art is of a piece with what is important to us in one another—as if the work of art were the externalization of the artist who made it, as if to appreciate the work is to see the world through the artist's sensibility and not just to see the world."

DANTO, *supra* note 28, at 160.

[55] RUDOLF ARNHEIM, ART AND VISUAL PERCEPTION: A PSYCHOLOGY OF THE CREATIVE EYE 138 (2d ed. 1974). This view is consistent with Judge Frank's oft-noted observation that even inadvertent mistakes caused by "[a] copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder," may yield original, and hence copyrightable, expression. *See* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 105 (2d Cir. 1951). *Cf.* DANTO, *supra* note 28, at 162 ("[t]here is a benign inane theory that every deviation is expressively relevant").

[56] Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of Authorship*, 2004 B.Y.U. L. REV. 69, 111.

[57] JANET MALCOLM, THE SILENT WOMAN: SYLVIA PLATH & TED HUGHES 154-55 (1994).

[58] *Id.*

More generally, there is little room for personal expression in a medium where any author competent to practice the art would produce exactly the same work as any other author. The standard example is a copyrighted map. Differences between versions of a map are not only difficult to induce, but such "creativity" could be dangerous for the traveler.[59] In works where fidelity is equated with accurately copying the facts, the copyright view of originality as fidelity to an author's unique personality "creates a perverse incentive to produce second-rate or poor quality copies. Such copies have less commercial and education value, but are more likely to satisfy the originality requirement."[60]

Even outside the province of nonfiction and fact-based works, the goal of fidelity to artistic convention might require authors to forgo the fullest measure of distinctive self-expression. "In this respect," Sandor Radnoti observed, "the reality of art is a given domain of representational and compositional possibilities. To a very large extent, these possibilities are determined by tradition, which enters the present in the form of pattern maintenance, reproduction, and copying."[61] These two aims—fidelity to the facts and fidelity to an artistic tradition—are very different, but are equally likely to require that the author's personality defer to something objective and impersonal beyond the self. Even within the school of Romantic authorship, there is a tradition that rejects the conception of personality as the expression of unique and eccentric individuality.[62]

Finally, turning to the relationship between works and copies,

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59 "If [a man] copies substantially from the map of the other, it is downright piracy; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other." Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.); *cf.* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151 (S.D.N.Y. 1924) (Hand, L., J.) ("if each [map] be faithful, identity is inevitable, because each seeks only to set down the same facts in precisely the same relations to each other. So far as each is successful, each will be exactly the same"). Copyright law does, however, recognize and reward the "cartographer's art" by protecting the elements of "selection, design, and synthesis" in map design. *See, e.g.*, United States v. Hamilton, 583 F.2d 448, 452 (9th Cir. 1978) (Kennedy, J.).

60 William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 13 (2000). Although Professor Landes was addressing the "distinguishable variation" test for originality in a derivative work based on an underlying public domain work, *see* Alfred Bell, 191 F.2d at 102-03, the point holds true generally for any fact-based work.

61 SANDOR RADNOTI, THE FAKE: FORGERY AND ITS PLACE IN ART 95-96 (Ervin Dunai trans., 1999).

62 "The poetical Character," John Keats wrote, "is not itself—it has no self—it is every thing and nothing . . . . A Poet is the most unpoetical of anything in existence; because he has no Identity—he is continually in for—and filling some other Body—" JOHN KEATS, *Letters: To Richard Woodhouse [October 27, 1818], reprinted in* 2 NORTON ANTHOLOGY OF ENGLISH LITERATURE 872-73 (M.H. Abrams et al. eds., 4th ed., 1979). See text accompanying note 162, *infra.*

the notion of fidelity refers to the relationship between the first tangible fixation of the work—the first copy—and subsequent copies. The work, in other words, is the origin of the first copy, and the first copy, as the template for further reproductions, is the origin of subsequent copies, *ad infinitum*. When dealing with an author's manuscript, for example, a textual scholar will try to recover the author's formal and substantive intentions and use his or her judgment to decide between textual variants in the service of compiling a perfectly faithful copy. In the case of graphic works created in two stages (preparing the template and printing from the template) and meant to be reproduced in multiples (like engravings, photographs or lithographs), the degradation of the plate, negative or stone will result in successively weaker and less accurate subsequent copies. The fidelity of the earliest impressions will surpass that of later editions to the point that later editions may no longer be considered original works.[63]

C. *Originals and Copies*

Before addressing a selection of cases that illustrate the problems considered so far, I would like to synthesize the preceding discussion into a summary of the considerations that enable us to differentiate between originals and copies.

First, the *author's intention* provides a basis for distinguishing the original from an identical copy. Although an original work may "copy" some preexisting natural object or human-made article, it does not plagiarize or forge that thing, but represents it.[64] A painting of Niagara Falls, for example, is *about* Niagara Falls,

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[63] Gerard Genette explained what fidelity means in the context of two-stage printmaking techniques and their resulting "autographic" products:

> whatever the technique, the first stage consists in the production of a unique "plate" (or screen), and the second in inking this plate and then using it to take an impression on a certain number of sheets of paper, which then constitute so many authentic prints, whether they are pulled by the artist himself or a craftsman. [T]he limits on the procedure are at once technical (wear and tear on the plate) and institutional (limited editions to avoid depreciation) . . . . [F]raud is a matter either of pulling extra prints, or passing off as originals third-degree reproductions made from one of these prints, a photograph, or—why not—a new plate made by tracing the original.

GERARD GENETTE, THE WORK OF ART: IMMANENCE AND TRANSCENDENCE 47 (G.M. Goshgarian trans., 1997) (1994).

[64] An artist who slavishly copies nature, however, has something in common stylistically with the forger and plagiarist:

> When a forger endeavors to imitate someone else's work, his anxious, puny concern with detail after detail resembles the mechanical copying of nature in mindless realism . . . . A similar ugliness of texture is found in the products of [forgers and of] artists who 'forge nature'—that is, who imitate what they see piece by piece.

Rudolf Arnheim, *On Duplication, in* THE FORGER'S ART, *supra* note 49, at 236.

rendering Niagara Falls *as* a painting. An indiscernible object that copies the representation, on the other hand, is both a copy and a "fake." A fake is not *about* anything, but merely realizes a deceptive intention to replace the original with a counterfeit.

Second, *temporal priority* distinguishes the original from an identical copy. The original is what came first, and the copy is what belatedly follows.[65] In addition, this relationship must be grounded on the element of causation.[66] The first thing must *cause* the second thing. The element of causation determines the originality of these two things (or their lack of it), but not their novelty.[67] As previously noted, a contemporary author who writes his "Ode on a Grecian Urn" without any knowledge of the identical poem by John Keats will have written an original work, but not a novel one.[68]

Third, and finally, *context* distinguishes the original from an identical copy. Here, we are concerned with the way these two things relate to their surroundings rather than with the way they relate to each other. The factor of context is illustrated by the scandal over Marcel Duchamp's "Fountain;" the point of the story was the art world's astonishment that two instances of the same object could serve at the same time as a lowly utilitarian article (in fact, a receptacle of human waste) and as an artwork, depending upon where and how the objects were displayed.[69] In fact, the

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65 *See* text accompanying notes 16-17.

66 What are the cultural beliefs that underlie our aesthetic criteria? Probably one of the most important—one from which many of the others are directly or indirectly derived—is the belief in causation . . . . Causation not only changes the quality, quantity, and relationships of things already in the world, but, from time to time, these are reordered in a way that new entities and patterns come into existence . . . . 'When a great poet has lived,' writes T.S. Eliot, 'certain things have been done once and for all and cannot be achieved again.' The crucial word here is 'achieved.' They can perhaps be done again, but they cannot be achieved again."

Leonard B. Mayer, *Forgery and the Anthropology of Art, in* THE FORGER'S ART, *supra* note 49, at 77, 82.

67 "Originality is . . . distinguished from novelty; there must be independent creation, but it need not be invention in the sense of striking uniqueness, ingeniousness, or novelty, since the Constitution differentiates 'authors' and their 'writings' from 'inventors' and their 'discoveries.'" L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976).

68 *See* text accompanying note 18.

69 Marcel Duchamp's "Fountain," as displayed in the gallery, was presumably intended to be a perfectly accurate representation of a urinal. "Fountain" and an identical plumbing fixture, however, were both iterations of a common industrial prototype, so that, strictly speaking, neither one was a copy of the other. "Because it is mass-produced, *Fountain* shares with the other ready-mades the fate of being a perfect copy. Its serial reproduction through molds assures the impossibility of distinguishing it from the original; as an industrial object it is a copy with no original, so to speak." DALIA JUDOVITZ, UNPACKING DUCHAMP: ART IN TRANSIT 129 (1995). Duchamp was aware of this ambiguity, and, more generally, of "the paradoxical 'originality' and 'reproducibility' of the readymades . . . . In a series of notes of the 1930s on a pseudo-scientific category called

status of the "Fountain" as a good or bad "copy" is still unsettled—was it a valid artistic representation (that is, a work of authorship) or was it a hoax (that is, a *fake* work of authorship)? This question brings us full circle by returning us to the author's intention because the urinal's display in the art gallery was the product of Duchamp's decision to put it there, and to put us in the uncomfortable position of not knowing whether to admire or distrust the artist.

II. PHOTOGRAPHS AND COPIES

> Most contemporary expressions of concern that an image-world is replacing the real one continue to echo the Platonic depreciation of the image: true insofar as it resembles something real, sham because it is no more than a resemblance. But this venerable naïve realism is somewhat beside the point in the era of photographic images, for its blunt contrast between the image ("copy") and the thing depicted (the "original")—which Plato repeatedly illustrates with the example of a painting—does not fit a photograph in so simple a way.
>
> — Susan Sontag[70]

The theoretical question of how to make aesthetic distinctions between indiscernible objects becomes a practical question when we turn from the traditional arts, like painting and sculpture, to photography and the media arts. According to the conventional view, when a photographer takes a picture, he or she represents the "real thing" *as* a photograph, just as a painter, for example, represents the "real thing" *as* a painting. "Taking" and "representing," in this context, mean the same thing. When it comes to photography, however, the word "taking" might not be a synonym for "representing," but might instead mean something more like what it literally says—"appropriating."

A. *Artworks and Objects*

Photography's peculiar enchantment lies in its ability to transform inexpressive objects into works of authorship, and just as readily to transform works of authorship into copies. In her 1977 book about the most reliably mimetic of art forms, *On Photography*,

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'infra-thin' he had speculated, in almost metaphysical fashion, on infinitesimal differences or thresholds between physical states. One example reads: 'The difference / (dimensional) between / 2 mass produced objects / [from the same mould] is an 'infra-thin'.'" DAVID HOPKINS, AFTER MODERN ART, 1945-2000, at 63 (2000).

[70] SUSAN SONTAG, ON PHOTOGRAPHY 136-37 (1977).

Susan Sontag observed that "[l]ess and less does the work of art depend on being a unique object, an original made by an individual artist."[71] Unlike the traditional arts, whose "characteristic form is a single work, produced by an individual," the media arts, such as photography, use "techniques based on chance, or mechanical techniques which anyone can learn." In addition, "the traditional fine arts rely on the distinction between authentic and fake, between original and copy," while "the media blur, if they do not abolish outright, these distinctions."[72]

At an even more fundamental level, the "magical" ability of photographs to borrow the substance of what they portray reinforces our vestigial superstition about the power of such copies.[73] Photographs are troubling in this way because they seem to destabilize the homology upon which traditional, representational art is based: objects are to works as works are to copies. Works, that is, represent objects in the same way that copies represent works. Photographs, however, do more than merely represent objects. They are taken to be direct evidence of the way things really are—a piece of reality rather than a mere copy of it.

The photograph owes its special status to the fact that it is not *necessarily* dependent on an image maker in the same way that a painting or other graphic work is dependent on an artist to set brush, pencil, or pen to paper. Although we tend to assume that a photographer/author is always behind the camera (and the law will make every effort to find someone to play the role of photographer),[74] in fact, identical images could be imprinted on a photographic medium by a photographer's choice or by the random, entirely mechanical operation of a camera, and we would have no way of knowing, simply from examining the two pictures, which was a work of authorship and which was merely a piece of spoiled film.[75]

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71 *Id.* at 130.

72 *Id.* at 132. *See generally,* HILLEL SCHWARTZ, THE CULTURE OF THE COPY: STRIKING LIKENESSES, UNREASONABLE FACSIMILES (1996).

73 SONTAG, *supra* note 70, at 136-37.

74 In Los Angeles News Serv. v. Tullo, 973 F.2d 791, 793 (9th Cir. 1992), for example, the defendant claimed that "raw videotapes" were excluded from copyright protection because they "merely captured whatever was before the camera, involved no creativity or intellectual input, and so are not original works . . . . " The court rejected this argument. *See also* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography,* 65 U. PITT. L. REV. 385, 448 (2004) ("[t]he doctrine that has developed from the cases that adhere strictly to *Burrow-Giles* encourage courts to search photographs for the presence of a Romantic author conceptualized in a particular historically situated way").

75 The principle is that machines cannot be authors.

In order to be entitled to copyright registration, a work must be the product of

A copy of the spoiled film would be the same as a copy of the photographer's work—a convergence that seems to efface the identity of the author while enhancing the veracity of the representation since there is no author behind the work who might be tempted to "lie" about what he or she has seen. Although it is most unlikely that a moss stain could randomly coalesce in the image of George Washington, it is *not* unlikely that a person's image could be imprinted on a photographic medium by the random or entirely mechanical operation of a camera. The absence of an author's intent in the latter case does not undermine the veracity of the representation imprinted on the film; to the contrary, it makes the representation even more credible.

In photography, the relationship between originals and copies is thus complicated by the dual origin of the photograph itself—mechanically induced by the impression of a photographic subject on a photographic medium, but also caused by an author's intent to create a photograph. A randomly produced photograph could be intentionally copied, but since the underlying photograph is not a work of authorship, the copy would not violate anyone's copyright. In like manner, the same random sequence of events could produce two identical photographs, yet neither one would be a work of authorship—or a copy—because neither one would have an author.

B. *Transformations*

> The very principle of photography is that the resulting image is not unique, but on the contrary infinitely reproducible.
>
> — John Berger[76]

The problem is how to separate the two stages of the creative process: to find where the intentional ends and the mechanical begins. A photographer is a type of author who *uses* a machine (a camera), while a forger is a type of copyist who aspires to *be* a

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> human authorship. Works produced by mechanical processes or random selection without any contribution by a human author are not registrable. Thus, a linoleum floor covering featuring a multicolored pebble design which was produced by a mechanical process in unrepeatable, random patterns, is not registrable. Similarly, a work owing its form to the forces of nature and lacking human authorship is not registrable; thus, for example, a piece of driftwood even if polished and mounted is not registrable.

COPYRIGHT OFFICE, COMPENDIUM II, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 503.03(a) (1984). *Cf.* Urantia Foundation v. Maaherra, 114 F.3d 955, 958 (9th Cir. 1997) (although copyright laws "do not expressly require 'human' authorship . . . some element of human creativity must have occurred in order for the Book to be copyrightable").

[76] John Berger, *Understanding a Photograph*, *in* CLASSIC ESSAYS ON PHOTOGRAPHY 291 (Alan Trachtenberg ed., 1980).

machine (*like* a camera)—to make a perfectly faithful copy of someone else's work. The three cases I discuss below struggle with the disconcerting parallel between perfect fidelity (an unavoidable virtue of the photographic medium) and forgery (an unavoidable temptation of the photographic medium).

The first case questions, among other things, whether a hand drawn image identical to a photograph should be considered a painting *based on* the photograph or a copy *of* the photograph. The second considers whether an independently produced photograph that exactly resembles an earlier one of the same subject should be deemed an original or a copy. The third asks whether an enhanced photograph that achieves perfect fidelity to an original oil painting crosses the line between representation and forgery.

1. When a Photograph is Not a Photograph

> Photographs look like what they are: *photographs.*
>
> — Kendall L. Walton[77]

During the 1988 America's Cup yachting race in San Diego Harbor, a professional photographer, Jeffrey Mendler, took a series of pictures, including one of a tacking duel between the Spanish and Australian boats. In 1991, Mendler signed a licensing agreement with an apparel manufacturer, Winterland, allowing his photos to be used as illustrations on sportswear. The following year, Winterland converted the "tacking duel" photo into a line drawing and applied it to a T-shirt. Three years later, Winterland again printed the photo on a T-shirt, but this time it employed a different technique.

Winterland based the new "illustration" on a digitally altered photograph instead of a line drawing. Mendler claimed that this use of the photograph was unauthorized by the license and sued for copyright infringement.[78] The parties in *Mendler v. Winterland Productions, Ltd.*[79] agreed that Winterland had the right to use the photograph as the basis for an "illustration," defined by the contract as a "guide," "model" or "example" as opposed to a

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[77] Kendall L. Walton, *Transparent Pictures: On the Nature of Photographic Realism,* in 11 CRITICAL INQUIRY 246, 249 (December 1984).

[78] The T-shirt image was alleged to be an unauthorized reproduction of the photograph—a copyright infringement—because the terms of the license did not authorize its use in this manner.

[79] 207 F.3d 1119 (9th Cir. 2000) (Kozinski, J.). The title of this section paraphrases the rhetorical question that is the first line of the opinion, "[w]hen is a photograph no longer a photograph?" *Id.* at 1120.

"photographic reproduction."[80] They disagreed, however, about whether the digitally altered photograph was an illustration based on the photograph or an unauthorized copy of the photograph.[81]

This disagreement goes to a deeper question. In a hand drawn picture, the artist's hand and eye mediates between the thing represented and the representation. "As if following a chain of physical evidence," wrote Richard Shiff, "the viewer reaches the hand that grasped and manipulated the brush. . . . But to pass beyond this hand to an eye and a brain, to an act of vision, is problematic; to do so, we must enter the body."

> The causal connection or mechanism operating between hand and eye or brain remains obscure. If the interplay of brushwork and vision, mediated by the human organism, was as well formulated as the mechanism of photography, the hand might seem little more than an element of a machine operated by the brain systematically responding to stimuli in visual form. This clearly is not the case.[82]

In a photograph, by contrast, the relationship between vision and representation is mediated by a machine rather than by the human body. The photographer selects and frames the picture, but the camera *takes* the picture. What is the significance of *taking* a picture as opposed to *drawing* it?

When we look at any picture that aims at realism, we are seeing two things: the object copied and the picture in which the object is copied. Although photographs, in theory at least, have the advantage when it comes to realism,

> [p]aintings *can* be as realistic as the most realistic photographs, if realism resides in subtleties of shading, skillful perspective, and so forth; some, indeed, are virtually indistinguishable from photographs. . . . Photographic realism is not essentially unavailable to the painter, it seems, nor are photographs automatically endowed with it. It is just easier to achieve with the camera than with the brush.[83]

A realistic painting of a racing yacht therefore might look exactly like a realistic photograph of a racing yacht. Both the photograph and the painting copy the appearance of the same object, yet neither could be mistaken for a racing yacht. So grading the photograph vs. the painting for the quality of its realism does not

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80 *Id.* at 1121.
81 *Id.*
82 Shiff, *supra* note 40, at 170.
83 Walton, *supra* note 77, at 249.

explain the distinction between *taking* and *drawing*, nor does it account for the difference, if there is one, between a photograph and an identical painting.

Let us consider two explanations. First, different metaphors for artistic expression are required to describe the photographer's activity as opposed to the painter's. The photographer intends to express how the racing yacht would look *as a photograph*, while the painter intends to express how the racing yacht would look *as a painting*. The difficulty here, of course, is that the metaphors are different, but the artworks that embody them are indiscernible.

Second, a photographic image exists independently of the photographer's beliefs about what he or she has seen through the viewfinder, while a painted image does not.[84] In this sense, suggested Kendall L. Walton, a photograph is transparent to the viewer while an identical painting is opaque. The subject of a "realistic" painting is mediated by the hand and eye of the artist. In contrast, a photograph is taken by a machine and therefore, apart from the photographer's beliefs, provides evidence upon which other people may base their own beliefs. This evidentiary function does not imply that photographs are more realistic or accurate than paintings; as in any system of representation, the connection in photography between sign and referent is conventional rather than natural.[85] The difference is that we perceive the subject *directly* through a photograph as opposed to *indirectly* through a hand drawn picture because "[a] mechanical connection with something, like that of photography, counts as contact, whereas a humanly mediated one, like that of painting, does not."[86]

Suppose now, instead of going down to the harbor, the painter pins a photograph to his easel and refers to the photograph of the yacht rather than to the yacht itself. He still sees the yacht that he is painting, but he sees it *through* the photograph rather than directly. If his painting results in a perfect copy of the photograph, why would it be improper to call his painting a photograph? Isn't a perfect copy, by definition, an additional instance of the thing copied?

These theoretical questions foreshadow the legal problem presented by the *Mendler* case. One possibility based on the

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84 *Id.* at 262-65.

85 A black and white photograph, as the *Mendler* court noted, unrealistically portrays a colorful world in shades of gray, but is nonetheless photographic. *See Mendler*, 207 F.3d at 1123.

86 Walton, *supra* note 77, at 270.

considerations sketched above would be to define a photograph as the product of a certain technology—a technology that involves *taking* pictures rather than *drawing* or *painting* them. Another possibility would be to define a photograph as a type of picture whose nature resides in its perceptible qualities rather than in the history of how it was produced. In other words, a photograph is a picture that looks like a photograph.

The plaintiff's argument in *Mendler* was consistent with the first position; he argued that he had licensed Winterland to use the photograph in the same way that the hypothetical painter did—as a model or guide for a handmade "illustration." The illustration was to be created by an artist's hand, and the photograph was to serve the artist as a window through which to view the long-vanished tacking duel in San Diego Harbor. What the contract disallowed was any type of photographic reproduction of the original photograph.

Winterland's response was consistent with the second position—that it didn't matter *how* the "illustration" was made, by hand or by machine, as long as it wasn't identical to the underlying photograph. The dissenting judge accepted this argument, observing that while the digitally transformed racing yacht picture was "obviously based on the photograph, it is not the photograph."[87] The contract's purpose, presumably, was to preserve the value of the limited edition photograph by preventing the mass circulation of faithful copies.[88] This purpose would not be served by prohibiting Winterland from using a digital or photochemical process to author non-identical illustrations *based on* his photographs; indeed, transforming the photograph into an "illustration" is precisely what the license authorized Winterland to do.[89]

The Ninth Circuit held, however, that Winterland infringed the photographer's copyright because its T-shirt image *still looked*

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87 *Mendler*, 207 F.3d at 1126 (Rymer, J., dissenting).

88 The majority opinion noted in a footnote that at least one customer complained about seeing mass-produced copies of the picture showing up on T-shirts. *Id.* at 1124, n.15.

89 Judge Kozinski recognized that the contract permitted Winterland to use scanned photographic images to make the illustration.

> [T]he license gave Winterland the right to use 'whatever illustration process' it found most appropriate. Winterland was thus allowed to make a scanned image, so long as it used the image only as a 'guide[ ], model [or] example[ ]' to achieve an end result that was an 'illustration' and not a photographic reproduction. The question we must answer, then, is whether Winterland's subsequent electronic modifications transformed the scanned photograph into something that was no longer a photograph.

Id. at 1121.

like a photograph of racing yachts. The court speculated, to underscore this point, that even an identical copy of the original photograph would have been allowed by the licensing agreement as long as it had been drawn or painted by hand. Judge Alex Kozinski observed:

> A skilled artist can draw or paint an image that looks as real as a photograph—or even more so. Had Winterland engaged such an artist to create an image modeled after Mendler's photo, it would have stayed within the terms of its license, no matter how lifelike or how similar to the original the image looked. This doesn't help Winterland, however, for we know that whatever photographic elements remain in the T-shirt image were not created by Winterland's artistry—they were captured mechanically in the chamber of Mendler's camera.[90]

A perfectly faithful handmade copy of the photograph, in other words, would have been permissible because it would have been a drawing or a painting rather than a photograph, even though it would look exactly like a photograph. On the other hand, if Winterland used a photographic technique to create the "illustration," as it did, it was obliged to alter the image sufficiently "so it would no longer exhibit those qualities that cause us to recognize it as a photograph."[91]

On its way to this conclusion, the court grappled with the possibilities for metamorphosis through which a photograph might be transformed into a drawing or a drawing transformed into a photograph. A photograph, as previously noted, may be defined both as a product of photographic technology *and* as a picture that has photographic qualities. These definitions are usually consistent, but not necessarily so. The problem is that the same picture may satisfy one definition but not the other. A photograph, that is, can be crafted to look like a handmade work of art and a handmade work of art can be crafted to look like a photograph. In either of these instances, the two definitions will lead to different conclusions about whether the picture is a photograph.

Judge Kozinski tried to accommodate both definitions with two rules that, in combination, gave Winterland the benefit of the doubt, although Winterland still lost the case. First, a photograph is not a photograph unless it comes from a camera. Second, even if it comes from a camera, a photograph is not a photograph unless

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90 *Id.* at 1123-24.
91 *Id.* at 1124.

it looks like one. Applying these rules to the facts, the court allowed that any handmade illustration based on Mendler's photograph would have been permitted by the contract. Even if such a painting exactly resembled the photograph, it would be *a representation of the photograph in the form of a painting.*

This distinction accounts for the practice of "photo-realist" artists who transform photographs into paintings that are indiscernible from photographs.[92] The artist who works in this genre intends to represent a photograph *as* a painting.[93] Winterland's illustration, in contrast, was a *reproduction* rather than a *representation* of a photograph. Therefore, it was not an original artwork based on a photograph, but simply an inaccurate copy of a photograph. The copy's distortion, in other words, did not elevate it into something other than the debased thing it was—an unfaithful copy.

2. The Original Imprisoned in the Copy

The laziest way to copy a photograph would be to reprint the negative, or to re-photograph a print previously taken from the negative.[94] Another approach to copying a photograph would be to re-photograph the photograph's subject, using the same camera, lens, lighting, angle, and film exposures as were used for the original.[95] Whether in the latter case the second picture is legally a

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[92] Chuck Close's technique, for example, involves "transferring a photograph onto a grid and then painting square by square with an airbrush and a minimal amount of pigment to achieve the smooth photograph-like surface." AMY DEMPSEY, ART IN THE MODERN ERA: A GUIDE TO STYLES, SCHOOLS & MOVEMENTS 1860 TO THE PRESENT 252 (2002).

[93] A case in point is the work of Robert Bechtle, in which "something peculiar" happens to the underlying photograph: "your reflexive sense of the picture as a photograph breaks down, and the object's identity as a painting, done entirely on purpose, gains ground . . . . At last, it's as if the original photograph were a ghost that died and came back as a body." Peter Schjeldahl, *Parked Cars: American Photo-Realism at its Best,* THE NEW YORKER, May 9, 2005, at 89.

[94] *See, e.g.,* Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions,* 21 HASTINGS COMM & ENT L.J. 55 (1998) (discussing policy issues raised by unauthorized copying of photographs of public domain artworks owned by museums); Mitch Tuchman, *Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums,* 24 COLUM.-VLA J.L. & ARTS 287, 305-315 (2001); Landes, *supra* note 60, at 13-16.

[95] Ansel Adams's photograph, *Moonrise (Hernandez, New Mexico) 1941,* depicts an exposure of the moon over a town in central New Mexico made at 4:05 p.m. on October 31, 1941.

> Who but Adams . . . can safely claim ownership in the moonrise above Hernandez, New Mexico, whether original or copy? Given the replicative capacity in photographic technology, as well as the presumptions that arise in copyright from striking similarity, not to mention the implications in derivative works theory, the answer is, no one can. In a very real sense, at least since 4:05 p.m. Friday, October 31, 1941, the original has been imprisoned in the copy.

copy of the first depends on whether the second photographer intended to create a copy. Jones, for example, takes a photograph of Mt. Fuji; Smith, who has not seen Jones's picture, coincidentally takes a photograph of the same mountain from the same vantage point. The products of their endeavors are identical, but Smith's picture is not a copy of Jones's.[96] The same holds true in any case where two authors create identical works without the second author having had access to the first-created work.[97] The second-created work is identical to the first, but is not a copy because the act of copying is a necessary element of copyright infringement.[98] Judge Learned Hand provided the standard illustration. A latter-day genius is inspired to write an ode on a Grecian urn. He has never read a certain poem by John Keats. Although his poem is identical, word for word, to Keats's ode, it is not a copy.[99]

The consensus of experts is that an intentional reconstruction of a copyrighted photograph is considered by the law to be a copy, while a coincidental reconstruction is not.[100] This is an application

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David Lange, *Sensing the Constitution in Feist*, 17 U. DAYTON L. REV. 367, 374 n.9 (1992). The title of this subsection paraphrases Professor Lange.

96 *See* Ty Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997) (Posner., J.) ("[I]magine two people photographing Niagara Falls from the same place at the same time of the day and year and in identical weather—there is no inference of access to anything but the public domain, and, equally, no inference of copying from a copyrighted work").

97 A variant of this situation is where the first and second authors are the same person—in other words where an author, plagiarizing himself, creates the same work twice. *See* THOMAS HOVING, FALSE IMPRESSIONS: THE HUNT FOR BIG-TIME ART FAKES 75-76 (1996) (describing how Pierre-August Renoir, Claude Monet, Maurice Utrillo, and Giorgio de Chirico, "faked" their own works by passing off handmade copies as unique originals). Even though the self-plagiarist had access to his own prior work and presumably repeated (i.e., copied) himself (consciously or unconsciously), he is usually excused from liability for copyright infringement. The legal implications of self-plagiarism are addressed in a note, *Authors Reproducing Works in Which They No Longer Own the Copyright* in ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 498-500 (5th ed. 1999).

98 *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) ("[T]wo separate elements [are] essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went to [sic] far as to constitute improper appropriation").

99 *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("[B]orrowed the work must indeed not be, for a plagiarist is not himself pro tanto an 'author'; but if by some magic a man who had never known it were to compose anew Keats's "Ode on a Grecian Urn," he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's"). The other classic illustration of this principle is the short story, *Pierre Menard, Author of Don Quixote,* which tells of an eccentric scholar who steeped himself in the literature and lore of seventeenth century Spain and, after many years of effort, succeeded in writing several pages of *Don Quixote* without referring to Cervantes' original. JORGE LUIS BORGES, LABYRINTHS: SELECTED STORIES & OTHER WRITINGS 36-44 (Donald A. Yates & James E. Irby eds.) (New Directions 1964) (1956).

100 *See* 1 PAUL GOLDSTEIN, COPYRIGHT § 2.11.1 (LEXIS current through 2004) (suggesting that a photographer "who studies an earlier photograph and returns to the original scene to accurately replicate the earlier . . . work" will be liable for copyright infringement); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][2] (LEXIS current through 2004) (same where a photographer "in choosing

of the principle that "a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[101] The test for originality in identical photographs is similar to the one that applies to compilations of facts. The second compiler is not forbidden to try his or her hand at a project that has already been done; however, "[t]he second compiler must assemble the material as if there had never been a first compilation; only then may the second compiler use the first as a check on error."[102]

An early example is *Falk v. Brett Lithographing Co.*,[103] an 1891 suit alleging copyright infringement based on a mother-and-child photograph "taken by the plaintiff after arranging them in good positions according to his judgment, and after the child had put its finger in her mouth, which he thought improved the position and took advantage of, as photographers usually take photographs."[104] The court held that "[t]he defendants have not merely copied the woman and child, as they might have done with their consent, but they have used the plaintiff's production as a guide for making others, and have thereby substantially copied it as he produced it, and infringed upon his exclusive right of copying it."[105]

This much, therefore, is settled law—a photographer who intentionally restages a copyrighted photograph is no less an infringer than one who prints unauthorized copies from a negative. The photographer is a copyist, not an author. The more difficult and interesting question is determining the *scope* of the first photographer's rights *vis-à-vis* latecomers to the subject. This question arises because photographs are not copyrightable *per se*: in *Bridgeman Art Library, Ltd. v. Corel Corp.*, to give the most recent

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subject matter, camera angle, lighting, et cetera., copies and attempts to duplicate all of such elements as contained in a prior photograph"); *cf.* Kisch v. Ammirati & Puris, Inc., 657 F. Supp. 380, 384 (S.D.N.Y. 1987) (finding a photograph of the Village Vanguard nightclub restaged for a beverage advertisement to be an infringing copy).

When authors are called upon to reconstruct their own lost works for the purpose of belated copyright registration, however, the vice of *direct reference to the original* suddenly becomes a virtue. Indeed, in such cases, copying an original from memory is not enough. In Kodadek v. MTV Networks, Inc., 152 F.3d 1209 (9th Cir. 1998), for example, the court held that a copy of the work provided to the copyright office for deposit must be "virtually identical to the original and must have been produced by referring directly to the original. Once a bona fide copy is made in this manner, subsequent copies can be made by directly referring to that copy." *Id.* at 1212; *see also* Coles v. Wonder, 283 F.3d 798 (6th Cir. 2002) (songwriter's reconstruction of a musical composition he had created eight years earlier did not satisfy the registration requirement for deposit of a copy).

101 Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345-46 (1991).

102 Rockford Map Publishers. Inc. v. Directory Serv. Co. of Colorado, 768 F.2d 145, 149 (7th Cir. 1985) (Easterbrook, J.).

103 48 F. 678 (C.C.S.D.N.Y. 1891).

104 *Id.* at 679.

105 *Id.*

example, the court held that accurate photographic reproductions of public domain artworks lacked sufficient originality to warrant copyright protection:

> [O]ne need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. That is not to say such a feat is trivial, [it is] simply not original.[106]

When the photographic subject itself is meaningful or beautiful, how do we adjudicate between the claims of the subject, the first photographer, and subsequent photographers? The level of original authorship in the earliest photograph is the wild card in these cases because its claim to be a work of authorship might be derived in part or whole from the aesthetic qualities of its subject, from the expressive content of a preexisting work of authorship, or from the model's expression of his or her personality.[107]

A natural object—a beautiful seashell, for example—may have aesthetic qualities, but the seashell is not a work of authorship because it lacks an author. The same seashell in the form of a photograph, however, *becomes* a work of authorship because a photographer chose how and when to take the picture. Expression in the sea shell photograph is measured by the skill with which it was appropriated from nature—the how and the when—which is why continuous photographic monitoring cannot produce a work of authorship,[108] even if such monitoring by chance produces a photograph identical to another one that *is* a work of authorship.

When it comes to copyright questions, therefore, separating a photographer's expressive contribution from a subject's intrinsic worth might not always be so easy to do, and this, again, is a problem if the subject has a value—or an owner—of its own. That is why these cases tend to resemble an awkward dance with three

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106 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998). *But see* Richard Preston, *Capturing the Unicorn,* THE NEW YORKER, April 11, 2005, at 28-33 (profiling two mathematicians hired by the Metropolitan Museum of Art to digitize high resolution 3-D photographs of the medieval tapestries known as "The Hunt of the Unicorn").

107 The expressive value of Napoleon Sarony's famous photograph of Oscar Wilde, for example, may have owed more to Wilde's staging of his literary persona than to Sarony's staging of the picture. *Cf.* Falk v. Donaldson, 57 F. 32, 33 (C.C.S.D.N.Y. 1893) ("An examination of the photograph shows that it is the work of an artist. The question is whether the artist was Miss Marlowe [the subject], or complainant [the photographer]. How far the artistic contributions are to be attributed to the talent of Miss Marlowe, it is impossible to say"); *see also* Farley, *supra* note 74, at 433.

108 "If everything that existed were continually being photographed," wrote John Berger, "every photograph would become meaningless . . . . [The] choice is not [only] between photographing *x* and *y*: but between photographing at *x* moment or at *y* moment." CLASSIC ESSAYS ON PHOTOGRAPHY, *supra* note 76 at 291, 293.

partners: there is a subject, a first photographer, and a second photographer. By taking the first picture, the first photographer appropriates some aspect of the subject's appearance, or at least acquires an interest in preventing the subject from being represented again in a similar way.[109] The first photographer is then in a position to protect his or her interest against latecomers who want to stake their own claims to a share of the subject. This problem has been litigated in two recent cases where photographers have claimed that clients misappropriated the "product shots" they prepared to accompany advertising copy.[110] In these cases, successor photographers allegedly reconstructed rejected product shots, and the disappointed initial photographers then claim that their works were copied without authorization. The client responded that the photograph is secondary to the product—the product, that is, confers value on the photograph rather than vice-versa—and that, while it hired the photographer to take a picture of the product, it did not intend to cede the right to commission future portrayals of the product.

The leading case, *Ets-Hokin v. Skyy Spirits, Inc.*,[111] involved a "product shot" of the defendant's well-known blue vodka bottle. After the client rejected the plaintiff photographer's pictures, other photographers were hired to re-shoot the bottle. Ets-Hokin subsequently sued Skyy, claiming, "these photographers improperly used his photographs to produce virtually identical photos of the vodka bottle."[112] The case raised the threshold issue of whether the photograph's subject—the vodka bottle—was itself a work of authorship (which would make Ets-Hokin's photo a

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[109] Judge Posner described a variation on this theme:

> Suppose Artist A produces a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. . . . [I]f the difference between the original and A's reproduction is slight . . . the trier of fact will be hard-pressed to decide whether B was copying A or copying the Mona Lisa itself.

Gracen v. Bradford Exchange, 698 F.2d 300, 304 (7th Cir. 1983); *cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903) (Holmes, J.) ("Others are free to copy the original. They are not free to copy the copy.").

[110] Many similar cases involve disputes between advertising agencies and photographers hired to shoot "stock photos" or pictures to illustrate advertisements without depicting the product. *See, e.g.*, Fournier v. McCann Erickson, 202 F. Supp. 2d 290 (S.D.N.Y. 2002); Kaplan v. Stock Market Photo Agency, Inc., 133 F. Supp. 2d 317 (S.D.N.Y. 2001); Andersson v. Sony Corp. of America, No. 96 CIV 7975 (RO), 1997 WL 226310 (S.D.N.Y. May 2, 1997); Sharpshooters, Inc. v. Retirement Living Pub. Co., 932 F. Supp. 286 (S.D. Fla. 1996); Gentieu v. John Muller & Co., 712 F. Supp. 740 (W.D. Mo. 1989); *cf.* Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000) (book cover photo reconstructed for movie poster).

[111] 225 F.3d 1068 (9th Cir. 2000), *aff'd after remand*, 323 F.3d 763 (9th Cir. 2003).

[112] *Id.* at 1072.

derivative work based on the vodka bottle).[113] If his photographs were derivative works based on Skyy's vodka bottle, Ets-Hokin's rights against Skyy would be severely limited because he would have had to establish, among other things, that his copyright would not interfere with Skyy's rights to take additional photographs of the bottle.[114]

Most courts have held that the depiction in photographic or pictorial form of a preexisting work of authorship is a recasting, transformation, or adaptation that automatically qualifies as a derivative work.[115] The *Skyy* court, however, did not reach this issue because it held that the vodka bottle was not a preexisting work of authorship: it was purely functional or, at best, protected only by its trade dress, and so not entitled to copyright protection.[116] The case was remanded to the district court for a finding of whether the allegedly infringing photographs of the vodka bottle were in fact copied from Ets-Hokin's.[117]

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113 *See* 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.").

114 *Id.* at 1073 (citing Entm't Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1220-21 (9th Cir. 1997)).

115 *See, e.g.,* Ty Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 518-19 (7th Cir. 2002) (photographs in catalogue of "beanie babies" are concededly derivative works); Modern Publ'g v. Landoll, Inc., 841 F. Supp. 129, 132 (S.D.N.Y. 1994) (artistic renderings of three-dimensional "troll dolls" in two-dimensional pictorial form are derivative works). The reverse is also true: for example, in Fleischer Studios, Inc. v. Freundlich, Inc., 73 F.2d 276, 278 (2d Cir. 1934), the court held that a three-dimensional "Betty Boop" doll infringed the copyright of a two-dimensional drawing of the cartoon character. *But see* NIMMER, *supra* note 100 at § 2.08[C][2] ("The mere reproduction of a work of art in a different medium should not constitute the required originality, for the reason that no one can claim to have independently evolved any particular medium"); ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 712 (6th Cir. 2005) (finding that hand-drawn sketches of auto parts, copied from photographs as accurately as possible, were "a form of slavish copying that is the antithesis of originality").

116 The Copyright Act, in its statutory definition of "pictorial, graphic, and sculptural works," requires that the expressive content of a functional object be "identified separately from, and . . . capable of existing independently of, the utilitarian aspects of the work." 17 U.S.C. § 101 (2000). *See, e.g.,* Mazer v. Stein, 347 U.S. 201 (1954) (defining category of pictorial, graphic and sculptural works as applied to copyrighted table lamp bases); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) (same regarding clothing mannequins).

117 The dissenting judge would have decided as a matter of law that the photographs made in the second round were not infringing copies of Ets-Hokin's because they were "based on slightly different angles, different shadows, and different highlights of the bottle's gold label." 225 F.3d at 1083 (Nelson, J., dissenting). These slight differences would preclude a finding of infringement. Put differently, because the expressive options for photographing a vodka bottle are limited, Ets-Hokin's product shots were entitled only to a "thin" copyright that protected only against identical copying. *See* note 36, *supra* (discussing realistic jellyfish sculptures in the *Satava* case). A related possibility, recognized by the majority, was that the doctrine of merger would preclude an infringement claim because the assignment of photographing a vodka bottle left little or no room for original

A few months after the Ninth Circuit decided *Skyy*, a New York district court in *SHL Imaging, Inc. v. Artisan House, Inc.*,[118] decided a similar case involving product shots of picture frames rather than vodka bottles. The *SHL Imaging* court had read the *Skyy* decision, and expressly chose to take a different approach.[119] First, the court rejected Artisan House's claim that the photographs were derivative works based on the picture frames because they "merely depict defendants' frames and do not recast, adapt or transform any authorship that may exist in the frames."[120] In other words, the court accepted, at least for the sake of argument, that Artisan House's picture frames (unlike Skyy's vodka bottles) *were* works of authorship, but rejected Artisan House's conclusion that portraying the picture frames *as* photographs, or representing them *in the form of* photographs, transformed any preexisting expressive content.

What was odd about this reasoning was that the *SHL Imaging* court went on to treat this "depiction" as if it contained sufficient expressive content to warrant independent copyright protection. It is difficult to see how a photograph that merely "depicts" a work of authorship, without "recasting, adapting or transforming" it, can be independently copyrightable itself. Put differently, if a photograph is nothing more than a mechanically produced impression of its subject and thus not a derivative work, *a fortiori*, it is probably too unoriginal to reward its author with any copyright protection at all.[121] It would seem that the Ninth Circuit in *Skyy* had it right: the only way to reach the conclusion that the photograph was a work of authorship rather than a derivative work based on its subject (or, alternatively, a photograph totally lacking in originality) would be to find that the photograph's subject was not itself a work of authorship.

The *SHL Imaging* court, after finding the allegedly infringing photographs virtually identical to the originals, held in favor of the

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expression. *See id.* at 1082. This, indeed, was the basis for the case's final disposition. *See* Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 765-66 (9th Cir. 2003).

118 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000).

119 "This Court respectfully believes that the *Ets-Hokin* court misconstrued the nature of derivative works." *Id.* In fact, this criticism was mistaken: the Ninth Circuit had correctly identified the question of the vodka bottle's copyrightability as a threshold issue that logically preceded the question of whether the photographs of the vodka bottle were derivative works.

120 *Id.*

121 *Cf.* Oriental Art Printing, Inc. v. Goldstar Printing Corp., 175 F. Supp. 2d 542, 546-47 (S.D.N.Y. 2001) (finding generic menu photographs of Chinese food dishes insufficiently original to warrant copyright protection).

photographer.[122] The court, however, then balanced what may have been its overly generous treatment of the photographer by holding that a photographer who has taken product shots of picture frames "cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors . . . . Practically, the plaintiff's works are only protected from verbatim copying."[123] If this is true, a product owner evidently *would* be permitted to intentionally reconstruct a copyrighted photograph of the product, even borrowing the same lighting techniques and creative details (like the "blue sky reflection in the mirrors"), as long as the second photograph was discernible from the first.

3. What the Perfect Copy Represents

My final case involves a photograph of an oil painting that had been enhanced by simulated brushstrokes and then marketed without the artist's permission as designer room décor. In *Peker v. Masters Collection,*[124] the plaintiff, Elya Peker, was an artist who produced a series of oil paintings: "Flowers in a Basket," "Big Bouquet of Flowers on Marble Table," and "Flowers in Jug." Elya (the district court referred to him by first name) signed a licensing agreement with Galaxy of Graphics, Ltd., to make and sell photographic reproductions of the oil paintings in the form of poster prints. Masters Collection, the defendant, purchased a number of Galaxy's posters at retail price and turned them back into oil paintings using an ingenious process:

> To make each oil painting replica, Masters treats a poster with a thin coat of acrylic paint, allowing the poster's ink layer to be separated from its paper backing without ruining the image. The acrylic layer, now bearing the poster's ink image, is then mounted on a canvas. Once mounted, Masters employs specially trained artists to apply oil paint in brush strokes to the image, attempting to match the color and style of the original painting. After applying the brush strokes, a thin veneer of protective varnish is applied, similar to the type of varnish used

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122 *Id.* at 311. This conclusion, in fact, is consistent with the final disposition of *Skyy*, although *Skyy* was decided in favor of the defendant. On *Skyy's* second trip to the Ninth Circuit, the court emphasized that the allegedly infringing photographs were discernible from the original photographs: "[t]he lighting differs, the angles differ, the shadows and highlighting differ, as do the reflections and background. The only constant is the bottle itself." 323 F.3d at 766.

123 *SHL Imaging*, 117 F. Supp. 2d at 311.

124 96 F. Supp. 2d 216 (E.D.N.Y. 2000), *aff'd in relevant part, vacated and remanded on other grounds*, 47 Fed. Appx. 597 (2d Cir. 2002).

> for oil paintings. The new oil painting replica, complete with tangible "bumps" where the paint has been applied, is then placed in a museum-quality frame and sold.[125]

The issue in the ensuing lawsuit was "whether Masters had 'copied' Elya's painting in violation of his exclusive rights to . . . 'reproduce the copyrighted work in copies.'"[126]

To decide whether the Masters' oil painting replicas were "copies" of Elya's original oil paintings, the court turned to a line of copyright infringement cases in which the defendants were sued for gluing copies of art works, such as pages from books or illustrations from greeting or note cards, on laminated tiles for use as coasters or wall hangings. These "tile art" cases have not only been intensely litigated, but have led to a disagreement between the Ninth and Seventh Circuits. The Ninth Circuit in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*[127] concluded that pages cut from an art book and mounted on black surfaced tiles were unauthorized derivative works, while the Seventh Circuit in *Lee v. Albuquerque A.R.T. Co.*[128] rejected this notion in a case that involved note cards.[129]

The *Peker* court found that the closest decision factually on point was the earliest "tile art" case, a 1973 district court opinion from Texas. In *C.M. Paula Co. v. Logan*,[130] the tile art practitioner used an acrylic resin or other similar compound as a "transfer medium" to peel off the images from greeting cards he had purchased in retail stores, and mounted these images on ceramic plaques which he then coated with a transparent substance to give it a "glazed or crackled appearance."[131] By using this process, he transformed the greeting card into a decal and pasted the decal to a plaque. The court held that Mr. Logan's process for creating "tile art" was not copying because:

> each ceramic plaque sold by defendant with a Paula print affixed thereto requires the purchase and use of an individual piece of artwork marketed by the plaintiff. For example, should

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125 *Id.* at 217-18.

126 *Id.* at 218. The court dismissed Elya's additional claim that Masters' editions were unauthorized derivative works. *Id.* at 221.

127 856 F.2d 1341 (9th Cir. 1988).

128 125 F.3d 580, 582 (7th Cir. 1997).

129 *But see* Steve Lauff, Note, *Decompilation of Collective Works: When the First Sale Doctrine is a Mirage*, 76 TEX. L. REV. 869, 904 (1998) (reconciling the circuit split with the argument that decompiling a collective work into its individual contributions by removing plates from an art book "implicates rights and policies nonexistent for a notecard sold individually").

130 355 F. Supp. 189 (N.D. Tex. 1973).

131 *Id.* at 190.

> defendant desire to make one hundred ceramic plaques using the identical Paula print, defendant would be required to purchase one hundred separate Paula prints.[132]

Like the *C.M. Paula* court, the *Peker* court rejected the plaintiff's derivative works claim.[133] Instead the court focused on the more fundamental issue: whether Masters' oil painting replicas were unauthorized "copies" of Elya's original oil paintings. What complicated the case was that Elya's oil paintings had undergone an intermediate metamorphosis. Before their incarnation as Masters' replica oil paintings, the originals had first been transformed into Galaxy's authorized photographic reproductions. The sequence of the transformation was painting into photograph, then back into painting. The photograph on each poster was undisputedly an *authorized* copy of the original oil painting, but was the Masters' oil painting replica an *unauthorized* copy of the oil painting? Or was it simply an additional, legally purchased and legally resold copy of the photograph?[134]

Two alternative theories could have been used to decide the case. First, the concept of "framing" could have provided a rationale for vindicating the accused "copyist." Elya's complaint failed to satisfy the usual expectation that duplication of images requires multiplication of objects. This made it implausible for him to claim that he had been copied. Framing differs from copying because no additional iterations of the work are produced; all that changes is the manner in which the work is displayed. Judge Easterbrook, for example, could see no difference between mounting a picture on a ceramic plaque and mounting it inside a frame.[135] Similarly here, Masters reframed Galaxy's photo-poster in a room décor format. Although reframing the photo-poster might have improved its resale value by enhancing its status and making it useful to interior decorators,[136] reframing it did not

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[132] *Id.* at 191.

[133] Compare *C.M. Paula*, 355 F. Supp. at 192 with *Peker*, 96 F. Supp. 2d at 221. *Cf.* Simon v. Birraporretti's Restaurants, Inc., 720 F. Supp 85, 88 (S.D. Tex. 1989) (poster that was derived from and identical to a photograph was not original and not entitled to separate copyright).

[134] Under the first sale doctrine, the copyright owner's distribution right expires after a copy is sold for the first time. Purchasers of the copy have the right to resell it as personal property, without accounting back to the copyright owner. *See* 17 U.S.C. § 109 (2005).

[135] *Lee v. Albuquerque A.R.T. Co.*, 125 F.3d at 581 ("If the framing process does not create a derivative work, then mounting art on a tile, which serves as a flush frame, does not create a derivative work.").

[136] *See* GRAHAM CLARKE, THE PHOTOGRAPH 19 (1997) ("[e]ach change of context changes [the photograph] as an object and alters its terms of reference and value, influencing our understanding of its 'meaning' and 'status'"); *cf.* Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 (9th Cir 2003) (the copying of "thumbnail" size versions of photographs

produce a new copy of either the photograph or the painting.

The winning argument, however, focused on the key difference between Mr. Logan's decorative tiles and Masters' replica oil paintings. The Masters' replicas were covered with visible brushstrokes to give them the texture of original oil paintings. The copy, according to Masters' own advertising, was "virtually indistinguishable" from the original and thus (although the court did not use these terms) it was a *forgery* rather than a reproduction.[137] "A forgery copies another painting," explained Mark Sagoff, while "a reproduction is not a painting but a print, photograph, or something of the sort, which represents a painting."

> A photographic reproduction—generally this is the kind found on posters, postcards, and in art books—represents a painting just as, for example, a photograph of Churchill reprinted on a poster, postcard, or whatever, represents him. . . . The relationship between a *forgery* and an original, on the other hand, is not one of representation but one of similarity. . . . There are paintings that represent paintings, of course: pictures of art galleries and of artists in their studios often depict paintings, but these are paintings *of* paintings, not paintings which copy or duplicate paintings. . . . No; a forgery is simply a copy of a painting and if it represents anything it is what the original represents.[138]

If we apply this distinction between reproductions and forgeries to the facts of *Peker*, we are able to relinquish, at least for this case, the association of copying with multiplicity. When works are copied, the usual expectation is that quantities increase. A perfect copy duplicates the original and, if the copyist covers his tracks carefully, the copy may be able to displace the original. Nevertheless, where one thing (the original) existed before, two things (the original and the copy) exist now. This is not necessarily so, however, if one copy *incorporates and consumes* another. If making a copy means consuming another copy, at the end of the

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into an internet visual search engine was a fair use because "Arriba's use of the images serves an entirely different function than Kelly's use—improving access to information on the internet versus artistic expression"); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000) (a newspaper's unauthorized reproduction of risqué photographs from a modeling portfolio was a fair use in the context of the model's participation in an international beauty pageant). In other words, the context in which the photographs were published in both these cases changed what would have been an infringing literal copy into a fair use.

137 *Peker*, 96 F. Supp. 2d at 219.

138 Mark Sagoff, *The Aesthetic Status of Forgeries*, *in* THE FORGER'S ART, *supra* note 49, at 131, 145-46.

day the copyist has no more tangible manifestations of the work than when he or she began.

In *C.M. Paula,* creating a decorative tile consumed a lawfully purchased greeting card and, in *Peker,* the process of reproducing an Elya oil painting consumed a lawfully purchased Galaxy poster. But the similarity between *C.M. Paula* and *Peker* ends here because the Masters' technique turned an accurate copy into a perfect copy. The Galaxy poster, first, was stripped of its surface. The photograph, applied to blank canvas, then disappeared under a tracery of paint. The "craftsmen" employed by Masters were reconstructing Elya's works; in a creepy way—the ultimate offense to authorship—they made the artist redundant by plying his very brushstrokes.

The perfect copy was a forgery, which is, qualitatively, a different thing from an accurate copy. The Galaxy poster portrayed Elya's artwork *as a photograph,* while the Masters' replica oil painting provided a substitute for Elya's artwork. A forgery, in other words, is a fake—a substitutive copy—rather than a representation. Masters produced a forgery even though it did not generate any new copies. Just as each Galaxy poster contained only one copy of an Elya oil painting, each Masters' replica contained only one copy of a Galaxy poster. The difference is that Masters was doing more than reselling lawfully purchased copies of Galaxy's photograph; it was also making unauthorized copies of the artwork represented by the photograph.

CONCLUSION

> Doing it again is not finishing everything. Doing it again and again is not finishing everything. Doing it again and again and again is not finishing everything. Doing it again and again and again and again is not finishing everything. Doing it again and again and again and again and again is not finishing everything. Doing it again and again and again is not finishing everything. Doing it again is not finishing everything.
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> — Gertrude Stein[139]

I would like to conclude by returning to a question I introduced at the beginning of this discussion: if there *is* a difference between an original and a copy, why doesn't the copy have the same value as the original? First I would like to very briefly review the answers that rise to the surface upon brief

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[139] GERTRUDE STEIN, *A Long Gay Book, in* A STEIN READER 213 (Ulla E. Dydo ed., 1993).

reflection, answers that inspire confidence precisely because they are so familiar that they need little in the way of an extended explanation. Then I would like to take a more circumspect view of the question by suggesting that the term "copy" is the linchpin in a series of binary oppositions that revolve around the practice of copying and thereby organize our thinking about works and copies, as well as the values we attach to each.

The cynical point of view, which Sandor Radnoti called "[t]he ideological message of forgery," could be summed up in a series of questions: "Who cares about originality if the copy is beautiful (equally beautiful, more beautiful)? Who cares about originality if the copy cannot sensually be discerned from the original? Who cares about the art theory of originality if the practical reality of aesthetics makes fun of it?"[140] The short answer to these questions is to agree with the premise that perfect copies can substitute for originals, but to disagree with the conclusion that copying is harmless.

A. *Good Copies and Bad Copies*

> [P 33]
> . . .yet even colouring will never be perfectly attained by servilely copying the model before you.
> <Servile Copying is the Great Merit of Copying>
> — William Blake[141]

The accepted view is that copying is unproductive from an economic perspective and wrongful from a moral perspective. Forgery and plagiarism are shortcuts to authorship that produce new authors without producing new works. An additional marketplace participant has appeared, with his or her palm extended for payment, but no fresh value has been created to enrich the cultural economy. Why bother to create if you can copy? The same holds true for the distributor or consumer who might find piracy to be an attractive option. Why bother to purchase an authorized copy if you can make a free copy? The moral objections track the economic ones. The moral objection to forgery and plagiarism is that copying is a form of fraud since the consumer is deceived about the provenance of the work. The

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140 RADNOTI, *supra* note 61, at 55.

141 WILLIAM BLAKE, *Annotations to the Works of Sir Joshua Reynolds, in* THE COMPLETE POETRY AND PROSE OF WILLIAM BLAKE 634, 645 (David V. Erdman ed., Doubleday & Co. 1965) (1798).

moral objection to piracy is that copying is a form of theft since the copyist has misappropriated the author's property and payment.

The longer answer to these questions would require challenging the premise that copies can substitute for original works. Copying, unlike authoring, is inexpressive. The copyist successfully imparts expression only to the extent that he or she can channel expression derived from the work's author.[142] In at least two situations, however, even a perfect copy will fail to serve the same function as the original once we know that we are dealing with a copy. First, when contemplating autographic works of art (like original oil paintings), the viewer's aesthetic response arguably depends on the belief that he or she is looking at an original work rather than at a forgery.[143] The same is true for plagiarized copies of allographic works. An assessment of a work's meaning presupposes that we have received the product of the author's intent. Changing the by-line of a work—revealing or concealing the true author's identity—will often change an evaluation of the work's value and significance.[144]

Another way to understand how "copies" anchor the value system of copyright law would be to begin with a different premise. The etymology of the word "copy" revealed that copies are not inherently bad.[145] We have ways of talking about good copies as opposed to bad copies. In the most neutral sense, a *copy* is simply the binary opposite of an "original *work* of authorship," where originality is a *quality* of authorship, and the work is a *product* of authorship. The adjective "original" may also properly be applied to the noun "copy." As previously noted, an "original copy" is not an oxymoron, but rather the first tangible fixation of an author's expression—the first *copy*—the *origin* of all subsequent imprints.[146] When characterizing "bad" copies, on the other hand, it is more

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142 *Cf.* Jack W. Meiland, *Originals, Copies, and Aesthetic Value, in* THE FORGER'S ART, *supra* note 49, at 115, 123 ("It should be noted that creativity is a property of the artist, while originality is a property of the work . . . . Thus, we cannot infer from the lack of creativity on the part of the copyist that the copy does not express originality").

143 *See generally* BENJAMIN, *supra* note 25.For a description of the autographic-allographic distinction, see *supra* note 24.

144 This is the basis of an argument against blind submission policies to scholarly journals. *See* STANLEY FISH, *No Bias, No Merit: The Case Against Blind Submission, in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 163-179 (1989); *see also* Alfred Lessing, *What Is Wrong with a Forgery?, in* THE FORGER'S ART, *supra* note 49, at 58, 73-74 ("Vermeer is *not* a great artist only because he could paint beautiful pictures. He is great for that reason plus something else. And that something else is precisely the fact of his originality, i.e., the fact that he painted certain pictures in a certain manner *at a certain time in the history and development of art*") (emphasis in original).

145 *See* text accompanying notes 3-6, *supra.*

146 *See* text accompanying note 63, *supra.*

useful to choose between two different pejorative adjectives. A bad copy may be "unauthorized" or "inaccurate." A good copy, conversely, should be authorized *and* accurate. Authorization asserts that an author sanctioned the copy, while accuracy asserts the copy's fidelity to the work.

Bad *copying* is, needless to say, a type of dishonest conduct, and the distinction between "representations" and "fakes" provides a theoretical framework for sorting out the difference between "good" and "bad" copyists. Tracing the origin of the work to an author or copyist may indeed be the only way to distinguish representations from fakes when both are exact, interchangeable copies of the same thing. This is because an "author" can endow the work with different meanings depending upon his or her intentions.

A humorous story illustrates this lesson—a "Dear Ethicist" letter from a biographer who faces an unusual choice.

> *I have recently written two biographies of the same famous politician. One is intentionally filled with disgusting lies; the other is based solely on truth. The problem is, they are identical. Which one should I publish?*
>
> The key word in your question is that the lies are "intentional." Your admitted intention makes the first biography wholly honest, whereas there might be errors in the one based on fact. Publish the one with the disgusting lies.[147]

The difficulty that befuddles both the biographer and the ethicist is that two identical texts consist of the same words, but their significance, if not their meaning, is utterly different.[148] How can one version be "wholly honest" and the other "filled with disgusting lies"?

While copies and books can be accurate or inaccurate, only persons can be honest or dishonest. An honest author who makes misstatements of fact commits error. His book is erroneous, but not fraudulent. A dishonest author who makes the same misstatements of fact commits fraud rather than error. Both the inaccurate book and the fraudulent book are identically flawed as transcriptions of the truth, but they are not identical copies of each other because one fails to realize its author's intention, while the other succeeds. The loony "ethicist" applauds the author of the

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147 Steve Martin, *The Ethicist, in* THE NEW YORKER, March 5, 2001, at 50.

148 The same conceit was famously illustrated by *Pierre Menard, Author of Don Quixote,* about whom the story's narrator makes the ironic claim that "Cervantes' text and Menard's are verbally identical, but the second is almost infinitely richer." BORGES, *supra* note 99, at 42.

fraudulent book because his expression is congruent with his intention—he has honestly succeeded in being dishonest—which puts him in a position to trumpet the claim that his book is free of unintended errors. Authorship is an intentional expressive act, and an author's ability to realize his intention strengthens his claim to literary authorship, although it weakens his defense to defamation.[149]

B. *Nature, Authorship, and Copying*

> I send no agent or medium, offer no representative of value, but offer the value itself.
>
> — Walt Whitman[150]

Expression, then, is the *sine qua non* of authorship.[151] The "copy" cannot be distinguished from the "work" unless we recognize its equivocal relationship to the concept of expression. A copy is a thing that *would* be expressive *if* it had an author, but it does not. The example of appropriation art is the exception that proves the rule. The "found" objects of appropriation art are mute and inexpressive, except that they have authors. Their adoption by authors who claim them as works makes us willing to assume that, despite appearances to the contrary, the "found" objects express something.

These ultra-mundane objects, however, puzzle copyright law since they are not the types of things that convey expression. In traditional mimetic art, the object portrayed is recognizable as the thing represented, but is also instilled with the author's expression, which is what makes it a work of authorship. In appropriation art, however, the object portrayed—the urinal mounted on the art gallery wall—stubbornly remains an untouched thing which nevertheless is poised as if to convey a meaning. The recalcitrant "found" object is unable to remain a real thing, but refuses to become an artistic representation. By declining to settle into a recognized category—a "work of authorship" or a "real thing"—the "found" object challenges the relationship between expression, authorship, and works of authorship. This challenge is itself the

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149 *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (requiring plaintiff in a defamation action to prove that a false statement about a public official was intentionally false or made with "reckless disregard" of whether it was false).

150 WALT WHITMAN, *A Song for Occupations,* in LEAVES OF GRASS 211, 213 (Sculley Bradley & Harold W. Blodgett eds., W.W. Norton & Co. 1973) (1891-92).

151 *Cf.* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality"). The two statements are complementary if placed in the context of a homology: expression is to originality as authorship is to copyright.

subject of the work.[152]

The same is true, more generally, of some types of conceptual art. Consider, for example, the artwork of J.S.G. Boggs, who draws copies of legal currency and barters these copies for goods and services. Law enforcement officials, who by and large have little patience for this kind of experimentation, have prosecuted Boggs for counterfeiting.[153] His hand-drawn artistic renderings or "copies" of bills are neither real nor counterfeit. The law of counterfeiting, however, provides for only these two options. Boggs takes the legal risk of "spending" the bills by bartering them for goods and services and claiming that the transaction is a *representation* of a monetary exchange, rather than a *fake* (that is, a counterfeit) exchange.[154]

If we put aside, however, these specimens of appropriation and conceptual art with their deliberate challenges to legal and artistic norms, works of authorship can be both representational (that is, realistic) and expressive (that is, personal) because the world *outside* the work is incorporated *within* the work by the author's selection of words, colors, notes, or whatever constitutes the artistic medium. The concept of expression describes an author's response to the raw reality of readymade matter, the "visible things" presented by life itself.[155] In symmetry with the author's expressive effort, the copy returns the intangible work of authorship to the form of a tangible, physical object.

This emphasis on the author's personality is the basis of expressive theories of art.[156] Justice Holmes embraced it in a famous passage from *Bleistein v. Donaldson Lithographing Co.*: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."[157] When

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152 *Cf.* HAROLD ROSENBERG, THE DE-DEFINITION OF ART: ACTION ART TO POP TO EARTHWORKS 37 (1972) (the deaestheticization of the art object has the effect of aestheticizing the raw reality of the world in which it is placed by "inject[ing] into actual situations . . . the ambiguity, illusoriness, and emotional detachment of art").

153 *See, e.g.*, Boggs v. Bowron, 842 F. Supp. 542, 560-62 (D.D.C. 1993), *aff'd* 67 F.3d 972 (D.C. Cir. 1995).

154 *See generally,* LAWRENCE WESCHLER, BOGGS: A COMEDY OF VALUES (1999); J.S.G. Boggs, *Who Owns This?,* 68 CHI.-KENT L. REV. 889 (1993).

155 It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things . . . . [E]ven if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

156 *See* Noël Carroll, PHILOSOPHY OF ART: A CONTEMPORARY INTRODUCTION 59-66 (1999).

157 *Bleistein*, 188 U.S. at 250; *cf.* Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F.

an author or artist copies nature, personality imbues the whole work and is revealed even in the "involuntary flaws."[158] On the other hand, however, the subjective basis of Romantic authorship is consistent with the objective course of the mimetic impulse. The artist is both a mirror and a lamp whose work reflects nature and illuminates it.[159] Rudolf Arnheim observed that "'[o]riginality' is the unsought and unnoticed product of a gifted artist's successful attempt to be honest and truthful, to penetrate to the origins, the roots, of what he sees."[160] In this sense, *originality* does not refer to the work's origin in an author, but to the work's origin in the author's subject. Originality, in other words, faces in two directions at once, and this is why we perceive no inconsistency between objective portrayal and subjective expression.

Slavish copying, in contrast, reveals nothing of the artist's personality. Romantic authorship is grounded in this dichotomy between author and copyist. In 1853, for example, the defendant's counsel in *Stowe v. Thomas* argued that "[t]here is no hybrid between a thief and a thinker. Author and copyist are irreconcileable [sic] opposites."[161] In the same way, the terms "work" and "copy" are mutually exclusive. Works take the form of copies, but a work must be something *more* than a copy—*more* than a material object—because it has an existence that goes beyond its embodiment in a particular, tangible thing. Originality comes from a deeper stratum upon which the author draws, a stratum that is psychological and personal at its upper levels, but that, at its very deepest level, reconnects authorship with an impersonal universe.

As Isaiah Berlin described it, depth or profundity is the very essence of Romantic authorship. Referring specifically to Samuel Taylor Coleridge, but more broadly to the pan-European Romantic movement, Berlin wrote that, "[t]he only works of art, for him, which have any value at all—and this is a doctrine by which not only Coleridge but other art critics were subsequently influenced—are those which are similar to nature in conveying the pulsations of a not wholly conscious life. Any work of art which is fully self-conscious is for him a kind of photograph. Any work of art which is simply a copy, simply a piece of knowledge, something which,

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932, 934 (S.D.N.Y. 1921) (Hand, L., J.) ("no photograph, however simple, can be unaffected by the personal influence of the author").

158 *See* text accompanying note 55.

159 *See generally,* M.H. ABRAMS, THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION (1953).

160 ARNHEIM, *supra* note 55, at 138.

161 23 F. Cas. 201, 205-06 (C.C.E.D. Pa. 1853).

like science, is simply the product of careful observation and then of noting down in scrupulous terms what you have seen in a fully lucid, accurate, and scientific manner—that is death."[162]

162 ISAIAH BERLIN, THE ROOTS OF ROMANTICISM 98 (Henry Hardy ed., 1999).