TOWARD A STRICTER ORIGINALITY STANDARD FOR COPYRIGHT LAW

Abstract: In order to be copyrighted, a work of art must be "original." Critics have persuasively argued that copyright law, at various phases in its evolution, has defined originality by applying a Romantic conception of authorship, according to which the author creates out of a wholly personal, original self. But, in contrast to the idealized, Romantic work, an actual work need only exhibit an "extremely low" level of originality in order to merit copyright protection. This Note attempts to resolve this apparent tension between theory and practice, arguing that the Romantic conception of authorship underlies the law's low originality standard. Further, the Note argues that the modern understanding of authorship, which recognizes that the outside world shapes the author's consciousness, furnishes a more appropriate model for originality jurisprudence. Accordingly, the Note concludes, a stricter originality standard is needed, which would serve to reinvigorate the public domain while protecting truly original works.

INTRODUCTION

In order to be copyrighted in the United States, an item must be an original work of authorship.[1] This statutory requirement is implied in the Constitution's Copyright Clause, which authorizes Congress to protect the "writings" of "authors" so as to "promote the Progress of . . . the useful Arts."[2] Originality is "the very 'premise of copyright law.'"[3] In 1991, the United States Supreme Court stated the current originality standard: "Original, as the term is used in copyright, means only that the work is independently created . . . and that it possesses at least some minimal degree of creativity."[4] In order for a work to be copyrighted, it need only exhibit an "extremely low" level of originality.[5]

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[1] 17 U.S.C. § 102 (1994).

[2] U.S. CONST. art. I, § 8, cl. 8; *see* Russ Versteeg, *Rethinking Originality*, 34 WM. & MARY L. REV., 801, 802–03 (1993).

[3] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

[4] *See id.* at 345.

[5] *See id.*

But what constitutes "an original work of authorship" remains unclear.[6] As copyright's foundational, defining premise, the originality doctrine first requires a thorough articulation, and, second, must delimit the boundary between a truly original work and a work that exhibits a marginal contribution by the putative author.[7] However, the doctrine has encountered difficulties on both fronts.[8] Although courts and commentators have necessarily come to multiple conclusions regarding the originality of particular works, these often lack an adequate, conceptual clarity, since courts view the doctrine with "blurred vision."[9] Moreover, by setting the originality standard at such a low level, the law has eviscerated much of the doctrine's force, granting copyright protection to many works whose originality is questionable.[10] The doctrine has necessarily "fenced off" much of the public domain through propertizing arguably nonoriginal works.[11] In this manner, the low standard for originality has proven instrumental in expanding American copyright protection and concomitantly eroding the public domain.[12]

One strand of legal scholarship has persuasively argued that this expansion reflects a powerful, often unacknowledged deference to the "Romantic conception of authorship."[13] The very purpose of copyright law is to protect authors; therefore, the scope of copyright protection reflects the degree to which the law respects authorship.[14] Not surprisingly, courts approach copyright cases by applying their intuitive understanding of the author as a creator in the mold of eighteenth and nineteenth century Romantic authors, who use "words, musical notes, shapes, or colors to clothe impulses that come from within [each author's] singular inner being."[15] Since courts are likely to emphasize the putative artist's subjectivity and the uniqueness

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[6] *See* Versteeg, *supra* note 2, at 803–04.

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1008 (1990).

[11] *See id.* at 966–67.

[12] *See, e.g., id.*; David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 156, 156 (1981); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 886–87 (1997); Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, BERKELEY TECH. L.J. 777, 813–25 (2000).

[13] *See, e.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1466–67 (1992); Litman, *supra* note 10, at 1008–09.

[14] *See, e.g.*, Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 966–68, 1008–09.

[15] *See* Litman, *supra* note 10, at 1008–09.

of his or her creation and de-emphasize elements of his or her work that come from the outside world, works are likely to receive extensive copyright protection.[16]

At first glance, however, the law's permissive standard seems to clash with the Romantic model.[17] By conceptualizing artistic creation in terms of the distinctive, Romantic individual, one would expect the law to deny copyright protection for more mundane works.[18] Indeed, most critics of Romantic authorship encounter some difficulty in interpreting originality jurisprudence on account of this apparent tension between theory and legal practice.[19] One school of thought argues that the law's currently low originality standard is one feature of copyright law which reflects a twentieth century abandonment of the Romantic conception.[20] A second school of thought sees a common ground between the Romantic model and the legal standard.[21]

This Note extends the second school's approach by arguing that the Romantic conception of authorship lies behind the law's deferential approach to originality.[22] It further argues that a stricter originality standard more accurately reflects modern society's understanding of authorship and would serve the salutary goal of a reinvigorated public domain.[23] Part I discusses the cases that have most furthered the development of originality jurisprudence, along with recent cases that illustrate the current state of the doctrine.[24] Part II presents the threshold problem of how a theory criticizing Romantic authorship can legitimately claim to explain originality jurisprudence even though these cases never explicitly refer to theory.[25] Part III discusses various criticisms of the Romantic conception of authorship and its legal consequences, while Part IV explores the policy considerations of copyright protection and the public domain.[26] Part V analyzes and critiques these cases and criticisms, concluding that a stricter originality standard is appropriate.[27]

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[16] *See, e.g.*, Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 966–68, 1008–09.

[17] *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 461–63, 482–85 (1991).

[18] *See id.* at 482–85.

[19] *See id.*

[20] *See id.*

[21] *See* Boyle, *supra* note 13, at 1466–67.

[22] *See id.*

[23] *See* Litman, *supra* note 10, at 966–68.

[24] *See infra* notes 31–107 and accompanying text.

[25] *See infra* notes 108–152 and accompanying text.

[26] *See infra* notes 153–242 and accompanying text.

[27] *See infra* notes 243–305 and accompanying text.

At the outset, it is best to recognize the many other theoretical approaches for understanding copyright law.[28] This Note cannot pretend to offer an overarching theoretical explanation for the development of American originality jurisprudence.[29] Rather, it selectively traces one theoretical thread that has exerted, and still exerts, a powerful influence.[30]

I. Originality Case Law

Four cases illustrate the development of contemporary American originality jurisprudence.[31] Although they span over a century, the conceptual structure underlying them is consistent, and has fostered the development of a uniformly loose standard.[32]

A. Burrow-Giles Lithographic Co. v. Sarony

In 1884, in *Sarony*, the United States Supreme Court held that a photograph of Oscar Wilde was sufficiently original to merit copyright protection.[33] The defendant, an entrepreneur who had made and sold copies of the photographs, argued that his actions could not constitute copyright infringement because the photograph was merely a mechanical reproduction of an exterior event, rather than a copyrightable, original creation.[34] The Court first considered the threshold question of whether photographs were *per se* uncopyrightable, since they are not "writings," and thus are not expressly covered by the Constitution.[35] Noting that the applicable statute protected "maps and charts" in addition to texts, the Court found a broad meaning in the Constitution's language and in Congress's efforts at implementing

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[28] *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 325–26 (1989); Lemley, *supra* note 12, at 895.

[29] *See, e.g.*, Landes & Posner, *supra* note 28, at 325–26; Lemley, *supra* note 12, at 895.

[30] *See, e.g.*, Landes & Posner, *supra* note 28, at 325–26; Lemley, *supra* note 12, at 895.

[31] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–347 (1991); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–52 (1903); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54–55, 60 (1884); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104 (2d Cir. 1951); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* The Construction of Authorship: Textual Appropriation in Law and Literature 36–40 (Martha Woodmansee & Peter Jaszi eds., 1994); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. Cal. L. Rev., 247, 267–75 (1998).

[32] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–52; *Sarony*, 111 U.S. at 54–55, 60; *Catalda*, 191 F.2d at 104; Boyle, *supra* note 13, at 1466–67.

[33] 111 U.S. at 54–55, 60.

[34] *Id.* at 56, 59.

[35] *Id.* at 56–59.

the authority of the Copyright Clause: "Congress very properly has declared [copyrightable "writings"] to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."[36] The relevant concern, then, was not the means chosen to express the author's idea, but rather, the originality of that idea's expression.[37]

By the same token, the Court held that photographs are not *per se* copyrightable, since some photographs might not evidence the requisite "facts of originality, of intellectual production, of thought, and conception on the part of the author."[38] The Court applied an originality test that focused upon the author's subjective, creative contribution.[39] The photograph in question was judged to be "an original work of art" by virtue of the author's efforts in giving "visible form" to his "original mental conception."[40] According to the Court, these efforts included posing the subject in a particular way, choosing and arranging the costume and accessories, and making use of light and shade.[41] In addition, the Court found it significant that the photograph itself possessed artistic merit, being "useful, new, harmonious, characteristic, and graceful."[42]

B. Bleistein v. Donaldson Lithographing Co.

Bleistein provided the foundation for modern American originality jurisprudence.[43] In this case, decided in 1903, the Supreme Court found that certain circus advertisements were original for copyright purposes.[44] Employees of the plaintiff had prepared three chromolithographs—colored images fixed on a stone or metal plate—depicting the owner of the circus in one corner, along with various scenes from the circus.[45] The first lithograph portrayed "an ordinary ballet," the second depicted a family performing on bicycles, and the third showed people "whitened to represent statues."[46]

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[36] *Id.* at 57–58.
[37] *See id.*
[38] *Sarony*, 111 U.S. at 59–60.
[39] *See id.* at 60.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See* 188 U.S. at 249–52; Boyle, *supra* note 13, at 1466–67.
[44] *Bleistein*, 188 U.S. at 248, 252.
[45] *Id.* at 248.
[46] *Id.*

The Court first reiterated its *Sarony* holding that the mechanical nature of lithographic production did not bar copyrightability.[47] The Court rejected the contention that the lithographs were unoriginal merely because they represented objective entities, as opposed to an artist's subjective view of them.[48] Although mere copies of circus scenes, these works nonetheless contained the artist's personal imprint, and thus were original.[49] The Court's reasoning foregrounded authorial subjectivity:

> The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[50]

The Court flatly rejected the notion that originality should be decided with reference to the artistic merits of the work.[51] Since judges and juries cannot be presumed to be experts in aesthetic matters, the Court reasoned, it would be a "dangerous undertaking" for them to make aesthetic value judgments.[52] On the one hand, certain works, such as Goya's etchings or Manet's paintings, might be novel masterpieces, but be found noncopyrightable because the public, including judges, might not appreciate an aesthetic approach to which they are not yet accustomed.[53] On the other hand, the Court noted, judges are likely to have more elevated tastes than the public as a whole, and might deny copyright to works whose commercial value merits protection, even if their aesthetic quality is questionable.[54] Given the indeterminacy of aesthetics, the Court reasoned, economic value provides a more reliable criterion for determining a work's legal status.[55]

The Court constructed this foundation for originality jurisprudence by melding a "personality" theory of artistic creation with a

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[47] *Id.* at 249.
[48] *See id.*
[49] *See Bleistein*, 188 U.S. at 249–50.
[50] *Id.* at 250.
[51] *See id.* at 251–52.
[52] *See id.*
[53] *See id.* at 251.
[54] *See Bleistein*, 188 U.S. at 251–52.
[55] *See id.*

skepticism about aesthetics in legal reasoning.[56] The grounding criterion for originality is an irreducible, unique personality in the person; in creating a work, even a mere "copy" of an object, the artist projects that irreducible core onto nature, such that the work necessarily bears the imprint of the artist, and no one else.[57] The *Bleistein* test does not consider the novelty or creativity of the work, but rather the presence or absence of the putative artist's personal expression.[58] Given the dangers of judicial aestheticizing, the Court implied, the law should not examine the degree to which the work bears this personal imprint, but should only ask whether it exists.[59] However, this question is loaded, for the Court posited that *any* work created by an author necessarily expresses the artist's personality.[60] By presuming the originality of any work that is actually produced by an individual—as opposed to a machine—the *Bleistein* Court provided the conceptual structure underlying an exceedingly low originality standard.[61]

C. Alfred Bell & Co. v. Catalda Fine Arts, Inc.

In 1951, in *Catalda*, the United States Court of Appeals for the Second Circuit applied the *Bleistein* standard in finding that mezzotint engravings, which constituted "fairly realistic reproduction[s] of oil paintings," were original.[62] The defendant had produced lithographs of the plaintiff's mezzotints, and argued that this action could not constitute copyright infringement because the mezzotints were not original, and therefore not copyrightable at all.[63] The trial court had noted that the purpose of the mezzotint engraving process was to faithfully reproduce various eighteenth and nineteenth century masterpieces, "so that the basic idea, arrangement, and color scheme of each painting are those of the original artist."[64] However, it was impossible to make an exact reproduction.[65] After placing an image of the painting on a copper plate, "the engraver then scrapes with a hand

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[56] *See id.* at 249–50, 251–52.

[57] *See id.* at 249–50.

[58] *See id.*

[59] *See Bleistein*, 188 U.S. at 249–50, 251–52.

[60] *See id.* at 249–50. The Court accentuated the point by asserting that ordinary handwriting expresses the "author's" personality, and is thus copyrightable. *Id.*

[61] *See id.*; Boyle, *supra* note 13, at 1466–67.

[62] *See Catalda*, 191 F.2d at 104, 106; Alfred Bell & Co. v. Catalda Fine Arts, Inc., 74 F. Supp. 973, 975 (S.D.N.Y. 1947).

[63] *Catalda*, 74 F. Supp. at 974–75.

[64] *Id.* at 975.

[65] *Id.*

tool the picture upon the plate, obtaining light and shade effects by the depth of the scraping of the roughened plate."[66] According to the trial court, then, the scraping process required the "individual conception, judgment and execution" of the engraver in determining the depth and shape of the depressions formed, thereby engendering *Bleistein* uniqueness.[67]

On appeal, the Second Circuit Court affirmed, holding that the *Bleistein* test can be satisfied even if, as here, the author was attempting to perfectly reproduce another work, rather than create an original work of his or her own.[68] The court expressed the originality requirement as "little more than a prohibition of actual copying."[69] If the item exhibits a "distinguishable variation" from another work, the law presumes that such a variation bears the imprint of the author's person, thereby entitling the work to copyright protection.[70] Even if the variation is accidental, the court held, the copier is still the origin of that variation.[71] The law, as the *Bleistein* Court made clear, looks for a personal imprint in the work, but does not question how this imprint came about.[72]

D. Feist Publications, Inc. v. Rural Telephone Service Co.

Feist, decided in 1991, is the Supreme Court's most recent decision on the originality doctrine, and is most likely to shape the contours of originality jurisprudence for the foreseeable future.[73] In *Feist*, the Supreme Court found that a phone company's white pages were insufficiently original to warrant copyright protection.[74] The company had published in alphabetical order the name, town of residence, and phone number of each person who received phone service from it.[75] When a publishing company copied this information, the phone company sued for copyright infringement, and the publishing company claimed that the white pages were not copyrightable because of their nonoriginality.[76]

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[66] *Id.*
[67] *Id.*; *Bleistein*, 188 U.S. at 249–50.
[68] *Catalda*, 191 F.2d at 103–05; *see Bleistein*, 188 U.S. at 249–50.
[69] *Catalda*, 191 F.2d at 103.
[70] *Id.* at 102–03.
[71] *Id.* at 104–05.
[72] *See id.*; *Bleistein*, 188 U.S. at 249–50.
[73] 499 U.S. at 340; Jaszi, *supra* note 31, at 37.
[74] 499 U.S. at 363–64.
[75] *Id.* at 342.
[76] *Id.* at 343–44.

The Supreme Court posited the applicable standard: "Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[77] The Court also situated its reasoning within the *Sarony* and *Bleistein* scheme by emphasizing that the author's personal contribution, rather than the work itself, is the dispositive criterion.[78] In order to illustrate the point, the Court considered a hypothetical: Two poets write identical poems, but neither is aware of the other.[79] "Neither work is novel," the Court wrote, "yet both are original and, hence, copyrightable."[80]

The Court noted that facts, because they do not owe their origin to an author, are not copyrightable; therefore, the phone company's white pages were potentially open to copyright protection only as compilations of facts, rather than by virtue of the facts themselves.[81] Section 101 of the Copyright Act of 1976 defines a copyrightable compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[82] These white pages, according to the Court, were unoriginal, because the phone company's selection, coordination, and arrangement of facts did not exhibit the requisite "minimal creative spark."[83] First, the company selected the "most basic information"—the name, town of residence, and phone number of each person.[84] These choices were "obvious," given the self-evident purpose of the white pages, and this very plainness evidenced a lack of creativity.[85] Second, the company's coordination and arrangement of these facts was similarly lacking in creativity.[86] By simply listing the subscribers in alphabetical order, the company utilized a commonplace, "age-old practice."[87]

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[77] *Id.* at 345.
[78] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 59–60.
[79] *See Feist*, 499 U.S. at 345–46.
[80] *Id.*
[81] *Id.* at 347, 361–62.
[82] 17 U.S.C. § 101 (1994).
[83] *Feist*, 499 U.S. at 362–64.
[84] *Id.* at 362–63.
[85] *Id.*
[86] *Id.* at 363.
[87] *Id.*

On both fronts, the Court constructed a dichotomy between the distinctive, creative process and the everyday practice of reverting to pre-existing modes of selection, coordination, and arrangement.[88] In introducing the requirement of creativity, the Court apparently rejected the *Catalda* court's contention that artistic intention is not required.[89] Nonetheless, the Court made it clear that requiring a modicum of creativity had not rendered the originality standard any less permissive.[90]

E. *Recent Originality Cases*

A number of instructive originality opinions have been rendered since *Feist*, but two cases from the United States Circuit Courts of Appeals stand out: *Key Publications, Inc. v. Chinatown Today Publishing Enterprises* and *Ets-Hokin v. Skyy Spirits, Inc.*[91] These two decisions illustrate the law's continued adherence to the low standard for originality delineated above.[92]

1. *Key Publications v. Chinatown Today Publishing Enterprises*

In *Key Publications*, decided in 1991, the United States Court of Appeals for the Second Circuit found that yellow page listings in a telephone directory were original for copyright purposes.[93] A businessperson had produced the directory and had chosen certain businesses to be included therein.[94] In particular, businesses of particular interest to the Chinese-American community in New York City were selected.[95] The entries were categorized.[96] While many of the categories were common to most such directories (for example, "ACCOUNTANTS"), some were likely to be of particular interest to the relevant community (for example, "BEAN CURD & BEAN SPROUT SHOPS").[97]

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[88] *See Feist*, 499 U.S. at 362–64.

[89] *See id.* at 345–46; *Catalda*, 191 F.2d at 104–05.

[90] *See Feist*, 499 U.S. at 345.

[91] Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068 (9th Cir. 2000); Key Publ'ns, Inc. v. Chinatown Today Publ'g Enter., Inc., 945 F.2d 509 (2d Cir. 1991).

[92] *See Ets-Hokin*, 225 F.3d at 1076–77; *Key Publ'ns*, 945 F.2d at 512–13.

[93] *See* 945 F.2d at 511, 514.

[94] *Id.* at 511.

[95] *Id.* at 513–14.

[96] *Id.* at 514.

[97] *Id.*

The court applied the *Feist* standard, finding that the selection and arrangement of the listed businesses into categories evidenced the "de minimus thought" necessary to satisfy the originality standard.[98] According to the court, choosing certain businesses and excluding others required "thought and creativity," as evidenced by the businessperson's decision to exclude businesses which she believed would not be in business for much longer.[99] Moreover, choosing certain categories and arranging the businesses under them was not "mechanical," but rather "involved creativity," thereby satisfying the *Feist* requirement.[100]

2. *Ets-Hokin v. Skyy Spirits*

In *Ets-Hokin*, decided in 2000, the United States Court of Appeals for the Ninth Circuit found that the plaintiff's photographs of a vodka bottle were original.[101] The court described the photos in some detail:

> In all three photos, the bottle appears in front of a plain white or yellow backdrop, with back lighting. The bottle seems to be illuminated from the left (from the viewer's perspective), such that the right side of the bottle is slightly shadowed. The angle from which the photos were taken appears to be perpendicular to the side of the bottle, with the label centered, such that the viewer has a "straight on" perspective. In two of the photographs, only the bottle is pictured; in the third, a martini sits next to the bottle.[102]

In its analysis, the court reiterated and adopted the longstanding view that photographs "generally satisfy" the originality requirement.[103] Under this view, the photographer makes a personal choice in "subject matter, angle of photograph, lighting and determination of the precise time when the photograph is to be taken."[104] Therefore, the "personal influence" of the photographer inheres in the work, making it original.[105] The court held that the plaintiff's choices about "lighting, shading, angle, background, and so forth" exhibited more

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[98] *Key Publ'ns*, 945 F.2d at 513–14; *see Feist*, 499 U.S. at 345.
[99] *Key Publ'ns*, 945 F.2d at 513.
[100] *Id.* at 514; *see Feist*, 499 U.S. at 345.
[101] 225 F.3d at 1071, 1077.
[102] *Id.* at 1071–72.
[103] *Id.* at 1073, 1076–77.
[104] *Id.* at 1076–77.
[105] *See id.*; *Bleistein*, 188 U.S. at 249–50.

than the "minimal degree of creativity" required under the *Feist* standard.[106] Indeed, the court accentuated this ostensibly obvious creativity by asserting it had "no difficulty" in reaching its conclusion.[107]

II. Originality Jurisprudence as Theory

Any attempt to theorize about the foregoing cases must address a threshold question: How may one theoretically interpret them despite the fact that none of these cases mentions aesthetic theory?[108] Indeed, courts have explicitly considered the question, and have consistently found aesthetic theory subjective and indeterminate, a danger to the rigorous objectivity typically required in legal decisionmaking.[109]

One school of thought—here termed "legal aestheticism"—responds persuasively to this dilemma by uncovering the analytical identity between particular aesthetic theories and the reasoning of originality jurisprudence.[110] Even as judges in originality cases explicitly disavow aesthetic theory, they cannot break free from it, because the object of copyright is, by definition, aesthetic.[111] The logic of originality jurisprudence is theoretical, but is cloaked in anti-theoretical language.[112] In particular, originality jurisprudence has closely tracked two schools of aesthetic theory: formalism and intentionalism.[113]

The formalist school maintains that the key to understanding art lies in explicating the effect that an aesthetic object has on a person.[114] But, far from miring the critic in subjectivism, this approach calls for an analysis of the object itself, since aesthetic experience is governed by particular laws, and "[o]bjects that cause aesthetic emotions must have literal formal qualities that conform to these laws."[115] Formalist analysis, then, aims for an unprejudiced, dispassionate inquiry into an objective meaning.[116] One clear advantage of formalism is that it roughly conforms to a layperson's ordinary approach to art.[117] However, the formalists' emphasis on forms leads to myriad

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[106] *Ets-Hokin*, 225 F.3d at 1076–77; *see Feist*, 499 U.S. at 345.
[107] *Ets-Hokin*, 225 F.3d at 1077.
[108] *See* Yen, *supra* note 31, at 248–50.
[109] *See id.* at 249; *Bleistein*, 188 U.S. at 251–52.
[110] *See* Yen, *supra* note 31, at 250, 273–75.
[111] *See id.* at 247, 249–50, 273–75; *Bleistein*, 188 U.S. at 249–50, 251–52.
[112] *See Bleistein*, 188 U.S. at 249–50, 251–52; Yen, *supra* note 31, at 247, 249–50, 273–75.
[113] *See* Yen, *supra* note 31, at 273–75.
[114] *See id.* at 253–56, 261–62.
[115] *See id.* at 253, 261–62.
[116] *See id.* at 261–62.
[117] *See id.* at 254, 262.

problems.[118] For example, the formal qualities of a urinal exhibited in an art gallery do not ordinarily provoke "aesthetic emotions," but Marcel Duchamp's "Fountain," a conceptual piece, is one of the most famous twentieth century works of art.[119] Similarly, if two works, one original, one a copy, were identical to the naked eye, the formalist could not provide an account of why one is art, and the other merely a fake.[120]

For the intentionalist critic, in contrast, the latter example presents no difficulty.[121] This school of thought looks to the mind of the creator.[122] Intentionalist analysis centers around ascertaining the meaning that the author intended the work to have.[123] This approach avoids formalism's contradictions, as exemplified in the two identical works noted above, and offers the author's ostensibly objective account of his or her work, while formalism merely disguises the subjective judgments of the critic. However, intentionalism leaves much to be desired.[124] First, it cannot account for works that are considered aesthetic but which are not created with the requisite intent (such as when an artist disclaims aesthetic intent, or when a beautiful form is accidentally created).[125] Second, it effectively leads to excessive subjectivism, given the difficulties in understanding another person's mind and feelings.[126] Third, it "cheapens" our appreciation of works by classifying as art even those instances in which a person "tries to create art but fails miserably."[127]

According to the legal aestheticist, each school provides a tenable approach to understanding art, but, since each suffers from particular weaknesses from which another school does not suffer, no single school can provide one overarching, authoritative explication of art.[128] Given this "overlapping pattern of strengths and weaknesses," each may be used by viewers, readers, and spectators on a case-by-case basis.[129] This aesthetic pragmatism roughly adopts legal pragmatism's

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[118] *See* Yen, *supra* note 31, at 254–55, 262.
[119] *See id.* at 255.
[120] *See id.*
[121] *See id.* at 257.
[122] *See id.* at 256–57, 263.
[123] *See* Yen, *supra* note 31, at 256–57, 263.
[124] *See id.* at 257–58.
[125] *See id.*
[126] *See id.*
[127] *See id.*
[128] *See* Yen, *supra* note 31, at 260.
[129] *See id.*

understanding of truth as "tentative, always subject to revision as experiences change and new perspectives emerge."[130]

According to the legal aestheticist, judges have constructed originality jurisprudence by adopting one or more of these theories.[131] This mirror of case law and theory is evident in at least three of the cases discussed in Part I.[132] In *Sarony*, the Court rejected the notion that the photograph in question was a mere reproduction of "existing objects that the photographer did not create" and emphasized the "useful, new, harmonious, characteristic and graceful" nature of the photograph.[133] The Court utilized an intentionalist approach by finding originality in the photographer's choice of draperies, costume for the subject, light, shade, and the subject's facial expression.[134] According to the Court, the photograph was a "visible form" of the artist's "original mental conception," and this interpretation of the "operation of a putative author's mind" is essentially a matter of ascertaining the author's intention in making artistic choices.[135] At the same time, however, the Court's reference to the work's objective qualities was a classically formalist appraisal.[136]

Bleistein extended the *Sarony* intentionalist analysis by positing the author's unique imprint as the mark of originality, rather than considering the reproductions' similarity to an ordinary, objective event.[137] However, the *Bleistein* Court moved away from the *Sarony* Court's formalism by rejecting aesthetic merit as a criterion in deciding originality.[138]

The *Catalda* court, according to this interpretation, rejected intentionalism, instead adopting a formalist approach.[139] The "distinguishable variation" standard articulates the formalist response to the dilemma of the identical but inauthentic copy: Perfectly identical copies are, in fact, physically impossible, so that even minute differences distinguish one from the other.[140] By looking to the work's formal

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[130] *See id.* at 251, 260 & n.15.

[131] *See id.* at 274–75, 300–01.

[132] *See id.* at 274–75.

[133] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59–60 (1884); Yen, *supra* note 31, at 267, 274.

[134] *See Sarony*, 111 U.S. at 60; Yen, *supra* note 31, at 274.

[135] *See Sarony*, 111 U.S. at 60; Yen, *supra* note 31, at 268, 274.

[136] *See Sarony*, 111 U.S. at 60; Yen, *supra* note 31, at 268, 274.

[137] *See Bleistein*, 188 U.S. at 249–50; Yen, *supra* note 31, at 274.

[138] *See Bleistein*, 188 U.S. at 251–52; Yen, *supra* note 31, at 274.

[139] *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03, 104–05 (2d Cir. 1951); Yen, *supra* note 31, at 274–75.

[140] *See Catalda*, 191 F.2d at 102–03; Yen, *supra* note 31, at 255, 275.

qualities, one can determine whether a distinguishable variation exists, but authorial intent, by definition, is immaterial to the work's objective features.[141]

For the legal aestheticist, these three cases typify a certain judicial duplicity; while the judges in these cases avoided explicit references to aesthetic theory, their premises are, in fact, conditioned by exactly what they attempt to marginalize.[142] While the earliest case, *Sarony*, judged aesthetic merit, it did so without reference to aesthetic theory, and its consideration of authorial intent was phrased commonsensically.[143] *Bleistein* apparently moved further from aesthetics in rejecting judicial consideration of aesthetic merit, instead relying on an ostensibly self-evident authorial imprint.[144] *Catalda*'s focus on "distinguishable variations" appeared to dispense with the theoretical indeterminacies of authorial consciousness.[145]

However, these courts used theory to come to these conclusions.[146] The very dangers that courts have attempted to avoid—the inherent subjectivism of aesthetics and the concomitant threat of judicial censorship—have been present all along.[147] Because neither formalism nor intentionalism can completely explicate artistic originality, these cases remain necessarily provisional in providing a legally adequate standard for originality.[148] In the absence of an overarching rule, judges should remain "open-minded to alternate aesthetic sensibilities."[149] If a judge with a formalist prejudice against intentionalism, for example, were to consider authorial intent in deciding originality, his or her decision would gain another viable perspective, thereby increasing the likelihood that his or her decision would promote the flourishing of art, the prime objective of copyright protection in the first place.[150] But as long as judges apply their preconceptions in the name of commonsensical, rigorous objectivity, originality jurispru-

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[141] *See Catalda*, 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 255, 275.

[142] *See* Yen, *supra* note 31, at 273–75.

[143] *See* 111 U.S. at 60; Yen, *supra* note 31, at 273.

[144] *See* 188 U.S. at 249–50, 251–52; Yen, *supra* note 31, at 273–74.

[145] *See* 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 272–73, 274.

[146] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 273–75.

[147] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 248, 299.

[148] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 260, 299.

[149] *See* Yen, *supra* note 31, at 301.

[150] *See id.* at 301–02.

dence will remain as incomplete as any aesthetic theory that does not confront its own shortcomings.[151]

III. Criticism of the Romantic Conception of Authorship in Copyright

Critics of Romantic authorship adopt the legal aestheticist's view that the logic of the originality doctrine is the logic of aesthetic theory.[152] These critics interpret intentionalist analyses, typified by *Burrow-Giles Lithographic Co. v. Sarony*, as expressions of the Romantic understanding of authorship.[153] By defining artistic creation in terms of the author's wholly subjective choices, the *Sarony* Court applied the paradigmatically Romantic conception of the personality who creates from out of the deepest self, without the mediation of the outside world.[154] One approach—here termed "Type I"—associates the Romantic model with an elevated originality standard, reasoning that judges measuring a work against the standard of the great Romantic artist would find more mundane works to be too "commonplace."[155] Moreover, these critics explain the law's low originality standard, typified by *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, by interpreting the *Catalda* court's formalism as a rejection of the Romantic approach.[156] The "Type II" critic, on the other hand, regards the law's originality standard as consistent with the Romantic model.[157] This Part first delineates the criticism of the Romantic conception, proceeds to discuss the Type I school, and concludes by presenting the Type II alternative.[158]

A. *Criticism of the Romantic Model, Considered Generally*

Although such critics often disagree in their terms of debate and in their interpretations of the case law and legal and philosophical

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[151] *See id.* at 260, 299, 300.

[152] *See* Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 481–83; Litman, *supra* note 10, at 1009.

[153] *See* 111 U.S. at 60; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 481; Litman, *supra* note 10, at 1008–09.

[154] *See* 111 U.S. at 60; Jaszi, *supra* note 17, at 481; Litman, *supra* note 10, at 1008–09.

[155] *See* Jaszi, *supra* note 17, at 460–63, 484–85; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991).

[156] *See* 191 F.2d 99, 102–03, 104–05 (2d Cir. 1951); Jaszi, *supra* note 17, at 484–85; Litman, *supra* note 10, at 1009–11.

[157] *See* Boyle, *supra* note 13, at 1466–67.

[158] *See infra* notes 161–231 and accompanying text.

commentaries, the discourse criticizing Romantic authorship maintains a remarkable uniformity in its essential structure.[159] For this school of thought, the basic logic of copyright law stems from the uncritical adoption of this particular conception of authorship, thus leading to an overexpansion of copyright protection, whose lack of full-fledged legitimacy follows from the flaws of the underlying conceptual bias.[160] While the Romantic model envisions authorship as "creating Aphrodite from the foam of the sea," the modern view more accurately understands authorship in terms of "translation and recombination."[161] In other words, the typical, contemporary approach rejects the Romantic notion that the artist projects an irreducibly personal creativity onto the world.[162] This criticism of Romantic authorship is grounded in a substantive truth-claim about the nature of authorship.[163]

As long as one believes that there exists an inner, irreducibly subjective space in which the author creates something out of nothing, one can distinguish between the author's original creation and entities in an outside, objective world.[164] By insisting on this model of authorial subjectivity, the law has understood the author's property in terms of originality.[165] An originating space within the author's consciousness can successfully resist others' legal claims that pose a potential threat to the author's intellectual property, but only if this original consciousness is, at bottom, utterly free from the outside world.[166] In other words, the legitimacy of the author's claim rests upon the primacy of the author's creativity as against all other beings in the world, and therefore relies on a strict separation between subject and object.[167]

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[159] *See* Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 460–63, 481–85; Litman, *supra* note 10, at 965–67, 1008–11.

[160] *See* Boyle, *supra* note 13, at 1463–67, 1533–34; Jaszi, *supra* note 17, at 460–63, 481–85; Litman, *supra* note 10, at 965–67, 1008–11.

[161] *See* Boyle, *supra* note 13, at 1464–67, 1526–27; Litman, *supra* note 10, at 965–67, 1008.

[162] *See* Litman, *supra* note 10, at 965–67, 1008–11.

[163] *See id.* at 966–67, 1008–11; TERRY EAGLETON, LITERARY THEORY 113, 129–30, 136, 138 (1983).

[164] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–09.

[165] *See* Litman, *supra* note 10, at 965–67, 1008–09.

[166] *See id.* at 1008–09; Boyle, *supra* note 13, at 1466–67.

[167] *See* Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 1008–09.

This dichotomy breaks down, however, when one considers the actual character of artistic production.[168] No author comes to the act of creation without having been informed by his or her experience of the outside world, such that there is never a purely subjective space at all.[169] Rather, an artist translates experience into an artwork, recombining the raw materials of memory and interpretation into this new entity.[170] However, the novelty of the work, insofar as it can be traced back to the author, is not absolute, for the author's creativity can never be considered in complete isolation from the outside world in which the author lives.[171] In its most characteristic expression, contemporary literary thought diametrically opposes the Romantic understanding:

> There is no such thing as literary "originality," no such thing as the "first" literary work: all literature is intertextual. A specific piece of writing thus has no clearly defined boundaries: it spills over constantly into the works clustered around it, generating a hundred different perspectives which dwindle to a vanishing point. The work cannot be sprung shut, rendered determinate, by an appeal to the author, for the "death of the author" is a slogan that modern criticism is now confidently able to proclaim.[172]

Indeed, even if one hesitates to go so far as these modern critics, any author clearly is influenced and conditioned, consciously and unconsciously, by other works the author has read, not to mention the author's gender, socio-economic background, and historical milieu.[173] For the modern sensibility, the Romantic notion of a purely personal, utterly nonconditioned subjectivity seems overly metaphysical, even mythological.[174]

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[168] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[169] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[170] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[171] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[172] EAGLETON, *supra* note 163, at 138.

[173] *See id.* at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[174] *See* EAGLETON, *supra* note 163, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–11.

This philosophical debate is hardly as abstract as it might seem at first glance, because the very notion of authorship is historically conditioned.[175] Before the eighteenth century, the assertion that an author's work might constitute property on account of its originality would have seemed fantastical, since "things of the mind" were considered distinct from "articles of transferable property."[176] Indeed, the English, from whom American copyright law was inherited, did not even use the word "plagiarism" until the early 17th century.[177] True inspiration was divine, rather than human, such that humans could only be "craftsmen."[178] As mere copiers or mouthpieces, writers could claim no proprietorship over their words.[179] But, as one critic puts it, "the elevation of the romantic author both presented and seemed to solve the question of property rights in intellectual products."[180] "Originality" could become the defining quality of artistry only if true artistry were defined as "emanating not from outside or above, but from within the writer himself."[181]

But how did this conception of a wholly interior and subjective creative experience develop?[182] The rhetoric of authorship utilized in the Statute of Anne (1709) found a somewhat hospitable reception, in large part because of the ascendance of "possessive individualism" in contemporary English social thought.[183] Particularly influential was John Locke's implicit notion that the individual, in the proprietorship over the self, "authors" experience.[184] Similarly, Hobbes considered "he whose words or actions are considered . . . as his *own*" to be a "natural person," who *owns* those words or actions, and thereby "acts by authority."[185] The etymological connection between authorship and authority reflects the eighteenth century conflation of these two concepts; the author gained legal authority via "individual control over the created environment."[186] If an individual owns himself, he

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[175] *See* EAGLETON, *supra* note 163, at 18; Boyle, *supra* note 13, at 1463–66; Jaszi, *supra* note 17, at 466–67.

[176] *See* Jaszi, *supra* note 17, at 466–67.

[177] *See* Boyle, *supra* note 13, at 1465–66.

[178] *See id.* at 1463–64.

[179] *See id.* at 1463–65.

[180] *Id.* at 1465.

[181] *See id.*

[182] *See* Boyle, *supra* note 13, at 1463–67; Jaszi, *supra* note 17, at 466–71.

[183] *See* An Act for the Encouragement of Learning, 1709, 8 Ann. c. 19 (Eng.); Jaszi, *supra* note 17, at 468–70.

[184] *See* Jaszi, *supra* note 17, at 468–70.

[185] *Id.* at 470.

[186] *See id.*

authors his own experience, including the experience of creation.[187] "Possessive individualism" thus provided a critical, grounding premise for intellectual property as such—a work's ownership is a function of the author's individual self.[188]

This conception of owned subjectivity proved amenable to the Romantic understanding of authorship, which was ascendant by the late eighteenth century.[189] Criticizing the "mastery of rules extrapolated from classical literature," the Romantics "preached" originality, which they located "in the poet's own genius."[190] By combining the notion of self-ownership with the belief that the true artist's work sprung from his own originality, it was possible to understand literary work as property created by the artist's own, owned genius.[191] Fichte arguably provided the most salient philosophical response to the problem of separating out copyrightable from noncopyrightable elements in a particular work.[192] Fichte's conception was grounded in the dichotomy between form and substance: "*Precisely because the originality of his spirit was converted into an originality of form* the author retains the right to the form in which those ideas were expressed."[193] Moreover, by valorizing the artist as a quasi-religious beacon of both beauty and truth, the Romantic approach raised the stakes for copyright protection.[194] An originating, inner spirit thus provided the legal justification for a powerful protection of artists' rights over their expressions.[195]

B. *Type I Criticism of the Romantic Conception of Authorship*

The Type I critic argues that, while the Romantic model still exerts influence in contemporary originality jurisprudence, the law's permissive standard is best explained by the twentieth century trend

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[187] *See id.*

[188] *See id.* at 469–70; JANE M. GAINES, CONTESTED CULTURE 63–64 (1991). Gaines argues that the law's permissive originality standard exists independently of the Romantic conception, because it is fundamentally grounded in Lockean labor theory: "[I]f the individual author produces property in the work in the Lockean sense, then every act of product is an act of origination, *every* work is an original work, regardless of whether it is aesthetically unoriginal, banal, or in some cases, imitative." *Id.*

[189] *See* Boyle, *supra* note 13, at 1465–67; Jaszi, *supra* note 17, at 466–67, 469–70.

[190] *See* Jaszi, *supra* note 17, at 467.

[191] *See id.* at 466–67, 469–70.

[192] *See* Boyle, *supra* note 13, at 1466–67.

[193] *See id.*

[194] Boyle, *supra* note 13, at 1466, 1467–68; Litman, *supra* note 10, at 965–67.

[195] *See* Boyle, *supra* note 13, at 1466, 1467–68; Jaszi, *supra* note 17, at 466–67, 469–70; Litman, *supra* note 10, at 965–67.

toward formalism and the concomitant distancing from the Romantic model.[196] For this school of thought, the quasi-religious figure of the great author necessarily leads to a legal bias against more mundane producers of works.[197]

Accordingly, these critics look to late eighteenth and early nineteenth century works as the archetypal expressions of the Romantic understanding.[198] Although a late nineteenth century opinion, *Sarony* still held to this conceptual structure.[199] First, the Court found originality in the Oscar Wilde photograph by conceptualizing the photographs as "representatives of original intellectual conceptions of the 'author.'"[200] This reliance on the "individual artistic genius" evidences a Romantic conception of the work as the representation of a wholly personal self.[201] Second, the Court considered the aesthetic merit of the work.[202] For the Type I critic, this criterion echoes the Romantic apotheosis of art and the concomitant distinction between the work created by the truly original artist and that produced by the amateur or the craftsman.[203]

According to these critics, however, *Bleistein v. Donaldson Lithographing Co.*, marked the originality doctrine's evolution away from this Romantic scheme.[204] While *Sarony* focused on the artist as the fount of creativity, *Bleistein* concentrated on the work itself, thereby eliding the author.[205] For these critics, the Court left authorship with "little or no meaningful content" by rejecting aesthetic merit as a criterion for originality.[206] If circus advertisements are given the same legal protection as a Picasso, the law's role in determining originality is highly restricted, indeed.[207] The Court looked merely for some evidence that the work was produced by some individual, but since every

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[196] *See* Jaszi, *supra* note 31, at 35–36; Jaszi, *supra* note 17, at 481–85; Litman, *supra* note 10, at 1009–11.

[197] *See* Jaszi, *supra* note 17, at 483–85.

[198] *See* Jaszi, *supra* note 17, at 466–67.

[199] *See* 111 U.S. at 60; Jaszi, *supra* note 17, at 480–81.

[200] *See Sarony*, 111 U.S. at 60; Jaszi, *supra* note 17, at 480–81.

[201] *See Sarony*, 111 U.S. at 60; Jaszi, *supra* note 17, at 480–81; Litman, *supra* note 10, at 965–67, 1008–09.

[202] *See Sarony*, 111 U.S. at 60; Jaszi, *supra* note 17, at 480–81.

[203] *See Sarony*, 111 U.S. at 60; Jaszi, *supra* note 17, at 466–67, 480–81.

[204] *See* 188 U.S. at 249–50, 251–52; Jaszi, *supra* note 17, at 482–83.

[205] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; Jaszi, *supra* note 17, at 482–83.

[206] *See Bleistein*, 188 U.S. at 251–52; Jaszi, *supra* note 17, at 482–83.

[207] *See Bleistein*, 188 U.S. at 251–52; Jaszi, *supra* note 17, at 482–83.

individual leaves a mark on something produced, the individual artist was considered relatively insignificant.[208]

For these critics, *Catalda* represented the most extreme, pure application of this work-centered approach.[209] The "distinguishable variation" test looks only to the work.[210] That an accidental variation by a copier may be copyrighted illustrates the *Catalda* court's disavowal of the Romantic standard for creativity; the originality of the work appears in its distinguishing features, without any reference to authorial subjectivity at all.[211] The copier who inadvertently produces an "original" work transforms raw material, but does not "create" from within a wholly private consciousness.[212] Even though *Bleistein* and *Catalda* mentioned the formal, technical requirement that works be traced back to an author, they acknowledged, in effect, "the death of the author," as announced by contemporary literary theory.[213] The law's permissive standard for originality reflects this effacement of authorship.[214] By understanding the requisite authorship as a mere point of origin, modern copyright law has so generalized the concept that it is no longer meaningful or effective.[215]

The *Feist Publications, Inc. v. Rural Telephone Service Co.* Court, however, returned to the Romantic conception by arguably raising the standard for originality.[216] By conceptualizing the legal standard in terms of creativity, the Court returned to pre-*Bleistein* originality jurisprudence, focusing on the work as a sign of "the creative powers of the mind."[217] While *Bleistein* and *Catalda* effaced the author by setting forth a merely formal, permissive requirement of human agency, the *Feist* Court restored, to a limited degree, the Romantic conception of authorship as the creative projection of an originary self.[218] This

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[208] *See Bleistein*, 188 U.S. at 251–52; Jaszi, *supra* note 17, at 482–83.

[209] *See* 191 F.2d at 102–03, 104–05; Jaszi, *supra* note 17, at 483–85; Litman, *supra* note 10, at 1010–11.

[210] *See Catalda*, 191 F.2d at 102–03, 104–05; Yen, *supra* note 31, at 274–75.

[211] *See* 191 F.2d at 102–03, 104–05; Jaszi, *supra* note 17, at 483–85.

[212] *See Catalda*, 191 F.2d at 104–05; Litman, *supra* note 10, at 1008–11.

[213] *See Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 138; Jaszi, *supra* note 17, at 482–85.

[214] *See* Jaszi, *supra* note 17, at 482–85; Litman, *supra* note 10, at 1005.

[215] *See* Jaszi, *supra* note 17, at 482–85; Litman, *supra* note 10, at 1005.

[216] *See* 499 U.S. at 345–47; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 481–85.

[217] *See Feist*, 499 U.S. at 346; The Trade-Mark Cases, 100 U.S. 82, 94 (1879); Jaszi, *supra* note 31, at 36–39.

[218] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 138; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 482–85; Litman, *supra* note 10, at 1008–09.

movement toward a Romantic standard for authorship has raised the bar for copyright protection; insufficiently creative works produced by an individual would have received protection under *Bleistein* and *Catalda*, but not any longer.[219]

C. *Type II Criticism of the Romantic Conception of Authorship*

The Type II critic, on the other hand, rejects the notion that *Bleistein* adopted a work-centered, anti-Romantic approach, instead interpreting the minimal *Bleistein* standard as entirely consistent with the Romantic understanding of the self as creative origin.[220] Under this view, the theory underlying *Bleistein* exemplified the Fichtean scheme.[221] By grounding copyrightability in the individual's uniqueness, the *Bleistein* Court adopted the Fichtean notion of a wholly subjective, distinctive originality that expresses itself in a corresponding, original form of objective expression.[222] By concentrating on the work's form, rather than judging the substantive merits of the artist's creation, the *Bleistein* Court applied the Romantic model to even the most banal, commercialized works.[223] Far from completely rejecting the Romantic standard of genius, the *Bleistein* Court simply adopted the conceptual structure underlying that standard, and applied it to all works, no matter how mundane.[224] In other words, the Court applied the epistemology of Romantic aesthetics, but rejected the Romantic notion of a hierarchy of works based on aesthetic merit.[225] Indeed, as the Type I critic asserts, the low standard for originality reflects the *Bleistein* Court's "generalization" of authorship; originality means only that the work has a human being as its point of origin, as opposed to some specifically defined authorial process.[226] However, while the Type I critic interprets this generalization as an effacement of the Romantic author, Type II criticism implies that it is, in fact, an

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[219] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 138; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 482–85; Litman, *supra* note 10, at 1008–09.

[220] *See* 188 U.S. at 249–50; Boyle, *supra* note 13, at 1466–67.

[221] *See* 188 U.S. at 249–50; Boyle, *supra* note 13, at 1466–67.

[222] *See* 188 U.S. at 249–50; Boyle, *supra* note 13, at 1466–67.

[223] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67.

[224] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67.

[225] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67.

[226] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 483.

extension of the Romantic model.[227] According to the Type II critic, the generalization of authorship in *Bleistein* does not represent the rejection of the Romantic understanding of authorship as personal creation, but rather compels the Court to presume that *any* work, as long as it is produced by a human actor, expresses the producer's "originality of spirit."[228] That the *Bleistein* Court rejected the Romantic apotheosis of art and artist does not change the intentionalist, Romantic structure of its analysis.[229] Paradoxically, an apparently objective formalism was, in fact, grounded in Romantic subjectivism.[230]

IV. Policy: Protecting Authors and the Public Domain

The chief aim of copyright law, embedded in the Constitution, is to promote the progress of the arts.[231] Without copyright protection, few authors or artists would have an economic incentive to sell their works to the public; the legal propertization of the work thus fosters the flourishing of art.[232] From this perspective, the public domain—all works which are not so propertized—is defined negatively, as beyond the realm of works for which public policy demands protection.[233] But the public domain furthers significant public policy objectives of its own.[234] Most importantly, it provides an open intellectual commons in which discursive exchange can proceed without the burdens of legal formalities.[235] Indeed, by fencing off this commons, copyright protection limits the scope of debate and the availability of the "raw materials of authorship" upon which authors build in creating their own works; copyright protection, by definition, precludes access to works by citizens who might profit immensely by experiencing them.[236] The policy dimension of copyright protection expresses itself in the form of a balancing test, as commentators weigh the benefits of protecting

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[227] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 483.

[228] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 483.

[229] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 483.

[230] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67.

[231] U.S. Const. art. I, § 8, cl. 8.

[232] *See, e.g.*, Landes & Posner, *supra* note 28, at 326; Yen, *supra* note 31, at 248.

[233] *See* Litman, *supra* note 10, at 967–68.

[234] *See id.*; Lange, *supra* note 12, at 164; Travis, *supra* note 12, at 850–51.

[235] *See* Lange, *supra* note 12, at 164; Litman, *supra* note 10, at 967–68; Travis, *supra* note 12, at 850–51.

[236] *See* Lange, *supra* note 12, at 164; Litman, *supra* note 10, at 967–68; Travis, *supra* note 12, at 850–51.

an author's works against the benefits of a vigorous intellectual commons.[237]

As many commentators have detailed, the scope and duration of American copyright protection has expanded in recent decades.[238] The law's permissive originality standard has fostered this development.[239] By extending copyright protection to any work that evidences the production of an individual, the originality doctrine has increased the number of protected works beyond what was propertized in the eighteenth and nineteenth centuries.[240] As this expansion has occurred, the number of works in the public domain has necessarily shrunk, vitiating the benefits of an intellectual commons.[241] Moreover, it is uncertain whether the policy goal of fostering art is furthered by protecting works that many observers regard as marginally original, at best.[242]

V. Toward a Stricter Originality Standard

The most conspicuous critique of any theoretical approach to originality jurisprudence is epistemological: How can the observer know that the judicial approach is, in fact, theoretical when the judicial language is expressly untheoretical?[243] The critic of Romantic authorship must respond to the skeptic's reluctance to read meaning behind judges' words, so to speak.[244] Legal aestheticists, these critics included, adequately justify their reliance upon theory in explaining originality jurisprudence.[245] Indeed, the legal aesthetician simply proceeds from the pragmatic, everyday understanding of language as a

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[237] *See, e.g.*, Landes & Posner, *supra* note 28, at 326; Lange, *supra* note 12, at 164; Litman, *supra* note 10, at 967–68; Yen, *supra* note 31, at 248; Travis, *supra* note 12, at 850–51.

[238] *See, e.g.*, Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Travis, *supra* note 12, at 813–25.

[239] *See* Boyle, *supra* note 13, at 1466–67, 1525–26; Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Litman, *supra* note 10, at 966–67, 1000; Travis, *supra* note 12, at 813–25.

[240] *See* Boyle, *supra* note 13, at 1466–67, 1525–26; Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Litman, *supra* note 10, at 966–67, 1000; Travis, *supra* note 12, at 813–25.

[241] *See* Boyle, *supra* note 13, at 1466–67, 1525–26; Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Litman, *supra* note 10, at 966–67, 1000; Travis, *supra* note 12, at 813–25.

[242] *See* Boyle, *supra* note 13, at 1466–67, 1534; Litman, *supra* note 10, at 966–68, 1000, 1005.

[243] *See* Yen, *supra* note 31, at 247, 249–50, 273–75.

[244] *See id.*

[245] *See id.*

representation of meanings.[246] If the reader is bound by the judge's meanings, rather than the judge's words as such, a legal discourse might reasonably be understood in terms of a non-legal discourse.[247] Here, for instance, the legal discourse on originality makes the same assertions as aesthetic theory, but simply uses different words, used in different ways.[248] This duality allowed the *Bleistein* Court, for instance, to interpret authorial originality in starkly intentionalist terms while simultaneously disavowing theory.[249] Originality jurisprudence implicates aesthetic theory by superficially effacing it.[250]

By uncovering the logic of cases such as *Sarony* and *Bleistein*, critics have persuasively illustrated how the logic of originality jurisprudence mimics and performs the logic of Romantic authorship and of intentionalism.[251] Fundamentally, these discourses proceed from a particular understanding of authorial subjectivity.[252] In fact, the Romantic conception of a creative, irreducible subjectivity is the basis of the intentionalist argument that a work of art should be understood by reference to the author alone.[253] Romantic theory, by positing an unbridgeable gap between authorial subjectivity and the objectivity of the outside world, furnishes intentionalism with the subject-object dichotomy without which it could not function.[254] Indeed, how could one use the author as a reliable measure of art if the author were not immaculately independent from the ebb and flow of the outside world?[255] Otherwise, the artist would not truly be a subject, since his or her very self would "contain" elements of the outside world.[256] Intentionalism could not function in such a scenario, for its premise is

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[246] *See id.*

[247] *See id.*

[248] *See* Yen, *supra* note 31, at 247, 249–50, 273–75.

[249] *See id.*; Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50, 251–52 (1903).

[250] *See* Yen, *supra* note 31, at 247, 249–50, 273–75.

[251] *See Bleistein*, 188 U.S. at 249–50; Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884); Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 480–81.

[252] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[253] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[254] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[255] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[256] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

that the subject precedes the object, rather than the other way around.[257]

The reasoning of *Sarony* diametrically opposed the anti-Romantic stance of most contemporary theorists, defined by its rejection of this subject-object premise.[258] *Sarony* would have been unthinkable under the contemporary view, since it understood the work as a representation of the artist's subjective conception.[259] The very use of the word "representations" is enough to illustrate the Romantic assumption that the artist's work re-presents (literally, "presents again") the artist's originary mind.[260] If the work "presents again," it is derivative; some origin must precede it.[261] But the modern view summarily rejects the notion that there is ever a subjective consciousness that is not also in some way conditioned by experience of the outside world.[262] Under the modern approach, then, the work is not a re-presentation of a pure subject, but rather bears the mark of that subject, along with the marks of the many other texts and experiences which informed and engendered that subject's consciousness.[263] One may disagree with the positions of modern literary theory, but it is clearly incompatible with the *Sarony* Court's subjectivism.[264] The pre-modern view of creative originality, however, explains the *Sarony* Court's logic perfectly.[265]

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[257] *See* EAGLETON, *supra* note 163, at 67; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[258] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[259] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[260] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[261] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[262] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[263] *See Sarony*, 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[264] *See* 111 U.S. at 60; EAGLETON, *supra* note 163, at 67, 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

[265] *See* 111 U.S. at 60; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09; Yen, *supra* note 31, at 256–57, 263.

The *Bleistein* Court extended this Romantic, intentionalist logic by locating authorship within the irreducible subjectivity of the unique personality.[266] The Court's language was clear: Personality "expresses its singularity" in any individual's product, because it contains "something irreducible" that belongs only to the individual.[267] *Bleistein* perfectly reproduced *Sarony*'s conceptual scheme of a purely personal, wholly subjective artist.[268] Type I criticism fails to see that the Court relied on the conceptual structure of intentionalist Romanticism even as it rejected the notion that judges should apply a Romantic hierarchy by considering aesthetic merit.[269] This ambivalence toward Romanticism underlies the current standard for originality; the law presumes that a work produced by an individual bears the Romantics' mark of pure subjectivity, but extends copyright protection to works without making the Romantic judgment of the work's status as a revelation of beauty or truth.[270] Type II criticism, therefore, correctly articulates the essentially Romantic structure of the *Bleistein* Court's epistemology, even if that Court simultaneously rejected the Romantic hierarchy of aesthetic quality.[271]

Although no Type II critic has addressed *Catalda*, a Type II analysis reveals the shortcomings of the Type I reading.[272] By focusing on the work as evidence of originality, the Type I critic claims, the formalist *Catalda* court diametrically opposed Romantic subjectivism.[273] However, this reading ignores the fundamentally Romantic structure of the *Catalda* analysis.[274] According to that analysis, the originality of a "distinguishable variation" follows from an author's irreducible subjectivity, *as manifested in the work*.[275] The court explicitly followed *Bleistein*, and paraphrased the controlling principle: "No matter how

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[266] *See* 188 U.S. at 249–50; Boyle, *supra* note 13, at 1466–67.

[267] *See Bleistein*, 188 U.S. at 249–50; Boyle, *supra* note 13, at 1466–67.

[268] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; Boyle, *supra* note 13, at 1466–67.

[269] *See Bleistein*, 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 482–83.

[270] *See Bleistein*, 188 U.S. at 249–50, 251–52; Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1076–77 (9th Cir. 2000); Key Publ'ns, Inc. v. Chinatown Today Publ'g Enter., Inc., 945 F.2d 509, 512–15 (2d Cir. 1991); Boyle, *supra* note 13, at 1466–67.

[271] *See* 188 U.S. at 249–50, 251–52; Boyle, *supra* note 13, at 1466–67.

[272] *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03, 104–05 (2d Cir. 1951); Jaszi, *supra* note 17, at 483–85; Litman, *supra* note 10, at 1009–10.

[273] *See* 191 F.2d at 102–03, 104–05; Jaszi, *supra* note 17, at 483–85; Litman, *supra* note 10, at 1009–10.

[274] *See* 191 F.2d at 102–03, 104–05; Jaszi, *supra* note 17, at 483–84.

[275] *See Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 469–70.

poor artistically the 'author's' addition, it is enough if it be his own."[276] The court's emphasis on the artist's 'own' addition to the work perfectly tracked Lockean and Hobbesean possessive individualism, which set the condition for the Romantic conception of authorship in the first place.[277] As in *Bleistein*, an analysis that rejects the Romantic genius standard hardly becomes anti-Romantic by extending the essentially Romantic standard for uniqueness to more humble productions.[278] *Catalda* followed *Bleistein*, phrasing the irreducible subjectivity of Romantic uniqueness in terms of that which is the author's 'own,' as opposed to that which can be reduced further by separating out external elements.[279] *Catalda*'s grant of copyright protection to inadvertent works constituted a shift from *Sarony*'s emphasis upon the artist's volition, but this is hardly inconsistent with Romantic subjectivism; accidental subjectivity is subjectivity, nonetheless.[280] No matter how unequivocally *Catalda* rejected the Romantic cult of genius, this conception of the uniqueness of the author's creation stands in stark contrast to the contemporary view, according to which artistic production is inherently, necessarily mediated and conditioned by nonsubjective elements.[281]

The Type II approach thus reveals how the Romantic model underlies both intentionalist and formalist analyses of originality in copyright law.[282] The underlying, unspoken faith in a moment of irreducible, atomic subjectivity has proven so powerful that it sets the terms for a formalist, work-centered approach that, at first glance, might seem to be fundamentally opposed to the Romantic, intentionalist conception.[283] This understanding explains what Type I criticism cannot; the law's loose standard for originality has developed, not *de-*

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[276] *Catalda*, 191 F.2d at 103.

[277] *See Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 469–70.

[278] *See Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[279] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[280] *See Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[281] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09.

[282] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67.

[283] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 17, at 482–85.

spite the power of the Romantic paradigm, but *precisely because of it.*[284] The law, in determining the originality of a given work, accords an uncritical deference to putative authors because of the unexamined, Romantic assumption that an artwork as such is grounded in a purely subjective space that the law cannot and should not interrogate.[285] Examining and critiquing an author's creativity is impossible, according to this model, because the law, as an exterior being, cannot reach into a wholly private realm.[286] Further, the continuing Romantic bias of originality jurisprudence helps to explain how the law's permissive originality standard has contributed to the ongoing expansion of American copyright protection.[287] While Type I criticism associates extensive copyright protection with the Romantic reverence and respect for authorship, it nonetheless interprets most modern originality jurisprudence as a rejection of the Romantic model.[288] The Type II approach resolves this tension by showing how copyright expansion and a low originality standard have worked hand-in-hand.[289]

Today, originality jurisprudence is slowly taking steps away from this Romantic deference.[290] While the Type I approach criticizes *Feist* as a resurrection of a Romantic bias toward great, original authors, the *Feist* Court's approach is more ambivalent in its orientation toward Romanticism.[291] By insisting that the author's personal contribution, rather than the work itself, is the dispositive criterion, the Court situated itself within the Romantic epistemology of authorial subjectivity.[292] But in holding that the law must interrogate that subjectivity by ascertaining the author's creativity, the Court signaled its critique of

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[284] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 1008–09.

[285] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 1008–09.

[286] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[287] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67, 1525–26; Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Litman, *supra* note 10, at 966–67, 1000; Travis, *supra* note 12, at 813–25.

[288] *See* Jaszi, *supra* note 17, at 461–63, 482–85.

[289] *See Bleistein*, 188 U.S. at 249–50; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67, 1525–26; Lange, *supra* note 12, at 156; Lemley, *supra* note 12, at 886–87; Litman, *supra* note 10, at 966–67, 1000; Travis, *supra* note 12, at 813–25.

[290] *See Feist*, 499 U.S. at 345–46, 362–63; Boyle, *supra* note 13, at 1466–67.

[291] *See* 499 U.S. at 345–47; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 461–63, 482–85.

[292] *See Feist*, 499 U.S. at 345–47; Boyle, *supra* note 13, at 1466–67; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 480–81.

the deference given by the *Bleistein* and *Catalda* approaches.[293] While the *Feist* criterion of creativity certainly contains echoes of the Romantic insistence upon the author's autonomy, it is best read in light of the recognition that not all works produced by an individual are creative enough to justify legal protection.[294] It is evident that an ordinary phone book is not an "original work of authorship."[295] While the Romantic apotheosis of authorial subjectivity encouraged judicial deference, the critique of pure subjectivism, as in *Feist*, necessitates the opposite approach, encouraging judicial skepticism toward claims of creativity.[296] No work, and no author, is free from external influences, such that it no longer makes sense to effectively assume that a produced work contains a core of purely authorial creativity.[297] Rather, the question of originality is one of degree: To what extent does this work evidence artistic creativity?[298] This approach, intimated by the *Feist* Court, reflects the modern view that authorship is a "more modest achievement," rather than a mystical process upon which one should not tread.[299] The *Feist* approach signals a higher standard for originality, since a work's insufficient creativity is now a bar to copyright protection, even if it would have satisfied the *Bleistein* requirement of having a point of origin.[300]

The inadequacy of a loose standard for originality is most evident in *Key Publications* and *Ets-Hokin*.[301] In *Key Publications*, constructing a phone book was considered "creative."[302] Although ostensibly applying the *Feist* standard, the court did not include any analysis of how the selection and arrangement of business listings was "creative."[303] The court's reasoning effectively returned to the Romantic deference

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[293] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[294] *See Feist*, 499 U.S. at 345–47; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 461–63, 482–85.

[295] *See* 17 U.S.C. § 102 (1994); *Feist*, 499 U.S. at 362–63.

[296] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; Boyle, *supra* note 13, at 1466–67.

[297] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67; Litman, *supra* note 10, at 965–67, 1008–09.

[298] *See Feist*, 499 U.S. at 345–47.

[299] *See id.*; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[300] *See Feist*, 499 U.S. at 345–47; *Bleistein*, 188 U.S. at 249–50, 251–52; Jaszi, *supra* note 31, at 36–39; Jaszi, *supra* note 17, at 482–85; Litman, *supra* note 10, at 1008–09.

[301] *See Ets-Hokin*, 225 F.3d at 1076–77; *Key Publ'ns*, 945 F.2d at 512–15.

[302] *See Key Publ'ns*, 945 F.2d at 512–15.

[303] *See Feist*, 499 U.S. at 345–47; *Key Publ'ns*, 945 F.2d at 512–15.

of the *Bleistein* decision.[304] Under the modern, *Feist* view, the court should have critically examined the phone books in order to ascertain whether they were sufficiently creative, rather than assume a Romantic, wholly subjective creativity.[305] In all likelihood, the phone books would not be considered copyrightable according to this critical approach, because the degree of the businessperson's artistic contribution was minimal, at best; it is hardly clear that yellow pages evidence creative choices.[306] Rather, the putative author complied the directory for her customers' use, keeping in mind which businesses her prospective customers would most likely frequent.[307] Pragmatic, business decisions are hardly "creative," but instead typify exactly what the *Feist* Court has held not to be copyrightable—commonplace, ordinary choices.[308]

Similarly, the photographer in *Ets-Hokin* merely took photographs of a vodka bottle for use in an advertisement, and the weight of his "artistic" choices appears slight.[309] Under the modern approach, the court would have examined the photograph with an eye toward the creativity of the photographer's choices, or lack thereof.[310] In so doing, the court probably would have found that giving the viewer a "straight on" perspective was entirely foreseeable, given advertising's obvious goal of attracting the viewer's attention.[311] Further, the addition of the martini glass was entirely foreseeable and ordinary, because most people associate vodka with martinis.[312] These choices were probably within the scope of the ordinary, obvious choices which the *Feist* approach neglects to protect.[313]

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[304] *See Bleistein*, 188 U.S. at 249–50, 251–52; *Key Publ'ns*, 945 F.2d at 512–15; Boyle, *supra* note 13, at 1466–67.

[305] *See Feist*, 499 U.S. at 345–47; *Key Publ'ns*, 945 F.2d at 512–15; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[306] *See Feist*, 499 U.S. at 345–47, 362–63; *Key Publ'ns*, 945 F.2d at 512–15; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[307] *See Feist*, 499 U.S. at 345–47, 362–63; *Key Publ'ns*, 945 F.2d at 512–15; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[308] *See Feist*, 499 U.S. at 345–47, 362–63; *Key Publ'ns*, 945 F.2d at 512–15.

[309] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[310] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–11.

[311] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77.

[312] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77.

[313] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77.

The outcomes of these two cases illustrate why a stricter standard is appropriate for a post-Romantic age.[314] However, opposition to Romantic permissiveness does not entail or require a complete acceptance of modern theory's antisubjectivism, which erases the author by merging him or her into the work.[315] Indeed, the antiauthorial strain of modern theory is incompatible with the very existence of copyright law, insofar as copyright protection could not exist without authors to protect in the first place.[316] Since its theoretical basis undermines the essential function of copyright, pure antisubjectivism necessarily fails to fully articulate copyright law's approach to originality, just as the weaknesses of intentionalism and formalism preclude either school from offering an overarching explication of art.[317] Judges, then, should employ aesthetic pragmatism in originality cases.[318] Contemporary theory's erasure of the author should not function as an uncriticized basis for rethinking originality, but the modern understanding of authorship would effectively counter the underlying Romantic bias of originality jurisprudence.[319] This approach would correct the excesses of both Romantic subjectivism and contemporary antiauthorialism.[320]

By restricting the realm of propertized works to those that are truly original, this approach would reinvigorate the public domain.[321] Unoriginal items that otherwise would be "fenced off" would now be open to public access and debate.[322] As more people encounter and appreciate works, individuals' reservoirs of "the raw materials of authorship" would grow, thereby providing them with greater means to express their creative ambitions.[323] By enlarging the public domain,

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[314] *See Feist*, 499 U.S. at 345–47, 362–63; *Ets-Hokin*, 225 F.3d at 1076–77; *Key Publ'ns*, 945 F.2d at 512–13; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Litman, *supra* note 10, at 965–67, 1008–09.

[315] *See* EAGLETON, *supra* note 163, at 113, 129–30, 136, 138.

[316] *See id.*

[317] *See id.*; Yen, *supra* note 31, at 260, 299.

[318] *See* Yen, *supra* note 31, at 301–02.

[319] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67; Yen, *supra* note 31, at 260, 299, 301–02.

[320] *See Bleistein*, 188 U.S. at 249–50; *Sarony*, 111 U.S. at 60; *Catalda*, 191 F.2d at 102–03, 104–05; EAGLETON, *supra* note 163, at 113, 129–30, 136, 138; Boyle, *supra* note 13, at 1466–67; Yen, *supra* note 31, at 260, 299, 301–02.

[321] *See* Boyle, *supra* note 13, at 1466–67; Lange, *supra* note 12, at 165; Litman, *supra* note 10, at 967–68; Travis, *supra* note 12, at 850–51.

[322] *See* Boyle, *supra* note 13, at 1466–67; Lange, *supra* note 12, at 165; Litman, *supra* note 10, at 967–68; Travis, *supra* note 12, at 850–51.

[323] *See* Litman, *supra* note 10, at 967–68.

then, this approach would foster the flourishing of the arts, which, after all, is the fundamental purpose of copyright.[324] However, the law would continue to further the critical public interest in protecting truly original works of art, as opposed to obvious, ordinary products.[325]

Conclusion

The law's standard for originality reflects an uncritical deference toward authorial subjectivity. Critics have persuasively demonstrated how originality jurisprudence reflects the historically contingent logic of the Romantic understanding of authorship, according to which the author expresses an original, creative selfhood that is not mediated by non-subjective entities or experiences. In contrast, modern opinion recognizes the fact that any individual's experiences are conditioned, influenced, and mediated by external factors such as language, gender, and historical milieu.

Type II criticism of the Romantic model resolves an apparent tension in this area of law—while the law operates with a bias toward great, Romantic authors, the originality standard is remarkably low, leading to copyright protection for almost any work that is produced by an individual. By assuming that a work contains the imprint of a purely subjective, originating consciousness, the law has extended copyright protection to arguably nonoriginal works. Conversely, the more appropriate, modern view, typified by *Feist*, entails judicial enquiry into the creativity of the work, which inevitably engenders a stricter standard for originality. By restoring substance to the originality requirement, this approach would not only reflect the contemporary understanding of authorship, but would further the critical policy goal of reinvigorating the public domain.

Ryan Littrell

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[324] *See* Landes & Posner, *supra* note 28, at 326; Litman, *supra* note 10, at 967–68; Yen, *supra* note 31, at 248.

[325] *See* Boyle, *supra* note 13, at 1466–67; Landes & Posner, *supra* note 28, at 326; Yen, *supra* note 31, at 248.

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