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Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature

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Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*

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INTRODUCTION

Nature has always inspired artists, and depictions of flora and fauna are prevalent in almost every artistic period and movement.¹ Today, some of the most famous works of art portray elements of the natural world. No Art History 101 course would be complete without a discussion of Monet’s

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1. See generally Eugenio Battisti, *Zoomorphic and Plant Representations*, in 14 ENCYCLOPEDIA OF WORLD ART 936 (Inst. for Cultural Collaboration ed., 1967) (discussing art depicting animals and plants); Giovanni Garbini et al., *Landscape in Art*, in 9 ENCYCLOPEDIA OF WORLD ART 1 (Inst. for Cultural Collaboration ed., 1964) (discussing landscape art).

water lilies,² O'Keeffe's jack-in-the-pulpits,³ Cézanne's apples and oranges,⁴ Ansel Adams's landscapes,⁵ and Barye's jungle cats.⁶ These paintings, sculptures, and photographs have enriched our cultural heritage. It is difficult to stand in front of *Water-Lily Pool*⁷ and not be awed and amazed.

Works of art and photographs such as these⁸ are protected by U.S. copyright law,⁹ and artists¹⁰ generally enjoy robust protection. Artists possess, among other things, the exclusive right to reproduce their works, make derivative works, and publicly display their works¹¹ for a specified duration.¹² Although many people are likely to associate the phrase "work of art" with the fine art just discussed, copyright law defines art much more liberally, and "art" includes fine, graphic, and applied art.¹³ As the legislative history to the Copyright Act of 1976¹⁴ emphasizes, all types of art within this definition are protected regardless of aesthetic value or

2. See, e.g., Claude Monet, *Water Lilies* (1919), reprinted in 4 PRAEGER ENCYCLOPEDIA OF ART 1400 (1971).

3. See, e.g., Georgia O'Keeffe, *Jack-in-the-Pulpit, No. 5* (1930), reprinted in LLOYD GOODRICH & DORIS BRY, GEORGIA O'KEEFFE illus. 69 (1970).

4. See, e.g., Paul Cézanne, *Still Life with Apples and Oranges* (c. 1895–1900), reprinted in 1 ENCYCLOPEDIA OF ARTISTS 86 (William Vaughan ed., 2000).

5. See, e.g., Ansel Adams, *Yosemite Valley Storm* (1944), reprinted in REINVENTING THE WEST: THE PHOTOGRAPHS OF ANSEL ADAMS AND ROBERT ADAMS illus. 6 (2001).

6. See, e.g., Antoine-Louis Barye, *Lion and Serpent No. 2* (c. 1858), reprinted in WILLIAM R. JOHNSTON & SIMON KELLEY, UNTAMED: THE ART OF ANTOINE-LOUIS BARYE 101 (2006).

7. Claude Monet, *Water-Lily Pool* (1899), reprinted in 10 ENCYCLOPEDIA OF WORLD ART illus. 130 (Inst. for Cultural Collaboration ed., 1965).

8. Not all of the works by the artists mentioned are necessarily protected by U.S. copyright law. For example, works published prior to 1923 are not protected. Lolly Gasaway, *When Works Pass Into the Public Domain* (Nov. 4, 2003), <http://www.unc.edu/~unclng/public-d.htm>.

9. 17 U.S.C. § 102 (2000). Both two- and three-dimensional works of art and photographs are protected as pictorial, graphic, and sculptural works. *Id.* § 101.

10. The Copyright Act grants rights initially to "authors." See 17 U.S.C. § 201(a)–(c) (2000) (vesting the ownership of a work's copyright with its author or authors); see also *id.* § 106 (listing rights of copyright owners). This is constitutionally required due to the text of the Copyright Clause. See *infra* note 27 and accompanying text; see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06[A] (2006) ("[U]nder the Constitution, only an author is entitled to copyright protection . . ." (internal quotation marks omitted)).

This Comment uses the term "artist" instead of author because it concerns only works of art and photographs, and not other works of authorship. See § 102(a) (listing the categories of works of authorship). The term "artist" is used as substitute for author and is not meant to have a different meaning.

11. See § 106. An artist who creates a work of visual art also has rights of attribution and integrity. See *id.* § 106A; see also § 101 (defining a "work of visual art"). These rights are, however, subject to a number of statutory limitations, such as fair use. See *id.* § 107 (2000).

12. *Id.* § 302–05 (2000).

13. § 101.

14. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.A §§ 101–805 (West 2005 & Supp. 2007)).

potential commercial use.¹⁵ So, art, in the copyright sense of the word, includes fabric designs, lawn ornaments, toys, and jewelry.¹⁶

It may seem surprising that works of art and photographs inspired by, based on, or depicting nature are entitled to anything less than the most ardent copyright protection, but a number of issues arise when dealing with natural works¹⁷ that are primarily the result of constitutionally mandated limitations on copyright, such as the requirement of originality¹⁸ and prohibition on the copyright of ideas.¹⁹ These limitations can cause problems for artists who seek to use copyright law to protect their natural works. For example, suppose an artist travels to Bahrain in order to paint the famous Tree of Life,²⁰ and the painting is highly realistic. One could argue that because the artist is merely copying what already exists in nature and elements of nature are in the public domain,²¹ the work is not original as defined by copyright law.²² If a work is not original, it cannot be copyrighted, and anyone is free to copy it. Even if the painting is found to be sufficiently original, the artist cannot prevent another from going to Bahrain and painting, photographing, or sculpting the Tree of Life because copyright protects an artist's original expression of an idea, not the idea—the Tree of Life—itsself.²³ The artist also cannot prevent others from using expression that is necessary to depict the Tree of Life, such as its general

15. See H.R. REP. NO. 94-1476, at 54 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5667 (stating that the “definition of ‘pictorial, graphic, and sculptural works’ carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality” and includes “works . . . intended for use in advertising and commerce”); see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.”).

16. See *infra* Part V.

17. The phrase “natural works” or “natural work” as used in this Comment means works of art and photographs inspired by, based on, or depicting nature.

18. See *generally infra* Part II (discussing originality requirement).

19. See *generally infra* Part III (discussing copyright and ideas). These limitations are constitutionally mandated because the purpose of granting artists exclusive rights to their works is not *foremost* to secure economic enrichment for their efforts, see *Eldred v. Ashcroft*, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting) (“Under the U.S. Constitution, the primary objective of copyright law is not to reward the author . . .” (quoting H.R. REP. NO. 100-609, at 17 (1988))), but to “promote the Progress of Science.” U.S. CONST. art. I, § 8, cl. 8. See *generally infra* Part I (discussing the purpose of copyright law). These limitations further that objective.

20. The Tree of Life is a 400-year-old acacia tree that grows in an otherwise barren desert of Bahrain. The tree is famous because the source of its water is unknown. See Michael Martinez, *Symbolic Tree of Life Faces Uncertain Future*, CHI. TRIB., Dec. 14, 2001, at 37.

21. The “public domain” is the “universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge.” BLACK’S LAW DICTIONARY 1265 (8th ed. 2004).

22. See *infra* Part II.A (defining originality in copyright law).

23. See *infra* Part III.A (discussing prohibition on copyright protection for ideas).

shape, color, and location in the desert.²⁴ These seemingly straightforward rules are difficult to apply because it is hard to determine precisely what qualifies as the artist's protected, original expression of the Tree of Life and what qualifies as the idea of the Tree of Life and the expression necessary to depicting the idea of the Tree of Life.²⁵ If the dividing line between original expression and ideas/necessary expression is inaccurate, however, the artist's original expression, which should be protected by copyright, may instead be copied freely.

This Comment argues that original artistic expression in natural works is often undervalued or not recognized, which weakens artists' ability to enforce their rights and prevent unlawful copying of their natural works. The nonrecognition or undervaluation of original artistic expression in natural works can result in (or be the result of) requiring too much originality, defining the idea depicted by the work too broadly, considering too much expression as necessary to the depiction of the idea, or assigning the work a thin copyright. This outcome is unacceptable because it can undermine the constitutional purpose of copyright—to encourage creativity for the benefit of the public via an economic incentive.²⁶

Part I of this Comment discusses in more detail the purpose of copyright law and how it enriches public life. Part II explores the originality requirement and includes a discussion of the requirement as it pertains to works of art in particular. This Part will show that the amount of originality required to copyright a work of art or a photograph is quite low. Part III describes the dichotomy between ideas and expression and the related doctrine of merger, which provides the background necessary to understanding what parts of natural works can and cannot be protected by copyright. Part IV explains the modern substantial similarity analysis. Whether a work infringes another depends in part on whether the two are substantially similar, so a preliminary understanding of the analysis is needed in order to understand how the courts discussed herein decided if a work was infringing. Part V summarizes numerous cases that involve natural works in order to catalog the types of works for which these issues often arise and highlight what is at stake. Finally, Part VI, using examples from Part V, explains how original artistic expression in natural works is overlooked or undervalued and why this subsequently results in the works receiving inadequate protection under copyright law.

24. See *infra* Part III.B (explaining prohibition on copyright protection for expression that is necessary to the depiction of a particular idea).

25. See *infra* notes 77–79, 89–90 and accompanying text.

26. See *infra* Part I.

I. PURPOSE OF COPYRIGHT

Congress's power to grant artists copyright protection for their works of art and photographs comes from Article 1, Section 8 of the U.S. Constitution, which grants Congress the power to "promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."²⁷ As the text of the Copyright Clause makes clear, copyright exists to benefit the public by encouraging artists to create via an economic incentive: "The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . ." ²⁸ Although monopolies²⁹ were generally disfavored by the Founders,³⁰ the limited monopoly³¹ granted to authors furthered the important goal of "increas[ing] . . . the harvest of knowledge."³² James Madison, in *The Federalist No. 43*, noted that "the utility of [the Copyright Clause] will scarcely be questioned" and the "public good fully coincides . . . with the claims of individuals."³³

With the power granted to it by the Copyright Clause, Congress has sought to further this purpose through the enactment of copyright

27. U.S. CONST. art. I, § 8, cl. 8. This clause is commonly referred to as the Copyright Clause. Copyright promotes the "Progress of Science" rather than the "useful Arts," *see id.*, due to usage at the time the Constitution was written. *See* RICHARD C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 15–16 (1925) (explaining that in the Framers' time, "science" meant "learning in general" and "art" did not necessarily mean "fine art[]"); *see also* CRAIG JOYCE ET AL., COPYRIGHT LAW 63 n.1 (7th ed. 2006) (discussing textual reasons for this reading in addition to eighteenth-century usage).

28. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright "is intended to motivate the creative activity of authors . . . by the provision of a special reward"). It is not universally accepted that the purpose of copyright is to provide an economic incentive for authors and artists to create. For a brief overview of the other theories of the purpose of copyright, *see* JOYCE ET AL., *supra* note 27, at 51–61.

29. Copyright creates a monopoly because it grants artists *exclusive* rights. *See* 17 U.S.C. § 106 (2000).

30. *See* *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 7 (1966) ("Jefferson, like other Americans, had an instinctive aversion to monopolies.").

31. Copyright creates only a *limited* monopoly because the exclusive rights are limited in duration. *See* 17 U.S.C. §§ 302–05 (2000); Gasaway, *supra* note 8. The rights are also subject to a number of other limitations. *See* 17 U.S.C.A. §§ 107–22 (West 2005 & Supp. 2007).

32. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

33. THE FEDERALIST NO. 43 (James Madison), *available at* http://thomas.loc.gov/home/fedpapers/fed_43.html; *see also* *Pellegrini v. Allegrini*, 2 F.2d 610, 610 (E.D. Pa. 1924) ("The motive underlying . . . copyrights of works of art is one readily appreciated. The beautiful and the development of a love of the beautiful and of the artistic sense and taste is [sic] as much necessary to a well-rounded life as are the useful things.").

legislation.³⁴ The Copyright Act is ultimately a “system”³⁵ that, along with the cases interpreting and applying it, promotes the constitutional purpose of copyright by finding the correct balance between the interests of artists in receiving just compensation for their creations and the interests of the public in benefiting from the artists’ creative endeavors.³⁶ As evidenced below,³⁷ this balance can be difficult to achieve, but courts must be ever vigilant to maintain it.³⁸ One component of copyright law that helps maintain this balance is the requirement of originality.

II. REQUIREMENT OF ORIGINALITY

For any work to qualify for copyright protection, it must be original. In regard to works of art, the creativity component of originality has a special significance.

A. *Originality Defined*

Copyright law only protects “*original* works of authorship.”³⁹ Originality means a work was independently created and possesses a minimal degree of creativity.⁴⁰ Independent creation merely requires that a work was not copied from another.⁴¹ A work can even be an exact replica of another and still be original in the copyright sense of the term⁴² because originality does not mean unique or novel.⁴³ For example, if a young artist

34. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.A. §§ 101–805 (West 2005 & Supp. 2007)). Previous versions of the Copyright Act are available on the U.S. Copyright Office’s Web site. U.S. Copyright Office, Historical Information, <http://www.copyright.gov/history/index.html> (last visited Dec. 3, 2007).

35. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (quoting *Graham*, 383 U.S. at 6).

36. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

37. See *infra* Part V.

38. See *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 63 (3d Cir. 1978) (Courts must “guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.” (quoting *Cary v. Longman*, 102 Eng. Rep. 138, 140 (K.B. 1801))).

39. § 102(a) (emphasis added); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

40. *Feist*, 499 U.S. at 345.

41. *Id.*

42. See *id.* at 345–46 (“To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original, and hence, copyrightable.”).

43. The legislative history of the Copyright Act of 1976 states that “[t]he phrase ‘original works of authorship,’ . . . does not include requirements of novelty [or] ingenuity.” H.R. REP. NO. 94-1476, at 51 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664. The lack of a requirement for novelty is partly why one cannot copyright an idea. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (“The novelty of the art or thing

in North Carolina, without ever having heard of or seen any works by Jackson Pollock, miraculously created a painting identical to Pollock's famous *Autumn Rhythm*,⁴⁴ the work would not be denied copyright protection for lack of originality.⁴⁵

Although originality is required for a work to be copyrighted, a great deal of originality is not.⁴⁶ As long as an artist contributes something of her own—independently created—and the work contains “more than a *de minimus* quantum of creativity,”⁴⁷ it is sufficiently original.⁴⁸ Only if a work completely lacks a “creative spark,” or if the spark is “so trivial as to be virtually nonexistent,” will it be denied copyright protection for lack of creativity.⁴⁹ It is important to note that absent from this requirement is any

described or explained has nothing to do with the validity of the copyright. To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.”)

44. Jackson Pollock, *Autumn Rhythm* (1950), reprinted in MARILYN STOKSTAD, *ART HISTORY* 1134 (3d ed. 2008).

45. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (stating that “if by some magic a man who had never known it were to compose anew Keats’s Ode to a Grecian Urn,” he would be able to copyright the poem). The twin work also would not infringe the copyright of *Autumn Rhythm* because there was no copying. See *infra* note 98 and accompanying text.

46. *Feist*, 499 U.S. at 358 (“[T]he originality requirement is not particularly stringent.”).

47. *Id.* at 363.

48. Interestingly, expression may be original even if it was not intentional. See, e.g., *Alfred Bell*, 191 F.2d at 105 (“A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”). But see *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1373–74 (10th Cir. 1997) (holding that arbitrarily assigned command codes used to activate a telecommunications device were not copyrightable for lack of the requisite amount of creativity).

49. See *Feist*, 499 U.S. at 359. The Supreme Court in *Feist* found that a standard telephone directory containing an alphabetical listing of subscribers was not sufficiently creative to warrant copyright protection. See *id.* at 362 (arranging the subscribers “alphabetically by surname . . . [is] devoid of even the slightest trace of creativity”). A pre-*Feist* case in which a work of art was denied copyrightability for lack of creativity is *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986). In *John Muller & Co.*, the court of appeals upheld the Register of Copyrights’s refusal to register a soccer team logo that consisted of “four angled lines which form an arrow and the word ‘Arrows’ in cursive script below the arrow” because it was not creative enough. *Id.* at 990. And, in a very recent example, online maps derived from U.S. Census maps that enabled users to locate real estate appraisers were denied copyright for insufficient creativity. See *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007) (“Additions to the preexisting maps such as color, shading, and labels using standard fonts and shapes fall within the narrow category of works that lack even a minimum level of creativity . . .”). The court of appeals reasoned that the added features of the appraisal maps lacked the requisite amount of creativity because they resembled the types of works specifically listed in U.S. Copyright Office regulations as not copyrightable for lack of creativity. See *id.* (citing 37 C.F.R. § 202.1(a) (2007) (listing “names, titles, slogans[, and] familiar symbols or designs” as not copyrightable)).

consideration of the amount of time or effort spent creating a work, which has no bearing on its copyrightability.⁵⁰

Originality is a constitutional requirement in addition to a statutory one because originality is inherent in the definition of “Writings” and “Authors” as used in the Copyright Clause.⁵¹ In the *Trade-Mark Cases*,⁵² the Supreme Court held that for a work to constitute a writing and be eligible for copyright protection, it had to be original,⁵³ and in *Burrow-Giles Lithographic Co. v. Sarony*⁵⁴ the Court defined an author as the person who was the “originator” of the work or the person “to whom [it] owes its origin.”⁵⁵ The creativity component of originality also owes its recognition as a constitutional requirement to these two cases,⁵⁶ in which the Supreme Court held that “writings” must be “founded in the creative powers of the mind,”⁵⁷ and copyright protects only “original intellectual conceptions of the author.”⁵⁸

B. *Special Case of Works of Art*

The creativity requirement plays a unique role in the case of works of art.⁵⁹ Whereas creativity is required in *all* pictorial, graphic, and sculptural works⁶⁰ “as a matter of policy,”⁶¹ creativity is required in works of art “as a matter of definition.”⁶² If a work is not creative in some way, “it cannot by definition be regarded as a work of art.”⁶³ However, the level of creativity

50. See *Feist*, 499 U.S. at 353 (rejecting “sweat of the brow” copyright); see also *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo.*, 768 F.2d 145, 148 (7th Cir. 1985) (“The input of time is irrelevant. A photograph may be copyrighted although it is the work of an instant and its significance may be accidental. In fourteen hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week’s installment of *Bleak House*.”).

51. See *Feist*, 499 U.S. at 346 (citing the cases discussed *infra* text accompanying notes 52–55 for the rule that “[o]riginality is a constitutional requirement”)

52. 100 U.S. 82 (1879).

53. *Id.* at 94.

54. 111 U.S. 53 (1884).

55. *Id.* at 57–58.

56. See *Feist*, 499 U.S. at 346 (“As in *The Trademark Cases*, the Court [in *Burrow-Giles*] emphasized the creative component of originality.”).

57. *The Trade-Mark Cases*, 100 U.S. at 94.

58. *Burrow-Giles*, 111 U.S. at 58.

59. 1 NIMMER & NIMMER, *supra* note 10, § 2.08[B][1] (“This requirement [of creativity] is evident in connection with works of art in a manner which differs qualitatively from the application of the creativity requirement for other works . . .”).

60. 37 C.F.R. 202.10(a) (2006) (“In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form.”).

61. 1 NIMMER & NIMMER, *supra* note 10, § 2.08[B][1].

62. *Id.* Works of art, or more specifically, “works of fine, graphic, and applied art,” 17 U.S.C. § 101 (2000), and photographs, *id.*, are only two types of works defined and protected as “pictorial, graphic, and sculptural works.” *Id.* (including also by definition “prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings”).

63. 1 NIMMER & NIMMER, *supra* note 10, § 2.08[B][1].

required still remains minimal,⁶⁴ and the definition of a work of art remains broad.⁶⁵

The creativity requirement for works of art must remain low because requiring more may tempt judges to evaluate the aesthetic merit of the work.⁶⁶ As Justice Holmes warned in *Bleistein v. Donaldson Lithographing Co.*⁶⁷ when the Supreme Court held that an advertisement for a circus was copyrightable:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.⁶⁸

III. IDEA/EXPRESSION DICHOTOMY

A. *No Copyright for Ideas*

An axiom of copyright law is that copyright protection does not extend to ideas.⁶⁹ Rather, copyright protects only an artist's original expression of those ideas.⁷⁰ The reason ideas are not protected by copyright is that doing so would thwart the purpose of copyright to

64. *Id.*

65. *Id.* (“[I]f a work might arguably be regarded as a work of art by any meaningful segment of the population, be they high-brow, low-brow, hippy, avant-garde, middle class-bourgeois, adult or juvenile, then the work must be considered a work of art for copyright purposes.”); *see also supra* text accompanying notes 13–16 (discussing the broad definition of a work of art in copyright).

66. *See* 1 NIMMER & NIMMER, *supra* note 10, § 2.08[B][1].

67. 188 U.S. 239 (1903).

68. *Id.* at 251–52; *see also* *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (“Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.”); *Pellegrini v. Allegrini*, 2 F.2d 610, 611 (E.D. Pa. 1924) (“It is clear enough that a comparison is not to be made between the two works of art, with a view to determine their relative artistic merit. Such a judgment would not be a judicial one. Even if rendered, it might not be of much value. ‘De gustibus non disputandum’ is a truth now of ancient vintage, but none the less remains a truth.”).

69. *See* 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea . . . concept, [or] principle, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“[N]o author may copyright . . . ideas.”).

70. *Id.* at 547 (“The copyright is limited to those aspects of the work—termed ‘expression’ . . .”). This principle is often referred to as the “idea/expression dichotomy.” *See, e.g., id.* at 556.

“promote the Progress of Science.”⁷¹ Copyright law promotes this purpose by encouraging artists, in exchange for a monopoly on their expression, to communicate their ideas and knowledge to the world.⁷² Once the ideas are available, other artists are free to build upon the ideas embodied in the work,⁷³ which results in the “intellectual advancement of mankind.”⁷⁴ If, on the other hand, the use of ideas constituted copyright infringement, copyright would have the opposite effect.⁷⁵ Given the duration of copyright today,⁷⁶ the impact on artistic innovation from the monopolization of ideas would be severe.

Although it is well-established that copyright protection is limited to original expression,⁷⁷ identifying the idea and the expression of the idea in a work and determining whether another artist has copied the expression is a difficult task. Judge Learned Hand is often cited for recognizing the challenge: “[N]o principle can be stated as to when an imitator has gone beyond copying the idea, and has borrowed its expression.”⁷⁸ He further noted that with regard to visual works: “[T]he test is, if possible, even more intangible.”⁷⁹ For example, going back to the artist painting the Tree of Life,⁸⁰ another artist would be free to see the painting and also decide to paint the Tree of Life—this is copying the idea of the painting. However, the difficult question is what aspects of the painting are unprotected ideas and what constitutes original expression? Can the imitator, who has seen the other artist’s painting, paint the tree the same size? From the same

71. U.S. CONST. art. I, § 8, cl. 8; see *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting). The First Amendment also requires that ideas not be protected by copyright. See *Harper & Row*, 471 U.S. at 582.

72. 4 NIMMER & NIMMER, *supra* note 10, § 13.03[B][2][a] (“Indeed, it has been said that copyright protection is granted for the very reason that it may persuade authors to make their ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind.”).

73. See, e.g., *Baker v. Selden*, 101 U.S. 99, 100–01 (1879) (“Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.”).

74. 4 NIMMER & NIMMER, *supra* note 10, § 13.03[B][2][a].

75. *Baker*, 101 U.S. at 103 (“The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”).

76. Generally, copyright lasts for the life of an artist plus seventy years. 17 U.S.C. § 302(a) (2000). For more detailed information on the duration of copyright for various works, see Gasaway, *supra* note 8.

77. See, e.g., *Baker*, 101 U.S. at 105 (“The description of the art in the book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.”).

78. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (internal quotation marks omitted).

79. *Id.*

80. See *supra* notes 20–25 and accompanying text.

angle? At the same time of day? With the same accoutrement, such as birds or tourists?⁸¹ Despite this difficulty, it is imperative that courts properly distinguish ideas from the expression of those ideas because doing so has serious implications for the ability of an artist to protect her work.⁸²

B. Merger Doctrine

The enforcement and application of the idea/expression dichotomy becomes even more difficult when there is only one way or a very limited number of ways in which an artist can express an idea. If it is impossible or nearly impossible to convey an idea without using certain forms of expression, the “merger doctrine” applies and expression that normally would be protected is not.⁸³ The doctrine is so named because when the idea and its expression are so inseparable that to protect the expression necessarily protects the idea, they are said to “merge.”⁸⁴ To use a well-known, albeit non-natural works example, an artist who depicts the Annunciation⁸⁵ would almost certainly include the winged angel Gabriel

81. In natural works cases, many courts break the work down into its constituent elements and label each part as idea or expression. Usually, the depiction of the natural element itself—the Tree of Life, for example—is identified as the idea and the choices made in how to depict the natural element—size, angle, background—as the expression. *See, e.g., Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747, at *9 (D. Ariz. Sept. 25, 2006). Situations in which this practice and classification can be problematic are discussed *infra* Part VI.

82. *See infra* Part VI.C

83. *See* 4 NIMMER & NIMMER, *supra* note 10, § 13.03[B][3]; *see also* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (“When the idea and its expression are thus inseparable, copying the expression will not be barred, since protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner free of the conditions and limitations imposed by the patent law.” (internal quotation marks omitted)).

84. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000). In addition to the merger doctrine, the related doctrine of *scènes à faire* is sometimes applied in natural works cases. According to *scènes à faire*, certain elements commonly used in the depiction of a subject or theme are not protected because they naturally flow from the subject or theme. *See Psihoyos v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 268, 274 (S.D.N.Y. 2005); *see also* BLACK’S LAW DICTIONARY, *supra* note 21, at 1372 (“[s]tandard or general themes that are common to a wide variety of works and are therefore not copyrightable”). Because the use of these elements is obvious or commonplace, an artist is not expressing the theme or subject in an original way. *See Psihoyos*, 409 F. Supp. 2d at 274; *see also id.* at 275 (stating that the use of sand as a background for a photograph of a fossil was subject to *scènes à faire* because it was “the obvious choice of background for the Fossil”); *Yankee Candle Co. v. Bridgewater Candle Co.*, 99 F. Supp. 2d 140, 145–46 (D. Mass. 2000) (applying *scènes à faire* to the use of a cone of vanilla ice cream to depict the idea of vanilla), *aff’d* *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 32 (1st Cir. 2001). *Scènes à faire* will not be discussed further in this Comment because it is not utilized that frequently in natural works cases, at least compared to the merger doctrine.

85. The Annunciation, a popular subject in Renaissance art, *see* JAMES HALL, DICTIONARY OF SUBJECTS & SYMBOLISM IN ART 18–20 (1974); Susan van Rohr Scaff, *The Virgin Annunciate in Italian Art of the Late Middle Ages and Renaissance*, C. LITERATURE, Summer 2002, at 109, is the important event in Christianity when the angel Gabriel tells the Virgin Mary she is pregnant

kneeling before a haloed Virgin Mary.⁸⁶ In such a situation, protecting the expression (a kneeling, winged Gabriel and haloed Mary) would grant a monopoly of the idea (the Annunciation) because it would be nearly impossible to depict the Annunciation without these elements. Therefore, all artists are free to use this expression to depict the Annunciation.⁸⁷ Although it may seem unfair to prevent an artist from protecting her original expression, this result is both statutorily and constitutionally required.⁸⁸

Similar to separating an idea from the expression of that idea, the merger doctrine can be difficult to apply in practice. One problematic issue—and a point on which courts vary—is how limited the range of available expression must be before the doctrine can be invoked. Some courts apply the doctrine if there are a very limited number of ways to express an idea, and some courts will only apply it when there is one way to express the idea.⁸⁹ Additionally, courts disagree on whether merger is applicable to the question of copyrightability or infringement.⁹⁰

The idea/expression dichotomy and the merger doctrine play a very important and practical role in copyright by ensuring that protection is extended only when it will *promote* the advancement of the arts.⁹¹ For the purposes of this Comment and natural works, they are most relevant to

with Jesus. *Luke* 1:26:31 (King James) (“[T]he angel Gabriel was sent from God, unto a city of Galilee, named Nazareth . . . [t]o a virgin . . . name[d] Mary. . . . And the angel said unto her . . . though shalt conceive in thy womb, and bring forth a son, and shalt call his name Jesus.”).

86. See, e.g., Fra Angelico, *The Annunciation* (1440–45), reprinted in GARDNER’S ART THROUGH THE AGES 600 (Fred S. Kleiner & Christin J. Mamiya eds., 12th ed. 2005) [hereinafter GARDNER’S]; Robert Campin, *Mérode Altarpiece* (c. 1425–28), reprinted in GARDNER’S, *supra*, at 560.

87. A great deal of variable expression, however, remains in depicting the Annunciation, such as clothing, facial expression, and background, and a painting that copied expression not required to portray the Annunciation could be infringing. See *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 36 (1st Cir. 2001) (“The merger doctrine does not, however, allow the identical reproduction . . .”).

88. See 17 U.S.C. § 102(b) (2000); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985); see also 4 NIMMER & NIMMER, *supra* note 10, § 13.03[B][3] (“[G]iven the dilemma of either protecting original expression . . . or of making the idea free to all . . . copyright law chooses the latter course.”).

89. Compare *Yankee Candle*, 259 F.3d at 36 n.6 (“[A]ll that is required for application of the merger doctrine is that there be a sharply limited number of choices.”), with *Skyy Spirits*, 225 F.3d at 1082 (“[C]ourts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way . . .” (emphasis added)).

90. Compare *Skyy Spirits*, 225 F.3d at 1082 (“[C]ourts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way . . .” (emphasis added)), with *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 241 F.3d 398, 407 (5th Cir. 2001) (“In this circuit, the merger doctrine has been applied to the question of whether a work was copyrightable . . . rather than as an infringement defense . . .”).

91. The monopolization of an idea for at least seventy years does not promote creation. See *supra* notes 71–76 and accompanying text.

determining the level of copyright protection given a particular work. Contrary to what one might think, copyright is not all-or-nothing. Rather, there is a spectrum of protection.⁹² If a work comprises mostly unprotectable ideas or facts or has very little originality or creativity, the protection afforded it is “thin.”⁹³ Conversely, “works in which fairly complex or fanciful artistic expressions predominate . . . and which are almost entirely products of the author’s creativity” receive the “strongest” protection.⁹⁴ Additionally, the idea/expression dichotomy and the merger doctrine play a significant role in the substantial similarity analysis because similarity between ideas and expression necessary to depicting those ideas cannot be a basis for finding two works substantially similar.⁹⁵

IV. SUBSTANTIAL SIMILARITY

A plaintiff in an action for copyright infringement must show both the ownership of a valid copyright and the copying of protected elements of the work.⁹⁶ The copying does not have to be conscious and deliberate but “ ‘may be the result of subconscious memory derived from hearing, seeing or reading the copyrighted work at some time in the past.’ ”⁹⁷ Absent copying, however, there is no infringement because even if the two works are identical, the later work is not infringing if it is the product of independent creation.⁹⁸ In addition to proving that copying in fact occurred,⁹⁹ a plaintiff must prove that her work and the defendant’s work

92. *See Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982).

93. *Feist Publ’ns, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 349 (1991). For an example of a natural works case where a court held the copyright in a photograph was thin because it depicted mostly unprotected ideas, see *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747, at *9 (D. Ariz. Sept. 25, 2006).

94. *Atari*, 672 F.2d at 617. The natural works discussed at the beginning of this Comment would likely be characterized as works qualifying for the strongest protection. *See supra* notes 2–7 and accompanying text.

95. *See infra* Part IV.

96. *See* 4 NIMMER & NIMMER, *supra* note 10, § 13.01.

97. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (quoting HOWELL’S COPYRIGHT LAW 129 (4th ed. 1962)).

98. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903) (“Others are free to copy the original. They are not free to copy the copy.”); *see also supra* text accompanying notes 41–45 (discussing independent creation).

99. Copying can be proven by direct evidence, such as the defendant admitting she copied the work. *See* 4 NIMMER & NIMMER, *supra* note 10, § 13.01[B]. However, there is rarely direct evidence that the defendant copied the plaintiff’s work, so copying is usually inferred from circumstantial evidence. *Id.* Generally, to properly infer that a defendant copied, a plaintiff must prove “access and ‘substantial’ similarity.” *Id.*; *see also Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 765 (2d Cir. 1991) (“Infringement of copyright may be inferred when it is shown defendants had access to the copyrighted work and substantial similarities exist as to protectible

are substantially similar.¹⁰⁰ If the two works are similar but not similar enough, the copying is not actionable.¹⁰¹

Courts employ a number of different tests to determine whether two works are substantially similar.¹⁰² It is unnecessary for the purposes of this Comment to describe all of the tests; however, a brief summary of the tests used in the First, Second, Third, Fifth, and Ninth Circuits will aid in understanding the cases discussed in Part V.¹⁰³ The First, Second, Third, and Fifth Circuits all apply the “ordinary observer test.”¹⁰⁴ To determine whether two works are substantially similar, courts in the Second Circuit consider whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the works’] aesthetic appeal as the same.”¹⁰⁵ If a copyrighted work contains unprotected elements, however, courts in the Second Circuit apply a “more

material.”). Substantial similarity in this context is not the same as substantial similarity discussed in this Part. Substantial similarity in terms of proving a defendant actually copied means that the similarities between two works are evidence of copying because it is unlikely that they would exist absent copying. See NIMMER & NIMMER, *supra* note 10, § 13.01 [B] (referring to this type of similarity as “probative similarity” (citing Alan Latman, “*Probative Similarity*” as *Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990))); see also ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 1:2 (2007) (discussing the difference between the two concepts and also referring to this type of similarity as probative similarity). In regard to natural works, it can be difficult to prove copying based on circumstantial evidence because a number of similarities may exist not because one artist copied another but rather because the two works depict the same element of nature. See, e.g., *Kalpajian*, 446 F.2d at 741 (“Any inference of copying based upon similar appearance lost much of its strength because both pins were lifelike representations of a [bee].”). But see *Ty v. GMA Accessories, Inc.*, 132 F.3d 1167, 1175 (7th Cir. 1997) (finding similarity between two bean bag pigs evidence of copying). For example, two paintings of a sunflower by two different artists with different styles will likely include yellow petals. Compare Georgia O’Keeffe, *A Sunflower from Maggie* (1937), reprinted in BARBARA BUHLER LYNES & RUSSELL BOWMAN, O’KEEFFE’S O’KEEFFES: THE ARTIST’S COLLECTION illus. 48 (2001), with Vincent Van Gogh, *Still Life: Vase with Twelve Sunflowers* (1888), reprinted in INGO F. WALTHER & RAINER METZGER, VINCENT VAN GOGH: THE COMPLETE PAINTINGS 409 (2001). Because real sunflowers in fact have yellow petals, it is not necessarily proper to infer that one artist copied the other because they both portray a sunflower with yellow petals. This dilemma can be further exacerbated when the works at issue involve highly realistic depictions. See generally *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747 (D. Ariz. Sept. 25, 2006) (involving a photograph of a mountain lion and a lifelike sculpture of a mountain lion).

100. See 4 NIMMER & NIMMER, *supra* note 10, § 13.03[A].

101. *Id.*

102. See OSTERBERG & OSTERBERG, *supra* note 99, §§ 3:1 to 3:4.1 (explaining the test used in each of the federal circuits).

103. All of the cases in Part V come from one of these circuits.

104. See OSTERBERG & OSTERBERG, *supra* note 99, at §§ 3:1 to 3:1.4.

105. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see also OSTERBERG & OSTERBERG, *supra* note 99, § 3:1.1[A] (describing the ordinary observer test).

discerning ordinary observer” test.¹⁰⁶ When this test applies, a court first removes the unprotected elements of the work from the analysis and then asks whether an ordinary observer would find the remaining protected elements substantially similar.¹⁰⁷ The Third Circuit has adopted the Second Circuit’s approach to determining substantial similarity,¹⁰⁸ and so has the Fifth Circuit except for a slight variation.¹⁰⁹ The First Circuit also applies an ordinary observer test,¹¹⁰ but it is more “enthusiastic” about dissecting a work to remove unprotected elements.¹¹¹ Courts in the First Circuit also “apply the doctrines of merger and *scènes-à-faire* to determine *how* ‘substantially similar’ the copy must be to infringe.”¹¹² Finally, after removing unprotected elements and applying those two doctrines, the court asks “whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protected expression by taking material of substance and value.”¹¹³ Finally, the Ninth Circuit uses an “extrinsic/intrinsic” test.¹¹⁴ The test consists of a two-part analysis. First, the “extrinsic test” is applied to determine whether the ideas in two works are substantially similar.¹¹⁵ This is an objective, factual inquiry, and the court looks at specific criteria, such as “the type of artwork involved, the

106. See *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991) (internal quotation marks omitted); see also OSTERBERG & OSTERBERG, *supra* note 99, § 3:1.1[B] (describing the more discerning ordinary observer test).

107. See OSTERBERG & OSTERBERG, *supra* note 99, § 3:1.1[B].

108. See *id.* § 3:1.3; see also *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986) (noting adoption of Second Circuit’s test in the Third Circuit (citing *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975))); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975) (citing Second Circuit as source of the test for substantial similarity in the Third Circuit).

109. See OSTERBERG & OSTERBERG, *supra* note 99, § 3:1.4 (stating that to determine whether two works are substantially similar in the Fifth Circuit, “a side by side comparison must be made between the original and the copy to determine whether a layman would view the two works as ‘substantially similar’ ” (quoting *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d. 131, 142 (5th Cir. 2004))).

110. See *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); see also OSTERBERG & OSTERBERG, *supra* note 99, § 3:1.2 (explaining the substantial similarity test in the First Circuit).

111. See *Yankee Candle*, 259 F.3d at 34.

112. *Id.* (citing *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 609 n.9 (1st Cir. 1988)). For a discussion of *scènes-à-faire*, see *supra* note 84.

113. *Id.* at 33 (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988)); see also OSTERBERG & OSTERBERG, *supra* note 99, at § 3:1.2 (noting this as the formulation of the ordinary observer test in the First Circuit).

114. See OSTERBERG & OSTERBERG, *supra* note 99, § 3:2.1.

115. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); OSTERBERG & OSTERBERG, *supra* note 99, § 3:2.1[A].

materials used, the subject matter, and the setting for the subject.”¹¹⁶ If there is substantial similarity between ideas, then the “intrinsic test” is applied to determine whether this is also substantial similarity in expression.¹¹⁷ The intrinsic test is subjective and determines whether the “ordinary reasonable person,” without considering external criteria or analytically dissecting the work, would consider the two works substantially similar.¹¹⁸

Finally, it is important to note that, as a general principle, an alleged infringer cannot point to minor dissimilarities between two works in order to avoid an otherwise appropriate finding of substantial similarity: “No copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated. Thus, where substantial similarity is found, small changes here and there made by the copier are unavailing.”¹¹⁹ This result is logical considering that the similarity required is substantial and not identical or nearly identical.

V. NATURAL WORKS CASES

Given the popularity of nature as a subject of art, courts have had ample opportunity to hear and decide cases dealing with natural works. The diversity of the type of works at issue and the approach taken to deal with natural works has resulted in a number of interesting and notable opinions. This Part surveys a number of these opinions in order to provide a compilation of cases that highlights the unique copyright issues raised in natural works cases and to illuminate the importance of accurately identifying and valuing original artistic expression. Additionally, the cases discussed below were selected because they provide examples of the kinds of works that often depict nature, including floral fabric patterns, artificial flowers, and plant-inspired lamps; realistic animal sculptures, including taxidermy, hunting decoys, statues, lawn ornaments, and masks; animal toys; animal jewelry; labels depicting fruit and flowers; and, finally, art as it is more traditionally defined—paintings, sculptures, and artistic photographs.

After reviewing these cases and how the court in each resolved such questions as whether a work was original and creative, what was an idea

116. *Sid & Marty Krofft*, 562 F.2d at 1164. Obviously, the court must take the preliminary step of distinguishing between ideas and expression. See *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747, at *5 (D. Ariz. Sept. 25, 2006); see also OSTERBERG & OSTERBERG, *supra* note 99, at § 3:2.1[C] (discussing “analytic dissection” in the extrinsic test).

117. See *Sid & Marty Krofft*, 562 F.2d at 1163; OSTERBERG & OSTERBERG, *supra* note 99, § 3:2.1[A].

118. See *id.* at 1164; OSTERBERG & OSTERBERG, *supra* note 99, § 3:2.1[A].

119. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

and what was expression, and whether the merger doctrine applied, the final Part of this Comment will show that if the tools of copyright analysis are employed without taking adequate account of original artistic expression, artists who create natural works may be denied the full protection of U.S. copyright law.

A. *Floral Sculpture and Fabric Patterns*

In *Prestige Floral v. California Artificial Flower Co.*,¹²⁰ the U.S. District Court for the Southern District of New York considered a motion for a preliminary injunction by a manufacturer of a "molded polyethylene flower in the form of a Charles lilac" to prevent a competing artificial flower manufacturer from producing a very similar product.¹²¹ In response to the defendant's attack on the validity of the copyright, the court considered whether creating artificial flowers was sufficiently artistic to warrant copyright protection.¹²² After citing numerous authorities in support of the principle that only a small amount of originality and creativity is required for a work to be copyrightable, including cases discussing natural works,¹²³ the court concluded that "though a flower . . . is a creation of nature, a likeness of it may be copyrighted."¹²⁴ Furthermore, the court stated that this result was especially proper here because creating the plastic lilac involved "numerous and detailed decisions as to proportion, form, contour, configuration, and conformation"¹²⁵ and a "substantial degree of skill and independent judgment."¹²⁶ Upon moving to the issue of infringement, the court quickly concluded that the defendant's lilac was a copy.¹²⁷

A decade after *Prestige Floral*, the district court considered artificial flowers again in *First American Artificial Flowers, Inc. v. Joseph Markovits, Inc.*,¹²⁸ which involved "wire and polyethylene plastic sculptured reproductions of tea roses."¹²⁹ In its consideration of whether the two works were substantially similar, the court initially stated that it would not be proper to infer copying based on a general impression of

120. 201 F. Supp. 287 (S.D.N.Y. 1962).

121. *Id.* at 287-88.

122. *See id.* at 289.

123. *See id.* at 289-91.

124. *Id.* at 291.

125. *Id.* (internal quotation marks omitted).

126. *Id.*

127. *See id.* at 293. There was also strong evidence that the defendant did actually copy the plaintiff's design. *See id.* at 288-89.

128. 342 F. Supp. 178 (S.D.N.Y. 1972).

129. *Id.* at 181.

similarity alone because two works that “represent a natural prototype or archetype are likely to be similar” even if both were independently created.¹³⁰ Comparing the two roses more closely, the court found a “pattern of differences” sufficient to negate the inference of copying.¹³¹ Specifically, ignoring similarities dictated by nature,¹³² the differences included the arrangement and placement of the leaves on the stems, the color and size of the leaves, the distinctiveness of the veins on the leaves, the color of the petals, and the position and shape of the thorns.¹³³ Therefore, the plaintiff’s motion for a preliminary injunction was denied.¹³⁴

*Sunset Lamp Corp. v. Alsy Corp.*¹³⁵ concerned whether a banana leaf design on a lamp was sufficiently original to qualify for copyright protection.¹³⁶ The court quickly rejected the argument that a sculpture that imitates nature is not copyrightable.¹³⁷ As for the plaintiff’s banana leaf design, the court held that it clearly surpassed the threshold requirement for originality because it was more than an imitation of nature: the leaves were elongated, stylized, and “twist[ed] and intertwine[ed]” in an unnatural fashion.¹³⁸ In the end, although the defendant’s floor lamps varied slightly in their shape from the plaintiff’s lamps, they were otherwise “slavish and blatant knock-off[s],”¹³⁹ and, thus, infringing.

In *Folio Impressions, Inc. v. Byer California*,¹⁴⁰ the Second Circuit noted the difficulty of determining whether two works are substantially similar when they both depict the same flower.¹⁴¹ *Folio Impressions*

130. *Id.* at 186. This approach is markedly different from that taken in *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960). The *Peter Pan* court found the defendant’s design substantially similar to the plaintiff’s “Flower Plaid” design because “the overall appearance [of the two designs] evokes the striking impression that they are identical.” *Id.* at 336. The “minor dissimilarities” were disregarded because the court thought they were the result of defendant’s attempts to hide the fact that it had copied the plaintiff’s design. *Id.*

131. *See First Am. Artificial Flowers*, 342 F. Supp. at 186–87.

132. *See id.* at 186 (“[B]oth roses possess two topmost leaves composed of three leaflets each; the next lower leaf . . . or leaves . . . are composed of five leaflets. . . . From our experience we note that the rose as it commonly appears in nature contains three leaflets on each of the two leaves closest to each major bud, and five leaflets on all other leaves.”).

133. *See id.* at 186–87.

134. *Id.* at 188.

135. 698 F. Supp. 1146 (S.D.N.Y. 1988).

136. *Id.* at 1151.

137. *Id.* (citing a “roll call of mundane and imitative objects that have qualified for copyright protection”).

138. *Id.*

139. *Id.* at 1152–53 (“The background and portrayal of the leaves is exactly the same, as is the over-all shape of the lamps . . .”).

140. 937 F.2d 759 (2d Cir. 1991).

141. *See id.* at 766.

involved two similar fabric patterns, each with a common background¹⁴² and roses aligned in a straight line.¹⁴³ The court first held that the arrangement of plaintiff's "Folio Roses" in a straight line was copyrightable because it was original and creative.¹⁴⁴ However, it circumscribed the copyright and protected only the Folio Rose arranged in a straight line, as opposed to any rose arranged in a straight line, because otherwise the plaintiff would have a monopoly over the idea of arranging roses in a straight line.¹⁴⁵ Turning to infringement,¹⁴⁶ the court held the roses themselves were not substantially similar because the pattern and the focus differed.¹⁴⁷ Regarding the obvious similarities between the two designs, the court reasoned: "[T]hough playwrights and poets from William Shakespeare to Gertrude Stein have extolled the beauty of this five-petaled flower, by the rose's very nature one artist's rendering of it will closely resemble another artist's work."¹⁴⁸

The Second Circuit, however, quickly limited the applicability of *Folio Impressions* in cases involving floral fabric designs when it decided *Hamil America, Inc. v. GFI*.¹⁴⁹ Again, the court was faced with very similar floral fabric designs, this time consisting of "clusters of small white and yellow flowers with blue centers on a red background."¹⁵⁰ The court, however, refused to dissect the design and compare only certain elements because it decided that the more discerning observer standard applied in *Folio Impressions*¹⁵¹ is not triggered by the presence of elements of nature,

142. The background, however, was in the public domain, so it was irrelevant whether the defendant used it. *See id.*

143. *Id.* at 764.

144. *Id.* at 765 (stating that the decision to arrange the roses in "straight rows was an artistic decision" and that it was the designer's "original work").

145. *Id.* The court did not discuss whether the Folio Rose itself, as opposed to the arrangement, was sufficiently original or creative. Rather, it accepted it as copyrightable because it was registered with the U.S. Copyright Office and no evidence was introduced at trial to dispute the validity of the copyright. *See id.* at 763.

146. The court considered only whether the defendant's "Baroque Rose" was substantially similar to the Folio Rose and did not analyze the similarity between the background and the arrangement for the reasons mentioned above—public domain background and no protection for the idea of arranging roses in a straight line.

147. *Folio Impressions*, 937 F.2d at 766. In finding these small variations sufficient to defeat a claim of substantial similarity, the court applied a "more discerning 'ordinary observer' test" where the unprotected elements (background, straight line) were ignored. *Id.* at 765–66.

148. *Id.* at 766. Unlike in *Prestige Floral*, *see supra* note 127, there was "considerable evidence" in *Folio Impressions* that the Baroque Rose was independently created. *Id.*

149. 193 F.3d 92 (2d Cir. 1999).

150. *Id.* at 96.

151. *See supra* note 147.

but rather by design components in the public domain.¹⁵² Furthermore, the court adopted the view, similar to that in *Sunset Lamp*,¹⁵³ that because the flowers were stylized and unique rather than precise reproductions of real flowers, they were clearly protected expression and should not be withdrawn from consideration during the substantial similarity analysis.¹⁵⁴ Considering the design as a whole, the court then found the defendant's design infringing.¹⁵⁵

A few patterns emerge in these opinions on two- and three-dimensional representations of flowers and plants in fabric patterns, plastic sculptures, and lamps. First, originality in representations of nature is acknowledged, and the argument that realistic depictions of flowers and plants are not copyrightable per se is rightly rejected. The originality requirement is low and a sculpture or drawing of a flower or leaf will almost always contain more than de minimus creativity. In *Sunset Lamp* and *Hamil America*, however, the court noted that the result was partly driven by the fact that the works involved stylized rather than realistic representations of nature. Although an artistic choice to stylize an element of nature certainly is relevant because it is original expression that another artist cannot copy freely, a work of art should not be more deserving of protection because it is a fanciful representation of nature. As recognized in *Prestige Floral*, even realistic depictions of flowers contain a great deal of original expression.

B. Taxidermy and Decoys

It is not surprising that it can be difficult to prove infringement when the works at issue are taxidermy mannequins¹⁵⁶ and hunting decoys¹⁵⁷ because these works by their very nature and purpose are meant to look as realistic as possible. In *Streeter v. Rolfe*,¹⁵⁸ the defendant asked the plaintiff, a taxidermist, to design a "lightweight wild turkey decoy," as well as the molds to mass produce the decoy.¹⁵⁹ When the business relationship fell apart and the defendant designed another decoy and set of molds, the

152. See *Hamil Am.*, 193 F.3d at 101. Again, the background of the pattern at issue in *Folio Impressions* was in the public domain. See *supra* note 142.

153. See text accompanying note 138.

154. *Hamil Am.*, 193 F.3d at 101.

155. See *id.* at 102–03.

156. A taxidermy mannequin is the model on which the animal skin is mounted. See *Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 321 (2d Cir. 1996).

157. A hunting decoy is "an artificial bird used by hunters to attract live birds (as water fowl) within shot." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 588 (1993) (defining "decoy").

158. 491 F. Supp. 416 (W.D. La. 1980).

159. *Id.* at 417.

plaintiff sued for copyright infringement.¹⁶⁰ In finding the two decoys not substantially similar, the court held that the defendant copied only the idea of a turkey decoy and not the plaintiff's original expression.¹⁶¹ The court further noted that the decoys must be similar because they must both resemble a real turkey "or they would be useless,"¹⁶² and insofar as the decoys could differ, they did.¹⁶³ Lastly, the court adopted an approach similar to that taken by a few other courts¹⁶⁴ when dealing with highly realistic natural works: "[R]efus[al] to find a copyright infringement absent a finding that the defendant made an *exact copy* of plaintiff's likeness."¹⁶⁵

*Hart v. Dan Chase Taxidermy Supply Co.*¹⁶⁶ presented the Second Circuit with the question: Once you have "seen one fish mannequin," have you "seen them all"?¹⁶⁷ The court did not reach the answer,¹⁶⁸ but it did say that if "*all* realistic fish mannequins, no matter how artistic they might be, will necessarily be substantially similar," then no fish mannequin can be copyrighted because the idea and expression have merged completely.¹⁶⁹ On remand, the district court rejected the plaintiff's argument that there is an endless number of ways to express a lifelike fish¹⁷⁰ and concluded that the only element of the fish mannequin not necessitated by the idea¹⁷¹ was the "cant or swish" of the tail;¹⁷² however, there was an extremely limited number of ways to design the tail. Therefore, the district court held that there are so few ways to express a realistic fish mannequin that the merger

160. *Id.* at 417, 419–20.

161. *See id.* at 420–21.

162. *Id.*

163. *Id.* at 421 (noting that the "fullness" of the necks, tails, and bodies was different).

164. *See, e.g., infra* text accompanying notes 186, 251.

165. *Id.* (emphasis added). The court acknowledged that the defendant's decoy was not the result of independent creation. However, it still found the decoy noninfringing because people can "use, not only all that ha[s] gone before, but even the plaintiffs' contribution itself, if they [draw] from it only the more general patterns; that is, if they [keep] clear of its 'expression.' " *Id.* (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

166. 86 F.3d 320 (2d Cir. 1996).

167. *Id.* at 323.

168. *Id.* at 323 (remanding the question to the district court).

169. *See id.* at 322 (internal quotation marks omitted).

170. *Hart v. Dan Chase Taxidermy Supply Co.*, 967 F. Supp. 70, 72 (N.D.N.Y. 1997) ("For example, a large mouth bass could be eighteen inches long and twelve inches in girth, or sixteen inches long with a fourteen inch girth. Further, a bass could be swimming with its tail to the left, or with its tail up, jumping with a right turn, 'sipping' or feeding on insects, or many other 'poses.' "); *aff'd* *Hart v. Dan Chase Taxidermy Supply Co.*, 152 F.3d 918, 918 (2d Cir. 1998).

171. The court defined the idea as the creation of "a form, that when mounted with the skin and head of a fish carcass, gives the appearance of a 'life-like' fish." *Id.*

172. *Id.* at 72–73 (internal quotation marks omitted).

doctrine precluded it from being copyrighted.¹⁷³

Taxidermy mannequins and hunting decoys are probably the most troublesome natural works. Two mannequins or decoys will likely be very similar because they are meant to be realistic, and their function limits the ways in which an artist can depict the animal. The merger doctrine will apply to many aspects of the work, and small dissimilarities may be significant in the substantial similarity analysis. There are, however, different ways of expressing a particular mannequin or decoy, as the courts in both *Streeter* and *Hart* acknowledged. Therefore, these works should not be denied copyright protection for lack of originality; deciding how to sculpt the tail of a fish mannequin, for example, should count as a creative spark.

C. Other Realistic Animal Sculpture

In *F.W. Woolworth Co. v. Contemporary Arts, Inc.*,¹⁷⁴ the often-cited dog-in-the-show-position case,¹⁷⁵ the First Circuit upheld a finding of infringement¹⁷⁶ for a sculpture entitled “Cocker-spaniel in show position.”¹⁷⁷ The court first separated the artist’s unprotected expression from the idea and found that the show position stance was an idea free for anyone to replicate.¹⁷⁸ Conversely, the artists’ expression was “the proportion, form, contour, configuration, and conformation, perhaps the latter in details too subtle for appreciation by anyone but a fancier, of the dog represented by the sculptured work of art.”¹⁷⁹ The defendant’s sculpture was infringing because it went beyond copying the idea of a dog in a show position and “embod[ied] the identical intellectual or artistic conception.”¹⁸⁰ Differences between the two sculptures were discounted because they were likely the result of the defendant altering a mold made from one of the plaintiff’s statues.¹⁸¹

173. *Id.* at 73. The court of appeals affirmed because the district court’s opinion was not clearly erroneous, and “[w]hile it is possible that artists (and maybe even judges) might divine nuanced differences in the expressiveness of the tail angle of the various mounts, it is not our job, as an appellate court, to get into a debate over the essence of fishness.” *Hart v. Dan Chase Taxidermy Supply Co.*, 152 F.3d 918, 918 (2d Cir. 1998).

174. 193 F.2d 162 (1st Cir. 1951).

175. *See, e.g.*, *Sunset Lamp Corp. v. Alys Corp.*, 698 F. Supp. 1146, 1151 (S.D.N.Y. 1988).

176. *F.W. Woolworth*, 193 F.2d at 169.

177. *Id.* at 163.

178. *Id.* at 164 (“[S]how position in a dog is a standardized, stylized position which anyone is free to reproduce.”).

179. *Id.* at 164–66.

180. *Id.* at 165.

181. *Id.* at 165–66 (stating that the fact that the defendant’s dog had long hair while the plaintiff’s dog had short hair was insignificant because the defendant likely made a mold from the plaintiff’s statue and then carved wavy lines into it).

Several decades later, the First Circuit was confronted with similar issues in *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*,¹⁸² in which the works at issue were “molds to make concrete statues and ornamental articles, such as swans, donkeys, deer, and urns, used primarily for lawn decorations.”¹⁸³ The opinion naturally included a discussion of the merger doctrine, and the court stated that it would apply the merger doctrine to situations in which “there is essentially only one way to express an idea.”¹⁸⁴ In circumstances where there is more than one way to express an idea, but the ability to express the idea remains limited, the court will not completely remove the bar on copying.¹⁸⁵ It will, however, require the plaintiff to show “near identity” between the works.¹⁸⁶ In *Concrete Machinery*, the idea was “a realistic-looking concrete deer,” and the court stated that all artists are free to use the features inherent to a real deer in making their realistic concrete deer.¹⁸⁷ The protected, original expression included any discretionary features, such as the “pose, posture, and facial expression.”¹⁸⁸ Ultimately, the court decided that realistic concrete deer statues were “subject to diverse expression”¹⁸⁹—so the merger doctrine did not apply—and remanded the case to determine whether the defendant copied protected expression.¹⁹⁰

In *Masquerade Novelty, Inc. v. Unique Industries, Inc.*,¹⁹¹ the Court of Appeals for the Third Circuit concerned itself primarily with whether “masks configured to resemble the noses of a pig, elephant, and a parrot”¹⁹² were copyrightable or if they were precluded from protection as useful articles.¹⁹³ Although the court of appeals did not reach the issue of

182. 843 F.2d 600 (1st Cir. 1988).

183. *Id.* at 603.

184. *Id.* at 606.

185. *Id.*

186. *Id.*

187. *Id.* at 607 (internal quotation marks omitted).

188. *Id.*

189. *Id.* at 609 (“Even the various animal representations, while lifelike and allowing of fewer possibilities, are nonetheless somewhat stylized versions of these creatures in terms of posture and facial expression.”).

190. *Id.* at 611.

191. 912 F.2d 663 (3d Cir. 1990).

192. *Id.* at 664.

193. Copyrightability was not at issue because the masks were unoriginal. Rather, the district court had ruled that the masks were useful articles “allowing people to humorously masquerade as humans with an animal feature.” *See id.* at 667. Useful articles as such are not copyrightable. *See* 17 U.S.C. § 101 (2000); *see also* U.S. COPYRIGHT OFFICE, CIRCULAR 40: COPYRIGHT REGISTRATION FOR WORKS OF THE VISUAL ARTS 2 (July 2006), available at <http://www.copyright.gov/circs/circ40.pdf> (“Copyright does not protect the mechanical or utilitarian aspects of [useful articles].”). The court in *Masquerade Novelty* held that the masks were copyrightable. *Masquerade Novelty*, 912 F.2d at 671.

infringement,¹⁹⁴ it noted that on remand, proving infringement may be difficult because both masks “are relatively straightforward representations of animal noses.”¹⁹⁵ To prove infringement, the plaintiff would need to show that similarities were the result of copying rather than simply the result of depicting the same animal’s nose.¹⁹⁶ The plaintiff did meet its burden on remand. After finding that the plaintiff’s masks did not merely replicate a real animal nose but were instead humorous interpretations,¹⁹⁷ the district court held that the defendant’s masks copied the “artistic elements and flourishes” of the plaintiff’s pig, elephant, and parrot masks,¹⁹⁸ and the defendant was found liable for infringement.¹⁹⁹

The opinions discussed above correctly acknowledge that realistic animal sculpture can contain a great deal of original artistic expression. The court in *F.W. Woolworth* and *Concrete Machinery* recognized that even when artists represent animals realistically, they make numerous artistic choices, and these choices can result in protected original expression. Although the reasoning in *Masquerade Novelty* suggests that the result may have been different if the masks were lifelike representations of animal noses, the case is still a good example, like the other two cases, of a court carefully examining a natural work for original artistic expression and not assuming that all of the expression is necessitated by the idea of depicting a particular animal.

D. Toys

In *Rushton Co. v. F.W. Woolworth Co.*²⁰⁰ the U.S. District Court for the Southern District of New York had to decide whether the faces of two stuffed chimpanzee dolls were substantially similar.²⁰¹ Although experts testified that the dolls’ faces “bear striking resemblances,”²⁰² the court noted many “significant” dissimilarities.²⁰³ In regard to the allegedly infringing doll, the

face is larger; its cheek bone area is higher; the distance from its nose to the tip of the upper lip is longer; the expanse of its lips from end to end is larger; the shape of its mouth opening is different; the

194. *Masquerade Novelty*, 912 F.2d at 671.

195. *Id.*

196. *Id.* at 671–72.

197. *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, No. 89-6926, 1990 WL 209320, at *1 (E.D. Pa. Dec. 13, 1990).

198. *See id.* at *4–5.

199. *Id.* at *7.

200. 135 F. Supp. 317 (S.D.N.Y. 1955).

201. *Id.* at 319.

202. *Id.* at 321.

203. *Id.*

curvature of the upper lip is different; and, viewed sideways, the contours and profile of the face are different.²⁰⁴

The court reasoned that the similarities which did exist were likely the result of the fact that the artists used “the same source of materials: live chimpanzees, photographs of chimpanzees, and [famous chimpanzees on television].”²⁰⁵ Therefore, the court held the defendant’s doll was noninfringing.²⁰⁶

The Ninth Circuit made clear in the case of *Aliotti v. R. Dakin & Co.*²⁰⁷ that it grants copyright protection to stuffed animals that are realistic depictions of live animals, yet carefully tailors the scope of the protection.²⁰⁸ The works at issue in *Aliotti* were two lines of stuffed toy dinosaurs—the plaintiff’s “Ding-A-Saur” line and the defendant’s “Prehistoric Pet” line.²⁰⁹ The court of appeals upheld summary judgment for the defendant because there were numerous dissimilarities between the two lines: The Ding-A-Saurs were “sleepy eyed . . . with exaggerated facial and other anatomical features” while the Prehistoric Pets were “more accurate depictions of dinosaurs” and “reflect[ed] less personality.”²¹⁰ Furthermore, many of the similarities between the two lines were a result of the “physiognomy of dinosaurs,” and, thus, could not be given weight in the substantial similarity analysis due to the merger doctrine.²¹¹

Judge Posner did not assume that similarities between two bean bag pigs were the result of both toys depicting a real animal in *Ty, Inc. v. GMA Accessories, Inc.*²¹² Ty, the manufacturer of Beanie Babies, obtained a preliminary injunction against a retailer to prevent the sale of a bean bag pig (Preston the Pig) because it allegedly infringed Ty’s bean bag pig (Squealer).²¹³ On appeal, the court of appeals was primarily concerned

204. *Id.* at 321–22.

205. *Id.* at 322 (internal quotation marks omitted).

206. *Id.* at 325–26. There were actually two dolls at issue, and the other was found to be infringing primarily because of evidence it was made from a copy of the plaintiff’s doll mold. *Id.*

207. 831 F.2d 898 (9th Cir. 1987).

208. In a previous case that involved stuffed toy animals, the Ninth Circuit quickly rejected the argument that realistic depictions of live animals are never copyrightable. *See Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981) (“Anyone can copyright anything, if he adds something original to its expression.”).

209. *See id.* at 899–900. Both lines included a Brontosaurus, Stegosaurus, Triceratops, Tyrannosaurus Rex, Pterodactyl, and Woolly Mammoth. *See id.*

210. *Id.* at 900 (quoting Order Granting Summary Judgment at 2–3, No. 84-20368 (N.D. Cal. Apr. 29, 1986)).

211. *See id.* at 901 (“No copyright protection may be afforded the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls.”).

212. 132 F.3d 1167 (7th Cir. 1997).

213. *Id.* at 1169; *see also id.* at 1174 (picture of the two toys).

with whether the two toys were so similar—strikingly similar—that the plaintiff need not independently prove the defendant had access to the work.²¹⁴ The court acknowledged that it is not proper to forgo independent proof of access if the similarity between the two works could be the result of both depicting something in the public domain, such as two photographs of Niagara Falls,²¹⁵ but reasoned that this was not the case here:

[Preston the Pig] is strikingly similar to [Squealer] but not to anything in the public domain—a real pig, for example The parties' bean-bag pigs bear little resemblance to real pigs even if we overlook the striking anatomical anomaly of Preston—he has three toes, whereas real pigs have cloven hooves. We can imagine an argument that the technology of manufacturing bean-bag animals somehow prevents the manufacturer from imitating a real pig. But anyone even slightly familiar with stuffed animals knows that there are many lifelike stuffed pigs on the market, and whether they are stuffed with beans or other materials does not significantly affect their verisimilitude²¹⁶

Therefore, the court of appeals upheld the preliminary injunction.

Cases that involve stuffed animals reveal a number of important points. First, just because a court recognizes the original expression in a stuffed animal does not mean it will find that another artist has copied that expression. The *Rushton* court acknowledged the varying ways in which an artist could represent a chimpanzee's face when it detailed the differences between the two toys, but because the artists each used distinctive expression in creating the toy, they were not substantially similar. Second, defendants should not be allowed to hide behind the fact that similarities usually exist between two works that depict the same animal when that does not explain the similarities. As Judge Posner noticed in *Ty*, the defendant's bean bag pig did not look like a real pig, but it did look like the plaintiff's bean bag pig.

214. When direct evidence of copying is absent, copying can be inferred if the plaintiff can prove access and substantial similarity. See *supra* note 99. However, if the two works are strikingly similar, a plaintiff may not have to prove access separately because "similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access." *Ty*, 132 F.3d at 1170.

215. See *id.* at 1170.

216. *Id.*; see also *id.* at 1175 (picture of real pigs).

E. *Jewelry and Candles*

Two frequently cited and important natural works cases that do not quite fit into the other categories are *Herbert Rosenthal Jewelry Corp. v. Kalpakian*²¹⁷ and *Yankee Candle Co. v. Bridgewater Candle Co.*²¹⁸

Kalpakian involved “pin[s] in the shape of a bee formed of gold encrusted with jewels.”²¹⁹ In this case, the court reasoned that substantial similarity between the two bee pins did not enable a legitimate inference of copying because the similarity was likely due to both pins being “lifelike representations of a natural creature.”²²⁰ The court, however, admitted that the defendants may have copied the pin because the defendants, who were jewelers, had access to the plaintiff’s bee pin,²²¹ and because copying “may be the result of subconscious memory.”²²² However, defining the idea as a “jeweled bee pin,” the court stated that the idea and the expression were indistinguishable because the similarity between the bee pins was inevitable.²²³ Thus, the court ultimately held that even if the defendants had copied the bee pin, the merger doctrine allowed it.²²⁴

Yankee Candle involved the application of the merger doctrine to candle jar labels depicting fruit and flowers.²²⁵ Both parties manufactured candles that smelled like various fruits and flowers, such as cranberry, peach, apple, gardenia, mulberry, and raspberry.²²⁶ Naturally, the labels

217. 446 F.2d 738 (9th Cir. 1971).

218. 259 F.3d 25 (1st Cir. 2001).

219. *Kalpakian*, 446 F.2d at 739.

220. *Id.* at 741. The court also noted that there were differences between the two bee pins, “notably in the veining of the wings.” *Id.*

221. *Id.* (stating that the plaintiff’s bee pin was “highly successful”).

222. *Id.* (quoting HOWELL’S COPYRIGHT LAW 129 (4th ed. 1962)).

223. *See id.* at 742 (“When the idea and its expression are thus inseparable, copying the expression will not be barred, since protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner” (internal quotation marks omitted)).

224. A few years after *Kalpakian*, the parties found themselves in court again. This time, the work at issue was a jeweled gold turtle pin. *See Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co.*, 509 F.2d 64, 64 (2d Cir. 1974) (per curiam). The Second Circuit also found the defendant’s pin noninfringing because most of the similarities between the pins resulted from the fact that they both depicted a turtle:

Although the oval arrangement of 10 gems might at first blush appear to possess individuality of expression, further observation discloses that it merely conforms to the normal shape of the turtle’s back and the pattern of its vertebrae segments, of which there are in nature not less than 10 nor more than 12.

See id. at 65–66.

225. *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35 (1st Cir. 2001).

226. *Id.* at 32 n.1 (citing *Yankee Candle Co. v. Bridgewater Candle Co.*, 99 F. Supp. 2d 140, 148–50 (D. Mass. 2000)).

contained images of the fruits and flowers that inspired the scents.²²⁷ To determine whether the labels were substantially similar, the First Circuit proceeded first to “dissect” the labels to remove unprotected elements²²⁸ and apply the merger doctrine to see “*how* substantially similar the copy must be to infringe.”²²⁹ The merger doctrine as applied by this court was quite robust. The merger doctrine applied (and copying was allowed) when the only way to express the idea of the fruits and flowers was to depict their likeness or when there were “sharply” limited choices of subject matter.²³⁰ Merger applied even if the subject matter “expressed more subtle ideas open to greater possibilities of representation.”²³¹ Moreover, the court reasoned that the merger doctrine was particularly applicable when the work depicted nature.²³² The only limitation the court placed on this reasoning was that the merger doctrine would not sanction actual identical reproduction of an image if it had some original elements.²³³ The court ultimately concluded that the merger doctrine applied to the labels because “there were few associated expressions, of which the most obvious was a realistic representation of the fruit or flower at issue.”²³⁴ Thus, after describing the differences in the labels at length,²³⁵ the court decided that once the unprotected elements were removed and the merger doctrine applied, the labels were not substantially similar.²³⁶

As will be discussed in detail in Part VI, *Kalpakian* and *Yankee Candle* exemplify what happens when original artistic expression is undervalued and the merger doctrine is applied too vigorously. Although certain features of a pin designed to look like a bee are subject to the merger doctrine, the entire work is not preordained by the anatomy of a

227. *Id.* at 36.

228. *Id.* at 34–35 (finding the “full-bleed photo[graphy]” and rectangular gold border unprotected).

229. *Id.* at 34 (internal quotation marks omitted). The court dismissed the argument that dissection was improper because dissection resulted in undervaluing the original expression involved in the selection and arrangement of the unprotected elements. *Id.* (“This court . . . has been more enthusiastic . . . about the use of dissection analysis to disaggregate a visual work into its component elements for the purpose of removing the unprotectible elements contained within.”).

230. *See id.* at 35–36 & n.6.

231. *Id.* at 35.

232. *Id.* at 36 (“[T]he merger doctrine is most applicable where the idea and the expression are of items found in nature.”).

233. *Id.* at 36 (“If Bridgewater had scanned Yankee’s labels into a computer and reproduced them exactly, it would have certainly infringed Yankee’s copyrights on those labels.”).

234. *Id.*

235. *Id.* at 37 n.7. For example, Bridgewater’s cranberry-scented candle jar label depicted cranberries alone while Yankee’s label had fewer cranberries and green leaves; Bridgewater’s mulberry-scented candle jar label had redder mulberries; and Yankee’s raspberry-scented candle jar label had more leaves. *Id.*

236. *Id.* at 37.

bee. Moreover, an image of a fruit or flower is admittedly the most obvious choice for how to visually represent its scent, but there still remains an almost endless variety of ways to represent the fruit or flower itself.

F. Art “within the historical and ordinary conception of the term art”²³⁷

This Comment would be incomplete without a discussion of cases involving “art” in the traditional sense of the word.²³⁸ Although some may find it easy to dismiss as unimportant the copying of a fake turkey or plastic flower because it does not seriously undermine the advancement of the arts, what about those works arguably thought of as the most rigorously protected?

*Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*²³⁹ involved two watercolor paintings of cardinals sitting on the branches of an apple tree in blossom.²⁴⁰ The court preliminarily stated that copyright in works of art that depict their subject matter with “photograph-like clarity and accuracy”²⁴¹ is “‘weak,’”²⁴² and artists who create such works will find it difficult to prove unlawful copying.²⁴³ In regard to the cardinal paintings, the court noted that many of the similarities between the two works were unavoidable because in ornithological art, “minute attention to detail of plumage and other physical characteristics is required and the stance of the birds must be anatomically correct.”²⁴⁴ There were, however, a number of dissimilarities between the two paintings.²⁴⁵ Although there

237. *Rosenthal v. Stein*, 205 F.2d 633, 635 (9th Cir.1953).

238. *The Oxford English Dictionary* defines art as “[t]he application of skill to the arts of . . . painting, engraving, sculpture, [and] architecture” or the “skilful production of the beautiful in visible forms.” 1 THE OXFORD ENGLISH DICTIONARY 657 (2d ed. 1989) (noting also that “[t]his is the most usual modern sense of *art*, when used without any qualification”). This section includes photography because the photograph in the case discussed was a carefully crafted image and not just a snapshot.

239. 575 F.2d 62 (3d Cir. 1978).

240. *Id.* at 64. The two works at issue in *Franklin Mint* were created by the same artist. National Wildlife Art Exchange hired the artist to paint *Cardinals on Apple Blossom*, and the company owned the copyright in the painting. Franklin Mint Corporation subsequently hired the artist to paint *The Cardinal*, the allegedly infringing work. *Id.* at 63–64.

241. *Id.* at 65.

242. *Id.* (quoting *First Am. Flowers, Inc. v. Joseph Markovits*, 342 F. Supp. 178, 186 (S.D.N.Y. 1972)).

243. *See id.* (contrasting highly realistic paintings with impressionist paintings, such as Monet’s studies of Rouen Cathedral, for which “infringement attempts [are] difficult”).

244. *See id.* at 66.

245. *See id.* (describing the differences between the two paintings, such as differences in color, posture, position, placement, and expression of the birds, foliage, and general composition).

was “strong circumstantial evidence of copying,”²⁴⁶ the court of appeals deferred to the trial court’s determination that the artist did not copy,²⁴⁷ and stated that even if he had copied, only ideas, and not expression, were used.²⁴⁸ Because the expression of the idea of cardinals on a blossoming apple tree branch differed in the two paintings, the defendant’s work was found noninfringing.²⁴⁹

In *Satava v. Lowry*,²⁵⁰ the Ninth Circuit concluded that a glass-in-glass sculpture of lifelike jellyfish “possesse[d] a thin copyright that protects against only virtually identical copying.”²⁵¹ The plaintiff was inspired to create the sculptures after attending a jellyfish exhibit at an aquarium, and his rendition was extraordinarily realistic.²⁵² The defendant began creating glass-in-glass jellyfish sculptures after seeing a picture of plaintiff’s work, and his sculptures were remarkably similar.²⁵³ The plaintiff, however, was unable to prevent this blatant copying because the court found that his sculpture consisted of “unprotectable ideas and standard elements,” and his selection and arrangement of the elements was not original.²⁵⁴ The court reasoned that there was no protection for “the idea of producing a glass-in-glass jellyfish sculpture or to elements of expression that naturally follow from the idea of such a sculpture,” and the plaintiff could “not prevent others from copying aspects of his sculptures resulting from . . . jellyfish physiology,”²⁵⁵ such as tendril-like tentacles, rounded bells, or bright colors.²⁵⁶ The court did not go so far as to deny copyright protection for all realistic depictions of animals, but justified its holding as follows:

Nature gives us ideas of animals in their natural surroundings: an eagle with talons extended to snatch a mouse; a grizzly bear clutching a salmon between its teeth; a butterfly emerging from its cocoon; a wolf howling at the full moon; a jellyfish swimming through tropical waters. These ideas, first expressed by nature, are

246. *Id.* The artist, who painted both works, obviously had access to the previous work, and the two paintings were similar. *See id.*

247. *Id.* at 66–67.

248. *Id.* at 67. The court also explained that an artist cannot use copyright to monopolize an entire subject matter, concept, or theme. *See id.* at 65, 66.

249. *Id.* at 66.

250. 323 F.3d 805 (9th Cir. 2003).

251. *Id.* at 812.

252. *See id.* at 807–08.

253. *Id.* at 808–09 (including pictures of the two sculptures).

254. *Id.* at 811.

255. *Id.* at 810. The Ninth Circuit, however, did, acknowledge that artistic choices “not governed by jellyfish physiology or the glass-in-glass medium” were protected. *Id.* at 812. Even these elements, however, were afforded only a thin copyright. *Id.*

256. *Id.* at 811 (stating additionally that others could not be prevented from “depicting jellyfish swimming vertically because jellyfish swim vertically in nature and often are depicted swimming vertically”).

the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them.

An artist may, however, protect the original expression he or she contributes to these ideas. An artist may vary the pose, attitude, gesture, muscle structure, facial expression, coat, or texture of animal. An artist may vary the background, lighting, or perspective. Such variations, if original, may earn copyright protection.²⁵⁷

Finally, *Dyer v. Napier*²⁵⁸ involved a photograph of a mother mountain lion standing on the edge of a boulder with a cub in her mouth and a bronze sculpture of a mother mountain lion with a cub in her mouth.²⁵⁹ Despite evidence of access²⁶⁰ and similarity between the two works, the court granted summary judgment for the defendant because only unprotected elements were similar.²⁶¹ Specifically, the court decided that the similarities were not substantial for three reasons: (1) “the ‘idea’ of the protective nature of a mother mountain lion with her kitten is not protected,” (2) “similarity in expression aris[ing] from the use of a common idea” cannot be the basis for a finding of substantial similarity, and (3) “the image of a mother mountain lion holding a kitten in her mouth is expressed by nature” and is not protected.²⁶² Additionally, the court stated that not only was the image of the mother mountain lion with the cub in her mouth not protected because it was expressed by nature, but also because the image was “necessary to the expression of the underlying idea of the protective nature of a mother mountain lion.”²⁶³ Citing *Satava* at length for the proposition that images from nature belong to all,²⁶⁴ the court similarly held that despite this, the photograph had a thin copyright due to the plaintiff’s many artistic choices in its composition, such as location, background, perspective, and angle.²⁶⁵

These three cases show that even in traditional works of art, original artistic expression in representations of nature can be undervalued or not

257. *Id.* at 813.

258. No. CIV 04-0408-PHX-SMM, 2006 WL 2730747 (D. Ariz. Sept. 25, 2006).

259. *Id.* at *1; see also Andrew Berger, *Rights of Photographers and Visual Artists*, in ADVANCED SEMINAR ON COPYRIGHT LAW 2007 app. at 657–58 (PLI Intellectual Prop., Course Handbook Series No. G-897, 2007) (pictures of the photograph and sculpture).

260. The defendant sculptor obtained a copy of the photograph at an art show. *Id.* at *2.

261. *Id.* at *1.

262. See *id.* at *6–7.

263. See *id.* at *9.

264. *Id.* at *7–8 (citing *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003)).

265. See *id.* at *9. The photograph was actually not of a mountain lion in the wild. The scene captured in the photograph was staged. The photographer selected the site in advance, and then, with the assistance of animal trainers, had the mountain lion pose on the edge of the boulder with her cub. See *id.* at *1–2.

recognized. The court in *Franklin Mint* carefully drew the line between idea and expression and recognized the original artistic expression present in ornithological art. Conversely, in *Satava* and *Dyer*, the court employed reasoning that denies the presence of original artistic expression in almost every realistic depiction of nature.

VI. CRITIQUE

After surveying copyright law generally and a number of cases concerning natural works, it appears that many natural works do not receive the protection they deserve. When artists who create natural works seek to enforce their rights under § 106²⁶⁶ in an infringement action, they often lose because the allegedly infringing work is found not to be substantially similar. To quickly review what copyright law allows in terms of similarity between two works, if a natural work is independently created, it does not matter if it is similar to or even an exact duplicate of another work. Similarity is also be irrelevant if artist *B* had access to artist *A*'s work, which inspired artist *B* to create a work of art depicting the same element of nature, as long as artist *B* did not copy artist *A*'s original expression in the process of creating the work.²⁶⁷ Furthermore, artist *B*, rather than creating the work by observing the real-life subject, can actually copy artist *A*'s work as long as artist *B* only copies ideas and expression necessary to the depiction of those ideas. Artists cannot use copyright law to monopolize a subject because they are the first to depict it. In each of these scenarios, artist *B*'s work is not substantially similar because there is no similarity of protected expression.

The problem with the current state of copyright law as applied to natural works is when artist *B* goes beyond copying ideas and expression necessary to depict those ideas and copies *original artistic expression*, artist *B*'s work is *still* found not to be substantially similar to artist *A*'s. This occurs because original artistic expression in natural works is not recognized or is undervalued. The nonrecognition or undervaluation of original artistic expression in natural works can result in (or be the result of) requiring too much originality, defining the idea depicted by the work too broadly, considering too much expression as necessary to the depiction of the idea, or assigning the work a thin copyright.

266. 17 U.S.C. § 106 (2000) (listing exclusive rights of copyright owners).

267. Again, intent to copy is irrelevant. Copying can be subconscious. See *supra* text accompanying note 97.

A. *Artistic Expression*

The primary reason that original artistic expression is erroneously allowed to be copied is that it is not recognized as such. A brief discussion of expression as defined by artists and philosophers of art will help show that natural works, even highly realistic works, generally contain a great deal of original expression. Determining what is original artistic or creative expression in copyright law is not the same as determining what it is from the viewpoint of artists or philosophers of art. While the former attempts to refrain from making aesthetic judgments about art,²⁶⁸ the latter concerns itself primarily with making such determinations.²⁶⁹ Moreover, the definition of art is certainly not the same.²⁷⁰ However, a consideration of what artists and art philosophers consider artistic or creative expression²⁷¹ and how artists create is still worthwhile because there is overlap between how judges and art professionals identify original artistic expression,²⁷² and courts have even turned to the art world for assistance in deciding copyright cases.²⁷³

268. See *supra* notes 66–68 and accompanying text (explaining that the requirement of creativity does not include an aesthetic component); see also H.R. REP. NO. 94-1476, at 51 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (stating that the requirement of originality does not include a requirement of “esthetic merit”).

269. See, e.g., Vincent Tomas, *Creativity in Art*, 67 PHIL. REV. 1, 4 (1958) (“Although we do not judge a work to be a work of creative art unless we believe it to be original, it is not enough that we should judge it to be merely different or novel. In discourse about art, we use ‘creative’ in an honorific sense, in a sense in which creative activity always issues in something that is different in an interesting, important, fruitful, or other *valuable* way. If what the artist produces is a novelty, yet indifferent or bad, we do not regard him as a creator.”).

270. Compare *supra* text accompanying notes 13–16 (discussing the inclusive definition of art in copyright law), with GORDON GRAHAM, *PHILOSOPHY OF ARTS: AN INTRODUCTION TO AESTHETICS* 3–75 (3d ed. 2005) (explaining the many philosophies and theories of what is art and why it is valued).

271. Legal scholars are not alone in their inability to definitively define the concept of artistic expression or creativity; Picasso was once asked to define creativity, and he said, “I don’t know, and if I did I wouldn’t tell you.” THE CREATIVE PROCESS IN SCIENCE AND MEDICINE 31 (Hans A. Krebs & Julian H. Shelley eds., 1975).

272. See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 266–97 (1998) (discussing parallels between legal reasoning in copyright cases and aesthetic theory).

273. See James H. Carter, *They Know It When They See It: Copyright and Aesthetics in the Second Circuit*, 65 ST. JOHN’S L. REV. 773, 775 (1991) (“[C]ourts regularly take account of published literary or art criticism of the works before them for various purposes when such criticism is consistent with their own judgments.”); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 11 (2001) (“Courts have turned to the customs and understandings of the art community in determining whether certain works are meant to be protected by [the Visual Artists Rights Act, 17 U.S.C. § 106A (2000)].”). Additionally, despite Holmes’s warning that judges should refrain from evaluating art, see *supra* text accompanying note 68, it has been argued that courts do make aesthetic judgments in copyright cases. See generally Gorman, *supra*; Yen, *supra* note 272. Therefore, judges should

First, most philosophers of art and artists would not consider art that realistically depicts nature to be a mere copy of nature. Rather, natural works are a *representation* of nature.²⁷⁴ Art represents and does not merely copy nature because it is impossible to copy it: “Any depiction of nature that tries just to copy must fail, partly because every ‘copy’ of nature must involve seeing selectively, and partly because the work must reflect the representational resources available to the painter.”²⁷⁵

Furthermore, artists make numerous choices when they create a work of art. Even the creation of highly realistic works involves a myriad of artistic choices, and the depiction of even simple objects is not as straightforward as it may seem. For example, Stevan Dohanos, a well-known illustrator and “passionate realist”²⁷⁶ described what the creation of a common awning involves as follows:

We take for granted the so-called common object. . . . [M]aybe you want to use an awning in a picture. Awnings can be endlessly different in design and structure. Obviously you shouldn’t settle for an image you have in your mind of an awning. Through legwork or professionally motivated curiosity, you will unearth tremendous variations, artistic possibilities, in colors and shapes of awnings.²⁷⁷

Dahanos also noted that the process of creating realistic images involves constant editing and is not straightforward: “The final product may seem ordinary and realistic, but there’s been a continual process of editing and designing throughout the period of preparing the picture.”²⁷⁸

This brief excursion into the world of philosophy and art is meant to demonstrate that, contrary to how it is sometimes treated in the legal world, the creation of natural works is much more than paint-by-numbers—an artist’s representation of nature is the result of a great deal of skill, choice,

understand notions of creativity and artistic expression as understood by artists and philosophers of art because it will enable courts to make better decisions. See Yen, *supra* note 272, at 247.

274. See GRAHAM, *supra* note 270, at 104–05; see also *id.* at 111 (“Painters do not merely imitate. They cannot be thought of as presenting ‘raw’ visual data which the spectator then ‘observes.’”).

275. *Id.* at 105.

276. MARY ANNE GUITAR, 22 FAMOUS PAINTERS AND ILLUSTRATORS TELL HOW THEY WORK 55 (1964).

277. *Id.* at 57.

278. *Id.* at 63; see also JOHN DEWEY, ART AS EXPERIENCE 70–71 (Capricorn Books 1958) (1934) (“Keats speaks poetically of the way in which artistic expression is reached when he tells of the ‘innumerable compositions and decompositions which take place between the intellect and its thousand materials before it arrives at that trembling, delicate and snail-horn perception of beauty.’”). This example is not meant to advocate that a work of art should be protected by copyright because a lot of effort is used in creating it. As noted previously, copyright does not reward artists for their labor, but rather only for their original expression, regardless of effort or time spent creating the work. See *supra* note 50 and accompanying text.

selection, and revision, which results in a very expressive work. The recognition of original expression in natural works is not solely found in the field of art; it has been recognized in copyright law as well. As Justice Holmes indicated in *Bleistein*, “[t]he copy [drawn from life] 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*.”²⁷⁹ Even in the most precise depiction of nature, this personality is expressed through the numerous artistic choices that must be made, including “pose, posture, and facial expression”²⁸⁰ and “proportion, form, contour, configuration, and conformation.”²⁸¹

Satava is the best example of a court undervaluing original artistic expression.²⁸² The Ninth Circuit treated almost every artistic decision *Satava* made in the creation of the glass jellyfish sculptures as if it was dictated by nature and the physiology of a jellyfish. The different colors used by the artist were not even recognized as protected expression because jellyfish naturally come in different colors.²⁸³ Although many aspects of the sculpture were prescribed by the way a jellyfish actually looks, that does not mean the way in which the artist specifically chose to depict the jellyfish was in no way original.

B. Originality

It is difficult to imagine a work of art that does not pass the very low threshold required for originality.²⁸⁴ The work discussed herein found not to be copyrightable—the fish mannequins in *Hart*²⁸⁵—did not fall short of this low standard. A work of art technically can be copyrighted even if it is black paint on canvass.²⁸⁶ *Feist* did establish a threshold under which a work is not sufficiently original to warrant copyright protection,²⁸⁷ but

279. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (emphasis added); see also Michael D. Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrine for Visual Works*, 58 BAYLOR L. REV. 779, 853 (2006) (arguing that courts “fail to understand or appreciate the creative opportunities to express and portray objects visually”).

280. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988).

281. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951).

282. See Murray, *supra* note 279, at 849–50 (2006) (citing *Satava* as an example of a court not appreciating creativity in the selection and arrangement of the elements of a visual work).

283. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

284. See *supra* notes 46–49 and accompanying text.

285. See *supra* notes 166–73 and accompanying text.

286. See, e.g., Mark Rothko, *Black on Black* (1964), reprinted in MARK ROTHKO: 1903–1970, at 170 (Stewart, Tabori, & Chang eds., rev. ed. 1996) (1987).

287. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363–64 (1991).

anything with more than de minimus creativity is sufficient.²⁸⁸ As Justice Holmes observed in *Bleistein*, “[t]he least pretentious picture has more originality in it than directories and the like, which may be copyrighted.”²⁸⁹

Therefore, although a fish mannequin may consist mostly of ideas and may be subject to the merger doctrine, even the most realistic animal sculpture is not entirely devoid of original expression,²⁹⁰ and a small amount of original expression suffices to uphold copyright protection. The consequences of a court deciding that a work as a whole is not copyrightable for lack of originality are severe because it precludes an artist from preventing even direct, actual copying.²⁹¹ For example, the jeweled gold bee and turtle pins discussed previously²⁹² were also the subject of litigation in *Herbert Rosenthal Jewelry Corp. v. Grossbardt*²⁹³ and *Herbert Rosenthal Jewelry Corp. v. Grossbardt*,²⁹⁴ respectively. In these two cases, there was direct evidence of copying, and the defendants created identical replicas of the plaintiff’s pins.²⁹⁵ The Second Circuit upheld the preliminary injunction in both cases,²⁹⁶ because unlike in the cases discussed previously,²⁹⁷ the court decided that the defendant went beyond copying ideas and copied original expression. If the bee and turtle pins had been denied copyright protection entirely because they allegedly consisted of only unprotected ideas and expression necessary to the depiction of those ideas, Herbert Rosenthal Jewelry would have been unable to prevent this blatant, actual copying because anyone in the world would be free to duplicate its pins.²⁹⁸ Admittedly, if a work lacks any original expression,

288. *Id.* at 363.

289. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). Of course, not all directories are necessarily copyrightable, *see Feist*, 499 U.S. at 363 (denying copyright protection to telephone directory listing subscriber’s alphabetically by last name).

290. *See supra* text accompanying notes 279–81.

291. In addition to possessing a valid copyright, artists must register their U.S. works with the U.S. Copyright Office before they can sue for infringement. *See* 17 U.S.C. § 411(a) (2000).

292. *See supra* notes 219–24 and accompanying text.

293. 436 F.2d 315 (2d Cir. 1970).

294. 428 F.2d 551 (2d Cir. 1970).

295. *See Grossbardt*, 436 F.2d at 316 (“[D]efendants . . . obtained one of Rosenthal’s bees, made a rubber mold from it, [and] duplicated the bee”); *Grossbardt*, 428 F.2d at 552–53 (“[D]efendants do not dispute that they duplicated and sold a turtle pin basically identical to plaintiff’s copyrighted work.”).

296. *Grossbardt*, 436 F.2d at 316, 318; *Grossbardt*, 428 F.2d at 552.

297. *See supra* notes 219–24 and accompanying text.

298. Inability to prevent actual, direct copying is also why the merger doctrine should be applied when considering infringement rather than copyrightability. *See* 4 NIMMER & NIMMER, *supra* note 10, § 13.03[B][3] (stating that the merger doctrine should not be used to “disqualify certain expressions from protection per se”).

the entire world *should* be free to create knock-offs, but a fish mannequin and jeweled gold bee and turtle pins are not among those works.²⁹⁹

C. *Definition of Idea*

A court can undermine artists' ability to protect their works and undervalue original artistic expression if it defines the scope of the unprotected idea too broadly. What is an idea and what is expression is not readily defined,³⁰⁰ but demarcating the two correctly is important. Whether an allegedly infringing work is substantially similar to another depends in large part on what the court defines as the idea because substantially similarity between ideas alone does not equal infringement.³⁰¹ For example, in *Dyer*, the outcome of the case was driven in large part by the court's definition of the idea—"the protective nature of a mother mountain lion with her kitten."³⁰² Given this broad definition of the idea, *Dyer* will almost never be able to protect his photograph of the mother mountain lion with the cub in her mouth at the edge of a boulder because the image is so intertwined with the idea of the protectiveness of the lioness.³⁰³

299. This Comment will not go so far as to claim that under no circumstances should a natural work be denied copyright protection for lack of originality. Given the de minimus requirement of originality and the nature of art and artistic expression, however, it is very unlikely that a work lacks the requisite originality just because it is inspired by, based on, or depicts nature.

300. See *supra* text accompanying notes 77–82.

301. An excellent example of how the definition of the idea determines whether two works of art are substantially similar is the discussion in *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005) of the photographs at issue in *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001). The photographs depicted a businessman standing on the edge of a tall building looking down from the vantage point of the businessman. See *Mannion*, 377 F. Supp. 2d at 467–68 (showing the two photographs). The court in *Mannion* considered the possible definitions of the idea in the photograph and the consequences of adopting each of the definitions:

But what is the 'idea' of Kaplan's photograph? Is it (1) a businessman contemplating suicide by jumping from a building, (2) a businessman contemplating suicide by jumping from a building, seen from the vantage point of the businessman, with his shoes set against the street far below, or perhaps something more general, such as (3) a sense of desperation produced by urban professional life?

If the 'idea' is (1) or, for that matter, (3), then the similarities between the two photographs flow from something much more than that idea, for it have would [sic] been possible to convey (1) (and (3)) in any number of ways that bear no obvious similarities to Kaplan's photograph. (Examples are a businessman atop a building seen from below, or the entire figure of the businessman, rather than just his shoes or pants, seen from above.) If, on the other hand, the 'idea' is (2), then the two works could be said to owe much of their similarity to a shared idea.

Id. at 456.

302. *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747, at *6 (D. Ariz. Sept. 25, 2006).

303. *Id.*

Furthermore, he will likely be unable to protect any future photographs he creates of a mother mountain lion with her cub if their posture and positioning are such to convey the idea of protective nature. There are numerous ways to express the idea of the protective nature of a mother mountain lion,³⁰⁴ all of which are not protected by copyright according to the reasoning of the court in *Dyer* because they are necessary to expressing this broad idea of protectiveness. A more appropriate definition of the idea in *Dyer* would have been “a mother mountain lion with her cub in her mouth.” This would have correctly allowed other artists to depict this naturally occurring image using their own expression while allowing the artist to protect his particular expression of this idea.

D. Application of the Merger Doctrine

Likewise, the merger doctrine can be used too ambitiously to prevent a proper finding of infringement.³⁰⁵ Although the doctrine would be more or less useless if it is applied only when the expression and the idea are completely inseparable, applying it when there is more than a very limited number of choices unduly limits an artist’s ability to prove substantial similarity. Specifically, if an idea can be expressed in a number of ways and one artist expresses the idea in the same way as another artist, this similarity should be considered evidence of copying,³⁰⁶ and it should count in the assessment of whether the works are substantially similar.³⁰⁷ If the merger doctrine applies, however, the similarity is disregarded for the purpose of evaluating similarities between two works because the expression is unprotected. Therefore, when the merger doctrine is applied inappropriately, an artist is unfairly prevented from proving infringement absent showing near identity between the works.³⁰⁸

This was the result in *Kalpakian*.³⁰⁹ The Ninth Circuit held that because there was really only one way to express the idea of a jeweled bee pin, the plaintiff’s expression was not protected.³¹⁰ There are numerous

304. For example, a mother cleaning a cub, standing over a cub, or bringing food to a cub all evoke the idea of her protective nature.

305. For an argument that the merger doctrine should not be applied at all to works of art or photographs, see generally Murray, *supra* note 279.

306. This is assuming the artist of the allegedly infringing work had access to the other work and the allegedly infringing work was not independently created.

307. Again, the requirement of substantial similarity arises in two contexts: whether the defendant in fact copied and whether the copying is actionable. See *supra* notes 99–100 and accompanying text.

308. See, e.g., *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35 (1st Cir. 2001).

309. See *supra* notes 219–24 and accompanying text; see also Murray, *supra* note 279, at 792–93 (arguing that *Kalpakian* is wrongly decided because there are numerous ways to depict a jeweled bee pin).

310. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

ways, however, to express a jeweled bee pin as evidenced by the fact that the defendant had an entire line of bee pins that varied in size and in the number, size, color, and kind of jewels on the pin.³¹¹ Moreover, if two readers of this Comment presently closed their eyes and envisioned a gold, jeweled bee pin, this author expects that those pins would differ greatly.

*Yankee Candle*³¹² also involved the application of the merger doctrine when there were numerous ways to depict an idea.³¹³ Admittedly, the obvious choice of expression to depict the idea of the scent of a particular fruit or flower is an image of the fruit or flower. There are, however, many ways to depict the fruit or flower *itself*. For example, the image could contain only the piece of fruit, or it could also contain leaves;³¹⁴ and, the color of the petals on the flower blossom or the skin of the fruit could be different.³¹⁵ Additionally, depictions of nature should not be considered more subject to the merger doctrine than other types of works. The amount of original expression in a work can range from hardly any to a great deal, and natural works as a class do not per se fall on the former end of the spectrum.³¹⁶ The labels at issue in *Yankee Candle* may not have been substantially similar once the court accounted for the fact that they portrayed the same flower or fruit, but this broad application of the merger doctrine to natural works generally may allow original artistic expression to be freely copied in contravention of copyright law.

Defining too much expression as part of the idea or necessary to the depiction of an idea can also allow insignificant dissimilarities in an otherwise infringing work to prevent an appropriate finding of infringement. This violates the well-known rule that “no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated.”³¹⁷ Admittedly, small dissimilarities in the case of realistic natural works can be significant. As previously discussed, however, there is an incredible range of artistic choice and expression involved when depicting nature, and “when two artists take up . . . the painting of a portrait

311. See *id.* at 740; see also Murray, *supra* note 279, at 793 (“The amount of gold or other metal used and exposed in the design, the size and shape and number of the gems or semi-precious stones used, the color, tone, shade, clarity, and brilliance of the gems or stones used, whether the gems or stones will have few or many or no facets are simply the beginning of the creative opportunities available to a designer of a jeweled bee pin.”).

312. See *supra* notes 225–36 and accompanying text.

313. See Murray, *supra* note 279, at 801 (discussing “expansive application of merger” in *Yankee Candle*).

314. See *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 37 n.7 (1st Cir. 2001) (noting this difference in the cranberry labels).

315. See *id.* (noting this difference in the eucalyptus and mulberry labels).

316. See *supra* notes 268–81 and accompanying text.

317. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

of the same subject from life, or of the same landscape at the same time of the year, the wonder commonly excited is not at the resemblance, but over the unlikeness.”³¹⁸ Thus, when two works that depict the same animal, for example, are completely alike save for one or two minor changes, such as the size of the face,³¹⁹ the defendant should not necessarily avoid liability, especially when there is strong evidence of actual copying.

E. *Thin Copyright*

A potentially valid infringement claim can be undermined by a finding that the copyright for a natural work is thin.³²⁰ The copyright in a work is thin when it is substantially comprised of either works already in the public domain or other unprotected elements such as facts and ideas.³²¹ Highly realistic natural works are said to have only a thin copyright because such works supposedly copy what already appears in nature.³²² Although the idea of a thin copyright makes sense when dealing with relatively straightforward factual compilations such as a telephone directory, it does not translate to realistic natural works; are seventeenth-century Dutch still-life and flower paintings any less magnificent because they so precisely depict the subject?³²³ Or, to give a modern-day example, an artistic movement called surrealism aims to depict a subject as realistically as a photograph.³²⁴ Two surrealist works depicting the same element of nature will necessarily be similar, but cursorily dismissing a legitimate claim of infringement because the copyright protection for the work is thin

318. *Pellegrini v. Allegrini*, 2 F.2d 610, 612 (E.D. Pa. 1924); see also Murray, *supra* note 279, at 852–53 (noting dissimilarity between Monet’s and Renoir’s paintings of people swimming at a pond despite the fact that the two artists stood next to each other while painting the scene).

319. See *supra* text accompanying note 204.

320. See, e.g., *Dyer v. Napier*, No. CIV 04-0408-PHX-SMM, 2006 WL 2730747, at *9 (D. Ariz. Sept. 25, 2006).

321. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

322. See, e.g., *Dyer*, 2006 WL 2730747, at *9; *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *First Am. Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178, 186 (S.D.N.Y. 1972) (a pre-*Feist* decision stating that the copyright was “weak”).

323. See *Baroque Art*, in 2 ENCYCLOPEDIA OF WORLD ART 255, 351 (Inst. for Cultural Collaboration ed., 1960) (stating that still-life painting in the Netherlands involved an “illusionistic presentation of flowers, insects, and smaller animals [with] almost scientific precision”); Valentin Denis et al., *Flemish and Dutch Art*, in 5 ENCYCLOPEDIA OF WORLD ART 402, 437 (Inst. for Cultural Collaboration ed., 1961) (“The multicolored Dutch ‘bouquet’ was generally rendered with as much finesse and evidenced as precise an observation of nature as a scientific botanical study.”); see also *id.* at 438 (noting that the “most beautiful Dutch still-life paintings” in the late seventeenth century resulted “not from slavish imitation of nature but from the power of convincing selective recall”).

324. See *Supersrealism*, in GARDNER’S, *supra* note 86, at 1054, 1054–56.

due to lack of original artistic expression does not seem right.³²⁵ Once again, works of art, even highly realistic ones, are always personal to the artist.³²⁶ Moreover, surrealist paintings and sculptures are quite impressive³²⁷ and their existence surely enriches cultural life. To label these works as possessing only a thin copyright undermines an artists' ability to protect the work, which in turn undermines the purpose of copyright to "advance the public welfare through the talents of authors"³²⁸ via an economic incentive.

Finally, an excerpt from Leonardo da Vinci's *Treatise on Painting*³²⁹ highlights why it is troubling to conclude that works of art depicting nature have a thin copyright because they consist mostly of unprotected elements. In *Treatise on Painting*, Leonardo describes in detail elements of nature and how to paint those elements of nature; he describes how to represent a storm as follows:

If you wish to represent a storm well, consider and place before your mind the effects of the wind, blowing over the surface of the sea and the earth, as it removes and carries with it those things which are not firmly imbedded in the mass of the earth. In order to represent the storm well first of all paint the clouds, torn and rent, swept along by the course of the wind, together with the sandy powder lifted from the seashores; include branches and leaves, raised by the powerful fury of the wind, scattered through the air, as well as many other light objects. The trees and grass are bent against the earth, seeming almost as if they were trying to follow the course of

325. See, e.g., *Graham v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983) (discussing the commercial success of surrealist artists and how the paintings must be original, in the aesthetic sense, or else no one would buy them).

326. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

327. See, e.g., Chuck Close, *Big Self-Portrait* (1967–68), reprinted in GARDNER'S, *supra* note 86, at 1056. Another type of art for which it would not be appropriate to grant only thin protection because it involves nature is "eco-installations." See Aleksandra Mańczak, *The Ecological Imperative: Elements of Nature in Late Twentieth-Century Art*, 35 LEONARDO 131 (2002). An eco-installation is a work of art that incorporates elements of nature themselves. The artist who creates an eco-installation either takes objects out of nature and uses them as part of a sculpture or installation or the artist manufactures a landscape. See generally *id.* (discussing examples of eco-installation). Although the works incorporate elements of nature, which are arguably unprotected for lack of originality because they do not originate with the artist, see *supra* text accompanying notes 52–55, the work includes a great deal of original artistic expression: the artist selected the specific materials or landscape and arranged the selected elements in a creative fashion in order to convey a specific message. See Mańczak, *supra*, at 131–32 (noting how eco-installations can be a means of commenting on environmental issues).

328. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

329. LEONARDO DA VINCI, *TREATISE ON PAINTING* (CODEx URBINAS LATINUS 1270) (A. Philip McMahon trans., 1956).

the winds, with their branches twisted out of their natural direction, their leaves battered and turned upside down.³³⁰

Although Leonardo describes a storm realistically, it would seem dubious to argue that this passage has a thin copyright because it contains mostly unprotected ideas or facts.³³¹ The passage is a very expressive description of what occurs when a storm hits. If an artist, however, sat on the seashore during a storm and painted or photographed the scene before her, these are precisely the arguments that would be made, and likely accepted by a court, if another artist copied her work and the artist sued for copyright infringement.

CONCLUSION

Copyright law should not hinder the advancement of the arts in contravention of its constitutional purpose. The monopolization of ideas thwarts the goal of copyright law and should never be allowed. Equally prejudicial to progress, however, is not adequately protecting artists' exclusive rights in their original works of art and photographs. The drafters of the Constitution decided that the best way to achieve the constitutional purpose of copyright was to encourage creation with an economic incentive. The economic incentive is diminished, however, if original artistic expression is not protected because artists' ability to economically exploit their works is severely undermined.

Original artistic expression in works of art depicting nature, especially highly realistic works, is not adequately protected by copyright law. It is often undervalued or not recognized, and the current methods of identifying whether original expression has been copied are misapplied to natural works. This Comment does not propose to have an answer to this difficult dilemma. For copyright law to achieve its constitutional goal, a delicate balance must be struck between securing artists a reward for their creativity and making works and ideas available to the public. A possible first step towards finding this balance for natural works is to develop a new approach to identifying original expression in works of art and photographs depicting nature and whether an artist has copied another's protected expression of nature.³³²

330. *Id.* at 114.

331. A counterargument is that this passage does have a thin copyright because Leonardo is merely describing how to do something (paint a storm), similar to an instruction manual. See, e.g., Dennis S. Karjala, *Copyright Protection of Computer Documents, Reverse Engineering, and Professor Miller*, 19 U. DAYTON L. REV. 975, 1001 (1994) (noting that instruction manuals have a thin copyright).

332. See *Franklin Mint Corp. v. Nat'l Wildlife Art Exch. Corp.*, 575 F.2d 62, 65 (3d Cir. 1978) ("Troublesome, too, is the fact that the same general principles are applied in claims

Whatever the solution, one is needed because artists who create natural works have contributed greatly to the advancement of the arts, and they should not be punished for choosing to use their talents to depict nature. Most artists are certainly not motivated by financial gain alone, and the creation of natural works has not come to a grinding halt despite the current state of the law. However, the ability to make a living from the economic exploitation of their work gives artists additional time and resources to create even more works of art.³³³ Therefore, adequately protecting natural works will ensure that the public is not denied the reward of works created by a future Monet, O’Keeffe, Cézanne, Adams, or Barye.³³⁴

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involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings. Isolating the idea from the expression and determining the extent of copying required for unlawful appropriation necessarily depend to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvas.”); *see also* *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 458–61 (S.D.N.Y. 2005) (discussing at length the problem with the idea/expression dichotomy as applied to visual works). It is feasible to develop new approaches based on the type of work. For example, in regard to computer programs, the “abstraction-filtration-comparison” test developed to determine whether two programs are substantially similar. *See* OSTERBERG & OSTERBERG, *supra* note 99, §§ 8:5 to 8:5.3.

333. *See* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540–41 (2005) (discussing how copyright “makes creativity and dissemination possible for some authors who could not otherwise afford to create and share their works”). *But see* William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1996) (arguing that modern copyright law financially benefits distributors but not authors).

334. *See supra* notes 2–6 and accompanying text.

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