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# Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers

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# Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers

Jessica Silbey\*

*This Article explores the justification for copyright from two sources: seminal court cases and accounts from photographic authors. It takes as its premise that copyright protection requires justification, not only because creative work is frequently made and disseminated without reliance on copyright, but because, in the age of digital technology, practices of creative production and dissemination have sufficiently changed to question the existing contours of the forty-year-old Copyright Act. Why read the photographers' stories alongside the court cases? Each present contested views of copyright's relation to creativity. At times, the photographers' accounts and the case law strengthen and reinforce each other; other times, their differences challenge the other's coherence. Reading the accounts side-by-side further identifies synergies that may serve as moral confirmation for winners in the copyright system. At the same time, comparisons reveal opportunities for resistance by those who contest copyright law's explanation of how it promotes creativity as a function of "progress." The social structures made legible through the overlapping stories of creativity, copying, and copyright delineate in diverse ways the object of value ("copyright" and "original works of authorship") as well as the anxieties regarding digital age trends of widespread dissemination and verbatim copying. Simultaneously, these same stories signal an expectation of access to the tools of distribution and of opportunity to practice one's own art, undermining copyright's exclusivity and value associated with it. Understanding this complex*

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*position regarding digital reproduction, creative practices, industry changes, and professional opportunity may be useful for reforming copyright in a manner that includes rapidly evolving aesthetic practices and diverse creators of the future.*

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#### INTRODUCTION

This paper explores the justification for copyright from two sources: seminal court cases and accounts from photographic authors. It takes as its premise that copyright protection requires justification, not only because creative work is frequently made and disseminated without reliance on copyright, but because, in the age of digital technology, practices of creative production and dissemination have sufficiently changed to question the existing contours of the forty-year old Copyright Act. To be sure, this paper's conclusions as to copyright's justifications are contingent upon the reach and applicability of the sources used. The court cases are widely applicable as seminal opinions.<sup>1</sup> The case of photographers, however, may produce particularized accounts of copyright's importance. Photographers may face aesthetic and technical issues in the digital age specific to their medium, available business models, and professional communities. Another question this paper raises, therefore, is whether the case of photographic copyright in the digital age is a special case or if it provides an analogy for authorship in the twenty-first century.

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1. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 61–73 (4th ed. 2015).

The seminal cases and the photographers' accounts are structured as stories about creativity's process and products. As stories, they are "intimately related to, if not a function of, the impulse to moralize reality, that is, to identify it with the social system that is the source of any morality that we can imagine."<sup>2</sup> The social system is both the subject and framework of the stories told in which creativity and copyright are related in struggle. And the law, as part of that social system, forms a background of rights and responsibilities structuring expectations and aspirations for how that struggle should resolve. Reading the cases alongside the photographers' accounts of their aesthetic and business practices clarifies the relevance of the struggle between copyright and creativity for digital photography, a ubiquitous and important form of communication and visual art today.<sup>3</sup>

Explanations for copyright in both the court cases and the photographer's accounts do not contain all marks of stories. But the particular struggles among authors, publishers and purported infringers, between legal rules and complaints of their irrelevancy or inadequacy, enable evaluation of copyright's role in promoting creativity beyond the particular to general cases. This feature of projection, a core story function with origins in the parable, is essential to reasoning and meaning in a larger social context.<sup>4</sup> And when the story coheres internally and through projection, it binds people within a social world remade and strengthened by the story itself.<sup>5</sup> In this way, stories may be "legible reflections of social structures"<sup>6</sup> with their particular forms and relations of features "lay[ing] claim to a limited range of potentialities and constraints."<sup>7</sup>

These stories about authorship in the age of rapid reproduction reveal opportunities to act, to work with others, or prevent future harm within in the social structures imagined and described. The legal cases recount stories of creativity

2. HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 14 (1987).

3. Martin Heiferman, *If You See Something, Say Something: Why We Need to Talk About Visual Literacy, Now*, in *VISION ANEW: THE LENS AND SCREEN ARTS* 64–67 (Adam Bell & Charles Traub eds., 2015).

4. MARK TURNER, *THE LITERARY MIND* 7 (1996) ("The projection of story operates throughout everyday life and throughout the most elite and sacred literature. . . . Parable . . . has seemed to literary critics to belong not merely to expression and not exclusively to literature, but rather . . . *to mind in general*.").

5. WHITE, *supra* note 2, at 24 ("[V]alue attached to narrativity . . . arises out of a desire to have real events display the coherent, integrity . . . and closure of an image of life that is and can only be imaginary."); *id.* ("Where in any account of reality, narrativity is present, we can be sure that morality or a moralizing impulse is present too. There is no other way that reality can be endowed with the kind of meaning that both displays itself in its consummation and withholds itself by its displacement to another story 'waiting to be told,' just beyond the confines of 'the end.'"); *see also* Patricia Ewick & Susan Silbey, *Narrating Social Structures: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328, 1341 (2003) ("Some authors argue that stories as a form of social action, reflect and sustain institutional and cultural arrangements, bridging the gap between daily social interaction and large-scale social structures.") (citations omitted).

6. CAROLINE LEVINE, *FORMS: WHOLE, RHYTHM, HIERARCHY, NETWORK* 12 (2015).

7. *Id.* at 6.

related in a system of copyright regulation, idealizing the social system as compromised of similarly situated individuals with copyright as an incentive and accumulation of expressive work the goal. The photographers' stories share the aspiration of similarly situated authors and the desire for copyright to respect their efforts, but the contemporary system of industrial capital they describe as structuring their work is tainted by inequitable hierarchies and thus is far from ideal. In other words, these stories are both aesthetic and political. Paying close attention to their constraints and opportunities—what Caroline Levine describes as formal *affordances*—sheds light on copyright's fitness and flaws for creative production in the digital age.<sup>8</sup>

Why read the photographers' stories alongside the court cases? Each presents contested views of copyright's relation to creativity, e.g., creativity as a function of the promise of anti-copying protection. At times, the stories strengthen and reinforce each other; other times, their differences challenge the coherence of each account. Moreover, reading the accounts side-by-side identifies synergies that may serve as moral confirmation for winners in the copyright system. At the same time, comparisons reveal opportunities for resistance by those who contest the law's explanation of copyright's method of promoting creativity as a function of "progress."<sup>9</sup> The social structures made legible through the overlapping stories of creativity, copying, and copyright deserve attention for their strong normative resonance regarding the marks of authorship and the function of anti-copying protection. Not only do they form an object of value to analyze and critique as such ("copyright" and "original works of authorship"), but they delineate the anxieties of digital age trends of widespread dissemination and a default for copying. Simultaneously, and somewhat paradoxically, these same stories signal an expectation of access to the tools of distribution and of opportunity to practice one's own art. Understanding this complex position regarding digital reproduction, creativity, industry changes, and professional opportunity may be useful for reforming copyright in a manner that includes rapidly evolving aesthetic practices and the creators of the future.

Despite the photographers' stories taking place in the present day, the legal account begins in 1884 with *Burrow-Giles Lithographic Co. v. Sarony*.<sup>10</sup> *Sarony* is a case with remarkable contemporary resonance. Like contemporary photographers, the 1884 case justifies photographic copyright in terms of pre-shutter activities of photographic composition and preparation. Also, the case confronts challenges of technological evolution and the democratization of the photographic industry for nineteenth century photographic art and businesses that are magnified today. The 1903 case of *Bleistein v. Donaldson Lithographic Co.* resolves a question *Sarony* left open—the copyright status of "ordinary" photography as compared to art

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8. *Id.*

9. U.S. CONST. art. I, § 8, cl. 8.

10. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

photography—by deferring to the aesthetic tastes of the public and rejecting aesthetic hierarchy.<sup>11</sup> As we will see, contemporary photographers’ accounts of creative practices and aesthetic value resonate with *Sarony* and largely reject *Bleistein*, setting up a collision for the digital age when nearly all photography that circulates on the internet is both amateur and “ordinary” leaving the originality standard “destabilized and overextended.”<sup>12</sup>

The third case is *Feist Publications, Inc. v. Rural Telephone Service, Co.*<sup>13</sup> It rejects copyright’s “sweat of the brow doctrine”—a rule which would protect creative work based on skill and labor—in favor of *Bleistein*’s minimal originality standard from 1903. Although *Feist* reaffirms copyright protection for nearly all work made by photographic authors, its devaluation of skill and labor as factors in copyright protection dilutes the professional photographer’s status and her market leverage in the digital age. Original selection and arrangement may be copyright protected features of photographs, but hard work or skills have no purchase in copyright law. “It may seem unfair that . . . the fruit of the . . . labor may be used by others without compensation . . . [but] [t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”<sup>14</sup> *Feist* tells a story of competitive industries thriving despite copyrightable subject matter being limited to creative expression and facts being free to all (even facts collected after significant investment of time and money). By contrast, photographers’ stories of the value they bring to picture making rely on discipline and craft. *Feist*’s winners are not professional photographers for whom “sweat of the brow” defines their aesthetic and business practices. They may retain copyright over their images because *Sarony* and *Bleistein* remain good law, but the proliferation of photographs in the digital age, made by amateurs and professionals, nearly all of which are protected by copyright, renders unsustainable the marketplace for many professional photographers. Does this matter? And if it does, how and what is to be done? The social situations that *Feist* and professional photographers describe in their accounts justifying copyright protection present different benefits and risks of the digital domain.

Side-by-side, photographers’ accounts and seminal court cases illustrate the law’s tense relationship with creative and innovative industry professionals as it attempts to harmonize private interests and the public good within a rapidly changing technological context. The stories revolve around familiar tensions: originality/copying; individual personality/sociality; human/machine; work of art/labor; high art/ordinary art; commercial worth/aesthetic value. At

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11. *Id.* at 59 (“This may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection. On the question as thus stated we decide nothing.”); see *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251–52 (1903).

12. Justin Hughes, *The Photographer’s Copyright – Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 388 (2012).

13. *Feist Publ’ns v. Rural Tel.*, 499 U.S. 340, 349–50 (1991).

14. *Id.*

stake in the photographic accounts is the blending of livelihood and professional respect and the structure of these dialectical tensions for the survival of a professional class of artists. The legal stories delineating copyright as intentionally more ubiquitous and democratic and with more starkly defined public domain features ironically degrades human efforts, replacing diverse human values with narrow economic ones. The dissonance created focuses blame on twenty-first century copying technology (the internet) and its users, instead of a legal structure that ignores distributive justice and sustainable wage labor. Comparing these stories uncovers opportunities to build alliances between authors and audiences broadly construed by naming shared stakes, such as wage equity and access. This is the first step toward reconfiguring rules (law) and structures (society and technology) to reform copyright in a manner that accounts for evolving aesthetic practices, diverse creators and broad audiences of the future.

#### I. BURROW-GILES LITHOGRAPHIC CO. V. SARONY AND CREATIVITY FINGERPRINTS

*Burrow-Giles Lithographic Co. v. Sarony* is the first Supreme Court case to declare photography worthy of authorship, and thus of copyright protection, despite photography's mechanized process.<sup>15</sup> Photography was statutorily added to the list of copyrightable works in 1865, but not until 1884 did the Supreme Court explain why photographs were authored as the Constitution's intellectual property clause requires.<sup>16</sup> Photography was a new technique in the late 1800s, "promoted as a . . . mechanical science . . . able to produce a direct transcription of the scene before it."<sup>17</sup> It was used more often as evidence than art.<sup>18</sup> As Oliver Wendell Holmes said photography was a "mirror with a memory,"<sup>19</sup> challenging its status as protectable human expression.

##### A. *Photographic Copyright*

The dispute in *Burrow-Giles* concerned the lithographic company's unauthorized reproduction and selling of 85,000 copies of photographer Napoleon Sarony's portrait of Oscar Wilde.<sup>20</sup> The defendant sought to evade liability with two arguments. First, the lithography company claimed a photograph is not a "writing" by an "author" as the Constitution requires. The photograph is a mere output of a machine and thus was not the proper subject of copyright, which protects authors,

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15. Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 872 (2015).

16. U.S. CONST. art. I, § 8, cl. 3 (granting copyright to authors of writings for limited times).

17. Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 389 (2004).

18. Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 13–14 (1998).

19. Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, in CLASSIC ESSAYS ON PHOTOGRAPHY 71, 74 (Alan Trachtenberg ed., 1980).

20. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

not automated processes. Second, and, relatedly, the defendant argued that photographs are by definition unoriginal, removing them from the scope of copyright protection, because photography merely copies nature by making “mechanical reproduction[s] of the physical features or outlines of some object.”<sup>21</sup>

The Court decides both issues on similar grounds by finding human traces in the work produced and defining those traces as the value protected.<sup>22</sup> To make its point, the court relies on the first copyrightable subject matter—maps and charts. Both intend to accurately depict geography, but both are the original “writings” protected by the first Copyright Act. As such, the result of photographic processes, even if intended to depict reality, can also be protected by copyright as long as the “ideas in the mind of the author are given visible expression.”<sup>23</sup> Famously, the court wrote that an “author . . . is ‘he to whom anything owes its origin, originator, maker;’ . . . the nature of copyright . . . was . . . the exclusive right of a man to the production of his own genius or intellect.”<sup>24</sup> This first basis of copyright protection is a story about equality among writings and authors of writings, even if made with new and mysterious tools. There may be traces of the human in both maps and photographs. Like a pen on paper or etching on metal, the photograph owes its origin to the photographer’s use of the camera. In all of these cases, the writing comes from the person. It is an authored writing in that sense.

In addition, the particular contribution of this author (Sarony) to this writing (the Oscar Wilde portrait) was obvious. Reciting the findings of fact from the trial court, the Supreme Court writes:

[I]n regard to the photograph in question, . . . it is a “useful, new, harmonious, characteristic, and graceful picture, and . . . plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.”<sup>25</sup>

From this reasoning generates the future courts’ reliance on photographer’s pre-shutter activity—selection, arrangement and framing—as the unique and human contributions that render photographs original works of authorship.<sup>26</sup> In

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21. *Id.* at 59.

22. *Id.* at 58–59.

23. *Id.* at 58.

24. *Id.* at 57–58.

25. *Id.* at 60.

26. *E.g.*, *Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068 (9th Cir. 2000); *Mannion v. Coors Brewing*, 377 F. Supp. 2d 444 (S.D.N.Y. 2000).



other words, photographers intervene to make photographs original by “superintend[ing] the arrangement, . . . form[ing] the picture.”<sup>27</sup>

In deciding the case for Napoleon Sarony, a prominent portrait photographer at the time,<sup>28</sup> the Court erects a conflict between humans and machines concerning copyright’s protected subject matter. The conflict revolves around a dialectical tension between innate human contributions, “the exclusive right of a man to the production of his own genius or intellect” and the “merely mechanical” process of “light on the prepared plate” that transfers “to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit.”<sup>29</sup> In this hierarchy of humans over machines regarding copyright’s protection, we hear rumblings of fear of automation and desire for control over it. We also hear a resigned understanding that humans and machines will have to learn to co-exist. By distinguishing the personal contribution to the representation of nature from mechanical reproduction, the Court describes what copyright does (protecting people not mechanical processes) and says why: because human genius or intellect has will, which is the source of its moral authority “involv[ing] originating, making, [and] producing as the inventive or mastermind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.”<sup>30</sup>

Human will and its domination of machines forms the background of the rule and its exception declaring most photographs copyrightable. Sarony’s photograph was protected by copyright because he “superintended” its arrangement making a “graceful picture.”<sup>31</sup> But not all photographs may be so protected.<sup>32</sup> Where “the accuracy of th[e] representation [is] [the photograph’s] highest merit . . . [which is] true in regard to the ordinary production of a photograph, . . . in such case a copyright is no protection.”<sup>33</sup> In other words, when the machine is in control, as opposed to the person operating the machine, no copyright lies. When the machine is in control, there is no originality, only copying. There is no individual personality, only reproductions of nature. There may be beauty (nature can be beautiful), but copyright protection derives from human contributions.

Another background consideration shapes the outcome of *Burrow-Giles*. Not only must humans control machines under the logic of copyright law, but also the products of control worthy of protection are not “ordinary” photographs that are the “mere mechanical reproduction of the physical features . . . of some

27. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (quoting *Nottage v. Jackson*, (1883) 11 Q.B. 627 (Eng.)). Indeed, Sarony, the plaintiff photographer in this case, has been described as a “modern-day director, cajoling, parodying, and even intimidating his sitters to elicit dramatic and expressive representations.” ROBERT HIRSCH, *SEIZING THE LIGHT: A SOCIAL & AESTHETIC HISTORY OF PHOTOGRAPHY* 87–88 (3d ed. 2017).

28. HIRSCH, *supra* note 27, at 87–88.

29. *Burrow-Giles*, 111 U.S. at 59.

30. *Id.* at 61.

31. *Id.* at 54.

32. *Id.* at 59.

33. *Id.*

object, . . . involv[ing] no originality of thought . . . in the intellectual operation connected with its visible reproduction.”<sup>34</sup> There are, therefore, two morals that emerge from *Burrow-Giles*. Humans shall control automation (not the other way around) and the “inventive or master mind” deserves copyright not the “manual operat[or].”<sup>35</sup>

Notice this is not explicitly a story about recuperating investment in skill, practice, or equipment that copyright exclusivity might enable, which is today a common justification for copyright grounded in economic theory.<sup>36</sup> And it is not a story about leaving the “ordinary” photographs that are mere mechanical reproductions of reality in the public domain to avoid copyright thickets that thwart the public interest in dissemination, education, and collaboration.<sup>37</sup> Those stories will be told later; arising only after copyright expands with demands from authors to control competition. Instead, the *Burrow-Giles* court tells a story about how humans who tame machines and express their “genius or intellect” through the mechanical process are granted copyright authorship as a matter of moral authority and human-centered law in the age of mechanical reproduction. Intriguingly, more than a century later, this is the same story contemporary photographers tell about the reason copyright should protect their work and their status as authors in an increasingly competitive market for professional photography. The differences in their stories and the twentieth century justification for copyright concern *Burrow-Giles*’ open question about the authorship status of ordinary photographs. In 1903, *Bleistein* addresses this question broadening copyright’s reach and diminishing the market leverage copyright provides professional photographers.<sup>38</sup>

### B. Digital Photographers’ Creative Contributions

Sarah Newman is an award-winning photographer and visual artist. Currently in her thirties, she has been making photographs since high school. She attended college and graduate school working intensively with photography, assisted professional fine art photographers for several years, and developed her portfolio. She is currently the Creative Director of Harvard University’s Metalab, an “idea foundry” experimenting with the “networked arts and humanities.”<sup>39</sup> I interviewed

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34. *Id.* Here, the Court presages the inapplicability of copyright to “slavish copying.” *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.08[E][2], at 2–131 (1998)).

35. *Burrow-Giles*, 111 U.S. at 59.

36. Richard Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57 (2005).

37. *Burrow-Giles*, 111 U.S. at 59; *see also* *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (“To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.”).

38. *See infra* Part II (discussing *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903)).

39. META LAB AT HARVARD, <https://metalabharvard.github.io/> [https://perma.cc/C6A9-854L] (last visited Jan. 18, 2019).

Sarah as part of a larger empirical project studying the changing aesthetic and business practices of photographers in the digital age.<sup>40</sup> Sarah gave the following answer in response to a question about becoming a professional photographer in the digital age.

Everybody has a camera . . . . There's a shit ton of pictures, and . . . production of photographs and quantity of floating pictures, . . . everybody's a photographer now . . . . So there's that, and then in terms of the originality, or sort of making something new, photography's different than other media because it requires something to be existing in the world to base the photograph on, and in photography's history, it was kind of about copying the world. [A]nd for that reason, [it replaced] . . . other sort of forms of copying representation. But photography's relationship, in my opinion, to those objects in the world is that [photography is] more closely tied [to the objects] than . . . drawing. Because it's a causal relationship, and I think that's different, and important, in that the object is required in order for the subject to be depicted, . . . the light has to reflect off of it. So . . . people often mistake [the image for the thing]. . . [and] see past the surface of the photograph. [A] lot of people see the subject, they don't see the photograph. They see, if there's a picture of a tree, they see the tree. They just kinda [*sic*] see past [the]. . . mediation of the world. [I]t's like . . . the Magritte paintings [Ceci n'est pas une pipe] . . . . It's kind of like that. [W]hat is [this]? [A] picture of a tree, it's a tree . . . no it's a photograph. It's the same kind of thing, but it's even harder with photography.<sup>41</sup>

Sarah's experience and understanding of photography as an aesthetic practice articulates the tense relationship between mimetic representation and creativity. She describes the making of photographs as a "causal relationship" in the same way the *Burrow-Giles* defendant described a photograph as "being a reproduction on paper of the exact features of some natural object."<sup>42</sup> But like the *Burrow-Giles* court, Sarah insists that making photographs as an artist is the process of showing an audience more than the subject of the picture. She says "if there's a picture of a tree, they see

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40. Data for this paper was collected over two years as part of a larger qualitative empirical project investigating the changing aesthetic and business practices of photographers in the digital age. The project is on-going in collaboration with Professors Eva Subotnik and Peter DiCola. We have interviewed thirty-two photographers distributed among relevant genres of photography (event, commercial, photojournalism, portrait, and fine art) and ranging in experience from emerging professional photographers, to established photographers, to famous ones. We also interviewed photographers who are both freelance and staff. Semi-structured interviews with photographers last approximately sixty to ninety minutes and are transcribed, coded, and analyzed using qualitative analytic software.

41. Interview with Sarah Newman, Creative Director, Harvard Meta Lab, in Cambridge, Mass., Tr. at 1–2 (Sept. 29, 2016).

42. *Burrow-Giles*, 111 U.S. at 56.

the tree. They just kinda [*sic*] see past . . . the meditation of the world.”<sup>43</sup> But she says, it’s not only a tree, *it’s a photograph*.<sup>44</sup>

Sarah’s early experience with photography when discovering the practice of making pictures informs her understanding of how photography is an interaction with the world, not just a reflection of it. She explains below.

[T]here’s all these layers of reality[] and . . . things we can perceive and experience, but somehow having a camera[] and . . . interacting with the world, in all these layers of experience, . . . gave me more agency . . . [t]o . . . make creative expressions and interpretations of what I was seeing. So it was almost as if I were just starting to write poetry or something. I ha[d] this tool that I c[ould] use, and anything that would normally be kind of mundane became a lot more interesting, because I always had my camera with me . . . . [P]retty much anywhere I went, I had a camera . . . so I wasn’t just receiving, and engaging, I was actually searching for meaning . . . .<sup>45</sup>

Much like the *Burrow-Giles* decision compares photography to “all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression,” Sarah describes the camera as a “tool” and photographs like other forms of art (such as “poetry”) for seeing the world in a new way.<sup>46</sup> She personally experiences that vision and aims to bring it to audiences with her work. Her first teacher and mentor would help develop this visionary practice by

point[ing] out things that we might not notice in pictures. He would say . . . , “You see this thing in the background, how the silhouette of that mimics the silhouette of that person standing on the other side,” . . . “[y]ou see how the edges are activated,” or, . . . “you wouldn’t think to offset this.” It was all very formal. He didn’t talk about meaning, what pictures meant. He didn’t talk about emotion. Which was . . . interesting, . . . and having had a lot of photography training since then, I actually think it’s a great way to introduce people to photography.<sup>47</sup>

Sarah’s photographic praxis renders inseparable the human and her machine. She may prioritize human agency as the will that generates and gives form to the art, but she is not describing the relationship as hierarchical the way the *Burrow-Giles* court did.<sup>48</sup> Photographic art helps us see things in the world differently and from new perspectives. It may also transform how we relate to the world. In this way, Sarah explains photographic art as quintessentially *original*, making something new

43. Interview with Sarah Newman, *supra* note 41, at 2.

44. *Id.* (emphasis added).

45. *Id.* at 4.

46. *Id.*; *Burrow-Giles*, 111 U.S. at 58 (“Congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.”).

47. Interview with Sarah Newman, *supra* note 41, at 6.

48. See *Burrow-Giles*, 111 U.S. at 61; see also Farley, *supra* note 17, at 431.

from the photographer's intervention "interfacing with the world, and . . . placing a viewer in a space[] even if there's no human subjects in the space."<sup>49</sup>

Sarah doesn't go as far as to distinguish between novel and "ordinary" photographs as *Burrow-Giles* does. But she does make a distinction between art photographers and other people who take pictures:

I think . . . [many] people . . . don't appreciate . . . what photography is as an art form. Even really educated people, I think, understand painting as a genre, but have a lot more trouble grasping photography as a genre of art, even now. Even if they say, "Yes, yeah, right, I know it's art," [be]cause they've been told, oh yes, you have to believe that it's art. I still think that sincerely the appreciation of it is limited. There's exceptions, [be]cause some people really like photography. But . . . some of those exceptions are people that like photography [be]cause they like to like go to the lake and shoot photographs, and that's really not what professional . . . art photographers do anyway. They're not going to a beautiful place to make beautiful pictures. So then the people are like, "Ooh, I love photography," you know, "I, I love to take pictures when I—," and I sound like I'm being dismissive of them, I'm not, but their understanding of it is not really any better than people who don't appreciate it as an art form, [be]cause I actually think what art photographers are doing is much more complicated than many people can see.<sup>50</sup>

There will be more to say below about the complexity of photography and the skill and labor involved in making photographs in the way Sarah describes. Here, the point is that Sarah draws a distinction between photographers and photographs along the lines of professionalization, skill and practice. This focuses the *Burrow-Giles* copyright hierarchy on the worker (the photographer) not the work (the photograph).

A commercial photographer based in New York, when answering a question about relationships between photographers and their assistants regarding authorship and ownership of the photograph, mirrors *Burrow-Giles's* concept about photographers as directors superintending the photographic composition. She explains here.

There are instances where an assistant might press the button for the photographer, where the photographer has directed everything to that point, and they might make their assistant sign that [work for hire] agreement . . . . I personally never had a problem with that concept because I think taking pictures isn't just about pushing a button. It's about all the stuff that happens beforehand, . . . if I was handicapped and I

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49. Interview with Sarah Newman, *supra* note 41, at 19.

50. *Id.* at 60–61.

couldn't push the button, and I directed a technician to push the button for me, it is still my photo, it's how I see that thing.<sup>51</sup>

In fact, most photographers shared some version of the “photographer as director” concept.<sup>52</sup> The photographer is not only the actuator of the image, but produces an intended or deliberate vision. From the newest and most digitally native photographers to the most experienced and celebrated, some who still work only in film, photographers describe what they do as unique and notable. They focus on what they do with cameras, not on the products of picture taking.<sup>53</sup>

Lee Crosson and Ali Campbell are young photographers with substantial time and experience making photographs and with aspirations to eventually make a living doing so full-time. Both are world travelers and use their photography to share those travels with others. To both Lee and Ali, the diverse beauty of the world and its vastness is one of the challenges of being a photographer. Lee says that he thinks often how “a photographer’s job is to crop the world, and prioritize . . . a certain set of images or an image in what is an infinite degree of, or an infinite number of perspectives, . . . it’s more what a photographer leaves out than what they include.”<sup>54</sup> Ali offers a similar account that is more overtly political. As she says below, she worries about the lack of visual literacy in context of the accumulation of photographs on the Internet and the unspoken cultural forces that shape what we see and what we don’t see in photographs.

[T]here’s this crazy proliferation of visual media, and I think a lot of people have this kind of antagonism, where it’s like, “This is a photographer,” “This is not a photographer,” and for me, . . . I think it’s really good for people to be creating, I think by and large, . . . photography is such a fantastic thing, [be]cause it encourages people to notice other things around them . . . that we’re trained not to, right? Like everyone’s constantly on their phone, constantly listening to music, [so] there’s not this propensity to . . . [think], “That’s really beautiful, I wanna take a picture of that.” I think it’s really nice that [the availability of cameras] gives people an automatic mechanism for doing that. I do think as well [that] . . . we don’t have much visual literacy . . . [in] understanding what photos mean, . . . how they’re taken, or how to interact with them.<sup>55</sup>

Ali draws a distinction between *taking* photographs, as most of us do, and *making* photographs, which is how all the photographers I interviewed characterized

51. Interview with “Esther” in N.Y.C., N.Y., Tr. at 6 (Sept. 22, 2017). Some of the photographers we interviewed requested anonymity, which is why this photographer is given a pseudonym.

52. *Burrow-Giles*, 111 U.S. at 61 (describing photographic authors as “superintend[ing] the arrangement . . . form[ing] the picture”); see also HIRSCH, *supra* note 27, at 88 (describing Napoleon Sarony as a “modern-day director”).

53. JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS AND EVERYDAY INTELLECTUAL PROPERTY* 67 (2015) (analyzing more diversely stratified data and drawing a similar conclusion).

54. Interview with Lee Crosson in Arrowsic, Me., Tr. at 11 (Dec. 24, 2016).

55. Interview with Ali Campbell in Bos., Mass., Tr. at 20–21 (Feb. 4, 2017).

their practice. When a photographer makes a photograph, they deliberately render the image from a particular perspective, with particular tools, making choices about composition and arrangement. This is the *Burrow-Giles* story, identifying the origin of the photograph as the photographer and not the machine or nature. It also tracks Ali's story in the above quote where she distinguishes photographs made by artists ("This is a photographer") from those taken by amateurs ("This is not a photographer").<sup>56</sup>

When Ali's says her account as described above is less "antagonis[ti]c"—less hierarchical in her view of what makes someone a photographer—she appears to embrace the possibility for other people who may not be considered "photographers" to experience unappreciated beauty around them and document it. But then she also below describes the ethical implications "photographers" should consider when making pictures because the proliferation of picture-taking renders "ordinary" the resulting images that circulate so easily today.

[W]e get so much of our information and so many of our views about the world around us . . . predicated upon the images that we see . . . that comes from a certain perspective, and . . . there's motives behind how this information and this knowledge is produced. I think it's the same way with photos, right? . . . [T]here's not this kind of understanding that this means something, [that] I should be critical of this, or [that] I should understand this in a certain way . . . . [W]hen people take images[,] . . . frame it their particular way, . . . put seven filters on it, and share it [with] . . . particular captions and hashtags and things like that, I think people can do it in their own right, but I don't think they necessarily have the same understanding of, "This is what others are doing, . . . ?" [They think] "This is my own feed," and then looking at others, [they're not thinking] "they're going through the same process, I get this," . . . for so many this is especially [the case with] photojournalism and news photography, but I think people don't necessarily understand the link between "OK I'm going out, and I'm taking a picture of my coffee," . . . and [connecting that to] "what is the relationship between that process and then what's happening in Syria," or "what's happening in this other part of the world," right? [H]ow are those parallel, and, . . . you know, you're making choices about what you're sharing . . . . There's just so much horrific content out there, and I think so much of it is click bait, and people are like, "atrocious footage to share," [or] "Terrible news story to share" . . . and . . . obviously, there's really horrific things that are going on, that we have to . . . grapple with, and fight against, but also I think culturally, we think in such binary terms, . . . "Everything is awful now," or "Everything is good now," and that's not how the world functions, right? [T]here's nuance in everything.<sup>57</sup>

For Ali, the photographer's task communicates that nuance and shares responsibility for it. Lee confirms that goal in his explanation of the selectivity of

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56. *Id.* at 20.

57. *Id.* at 22–23.

each photograph in “crop[ping] the world.”<sup>58</sup> Making photographs focuses the photographer’s attention (and hopefully its audiences) on the many ways that images can be rendered to shift or make new understandings. To these photographers, making photographs is not “mere[ly] mechanical” but is part of a larger conversation they are having with and about their world.<sup>59</sup> Being a photographer has an ethical component one learns through concerted practice over time.

The conflict animating the photographers’ accounts of “originality” does not yet justify the right to prevent copying their photographs. But it explains how they add value to culture. Like the reasoning in *Burrow-Giles*, these photographers draw distinctions between copyrightable photographs and ordinary ones based upon pre-shutter activity and the skill and experience a photographer incorporates when making photographs from the surrounding world. Notably, the antagonist in the *Burrow-Giles* story is not the pirate who copies without asking to rob the artists of expected income, but the machine that minimizes human input and individualized reflection. By contrast, contemporary photographers embrace their machines and are not threatened by their availability. But these photographers do worry that the ubiquity of photographs and photographic equipment may dull the effect of the nuanced, novel, and critical perspectives that photographers work hard to produce to benefit cultural diversity and critique.

*Burrow-Giles*’ open question about copyright protection and automated image-making (“ordinary” photographs) narrows the holding to photographers who, like Sarony, are extraordinary in their fame and artistry. Contemporary photographers are not likely to accept the logical end of this argument: that some photographs produced by photographers are left unprotected. Photographers appear to consider creative choice as inherent in the act of making pictures even if the weight of the photographers’ accounts focuses on connecting skill, experience, and developing artistry with the protection of a photographer’s output. The problem of “ordinary” photographs is not their lack of authorship, but the imperceptibility of their creative and expressive aspects in light of the over-determined perception of their depiction of reality. When photographic skills of rendering become invisible, as they are in ordinary photographs, audiences become uncritical.

Like *Burrow-Giles*, contemporary photographers appear to privilege the original photograph over the ordinary one for its stimulating effects and its reflection of skill and expertise. But this doesn’t explain photographers’ unilateral protection of all photographs. In fact, most photographers consider a third-party’s desire to reuse, reproduce, and further distribute even an “ordinary” photograph in its original form sufficient evidence of its originality and value and thus its protectability.<sup>60</sup> In other words, verbatim copying is a per se copyright infringement. This is a version of the “if value, then right” argument that copyright law generally

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58. Interview with Lee Crosson, *supra* note 54.

59. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

60. See discussion *infra* Section II.B.1.



rejects in light of fair use and extensive statutory limitations.<sup>61</sup> And yet, in *Bleistein v. Donaldson Lithographic Co.*, the Court relies on a version of this argument to dispose of the aesthetic hierarchy around which the logic of *Burrow-Giles* revolves to dramatically expand copyright protection.<sup>62</sup> Despite *Bleistein's* synergies with contemporary photographers' explanation of aesthetic value, *Bleistein's* simultaneous flattening of the originality standard and broadening of copyright eligibility disrupts contemporary photographers' accounts of artistry and skill as the defining contours of their profession on which a market for their work depends.<sup>63</sup>

## II. BLEISTEIN V. DONALDSON LITHOGRAPHIC CO. AND COPYRIGHT AS CURRENCY

As in *Burrow-Giles*, the *Bleistein v. Donaldson Lithographic Co.* Court faced the expansion of copyright subject matter as a result of technological evolution. *Bleistein* concerned a dispute between competing copiers: Bleistein, the president of Courier Lithographic Company who designed and mass-produced the circus advertisements in question for Great Wallace Shows, and Donaldson Lithographic Company, who made further copies of the same posters.<sup>64</sup> Mass produced advertisements, such as those for circuses, did not obviously promote progress of science and the useful arts. And the business of mass-reproduction, like lithography, was sufficiently competitive to question the need for copyright incentives to promote the business further.<sup>65</sup> And yet the story the case tells was not the role of copyright in battle over marginal pricing of copyrightable goods, or even the benefits of such competition for contemporary consumers. It is the democratization of authorship and rejection of copyright elitism in the age of diversifying tastes at the dawn of the twentieth century.

### A. Leveling Copyright for the Crowd

*Bleistein* could have been a story about the virtue of first in time: the Courier Lithography Co. (the plaintiff) first made and reproduced the circus advertisements.<sup>66</sup> Donaldson is the second-comer, trading on the first-mover's investment in design and engraving. This could have been a story about investment-backed expectations and priority, a familiar justification for property rights balancing respect for initiators with the importance of fair competition to a diversified and affordable marketplace.<sup>67</sup> Instead, the Court's account of the dispute

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61. Rochelle C. Dreyfuss, *Expressive Generosity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405 (1990).

62. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

63. See *infra* Section III.

64. *Bleistein*, 188 U.S. at 248–49.

65. *Id.* at 249.

66. *Id.* at 248.

67. Lawrence Berger, *Analysis of the Doctrine That "First in Time, Is First in Right,"* 64 NEB. L. REV. 349 (1985).

between the two lithography companies turns on the question of whether copyright law was ever intended to protect “tawdry pictures” or “mere advertis[ing]” given the constitutional prerogative of promoting the “progress of science and the useful arts.”<sup>68</sup>

The Court concluded by extending the privilege of copyright to advertising content and refusing to limit copyright to illustrations connected with the fine arts.<sup>69</sup> First, the Court extends *Burrow-Giles*’ reasoning about the central role of rendition, intentionality, and personality for copyright protection:

[T]he plaintiffs’ case is not affected by the fact . . . that the pictures represent actual groups . . . [and may have been] drawn from . . . life . . . . Others are free to copy the original. They are not free to copy the copy. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity . . . and a very modest grade of art has in it something irreducible, which is one man’s alone . . . . There is no reason to doubt that these prints in their ensemble and in all their details, in their design and particular combinations of figures, lines, and colors, are the original work of the plaintiffs’ designer.<sup>70</sup>

As in *Burrow-Giles*, creating new images based on real people in the world does not bar copyright protection. Copyright authors make “copies” of the world embodying their “personal reaction . . . upon nature,” which “always contains something unique.”<sup>71</sup> Whether the authored copy is a photograph or an illustration, if the author is reacting to the natural world and not to another copyrighted work, the copy will always contain “something irreducible, which is one man’s alone” and thus protectable as “original” under copyright law.<sup>72</sup> *Bleistein* thus extends *Burrow-Giles*’ originality standard by implying that *any* human reaction upon nature will be original because personality is distinctive. This includes not only those intentional renditions, such as Sarony’s photographic portrait, but arguably anything labeled “art” made by humans, such as the circus illustrations.<sup>73</sup>

Second, the Court responded to defendant’s argument that the advertisements, even if original, are of insufficient “artistic merit, . . . value and usefulness to be entitled to copyright.”<sup>74</sup> Whereas the first argument responds to the scope of originality, this second argument is constitutionally grounded in the meaning of “progress of science and the useful arts.”<sup>75</sup> Although Justice Holmes

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68. *Bleistein*, 188 U.S. at 250.

69. *Id.*

70. *Id.* at 249–50.

71. *Id.* at 250.

72. *Id.*

73. *Id.*

74. *Id.* at 244 (defendant’s argument in *Bleistein* preceding the opinion in the U.S. Reports).

75. See Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 330 (2017) (offering a revised account of *Bleistein* as disconnecting the low originality standard in the name of personality from the importance of aesthetic neutrality to promote commercial markets, the latter of which has become the measure of progress).

does not cite *Burrow-Giles*' distinction between copyrighted works and "ordinary" productions, he refutes the contention that "ordinary posters are not good enough to be considered" within copyright protection.<sup>76</sup> Ordinary posters in this situation refer to advertisements and other illustrations *unconnected* to the fine arts. The dissent echoes the defendant's position that the popular and consumer-oriented nature of the work—its function as an advertisement—prevents it from being "promotive of the useful arts, within the meaning of the constitutional provision."<sup>77</sup> But Holmes, writing for the majority, disagrees.

Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use,—if use means to increase trade and to help make money. A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement . . . . 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. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt . . . . That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.<sup>78</sup>

The anti-hierarchical and populist sentiment in this passage is laudable in principle.<sup>79</sup> It reflects the reasoning of Holmes' famous dissent two years later in *Lochner v. New York*, in which he castigates the Court majority for striking down New York's fair labor laws on the basis of a policy disagreement with the New York legislature.<sup>80</sup> There, Holmes argued that when a reasonable disagreement exists concerning the judiciousness of legislative line drawing, judges should defer to the democratic process absent a clear violation of the Constitution.<sup>81</sup> In *Lochner*, Justice Holmes wrote the following:

It is settled . . . that . . . state laws may regulate life in many ways which we . . . might think as injudicious . . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing

76. *Bleistein*, 188 U.S. at 251 (emphasis added).

77. *Bleistein*, 118 U.S. at 252 (Harlan, J., dissenting).

78. *Id.* at 251–52 (majority opinion).

79. As Barton Beebe writes, it is also a "tendentious" finesse of the statutory language approved by a democratic majority in Congress that confines copyright to "pictorial illustrations or works connected to the fine arts." Beebe, *supra* note 75, at 363.

80. *Lochner v. New York*, 198 U.S. 45, 64–65 (1905).

81. *Id.*

views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>82</sup>

Holmes' dissent in *Lochner* is famous for its judicial humility: legislatures (democratic government) not judges should decide questions of policy.<sup>83</sup> At a time when judges (especially Supreme Court justices) struck down welfare-enhancing laws further distancing elite judges from the people the laws govern, Holmes resisted this tact and infused his decisions with democratic principles, including those about copyright.<sup>84</sup> In *Bleistein*, Holmes stretches the meaning of the copyright statute covering "only pictorial illustrations or works connected with the fine arts" to reach circus advertisements.<sup>85</sup> He does so apparently to honor everyday, common creations and their authors as promoting the constitutional progress prerogative.<sup>86</sup>

Together, Holmes' opinion in *Bleistein* and his dissent two years later in *Lochner* celebrate the role democratic majorities play in regulating everyday life at the expense of judicial authority.<sup>87</sup> In *Bleistein*, "ordinary" illustrations should not be deprived copyright status precisely when (and perhaps also because) "they command the interest of any public," and especially not in this case when "their success [was] shown by the desire to reproduce them" thousands of times.<sup>88</sup> Holmes declares that "progress" according to the Constitution's intellectual property power should be interpreted flexibly to reflect the will of the people.<sup>89</sup> In *Bleistein*, the people's will was reflected in market preferences and Holmes' broad statutory construction.<sup>90</sup> In the age of mechanical reproduction with cutthroat competition for copying services and when mass-production threatens to erase individuation, democratic decision-making and populism characterize the hero and elitist judges are untrustworthy antagonists. This is declared against idealistic background assumptions of a functioning democracy responsive to unfair labor practices

82. *Id.* at 75–76.

83. *See, e.g.*, Rebecca Brown, *The Art of Reading Lochner*, 1 N.Y.U. J.L. & LIBERTY 570, 573 (2005).

84. *Compare Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting), *with* *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 250–51 (1903) (Holmes, J., writing for the majority).

85. *See Bleistein*, 188 U.S. at 250 (in citing relevance of Act of 1874, ch. 301, c. 3, noting that "in the construction of this act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts."); *see also* Beebe, *supra* note 75, at 363 ("Present-day accounts of *Bleistein* . . . celebrate his declaration later in the opinion that judges should not impose their own aesthetic standards when deciding copyright cases, but they omit the fact that this is precisely what he did in his highly tendentious statutory interpretation.")

86. Beebe points to the irony of Holmes' deference to legislative judgment at the same time as he appears to be rewriting through broad interpretation the provision of the Copyright Act at issue. *See* Beebe, *supra* note 75, at 363.

87. *Compare Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting), *with Bleistein*, 188 U.S. at 250–51 (Holmes, J., writing for the majority).

88. *Bleistein*, 188 U.S. at 252.

89. *Id.* at 251.

90. *Id.* at 252 ("[T]he taste of any public is not to be treated with contempt.")

(*Lochner's* wage statute) and market opportunities for creative work (*Bleistein's* interpretation of progress guiding copyright law). The photographers in today's age of digital reproduction challenge those assumptions and tell a different story.

*B. Inclusive Authorship, Exclusive Business Practices*

As we will see below, photographers consider non-discriminatory aesthetics important for promoting photographic (and other artistic) practices. They agree that judges should not be deciding what is worthy of copyright protection as a function of beauty, form, or style. As described above, oftentimes making photographs reflects specific and unique personal circumstances of each author's practice. Holmes left the judgment of aesthetics to the commercial market by preserving the default that copyright covers all minimally creative works. Photographers embrace this default by espousing the benefits of business-to-business norms that mandate payment for reproduction and distribution as the basis for attributing value to and reward for photographic labor, service and works.

Photographers part company with *Bleistein* concerning the case's implication for broad copyright infringement liability. This breadth potentially obstructs the development of aesthetic practices and with it the virtue of the everyday author's chance to develop personality and distinctiveness. Photographers distinguish between three dimensions of photographic practice relevant to *Bleistein's* holding regarding aesthetic progress and copyright: (1) the creativity of a photograph, which they think law has no business assessing, (2) aesthetic borrowing and stylistic influencing through practices of resemblance and imitation, which they think the law has no business obstructing, and (3) verbatim copying and reuse, which they think copyright law is supposed to constrain.

The first principle accords with *Bleistein*, the last two remain contentious in copyright doctrine today.<sup>91</sup> Photographers describe aesthetic borrowing and stylistic influences as central to the development of both photographic skill and aesthetics. *Bleistein* does not speak to the scope of copyright protection beyond the dispute concerning the reach of fine arts and pictorial illustrations to advertising. But insofar as *Bleistein* establishes broad copyright protection, including of "ordinary posters," it not only protects copyrighted works from exact copying (as was the case in *Bleistein*) but also from being imitated in style or content. Holmes says "others are free to copy the original. They are not free to copy the copy," implying that avoiding copyright infringement requires reacting to the original source of inspiration (nature and real life) and not to other works of art.<sup>92</sup> This poses a problem for

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91. As will be discussed, imitation and borrowing even for the purposes of developing skill or making other art may be copyright infringement if substantial similar copies or derivative works are made and no exception or limitation to copyright infringement applies. Verbatim copying and reuse is often copyright infringement, but sometimes it is fair use. *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526 (9th Cir. 1992).

92. *Bleistein*, 188 U.S. at 249.

photographers who demand protection from verbatim copying but refuse or resist the idea of copyright liability for works that are influenced by or stylized after other works. Making photographs in the style of Ansel Adams or Annie Liebowitz, for example, is partly how photographers develop skills critical for professional success. Verbatim copies, however, are always copyright violations. Exact copying, reusing and distributing the photograph in the way viral reuses of photography occur today violates professional norms, inflict harm (they say), and should be actionable under copyright law.

Herein lies a paradox embedded in contemporary photographers' story of creativity and copyright with origins in *Bleistein's* democratic principles. On the one hand, the photographers describe the importance of a diverse, non-hierarchical aesthetic to facilitate the making of creative work by defining "original works of authorship" broadly. On the other hand, they tout the importance of professional status and promote an alternative hierarchy by distinguishing between photographers on the basis of the investment of discipline, time and skill to justify an ownership interest that protects economic rights in certain kinds of copying. *Bleistein's* story of democratized copyright explaining how authorship is open to all merges copyright scope (defining "original works of authorship") with protection against infringement (defining "unlawful copying").<sup>93</sup> This conflation may have been irrelevant to *Bleistein's* reasoning from its facts, explaining why it was left unexamined in the decision.<sup>94</sup> The photographers, however, insist on a distinction precisely to preserve certain hierarchies central to their professional wellbeing. Anyone can be an author—even amateur photographers are authors. Developing and claiming authorship is a function of distinctiveness in a crowded cultural and market-oriented society. But only those uses of photographs to which professional photographs are put require payment (e.g., licensed reuses in specified outlets). In other words, photographers do not judge the aesthetic merit of photographic works—authorship is open to all—but payment for using an exact copy of an authored work follows from the observation of professional norms and status. In the photographers' stories, there are masters and apprentices, and one moves from one to the other on the basis of market success, as well as skill, practice, and reputation.

Contemporary digital photographs supply two story elements missing in *Bleistein*. One concerns the importance of sustainable work practices, requiring freedom to make photographs without restriction on borrowing and stylistic influence and regular demand for production. Second is the stability of institutional hierarchies defined by investment of time and development of skill (e.g., the difference between amateurs and professionals) along with the control professional

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93. This is a common elision in intellectual property and subject to much criticism. See Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2230–31, 2268 (2016).

94. Because defendant made exact copies in *Bleistein* and directly competed with plaintiff's market in those copies, the need to disentangle subject matter (what is protected) from infringement liability (how is it protected) was unimportant.

status provides (ownership and avoidance of work-for-hire arrangements). The photographers insist upon both to sustain their creative autonomy and business leverage. Corporate consolidation and the development of distribution platforms such as Getty Images or Time Inc. have weakened photographers' bargaining power and destabilized their business models. Declaring all authors equal in view of copyright eligibility, and relying on raw commercial value as a measure of progress, Holmes missed an opportunity in *Bleistein* to connect the promotion of creative praxis with industrial organization that promotes fairness in labor standards and opportunities for capital accumulation for workers.<sup>95</sup> To some, this was a mistake that dashed the hopes of writing American pragmatist aesthetics into U.S. copyright law by privileging "the 'commercial value' of works, creative products, aesthetic objects" instead of "the 'personality' of work, creative practice, aesthetic subjects."<sup>96</sup> Indeed, contemporary photographers engage this critique without knowing *Bleistein* and its legacy. In their accounts of sustainable photographic practices, they describe personality as a feature of aesthetic progress enabled as a matter of authorship, of which economic rights are a subset, reserved for those few works that demonstrate value in the marketplace as photographs. They also complain about a digitally networked culture and marketplace that devalues personhood and labor justice under the banner of access and a level playing field. One implication of the photographers' accounts is that the problems and pitfalls of copyright law since *Bleistein* (relating to the "destabilized and overextended"<sup>97</sup> originality standard and its relation to "progress") may improve with attention to the condition of capital accumulation and industrial transformation affecting the business opportunities and aesthetic practices of professional photographers in the age of digital reproduction.

### 1. *Verbatim Copying*

Professional photographers describe how verbatim copying of their work requires permission and payment for two reasons. First, the exact replication of their photograph appropriates their identity and distinctive contributions. Second, as an embodiment of their efforts, the photograph's tangible transferability conveys value for which payment should be rendered, payment that photographers believe necessary to make a living. Facilitating both permission and payment by controlling verbatim copying is therefore (to them) essential to the production of skilled photography in its diverse forms. Whether or not freelance, the photographers describe their creative practice and financial well-being as relying on a functioning market in professional photography services and products, with paying customers or clients who respect contract and copyright. This requires recognizing

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95. This is a curious oversight in *Bleistein* given Holmes' *Lochner* dissent two years later favoring labor regulation that benefits workers and would have promoted equality in labor negotiations and the fairer distribution of capital based on time and skill.

96. Beebe, *supra* note 75, at 351.

97. Hughes, *supra* note 12, at 388.

professional status, preserving established business norms, and demanding conformity in business expectations among newcomers.

Ashok Sinha is a commercial photographer with a growing fine art practice.<sup>98</sup> Photography as a business is his second career (the first was marketing and sales). And yet despite coming to professional photography late, and without formal training, his accounts of professional norms and aesthetic practices resonate with most of the photographers interviewed. When asked about his reaction to the copying of one of his photographs for the purposes of transforming it into another medium, for example from photography to painting, he gave the following response.

I'd be like, "Wait a second, . . . you had to get permission from me first, to make your work." Because at the end of the day, even if they're saying they're not doing it for commercial purposes, it is commercial . . . [S]o I think there has to be some sort of permission there. Just like when I photograph something with a picture or painting in it, if I have to commercialize that picture, right, I have to get permission from the copyright holder. So to me that is, again, I come back to it, that is the most important thing is what I have inside of me.<sup>99</sup>

Ashok clarifies the norms he hopes guides the practice of reuse:

I think commercial use, . . . people taking my work[] and claiming it to their own[], would bother me the most. That would . . . most . . . annoy me, and make me very mad. Whether commercial or non-commercial. Simple cheating. [laughs][.] [T]he second thing would be obviously usage, like if I were to find an image that was used for something that it was not intended for, and I never got compensated for it . . . [b]y that client. [That] would really bother me.<sup>100</sup>

This explanation articulates three harms of verbatim copying. The first is the injury caused by the pirate who copies and sells the image claiming it as his own. This most resembles *Bleistein's* facts, as the lithography companies were selling the same image but only one company was its author and owner.<sup>101</sup> This injury combines emotional and commercial injuries from unfair competition. The second is a breach of contract or trust between photographer and client when services are rendered and images licensed for specific purposes and the client reuses the image in other venues and fails to pay the extra fees. Although this is a transaction anchored by copyright's exclusivity in the photographic author (with the right to transfer that exclusivity for limited purposes to licensees), the injury here is the contractual breach based on unauthorized reuse of photographs. The copying per se is less what hurts than the fact the client broke its promise to the photographer. This is about economic loss too, but the account highlights the offense of

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98. Interview with Ashok Sinha in N.Y.C., N.Y. (July 10, 2017).

99. *Id.*

100. *Id.* at 24.

101. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903).



disrespecting an agreement between professionals. The third harm from verbatim copying concerns the emotional distress (and not the economic loss) of using a photograph without permission. Photographers describe this as an act of erasure and also of disrespect. When Sinha emphasizes that “again, I come back to it, that is the most important thing is what I have inside of me” he is referring to the creative expression embodied in the photograph that represents his personality, which he believes should not be appropriated without his permission.<sup>102</sup>

As to this last point, the photographers were remarkably consistent. Copyright law may be fraught with complexity and inconsistencies, but to them the one sure thing copyright accomplishes is connecting the photographer to the photograph. Most photographers adhere to this principle even in the context of a photograph to which they may not be particularly attached personally, aesthetically or commercially, as with event or wedding photography.<sup>103</sup> Josh Silk, an event photographer in New York, explained it this way:

Silk: “It’s important [I retain copyright] because it’s just always, it’s the school I come from. I come out of that school of thought of like, once you create, you created that image. If you weren’t there with your camera, you know, making something happen, or documenting that moment, it wouldn’t exist. So therefore it becomes that photographer’s image, from the second the shutter is pressed.”

Q: “So is it . . . the symbolic meaning that’s associated with it, or is it for practical uses that you want to make with these images[] that . . . means retaining the copyright is important?”

Silk: “In the instance of event photography, I think it’s symbolic. It’s just what it stands for. I’m not gonna give you this for free, and you can say it’s yours. That has . . . not only monetar[y] [value], but [also] has value in terms of being the creator, you know? If . . . you’re the creator, that’s what being an artist is all about, is being the person that’s creating stuff, and when somebody takes your creation and puts their name on it, and says it’s their creation, that kinda takes the creator aspect out of the equation, which is kind of futile, I guess.”<sup>104</sup>

Photographers fight against different forms of erasure: their identities as artists embodied in their aesthetic creations; and their labor and investments, as embodied in the payment for their time, skill, and photographs. Unauthorized verbatim copying involves all of these erasures.

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102. Interview with Ashok Sinha, *supra* note 98.

103. There was a variation on how photographers sought attribution in the commercial realm. Some didn’t want the clients bothering them with permissions in the future, and thus initial contracts for services and the photographic license were drafted broadly to cover all future uses of the photograph and payment was determined accordingly. In these cases, the photographers still retained their copyright, however. Most photographers also still sought attribution for the future uses of photographs, although one commercial and portrait photographer said he did not care about attribution for certain uses that were strictly corporate.

104. Interview with Josh Silk, Silk Studios, in N.Y.C., N.Y. (June 26, 2016).

Photographers speak in stark terms about the expectation that payment should follow from verbatim uses of their images. One long-time editorial and fine art photographer describes the usage of her work as the “unit of currency.”<sup>105</sup> She explains that when other professionals fail to pay for the use of photographs, for example as illustrations in research presentations or in books or articles, it is “because [they] do[n’t] come from an industry where you get paid for that kind of work. Like that kinda work is just incidental to the profession, whereas in photography . . . [it is not] . . . . I think because that was our unit of currency. Usage rights are the unit of currency in photography. Not the audience. We . . . want an audience, but the ticket to see the show is the usage fee.”<sup>106</sup> This same photographer elaborates with an analogy to consumer products such as perfume and pie:

[T]his new generation that grew up on Flickr think that every photograph [is for the taking] . . . . As long as you give attribution, and you don’t make any money on it . . . . [I]t’s just like you’re a baker, . . . you . . . don’t . . . [ever] question [the business model], [but] . . . where photography fits into people’s idea, it’s [as if photographs] they’re almost like perfume, like why are you wearing that perfume if you don’t want anyone to smell it? Are you gonna charge [laughs] me to smell it? It’s just there . . . photography is like that . . . . People perceive that of photography, whereas if you’re making pies, it’s more like, well, sometimes people make pies to give, and sometimes people make pies to sell . . . .<sup>107</sup>

Interestingly, this photographer still largely only works with film photography, resisting digital photographic practice except for assignments with media companies who insist on it. She has such strong feelings about the injury of verbatim copying in the digital age, its erasure of physical labor and of the value photographers create with their work, that she confines her practice making photographs to material that erect physical barriers to mass reproduction that she believes devalues photography as a skilled profession.

Another professional photographer, Lou Jones, has been a photographer since the 1970s and maintains a very busy commercial practice with a staff of assistants.<sup>108</sup> He also pursues editorial photography, largely funded by his commercial work. He echoes the above-described concern about verbatim copying, specifically addressing what he sees as the paradox of non-payment accompanied by a shared belief in the photograph’s intrinsic value. Photographs are everywhere, he says, implying their desire and need, but price of use has diminished if not evaporated.

Jones: [Being a photographer in the 1970s] was such a scummy way to make a living, but then it changed, you know, the TV, there’s photographers . . . for the Sports Illustrated swimsuit thing, there’s photographers at National Geographic, . . . it evolved, it was a steady

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105. Interview with “Linda” in N.Y.C., N.Y. (Nov. 30, 2016).

106. *Id.*

107. *Id.*

108. Interview with Lou Jones in Bos., Mass. (Nov. 10, 2016).

evolution, but the photographers started to get a little more of a cachet. [But] . . . the thing that nobody talks about, that I continually talk about . . . is that we are in an era . . . [when] photography continues to have a stranglehold on the premier way of communicating in the world. It is the universal language. People do not have to be able to speak your language to be able to see a photograph, and to be able to communicate, and we use it in every computer, . . . every newspaper, every magazine, every brochure, we are inundated with photographs. [I]f somebody has a fire in their house, the thing that they're most wor[ried about is], "we've lost all the family photographs." They are being produced at a rate higher than ever in history, and nobody wants to pay for them. So that is the bizarre thing that changes our industry. Whether it be stock, or commercial, . . . it's purely a[n] economic sea change.

Q: Yeah. But you still get paid, right? Not to be devil's advocate, but you still can command a price, right? I mean, I'm looking at these pictures. These are extraordinary pictures.

Jones: Rarer and rarer. [It's] [h]arder and harder to get those clients. And the deals we make are . . . less and less, and interesting, yes. We're making [deals that say] "Yes you can use this for this purpose and this purpose, and oh, you wanna use it on the internet? Oh, OK, for another hundred dollars I'll let you use it on the internet." I said, "Well you can use it for a year." [And they say] "No no no, we've got our website, it's gonna be up," you know, "OK, well you can use it, OK, we'll give you two years. We'll give you three," you know, . . . It's like, ugh.<sup>109</sup>

Lou Jones describes how photographic contract terms have evolved in the internet age to benefit clients but not photographers. These contracts traditionally covered day rates (time and labor), equipment and assistants, as well as the limited rights to use the photographs in certain outlets for a particular duration. Now, these same contracts restrict photography budgets, limiting the use of professional equipment and assistants that can distinguish the photographic output, stagnate day rates, and demand licenses for the same fee but for almost all uses, including web and print and for unlimited time. In these commercial contexts, verbatim copies are paid for but their prices have shrunk considerably whereas the labor to produce them has not. Here are two examples from commercial photographers describing the problematic situation concerning contractual negotiations and the market for professional photography arising over verbatim copies.

Stan Rowin, a commercial photographer in his 60s, who was previously a leader of the American Society for Media Photographers (ASMP), describes the dynamic of rights depletion he experienced this way:

That was the first time that Condé Nast came up with a contract that said, basically, we can use [the photograph] for whatever we want in perpetuity online or in print. That's the first generation of contract. I gave it to my

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109. *Id.*

attorney . . . and he said, “Well, you can’t sign that contract.” I said, “I know I can’t sign this contract, but . . . what am I gonna do, call them back and say “I can’t do this, I can’t do this, I can’t do this, I can’t do this?” And he said, “Yeah. That’s what you’re gonna do. That’s what you paid me for, and that’s what you’re gonna do.” So I was dealing with the legal department now, as opposed to the art department . . . . [T]hen I faxed . . . back the crossed-out things, and I got a phone call back, [saying], “I think we can work with you on this.” And I’m saying, “This is too . . . odd. There’s somethin’ wrong here.” So [Condé Nast] wrote me a new contract, without those terms in it . . . . [R]ight after I signed the contract, I never got work from them again.<sup>110</sup>

Media clients do and can demand onerous contract terms because of their market dominance and industry coordination (in contrast to photographer’s relative lack of coordination or unionization as freelancers). In addition to this problem, shrinking photography budgets prevent photographers from recuperating revenue from fees associated with time, labor and skills. It may seem ironic that in the digital age when demand for photographs grows across the multiplying platforms—for social media, websites, mailings, buildings, packaging and print—photography budgets are not growing and usage fees are not multiplying. In the digital age, prioritizing skilled use of equipment and post-production editing (akin to darkroom and printing skills in the film era) permits one to distinguish oneself as a photographer. Photographers expend this time and labor as a measure of quality production, but they struggle to recuperate the costs from the client.

Carl Tremblay, a Boston-based commercial photographer with a focus on food photography, describes the shrinking budgets in relation to lower quality photographs:

You know, because . . . whatever the budget they have, they’ve been getting smaller, they wanna make sure they’re gonna get what they want, and I think advertising agencies have become mindful of their relationship with their clients, the same that we are with them, so they are willing to cede a little more control to the client, instead of saying, you know, “You hired us. We’re the creative agency.” The digital realm I think has brought “I believe that it’s good enough.” You know, there’s so much more content out there, and people are satisfied with less, I think. And that directly impacts budget[s], and [explains] why [people will] pay less. And I’ve seen budgets just decrease and decrease, and . . . once they pay less, why would they pay more[] for something?<sup>111</sup>

Tremblay combines in his account an understanding of how photographers lose control over aesthetics in the digital age with the shrinking budgets for producing photographic images. He describes a vicious circle: budgets reduce, clients are more certain in their demands, control over aesthetics transfer from

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110. Interview with Stan Rowin in Bos., Mass. (June 28, 2016).

111. Interview with Carl Tremblay in Bos., Mass. (Sept. 8, 2016).

photographer or advertising agency to client, the quality and nature of images widen as photographers bring less personalized skill and attention to the deliverable images. This changes the expectations for photographers' deliverables (he says downgrades) reducing the prices people will pay and further shrinking budgets.

According to many photographers, despite digital consumption of images growing in volume and pace, the photographers' time, labor and equipment costs have not appreciably decreased and in some aspects have actually increased with the need to edit and curate so many more digital images. Thus, in bespoke negotiations over session fees, day rates, usage fees and production costs, with budgets shrinking and clients demanding more usage, photographers' fees shrink relative to the costs associated with production, resulting in an apparent devaluation of each unit (the photograph) that the photographers' licenses. Some photographers call it a downward spiral, whereas others, like Tremblay, describe the problem as a vicious circle. Whatever the causal relationships between revenue, image quality, volume of images produced, and consumption across multiplying platforms, photographers experience waning leverage in these one-to-one negotiation with clients. Moreover, the copyright dimension of this leverage—the fact they retain copyright and can relicense the use of the photograph in the future if the copyright transfer is not overly broad—remains insufficient to protect photographers against the shrinking budgets despite growing demands.

These accounts distinguish various forms of value: making photographs for a client (a bespoke service dependent on skill and experience), the role of photographs in culture, and photographers' individual authorship. According to the photographers, copyright and contract are the mechanisms by which these values are recognized and protected, albeit in loosely understood legal terms. Copyright anchors the contract for services and output, which memorializes the agreement between professional service and client and is dependent on mutual respect and the assumption of dedication to task and payment. Copyright also enables the photographer to demand attribution and a leveraged price for services and outcomes. In significant ways, this comports with the stories of broad authorship (e.g., the low originality standard) in both *Burrow-Giles* and *Bleistein*—any photograph can be the subject of copyright and contract—and also of *Bleistein's* description of “progress” as determined by evidence of and facilitating more commercial exchanges.<sup>112</sup> But in the context of rapid technological change, photographers tell a story of depleted professional opportunities, ubiquitous verbatim copying, and onerous contract terms all threatening their photographic practices. In contrast with *Bleistein's* story of commercial exchange promoting aesthetic progress told against the backdrop of democratically enacted market regulation, the photographers describe monopolistic and anti-competitive corporate practices that thwart opportunities for diverse market entrants and varied aesthetic output. Technological evolution has increased access to the means of production,

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112. See *supra* Sections I.A. (*Burrow-Giles*), II.A (*Bleistein*).

but copyright law is not necessarily consistent with fair labor regulation, despite its roots in *Bleistein*'s anti-hierarchy sentiment of access and opportunity.

## 2. *Neither Ordinary Photographers nor Ordinary Photographs*

While embracing broad authorship potential, photographers nonetheless prioritize professionally made photographs in terms of economic privilege and aesthetic value. Recall the distinction between “ordinary” photographs in *Burrow-Giles* (left unprotected) and works in *Bleistein* that “always contains something unique” as “personal reaction[s] of an individual upon nature.”<sup>113</sup> Contemporary photographers distinguish between these two kinds of authored works in terms of professional status and investment of time and development of skill. They do not deny the importance of ordinary photographs made by unintentional authors to everyday behavior and communication. These are authored works. But they reject *Bleistein*'s anti-hierarchical principle barring aesthetic discrimination in order to protect a class of professional artists, the demand for their services, and the photographic skills they develop.

Consider Lee Crosson again, an aspiring photographer who is developing his skills and would like someday to make money from his photography work. He says

[i]t would be really nice to be able to make a little bit of scratch from it, to help . . . further travel really more than anything else, but how to do that, I haven't really found a way that's comfortable at this point . . . There're a lot of photographers out there right now. And the definition of a photographer is a complex one . . . when everyone is walking around with a camera in their pocket . . . I think . . . some of my discomfort with attempting to make money at it, when I have tried to, is that I . . . have not invested myself appropriately in order to call myself a photographer, and therefore I don't feel like I have the right yet. I haven't gone through the trials that . . . the professional photographers that I know have gone through . . . [M]ost of the photographers that I know, for instance, all came up with film photography, so hearing them talking about the amount of hours that they spend, . . . the amount of money that they've spent on film, . . . the failures, and . . . getting back home with a roll of film that they were so excited about, and . . . in one way or another, that feeling of loss, and having digital come along, and suddenly . . . having infinity . . . at your fingers, but also seeing the transition, the change of that, and seeing their work that they had worked so hard to craft suddenly being right up against people who are just taking a phone out of their pocket, and clickin' somethin', and maybe getting lucky, maybe not, maybe having a great eye, maybe, maybe not. I feel like just the definition of a photographer . . . [is] a complex one. Even beyond the analog versus digital [distinction], I think . . . it takes time to do anything. Like you [have to] . . . be in something for a while in order to figure yourself out, in order to figure the

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

craft out, in order to figure the market out, [and] in order to figure . . . the community [out]. And I just don't feel like I've been in it long enough.<sup>114</sup>

Contrast Lee's comment with Rick Friedman, a long-time freelance photojournalist based in Boston, who says

[p]eople seem to have a lot less respect for a photograph, 'cause everybody runs around with their iPhone and does it . . . I've actually had people say this to me, "I don't see what the big deal is. It's only a photograph." I've actually had people say that to me. And I have also had people say to me, when we've done a job, "Well your pictures seem to come out better than our staff photographer." Actually, we shot a job at a hospital. And the head [of] communications called me and said, "Your pictures look a lot better than our staff photographer's. Can you explain to him how you do it?" And I said, "I teach workshops. Would love to have him come to one of my workshops. But I'm not gonna get on the phone."<sup>115</sup>

Friedman relayed this story with some sarcasm and incredulity. Why was it so surprising to the client that the result of the in-house photography shoot was not as impressive as the one done by the professional photographer with decades of experience? And why does the client think this skill and expertise can be taught with an explanation rather than years of training? Friedman directed his client to some of the professional development seminars he conducts for established photographers as well as introductory classes for hopeful photographers. He believes in the importance of teaching aesthetic and business skills—he says teaching “forces him to be a better photographer.”<sup>116</sup> And he is successful at both. He sustains a busy freelance photography business in an increasingly competitive marketplace for photographers driven by cheap camera equipment, the ease of photographic reproduction, and the consolidation of media companies, which leads to diminished fees for freelancers. Despite the growing marketplace competition, Friedman distinguishes himself and generates demand for his professional work because his photographs evidence his substantial experience in the field and advanced skills. As an experienced photographer, Friedman commands high prices for his time and photographs.

Another professional photographer describes the importance of teaching the difference between good pictures and “terrific pictures” especially in the digital age when anyone can take pictures with their phone.<sup>117</sup> Felice Frankel is a science photographer, in the vein of Berenice Abbott and Harold “Doc” Edgerton, all of whom explored the physical world unavailable to ordinary vision but made visible through photography.<sup>118</sup> Frankel's photographs, like those of Abbott and Edgerton

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114. Interview with Lee Crosson, *supra* note 54.

115. Interview with Rick Friedman in Bos., Mass. (Sept. 12, 2016).

116. *Id.*

117. Interview with Felice Frankel in Bos., Mass. (June 23, 2016).

118. HAROLD EDGERTON, *EXPLORING THE ART AND SCIENCE OF STOPPING TIME* (James Sheldon ed., 1999).

before her, are mysterious for their revelation of the physical world unavailable to the naked eye and are stunning in their beauty.<sup>119</sup> She also worries about accuracy, staying true to the science she is picturing with her camera, similar to how photojournalists worry about staying true to the events and the people whose lives are being represented.<sup>120</sup> Frankel's interest in digital photography given easy access to cameras is to preserve the integrity of information conveyed through photographs by developing the skills and awareness of those who make and share pictures with digital equipment. This not only distinguishes the photographer, but also the quality of the photograph. She says

I'm now making pictures on my phone . . . because . . . what it does is it takes three pictures, of different exposures, and puts them together . . . . And so I now see that making pictures is democratic, you know? But . . . what I'd like to think is that [pause] you could tell the difference between a good picture, a good-enough picture[,] and a terrific picture. I mean, that's why I'm making this book. I want to raise the standards of what should be demanded . . . of images."<sup>121</sup>

These accounts imply that audiences distinguish between ordinary and stylized photographs but do not appreciate the distinction as rooted in experience and skill. By contrast, photographers assess skill and quality as part of their professional practice. Attending to the process of making photographs—the particular skills, the hard work, and time—is one way photographers help clients and audiences appreciate professional photographers' contributions to visual culture and mass communication.

Photographers describe a range of activities and skills that generate aesthetic style and distinctiveness. Accounts of their photographic practice do not starkly oppose professional and amateur, or stylized and ordinary, but implicit in the accounts is a hierarchy built around these conceptual binaries that justifies market privileges. Here are two such accounts, one from Mark Ostow, a long-time professional photographer with a specialty in portraits and editorial, who also works in the general commercial space, and the other from Kim Lorraine, a photographer on the verge of opening her own portrait studio, who has been moonlighting as a photographer on the edges of her day-job for nearly a decade.

Ostow describes his stylistic distinctiveness in terms of his use of light and work with assistants, all of which has been honed over three decades in his own full-time professional photography practice. He answers a question about how with digital equipment he maintains an edge in the profession:

[Digital camera technology] . . . allow[ed] me to do this project [on 2016 presidential candidates], which meant that we could move the light

119. See generally JULIA VAN HAAFTEN, BERENICE ABBOTT: A LIFE IN PHOTOGRAPHY (2018); FELICE FRANKEL, <https://www.felicefrankel.com/> [<https://perma.cc/FXZ3-GZRH>] (last visited Jan. 18, 2019).

120. Interview with Felice Frankel, *supra* note 117.

121. *Id.*



constantly. I could . . . make something on the fly, . . . a mixture of photojournalism and portraiture. I think I came up with this . . . hybrid thing. And I'm the only person at these events who has an assistant with them, so . . . there were . . . all the other press photographers with all their lenses and two cameras, and vests, [and] they're all like, "I keep seeing this guy. What is he doing?" And . . . I'm like "Anna, Over there. There! There!" And then Hillary [Clinton] turns and . . . I think [my use of light is] unusual. [Bec]ause most people are using light [that] comes from the camera[] or they're using available light in these situations, but I was trying to create a portrait version of reportage. So I wasn't reporting on the event, I . . . felt that they had to come up with something that captures someone speaking in . . . New Hampshire, and I'm like "I'll do whatever the fuck I want."<sup>122</sup>

As compared to working with assistants, hand-held lighting, and blending photographic genres—all of which rely on depth of technical, aesthetic and managerial experiences—Kim Lorraine describes the substantial effort she expends on post-shutter activity editing and curating photographs from a portrait sitting to distinguish her style and add value to her work.

[A]fter the photo shoot, [I am] left with probably . . . two to four hundred pictures, and [I] have to weed through those pictures to find the best pictures. And after [I] weed through those pictures . . . I hand edit every single picture . . . . And that can take anywhere between ten seconds to three minutes, depending on what it is, and what I'm trying to create . . . it's saturation, it's colors, it's contrast, it's clarity, it's shadows, it's highlights, . . . I use Lightroom and Photoshop. Everything goes in Lightroom first, and then if I have to remove [something from] a really nice picture, [like] . . . a garbage can, I will [do so]. Or like [if] someone walked . . . into the frame[] and I can't crop them out, I will remove the person.<sup>123</sup>

Kim Lorraine's explanation of her post-shutter work parallels the developing and printing processes from pre-digital days. Mark Ostow's description of lighting and angle in contemporary photojournalism is also a hybrid of traditional practices with digital technology.<sup>124</sup> Both draw on practice experiences and skill development to explain aesthetic value.

Many contemporary photographers who began their careers in film describe nostalgia for the darkroom. It is meditative work as compared to the energetic frenzy of shooting photographs in the world. Also, in the darkroom (or now when using the computer program Lightroom), photographers can acutely focus on detailed aesthetic qualities of the images they are making. In both settings—in front of their computer or in the darkroom—photographers describe the need for

122. Interview with Mark Ostow in Arlington, Mass. (June 16, 2016).

123. Interview with Kim Lorraine in N.Y.C., N.Y. (June 22, 2016).

124. See MARK OSTOW PHOTOGRAPHY, <https://www.ostow.com/> [<https://perma.cc/D2S6-8HM2>] (last visited Jan. 18, 2019).

intensity of focus, practiced handicraft, and considerable time. More will be said below in Part III about the centrality of hard work (“sweat of the brow”) to photographers’ identification of value as represented through payment and credit. Here, the point is that time and labor, as essential to developing expertise, distinguish the professional from amateur photographer and the stylized from the ordinary photograph. *Burrow-Giles* implies this distinction given the relevance of the fame of the plaintiff to his victory and the narrowing of the holding to composed photographs.<sup>125</sup> *Bleistein* elides this distinction in terms of its leveling of authorship and reducing all aesthetic progress to evidence of commercial exchange.<sup>126</sup> As I discuss below, photographers accept the former account of authorship, when authorship and attendant ownership does not obstruct other authors from pursuing their practice. Photographers resist the commercial account of aesthetic progress when, as described above, it interferes with maintaining professional business standards, including fair pay for skilled professional work. But, as we’ll see below, they also resist *Bleistein*’s commercial account by assuming a more flexible infringement standard that is largely limited to verbatim or substantially similar copying.

### 3. *Creative Freedom and Sustainable Photography Practice*

Most photographers I interviewed insisted on payment for verbatim copies of their photographs. But these professional photographers also accepted as part of photographic practice, aesthetic development, and mass communication that photographs will be used or repurposed as part of artistic and communicative norms. Sometimes, contemporary photographers begrudgingly admitted that copying may be an uncomfortable necessity in the on-going conversation that relies on diverse artistic practices. Other times, they described being flattered by copying of their work when it promoted conversations not only about the subject matter of the photograph but photography itself. Note that it is photographers or other authors who make these kinds of tolerated but unauthorized copies of photographs. It is not clients, from whom payment is expected according to business norms.

The two examples immediately below display broad copying tolerances outside the ambit of verbatim copying (for which photographers usually expect to be paid) and that are perceived to promote creative freedoms and sustainable photographic practice. These accounts demonstrate more flexibility than copyright law allows, describing situations that resemble derivative uses for which copyright law would require permission and payment. By contrast, the last two examples demonstrate less flexibility insofar as the photographers describe critical or transformative reuses that copyright fair use would exempt but over which the photographers nonetheless seek control.

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125. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

126. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

Ashok explains his tolerance for others copying his work in certain circumstances. And like others, he doesn't track how his photographs travel over the internet. He doesn't use reverse image search or services to find unauthorized uses of his work. But of the few uses he did find by accident, he says

there's only a couple of instances I came [across where] I kinda felt a little flattered . . . [T]hey were good artists . . . they took one image of mine . . . said they were inspired by this image, . . . and they took some other image, . . . and I'm like, "All right . . . they're not selling it per se."<sup>127</sup>

From his description of this reuse, his initial photograph was used as inspiration and as raw material for a new work, although his photograph was recognizable as a component part.<sup>128</sup> This practice made sense to him as an artist and he considered the use of his photograph complimentary.

Lee Crosson explains that the unauthorized part of unauthorized copying is crucial to making art, and this is why one must be flexible when it comes to controlling copying. He says

I think it's a question of intent . . . . What is the person trying to do . . . ? In [the] case [of a student using a photograph in a PowerPoint presentation], I would have no problem at all. That would flatter me and nothing else . . . . The thing is that it's not even just making the money. . . . I actually support this . . . [The unauthorized use and the discomfort with it] needs to be there. That's the art. Like we're saying, this is a conversation that needed to happen, and I think this is really the only way that it would've happened.

Q: So what if [the copier] had asked permission and the photographer had said no, and then he went ahead and did it anyway?

Crosson: I think it would make it more powerful art. You know. I wouldn't wanna be that person. But it would make it more powerful art . . . . I don't know what I would say [if asked]. But that would destroy it . . . the conversation goes away . . . . F. Scott Fitzgerald has this great quote that I return to time and time again . . . : "The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function." And I think that's got applications everywhere. So . . . OK, I think it's almost necessary to be pissed about this [unauthorized copying], but . . . at the same time . . . I want to be able to say what I want to say, and when I want to say it, and this is a consequence of it, you know. And the law, . . . is it's impossible for that to be made around one single person, and that is essentially the expectation you're saying, like, "I don't want this to happen to me," but the implications of

127. Interview with Ashok Sinha, *supra* note 98.

128. See generally Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 368–69 (2016) (discussing how transformative standard will allow a "preexisting image" to be considered "component" when "used as raw material, transformed in the creation of new" art).

that not being able to happen I think are far more damaging, and far more wide-reaching.<sup>129</sup>

Without being aware, Crosson's explanation of tolerating unauthorized copying rehearses the "breathing room" copyright law intends to enact through its extensive statutory exceptions and limitations.<sup>130</sup> Copyright law aims to promote free expression at the same time as protect works from certain unauthorized copying and distribution, an opposition of ideas Crosson identifies in his approach to unauthorized copying of his work described above. But both Sinha and Crosson extend their tolerance for copying to derivative works and stylistic similarities, which would typically be outside copyright fair use.<sup>131</sup>

The accounts from both Crosson and Sinha contain an implicit caveat in their forbearance. Sarah Newman makes that caveat explicit when she explains that most forms of copying would be fine unless they were distorting its meaning to ends with which she disagreed.

I think I generally tend to be in a pretty liberal camp for that sort of thing, but I think that there could be definitely situations, especially if I disliked the person, or people that were using them, or what they stood for. Like, for example, if there was a right-wing political campaign . . . that was using it, then I would certainly have a problem with it. In general, I'd really like for people to be enjoying my work, and it makes me really happy when I go to people's houses and I remember that they own a piece . . . and I get to see it. It's nice for the work to . . . live in a place where people are getting to experience it [and] [h]ave their own experiences of it. [W]hat would really bother me[] is if something was ripped off, . . . printed really poorly, and attributed to me.<sup>132</sup>

Many photographers draw the same line. On the one hand, reuse that is mildly transformative (or as Crosson says above, in "conversation" with his work) and thus likely a derivative use under copyright law is nonetheless okay. But reuses that are subjectively offensive in form or content, which may be transformative and thus exempt from copyright, should be under the author's control. Photographers largely agreed with Newman's comment that attribution does not ameliorate an unauthorized reuse that may injure the photographer's reputation as an artist who, for example, uses high quality materials or supports certain social or political causes. Ali Campbell confirms Newman's account saying

I think . . . if someone were to lift my photos and use 'em in . . . a Breitbart news article, I'd be livid, like, right? Because I'd be like, "I don't want to have any association with that." [I]f someone were to do something . . . disparaging[] or really bigoted, I'd be really, really upset,

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129. Interview with Lee Crosson, *supra* note 54.

130. See Pamela Samuelson, *Justifications for Copyright Limitation and Exceptions*, in *COPYRIGHT LAW IN THE AGE OF LIMITATIONS AND EXCEPTIONS* 12, 25–26 (Ruth Okediji ed., 2017).

131. See 17 U.S.C. § 106(2) (2012); H.R. REP. NO. 94-1476, at 1049 (1976).

132. Interview with Sarah Newman, *supra* note 41.

whereas if someone's like, "I included this in a painting," or like "I drew somebody from one of your photos," and like it doesn't really bother me . . . . [Thumbs up]. [B]ecause I think if it's encouraging other people to do creative work, that's good, that's, . . . fine with me.<sup>133</sup>

Photographers describe their relationship to the subject of photographs as critical to the purpose of control over the photograph's circulation and reuse. Ali insists that the subject of her work be respected, referring to the people in her work especially (portraiture).

I try and be really cognizant [of posting on my website] . . . especially because so much of [my work] is portraiture, and like it's not just, "Oh it's like my particular art form," . . . . [T]hese are people with whom I have relationships and interactions, and I feel really lucky to be able to interact with people, and to be able to take their photos, . . . it's such an intimate thing . . . [to] take portraits[] and have people let you do that.<sup>134</sup>

This was a common refrain among photographers who took pictures of people and whose skill and expertise focused on making people comfortable in front of a camera and building trust to have the picture taken in the first place. Stephanie Gomez, a young, aspiring, and up-and-coming photographer in New York City, expressed sentiments similar to the more seasoned photographers. She seeks to preserve the context of her portraiture and documentary work through authorial control to protect her subjects. In light of her youth and relative experience, this consistency regarding professional expectations is remarkable.

I think the only thing that would actually bother me is . . . if they put [my photographs] in a context in which I wouldn't, or my subjects wouldn't like. Obviously, when I shoot, it's really personal, I have to sit down and talk with my subjects a lotta the time, and get to know them as people[] and as friends[] [be]cause that's how I'm really comfortable. When I'm comfortable, I can shoot really good work. And if they use it in a context that I wouldn't like, like say something bad about the individual . . . [t]hen that's when I would be really defensive of my work, because . . . it's almost like defaming art, like it's not cool, and I think that would be my only concern.<sup>135</sup>

In this account, Gomez relates the experience of photography as a process that builds relationships with her subjects and enriches our understanding of lived experience. Many photographers explain the joy of making pictures in this way—enabling an adventure, connecting people to experiences they wouldn't otherwise be able to see or understand—and thus the injury of unauthorized copying is that it demeans the human aspects of the photographic process in the first place. This was certainly true of the photojournalists and portrait photographers. But insofar as most photographs reflect or contain a human story

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133. Interview with Ali Campbell, *supra* note 55.

134. *Id.*

135. Interview with Stephanie Gomez in N.Y.C., N.Y. (June 29, 2017).

in their making or final form, reuses that defile the subject or purpose of that story offend photographic authors. Contemporary photographers emphatically lack tolerance for unauthorized uses when the subject of the photograph and the relationship the photograph helped establish is injured through decontextualization or reuse.

In these accounts, the photographers repudiate *Bleistein's* account of copyright's scope of protection and its purposes. Aesthetic progress requires aesthetic freedom, and *Bleistein's* logic protecting all uses for which some economic value may attach goes too far. Photographers and other authors must be free to borrow, be influenced and influence others' style and vision, and to transform underlying works as part of a conversation about the past and the future. Developing conversations and relationships by being inspired by previous work and drawing upon it is what photographers describe themselves doing. Copyright law with its broad right to prepare derivative works and its flexible but qualitatively complex fair use standard probably restricts more reuses than do practice norms of professional photographers.

On the other hand, photographers appear protective of certain recontextualizations that risk interfering with or infecting the relationship established between the photographer and her subject that was elemental to her work and its aesthetics. It seems not to matter if the perception of interference is subjective and in fact inconsequential to the photographer's future as a working professional. The desecration is personally felt and avoided. Under copyright law, however, these reuses may be critical, parodic or simply transformative and thus permitted as fair.<sup>136</sup> *Bleistein's* view of progress to which copyright aims has nothing to say about this. However, because it is an anchor in the copyright canon, copyright law has ignored self-actualization as a purpose of creativity and authorial attribution as a duty of reuse in the assessment of copyright boundaries.<sup>137</sup>

Photographers embrace the account of pre-shutter activity and post-shutter craft as the mark of authorship, consonant with *Sarony's* originality standard for granting authorship. The photographers further celebrate access to photographic art as a democratic ideal and an opportunity for each person to develop their authorial voice. But to photographers, *Bleistein's* cleavage of personality and progress in favor of commercial exchange as a measure of copyright's benefit ignores the skill, hard work, and experience that endows professional photographers with (to them) justified market leverage and control. Contemporary photographers would defy *Bleistein* and defend hierarchies among their ranks irrespective of the leveling market power copyright endows: they would agree that some photographers justifiably garner higher pay than others and that the personality of

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136. 17 U.S.C. § 107; H.R. REP. NO. 94-1476.

137. Beebe, *supra* note 75, at 394 (imagining a revised regime that excises *Bleistein's* "commodity fetishism—the erasure of authorial labor" and instead "emphasize[s] that cultural production—and culture more generally—does not consist of social relations among works but social relations among people, among personalities, by means of works").

the work should be protected as a matter of authorial respect. At the same time, those same photographers would insist that *Bleistein's* standard that protects all works uniformly and without discrimination threatens the necessity of aesthetic flexibility to sustain photographic practice. Verbatim copying is and should be controlled, on that they agree. But the preparation of derivative works as part of aesthetic call and response is a professional expectation. And so the scope of anti-copying protection would narrow to close to exact copying, if the photographers had their way, and the purpose of protection would shift to promote aesthetic experimentation, professional development and photographic skills. This leads to a direct confrontation with the most recent Supreme Court account of copyright's originality standard and its role in the copyright regime.

### III. *FEIST V. RURAL TELEPHONE SERVICE CO.* AND THE PRIORITIZATION OF WORKS OVER WORK

#### A. *Discrediting Hard Work*

In *Feist Publications, Inc. v. Rural Telephone Service, Co.*, the Supreme Court attempts reconciling competing instincts.<sup>138</sup> On the one hand, protectable copyrightable expression must be “original to the author” (e.g., not the work of someone else).<sup>139</sup> On the other hand, sometimes the outcome of someone else's hard work (e.g., collecting and arranging data) may be copied by others without consequences for copyright law.<sup>140</sup> Harmonizing these principles requires understanding the originality standard as embodying and celebrating the products of intellectual “thought and conception,”<sup>141</sup> which may or may not arise after hard work. Copyright does not protect hard work *per se*. And *Feist* quashes any residual hope that copyright aims to reward the labor of authors.<sup>142</sup> Indeed, the Supreme Court in *Feist* reminds its readers that copyright's primary objective is to “promote the Progress of Science and the useful Arts.”<sup>143</sup> This requires that some work—even work characterized as “sweat of the brow”—be in the public domain and beyond copyright protection.<sup>144</sup>

As already described, contemporary photographers consider hard work, skill, and expertise central to explaining the value they add to the practice of making photographs. One question, then, is whether it is possible to harmonize *Feist's* explanation for rejecting copyright protection in works characterized by sweat of the brow alone with the photographer's accounts that demand payment for services and products made from their labor, skill, and hard work. Another question is

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138. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

139. *Id.* at 345.

140. *Id.*

141. *Id.* at 347.

142. *Id.* at 349.

143. *Id.*

144. *Id.* at 353.

whether from the attempted harmonization we learn how the absence of copyright, despite its risks of uncompensated uses, provides opportunities for developing and growing photographic practices in a rapidly diversifying marketplace. The *Feist* story and the photographers' accounts conflict in their prioritization of labor equity. But their conflict helps shed light on troubling industry practices that copyright alone is unfit to address as well as on possibilities for alleviating constraints on creative productivity.

The 1991 dispute concerns competing publishers of telephone directories, of both white pages and the lucrative yellow pages.<sup>145</sup> Rural Telephone Service was a public utility that by law was required to compile and publish an updated telephone directory, which it funded in part through classified advertisements.<sup>146</sup> Feist Publications was an independent, private publication company that specialized in telephone directories covering a broader geographical area, reducing the need for customers to consult multiple directories.<sup>147</sup> In other words, Feist directly competed with Rural, but Feist typically paid for information it eventually sold, whereas Rural collected and wanted to control the information itself. When Rural refused to sell Feist its database of 7,700 listings in order to maintain a monopoly over that information, Feist copied the listings into its directory anyway.<sup>148</sup> Rural's copyright lawsuit against Feist reached the Supreme Court on the issue of whether Rural's directory information and its alphabetized arrangement that Feist copied without permission was copyrightable expression.<sup>149</sup>

In rejecting the "sweat of the brow" doctrine—which would protect creative work based on skill and labor alone that Rural expended collecting its data—the *Feist* Court reaffirms *Burrow-Giles*' definition of authorship ("[H]e to whom anything owes its origin; originator; maker."<sup>150</sup>) and *Bleistein*'s non-discrimination principle that bars aesthetic judgment beyond "the narrowest and most obvious limits."<sup>151</sup> The Supreme Court acknowledges that some arrangement or compilation of facts would be protectable if that arrangement or selection were "independently created by the author (as opposed to copied from other works), and . . . possesses at least some minimal degree of creativity."<sup>152</sup> But facts themselves do not

owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.

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145. *Id.* at 343.

146. *Id.* at 342.

147. *Id.* at 343.

148. *Id.* at 343–44.

149. *Id.* at 344.

150. *Id.* at 346 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

151. *Id.* at 359 (quoting *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903)).

152. *Id.* at 345.



Census takers . . . do not “create” the population figures that emerge from their efforts; . . . they copy these figures from the world around them.<sup>153</sup>

The Court reminds readers that “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”<sup>154</sup>

By now, we know that contemporary photographers embrace the low originality standard on the principle that every human has the potential to express personality through authorship, even when aided by a machine that records facts in the world. Photographers simultaneously reject the copyright restriction on inspirational and stylistic copying that may be similar or derivative of an author’s work to make room for professional development and flexible aesthetic practices. The copying in *Feist* was neither stylistic copying nor derivative. No doubt, contemporary photographers would consider Feist’s behavior theft.

But the Supreme Court absolves *Feist*, simultaneously blessing factual compilations as copyrightable assuming original selection or arrangement and without judging the aesthetic merits of the directory as such.<sup>155</sup> It further deems Rural’s directory without copyright protection because a comprehensive, alphabetized arrangement of telephone listings (the very characteristics that made the directory itself useful and valuable) lacked any “creative spark.”<sup>156</sup> “The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity. There is nothing remotely creative about arranging names alphabetically in a white pages directory. It is not only unoriginal, it is practically inevitable.”<sup>157</sup>

Here, too, contemporary photographers might agree that some recordations of the real world are so “ordinary” to be left unprotected, harkening back to the distinction in *Burrow-Giles* between intentionally authored photographs and the “ordinary” ones on which the Court deferred analysis.<sup>158</sup> But Rural’s directory was the result of significant time, effort, and expertise, which photographers value.<sup>159</sup> And Feist was a large, capitalized company with intentions to compete, even ruthlessly if necessary, which photographers fear in contemporary industry practices. One way or the other, Feist was going to publish its directory and cut into Rural’s revenue. To this, the Court says

It may seem unfair that . . . the fruit of the . . . labor may be used by others without compensation. [But] this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” . . . and a

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153. *Id.* at 347. For a criticism of the idea that facts are not created, see Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93, 94 (1992).

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

155. *Id.* at 361–63.

156. *Id.* at 363.

157. *Id.* at 362–63.

158. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

159. See discussion *supra* Section II.B.2.

constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and the useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>160</sup>

The problem with “sweat of the brow” doctrine, valuing labor alongside or as evidence of originality, was that it “flouted basic copyright principles.”<sup>161</sup> The Court held out the possibility of unfair competition claims, but copyright could not attach here because it “creates a monopoly in public domain material without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors.’”<sup>162</sup>

*Feist’s* ruling doesn’t impair photographer’s ability to claim copyright in nearly all of their photographs, but its rhetoric and description of copyright law’s purpose diminishes the importance of the photographer’s time, labor, and skill as a matter of authorship. While promoting and celebrating the public domain as essential to progress of “science and useful arts,”<sup>163</sup> a principle the photographers support, the demotion of accumulated hard work and expertise diminishes the professional photographer’s status and weakens her market leverage in the digital age when making, copying, and distributing photographs is easier and cheaper than ever. Moreover, *Feist’s* hierarchical trump of the public domain over copyright protection, while central to the First Amendment and the Constitution’s progress clause, oversimplifies problems rooted in unfair industry practices of the new millennium when media companies, such as Getty Images, Conde Nast, and Time Inc., control access to enormous databases of information and images and prescribe burdensome contract provisions for providers and users of photographs. These practices undermine photographer’s autonomy as freelancers and depress pay scales. They also control information and images that might otherwise be free to use.<sup>164</sup> Supporting access to the public domain is critical, especially when its openness is under siege from many directions and access to information on the internet is essential for managing everyday life.<sup>165</sup> Contemporary photographers’

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160. *Feist*, 499 U.S. at 349–50 (citations omitted).

161. *Id.* at 354.

162. *Id.*

163. *Id.* at 350.

164. Michael Hiltzik, *Photographer Sues Getty Images for \$1 Billion After She’s Billed for her Own Photo*, L.A. TIMES, July 29, 2016, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-getty-copyright-20160729-snap-story.html> [<https://perma.cc/AEJ9-MEA7>].

165. See *Golan v. Holder*, 565 U.S. 302, 351–67 (2012) (Breyer, J., dissenting) (“[W]ithdrawing information from public domain inhibits an important preexisting flow of information.”); *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, No. 13-cv-1215 (TSC), 2017 U.S. Dist. LEXIS 14623, at \*29 (D.D.C. Feb. 2, 2017) (referring to the “valid public policy concern that citizens benefit from greater access to statutes, regulations, and all materials they must reference in fulfilling their legal obligations”); *id.* (“The ability to know, understand, and communicate the law as a broad concept is of

accounts of their professional challenges undermine *Feist's* promise of openness and reveal other tensions regarding fair labor practices resulting from corporate consolidation in our technologically advanced society.

### B. *Talking Back to Unfair Labor Practices*

Photographers contend that they are paid for their skill and hard work and that both distinguish them in their fields. Time and reputation is also a substantial portion of their bill. Because clients rarely return to relicense the photographs they originally commissioned, and instead contract for discrete uses within a particular time window, the initial contract for photographic services is the bread and butter of a photographer's business. Steve Giralt, a New York commercial photographer explains the fee structure:

In the commercial space . . . [t]here might be a flat day rate, let's say five thousand dollars a day, and then depending, let's say they want rights for just billboards in Florida for one year, then they might pay five thousand dollars for that, and then if they come back later, then "[o]h we wanna use it on billboards nationwide," then that's a separate thing.<sup>166</sup>

What determines the price of these contracts, the day rate and initial usage fee? Photographers vary in their responses, but largely the contract is a personalized negotiation between the photographer and the client based on a combination of factors, including complexity of project, necessary equipment and assistants, time for turnaround, reputation and experience of the photographer and prior relationship with the client.<sup>167</sup> In other words, the photographer and client appear to be engaging in a unique fee-for-services arrangement with a specific deliverable (use of an image) that is unique to the client and that is licensed rather than transferred. Retention of the copyright for photographers resembles an insurance

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paramount importance to the continued success of our democracy."); *see also* Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 077) 20–28 (broadening scope of IP protection to databases and proliferating non-compete agreements). For a general discussion on broadening the scope of IP and proliferating non-compete agreements, *see* Catherine Howell & Darrell M. West, *The Internet as a Human Right*, BROOKINGS INST.: TECHTANK BLOG (Nov. 7, 2016), <https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right> [<https://perma.cc/E6PD-2QCL>] ("Specifically, an addition was made to Article 19 of the Universal Declaration of Human Rights (UDHR), which states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Section 32 adds 'The promotion, protection and enjoyment of human rights on the Internet' and another 15 recommendations that cover the rights of those who work in and rely on internet access."); *see also* Human Rights Council Agenda Item 3, U.N. Doc. A/HRC/32/L.20 (June 27, 2016); David Kravets, *U.N. Report Declares Internet Access a Human Right*, WIRED: SECURITY BLOG (June 3, 2011, 2:47 PM), <https://www.wired.com/2011/06/internet-a-human-right/> [<https://perma.cc/CFV5-NX86>].

166. Interview with Steve Giralt in N.Y.C., N.Y. (June 27, 2016).

167. *See* Jessica Silbey, Eva Subotnik & Peter DiCola, *Existential Copyright and Professional Photography, Part II* (unpublished manuscript) (on file with author) (documenting pricing mechanisms).

policy; downstream licensing revenue for previously made photographs is a very small part of most photographers' business, although many insist on retaining copyright as a matter of professional practice just in case demand for a photograph grows. Professional photographers' revenue derives mostly from new clients and repeats business from old clients who have new projects. Moreover, most photographers are independent contractors (freelancers) or they prefer to work that way, further emphasizing their autonomy and professional skill in the work they perform and produce.<sup>168</sup>

The simultaneous demand for more photographs and the rigidity of marketing budgets drives down contract fees, forcing photographers to choose between higher rates of production and lower quality images, or to differentiate themselves as high-quality, low production photographers for which higher fees are justified. Again, they describe skill, labor, and expertise as driving these distinctions, which photographers attempt to preserve and enhance to maintain professional pay scales. Steve Giralt again explains this tension in the industry:

[T]he problem the industry's happening is, for, as far as people like me, is that . . . I would consider myself a high-end image maker. I'm not the cheap guy that does the little jobs . . . with high-end image making comes a high level of production value, and the amount of people we need, and the amount of equipment, and all that stuff. And then . . . usage rights . . . determines my fee, with [] global print advertising being the greatest fee that I'd probably charge for, other than unlimited. And the fact that they now [say], "Oh we just want to pay you the fee for, you know, Snapchat, which can't possibly be that much, [be]cause the image is gonna be living in such a tiny little world for a second of time," like "[w]e want eight-second rights, we just wanna show it to each person for eight seconds," . . . but with that, the production fee, the cost of making that imagery is still the same to me. So . . . we're having a big fight in the world of . . . these clients, . . . they come with this ridiculously low budget, and it's like, no, the production's the same, if you want me to make the same quality imagery, it costs the same amount of mo[ney] . . . . And that's where it's causing a lot of friction, and the fact that then they're more likely to go to a lower-end photographer, and then their imagery looks low-end . . . . so many companies . . . feel that they need to make all this content, like "[o]h we need a new image to put on Facebook every day," [or] "[w]e need thirty images a month, instead of one image a month for one printout that we used to run," but their budgets aren't thirty times what they used to be . . . and as the image makers . . . I'm on the side . . . that I'm just not gonna make the image if I'm not gonna make it to the level of my standard that I make images . . . . [I]t's just a downward spiral, and like

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168. Many staff photographers who produce works-for-hire and photographers who work on commission and transfer their copyright under the terms of that agreement express preference for freelance work because of the autonomy it can provide, both monetarily and aesthetically. Moreover, dedicated staff photographers are rarer today than decades past. And photojournalist staff have decreased by half in most newsrooms. *Id.*

they don't wanna pay for production costs, they don't wanna pay properly for usage, and suddenly what are they paying for[?] [A]nd then also suddenly what do their images look like[?]<sup>169</sup>

Giralt makes clear, however, that some clients still insist on bespoke, high-quality images and will pay professional rates for them.

So I'm not worried about . . . the lower-cost stuff, [be]cause for the most part, so much of it is crap. What I worry about is when suddenly high-end stock is sold really cheaply, [be]cause then[,] now, those are images that a client might not hire me to shoot anymore [and] they might go to stock for. But for the most part, most clients aren't gonna buy a Shutterstock image . . . for anything important . . . . Also . . . a lotta things I shoot are specific to a client, so it's not like . . . a Victoria's Secret bra, they're not gonna find that on stock.<sup>170</sup>

The pool of high-end clients is limited, diminishing (or consolidating) opportunities for photographers who depend on those clients to sustain their professional practice. When labor is cheap, and expertise or skills are not part of the price of the copyright license that clients negotiate, low-end and amateur images become a business norm.

Photographers describe two distinct but related harms stemming from the devaluing of skill and expertise and consolidation of media publishers despite platform diversification. The first is reduction in wages. The second, related to the first, is the perceived reduction in quality and the characteristics of photographic images that dominate media and audience attention. As to the first, we've heard already how contract term accretion inures to the publisher's benefit, not to the professional photographers, spiraling downward the prices for professional photography which carries with it a degradation of journalistic ethics among other values. A long-time photojournalist explains the rapaciousness of publishers.

"[A friend has] been in the field since the Vietnam War, and he refused to sign that contract [that claimed all rights], even though he had a decades-long relationship. So now they wanna own forever, everything you take . . . . So this is what [the publishers are] thinking[:]" "We don't know what kinda company we're gonna be, and so we just wanna scoop everything up." Which is the ethos of the culture. And the other ethos of the culture is, undermine everybody, and pay the lowest amount you can possibly pay.<sup>171</sup>

She goes on to explain specifically, the value of the picture, the individual picture, the price for an individual picture has gone way down . . . . So it used to be that a picture printed this size or smaller . . . [o]n a page this big . . . 8 by 11 . . . [y]ou charge maybe \$150, \$125. The same picture now . . . . [O]pening picture of a major story,

169. Interview with Steve Giralt, *supra* note 166.

170. *Id.*

171. Interview with "Noreen" in N.Y.C., N.Y. (July 21, 2017).

it could license for 75 bucks. So that would normally have been a double page in a magazine . . . that would have gotten you twelve, fifteen hundred dollars. So a quarter page in a magazine, tiny, the smallest picture [then] . . . is higher than what you get now, all right? [Photojournalists survive today by] looking for grants. There's a lot more grants, and there's a lot of photographers, I mean, the aesthetic of photojournalism has changed, because of the business model as well, so there's a lot of photojournalism that's more mixed in with a kind of art-ish documentary style, which has created a lot of ethical debates . . . but the idea is to then try and sell more on the art market.<sup>172</sup>

Photographers describe this combination of the reduction in price, broad contract terms without more compensation, and the resulting low-quality images as the “good enough” problem.<sup>173</sup> They claim aesthetic quality is more diverse (and tending toward the amateur end). And, industry practices (and copyright rules) that devalue skill and expertise in photographic production reduce the intentional rendition of the photographs, decreasing aesthetic standards for photography. Photographers also complain that desire for immediate images, without sufficient or expert production and rendition, or without the time-consuming investigation and research that makes long-form journalism reliable and nuanced, renders our image culture shallow and repetitious rather than conscientious and diverse. Ashok describes how despite countervailing pressures he works within this changing industry maintaining his own level of aesthetic quality.

I can't rely on . . . people looking for . . . a low-cost provider, and saying, “Oh, you know, why would I pay you x when I can have it for nothing?” [A] lot of commercial jobs have gone that way, which could have been a commission job. Even commission work, the fees have come down . . . They feel like, “Oh, you know, I can get this image off the shelf, for a lot less.” You know, my biggest competition is the good-enough. Because a lot of people are OK with good-enough, and so . . . I'm trying, and I have tried to steer away from the clients who like the good-enough. Because the good-enough is not good enough for me. I want clients who want the best, and wanna know that[], “this is what we want. I wanna hire a professional.”<sup>174</sup>

Carl Tremblay, a veteran commercial photographer, echoes this sentiment, connecting the impatience digital cameras inculcate and their ease of use with the decrease in aesthetic quality of a vast amount of photographs online.

The digital, I think, [] has brought in “it's good enough. It's good enough.” And [] I think it . . . steals better work from being done, because you have the ability to look in the back of the camera and say, “We got it.”<sup>175</sup>

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172. *Id.*

173. Interview with Ashok Sinha, *supra* note 98.

174. *Id.*

175. Interview with Carl Tremblay, *supra* note 111.

One response, propelled by the logic of *Feist*, is that competition is good for consumers (or clients), lowering the cost of products and of barriers to entry for market producers. Two directories are better than one and the customers can decide which they would prefer to purchase. This is also an answer from *Bleistein* that reduces all aesthetic value judgments to the existence of and opportunities for commercial exchanges. But the photographers are not clearly complaining about copyright protection as such, which is the focus of both *Bleistein* and *Feist*: whether or how (photographic) works can be protected from copying by others. Contemporary photographers are not like Rural Telephone Service Company worried about a competitor scooping their exact work product and reselling it for less (although to be sure, some photographers are worried about uncompensated copying). Contemporary photographers are worried largely about their professional status and the devaluation of their craft—the specificity and quality of the work that is produced, the ability of audiences to distinguish quality within a crowded marketplace, and thus the willingness of clients or news outlets to pay for carefully and skillfully made photographs. This is particularly true among photojournalists, one of whom said explicitly

[w]e need to talk about ethics more, like in general . . . as a profession. I don't know [if] ethics are as stressed as they used to be . . . [we] used to get memos all the time, and I just think now, with fewer people, there's fewer mentoring, there's less mentoring . . . everybody's worrying about just getting the job done, not necessarily about taking the time . . . .<sup>176</sup>

Absent a professional class of photographers, whose skill and expertise shape the expectation of a truthful and powerful work product, photographers worry that photographic aesthetics will resolve at the lowest common denominator.

Why is this a problem? And doesn't the idea of an aesthetic standard return us to the problem of judges engaging in aesthetic discrimination to the detriment of fomenting and diversifying art and science? The story of *Feist* revolves around the binary of the public domain and copyrightable subject matter. The optimistic story in *Feist* is that facts or information are free, and unoriginal expression is unprotected, leaving a public domain sufficiently robust to be the foundation on which science and art may be built. But this assumes the background of a fair marketplace. The photographers' story assumes the baseline of *Feist's* public domain principles but unravels its optimism, describing a social situation in which shrinking wages, lopsided contract negotiations, consolidated media outlets, and disorganized freelance photographers have to work harder than ever before to earn a livable wage to make truthful and powerful pictures. A veteran photojournalist who now teaches full-time in a journalism school explains

there were publications that paid people to [produce investigative photo essays]. I mean, our whole industry now is just like survival. I mean . . . what you expect of a photograph. What it takes to get a

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176. Interview with "Martha" in Bos., Mass. (July 10, 2017).

photograph. Now, people just want something quick and dirty and throw it online, it doesn't have . . . lasting value. [Y]ou had Time[,] Life, [and] all these publications . . . [like] *National Geographic* . . . in its heyday, [which] was just really encouraging, you could make a living much easier. Being a documentary photographer now, very few people can be a documentary photographer.<sup>177</sup>

It is tempting to think that some photographers have it worse than others, for example, that photojournalists struggle more than commercial or event photographers, and thus that one may shrink in population more precipitously than the other.<sup>178</sup> But all interviewed photographers told the same story about contemporary challenges to their business models and altered aesthetic practices. The photographers' stories contemplate a range of aesthetic practices and a spectrum of aspiring and professional photographers but warn of the dangers of copyright in the age of digital reproduction that devalues labor, skill, and expertise, which form the basis of the photographic art. If this sounds radical from a copyright perspective, it is only because a story about property rights as opposed to labor rights is the easier story to tell given U.S. copyright's legacy.

*Feist* does not protect professional photographers from acquisitive publishers and intermediaries, who are photographer's primary concern today. Photographers embrace the ubiquity of authorship and welcome amateur photographers into the market place because they have faith that skill and experience will differentiate themselves among clients and justify professional prices. *Feist's* rule provides room for differentiation, but the photographers didn't need *Feist* to permit copying facts or the natural world. Making new things from nature defines the photographer's art.<sup>179</sup> *Feist's* abolition of "sweat of the brow," however, diminishes the value photographers create through client-centered services and time-consuming journalism. This devaluation of bespoke and laborious efforts refocuses photographers on the possibility of wages earned from downstream copyright licensing, which is typically a small part of professional photographers' wages as significant downstream licensing is minimal for most but the luckiest of

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177. *Id.*

178. As a qualitative study, I can only attest to the variation among contemporary photographers, not the distribution of those variables in the population at large. The next phase of this research will be a survey which results will hopefully be able to answer some of the questions about differences among photographers as regards wages, contract terms, and employment.

179. Moreover, photographers would agree that the facts of the world, and most of what they photograph, are "free" to make into pictures without permission. Commercial photographers often obtain subject releases when making portraits, and sometimes even collect permissions from authors or trademark owners of work visible in the background. But in general, photographers rely on the principle developed by necessity in their practice, and which *Feist* reflects as policy, that facts and ideas are in the public domain to enable communication, cumulative production, and creativity. For photographers, this is uncontroversial in light of the norms of their practice that rest on stylistic borrowing and influences as well as copying for the purposes of conversation and productive transformative aesthetics.



photographers.<sup>180</sup> When contractual terms no longer reflect the value of skill, hard work and experience because of consolidated media companies' demands and the photographers' lack of bargaining power, *Feist's* rule is a kick in the gut. It justifies all forms of copyright in minimal creativity (because authorship is open to everyone) and rejects skill, hard work, and expertise, which define the primary assets on which photographers' livelihood depends. The combination of these two correlatives to the *Feist* rule leave professional photographers without negotiating leverage in a market crowded with amateurs who gladly work for reduced wages or gratis in order to build a repertoire and reputation, only to learn later that opportunities to sustain a full-time professional photograph practice are waning.

We may celebrate *Feist's* winners as the amateur photographers or the rival market entrants (*Feist* Publications over Rural Telephone) who bring competition to the field. There is virtue to this position if we think market competition stimulates aesthetic progress and that is the purpose of copyright. To be sure, *Feist's* winners are not professional photographers for whom "sweat of the brow" anchors their aesthetic and business practices. Moreover, photographers don't divorce labor from intellectual conception, as *Feist* does, and we might want to consider whether that is a good idea. The photographers' stories link labor and aesthetic progress. Photographers do not distinguish between copyright justifying payment, as the *chit* that authorizes those uses, and the development of aesthetic skills and expertise, which produce the desired photographs in the first place. As such, professional photographers would not entirely rewrite *Feist*. But *Feist's* demotion of skill and hard work alongside its promotion of originality, which nearly any work and anyone can demonstrate, amplifies the significance of the photographers' criticism of contemporary labor and contractual practices in the photographic industry. Authorship is immaterial when contracts of adhesion claim all uses of the author's work and wages spiral downward. The only "capital" in which photographers can reliably invest is their time, labor, and skill, but these investments are worth much less under copyright law after *Feist*. Thus, photographers struggle to reap the benefits of their labor and skills in light of rapid technological reproduction despite working harder than before.

The social situations that *Feist* and professional photographers describe in their diverging accounts of copyright's scope and purpose highlight these advancing risks to the digital domain: bloated originality standards level access to authorship (ostensibly a good thing) but authorship's significance as a value to cultivate not only for its material consequences but also as a matter of diverse voices and identities depends on leverage in contract negotiations that most individual authors do not have. *Feist's* depreciation of skill and experience assumes there are other ways to differentiate oneself in the market as creator or innovator, which of course

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180. The devaluation of hard work and refocusing on downstream licensing opportunities, may also amp up photographers' complaints about unauthorized reuses of photographs on the internet on Pinterest, Google or elsewhere because all losses of revenue are now more critical than ever. See Silbey et al., *supra* note 167, at Part II (describing revenue streams).

there are. But the stories photographers tell remind us that those differentiating measures also depend on industry norms of apprenticeship and access to professional networks. These include ethical training in aesthetic production as well as differentiated pay scales that preserve an expert status in order to reproduce skilled techniques and high-quality work products.

#### CONCLUSION

In the description of their aesthetic practices making pictures of the world, photographers explain the structures to which they are subject. Sometimes the law shapes and constrains their behavior, but often structure comes from other photographers, clients and subjects, photographic equipment, and limitations of the natural world (lighting, shadows, and distance). The photographers' stories start with the act of creativity and eventually plot copyright's role (or the role anti-copying rules play) somewhere within their complex and evolving business and aesthetic practices. The photographers' accounts are about work and professionalization as a basis of aesthetic value and about contract and client relationships as the basis of material wellbeing. Anti-copying protection as a feature of copyright law plays only a cameo role in an intricate and diversely plotted story about the contemporary aesthetic and business practices of professional photographers.

Seminal copyright cases in our Supreme Court cannon describe creative practices of copying—of which photography is one form—within the context of a dispute about law's constraint on copying and its role promoting creativity.<sup>181</sup> By definition, the cases concern law, but their stories about creativity also describe contested situations concerning the role of copying in the production of valued aesthetic works against a background of evolving mechanical reproduction. While the photographers' accounts plot a story that begins with an inherent contest between originality and copying—the nature of photography itself, as photographers acknowledge—the court cases begin as stories about contested features of copyright law and in their resolution justify differential treatment of varying aesthetic practices, from photography, to lithography, to automated compilations. The legal cases describe a hierarchy of aesthetic practices in terms of copyright protection but reject aesthetic judgment as a feature of copyright law. The photographers reject a hierarchy of aesthetic practices but accept aesthetic judgment as a feature of photographic art. Reading the photographers' stories alongside the court disputes amplifies the hidden accounts of copying in creativity, copyright's restraint on copying, and thus copyright's restraint on creativity.

The role of copyright in this eco-system of digital industries, expert professionals, and diminishing opportunities for differentiated skills, is as a property right that photographers today experience as less relevant to their livelihood although central to their identity. Copyright nonetheless remains central to

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181. See discussion *supra* Sections I (*Burrow-Giles*), II (*Bleistein*), III (*Feist*).

publishers and licensing platforms. And it is here where the old story about the origins of our contemporary copyright system returns: copyright serves interests other than authors.<sup>182</sup> Perhaps this is as it should be to promote dissemination of science and the useful arts. But growing the public domain, a goal copyright ultimately serves, and advancing creative practices, which copyright is supposed to accomplish, are not the focus of current regulatory reform and remain fragile bulwarks on which to build a reform agenda. So what purpose does dissemination serve without these other essential features of our copyright system? Photographers tell us that we need better or adaptive protections to facilitate bargaining between authors and publishers that would (1) attribute authorship more widely (to align with originality standards), (2) require payment for works reflecting professional skill and expertise, and (3) narrow the range of actionable copyright infringement (e.g., derivative works) to enable more work to be done. In this way, photographers resemble other independent authors whose intellectual property rights are less relevant than everyday employment and labor issues.<sup>183</sup> Photographers may present a special case in terms of the fast evolution of their art and business mechanisms, but they raise concerns shared by many about the digital age's measurement of progress—more not better, efficiency not affordability—which await analysis and redress in the twenty-first century.

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182. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

183. SILBEY, *supra* note 53, at 274–78 (summarizing findings).