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TOWARD A STRICTER ORIGINALITY STANDARD FOR COPYRIGHT LAW

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

INTRODUCTION

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

¹ 17 U.S.C. § 102 (1994).

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

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

⁴ See *id.* at 345.

⁵ See *id.*

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

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

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

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

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

¹¹ See *id.* at 966–67.

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

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

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

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

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

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

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

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

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

¹⁸ See *id.* at 482-85.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Boyle, *supra* note 13, at 1466-67.

²² See *id.*

²³ See Litman, *supra* note 10, at 966-68.

²⁴ See *infra* notes 31-107 and accompanying text.

²⁵ See *infra* notes 108-152 and accompanying text.

²⁶ See *infra* notes 153-242 and accompanying text.

²⁷ See *infra* notes 243-305 and accompanying text.

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

I. ORIGINALITY CASE LAW

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

A. Burrow-Giles Lithographic Co. v. Sarony

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

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

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

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

³¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-347 (1991); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-52 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54-55, 60 (1884); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104 (2d Cir. 1951); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 36-40 (Martha Woodmansee & Peter Jaszi eds., 1994); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV., 247, 267-75 (1998).

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

³³ 111 U.S. at 54-55, 60.

³⁴ *Id.* at 56, 59.

³⁵ *Id.* at 56-59.

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

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

B. *Bleistein v. Donaldson Lithographing Co.*

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

³⁶ *Id.* at 57–58.

³⁷ *See id.*

³⁸ *Sarony*, 111 U.S. at 59–60.

³⁹ *See id.* at 60.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See* 188 U.S. at 249–52; Boyle, *supra* note 13, at 1466–67.

⁴⁴ *Bleistein*, 188 U.S. at 248, 252.

⁴⁵ *Id.* at 248.

⁴⁶ *Id.*

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

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

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

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

⁴⁷ *Id.* at 249.

⁴⁸ *See id.*

⁴⁹ *See Bleistein*, 188 U.S. at 249-50.

⁵⁰ *Id.* at 250.

⁵¹ *See id.* at 251-52.

⁵² *See id.*

⁵³ *See id.* at 251.

⁵⁴ *See Bleistein*, 188 U.S. at 251-52.

⁵⁵ *See id.*

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

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

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

⁵⁶ See *id.* at 249–50, 251–52.

⁵⁷ See *id.* at 249–50.

⁵⁸ See *id.*

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

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

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

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

⁶³ *Catalda*, 74 F. Supp. at 974–75.

⁶⁴ *Id.* at 975.

⁶⁵ *Id.*

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

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

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

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

⁶⁶ *Id.*

⁶⁷ *Id.*; *Bleistein*, 188 U.S. at 249-50.

⁶⁸ *Catalda*, 191 F.2d at 103-05; see *Bleistein*, 188 U.S. at 249-50.

⁶⁹ *Catalda*, 191 F.2d at 103.

⁷⁰ *Id.* at 102-03.

⁷¹ *Id.* at 104-05.

⁷² See *id.*; *Bleistein*, 188 U.S. at 249-50.

⁷³ 499 U.S. at 340; Jaszi, *supra* note 31, at 37.

⁷⁴ 499 U.S. at 363-64.

⁷⁵ *Id.* at 342.

⁷⁶ *Id.* at 343-44.

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

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

⁷⁷ *Id.* at 345.

⁷⁸ See *Feist*, 499 U.S. at 345-47; *Bleistein*, 188 U.S. at 249-50; *Sarony*, 111 U.S. at 59-60.

⁷⁹ See *Feist*, 499 U.S. at 345-46.

⁸⁰ *Id.*

⁸¹ *Id.* at 347, 361-62.

⁸² 17 U.S.C. § 101 (1994).

⁸³ *Feist*, 499 U.S. at 362-64.

⁸⁴ *Id.* at 362-63.

⁸⁵ *Id.*

⁸⁶ *Id.* at 363.

⁸⁷ *Id.*

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

E. Recent Originality Cases

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

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

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

⁸⁸ See *Feist*, 499 U.S. at 362-64.

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

⁹⁰ See *Feist*, 499 U.S. at 345.

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

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

⁹³ See 945 F.2d at 511, 514.

⁹⁴ *Id.* at 511.

⁹⁵ *Id.* at 513-14.

⁹⁶ *Id.* at 514.

⁹⁷ *Id.*

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

2. *Ets-Hokin v. Skyy Spirits*

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

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

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

⁹⁸ *Key Publ’ns*, 945 F.2d at 513–14; *see Feist*, 499 U.S. at 345.

⁹⁹ *Key Publ’ns*, 945 F.2d at 513.

¹⁰⁰ *Id.* at 514; *see Feist*, 499 U.S. at 345.

¹⁰¹ 225 F.3d at 1071, 1077.

¹⁰² *Id.* at 1071–72.

¹⁰³ *Id.* at 1073, 1076–77.

¹⁰⁴ *Id.* at 1076–77.

¹⁰⁵ *See id.*; *Bleistein*, 188 U.S. at 249–50.

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

II. ORIGINALITY JURISPRUDENCE AS THEORY

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

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

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

¹⁰⁶ *Ets-Hokin*, 225 F.3d at 1076-77; see *Feist*, 499 U.S. at 345.

¹⁰⁷ *Ets-Hokin*, 225 F.3d at 1077.

¹⁰⁸ See Yen, *supra* note 31, at 248-50.

¹⁰⁹ See *id.* at 249; *Bleistein*, 188 U.S. at 251-52.

¹¹⁰ See Yen, *supra* note 31, at 250, 273-75.

¹¹¹ See *id.* at 247, 249-50, 273-75; *Bleistein*, 188 U.S. at 249-50, 251-52.

¹¹² See *Bleistein*, 188 U.S. at 249-50, 251-52; Yen, *supra* note 31, at 247, 249-50, 273-75.

¹¹³ See Yen, *supra* note 31, at 273-75.

¹¹⁴ See *id.* at 253-56, 261-62.

¹¹⁵ See *id.* at 253, 261-62.

¹¹⁶ See *id.* at 261-62.

¹¹⁷ See *id.* at 254, 262.

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

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

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

¹¹⁸ See Yen, *supra* note 31, at 254-55, 262.

¹¹⁹ See *id.* at 255.

¹²⁰ See *id.*

¹²¹ See *id.* at 257.

¹²² See *id.* at 256-57, 263.

¹²³ See Yen, *supra* note 31, at 256-57, 263.

¹²⁴ See *id.* at 257-58.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See Yen, *supra* note 31, at 260.

¹²⁹ See *id.*

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

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

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

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

¹³⁰ See *id.* at 251, 260 & n.15.

¹³¹ See *id.* at 274-75, 300-01.

¹³² See *id.* at 274-75.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴⁹ See Yen, *supra* note 31, at 301.

¹⁵⁰ See *id.* at 301–02.

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

III. CRITICISM OF THE ROMANTIC CONCEPTION OF AUTHORSHIP IN COPYRIGHT

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

A. Criticism of the Romantic Model, Considered Generally

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

¹⁵¹ See *id.* at 260, 299, 300.

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

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

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

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

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

¹⁵⁷ See Boyle, *supra* note 13, at 1466-67.

¹⁵⁸ See *infra* notes 161-231 and accompanying text.

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

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

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

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

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

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

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

¹⁶⁴ See Boyle, *supra* note 13, at 113, 129–30, 138; Litman, *supra* note 10, at 965–67, 1008–09.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷⁶ See Jaszi, *supra* note 17, at 466-67.

¹⁷⁷ See Boyle, *supra* note 13, at 1465-66.

¹⁷⁸ See *id.* at 1463-64.

¹⁷⁹ See *id.* at 1463-65.

¹⁸⁰ *Id.* at 1465.

¹⁸¹ See *id.*

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

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

¹⁸⁴ See Jaszi, *supra* note 17, at 468-70.

¹⁸⁵ *Id.* at 470.

¹⁸⁶ See *id.*

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

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

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

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

¹⁸⁷ See *id.*

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

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

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

¹⁹¹ See *id.* at 466–67, 469–70.

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

¹⁹³ See *id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Type II Criticism of the Romantic Conception of Authorship

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

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

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

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

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

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

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

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

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

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

IV. POLICY: PROTECTING AUTHORS AND THE PUBLIC DOMAIN

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

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

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

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

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

²³¹ U.S. CONST. art. I, § 8, cl. 8.

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

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

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

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

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

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

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

V. TOWARD A STRICTER ORIGINALITY STANDARD

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

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

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

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

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

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

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

²⁴³ See Yen, *supra* note 31, at 247, 249-50, 273-75.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

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

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

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See Yen, *supra* note 31, at 247, 249-50, 273-75.

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

²⁵⁰ See Yen, *supra* note 31, at 247, 249-50, 273-75.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷⁶ *Catalda*, 191 F.2d at 103.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁸⁸ See Jaszi, *supra* note 17, at 461-63, 482-85.

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

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

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

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

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

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

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

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

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

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

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

²⁹⁸ See *Feist*, 499 U.S. at 345-47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³¹⁵ See EAGLETON, *supra* note 163, at 113, 129-30, 136, 138.

³¹⁶ See *id.*

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

³¹⁸ See Yen, *supra* note 31, at 301-02.

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

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

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

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

³²³ See Litman, *supra* note 10, at 967-68.

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

CONCLUSION

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

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

RYAN LITRELL

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

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

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
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