

Reconciling Copyright Originality for Photography and Generative Artificial Intelligence

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I.

Copyright protection requires creative choices—creative choices that manifest in the work for which protection is sought. We all understand this point in theory, but in practice it has proven difficult to apply to visual works. The contemporary treatment of photography and generative artificial intelligence (AI), two different technologies used to create images, illustrates this. Examples of courts holding photographs unprotected by copyright are few and far between; in contrast, the Copyright Office and federal courts have been reluctant to grant copyright protection to AI-generated elements of visual works. To sharpen the contrast with real-world examples: A photo of a sudden arrest, snapped without thought on a smartphone with default settings, has been found to be protected by copyright, while an AI-generated image refined over hundreds of prompts to illustrate a graphic novel has been denied protection. These seemingly incongruous outcomes may pose a challenge for copyright law as it seeks to regulate intellectual property rights across different media and technologies.

We do not argue here that the Copyright Office has been too harsh on a controversial emerging technology. Rather, we suggest that contemporary treatment of photography has become lax, prone to granting copyright with little or no analysis. Often, courts assume any photograph is protected by copyright and defer examination of what elements in the photograph (if any) might be protectable until forced to do so in connection with the infringement or fair use analysis. Instead, we suggest, courts should fully examine the originality of a work at the copyrightability stage. Recent Copyright Office actions on generative AI can provide a useful roadmap for a more rigorous originality analysis of visual works—specifically, by emphasizing the importance of tracing purported creative choices to an expressive result that manifests

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in the final work. Existing doctrines designed for infringement analysis, such as “thin copyright” and “dissection,” also offer useful conceptual models. Just as not every element in an image will be deemed creative for purposes of determining infringement, not every human choice should necessarily be deemed creative for purposes of finding originality. By closely analyzing the connection between creative choice and resulting expression in photographs at the originality stage, courts can return coherence and rigor to copyright doctrine for visual works.

II.

Proponents of copyrightability for AI-generated images have compared the technology to the camera, which similarly startled and upended traditional notions of artistic merit.¹ In fact, in the first case to consider the new medium of photography, the defendants argued that a photograph could not be copyrighted because photography was “merely mechanical, with no place for novelty, invention or originality.”²

It may surprise those of us familiar with modern copyright law that the Supreme Court did not dismiss this argument out of hand. The Court was receptive to the idea that the “ordinary production of a photograph” may lack originality.³ But in the case before the Court, the photographer Napoleon Sarony had posed his subject, Oscar Wilde, “selecting and arranging the costume, draperies, and other various accessories,” and “arranging and disposing the light and shade.”⁴ In other words, Sarony had made particular creative choices, the expressive results of which were identifiable in his photograph. These choices formed the basis for the Court’s finding that the photograph met the originality requirement.

The Court’s cautious originality analysis in *Sarony* morphed over time into the notion that virtually *all* photographs are copyrightable. Justice Holmes laid down the theoretical framework for this view in *Bleistein v. Donaldson Lithographing Co.* when he considered whether an advertisement for a circus could be copyrighted. Holmes mused that a copy is the “personal reaction of an individual upon nature. Personality always contains something unique.”⁵ Holmes warned judges against the “dangerous undertaking” of judging “the worth of pictorial illustrations.”⁶

In 1921, Judge Learned Hand confronted the question of whether photographs of trademarked images in a jewelry trade periodical contained originality sufficient for copyright protection. Judge Hand said yes, writing, “. . . no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be

1. See, e.g., Petitioner’s Motion for Summary Judgment and Memorandum in Support Thereof at 19, *Allen v. Perlmutter*, No. 1:24-cv-02665-WJM (D. Colo. Aug. 8, 2025) (comparing GenAI to “another revolutionary creative tool, the camera”); see also Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (1935), in *ILLUMINATIONS* at 9–16 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968).

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

3. *Id.*

4. *Id.* at 55.

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

6. *Id.* at 251.

absolutely alike.”⁷ And, he added, “[t]he suggestion that the Constitution might not include all photographs seems to me overstrained.”⁸

The strongest reading of Judge Hand’s opinion is a blunt *per se* rule: All photographs are copyrightable. Courts have been unwilling to go this far, aware that recognizing copyrightability means empowering the copyright holder to sue others for creating and distributing substantially similar works. Without guardrails, that ability can be abused. Two rare cases in which courts rejected photograph copyrightability illustrate the point; in both, the potential consequences for infringement featured heavily in the copyrightability analysis. In one case, a photographer made painstaking photo replications of two-dimensional public domain artworks.⁹ The court found that these efforts did not warrant copyright protection, noting that the unthinking extension of copyright could “put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.”¹⁰ In another case, a restaurant owner sought to protect menu photographs of common Chinese dishes.¹¹ There, too, the court declined to find copyrightability, observing that doing so “would secure plaintiffs the exclusive right of use in such photographs, which effectively would permit them to monopolize the market for printing menus that depict certain commonly served Chinese dishes. Such a result was not Congress’ intent.”¹²

But these cases are anomalies. While modern courts mostly run photographs through *Sarony*-esque originality analysis, the analysis is usually perfunctory. In one striking example, the Eleventh Circuit was confronted with a copyright claim concerning “before and after” photos of teeth, snapped in a dentist’s office. According to the district court, the photos had been taken in five minutes and required only “the most rudimentary and basic task[s] for photographers since the era of the daguerreotype.”¹³ The district court held on summary judgment that they lacked “any modicum of creativity or originality.”¹⁴

The Eleventh Circuit Court of Appeals reversed. “While Dr. Pohl may not have carefully staged Belinda [the patient] and adjusted the lighting as a professional photographer might have, that is not the standard,” the court explained.¹⁵ Any creative decisions counted: The enterprising dentist should get credit for “choosing what type of camera to use,” “instruct[ing] Belinda to look directly at the camera,” “tak[ing] the pictures close-up,” and choosing “to photograph Belinda smiling, instead of, for example, retracting her lips and photographing her teeth and gums only.”¹⁶ The circuit

7. *Jewelers’ Circular Publ’g Co. v. Key-Stone Publ’g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff’d*, 281 F. 83 (2d Cir. 1922).

8. *Id.* at 935.

9. *Bridgeman Art Libr. v. Corel Corp.*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999).

10. *Id.*

11. *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001).

12. *Id.* at 548.

13. *Pohl v. MH Sub I LLC*, 314 F. Supp. 3d 1225, 1231 (N.D. Fla. 2018), *rev’d and remanded*, 770 F. App’x 482 (11th Cir. 2019).

14. *Id.* at 1232.

15. *Pohl v. MH Sub I LLC*, 770 F. App’x. 482, 488 (11th Cir. 2019).

16. *Id.*

court was also wary of the district court's "utilitarian purpose" metric. Citing *Bleistein*, the court cautioned, "That the photographs were intended solely for advertisement has no bearing on their protectability."¹⁷ The important point was that "Dr. Pohl had something in mind when he took the pictures."¹⁸ But the Court did not elaborate on what that "something" was, or how Dr. Pohl's choices expressed it.

In *Pohl* the circuit court took pains to go through the motions of a *Sarony*-like analysis. But its purported identification of "creative" choices in practice resembles the *per se* rule suggested by Judge Hand. After all, there are only so many ways one can take a picture to display dental work. We are told that the dentist made creative choices when he instructed his patient to look directly at the camera and when he took the photo close up. But what else would a person trying to take a dental advertising photo have possibly done? The circuit court was wary of judging a work by its utilitarian purpose, but common sense dictates that a work taken for a utilitarian purpose has a smaller world of creative choices. Should the dentist have also been credited for his creative choice to take the photograph with the lights on, rather than off?

The *Pohl* court at least required a photographer to have "something in mind," even if framed at such a level of generality as to make the requirement meaningless, but other contemporary courts have extended copyright even to photographs and videos taken unintentionally or serendipitously. Consider three recent cases. In *Cruz v. Cox Media Grp., LLC*, a New Yorker on a walk with his girlfriend used his iPhone to photograph an arrest taking place on the street.¹⁹ In *Otto v. Hearst Commc'ns, Inc.*, a guest at a private wedding on the Trump National Golf Club was surprised when the wedding was crashed by the club's eponymous owner, and quickly snapped a shot.²⁰ And in *Roe v. Bernabei & Wachtel PLLC*, a victim of sexual harassment recorded that encounter on her phone.²¹

For the courts considering them, none of these photographs failed the originality test. In *Roe*, the plaintiff's claim that her video reflected "quick creative judgments as to the sight and sounds the phone would likely record by leaving the phone in her purse" was accepted by the court as "barely" sufficient to "nudge the video across the (low) threshold of creativity," surviving a motion to dismiss.²² In *Otto*, the defendants did not even bother to raise the question of originality.²³

Cruz featured the fullest discussion of originality and the strongest language supporting the copyrightability of serendipitous photos. "As with almost any photograph," the court declared, "the Photograph reflects creative choices, including Cruz's timing for when he took the Photograph."²⁴ Cruz's "recognition" of a significant

17. *Id.* at 489.

18. *Id.*

19. 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

20. 345 F. Supp. 3d 412, 420 (S.D.N.Y. 2018).

21. 85 F. Supp. 3d 89, 93 (D.D.C. 2015).

22. *Id.* at 98–99.

23. *Otto*, 345 F. Supp. 3d at 423–24.

24. *Cruz*, 444 F. Supp. 3d at 465 (citing *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005) (noting that timing is one of three main ways a photograph may be original)).

moment and “decision to take the Photograph when he did” were sufficiently creative acts to meet the originality threshold.²⁵

In this way a single choice—the choice to take the photo (not even the precise moment of snapping, but simply the choice to try to capture in the moment)—becomes the tautological basis of the photograph’s originality. Return, for a moment, to Sarony and Oscar Wilde. Imagine that, after a long portraiture session, Sarony grows tired and rests in the armchair in which he was shooting Wilde. Wilde, restless, goes over to the camera, still calibrated by Sarony. Without reflection, he takes a shot. Is Wilde entitled to copyright in the resulting photograph? Wilde has not determined the drapings, the arrangement of the room, the light and shade. His singular choice is to take a photograph of Sarony at the moment he took it. Yet, under modern case law, it seems clear that Wilde would receive the copyright. That his only contribution was bringing down a shutter would place him in the same class as the plaintiffs in *Roe*, *Cruz*, and *Otto*. To borrow the language of tort law, while the photographers in these cases are certainly the actual causes of their photographs, the expression in the images seems formed not by their creative choices, but entirely by circumstances outside and beyond their control—the lighting that existed on that day, the smartphone they happened to have, with the settings it happened to have, and the actions taken by others; the person who snapped the “shutter” is not the proximate cause of any seemingly creative choices manifested in the resulting image.

III.

The lenience courts have shown towards photography has not so far manifested in their treatment of generative AI, a technology as startling to a twenty-first century audience as the camera was in the nineteenth. Generative AI refers to a class of artificial intelligence models trained on vast amounts of data, such that they can produce new, seemingly creative content. Some AI models are designed to produce this new content in response to a prompt, with varying parameters within the prompter’s control. This means that a prompter may have to reformulate and iterate prompts a number of times to produce a satisfactory final product. As generative AI models have entered daily use, people have begun to seek copyright for their AI-generated images. But the Copyright Office and the U.S. Court of Appeals for the D.C. Circuit have so far rejected copyright for AI-generated aspects of pictorial works,²⁶ citing copyright’s human authorship

25. *Id.*

26. The Copyright Office has explicitly indicated its willingness to grant copyright for human-created works that also contain AI-generated contributions, requiring only that applicants disclaim the AI-generated elements first. Use of an AI tool will not always raise questions about human authorship and in some cases may not need to be disclaimed. See Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023); *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

requirement (previously invoked only to defeat the copyright of a macaque monkey and supernatural spirits).²⁷

In 2019, the Copyright Office received an application from Steven Thaler for the two-dimensional visual artwork, “A Recent Entrance to Paradise.” Thaler listed as the sole author: “Created autonomously by machine.”²⁸ The Copyright Office rejected the application on the grounds that the work failed to satisfy “the human authorship” criteria of copyright, noting that Thaler had “provided no evidence on sufficient creative input or intervention by a human author in the Work.”²⁹

In *Thaler v. Perlmutter*, the district court upheld the Copyright Office’s decision.³⁰ While recognizing that “Copyright is designed to adapt with the times,” the court observed that “human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media.”³¹ The court distinguished the new technology of generative AI from photography. In *Sarony*, the *Thaler* Court explained, “recognition of the copyrightability of a photograph rested on the fact that the human creator, not the camera, conceived of and designed the image and then used the camera to capture the image.”³² The photograph “represented the original intellectual conceptions of the author.”³³ To the extent a camera generates a mechanical reproduction, it does so “only after the photographer develops a ‘mental conception’ of the photograph.”³⁴ That mental conception is “given final form by the photographers’ decisions.” In photography, “ultimate creative control” lies with a human—in contrast, AI works lacked a “guiding human hand.”³⁵

On appeal, Thaler attempted to argue that his choices in designing the AI tool and prompting it were sufficient to show that he was the author of the resulting work and accordingly entitled to copyright protection. At oral argument, appellant framed this argument in terms of but-for causation: Thaler was the author, because the work only existed because of him.³⁶ The panel pushed on this argument, positing a hypothetical in which a printer jams, creating a serendipitous smearing of ink. Under Thaler’s theory, copyright would lie with the individual who pressed the print button, even though that person made no intentional creative choice. Ultimately, the D.C. Circuit held that the Copyright Act of 1976 required human authorship, and that Thaler had

27. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018); *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

28. U.S. COPYRIGHT OFF., Letter re: *A Recent Entrance to Paradise* (Aug. 12, 2019) (initial letter refusing copyright registration “because it lacks the human authorship necessary to support a copyright claim”).

29. U.S. COPYRIGHT OFF., Letter re: *A Recent Entrance to Paradise*, at 1 (Mar. 30, 2020) (letter responding to a request for reconsideration and again refusing copyright registration).

30. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff’d*, 130 F.4th 1039 (D.C. Cir. 2025).

31. *Id.* at 146.

32. *Id.* at 148.

33. *Id.* at 146 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884)).

34. *Id.*

35. *Id.*

36. Oral Argument at 5:53, *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025), <https://media.cadc.uscourts.gov/recordings/docs/2024/09/23-5233.mp3> [<https://web.archive.org/web/20250814044638/https://media.cadc.uscourts.gov/recordings/docs/2024/09/23-5233.mp3>].

waived the argument that he, rather than the AI machine he used, was an author of the work.³⁷ Due to this waiver issue, the court did not address the thornier issue of when a human using an AI application might be treated by copyright law as an author of the resulting work.³⁸

A subsequent generative AI application on its face presented a better case for the “guiding human hand” found lacking in *Thaler*. The Copyright Office’s decision about *Zarya of the Dawn* involved an eighteen-page graphic novel. The applicant, Ms. Kashtanova, wrote all text in the graphic novel herself and selected and arranged the final text and images.³⁹ But the images were generated by the AI model Midjourney.⁴⁰ Ms. Kashtanova described an intensive, “trial-and-error” process for each image in which she provided “hundreds or thousands of descriptive prompts to Midjourney until the hundreds of iterations created as perfect a rendition of her vision as possible.”⁴¹

But the Copyright Office was not convinced that Ms. Kashtanova’s contributions satisfied human authorship. The Office noted that, “Rather than a tool that Ms. Kashtanova controlled and guided to reach her desired image, Midjourney generates images in an unpredictable way.”⁴² The prompt might “influence” the final image but does not dictate a “specific result,” and “[t]he fact that Midjourney’s specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools used by artists.”⁴³ Invoking *Sarony*, the Office explained that “[u]sers of Midjourney do not have comparable control over the initial image generated, or any final image.”⁴⁴ To the Copyright Office, the fact that Ms. Kashtanova took “over a year from conception to creation” in order to match the vision she had in mind did not support her copyright claim—it undermined her contention by showing just how little control over the process she had.⁴⁵ The “significant time and effort” Ms. Kashtanova spent was beside the point, since courts reject “the argument that ‘sweat of the brow’ can be a basis for copyright protection in otherwise unprotectable material.”⁴⁶

While this is a correct statement of the “sweat of the brow” doctrine, it is simultaneously a novel application of it. The typical “sweat of the brow” case involves a creator arguing that their significant labor may transform a facially unexpressive work, like a telephone directory, into a copyrightable one.⁴⁷ Courts do not usually take issue with a photographer discussing their deliberation and repeated attempts as evidence of creative vision. Here, the Copyright Office’s qualm was not that the final work was unexpressive or a creative vision lacking, but that it was unconvinced that

37. *Thaler*, 130 F.4th 1039.

38. *See id.* at 1050 (noting that “line-drawing disagreements over how much artificial intelligence contributed to a particular human author’s work are neither here nor there in this case”).

39. U.S. COPYRIGHT OFF., Letter re *Zarya of the Dawn* (Registration #VAu001480196) (Feb. 21, 2023).

40. *Id.*

41. *Id.* at 8.

42. *Id.* at 9.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 10.

47. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

there was a sufficient connection between the author's creative choices and the resulting expression. In its view, "sweat of the brow" could not bolster that missing link.

The Copyright Office concluded its opinion with a counterfactual. If Ms. Kashtanova had commissioned a visual artist to produce her images and given that visual artists identical prompts, "the author would be the visual artist who received those instructions and determined how best to express them," not Ms. Kashtanova.⁴⁸

Let us return again to the Sarony and Wilde counterfactual raised above. Under the Copyright Office's analysis, Wilde would be comparable to the prompter—causing the final image without exercising any true control over its content. Just as the output of an AI model may be dictated by its various training inputs, Wilde's output would be attributable to choices he did not make. The Copyright Office's analysis would seem to dictate that, in this counterfactual, Wilde would *not* receive copyright for the photograph he took. Yet, as discussed, under modern copyright doctrine, Wilde would almost certainly be considered an author—and copyright owner.

Can this discrepancy be reconciled? The heft of the Copyright Office's analysis does not lie in its rejection of a machine as author (and to find otherwise would raise difficult issues as to when and why machines—including sophisticated cameras—might be recognized as authors of resulting works). Rather, the discrepancy enters in the way the Copyright Office parses out the contributions made by the human prompter and the way it scrutinizes the causal connection between those choices and the resulting image. The Copyright Office never disputes that *some* contribution is made by the prompter, without which the image, with its expressive properties, would not exist. But for AI-generated images, in contrast to photographs, the Copyright Office requires a more direct link between individual effort and apparently expressive result. Under this analysis, an individual appears to receive little or no credit for expressive elements that emerge from circumstances beyond their own choices. In other words, the Copyright Office has treated the watered-down "creative choice" analysis sufficient for copyright to attach to photographs, as insufficient with respect to AI.

Some critics have viewed the discrepancy between the copyright analysis for photographs and AI as evidence that the Copyright Office has erred.⁴⁹ But to the extent there is a discrepancy between the photography case law and the recent AI rulings, the discrepancy may be better found in how modern courts have adulterated the originality analysis for copyright with respect to photographs. In the recent AI-image rulings, we are offered a glimpse of what a robust originality analysis for visual arts could

48. Letter re: *Zarya of the Dawn*, *supra* note 39, at 10. This assertion by the Copyright Office is not so clear cut. *See, e.g.*, *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (when comic book artist drew distinctive characters based on a writer's verbal descriptions, the resulting comic book character was a joint work of the artist and the writer, even though the writer's "contribution may not have been copyrightable by itself"); *Moi v. Chihuly Studio, Inc.*, No. C17-0853RSL, 2019 WL 2548511, at *3 (W.D. Wash. June 20, 2019), *aff'd*, 846 F.App'x 497 (9th Cir. 2021) (artist running studio holds copyright and is not joint author with studio employee who carried out artist's directions); *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609 at *6 (S.D.N.Y. 1999) (individual who directed camera crew was sole author of the resulting footage).

49. *See, e.g.*, Brief of Legal Professors et al. as Amici Curiae in Support of Appellant and Urging Reversal, *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

resemble—an analysis that demands creative choices to manifest foreseeably in the resulting image.

IV.

AI-image cases are not the only site where a more rigorous copyright doctrine may be developed. Recall the monopoly concerns raised in *Bridgeman* and *Oriental Art*. In those cases, the courts considered the downstream consequences of finding the works copyrightable at the originality stage and so denied originality.⁵⁰ But as originality analysis has weakened, substantial similarity has broadened in scope, and as photographs have grown ubiquitous, courts have developed scoping doctrines at the infringement stage, namely *thin copyright* and *dissection*. These scoping doctrines have acted as pressure release valves in a system flooded with photographs often taken with little deliberation.

Thin copyright is the concept that some works are more protected by copyright law than others because some works contain more protected elements—and some works, often photographs, contain less. *Ets-Hokin v. Skyy Spirits, Inc.* neatly illustrates this concept.⁵¹ At issue in *Skyy* were two photographs of the same blue vodka bottle, taken for a commercial product shoot. As Judge Schroeder pithily began her opinion, “This long-running litigation is fundamentally about how many ways one can create an advertising photograph, called a ‘product shot,’ of a blue vodka bottle. We conclude there are not very many.”⁵² While the photographer in *Skyy* could point to a number of choices—centering a product, lighting it well, and shooting it with an aesthetically pleasing shallow depth of field—these choices were all customary “constraints of the commercial product shoot.”⁵³ The choices were sufficiently “original” to grant copyright, but, the court found, *not* sufficient to sue another photographer who made almost identical choices while photographing an identical subject.⁵⁴ For a photo with a copyright that thin, the implication was that only copy and paste-style copying would infringe.

Thin copyright doctrine can be understood as an implicit admission by courts that recognizing copyright in practically every photograph means recognizing copyright in vast scores of images that do not merit the extensive scope of protection that copyright law currently grants. Accordingly, thin copyright allows Dr. Pohl to sue others for copy and pasting his teeth snapshots from his websites to their own but prevents him from suing someone else who takes a close-up of teeth, while instructing their subject to smile (no matter how similar the resulting image may be to one by Dr. Pohl).⁵⁵ One might ask why Dr. Pohl’s photographs receive even this degree of protection, when

50. *Bridgeman Art Libr. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001).

51. 323 F.3d 763, 764 (9th Cir. 2003).

52. *Id.*

53. *Id.* at 766.

54. *Id.*

55. See *supra* Section II.

anyone can go out and produce a nearly identical photo to his by copying his “creative choices.” (The only observable difference may be whose teeth are shown.) Although copyright law purports not to reward “sweat of the brow,” it is difficult to escape the thought that thin copyright’s main function is to protect the labor of the photographer from the lazy copier—one who was not willing to do even that minimal work.

Dissection, like thin copyright, is a doctrine that limits the scope of copyright at the infringement stage. Courts that follow a dissection approach when evaluating substantial similarity ask which *protectable elements* in a work have been copied, discounting elements which are shared between works but are not themselves protectable. For example, in *Oriol v. H&M Hennes & Mauritz L.P.*, a photographer, whose photograph of ring-clad fingers spelling out the letters “LA” went viral, sued H&M after the company began to sell t-shirts with an image recreating the gesture.⁵⁶ The district court observed that the photographer “ha[d] no copyright to the idea of a person making the LA sign with their fingers.”⁵⁷ The court went on to dissect the ways that Oriol alleged the photographs were similar and found the following not protectable: shooting in black and white, “shooting an individual making a hand sign from directly in front,” and “simply the wearing of jewelry itself.”⁵⁸ With these unprotectable elements removed, nothing remained.

Courts have been understandably cautious about taking dissection too far. No element of a visual work, on its own, sounds that impressive, and in theory dissection could render any work a mere collection of unprotected elements. But this admitted difficulty has not stopped courts from trying to apply some degree of dissection.

Thin copyright and dissection are doctrines usually applied as part of the infringement analysis, not at the copyrightability stage. The photographer of the vodka bottle and “LA Fingers” lost their lawsuits against substantially similar works, but nobody disputed that their works were protected by copyright law—the only question was how far that protection extended.⁵⁹ Still, the mode of thinking applied in thin copyright and dissection analysis can be instructive for originality analysis. Just as not all expressive elements in a work are protectable elements at the infringement stage, not all choices give rise to originality in the first place.

V.

We have suggested that current approaches to the analysis of visual works yield results that may be incongruous across different mediums, indicating that a more robust originality analysis for photographs may be needed. What would this more robust originality doctrine for photographs look like in practice? We offer the following observations.

56. *Oriol v. H&M Hennes & Mauritz L.P.*, No. CV 13-05088-R, 2014 U.S. Dist. LEXIS 195340, at *6 (C.D. Cal. Feb. 10, 2014).

57. *Id.* at *2.

58. *Id.* at *3–5.

59. See *id.*; *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003).

1. ARTICULATION OF CREATIVE CHOICES AT THE PLEADINGS STAGE

One way to incorporate a more rigorous originality analysis at the pleading stage would be to require more specific pleading of originality by plaintiffs suing for copyright in visual works. In current practice, many copyright plaintiffs plead copyright infringement without elaborating on why originality is satisfied, possibly leaning on the statutory presumption of validity from registration as sufficient.⁶⁰

However, courts interpret the originality requirement as a *constitutional* requirement, not just a statutory one.⁶¹ Like the question of standing, it is something that every court has an obligation to consider regardless of what actions the Copyright Office has taken. Further, unlike in trademark and patent, where applicants must define the metes and bounds of their claims with precision, it is not always apparent from the face of a copyright registration what the author claims.

Other fields of intellectual property law recognize the importance of defining at the outset of the litigation the scope of the right claimed. In patent law, the patent-holder must submit infringement contentions at the outset of the case that specifically outline the novelty in their invention that has been infringed.⁶² In trade secret law, the trade secret holder is typically required to identify with “particularity” (and at an early stage of the litigation) the alleged trade secrets taken.⁶³ In trade dress law, the holder must be “specific” in defining the trade dress.⁶⁴ And for trademarks generally, the holder must define the “good and services” it offers, limiting the scope of its mark.⁶⁵ By contrast, courts have rarely required any level of specificity in copyright pleadings beyond

60. *Compare* Complaint, Otto v. Hearst Commc’ns, Inc., 345 F. Supp. 3d 412 (S.D.N.Y. 2018) (not formally pleading that originality is met), Complaint, Cruz v. Cox Media Grp., 444 F. Supp. 3d 457 (E.D.N.Y. 2020) (not formally pleading that originality is met), and Complaint at ¶8, Pohl v. MH Sub I LLC, 314 F. Supp. 3d 1225 (N.D. Fla. 2018), *rev’d and remanded*, 770 F. App’x 482 (11th Cir. 2019) (pleading only that “Dr. Pohl has extensively documented his work through the use of “before and after photographs that depict the transformational nature of his work”), *with* Complaint at ¶20–21, Roe v. Bernabei & Wachtel PLLC, 85 F. Supp. 3d 89, 98 (D.D.C. 2015) (pleading that Plaintiff “creatively” hid her phone in her purse and made “quick creative judgments as to the sights and sounds the phone would likely record by leaving the phone in her purse.”).

61. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 356 (1991) (“Originality is a constitutional requirement.”).

62. *See, e.g.*, N.D. Cal. Patent L.R. 3-1 (requiring identification of alleged infringement to be made as “specific[ally] as possible” at the outset of the lawsuit); *accord* E.D. Tex. P.R. 3-1.

63. *See, e.g.*, InteliClear, LLC v. ETC Glob. Holdings, Inc., 978 F.3d 653, 658 (9th Cir. 2020) (trade secret plaintiff must “describe the subject matter of the trade secret with sufficient particularity”).

64. *See, e.g.*, Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 381 (2d Cir. 1997) (trade dress plaintiff must articulate the “specific elements which comprise its distinct dress” as courts will “be unable to shape narrowly-tailored relief if they do not know what distinctive combination of ingredients deserves protection.”).

65. *See* J. THOMAS McCARTHY, 2 McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:48 (5th ed. 2025) (“One of the vital parts of an application is a specification of the particular goods or services on or in connection with which the mark is used or is intended to be used.”); *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 971 (9th Cir. 2007) (“[T]he recitation of goods and services in the registration limits the scope of presumptions of validity”(quoting McCARTHY at § 24:65)).

identifying the infringed work (and that it is registered). This makes copyright the outlier in areas of intellectual property law.

As all other fields of intellectual property law recognize, there are substantial practical benefits to requiring a plaintiff to state early and on the record what intellectual property they are claiming.⁶⁶ Doing so prevents gamesmanship (particularly claiming one's rights are broader than they are), a perennial concern in intellectual property law.⁶⁷ *Straight Path v. Cisco* demonstrates the problem of inconsistent claims by intellectual property holders at its extreme.⁶⁸ The patent holder in *Straight Path* had previously claimed an extremely narrow novel invention when arguing before the Federal Circuit for the validity of its patent in a related case.⁶⁹ The Federal Circuit pointed this out during oral argument, stating, "You've boxed yourself into a pretty narrow infringement argument, though, haven't you, with this claim construction?"⁷⁰ Despite telling the Federal Circuit that this was correct, once the patent holder had its validity ruling in hand, it turned around and sued for infringement on "an astonishingly overbroad theory."⁷¹ The district court found the patent holder's "duplicitous machinations in telling the Federal Circuit one thing and telling this Court the opposite on a critical point" exceptional enough to justify a grant of attorney's fees.⁷² But this finding was only possible because the patent holder had made its previous representations on the record with the Federal Circuit. In a typical copyright infringement case, the public record would not be so detailed.

In copyright, the staged nature of the analysis may raise additional gamesmanship concerns. The analysis of visual works traditionally occurs in two or three stages: originality, infringement, and, where applicable, fair use. At each stage, courts make a slightly different inquiry, but to the common end of understanding what is protected, what was taken, and whether that taking is justified under copyright law. These stages, in theory, logically build on one another. The scope of infringement should be limited by what the plaintiff has legitimately claimed as original in their work—a defendant should not be penalized for taking elements of a work that are not the plaintiff's protectable expression, as the various scoping infringement doctrines recognize. But it

66. Practical benefits include requiring a claimant to "investigate its claims beforehand," discouraging the filing of "meritless complaints," enabling a court to "frame appropriate discovery and rule upon it," and enabling the other party to "develop defenses and not face surprise on the eve of trial." ERIC E. BENSEN & ROGER M. MILGRIM, 1 MILGRIM ON TRADE SECRETS § 1.01 (1967).

67. See, e.g., *Jobscience, Inc. v. CVPartners, Inc.*, No. C 13-04519 WHA, 2014 U.S. Dist. LEXIS 64350, at *5 (N.D. Cal. May 1, 2014) ("Experience has shown that it is easy to allege theft of trade secrets with vagueness, then take discovery into defendants' files, and then cleverly specify whatever happens to be there as having been trade secrets stolen from plaintiff. A true trade secret plaintiff ought to be able to identify, up front, and with specificity the particulars of the trade secrets without any discovery. This order will not allow this old trick of vague pleading with the blanks to be artfully filled in only after discovery.").

68. *Straight Path IP Grp., Inc. v. Cisco Sys., Inc.*, No. C 16-03463 WHA, 2017 WL 6372971 (N.D. Cal. Dec. 13, 2017), aff'd sub nom. *Straight Path IP Grp., LLC v. Apple Inc.*, 748 F. App'x 1027 (Fed. Cir. 2019).

69. *Samsung Elecs. Co., Ltd. v. Straight Path IP Grp., Inc.*, 696 F. App'x 1008, 1013 (Fed. Cir. 2017).

70. *Straight Path IP Grp.*, 2017 WL 6372971, at *5 (quoting Oral Argument, Dkt. No. 131-19 at 28:25-29:9, *Samsung Elecs. Co.*, 696 F. App'x 1008).

71. *Straight Path IP Grp.*, 2017 WL 6372971, at *5.

72. *Straight Path IP Grp.*, 411 F. Supp. 3d at 1031.

is far easier to properly demarcate scope at the infringement stage if originality has already been established in a focused manner. And as scholars have recognized, courts have lately demonstrated a tendency to breeze past not just the originality stage of analysis, but the substantial similarity inquiry as well, leaving fair use as the load-bearing inquiry.⁷³ But the evidentiary work done at the originality and infringement stages lay the groundwork for making fair use determinations.⁷⁴ If a plaintiff is not made to explain their creative choices at the originality stage, that plaintiff is free to make broader arguments at later stages of the analysis that might have been rejected had they come earlier.

Requiring copyright plaintiffs to explain why their works satisfy originality serves the affirmative purpose of forcing plaintiffs to articulate their creative choices. Once articulated, creative choices may serve as a touchstone in lawsuit against which evidence can be developed to either vindicate or disprove the alleged choices. Recall that, in *Otto*, the plaintiff was attending a wedding at Trump National Golf Club when Donald Trump made a surprise appearance; the plaintiff held up her smartphone over the crowd around her and snapped a quick shot.⁷⁵ Because originality was never challenged in that case, the plaintiff never articulated what creative choices underlay this photograph. Perhaps there were many. Or perhaps, if pressed, the plaintiff would have had little to say, opening originality as a battleground in that case. Pleadings shape the path of litigation, guiding initial discovery, which in turn creates the record for summary judgment and trial. Increased transparency at the pleading stage lays the foundation for informed judicial scrutiny of originality, and for more lucid judicial analysis at the subsequent stages of copyright analysis. The less courts discuss originality, the more likely defendants are to forego it as a futile argument (as in *Otto*), creating a vicious cycle by then depriving courts of the opportunity to consider the argument at all.⁷⁶

2. DISSECTION OF WHETHER CREATIVE CHOICES RESULT IN FORESEEABLE EXPRESSION

Courts currently consider and filter out unprotectable elements in visual works when evaluating infringement. Courts could follow a similar process when analyzing visual works at the originality stage. Instead of simply asking whether choices were made, and accepting any answer, courts could do as the Copyright Office and the D.C. District Court have done in its AI image cases and examine whether these choices are

73. Sandra M. Aistars, *Copyright's Lost Art of Substantial Similarity*, 26 VANDERBILT J. ENT. & TECH. L. 109, 112–13 (recognizing a “trend of courts de-emphasizing the substantial similarity analysis and shifting the work of infringement decisions almost entirely to the fair use defense”).

74. *Id.* at 148 (“Originality and substantial similarity analyses provide courts the opportunity to make crucial factual assessments about visual artworks at issue in infringement proceedings.”)

75. *Otto v. Hearst Commc'nns., Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018).

76. Deferral of copyright questions to later stages of litigation, such as fair use, also significantly raises the cost, and correspondingly, the risk of lawsuits, incentivizing defendants to settle early rather than putting the plaintiff to their proof.

of the sort that copyright law is intended to protect—whether the choice foreseeably results in an expressive element of the work.

A focus on foreseeability accepts timing as a potential creative choice, but not fortuity. A landscape photographer who patiently crouches in the same spot for days on end, hunting for the perfect shot of a jumping fish, has made a protectable choice because the spontaneous moment she ultimately captures will be a foreseeable result of her waiting. In contrast, a photographer who happens to press a button at the right time in the right place is more analogous to the AI prompter whose single prompt fortuitously generates an image with pleasing expressive elements. In neither case are the expressive elements traceable to the creator's choices other than through luck or happenstance.

This thinking is not alien to how courts currently decide copyright cases, even if the language is new. In *Thaler*, the court considered how the photographer's "mental conception" was "given final form by the photographer's decisions."⁷⁷ In *Roe*, where the plaintiff sued over video taken of her sexual assault, the court found that her allegation that her video was the result of "quick creative judgments as to the sight and sounds the phone would likely record by leaving the phone in her purse" would "just barely" save the video from an originality challenge at the motion to dismiss stage.⁷⁸ This pleading tied the plaintiff's actions to their expressive results. Whether the plaintiff could convince the court—or a jury—that these "creative judgements" really occurred is another story.

For example, in *Sands v. CBS Interactive Inc.*, when pressed, the photographer plaintiff was not able to confidently distinguish the photos he was suing over from photos taken that day by another photographer of the same subject.⁷⁹ In *Sands*, this testimony did not stop the court from making a finding of originality, but it is plausible that another judge might have found that this deposition testimony raised an issue of fact for the jury—or even established a lack of protectable elements.

VI.

We have suggested that the current approaches to the analysis of photographs and AI-generated images are incongruous and discussed how courts troubled by this might apply a more robust originality analysis to photographs.

Of course, consistency could also be achieved by going in the other direction—extending the lenient standards of photographic originality to AI-generated images. The protection for such images would have to be exceedingly thin, only protecting against actual copying of the image itself. Images generated based on an identical prompt (which would not necessarily even be substantially similar to each other, as identical prompts to the same AI model may produce differing images) would most likely not be infringing, because the original prompter had no control of the process

77. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 146 (D.D.C. 2023), *aff'd*, 130 F.4th 1039 (D.C. Cir. 2025).

78. *Roe v. Bernabei & Wachtel PLLC*, 85 F. Supp. 3d 89, 98 (D.D.C. 2015).

79. *Sands v. CBS Interactive Inc.*, No. 18-cv-7345, 2019 WL 1447014, at *6 (S.D.N.Y. Mar. 13, 2019).

that translated prompt into image. But the creator of an AI-artwork could plausibly protect the exact image generated by their prompt against complete, actual copying. This approach of “thin copyright for all” respects the intuition shared by many people that a photograph or AI-generated image belongs to the person that caused it to exist, and that this causal relationship between idea and expression should result in some property right, regardless of how thin.

However, this model of shallow but ubiquitous copyright is not a cure-all. Even copyrights with limited enforceability have the potential, in practice, to stifle creativity. And this model raises the risk of stifling development of copyright doctrine as a whole. Copyright has never protected ideas; copyright law’s generosity in granting protection relative to other fields of intellectual property which require some kind of external test⁸⁰ is justified by copyright’s narrower focus on how a creator has expressed an idea in tangible form. In actual copying situations, and particularly digital copy-and-pasting, our intuitions from property law are at their strongest—something has been taken, like an apple swiped from a shelf. But a system built on easy cases will find itself without the necessary doctrine to decide harder ones. The novel question of AI-generated images has led the Copyright Office back to first principles of originality analysis. Courts should consider taking this opportunity to follow suit.

80. For patent, whether anyone else has had the idea; for trademark, whether consumers have formed associations with the mark; for trade secret, whether the particular information has been diligently kept secret.