Photographic Reproductions, Copyright and the Slavish Copy

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ABSTRACT

Despite years of training and experience, the professional museum photographer receives little respect from copyright law. His carefully crafted photographic reproductions of artwork are deemed unoriginal slavish copies, while he is styled a mere technician who fails to infuse those images with even a minimal degree of creativity. Vacationers' amateur snapshots taken with point-and-shoot cameras are considered original works, while the images of the professional museum photographer are deemed undeserving of copyright protection.

Commentators have applauded or condemned this conclusion based largely on policy considerations related to museums and the public domain. This is the first article to bring the tools of art and visual theory to bear on the question of whether the law's refusal to extend copyright protection to photographic reproductions is conceptually *sound. This Article argues that the law's failure to protect such photographs is a profound mistake, having little to do either with the inherent creativity of such images or with any lack of talent in museum photographers. Rather, as a result of ingrained cultural habits, ordinary viewers (including judges, juries and legal commentators) tend to look* through *a photographic reproduction as though it were transparent and see only the artwork depicted in the photograph. In so doing, they attribute all creativity to the painter of the artwork—and ignore entirely the uniquely photographic attributes of the image they are actually looking at, as well as the creative input of the photographer responsible for that image.*

In light of this theory, this Article argues that copyright law is mistaken in concluding that photographic reproductions of artwork are unoriginal slavish copies. Instead, I demonstrate that such images embody far more creativity than mundane photographs to which the law has heretofore extended copyright protection. This Article proposes that a more fruitful way to think about the relationship between a photographic reproduction and the depicted painting is to view the former as a map *that conveys a great deal of truthful and accurate information about the artwork, but does not imitate or duplicate it in any meaningful sense.*

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INTRODUCTION

Museum photographers are among the most maligned of all professional artists by copyright law. The honeymooner's amateur photograph of Niagara Falls taken with a point-and-shoot camera is entitled to copyright protection, while the carefully crafted photographic reproduction of a painting taken by a well-trained and seasoned photographer is deemed an unoriginal slavish copy, the legal equivalent of a photocopy.[1] In the realm of photography, perfection breeds contempt. The more accurate the art reproduction in capturing colors, the play of light off of the textured paint, the depth of shadow on the surface, etc., the less likely that a work will be deemed deserving of copyright protection. One author has even accused museum photographers who assert a copyright in photographic reproductions of public domain paintings of "copyfraud."[2]

This Article argues that denying copyright protection to the museum photographer's images is a profound mistake, one that reflects the law's perpetual struggle with identifying exactly what makes a photograph original. Copyright law has not been alone in this struggle. From the moment the technology was developed in the 1830s, artists and cultural critics have questioned whether photography should be considered a creative art form or a mere technological achievement.[3] Two features of photography have fueled this debate. First, the *product* of the technology—the photograph—has been the source of much confusion. Given that every photograph is a mirror-like image of whatever happens to be sitting in front of the camera, what room is there for a photographer's artistic input? Second, the technological *process* of making a photograph raises doubts about its creative potential. How can an image that results automatically from a "mechanical contrivance[]"—the mere clicking of a camera's shutter release—embody any creative input?[4]

The photograph was accepted into the pantheon of copyrightable works in the mid-Nineteenth Century, but the cultural controversy surrounding photography is imprinted in the very legal test used today to determine originality.[5] The Supreme Court set forth two criteria of originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*: "[T]he work [must have been] independently created by the author (as opposed to copied from other works), and . . . it [must] possess[] at

1. Melville Nimmer first applied the term "slavish copy" to photography. MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 22.1 (1963). The federal district court in Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998) [hereinafter *Bridgeman I*], *modified on reconsideration by* 36 F. Supp. 2d 191 (S.D.N.Y. 1999) [hereinafter *Bridgeman II*], relied on Nimmer to support its conclusion that photographic reproductions of public domain paintings are "slavish copies." *See, e.g.*, *Bridgeman II*, 36 F. Supp. 2d at 197. In support of the argument that photographic reproductions of paintings are the effective equivalent of photocopies, see *Bridgeman I*, 25 F. Supp. 2d at 427 ("The more persuasive analogy is that of a photocopier."). *See also* Jason Mazzone, *Copyfraud*, N.Y.U. L. REV. 1026, 1045 (2006) ("It is copying pure and simple—no different from making a photocopy.")

2. Mazzone, *supra* note 1, at 1042.

3. *See* discussion *infra* Part I.A.

4. NAOMI ROSENBLUM, WORLD HISTORY OF PHOTOGRAPHY 229 (4th ed. 2007).

5. Act of March 3, 1865, ch. 126, 13 Stat. 540.

least some minimal degree of creativity."[6] Applied to photography, the first criterion asks whether the *product* of the technology—the photograph—originated with the photographer or was copied from an existing work. Legal skeptics have long argued that, given the close resemblance between a photograph and its subject matter, such images are unoriginal copies devoid of independent creation.[7] The second criterion requires that, in the *process* of creating a photograph, the photographer must infuse the work with a minimal degree of personality. Again, legal skeptics argue that a photograph results from the simple interaction between light and the mechanics of the camera, relegating the photographer to the role of mere technician incapable of infusing his own personality into the image.[8]

Despite the skeptics, copyright law now embraces virtually any photograph as embodying the requisite creativity to be deemed original.[9] "Currently, there is almost no lower bound on copyrightability of photographs . . . . [O]nly a (successful) photographic attempt to reproduce an existing two-dimensional work will be considered to add so little originality to the world as to be uncopyrightable."[10] This "lower bound" was ostensibly reached in *Bridgeman Art Library, Ltd. v. Corel Corp.*, which held that a photographic reproduction of a public domain painting is a "slavish copy," undeserving of copyright protection.[11] Though the facts of *Bridgeman* concerned public domain paintings, the case's reasoning was broad enough to relegate all photographic reproductions of paintings to mere slavish copies. Many courts and commentators have endorsed *Bridgeman*'s conclusion.[12]

This Article challenges that conclusion and argues that most photographic reproductions of artwork fully satisfy *Feist*'s criteria of originality. To explain why courts and commentators have reached the opposite conclusion, I turn to recent scholarship in art and visual theory that explores certain ingrained cultural habits ordinary viewers bring with them when looking at photographic reproductions of artwork. Most importantly, a viewer tends to look *through* such an image, as though it were transparent, and see only the depicted painting. The viewer erases from his mind the fact that he is actually looking at a photograph with unique photographic attributes—erasing even the existence of the photographer responsible for that image, including the range of artistic judgments and choices

6. 499 U.S. 340, 345 (1991).

7. *See, e.g.*, Burrow-Giles v. Sarony, 111 U.S. 53, 56 (1884) ("It is insisted in argument, that a photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author.").

8. *See, e.g.*, *id.* at 59 ("[T]he taking of photographs is the work of the chemical forces of light on prepared plates, and that no intellectual labor, or other than the mechanical skill and manual dexterity of the photographer, contributes to the result.").

9. *See, e.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) ("Almost any photograph 'may claim the necessary originality to support a copyright.'") (quoting 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1], at 2-129 (1999)).

10. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 714 (2012).

11. *Bridgeman II*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999); *Bridgeman I*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998).

12. *See infra* note 99 and accompanying text.

that went into producing the photographic reproduction. The only artistic choices of which the ordinary viewer is consciously aware are those of the painter of the depicted artwork. Judges, juries and legal commentators are not exempt from these cultural habits, and this wreaks havoc when *Feist*'s criteria of originality are applied to photographic reproductions.

In light of these insights, I argue that *Bridgeman*'s widely accepted conclusion that photographic reproductions of paintings are slavish copies is flatly mistaken. A photograph of a museum painting in an art history textbook is no more a slavish copy of that painting than a photograph of a tree in a botany textbook is a slavish copy of the tree. Moreover, the professional museum photographer's judgments and choices—choosing a camera and adjusting its settings; choosing the film; arranging the lighting; developing and printing the photograph, etc.—fully satisfy *Feist*'s requirement of a "minimal degree of creativity."[13]

Part I of this Article explores copyright law's originality requirement and its application to photography. Part II turns to *Bridgeman* and examines the court's conclusion that a photographic reproduction of a painting is a slavish copy. To set the stage for my critique of *Bridgeman*, Part III invites the reader to participate in a simple thought experiment involving five photographs taken in a museum. The experiment is designed to raise doubts about whether a photographic reproduction of artwork is different in any meaningful respect from other photographs in terms of creativity. The Article then turns to art and visual theory to provide a theoretical foundation for the remainder of the Article.

Part IV examines the concept of a "slavish copy" and its application in *Bridgeman*. The term is often bandied about in cases and commentary, but virtually no one has attempted to explicate precisely what slavish copying actually means. Case law is reviewed to extract a definition of slavish copying, and show that most photographic reproductions of artwork fail to satisfy this definition. The Section concludes that most photographic reproductions of paintings are fully deserving of copyright protection.

Having rejected the view of a photographic reproduction as an imitation or duplicate, this Article proposes a more fruitful way to think about that image: as a *map* of the depicted painting. In the same way an aerial photograph of Manhattan maps each location of the island onto the image, so a photographic reproduction maps each point of the depicted painting. But neither the aerial photo nor the photographic reproduction is an imitation or duplicate, much less a slavish copy.

Finally, Part V addresses policy concerns. Refusing to grant copyright protection to photographic reproductions of paintings denies the museum

13. To be entirely clear, though a photographer is fully deserving of copyright protection for photographic reproductions of public domain artwork, that protection is thin. The photographer does not gain a monopoly over photographing the artwork depicted in the image. Rather, he is entitled to protection with respect to the incremental, uniquely photographic attributes that he has invested in that image. *See* 17 U.S.C. § 103(b) (2000). As a practical matter, he is protected only against "verbatim copying" of his photograph. *See* SHL Imaging v. Artisan House, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000).

photographer economic incentives that the law extends to other artists.[14] Given the importance of such images to educators, artists and the public's appreciation of artworks, I argue that the wisdom of denying that incentive to photographers whose very profession is to create high quality art reproductions is highly questionable and extremely unfair.

I. ORIGINALITY AND PHOTOGRAPHY

The basis for granting copyright protection lies in Article I, Section 8 of the U.S. Constitution, which grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[15] To implement that provision, Congress enacted the first Copyright Act in 1790,[16] followed by major revisions in 1909[17] and 1976.[18] Section 102 of the Act contains an originality requirement, granting copyright to "original works of authorship fixed in any tangible medium of expression," but the Supreme Court has concluded that originality has constitutional dimensions as well.[19]

A. PERPETUAL DEBATE: IS A PHOTOGRAPH A MERE MECHANICAL ACHIEVEMENT OR IS IT ART?

Congress first brought photography into the realm of copyright law in 1865.[20] Section 102 of the 1976 revisions to the Copyright Act enumerates the types of works that fall within the Act, including "pictorial, graphic, or sculptural works."

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14. *See, e.g.*, R. Anthony Reese, *Photographs of Public Domain Paintings: How, if at All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1041 (2009).

15. U.S. CONST. art. I, § 8.

16. Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version at 17 U.S.C. § 101 (2006)).

17. Act of Mar. 4, 1909, ch. 320, § 1(a), 35 Stat. 1175 (current version at 17 U.S.C. § 101 (2006)).

18. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 (1976)).

19. 17 U.S.C. § 102(a) (2006) provides: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid or a machine or device." For the constitutional elements of the originality requirement, see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) ("Originality is a constitutional requirement . . . ."). *See also id.* at 347 ("Leading scholars agree on this point. As one pair of commentators succinctly puts it: 'The originality requirement is *constitutionally mandated* for all works.'" (quoting L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA. L. REV. 719, 763 (1989)) (emphasis in original)); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06[A] (2011) ("[O]riginality is a statutory as well as a constitutional requirement.").

20. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540; *see also* Act of Mar. 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198. (The Act's provisions "shall extend to and include photographs and the negatives thereof . . . and shall enure to the benefit of authors . . . in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings."); Cong. Globe 981 (Feb. 22, 1865). Commentators have suggested that copyright protection was extended to photography as a result of the prominent role these images played "in bringing the horrors of the Civil War to the public." WILLIAM PATRY, 2 PATRY ON COPYRIGHT § 3:98 (2010).

Section 101 defines "pictorial, graphic, or sculptural works" to include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions . . . ."[21]

Decades of controversy set the stage for copyright law's embrace of this new technology.[22] From photography's invention in the 1830s, artists and cultural critics debated whether photography was an art form or merely a tool of science. The debate focused on two features of this technology. The first related to the product of the technology—the photograph—which seemed to imitate exactly the object placed before the camera, leaving no room for artistic intervention. Only months after the announcement of a new photographic process created by Louis Daguerre in 1839, Edgar Allen Poe noted: "The daguerrean image achieves an unprecedented 'identity of aspect with the thing represented.'"[23] The second related to the process of a photograph's creation—the mechanical nature of the camera and the perceived limitations on the photographer's creative input: "[T]he photographer must indeed reproduce, somehow, the objects before his lens; . . . he definitely lacks the artist's freedom to dispose of existing shapes and spatial interrelationships for the sake of his inner vision."[24]

Photography's power to mechanically imitate nature was a source of contempt for some.[25] Joel Snyder describes this attitude in the early years of photography: "Photographs are scientific pictures, not drawings, they are 'the naked truth . . . the imprint of the lens,' not the product of human agency or perception. Views like this came increasingly to dominate writing about photography during the 1850s . . . ."[26] While "[t]he painter creates, the photographer 'finds' or 'captures' or 'selects' or 'organizes or 'records' his pictures."[27] If nature is the artist, there is no place for a creative photographer.[28]

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21. 17 U.S.C. § 101.

22. For an excellent overview of the cultural history of photography, see SHL Imaging, Inc. v. Artisan House, 117 F. Supp. 2d 301, 306–08 (S.D.N.Y. 2000). *See also* Ets-Hokin v. Sky Spirits, Inc., 225 F.3d 1068, 1073–75 (9th Cir. 2000).

23. *See Daguerre (1787–1851) and the Invention of Photography*, THE METRO. MUSEUM OF ART, http://www.metmuseum.org/toah/hd/dagu/hd_dagu.htm (last visited Feb. 29, 2012); *see also* ALAN TRACHTENBERG, READING AMERICAN PHOTOGRAPHS: IMAGES AS HISTORY—MATHEW BRADY TO WALKER EVANS 15 (1989).

24. Siegfried Kracauer, *Photography*, *in* THE CAMERA VIEWED: WRITINGS ON TWENTIETH-CENTURY PHOTOGRAPHY 161, 163 (Peninah R. Petruck ed., 1979).

25. *See, e.g.*, *id.* at 167 ("[Critics] naturally rejected the idea that a medium confining itself to mechanical imitation could provide artistic sensations or help achieve them. Their contempt of this inferior medium was mingled with bitter complaints about its growing influence . . . .").

26. Joel Snyder, *Nineteenth-Century Photography of Sculpture and the Rhetoric of Substitution*, *in* SCULPTURE AND PHOTOGRAPHY—ENVISIONING THE THIRD DIMENSION 21, 28 (Geraldine A. Johnson ed., 1998).

27. Joel Snyder & Neil Walsh Allen, *Photography, Vision, and Representation*, 2 CRITICAL INQUIRY 143, 148 (1975) (discussing Rudolf Arnheim's view of photography).

28. Perhaps the strongest statement to this effect was voiced in 1848 by the French poet, Alphonse de Lamartine:

> In the same way that a musician would not be an artist if with the aid of an orchestra he restricted himself to imitating the noise of a cauldron on the fire or the noise of a hammer on an anvil, so a painter would not be a creator if he restricted himself to tracing nature without choice, without feeling, without embellishment. It is because of the servility of photography that I am

Photography's unique ability to provide "an ideal means of reproducing and penetrating nature without any distortions" led others, however, to view the new technology as potentially benefiting both science and art.[29] William Henry Fox Talbot, one of the inventors of photography, wrote in 1841 (a mere two years after the announcement of Daguerre's invention):

> [I]t was said . . . at the time when photogenic drawing was first spoken of, that it was likely to prove injurious to art, as substituting mere mechanical labor in lieu of talent and experience . . . . [but] there is ample room for exercise of skill and judgment. It would hardly be believed, how different an effect is produced by a longer or shorter exposure to the light, and also, by mere variations in the fixing process, by means of which almost anything, cold or warm, maybe thrown over the picture, and the effect of bright or gloomy weather may be imitated a pleasure. All of this falls within the artist's province to combine and regulate . . . . [S]uch an alliance of science with our will prove conducive to the improvement of both.[30]

B. PHOTOGRAPHY AND ORIGINALITY IN THE COURTS

This cultural debate provided the backdrop in 1884 for the Supreme Court's first decision involving photography and originality in *Burrow-Giles Lithographic Co. v. Sarony*.[31] The Court was asked to determine whether a photographer could qualify as an "author" for purposes of Article I, Section 8, and thus receive copyright protection for his work.[32] Napoleon Sarony, a New York City portrait photographer, accused Burrow-Giles Lithographic Co. of infringing his copyright by making unauthorized reproductions of one photograph in a series that Sarony had taken of Oscar Wilde.[33] The defendant argued that Sarony's pictures were unprotected by copyright because photographs were not "writings" for purposes of the Constitution.[34]

The defendant emphasized the features of photography at the heart of the cultural debate. First, the defendant noted the close resemblance between photograph and subject: "[A] photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which

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> fundamentally contemptuous of this chance invention which will never be an art but which plagiarises nature by means of optics. Is the reflection of a glass on paper an art? No, it is a sunbeam caught in the instant by a manoeuvre. But where is the conception of Man? Where is the choice? In the crystal, perhaps. But, one thing for sure, it is not in Man . . . . The photographer will never replace the painter; one is a Man, the other a machine. Let us compare them no longer.

BERNARD EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF THE LAW 45 (1979).

29. Kracauer, *supra* note 24, at 165.

30. PATRICK MAYNARD, THE ENGINE OF VISUALIZATION—THINKING THROUGH PHOTOGRAPHY 257–58 (1997); *William Henry Fox Talbot (1800–1877) and the Invention of Photography*, THE METRO. MUSEUM OF ART, http://www.metmuseum.org/toah/hd/tlbt/hd_tlbt.htm (last visited Feb. 29, 2012).

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

32. *Id.*

33. *Id.* at 54.

34. *Id.* at 55.

the producer is the author."[35] Second, the defendant insisted the mechanical nature of the camera precluded the possibility of a photographer's creative input: "[T]he taking of photographs is the work of the chemical forces of light on prepared plates, and that no intellectual labor, or other than the mechanical skill and manual dexterity of the photographer, contributes to the result."[36] Photography, the defendant argued, is "merely mechanical, with no place for novelty, invention or originality."[37]

The Supreme Court disagreed, finding Sarony's photograph of Wilde to be "a useful, new, harmonious, characteristic, and graceful picture, . . . made . . . entirely from [Sarony's] own original mental conception."[38] Sarony accomplished this by

> posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture . . . .[39]

Thus, the photograph achieved copyright status as "an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution [sic] intended that congress [sic] should secure to him the exclusive right to use, publish, and sell . . . ."[40] The Court did not address those aspects of photography that had fueled the decades-old cultural debate.[41] It did not, for example, address the photograph's close likeness to its depicted subject matter, shying away from locating originality in the specific

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35. *Id.* at 56.

36. Brief for Plaintiff in Error at 10, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

37. 111 U.S. at 59. In its brief, Burrow-Giles elaborated on this point:

> [T]he painter's mind is actively engaged; the choice of the correct colors, the mixtures of colors, the correct light and shade, the drawing of the outlines—all are acts of an intellectual kind, and it is *his work* which transforms the blank canvas into a thing of beauty.
>
> The sculptor molds the clay, or chisels the marble; guided by his *genius and intellect*, the formless mass assumes a definite shape, and a product of his work arises.
>
> . . . But in *photography* nothing of such a nature is required. The subject once arranged, there remains nothing to do but to allow the forces of nature to act.

Brief for Plaintiff in Error at 14–15, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (emphasis in original).

38. 111 U.S. at 53.

39. *Id.* at 54.

40. *Id.* at 60.

41. *See, e.g.*, Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 431 (2004) ("The Court could have focused on the photograph itself, evaluating originality as measured by aesthetics, but instead it focused on how the photographer created the subject of the photograph. That is, it does not evaluate the final product for signs of the author, but rather evaluates the *practice* as authorial.") (emphasis in original). This approach anticipates Learned Hand's well-known admonition in *Bleistein v. Donaldson Lithographing Co.* that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." 188 U.S. 239, 251 (1903).

aesthetic characteristics of the photograph. Moreover, by looking to pre-shutter activities as the basis for originality, the Court avoided any mention of the camera and its mechanical nature.[42]

The *Burrow-Giles* Court hinted that a professional photographer's work might be subject to different treatment than that of an amateur. In response to the defendant's argument that photography entails "simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object," the Court noted: "This may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection. On the question as thus stated we decide nothing."[43]

Later courts have declined the Court's invitation to distinguish between fine art and amateur photography. In the 1903 case of *Bleistein v. Donaldson Lithographing Co.*, which considered the copyrightability of circus posters, Justice Holmes stated: "The least pretentious picture has more originality in it than directories and the like, which may be copyrighted."[44] Two decades later, in *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, Learned Hand relied on *Bleistein* to conclude that virtually any photograph satisfies the requirement of originality:

> *Burrow-Giles* . . . left open an intimation that some photographs might not be protected . . . . I think that, even [applying] *Bleistein*['s] . . . rules, . . . no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.[45]

The Supreme Court's most recent authoritative statement on originality came in *Feist v. Rural Telephone Service Co.*[46] Reaffirming that "[t]he *sine qua non* of copyright is originality," *Feist* rejected the suggestion by some courts that an author's "sweat of the brow" alone without some infusion of "personality" could support copyright protection.[47] The Court set forth the criteria for originality as follows: "Original, 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."[48] The Court emphasized that "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it

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42. *See* Farley, *supra* note 41, at 427 ("[T]he court was straining to locate authorship away from the box."). Farley has suggested that, were the Court to have focused on the choices made either in operating the camera or in post-shutter activities, questions would have arisen concerning the credibility and objectivity associated with photographs as evidence in the courtroom. *Id.* at 437.

43. *Burrow-Giles*, 111 U.S. at 282.

44. 188 U.S. at 259.

45. *Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921).

46. 499 U.S. 340 (1991).

47. *Id.* at 345, 359. In doing so, the Court explicitly rejected Learned Hand's statement in *Jewelers' Circular Publ'g Co.*, 274 F. at 934, that "photographs are protected, without regard to the degree of 'personality' which enters into them."

48. 499 U.S. at 345.

might be."[49]

Relying on *Feist*, contemporary courts now agree that "[a]lmost any photograph 'may claim the necessary originality to support a copyright.'"[50] Courts follow *Burrow-Giles*'s lead in focusing on the photographer's actions and choices rather than on attributes of the image, but they have expanded the scope of relevant choices to include those closer in time to the mechanical clicking of the shutter, such as camera adjustment.[51] Some modern courts also look to a photographer's post-shutter choices related to developing and printing the final photograph.[52]

The most extensive and nuanced judicial discussion of photographic originality in the case law came from Judge Lewis Kaplan of the Southern District of New York in 2005 in *Mannion v. Coors Brewing Co.*[53] (Ironically, Judge Kaplan also authored the *Bridgeman* decisions, the critical focus of this Article.) The plaintiff in *Mannion,* a freelance photographer, took a photograph of a basketball star for a magazine article.[54] The defendant used a manipulated version of that photograph to create an outdoor billboard advertisement, and the plaintiff sued for copyright infringement.[55] Exploring issues of photography and originality, the Court relied on a British treatise on copyright law, noting that a photograph may be original in three nonmutually exclusive respects—rendition, timing and creation of the subject.[56]

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49. *Id.*

50. Mannion v. Coors Brewing Co, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005).

51. *See, e.g.*, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 (2d Cir. 1998) ("Leibovitz is entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected."); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."); SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) ("What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection."); E. Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000) ("The necessary originality for a photograph may be founded upon, among other things, the photographer's choice of subject matter, angle of photograph, lighting, determination of the precise time when the photograph is to be taken, the kind of camera, the kind of film, the kind of lens, and the area in which the pictures are taken."); Kisch v. Ammirati & Puris Inc., 657 F. Supp. 380, 382 (S.D.N.Y. 1987) (stating that copyrightable elements of a photograph "include such features as the photographer's selection of lighting, shading, positioning and timing"); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) ("Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated.").

52. *See, e.g.*, PATRY, *supra* note 20, § 3:118 ("Photographic authorship lies not in the object captured by the photographer (although elements of layout or placement of that object or objects may form a basis of protection), but rather in the creative choices made by the photographer about how to capture the object, as well as post-photographic choices made in developing and printing the work.") (footnote omitted).

53. *See Mannion*, 377 F. Supp. 2d 444.

54. *Id.* at 447.

55. *Id.* at 447–48.

56. *Id.* at 452–55; *see also* HON. SIR HUGH LADDIE ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGNS (3d ed. 2000). Nimmer similarly recognizes three ways in which a photograph can satisfy the constitutional requirement of originality, ways that parallel Judge Kaplan's (and Laddie's) discussion:

Rendition: A photograph may be original with respect to the unique photographic decisions made by the photographer—"angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques, etc."[57] Originality in rendition protects "not *what* is depicted, but rather *how* it is depicted."[58] Gaining copyright protection over a photograph as a result of its rendition gives the photographer no monopoly over the subject matter photographed.[59]

Timing: A photograph may be original by reason of the photographer's "being in the right place at the right time."[60] As an example, Judge Kaplan pointed to *Catch of the Day*, a photograph "by noted wildlife photographer Thomas Mangelsen, which depicts a salmon that appears to be jumping into the gaping mouth of a brown bear . . . ."[61] Like originality in rendition, "the image that exhibits the originality, but not the underlying subject, qualifies for copyright protection."[62]

Creation of the Subject: "A photograph may be original to the extent that the photographer posed the 'scene or subject that was photographed.'"[63] Originality based on creation of the subject is the one important exception to the principle that "copyright confers no right over the subject matter."[64]

Despite broad agreement that most photographs satisfy the originality requirement, courts and commentators also agree that there exists a lower boundary to photographic originality—one at the heart of *Bridgeman*: "A photograph of a painting or drawing, if a slavish copy, might be said to lack originality . . . ."[65] This

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> [A]ny (or as will be indicated below, almost any) photograph may claim the necessary originality to support a copyright merely by virtue of the photographers' personal choice of subject matter [Judge Kaplan's "Creation of the Subject"], angle of photography, lights [Judge Kaplan's "Rendition"], and determination of the precise time when the photograph is to be taken [Judge Kaplan's "Timing"].

NIMMER, *supra* note 9, § 2.08[E][1], at 2-129.

57. *Mannion*, 377 F. Supp. 2d at 452.

58. *Id.* (emphasis in original).

59. *Id.*

60. *Id.* at 452–53 (quoting LADDIE, *supra* note 56, § 4.57, at 229).

61. *Id.* at 453. Again, the photographer gains no monopoly over the subject matter itself—a salmon and a brown bear. The originality results from the unique coincidence of events. The possibility of infringing on such a photograph seems slight indeed (absent taking a photograph of the existing photograph).

62. *Id.*

63. *Id.* (quoting LADDIE, *supra* note 56, § 4.57, at 229).

64. *See id.* at 453, 454:

> [T]he nature and extent of protection conferred by the copyright in a photograph will vary depending on the nature of its originality. Insofar as a photograph is original in the rendition or timing, copyright protects the image but does not prevent others from photographing the same object or scene . . . . By contrast, to the extent that a photograph is original in the creation of the subject, copyright extends also to that subject. Thus, an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.

65. NIMMER, *supra* note 9, § 2.08[E][2]; *see also* Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1234 (11th Cir. 2010) ("Except for a limited class of photographs that can be characterized as 'slavish

lower boundary is the focus of this Article.

Before exploring this exception, however, one final issue concerning photography and originality must be addressed. Throughout the *Bridgeman* litigation, the court and all parties assumed that a photograph of a public domain artwork is a derivative work.[66] In the past, some courts and commentators have asserted that derivative works—that is, creative works based on or derived from an existing work—must meet a higher standard of originality than other works, a suggestion based on the Second Circuit's decision in *L. Batlin & Son, Inc. v. Snyder*.[67] The *Batlin* court applied a "substantial, not merely trivial" standard to judge the originality of a derivative work. The Seventh Circuit seconded this approach in *Gracen v. Bradford Exchange*, stating that there must be "sufficiently gross difference between the underlying work and the derivative work" to satisfy the requirements of originality.[68]

More recently, however, courts and commentators have rejected the idea of a different originality standard for derivative works. William Patry explains:

> Under the Supreme Court's *Feist* opinion, there is a single test for originality applicable to all works, derivative and nonderivative alike. That test is whether the material in which copyright is claimed was independently created and "possesses some minimal degree of creativity." If so, that material is subject to protection. Prior concerns that granting copyright in derivative works that contain "minuscule variations" from a public domain work missed the point: Those variations were insufficiently creative and thus not protectible. On the other hand, if an author has imbued the work with minimal creativity, he or she is entitled to copyright, albeit only to the extent of that minimal contribution.[69]

Most courts now agree that only one standard of originality applies to derivative

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copies,' courts have recognized that most photographs contain at least some originality in their rendition of the subject-matter."); L. Batlin & Sons, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) ("One who has slavishly or mechanically copied from others may not claim to be an author."); PATRY, *supra* note 20, § 3:118, at 3-346 ("[T]he photographs in *Bridgeman Art Library* were equivalent to a photocopy and thus were mere 'slavish copies' of public domain works.").

66. *See, e.g.*, *Bridgeman I*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998) (noting that "Protection of a derivative work turns on whether the [author's] skill, judgment and labour transforms the underlying work in a relevant way." (quoting MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW & PRACTICE § 2[3][b], at UK-28 (1998))).
Recently, courts have questioned whether a photographic reproduction is appropriately deemed a derivative work. For example, in *SHL Imaging, Inc. v. Artisan House*, 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000), the Court concluded that, as a general matter, a photograph of another artwork does not satisfy the definitional requirement that "any derivative work must recast, transform or adapt" the authorship contained in the preexisting work. Referring to a photograph of a sculpture by artist Jeff Koons, the Court noted: "A photograph of Jeff Koons' 'Puppy' sculpture in Manhattan's Rockefeller Center, merely depicts that sculpture; it does not recast, transform, or adapt Koons' sculptural authorship. In short, the authorship of the photographic work is entirely different and separate from the authorship of the sculpture." *Id.* The Court did note that some photographs are properly deemed to be derivative works, e.g., a cropped photograph of an earlier photograph or re-shooting an earlier photograph with some alternation of the expressive elements. *Id.*

67. 536 F.2d 486 (2d Cir. 1976).

68. 698 F.2d 300, 305 (7th Cir. 1983).

69. PATRY, *supra* note 20, § 3:55, at 3-156.

and nonderivative works alike.[70] In *Schrock v. Learning Curve International, Inc.*, the Ninth Circuit set forth two "general principles": (1) the originality requirement for derivative works is not more demanding than the originality requirement for other works; and (2) the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way.[71] Courts and commentators also agree that, where a new work utilizes an existing public domain work, copyright protection is available only for the incremental original elements contributed by the new work; no one can claim a monopoly over the underlying public domain work.[72] Accordingly, copyright protection for a photographic reproduction of any work is thin.[73] Paraphrasing the Court in *SHL Imaging v. Artisan House*, a photographer of an art reproduction "is granted copyright protection only for [his] 'incremental contribution.' Practically, [his] works are only protected from verbatim copying."[74]

Accordingly, in determining if a photographic reproduction of a public domain painting is original, the relevant standard is whether that photograph exhibits a nontrivial expressive variation from the depicted painting. As I argue in this Article, most photographic reproductions of artwork more than satisfy this standard.[75]

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70. *See, e.g.*, Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 521 (7th Cir. 2009); Montgomery v. Noga, 168 F.3d 1282, 1290 n.12 (11th Cir. 1999) (noting that *Feist* resolved "possible tensions in our prior precedent regarding the test for originality" and then citing previous different tests in that circuit for derivative and nonderivative works); Larch v. Sacks, 290 F.2d 548 (6th Cir. 1961); Sapon v. DC Comics, No. 00 CIV. 8992(WHP), 2002 WL 485730 (S.D.N.Y. Mar. 29, 2002) (discussing Second Circuit case law in light of *Feist*).

71. 586 F.3d 513, 521 (7th Cir. 2009). In *Bucklew v. Hawkins, Ash, Baptie & Co.*, the court applied a similar standard to determining whether a derivative work based on a public domain work is original:

> When . . . a work in which copyright is claimed is based on work in the public domain, the only "originality" required for the new work to be copyrightable . . . is enough expressive variation from public-domain or other existing works to enable the new work to be readily distinguished from its predecessors . . . . "Originality in this context means little more than a prohibition of actual copying."

329 F.3d 923, 929 (7th Cir. 2003).

72. *See* NIMMER, *supra* note 9, § 3.04.

73. *See id.* § 2.08[C][3].

74. *See* 117 F. Supp. 2d 301, 311 ("While plaintiff's photographs meet the minimal originality requirements in *Feist*, they are not entitled to broad copyright protection. Plaintiff cannot prevent others from photographing the same [picture] frames, or using the same lighting techniques and blue sky reflection in the mirrors. What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its 'incremental contribution.' Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did.").

75. This Article does not consider whether, absent a license, a photographic reproduction of a copyright-protected painting would infringe on the artist's Reproduction Rights under § 106(a) of the Copyright Act. According to copyright law, a new work copies and thereby infringes on a copyright protected work if it is "substantially similar" to the copyright protected work. *See, e.g.*, Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). Substantial similarity exists when "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).

II. A HARD LOOK AT *BRIDGEMAN ART LIBRARY, LTD. V. COREL CORP.*

The Bridgeman Art Library licensed images of well-known public domain artworks in museums and other institutions, images made from photographs taken by museum photographers and freelance photographers hired by Bridgeman.[76] The photographs were stored in two formats.[77] High-resolution transparencies were provided to clients, including book and periodical publishers, who paid licensing fees for the use of these images.[78] A CD-ROM containing low-resolution digital images was available for free as a catalog of Bridgeman's library.[79]

Bridgeman alleged that Corel infringed its copyright in these images by producing a low-resolution CD-ROM entitled "Corel Professional Photos CD-ROM Masters I–VII."[80] Corel's CD-ROM contained digital reproductions of 700 works of art, among which were 120 images allegedly taken from Bridgeman's CD-ROM.[81] As proof of Corel's copying, Bridgeman claimed to control the only authorized reproductions of the contested images.[82] Corel's defense was twofold. First, it insisted Bridgeman could not prove it copied the images.[83] Second, Corel asserted that, irrespective of the copying issue, Bridgeman's photographic reproductions lacked the requisite originality for copyright protection.[84] The Court agreed with Corel that Bridgeman's reproductions were ineligible for copyright protection.[85]

The Court initially granted Corel's motion for summary judgment in *Bridgeman I*, relying on British law.[86] The Court heard reargument in response to Bridgeman's request, and then reaffirmed its grant of summary judgment to Corel in *Bridgeman II*, relying instead on American law.[87] No appeal followed.

Recently, commentators have questioned the continued viability of the substantial similarity test. *See, e.g.*, Tushnet, *supra* note 10, at 716–17 ("The substantial similarity test is notoriously confusing and confused, perplexing students and courts alike."). Given this Article's argument that ordinary viewers tend to conflate a photographic reproduction with the painting depicted in that image, asking whether an average lay observer would deem the two images substantially similar could well lead to serious confusion.

76. *Bridgeman I*, 25 F. Supp. 2d 421, 423–24 (S.D.N.Y. 1998).
77. *Id.* at 424.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 428.
84. *Id.* at 426–27.
85. *Id.* at 428.
86. Bridgeman Art Library, Ltd., a British corporation, first argued that British law should apply based on the theory that the copying and initial infringement occurred in England. *Id.* at 425. In *Bridgeman I* the Court agreed, concluding that, "the United Kingdom has the most significant relationship to the issue of copyrightability." *Id.* at 426. On reargument, the court concluded that the issue of copyrightability was in fact governed by U.S. law. *Bridgeman II*, 36 F. Supp. 2d 191, 193–95 (S.D.N.Y. 1999).
87. 36 F. Supp. 2d at 191.

Though the Court considered a range of issues,[88] this Article is concerned solely with its analysis of constitutional originality as it applies to photographic reproductions of paintings.[89] In its first decision, the Court denied copyright protection to the plaintiff's reproductions, concluding that they were copied from the paintings and lacked originality:

> It is uncontested that Bridgeman's images are substantially exact reproductions of public domain works, albeit in a different medium. The images were copied from the underlying works without any avoidable addition, alteration or transformation. Indeed Bridgeman strives to reproduce precisely those works of art . . . . At bottom, the totality of the work is the image itself, and Bridgeman admittedly seeks to duplicate exactly the images of the underlying works.[90]

Though the Court acknowledged that "[t]o be sure, much, perhaps almost all, photography is sufficiently original to be subject to copyright,"[91] it went on to assert: "But one need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality."[92]

The Court granted that Bridgeman's photographers may have possessed a high degree of "technical skill," but concluded that such skill alone cannot satisfy the requirement of originality.[93] Looking to a British case for the proposition that "[s]kill, labour or judgment merely in the process of copyright cannot confer originality," the Court reasoned: "The more persuasive analogy is that of a photocopier. Surely designing the technology to produce exact reproductions of documents required much engineering talent, but that does not make the reproductions copyrightable."[94]

In reaching its conclusion that Bridgeman's photographic reproductions lacked originality, the court relied heavily on the Nimmers' copyright treatise, stating:

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88. Among the issues considered in the two decisions were choice of law, copyright infringement under British law, copyright infringement under U.S. law, Lanham Act claims and federal jurisdiction. *Id.*

89. Despite its first applying British law and subsequently American law, the court concluded that the laws of both countries were in accord on the issue of the originality of photography. *Id.*

90. *Bridgeman I*, 25 F. Supp. 2d at 426–27. The phrase "addition, alteration or transformation" is a reference to the court's treating photographic reproductions as a derivative works under § 103 of the Copyright Act.

91. *Id.* at 427.

92. *Id.*

93. *Bridgeman II*, 36 F. Supp. 2d at 196. Among the photographs that Judge Kaplan found to be sufficiently original to deserve copyright protection were the following:

> Certainly anyone who has seen any of the great pieces of photography—for example, Alfred Eisenstadt's classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V–J Day, the stirring photograph of U.S. Marines raising the American flag atop Mount Surabachi on Iwo Jima, Ansel Adams' work and the portraits of Yousuf Karsh—must acknowledge that photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations.

Bridgeman I, 25 F. Supp. 2d at 427.

94. *Id.* at 426–27 (quoting Interlego A.G. v. Tyco Industries Inc., [1988] 1 A.C. 217 (P.C.) (appeal taken from H.K.)).

> There is little doubt that many photographs, probably the overwhelming majority, reflect at least a modest amount of originality required for copyright protection .... But "slavish copying," although doubtless requiring technical skill and effort, does not qualify .... In this case, plaintiff by its own admission has labored to create "slavish copies" of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in the circumstances.[95]

Reactions to *Bridgeman* were largely policy oriented. Those who applauded the decision believed the case would increase protection for the public domain, result in broader public access to art in museum collections and lead to a democratization of art.[96] Those who condemned the decision argued that it would deny museums much needed revenues from licensing fees related to use of its photographic reproductions and from sales of postcards and posters in museum stores.[97] In fact, *Bridgeman*, which was never appealed, appears to have had little impact on the museum world, which continues to assert a copyright in photographic reproductions of public domain works.[98]

It is critical to point out the scope of the *Bridgeman* decision. Though the facts concerned public domain paintings, the Court's reasoning is universal and applies to photographic reproductions of *any* painting, whether or not copyright protected. Even were a photographer granted a license to produce a photographic reproduction of a copyright protected painting, under *Bridgeman*'s reasoning, that photograph would also be a slavish copy undeserving of copyright protection.

The *Bridgeman* case effectively rendered the photographic reproduction of a

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95. *Bridgeman II*, 36 F. Supp. 2d at 196–97 ("As the Nimmers have written, there 'appear to be at least two situations in which a photograph should be denied copyright for lack of originality,' one of which is directly relevant here: 'where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying.' The authors thus conclude that a slavish photographic copy of a painting would lack originality . . . .").

96. *See, e.g.*, Robert C. Matz, *Public Domain Work of Art:* Bridgeman Art Library, Ltd. v. Corel Corp., 15 BERKELEY TECH. L.J. 3, 15 (2000) (stating that the *Bridgeman* decision is significant "not for the doctrine it applied but for the policy considerations it embodied. These policy considerations, in turn, serve to promote fair competition between producers of art reproductions."); Mary Campbell Wojcik, *The Antithesis of Originality:* Bridgeman. *Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L.J. 257, 259 (2008) (applauding *Bridgeman* as helping to preserve "meaningful, productive access to public domain artworks."). In terms of the impact of the unappealed district court decision, commentators have decried the fact that *Bridgeman* has been largely ignored by the museum community, which continues to place copyright notices on photographic reproductions of artwork. *See id.* at 271 ("Like Bridgeman [Art Library], many museums have decided to simply ignore the law.")

97. *See, e.g.*, Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 965 (2007) (stating that the *Bridgeman* decision will "foster an inaccurate analysis of the originality requirement, draw revenue away from museums, discourage the creation of high-quality reproductions, and, most importantly, diminish the rights of viewers through increasingly constrained contracts of adhesion."). Allen also argues that Bridgeman's photographic reproductions did, in fact, contain enough creativity to satisfy the law's relatively low threshold for copyright protection of photographs. *Id.* at 973–80.

98. *See, e.g.*, Colin T. Cameron, *In Defiance of* Bridgeman*: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 48–50 (2006).

painting the *bête noir* of copyright law, as setting the lower limit on photographic originality. *Bridgeman*'s conclusion that such images are unoriginal slavish copies continues to this day to influence both courts and commentators. For example, in *Schrock v. Learning Curve International*, the Seventh Circuit stated:

> Most photographs contain at least some originality in their rendition . . . except perhaps for a very limited class of photographs that can be characterized as "slavish copies" of an underlying work, *Bridgeman Art Library, Ltd. v. Corel Corp* . . . . (finding no originality in transparencies of paintings where the goal was to reproduce those works exactly and thus to minimize or eliminate any individual expression).[99]

The remainder of this Article builds the case that *Bridgeman*'s conclusion that a photographic reproduction is an unoriginal slavish copy of the depicted painting is fundamentally flawed.

III. ART AND VISUAL THEORY: THE PHOTOGRAPH AS A DOCUMENT VS. THE PHOTOGRAPH AS A DUPLICATE

To set the stage for my critique of *Bridgeman*, I invite the reader to participate in a simple thought experiment. I then turn to recent scholarship in art and visual theory that considers ingrained cultural habits that ordinary viewers bring with them when looking at photographs—habits that profoundly impact the relationship between copyright law and photography.

A. THOUGHT EXPERIMENT: FIVE PHOTOGRAPHS

This is a story involving five photographs. I invite you, the reader, to consider whether each photograph exhibits a "nontrivial expressive variation" from the painting depicted (the originality standard set forth above).

Imagine a teenager named Amateur, the child of wealthy parents, who has been given a Hasselblad camera and tripod for Christmas. Amateur's best friend, a guard at a local art museum, invites Amateur to try out his new camera at the museum. (Assume that the museum imposes no restrictions on patrons' taking photographs.) Upon his arrival, Amateur's friend escorts him to a gallery.

Amateur sets up his tripod near a painting, and snaps Photograph No. 1:[100]

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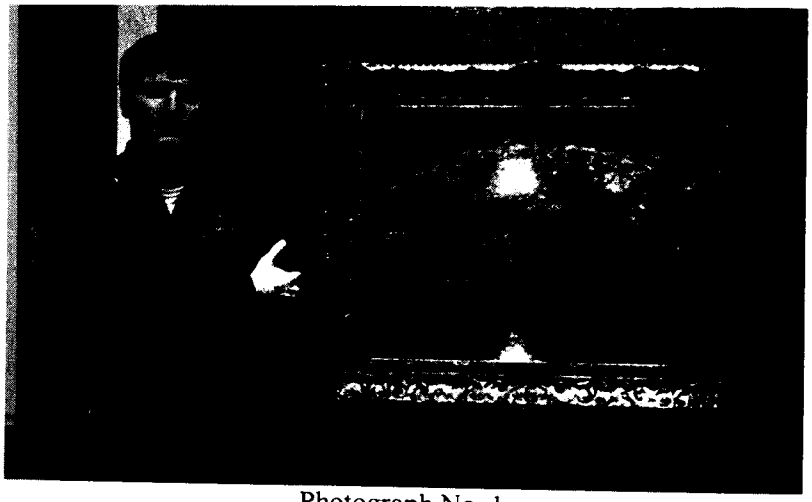
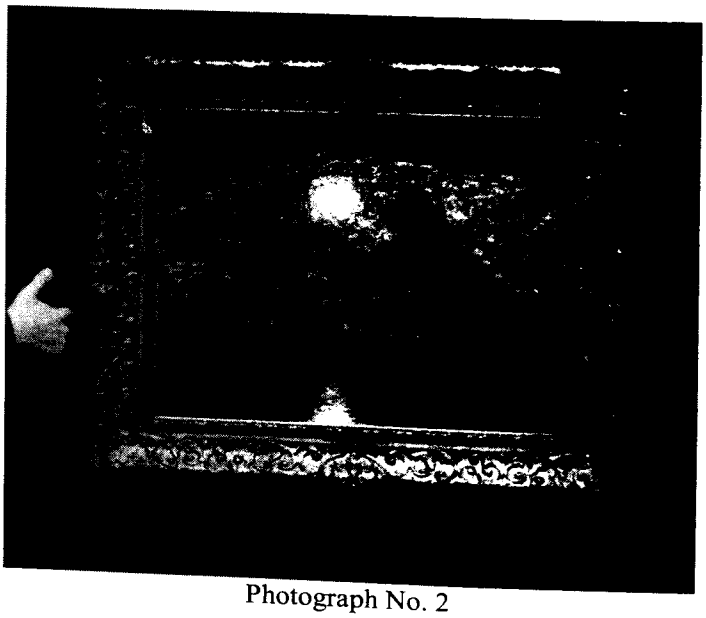
99. 586 F.3d 513, 519 (7th Cir. 2009). *Schrock*'s invocation of *Bridgeman*'s principle that slavish copies are unoriginal was cited with approval in *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1233 (11th Cir. 2010). Commentators have also cited *Bridgeman*'s slavish copy principle with approval. *See, e.g.*, PATRY, *supra* note 20, § 3:118, at 3-346 ("This is not to assert that all photographs are protected. In *Bridgeman Art Library, Ltd. v. Corel Corp.*, the Court correctly rejected a claim of copyright in exact photographic copies of public domain works of art . . . . [T[he photographs in *Bridgeman* []were equivalent to a photocopy and thus were mere 'slavish copies' of public domain works.").

100. All photographs were taken by Jesse Nix, with thanks. The author holds the copyright on all photographs reproduced in this article. Moreover, all photographs were taken with permission of the Utah Museum of Fine Arts. The painting depicted is *Silvery Night*, painted by Ralph Albert Blakelock (1847–1919) in the late Nineteenth Century. The painting is displayed at the Utah Museum of Fine Arts in Salt Lake City, Utah.



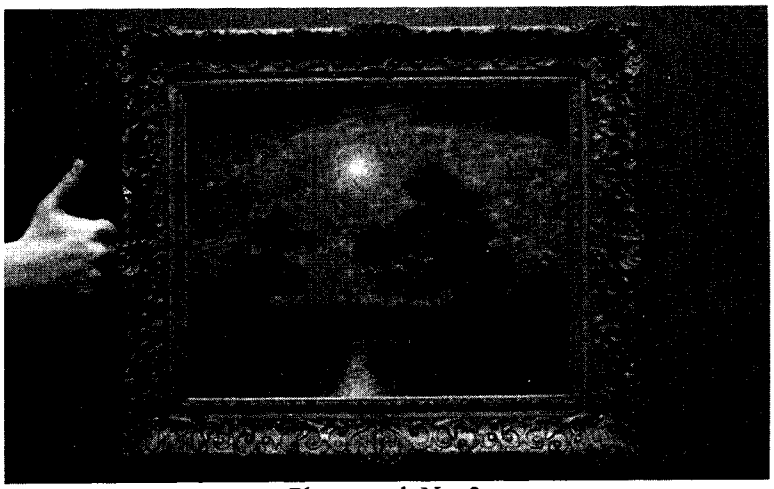
Photograph No. 1

Considering himself very clever, Amateur decides to slowly move his camera closer to the artwork. He takes two steps in and snaps Photograph No. 2:



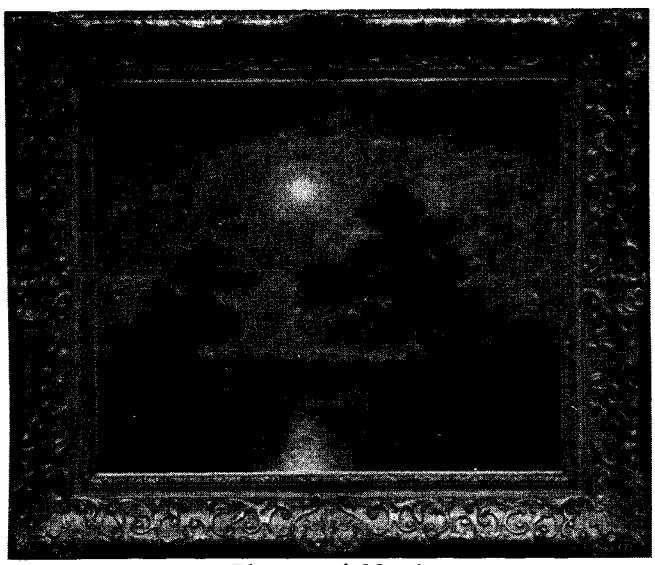
Photograph No. 2

Amateur then moves his tripod two steps closer, and asks his friend to step aside. Amused by how seriously Amateur is taking his newfound avocation, his friend becomes playful. The result is Photograph No. 3:



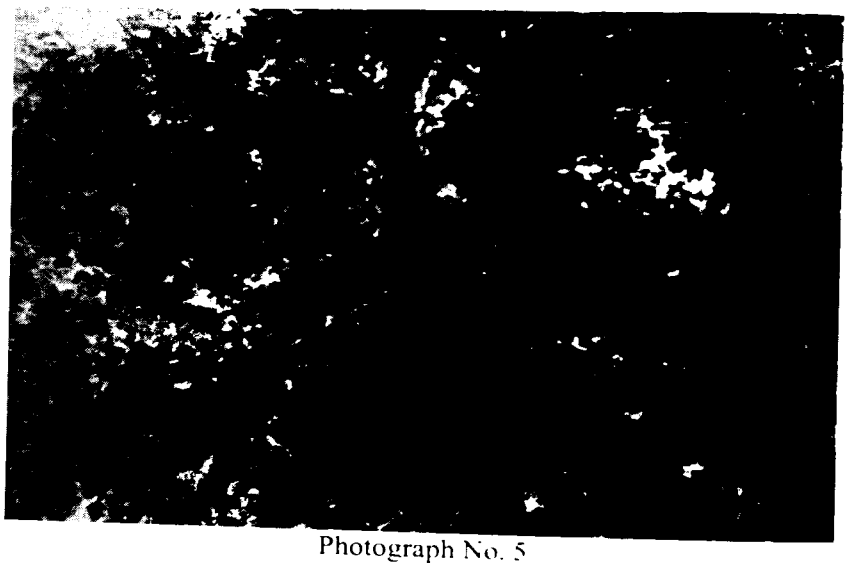
Photograph No. 3

After scolding his friend, Amateur moves the tripod two steps closer and snaps Photograph No. 4:



Photograph No. 4

Continuing in this vein, Amateur takes two additional steps closer and snaps Photograph No. 5:



Photograph No. 5

Let's extend this thought experiment. Amateur leaves the museum. Later that evening, a freelance photographer arrives who has been engaged by the museum to take a series of photographs. Let's call him Professional. Professional has extensive training in photography and years of experience photographing museum artwork. Because it is dark outside, Professional sets up spotlights and reflectors to supplement the gallery's artificial lighting. As it turns out, he is using a Hasselblad camera, film and tripod all identical to those used by Amateur.

Professional then takes a series of five photographs that, to the ordinary observer, might seem virtually indistinguishable from those taken by Amateur (though to a more discerning eye, Professional's final prints portray the paintings with greater clarity and precision). Professional's Photograph No. 1 (which includes the guard) is taken for the museum's employee handbook. Professional then takes two photographs, Photograph No. 2 and No. 3, to test the room's lighting and shadows on the artwork and on other objects—in this case the guard's arm and open fist.

He then moves his camera closer and snaps Photograph No. 4, a photograph that will be used for postcards and posters in the museum store. Finally, to fulfill an assignment to create a background for the cover of the museum's quarterly magazine, he snaps Photograph No. 5.

Which, if any, of the photographs taken by Amateur or by Professional satisfies the constitutional standard for originality? I suggest that, because each contains a nontrivial expressive variation from the depicted public domain painting, Photographs Nos. 1, 2, 3 and 5 are readily deemed original works.

What about Photograph No. 4, the photograph that most resembles the photographic reproductions at issue in *Bridgeman*? The only difference between Photograph No. 4 and Photographs No. 3 and No. 5 is that it was taken two steps closer to the artwork than No. 3 and two steps farther away from the artwork than

No. 5. In terms of the two photographers' creative input, nothing changed whatsoever with respect to rendering Photograph No. 4. The creative choices regarding how far to position the camera from the painting, adjusting the camera's focus, exposure settings, etc., remained the same. If the other four photographs possess the requisite minimal creativity for copyright protection, it is difficult to explain why Photograph No. 4 should uniquely fail in this respect.

The problem is that Photograph No. 4 simply *looks different* from the other photographs. It appears to be an exact copy that adds nothing to the depicted painting (and accordingly founders on *Feist*'s first criterion of originality, that it not copy another work). But appearances deceive. The remainder of this Article will demonstrate that, in fact, Photograph No. 4 is not an exact copy of the depicted painting, and it contains as much creativity as each of the other photographs. To provide a foundation for this argument I turn to recent scholarship in art and visual theory.

B. INGRAINED CULTURAL HABITS THAT ORDINARY VIEWERS BRING TO LOOKING AT PHOTOGRAPHS

Copyright law struggles to make sense of nontextual images, including photographic images. Rebecca Tushnet notes:

> Copyright oscillates between two positions on nontextual creative works such as images: they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that images merely replicate reality, so that the meaning of an image is so obvious that it admits of no serious debate. When they treat images as opaque, they deny that interpretation is possible, because images are so far from being susceptible to discussion and analysis using words that there is no point in trying. Either way, the image itself can seem beside the point: a "copyrighted image." This oscillation between opacity and transparency has been the source of much bad law.[101]

Photographs suffer from this same treatment. When deemed opaque for copyright purposes, courts consider a photograph's meaning to be entirely mysterious and inaccessible to judicial evaluation; in such cases, judges refuse to second-guess the aesthetic value of the depiction and, instead, focus on the photographer's acts in setting up the photograph.[102] This approach has led courts to conclude that virtually any photograph is deserving of copyright protection.

On rare occasion, however, courts treat a photograph as if the image's meaning is transparent. In apparently replicating reality—i.e., facts about the world—such images are considered devoid of creative expression and undeserving of copyright protection. The photographic reproduction of artwork is the paradigmatic case in which copyright law treats a photograph as transparent. This is well illustrated by the *Bridgeman* court's confident assertion that "[i]t is uncontested that Bridgeman's

101. Tushnet, *supra* note 10, at 686–87.
102. *See id.* at 713–15 (discussing copyright law's treatment of photographic images).

images are substantially exact reproductions of public domain artworks . . . ."[103] (In fact, Bridgeman Art Library's counsel did contest this conclusion throughout the litigation.) I suggest that copyright law treats the photographic reproduction as so transparent that the photograph *disappears* (along with its creator, the museum photographer) from the very purview of the law.

The remainder of this Article demonstrates that a photographic reproduction of artwork is actually no more transparent—and no less in need of interpretation—than any other photograph, though in some sense it may *look different* from other photographs. Recent art and visual theory shed considerable light on these issues by shifting attention from questioning the nature of photographs to examining ingrained cultural habits that ordinary viewers bring to the experience of looking at such images.

1. Photography and Objectivity

I begin with an observation by philosopher Scott Walden: "[C]ommonsense suggests there is a difference between attempts to learn about the world via photographic images, and attempts to learn about the world via handmade images such as paintings or drawings."[104] Something about a photograph leads viewers to perceive it to be a more accurate depiction of the world than a handmade visual image like a painting. This is reflected in the courtroom where a photograph of a crime scene carries much greater weight than a police sketcher's rendering of the same scene.

What is it exactly about a photograph that leads viewers to instill greater confidence in its truth and accuracy? Walden suggests that photographs are "objective" in a way that handmade images are not: "Photography, which excludes the image-maker's mental states from the process that maps features of the original scene onto features of the image, is an objective process; painting and sketching, which include the image-maker's mental states in this process, are subjective processes."[105]

A photograph is objective because it is not mediated through the mental states of the image-maker. Though a painting of an apple may accurately reflect the fruit's color to be red, the painting displays that color because of the painter's conscious interpretive choice to use red paint. ("If she believed the apple was green, either because it was in fact green or because she hallucinated that it was green, she would have applied green paint instead."[106]) In contrast, a photograph of the same apple may similarly display the apple as red, but the redness in the image is independent of the photographer's mental state:

> The photographer's belief that there is a tree in front of her, for example, operating in

103. *Bridgeman I*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998).

104. Scott Walden, *Objectivity in Photography*, 45 BRIT. J. OF AESTHETICS 258 (2005) [hereinafter Walden, *Objectivity*].

105. Scott Walden, *Truth in Photography*, *in* PHOTOGRAPHY AND PHILOSOPHY: ESSAYS ON THE PENCIL OF NATURE 105–06 (Scott Walden ed., 2008) [hereinafter Walden, *Truth*].

106. Walden, *Objectivity*, *supra* note 104, at 259.

> conjunction with her desire to take a picture of a tree, might cause her to point her camera straight ahead, but once she trips the shutter it is the optical-chemical (or, these days, optical-electronic) process that renders the image, not any aspect of the contents of her mind. With the handmade image such as a painting matters are different—the beliefs a painter has about the scene before him are directly involved in what gets rendered on the canvas.[107]

Because of their objectivity, photographs have what Walden refers to as an "epistemic advantage" over handmade images—a greater likelihood to lead a viewer to create true and accurate beliefs about the subject matter depicted.[108] (Of course, the fact that a photograph can be digitally manipulated—"photoshopped"—directly calls into question the inherent objectivity of photography.[109])

A photograph's objectivity does not, however, *assure* its truthfulness and accuracy.[110] A photograph may not truthfully and accurately display the depicted subject matter for any number of reasons: a colored filter was placed over the camera's lens; the wrong mix of chemicals was used in the dark room; dramatic lighting was used to illuminate the subject matter, creating shadows or bright areas that distort the depiction; the photograph was taken from an unusual angle; a wide-angle or other distortive lens was used; the photograph was strangely cropped, distorting the information conveyed to the viewer; the photograph was taken from an airplane; the photograph was taken during a snowstorm, obscuring much of the subject matter's detail.

Put differently, though a photograph is often an excellent and reliable way for a viewer to form accurate beliefs about the world (which explains the degree of confidence that jurors instill in photographic evidence), there is no necessary connection between a photograph and truth. On occasion, a photograph can lead to false beliefs about the world. In contrast, some handmade images can lead a viewer to develop more truthful beliefs about the subject matter depicted than a photograph of the same subject matter. Examples include drawings of birds by John James Audubon or paintings of elevated highways in New York City by

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107. Scott Walden, *Introduction* to PHOTOGRAPHY AND PHILOSOPHY: ESSAYS ON THE PENCIL OF NATURE 2 (Scott Walden ed., 2008) [hereinafter Walden, *Introduction*]. Accordingly, a photographer has an important *indirect* impact on the final photograph because of the choices he makes as to what to photograph, where to take the photograph, what camera to use, what film to use, what lighting to use, how to print the picture in the darkroom, etc. An amateur photographer using a point-and-shoot camera makes far fewer choices of this nature than does a professional photographer.

108. *See* Walden, *Objectivity*, *supra* note 104, at 262.

109. Walden recounts the case of a *Los Angeles Times* photojournalist who was summarily fired after admitting to digitally combining two images into a single photograph for the front page of the newspaper. Walden, *Truth*, *supra* note 105, at 91.

110. Author and philosopher Barbara Savedoff explains:

> In truth, photographs can be far from objective in how they present a subject; the photographer's choice of camera angle, lighting, and framing all influence the way in which the subject will be seen. Furthermore, the characteristics of the medium itself—its two-dimensionality, the delimitation of its image, the use of black and white—all contribute to a divergence between what we see in a photograph and what we would have seen in person. Nevertheless, our awareness of all these factors does not change the way we see photographs—as having a special connection to reality.

BARBARA SAVEDOFF, TRANSFORMING IMAGES 87 (2000).

photorealist painter Rackstraw Downes.[111] In both instances, because of the distorting effect of shadow, lighting, etc., few photographs can capture the exactitude of detail that appears in these handmade images.[112]

In sum, photographs are objective in a way that paintings are not. This objectivity, however, does not assure that any one photograph will display the depicted subject matter truthfully and accurately.

2. Cultural Habits of Ordinary Viewers: Conflating the Photograph as a Document with the Photograph as a Duplicate

The objectivity of photographs leads ordinary viewers to develop particular habits in the way they look at such images. Implicitly aware of the epistemic advantage of photographs, ordinary viewers tend to believe "there is a special connection between photographs and the objects they present, one that distinguishes photography from the other pictorial arts."[113] As a result, they bring different expectations to the experience of looking at a photograph as compared to their expectations when looking at other graphic images such as paintings.[114] Author and philosopher Barbara Savedoff explains:

> [I]f there is a horse in a photograph, we assume that there must have been a horse in front of the camera, since the horse cannot just be a product of the photographer's imagination. For this reason, a photograph is thought to verify the existence of its subject in a way that a painting never could; the photograph requires the presence of a horse for its production while a painting could depend wholly on the artist's imagination. When . . . works are identified as photographs, they are seen not as products of the imagination, but as records of our world.[115]

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111. Rackstraw Downes (born 1939) is a British-born realist painter and author. His oil paintings, depicting industry and the environment, are notable for meticulous detail accumulated during months of plein-air sessions and elongated compositions with complex perspective. Downes has received honors from the American Academy and Institute of Arts and Letters, the John D. and Catherine T. MacArthur Foundation and the John Simon Guggenheim Memorial Foundation. *Biography—Rackstraw Downes*, CROWN POINT PRESS, http://www.crownpoint.com/artists/111/biography (last visited Mar. 28, 2012); *2009 MacArthur Fellows—Rackstraw Downes*, JOHN D. AND CATHERINE T. MACARTHUR FOUND., http://www.macfound.org/site/pp.aspx?c=lkLXJ8MQKrH&b=5458009&printmode=1 (last visited Mar. 28, 2012); *Rackstraw Downes*, JOHN SIMON GUGGENHEIM MEMORIAL FOUND., http://www.gf.org/fellows/3799-rackstraw-downes (last visited Mar. 28, 2012).

112. Scott Walden explains:

> [T]he question is not whether the viewer would form more true beliefs by looking at a detailed photograph than a less-detailed handmade image, but rather whether he would form more true beliefs by looking at a detailed photograph than he would by looking at an *equally detailed* handmade image. It is far from clear that the answer is yes.

Walden, *Truth*, *supra* note 105, at 103 (emphasis in original).

113. SAVEDOFF, *supra* note 110, at 48.

114. Barbara Savedoff notes: "The fundamental difference in our reactions [to paintings and to photographs] rests . . . on our disparate beliefs about the genesis of each image." *Id.* at 110.

115. *Id.* at 84–85; *see also* Kendall L. Walton, *Transparent Pictures: On the Nature of Photographic Realism*, *in* PHOTOGRAPHY AND PHILOSOPHY: ESSAYS ON THE PENCIL OF NATURE 20 (Scott Walden ed., 2008) ("There is one clear difference between photography and painting. A photograph is always a photograph of something which actually exists.").

All of this leads viewers to instill special confidence in the truthfulness of photographs—not because "photography is actually more closely tied to reality than painting," but rather because viewers "*perceive* it in this way. Whether it is warranted or not, we tend to see photographs as objective records of the world, and this tendency has a far-reaching influence on interpretation and evaluation."[116]

Because we "think of photographs as providing us with records of how things look," and "as having a special connection with reality," ordinary viewers tend to assume that every photograph is a truthful and accurate portrayal of the world, even though, as explained above, this is not always the case.[117]

Savedoff introduces a distinction between a photograph as a *document* versus a photograph as a *duplicate,* a distinction that will prove central to the analysis of copyright law presented below:

> There are actually two separate issues here . . . . [T]he *documentary* power of the photograph has to do with the way photographs are typically made; it does not reside in the exact *duplication* of appearances. Even a blurred photograph has a documentary value unavailable to a drawing or painting.[118]

Every photograph that is not intentionally distorted or manipulated is a *document* of its subject matter—a record of its existence in the world. Every photograph is not, however, a *duplicate* of that subject matter—an accurate and truthful likeness of that subject matter.

The problem is that ordinary viewers "tend to conflate the separate concerns of documenting and duplicating when we look at photographs, and this conflation allows our faith in the documentary character of the photograph to be inappropriately transferred to the way things appear within the photograph."[119] Our tendency to conflate these concerns leads us to "believe not only that a photograph gives evidence of an object's existence, but also that it shows us how that object really looks."[120] Returning to Savedoff's example of a photograph of a horse, "not only do we believe that a photograph of the horse is evidence of the horse's existence, we also believe that it shows us what the horse really looks like."[121]

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116. SAVEDOFF, *supra* note 110, at 49. (emphasis in original).

117. *Id.* at 2, 7. Photographs have not always been valued for their capacity for accurate portrayal. Early in the technology's history, "[s]ome photographers, such as Oscar Rejlander and Henry Peach Robinson, attempted to model their photographs on paintings. They chose themes characteristic of academic painting, creating allegories and illustrations, and they achieved a painterly look, using soft focus and carefully posed compositions." *Id.* at 188.

118. *Id.* at 87 (emphasis added).

119. *Id.* at 193.

120. *Id.* Elsewhere Savedoff notes:

> We read photographs and paintings differently not simply because of differences in the way they look and not simply because of what we know about their genesis—the two reasons are interrelated. Presumably we see photographs as documents because of the mechanical production of their image, but the detail and precision typical of that image allow for the confusion of the documentary and the duplicatory functions . . . .

Id. at 115.

121. *Id.* at 88. Siegfried Kracauer explains this phenomenon as follows:

> We know, says [Beaumont] Newhall, that subjects "can be misrepresented, distorted, faked . . .

3. Cultural Habits of Ordinary Viewers: Seeing *Through* the Photographic Reproduction

Because they invest special confidence in the accuracy of photographs, ordinary viewers adopt another cultural habit when looking at such images. They look *through* the photograph and focus attention on the subject matter depicted in the image. Neal Feigenson and Christina Spiesel describe this tendency as "naïve realism":

> Because pictures are tied to vision, the primary sense through which we experience the world outside ourselves, pictures can seem transparently obvious and completely "natural." . . . People tend . . . to conflate representations with direct perceptions of reality, to "look through" the mediation at what is depicted. To see the picture is to see the real thing, unmediated. What a picture depicts just seems to have presence, a kind of being in the world. As a consequence, the meaning of the picture is understood to be identical to its content.[122]

In looking *through* a photograph, ordinary viewers tend to overlook the photographer's creative choices. As Patrick Maynard explains, photography has a "tendency . . . to draw perceptual attention toward detecting the situation photographed and away from appreciating the way in which the image was formed by the photographer."[123]

These tendencies to look through a photograph to the depicted subject matter and overlook the photographer's creative input are exaggerated when looking at a photographic reproduction of a painting. That photograph has a way of collapsing into the artwork. As Savedoff explains, "we are encouraged to look past the photograph and its properties and to see only the work of art that is presented. We are encouraged to treat reproductions as more or less transparent documents."[124]

In other words, "[t]he painting is not seen as an object within the photograph, it is seen as the image presented by the photograph."[125] In the viewer's mind, the photographic reproduction—which is actually a *document* of the painting—loses its photographic character entirely and appears to the viewer as a small-scale *duplicate* of the painting.

Why does this happen? In part, it's because of the common purpose photographic reproductions serve in art history textbooks, on postcards and on posters, where they are intended to convey as much truthful information about the artwork as possible—e.g., about its colors, shape and design features. To accomplish this, photographic reproductions generally eliminate from the visual field the context in which the painting exists in the world (the walls, floor, and

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and even delight in it occasionally, but the knowledge still cannot shake our implicit faith in the truth of a photographic record." This explains a common reaction to photographs: since the days of Daguerre they have been valued as documents of unquestionable authenticity. Kracauer, *supra* note 24, at 161, 185 (alteration in original).

122. NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 9 (2009).

123. MAYNARD, *supra* note 30, at 277.

124. SAVEDOFF, *supra* note 110, at 152.

125. *Id.* at 86.

ceiling surrounding the art; adjacent paintings; often the frame) so as not to distract the viewer's attention away from details of the artwork:

> [P]hotographic reproductions . . . are usually made so as to call as little attention to their own photographic qualities as possible, eschewing extreme angles, eccentric framing, and the like. Moreover, they tend to eliminate anything outside the work of art "proper," anything that might distract; the boundary of the photograph usually coincides with the boundary of the work.[126]

A viewer's tendency to collapse the photographic reproduction into the depicted painting (and to ignore the photographic image entirely) leads to a further misperception. When viewing such an image, the creative input of the photographer is not simply downplayed, as it is with most photographs. The very existence of the photographer is erased from the viewer's consciousness, and all artistic creativity gets attributed to the painter of the artwork, and none to the photographer responsible for the image the viewer is actually looking at.

Understanding these cultural viewing habits of ordinary viewers casts light on the thought experiment. As suggested, Photograph No. 4—the photograph that most resembles the contested images in *Bridgeman*—looks different from the other photographs. We can now appreciate why. Unlike Photographs Nos. 1, 2, 3, and 5, that photograph eliminates from the visual field the spatial context in which the painting exists in the world—the features of the museum gallery in which the painting hangs. As a result of Amateur and Professional setting their cameras in the exact position to capture only the edges of the painting's frame and eliminate the painting's surroundings, the image undergoes a profound transformation in the viewer's eyes. It loses its independent identity as a photograph and collapses into the depicted artwork. In spite of this perceived transformation, in reality the creative input of the photographer and the *photographic* attributes of Photograph No. 4 are no different from the other photographs.

As argued below, these cultural tendencies have profound implications for how copyright law evaluates the originality of a photographic reproduction.

IV. PHOTOGRAPHIC REPRODUCTIONS OF ARTWORK AND SLAVISH COPYING

Armed with these insights from art and visual theory, I return to *Bridgeman* and ask whether the Court correctly concluded that a photographic reproduction of a painting is an unoriginal slavish copy undeserving of copyright protection. Before doing so, however, I step back and ask a question that few courts have confronted directly: What exactly is a slavish copy?

126. In fact, Bridgeman Art Library's photographic reproductions included each painting's frame. *See* Transcript of Hearing on Motion for Summary Judgment at 24, Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998) (No. 97 Civ. 6232 (LAK)) ("[Bridgeman's photographers] selected more than a portion [of the paintings]. They selected the whole work plus the frame . . . ."); *see also* SAVEDOFF, *supra* note 110, at 151–52.

A. THE SLAVISH COPY AND *BRIDGEMAN ART LIBRARY, LTD. V. COREL CORP.*

Copyright law is resolute in its disdain for the "slavish copy," that paradigm of a work devoid of originality.[127] A slavish copy of another's copyright protected work is also the paradigm of copyright infringement. Though the concept of a slavish copy first appeared in American copyright law in the mid-Nineteenth Century, virtually no court has provided a straightforward definition of what constitutes a slavish copy.[128] Perhaps this is because we think it obvious—we know it when we see it. In some cases this may be true. In the realm of literature, an author who copies word for word a (nontrivial) passage from another author's literary work creates a slavish copy.[129] In the realm of music, the composer who copies note for note a passage from an existing musical score creates a slavish copy.[130] And in the realm of visual arts, the painter who sits before a museum masterpiece and painstakingly replicates each and every brushstroke of the original creates a slavish copy.[131]

The adjective "slavish" derives from the same root as the words slave and slavery.[132] There are (at least) two distinct nuances to the meanings of these words. They suggest enslavement, a loss of personal autonomy to another's control in

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127. There are a number of analogous terms for "slavish copying" in the case law. *See, e.g.*, United States v. Am. Soc. of Composers, Authors & Publishers (*ASCAP*), 599 F. Supp. 2d 415, 424 (S.D.N.Y. 2009) ("It is undisputed that the music segments used in applicant's previews are *exact copies* of ASCAP music."); Kaplan v. Stock Market Photo Agency, Inc., 133 F. Supp. 2d 317, 322 (S.D.N.Y. 2001) ("In making this determination, the Court must bear in mind that substantial similarity does not require literally *identical copying* of every detail."); Car-Freshner Corp. v. Marlin Prods. Co., 183 F. Supp. 20, 37 (D. Md. 1960) ("Aside from the remarkable similarity between plaintiff's and defendant's products and defendant's admission of *verbatim copying* or 'lifting' from plaintiff's advertisements, the display easels of both parties hereto also bear an identity in context, arrangement of material and pictorial display."); Falk v. Donaldson, 57 F. 32 (C.C.S.D.N.Y. 1893) ("It is not a question of quantity, but of quality and value; not whether the part appropriated is a *literal copy* of the original production, but whether it is a substantial and material part.") (emphasis added throughout).

128. Boucicault v. Fox, 3 F. Cas. 977, 982 (C.C.S.D.N.Y. 1862) (No. 1,691).

129. *See, e.g.*, Schellberg v. Empringham, 36 F.2d 991, 995 (S.D.N.Y. 1929) ("[T]he slavishly copied matter taken from Schellberg, whether it is regarded as having been lifted from his articles or his book, is sufficient to make out a case of infringement.").

130. *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F.Supp. 177 (S.D.N.Y. 1976) (use of identical musical motifs and harmonies determined to be copyright infringement).

131. *See, e.g.*, Peker v. Masters Collection, 96 F. Supp. 2d 216, 219–20 (E.D.N.Y. 2000) ("The purpose of Masters' process is to replicate the original painting in its appearance, texture, and use of materials . . . . It also uses the image as a template for the application of oil paint brush strokes, making it easier for defendant to reproduce the exact colors and distinctive painting style or the original, down to the raised portions left by the brush strokes.").

132. *See, e.g.*, THE OXFORD ENGLISH DICTIONARY (Clarendon Press 2d ed. 1989). Among the definitions of "slavish" is the following: "Servilely imitative; lacking originality or independence." *Id.* As an example, the OED quotes British Lord Chancellor Henry Brougham's 1861 work, THE BRITISH CONSTITUTION: "In preparing this great work there was no slavish adherence to the old law." *Id.*

American copyright law's usage of the concept of "slavish" to modify "copying" is implicated in both the definition and illustrative sentence. Slavish copying entails a fixated, enslaved adherence to an existing work with the goal of imitating that work exactly. In so doing, the slavish copier intentionally avoids injecting any of his personality or creativity—"originality or independence"—into the copy. The concept entered the realm of American copyright law in 1862 in *Boucicault v. Fox*, 3 F. Cas. 977, one year after Lord Chancellor Brougham's work was published.

undertaking a task. They also suggest extremely burdensome labor. As suggested below, as a modifier of the term "copy" in the realm of copyright law, "slavish" is related more to the former sense than the latter. In slavishly copying, a writer, musician or graphic artist gives up his creative autonomy and personality, and becomes enslaved to the act of duplicating the exact details of another work. The amount of effort required to slavishly copy, however, is not always burdensome. Courts often deem slavish copying to be a mindless, inartful and rote exercise.[133] However, one emblematic example of slavish copying involves highly onerous effort: that of a painter who sits before an Old Master with the goal of copying each and every brushstroke of the artwork, an exhausting, time-consuming exercise requiring extraordinary talent. Nonetheless, his work is generally deemed to be unoriginal slavish copying.[134] (Henceforth, I will refer to this hypothetical artist as the "Copying Painter.")

The concept of "slavish" entered the realm of American copyright jurisprudence in the 1862 case of *Boucicault v. Fox*.[135] The plaintiff in the case alleged that the defendant had mounted nine performances of the plaintiff's copyright-protected play without permission.[136] Among other defenses, the defendant asserted that though "the plaintiff constructed and wrote the play . . . he drew his materials from 'The Quadroon' [a novel by Mayne Reid], to such an extent, and with so little modification, as to destroy his claim to originality."[137] The Court disagreed. Though recognizing common features in the plot, the Court noted that "there are points of marked contrast, both in the fictitious persons sketched, and the vicissitudes they experience."[138] Noting that "[m]any of the plays of Shakespeare are framed out of materials which existed long before his time," the Court concluded that the plaintiff's drama was "an original work, in the sense of the law. It is not a copy of 'The Quadroon,' nor an abridgement of it."[139]

The Court went on to state: "Plagiarism and servile imitations are not to be encouraged. Those literary thefts which are committed upon copyrighted works the law promptly suppresses. The mere copyist, or the *slavish* imitator who reproduces

133. *See, e.g.*, Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560, 1567 (M.D. Fla. 1995) ("To demonstrate substantial similarity, a plaintiff need not prove mindless, slavish, or inartful copying."); *see also* Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988) (describing slavish copying as "involving no artistic skill whatsoever").

134. *See* NIMMER, *supra* note 9, § 2.01[A] ("[A]n artist who makes such an exact reproduction of a Rembrandt that even the experts cannot distinguish from the original, undoubtedly exhibits great skill, training, knowledge and judgment, but in failing to create a 'distinguishable variation,' he has not produced anything that 'owes its origin' to him, and hence, has not engaged in an act of authorship."); *see also Bridgeman I*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998) ("This principle is exemplified in the Privy Council's oft quoted observation that although '[i]t takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, . . . no one would reasonably contend that the copy painting or enlargement was an 'original' artistic work in which the copier is entitled to claim copyright.'").

135. 3 F. Cas. 977.

136. *Id.* at 978.

137. *Id.* at 980.

138. *Id.* at 982.

139. *Id.*

old materials, substantially in their old form, without new combination, is entitled to no protection under the statute."[140]

Boucicault v. Fox suggests three criteria of slavish copying:

1. Exact Imitation: The notion of a "slavish imitator" who engages in "servile imitation" envisions a copier enslaved to the task of reproducing each and every detail of an original work. Slavish copying entails an effort to duplicate the original work with exactitude, to create an indistinguishable facsimile.[141]

2. Lack of Creative Input: Second, the slavish copier injects none of his own personality or vision into the act of duplicating the original. Slavish copying is devoid of creativity. In the words of *Boucicault*, it involves no "new combination."[142]

3. Intention to Copy: As suggested by the *Boucicault* court, slavish copying, like plagiarism, involves intentional action[143]—a conscious effort to create an exact duplicate.[144]

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140. *Id.* (emphasis added). In line with *Feist*'s conclusion that originality requires only minimal creativity, the *Boucicault* Court continued:

> But the law rests upon no code of comparative criticism. It protects alike the humblest efforts at instruction or amusement, the dull productions of plodding mediocrity, and the most original and imposing displays of intellectual power. This law should be liberally construed in favor of authors, and, leaving their comparative merits to be settled by critics, at the tribunal of public opinion, it should protect and encourage their labors.

Id. at 982–83.

141. *See, e.g.*, Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1093 n.4 (2d Cir. 1977) ("Only a slavish copy would have no differences . . . ."); Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F.2d 416, 419 (2d Cir. 1952) (equating copying "slavishly" with copying "down to the last detail" in an unfair competition case).

142. *Boucicault*, 3 F. Cas. at 982.

143. Slavish copying sits somewhere between copyright infringement (which requires neither intention nor deceit) and plagiarism and literary theft (which are both intentional and deceitful acts). Commentators distinguish between acts of plagiarism—a nonlegal concept—and acts of copyright infringement:

> Plagiarism is not necessarily copyright infringement, nor is copyright infringement necessarily plagiarism. The two concepts diverge with respect to three main aspects of the offense: copying, attribution, and intent. In some ways the concept of plagiarism is broader than infringement, in that it can include the copying of ideas, or of expression not protected by copyright, that would not constitute infringement, and it can include the copying of small amounts of material that would be disregarded under copyright law. In other ways, the concept of infringement is broader, in that it can include both properly attributed copying and unintentional copying that would be excused from being called plagiarism.

Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, *in* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 5, 9 (Lise Buranen & Alice Roy eds., 1999); *see also* RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 12 (2007) ("[N]ot all copying is plagiarism—not even all unlawful copying, that is, copyright infringement. There is considerable overlap between plagiarism and copyright infringement, but not all plagiarism is copyright infringement and not all copyright infringement is plagiarism.").

144. *See, e.g.*, Joshua Meier Co. v. Albany Novelty Co., 236 F.2d 144, 146 (2d Cir. 1956) (finding that "defendant deliberately copied a large part of the plaintiff's catalogs" in its conclusion that defendant engaged in "slavish imitation"); *see also* Drop Dead Co. v. S.C. Johnson, 210 F. Supp. 816, 819 (S.D. Cal. 1962), *aff'd*, 326 F.2d 87, 90 (9th Cir. 1963) ("Defendants' original Promise label was copied from and is a slavish copy of plaintiff's Pledge label. The palpable copying of the wording on the

Every photograph, unless digitally manipulated or purposely distorted, bears a close resemblance to the subject matter depicted. Given that most photographs are deemed original, close resemblance alone obviously does not render a photograph a slavish copy. What then transforms a photograph into a slavish copy? This question will frame our exploration of the *Bridgeman* case.

In the 150 years since *Boucicault*, though the concept of slavish copying has been invoked often, no other court has articulated a clear legal test for determining precisely what makes a copy slavish. Given the rather intuitive approach of modern courts, I embrace *Boucicault* as a useful guide in reviewing *Bridgeman*'s conclusion that photographic reproductions constitute slavish copies.

The two decisions in *Bridgeman* effectively (though perhaps unknowingly) applied *Boucicault*'s three criteria—exact imitation, lack of creative input and intention to copy—when the Court determined that Bridgeman's photographic reproductions were slavish copies:

1. Exact Imitation: Bridgeman's photographic reproductions were denied copyright protection because the judge found them to be exact duplicates or facsimiles of the underlying paintings:

> It is uncontested that Bridgeman's images are substantially *exact reproductions* of public domain works, albeit in a different medium. The images were copied from the underlying works without any avoidable addition, alteration or transformation.[145]

> At bottom, the totality of the work is the image itself, and Bridgeman admittedly seeks to *duplicate exactly* the images of the underlying works.[146]

> [O]ne need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another *as exact as science and technology permit* lacks originality.[147]

> [T]here was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with *absolute fidelity*.[148]

2. Lack of Creative Input: The Court dismissed the efforts of Bridgeman's photographers in taking the photographs as a rote exercise, involving skill and effort but devoid of creative input:

> There is little doubt that many photographs, probably the overwhelming majority, reflect at least a modest amount of originality required for copyright protection .... But "slavish copying," although doubtless requiring *technical skill and effort,* does not qualify. As the Supreme Court indicated in *Feist*, "sweat of the brow" alone is not the "creative spark" which is the sine qua non of originality.[149]

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label discloses the intention of defendants to appropriate plaintiff's Pledge label.").

145. *Bridgeman I*, 25 F. Supp. 2d 421, 426–27 (emphasis added).

146. *Id.* (emphasis added).

147. *Id.* (emphasis added).

148. *Bridgeman II*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (emphasis added).

149. *Id.* at 196–97 (emphasis added).

> While it may be assumed that this required both skill and effort, there was no spark of originality — indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in the circumstances.[150]

> The more persuasive analogy is that of a photocopier. Surely designing the technology to produce exact reproductions of documents required much engineering talent, but that does not make the reproductions copyrightable.[151]

3. Intention to Copy: The Court imputed to Bridgeman's photographers a mental intention to create exact duplicates of the paintings depicted in the reproductions:

> In this case, plaintiff by its own admission has labored to create 'slavish copies' of public domain works of art.[152]

> Indeed, Bridgeman strives to reproduce precisely those works of art.[153]

> At bottom, the totality of the work is the image itself, and Bridgeman admittedly seeks to duplicate exactly the images of the underlying works.[154]

Was the *Bridgeman* Court correct in concluding that Bridgeman's photographic reproductions satisfied the criteria of slavish copying? I turn now to this question.

B. A PHOTOGRAPHIC REPRODUCTION IS RARELY A SLAVISH COPY OF THE PAINTING DEPICTED IN THE IMAGE

Let's explore whether each of *Boucicault's* three criteria is properly applied to a photographic reproduction of a museum painting.

1. Exact Imitation: The Photographic Reproduction is a Map, not a Duplicate, of the Depicted Painting

Before turning to photographic reproductions of artwork, let's focus on the paradigmatic instance in which a photograph is properly deemed an unoriginal slavish copy: the photograph of another photograph. Nimmer explains:

> The first such situation [in which a photograph should be denied copyright for lack of originality] would arise where a photograph of a photograph or other printed matter is made that amounts to nothing more than a slavish copying. If no originality can be claimed in making an additional print from a photographic negative, there should be no finding of greater originality where the same effect is achieved by photographing a

150. *Id.* at 197.
151. *Bridgeman I*, 25 F. Supp. 2d at 427 (emphasis added).
152. *Bridgeman II*, 36 F. Supp. 2d at 197 (emphasis added).
153. *Bridgeman I*, 25 F. Supp. 2d at 426 (emphasis added).
154. *Id.* at 427 (emphasis added).

print, rather than printing a negative.[155]

Looking to *Mannion*, such a photograph is unoriginal because it copies each and every detail of the existing photograph's *rendition*—"not *what* is depicted, but rather *how* it is depicted."[156] Like the Copying Painter, a copying photographer may exercise choices and judgments in setting up his equipment that satisfy *Feist*'s second criterion, minimal creativity. But his work is unprotected because it founders on *Feist*'s first criterion of originality. It is a copy of another work because its rendition—angle of shot, light and shade, exposure, etc.—*exactly* imitates the rendition of an existing photograph (even if the size is altered or the photograph is cropped).[157]

Should a photographic reproduction of a painting also be deemed an unoriginal slavish copy because it imitates exactly the rendition of the depicted painting? To answer this question, we return to art and visual theory. Kendall Walton observes:

> Only in the most exotic circumstances would one mistake a photograph for the objects photographed. The flatness of photographs, their frames, the walls on which they are hung are virtually always obvious and unmistakable. Still photographs of moving objects are motionless. Many photographs are black-and-white. Even photographic motion pictures in "living color" are manifestly mere projections on a flat surface and easily distinguished from "reality." Photographs look like what they are: *photographs*.[158]

Barbara Savedoff offers an extensive list of ways in which the rendition of a photographic reproduction differs from that of the painting depicted, from which I quote directly:

> 1. Reproductions do not capture the colors of the original. With new techniques, the accuracy of color reproductions may improve, but still, a photograph can at most show the colors of the painting in a fixed light and from a fixed angle. . . . Furthermore, the goal of reproducing accurate color can conflict with the presentation of the subtle or ephemeral character of a painting.[159]
>
> 2. The surface of the photographic reproduction is markedly different from the surface of the original artwork. In reproduction, the texture and bulk of paint are exchanged for flat glossy paper or an iridescent screen. This not only leads to a loss of color and spatial effects, it also prevents us from seeing the way a painting is constructed.[160]

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155. NIMMER, *supra* note 9, § 2.08[E][2].

156. 377 F. Supp. 2d at 452 (emphasis in original).

157. Similarly, in Interlego A.G. v. Tyco Indus., Inc., [1988] 1 A.C. 217 (P.C.) (appeal taken from H.K.), a British case relied on in *Bridgeman I*, 25 F. Supp. 2d at 426, the court stated:

> Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.

1 A.C. at 262–63.

158. Walton, *supra* note 115, at 19 (emphasis in original).

159. SAVEDOFF, *supra* note 110, at 160.

160. *Id.* at 161.

> 3. Reproductions do not preserve the scale of the original. In art books, paintings that are of vastly different size are reproduced in images that are roughly the same size. Even when the dimensions of the original are given, the reproduction can mislead. . . . The scale of a reproduction . . . can . . . interfere with our understanding of the work of art. . . . The change in size can also affect our understanding of the painting's perspective.[161]
>
> 4. In reproduction, the physical presence of the painting is lost. The importance of this loss is most obvious for works that emphasize their objecthood through size, unusual shape, multiple panels, or the three-dimensionality of painted surface.[162]
>
> 5. The reproduction does not usually show the painting's frame. When we compare reproductions that show frames with those that do not, we see that the presence of a frame tends to remind us that we are looking at an image of an absent object rather than at the artwork itself.[163]
>
> 6. Even when the reproduction includes the frame, the relationship between painting and frame is obscured because the material differences between them are not preserved. Painted canvas and carved wood become continuous elements in the flat photograph.[164]
>
> 7. The reproduction not only fails to convey the function of the frame; it also fails to convey the function of the surrounding wall. The flat surface of the wall is important insofar as it serves as a foil for easel paintings and as a ground or negative space for shaped canvases. In a reproduction, the image of the artwork is flush with the paper on which it is printed and the white that occurs within the painting is put on the same plane as the white of the surrounding paper.[165]
>
> 8. When looking at reproduction in the book, we look down at a page instead of up at a wall or a ceiling. This can interfere with our reading and the appropriate functioning of the painting's perspective.[166]
>
> 9. When looking at a photographic reproduction, we lose the ability to move closer and farther away from the painting's surface. This prevents us from discovering the tension between a painting's visual effect and the surface that allows that effect.[167]

In sum, the many *photographic* attributes of a photographic reproduction—size, surface texture, interplay with light, etc.—are fundamentally different from the pictorial and painterly attributes of the depicted painting. This is because the technology of applying light to chemicals on paper to create a two-dimensional photograph (or pixels to a digital photograph) is qualitatively different from the technology of applying colored pigments to canvas to create a three-dimensional painting. Unlike the photograph of a photograph, pointing a camera at a painting and snapping the shutter release does not duplicate the artist's rendition of that

161. *Id.* at 161–62.
162. *Id.* at 162.
163. *Id.* at 164.
164. *Id.* at 165.
165. *Id.* at 165–68.
166. *Id.* at 168.
167. *Id.* at 169.

painting.[168] Thus, a photographic reproduction is *not* a slavish copy—an exact imitation—of the depicted painting.

Is a photographic reproduction *ever* properly considered a slavish copy? Recall Savedoff's list of differences between a photographic image and the depicted painting: as the items on that list disappear, the photograph approaches being an exact imitation of the painting. To understand this, let's return to the statement in *Bridgeman* that "a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality."[169] Is it true that a typical photographic reproduction on a postcard or poster represents the most exact copy of a painting that science and technology can create?

The answer is no. Photographic technologies do exist that enable a photographic image to closely imitate the rendering of a painting. An obvious candidate is a *giclée* photograph, a process developed in the 1990s for making fine art prints from a digital source using high-end inkjet printers.[170] A *giclée* print made from a high quality digital copy of an existing painting, if printed on canvas in a size close to the original, might well appear virtually indistinguishable from the painting—an exact imitation or facsimile of the artwork. Nonetheless, at the present time, even the *giclée* process does not yet have the capability of reproducing the surface topography of a highly textured painting.[171] Were that

168. Savedoff is not alone in concluding that a photographic reproduction is fundamentally different than the depicted painting. *See* Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 845–46 (2001):

> By contrast, the [photographic] transparency of the painting is anything but complete. A confection of celluloid and colored dyes, it may capture the painting's informational content—in essence, what it's about—but in no way does it reflect what the painting is: that it is a tangible object with a physical scale and presence, a canvas support or other surface encrusted and/or stained with a distinctively applied coat of paint in a range of pigment-based colors that in the depth of their hues and their subtle interplay far exceed anything that a camera might possibly record. That the various paper products commonly generated from such transparencies—catalogue and book illustrations, postcards, posters, and various size prints suitable for framing—are so frequently referred to as "reproductions" seems an unfortunately imprecise and misleading usage. If Judge Kaplan's photocopy is truly what counts as a reproduction of the typescript from which it was made, then the only thing that ought comparably to count as a reproduction of a six-foot-square heavily impastoed abstract expressionist canvas would be another six-foot-square canvas—a full-scale and just as heavily impastoed copy of the original. The transparency and its progeny are not reproductions. A more accurate term for them might be "photoreductions."

169. *Bridgeman I*, 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998).

170. The word "*giclée*" is derived from the French language word "*le gicleur*" meaning "nozzle," or more specifically "*gicler*" meaning "to squirt, spurt, or spray." It was coined in 1991 by Jack Duganne, a printmaker working in the field, to represent any inkjet-based digital print used as fine art. *A Brief History of Giclee*, EGICLEE.COM, http://www.egiclee.com/giclee-history.html (last visited Feb. 25, 2012).

171. Various companies specializing in fine art reproduction claim to be able to reproduce exactly a painting's texture as well as its color. This process generally involves enhancing a *giclée* print with hand-applied brushstrokes designed both to resemble the texture of original painting and to reflect light in a similar way. *See, e.g.*, *Brushstrokes Effect*, FINE ART REPRODUCTIONS ON CANVAS, http://www.colours-art-publishers.com/brushstrokes.htm (last visited Apr. 27, 2012) (describing such a product, which this company has branded with the name "Brushstrokes Effect"). Some technologies have boasted the ability to mechanically recreate accurate texture, but none appear to be in use today. For example, a company called Artagraph Reproduction Technologies, Inc., apparently no longer in

process to improve to a point where surface topography could also be reproduced, one might well have an instance in which a photographic reproduction could correctly be deemed a slavish copy—an *exact* imitation of the painting.

How then can one explain the *Bridgeman* court's conclusion that photographic reproductions are slavish copies, "as exact as science and technology permit"?[172] Savedoff's distinction between a photograph as a *document* and a photograph as a *duplicate* sheds critical light on the court's mistake. A photographic reproduction is a document of a painting. It records the existence of the painting. If it is of high quality, it conveys a great deal of truthful information about the painting's color, texture and the play of light and shadow on the painting's surface. Rarely, however, is it a *duplicate* or exact imitation of the painting. But legal viewers—judges, juries and commentators—are not immune to the ingrained cultural habits ordinary viewers bring with them when looking at photographic reproductions of paintings. Accordingly, they have a tendency to conflate the issues of documentation and duplication. When viewing Bridgeman's photographic reproductions, the *Bridgeman* judge looked *through* the photograph and saw only the depicted painting. He overlooked the myriad differences between the photograph and the painting, because he experienced the photographic image as transparent.[173] The photograph effectively disappeared, collapsed into the painting itself, and the judge mistook a *document* of the painting for a *duplicate*.

To see this more clearly, recall the Copying Painter, the accomplished artist who, sitting before a painting in a museum, creates on his own canvas a painting that even an astute observer cannot distinguish from the original. The Copying Painter creates a *duplicate* of the original painting, an exact imitation—a slavish copy. I contrast the Copying Painter with an individual I will refer to as the "Documenting Photographer."

The Documenting Photographer who creates a photographic reproduction does not create an exact imitation of the painting that would be indistinguishable from the painting to even an astute observer. Rather, that photographer creates a *document* of the painting, an image that conveys truthful information about the artwork, useful, for example, to readers of art history textbooks to learn about the artwork or to encourage appreciation of the depicted artwork by members of the public looking at museum postcards, posters and websites. A Documenting Photographer of museum paintings creates the same type of image as that created

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business, filed a U.S. patent in 1990 for "a method of faithfully reproducing a multicolor image having three-dimensional texture." U.S. Patent No. 5,182,063 (filed June 29, 1990). The patent describes the invention as a "method and means for reproducing images such as works of art" in which the resulting "reproduction images have both coloration and three-dimensional texture" of the original images. *Id.* at 2. However, even if this process functioned as described, it was prohibitively expensive and is not in used widely, if at all, today. *See Fine Art Reproduction Technologies and Alternative Photo Printing Process*, ART PRINTING TECHNOLOGIES, http://lavendera.com/PrintingTech/PrintingTech.htm (last visited Apr. 27, 2012). Another company called TDi, also no longer in business, claimed to have developed a plotter it called the Modern Master system which could paint oil based inks or paints directly on a canvas, but this system also does not appear to be in use today. *Id.*

172. *Bridgeman I*, 25 F. Supp. 2d at 427.

173. *Id.* at 426.

by a photographer taking photos of trees for botany textbooks, or photos of birds for ornithology textbooks. These photographers do not create slavish copies of the trees, birds *or paintings* they capture, in spite of the fact that their images convey a great deal of visual information.[174] Capturing truthful details of an artwork in a photograph is simply not the same as mimicking or imitating or duplicating or making a facsimile of that artwork. In fact, as suggested above, photographic reproductions distort the paintings they depict. Barbara Savedoff notes: "In [a photographic] reproduction, a painting or sculpture is reduced to its photographically transmittable properties. Despite its aura of objective accuracy, a photographic reproduction distorts the work it presents. Moreover, the widespread use of reproductions tends to obscure critically important differences between paintings and photographs."[175]

If it is a mistake to consider a photographic reproduction to be a slavish copy of the depicted painting, what then is the best way to understand the relationship between the two images? Art historian Estelle Jussim suggests that such a photograph should be viewed as a *map* of the depicted painting. Jussim disputes the assertion that photography offers a superior way to create reproductions of paintings because it is free of stylistic conventions, and she argues that reproductive photography contains its own distorting syntax that results from the differences in scale, texture and color.[176] Rather, photographic reproductions are "simply 'maps' of originals, not duplications of originals."[177]

Jussim's suggestion is compelling. Consider an aerial photograph of Manhattan Island, New York City. In such an image, every building and street in Manhattan maps onto the photograph. Assuming the photograph is of high quality, an aerial

174. Photographs have long been recognized as a tool for learning about art. Garnett McCoy notes: "For art scholars, museums, dealers, and publications, photographs have become an indispensable tool. Today it would be virtually impossible to carry on research in art history without them. . . . While photographs of paintings are no substitute for the close analysis which can only come from a careful examination of the works themselves, they do effectively represent those works and enable the researcher to get a quick, if imperfect, view of style, subject matter, and method." Garnett McCoy, *Photographs and Photography in the Archives of American Art*, 12 ARCHIVES OF AM. ART J., no. 3, 1972, at 1–2.

175. SAVEDOFF, *supra* note 110, at 8. Elsewhere Savedoff notes: "Paintings and sculptures are presented as photographs. But despite the distortions inherent in this process, we nevertheless tend to think of photographic reproductions as reliably showing us how works of art look." *Id.* at 152. Similarly, Trevor Fawcett notes: "[T]he plausibility of photographic, and electronic, reproductions makes it easy to overlook that they are by no means transparent windows through which works of art may be examined free from distortion, but coded, problematic images in their own right." Trevor Fawcett, *Reproduction of Works of Art*, OXFORD ART ONLINE: GROVE ART ONLINE, http://www.oxfordartonline.com/subscriber/article/grove/art/T071551?q=reproduction+of+works&search=quick&pos=1&_start=1#firsthit (last visited Feb. 23, 2012).

176. *See* WILLIAM M. IVINS, JR., PRINTS AND VISUAL COMMUNICATION 177 (1953) ("Man had at least achieved a way of making visual reports that had no interfering symbolic linear syntax of their own."); ESTELLE JUSSIM, VISUAL COMMUNICATION AND THE GRAPHIC ARTS—PHOTOGRAPHIC TECHNOLOGIES IN THE NINETEENTH CENTURY 274 (1974) ("Art reproductions, even prepared from 'costly color models,' could not escape the technological limitations of scale, size, subjective evaluations of color differentiation, or the lack of a direct one-to-one relationship of printing inks to original art media.").

177. *Id.*

map will reveal a great deal of accurate information about Manhattan—but only minimal information about its topography. Perhaps one could pick out, say, the very tallest buildings, but it would be strange to consider the aerial photograph to be a slavish copy of Manhattan.

A photographic reproduction is related to its depicted painting in much the same way as the aerial photograph is related to Manhattan. Each point on the depicted painting maps onto the photographic reproduction, conveying a great deal of accurate information about the artwork. But, like the aerial photograph of Manhattan, art reproductions are less successful in conveying information about the surface topography of paintings.

One might object to the analogy because Manhattan is not a "work" for purposes of copyright law that can be slavishly copied.[178] Consider then, an aerial photograph that *does* map an artwork: a photograph of Robert Smithson's *Spiral Jetty*, located in the Great Salt Lake near Rozel Point, Utah.[179] Smithson's counterclockwise coil, constructed in 1970 out of rocks, mud, salt crystals, and water, juts out from the shoreline into the water. Like an aerial photograph of Manhattan, an aerial photograph of *Spiral Jetty* would map each detail of Smithson's creation onto the image, conveying much accurate information about the artwork's appearance, while failing to convey information about its topography. Again, the aerial photographic reproduction of *Spiral Jetty* is no more a slavish copy of the artwork than an aerial photograph of Manhattan is a slavish copy of the island. Photographic reproductions of artwork (whether taken from the sky or with a tripod placed before a painting) are best viewed as maps of the depicted subject matter, not slavish copies.[180]

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178. Of course it is filled with architectural works that appear in the aerial photograph, some of which are subject to copyright protection, but Congress explicitly extended permission to the public to photograph such works in the Architectural Works Copyright Protection Act of 1990, 17 U.S.C. § 120(a) (1990).

179. Constructed in 1970, Robert Smithson's *Spiral Jetty* is located on the northeastern shore of the Great Salt Lake, near Rozel Point, Utah. It forms a 1,500-foot-long, 15-foot-wide counterclockwise coil. Robert Smithson, *Spiral Jetty*, DIA ART FOUND., http://www.diaart.org/sites/main/spiraljetty (last visited Feb. 25, 2012).

180. One final basis for the *Bridgeman* Court's conclusion that photographic reproductions are slavish copies needs to be considered: the issue of "change in medium." In reaching its conclusion, *Bridgeman* relied on the principle that "[t]he requisite 'distinguishable variation' . . . is not supplied by a change of medium, as 'production of a work of art in a different medium cannot by itself constitute the originality required for copyright protection.'" *Bridgeman II*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (quoting Past Pluto Productions v. Dana, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986), which relied on L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) ("'[T]he mere reproduction of a work of art in a different medium should not constitute the required originality . . . .'") (citation omitted)). Commentators have also looked to *Batlin*'s "change in medium" principle to argue that photographic reproductions are not original. *See, e.g.*, Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM. & ENT. L.J. 55, 96–97 (1998).

To begin, as argued above, photographic reproductions of paintings are not a mere "change in medium" in relation to the depicted paintings. Such images contain a range of uniquely photographic attributes that more than satisfy the required nontrivial variation from the artwork.

But the "change in medium" principle seems inappropriately applied to photographic reproductions

In short, photographic reproductions created by museum photographers do not satisfy the first criterion of slavish copying—they are not exact imitations of the depicted paintings.[181] Moreover, given their unique photographic attributes (attributes very different from the rendition of the painting depicted in the image), they more than satisfy the test for originality for derivative works of a "non-trivial expressive variation."

2. Lack of Creative Input: A Photographic Reproduction of a Painting Involves Creative Choices Well Beyond Mere "Technical Skill and Effort"

To satisfy the second criterion of slavish copying, the copier must fail to infuse

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for other reasons. In *Batlin*, the defendants attempted to claim copyright protection for a plastic version of a cast iron "Uncle Sam Mechanical Bank," a toy savings bank in the public domain. *Batlin*, 536 F.2d at 488. Defendant's plastic reproduction was smaller than the original with minor variations in detail. *Id.* Relying on the "change in medium" principle, the *Batlin* Court upheld the trial court's finding that the differences between the reproduction and the original were "merely trivial." *Id.* at 492.

In *Batlin* and similar cases that rely on the "change in medium" principle, the creator of a new work is very much like the Copying Painter described above. Using the existing work as a model, he takes painstaking steps to duplicate the existing work detail by detail. Under such circumstances, the fact that the *Batlin* defendant used plastic instead of metal did not mask the fact that he imitated the details of the original bank with exactitude.

In *Durham Industries, Inc. v. Tomy Corp.*, the defendant created three-dimensional windup toys of various Disney characters, and the plaintiff manufactured and sold toys that were virtually indistinguishable from the defendant's toys. 630 F.2d 905, 908 (2d Cir. 1980). (The defendant had a license from Disney to use the underlying characters as models. *Id.* at 909.) In concluding that the defendant's toys were not original, the Court relied on

> the explicit rejection in *Batlin* of the contention that the originality requirement of copyrightability can be satisfied by the mere reproduction of a work of art in a different medium . . . . Tomy has demonstrated, and the toys themselves reflect, no independent creation, no distinguishable variation from preexisting works, nothing recognizably the author's own contribution that sets Tomy's figures apart from the prototypical Mickey, Donald, and Pluto, authored by Disney and subsequently represented by Disney or its licensees in a seemingly limitless variety of forms and media.

Id. at 910. Like the Copying Painter, Tomy intentionally and painstakingly duplicated each and every detail of the design of Disney's characters, albeit in a three-dimensional plastic toy rather than a two-dimensional drawing. Given such slavish imitation, the change in medium and dimension added no original contribution to the original Disney designs.

I suggest, however, that the "change in medium" principle is inapplicable to most photography. Unlike virtually every case relying on *Batlin*, a photographer of art reproductions is not engaged in an exercise of painstakingly copying another work, detail by detail. As argued above, pointing a camera at a painting and snapping the shutter is not an act of duplication; it is an act of documentation or mapping. Granted, the photograph documents and depicts the artwork. In so doing, however, numerous features of the rendition of the photograph are different from the rendition of the depicted artwork. To apply the "change in medium" metaphor to photographic reproduction of a painting is to fundamentally misunderstand the nature of that image, the technology, and the intentions of a professional photographer in creating such an image.

181. *See* Fawcett, *supra* note 175 ("Photoprocess printing technology gave an enormous boost to photographically based reproduction, so that in the 20th century the camera-recorded image became ubiquitous and supreme, aided by steadily improving colour film and advances in printing and publishing; but photography's apparent ability to furnish slavish likenesses of works of art remains deceptive. If near-perfect facsimile can now be achieved in copying prints, drawings and certain other paper-based art, the general run of reproductions must be regarded as at best no more than serviceable approximations.").

his work with his creative personality. Are the actions of a Documenting Photographer in shooting a photographic reproduction devoid of even the minimal spark of creativity?

The *Bridgeman* Court acknowledged that the acts of the plaintiff's photographers entailed "technical skill and effort," but deemed those acts unoriginal, relying on *Feist*'s assertion that "'sweat of the brow' alone is not the 'creative spark' that is the sine qua non of originality."[182] But supporting that conclusion was the *Bridgeman* Court's greatest challenge, for two reasons.

First, the actions undertaken by Bridgeman's photographers were identical to those that courts historically have relied upon to find a photograph to be original, actions including the photographer's choices related to "posing the subjects, lighting, angle, selection of film and camera . . . and almost any other variant involved."[183] To conclude that Bridgeman's photographs were unoriginal, one must explain why its photographers' undertaking those very same actions did not embody the requisite creativity for originality.

Second, courts and commentators have opined that virtually any photograph satisfies the minimal creativity requirements for copyright protection.[184] This presumably includes vacationers' amateur photographs taken with point-and-shoot cameras. In contrast, Bridgeman Art Library's photographers were highly trained professionals using sophisticated equipment. Why do the acts of amateur photographers embody the requisite creative spark, while the more complicated acts of highly trained professionals entail mere "technical skill and effort"?

Courts and commentators suggest three responses to these questions. First, they argue that the actions involved in creating a photographic reproduction are inherently rote and formulaic, thereby devoid of creativity. Second, they argue that any differences between a photographic reproduction and the depicted painting are not the result of the photographer's creative choices but rather the mechanics of the camera. Finally, they argue that a documentary photograph, by its very nature, lacks creativity. I will examine each response in turn.

a. The Actions of a Museum Photographer Creating Art Reproductions Are Creative Even when They Follow Representational Conventions

Courts and commentators suggest that there is only one way to shoot a photographic reproduction, and thus there is no room for the photographer's creative input. Though stating that virtually any photograph is worthy of copyright protection, Nimmer sets forth a qualification: "[A] photograph of a painting or drawing, if a slavish copy, might be said to lack originality *because of the predetermined subject matter and angle.*"[185] This view presumes that creating a

182. *Bridgeman II*, 36 F. Supp. 2d at 197.
183. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).
184. *See, e.g.*, *Bridgeman II*, 36 F. Supp. at 197 ("There is little doubt that many photographs, probably the overwhelming majority, reflect at least a modest amount of originality required for copyright protection.").
185. NIMMER, *supra* note 9, § 22.1 (emphasis added).

photographic reproduction entails a "predetermined" procedure, .one involving an identical, rote set of steps that all photographers creating such images necessarily follow. Thus their works lack even minimal creativity; while following these steps may require a certain degree of technical proficiency, such skill does not equate to the input of personality required for copyright protection.

The *Bridgeman* Court adopts these presumptions in demoting the acts of Bridgeman's photographers to slavish copying: "The more persuasive analogy is that of a photocopier. Surely designing the technology to produce exact reproductions of documents required much engineering talent, but that does not make the reproductions copyrightable."[186] In other words, the acts of museum photographer are as rote, unalterable, and uncreative as the mechanical movements of a photocopy machine.[187]

In a pre-*Bridgeman* law review article, Kathleen Connolly Butler presents a well-developed version of this argument. An exploration of that argument reveals its weaknesses. To support her claim that creating a photographic reproduction is unoriginal because it is formulaic, Butler looks to a monograph by Sheldan Collins, a former photographer for the Metropolitan Museum of Art, entitled *How to Photograph Works of Art*.[188] Relying on that work, she argues that "photography of two-dimensional artworks" follows "six basic steps" that are "technical" and "routinized," leaving no room for creative choices by a photographer.[189] Butler concludes: "What emerges from Collins' explanation of copy photography is the image of a highly skilled technician, measuring lens axes, positioning lights, calculating exposures. If true artistic skill is required [for copyright protection], the copy photographer, skilled though he may be, has not met the test."[190]

Butler fails to note, however, that Collins himself fully supports the view that a photographic reproduction of an artwork can itself involve highly creative input on the part of the photographer:

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186. *Bridgeman I*, 25 F. Supp 2d 421, 427 (S.D.N.Y. 1998). Kathleen Connolly Butler also adopts this analogy:

> [T]he photographer or digitizer who copies the same painting with a camera or computer, simply to provide information about the painting or a usable substitute for it, is likely to contend that the copy is sufficiently original to merit copyright protection. It seems, though, that the camera or computer in this instance is merely a more sophisticated copying device than the photocopier and the photographer or digitizer merely a more sophisticated operator than the teacher who pushed the button on the Xerox machine.

Butler, *supra* note 180, at 117; *see also* Mazzone, *supra* note 1, at 1045 ("It is copying pure and simple—no different from making a photocopy.").

187. In discussing *Bridgeman*, Landes and Posner question the aptness of this analogy: "[t]he court likened these transparencies to copies produced by a photocopy machine and held that since photocopying obviously fails the originality requirement of copyright law, modest as it is, so did the transparencies. Left out of this account is the fact that . . . making high-quality transparencies of artworks is a time-consuming process that requires considerable skill on the part of the photographer or copyist." WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 263 (2003).

188. SHELDAN COLLINS, HOW TO PHOTOGRAPH WORKS OF ART (1986).

189. Butler accepts that photographs of three-dimensional sculpture may well satisfy the constitutional requirements of originality. *See* Butler, *supra* note 180, at 107–09, 120.

190. *Id.* at 121–22.

> Photographic technique easily blurs the distinction between the beauty of the subject and the beauty of its image. . . . Insofar as the photo-documentation of works of art necessarily involves distorting and abstracting—lying and beautifying—it partakes of the nature of those higher art forms that comment on reality. Here we have a neat paradox: one potential art form—photography—remarking on another. It is like holding two mirrors face-to-face. But unlike a static mirror reflection, the photographic process has a dynamic mind controlling it, editing and selecting which "truths" about a work of art will be formed in the camera's ground-glass.[191]

The fact that a professional photographer like Collins may have written a "how-to" book that breaks down the process of taking art photographs into discreet steps does not lead to a global conclusion that the practice of making photographic reproductions is inherently devoid of creativity. Art students are regularly taught basic formulae for painting, photography, and other art forms. Simply because a professional photographer follows tried and true techniques to photograph artwork does not reduce his choices to mere skill, lacking originality. He *chooses* to follow established practices and, in doing so, makes creative choices. This does not demote his art to a mere technical craft.

In fact, the quality of photographic reproductions can vary significantly. Over time, new techniques have led professional photographers to photograph art in new ways, creating improved images in which "the colors . . . appear[ ] 'softer,' the lighting 'cleaner,' and the resulting image sharper."[192] Robert A. Baron has noted: "The very fact that you can write a stylistic history of reproductive photography may indicate that photographers (whether they know it or not) are making stylistic decisions—and in these decisions [may be] the needed original elements."[193] Given such stylistic decisions, one of *Bridgeman*'s staunchest supporters admits that "it is often possible to point to distinguishable variations between the original work of art and an 'exact' reproduction; and it is also possible to point to distinguishable variations between two 'exact' copies of the same work."[194]

Let's explore further the argument that shooting a photographic reproduction of art is entirely rote and formulaic. One assumption underlying this argument is that there is only one perspective from which such a photograph can be shot: the camera must be placed along a line perpendicular to the center vertical axis of the painting, and then moved to that point at which only the edges of the painting appear in the photo's frame. I want to challenge this assumption with a personal experience.

As a child, one of my favorite paintings was an 1865 work by Edouard Manet entitled *The Dead Toreador*, which hangs in the National Gallery in Washington,

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191. COLLINS, *supra* note 188, at 4. Equally revealing is Collins's admission in the preface to his book that "I've accumulated seven volumes of journals, fat with the history of my failures and successes in photographing art." *Id.* at xviii. If creating art reproductions is mechanical and formulaic, one wonders how a professional like Collins, who has spent a lifetime photographing museum paintings, could admit to "failures."

192. *See* Matz, *supra* note 96, at 15 n.96 (discussion with Maryly Snow, Slide Librarian at U.C. Berkeley's School of Art and Architecture).

193. *Id.* at 16 (quoting an email from Robert A. Baron to Robert Matz).

194. *Id.* at 15.

D.C. Standing directly in front of that work, one sees a matador lying on his back. The fallen body lies at roughly a 45-degree angle to the plane of the painting and is dramatically foreshortened, seeming to thrust outward toward the viewer. The background is featureless, offering no context to orient the prone figure. During one gallery visit, I discovered an extraordinary feature of this artwork: if one moves to the left of the canvas, the matador's body appears to shift and instead seems to lie parallel to the plane of the canvas. If one moves to the right of the canvas, the body remarkably shifts again and appears to lie perpendicular to the plane of the canvas. I remember walking back and forth from one side of the canvas to the other, amazed at how a figure seemingly frozen in paint could undergo a ninety-degree shift, depending on one's viewing angle.

Is there one and only one formulaic way to photograph Manet's artwork? The answer is clearly no. One can imagine an extended photographic study of that painting involving a series of images, each taken from a different angle. Moreover, Manet's painting is not unique in this regard. A great deal can be learned about many paintings by viewing them from various angles. What becomes clear is that shooting a photographic reproduction from the head-on perspective entails a *creative choice* to follow a representational convention. That convention results from an economic and art historical determination that, if only one photograph of an artwork is to appear in a book or on a postcard, that photograph should be shot from the perspective offering the most information about the artwork. The fact that the head-on perspective is the one with which we are most familiar masks the photographer's creative choice in adopting that perspective.

b. The Differences Between a Photographic Reproduction and the Depicted Painting Are a Result of the Different Goals of Photographic Documentation and Painting

Aware of the differences noted by Barbara Savedoff between a photographic reproduction and the depicted painting, Butler dismisses the possibility that such differences result from the photographer's creative choices.[195] Instead, she concludes that they result from the mechanics of the camera. For example, she asserts that "[o]ne significant difference is that the color in a photograph or digitally produced image cannot be true to the color in the painting."[196] She concludes however that "[t]he failure to render colors accurately cannot be a distinct artistic element deserving protection."[197] Rather that difference results from a "limitation[] of the medium."[198] She states:

> In a photographic reproduction, the camera, not the photographer, mimics the art. The mechanical process involved, rather than decisions by the photographer about composition, contour, and texture, insures that the photograph will look like the

195. Butler relies on the work of Barbara Savedoff. *See, e.g.*, Butler, *supra* note 180, at 110 nn. 247, 248 & 252.

196. *Id.* at 110.

197. *Id.* at 111.

198. *Id.*

painting. The photographer may decide how to position, light, and focus the artwork to ensure the quality of the likeness, but every photographer will obtain a likeness of some quality.[199]

Two assumptions underlie this argument. First, a photographic reproduction of a painting is a "failure," a lesser version of the original painting. Second, but for the "limitations of the medium," a Documenting Photographer would aspire to have his photograph appear to be a facsimile of the depicted painting.

Neither assumption is correct. Reproduction photography is not a failed attempt at painting. Given his fundamental goal—documentation—the Documenting Photographer does not decry the fact that he cannot create a facsimile of the original painting. Unlike the Copying Painter, the Documenting Photographer is not trying to create a one-to-one correspondence between his photograph and the depicted painting that would lead an ordinary viewer to consider the two indistinguishable. Rather, the Documenting Photographer aims to excel at what his chosen technology does best—creating excellent documents of the world.[200] He aims to capture in his image truthful details of a painting for a range of uses *other* than hanging on a museum wall. The actions of a Documenting Photographer are not inherently more or less creative than the actions of a painter (in some instances they may be more; in others, less). They are simply different acts of creativity that evolve out of the nature of the particular technology each utilizes and the particular goals each artist aims to achieve. These actions must be critiqued and judged on their own criteria.[201] Art reproduction photography is not a lesser form of painting, nor does a photographic reproduction result from a "limitation[] of the medium."

The irony of the *Bridgeman* case is that the plaintiff's photographers were, in a sense, punished for being extremely talented at doing exactly what photography does best—documenting the world. Were they less talented in creating photographic reproductions, e.g., blurring or otherwise distorting the appearance of the depicted painting, their resulting product might well have been deemed original under *Feist*.[202] As this Article's thought experiment demonstrates, it is a strange result indeed that a photographic reproduction of a painting casually taken by an

199. *Id.* at 113. This argument harkens back to the defendant's argument in *Burrow-Giles* that no photograph is original because it results merely from "the mechanical skill and manual dexterity of the photographer." Brief of Plaintiff in Error at 10, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), *available at* http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1883b%22, an argument that courts have long rejected.

200. While the Documenting Photographer *chooses* to create accurate depictions of artwork, there are photographers who intentionally choose to photograph paintings in a distorted manner. For example, German artist Gerhard Richter created a series of photographs that depict paintings as a blur. *See, e.g.*, *Pyramide* (1966), a photograph based on a 1964 oil painting titled *Kleine Pyramide (Little Pyramid)*, *in* HATJE CANTZ, GERHARD RICHTER, EDITIONS 1965–2004—CATALOGUE RAISONNÉ 136 (Hubertus Butin, Stefam Gronert & Dallas Museum of Art eds., 2004).

201. *See, e.g.*, SAVEDOFF, *supra* note 110, at 151 ("Photographic reproductions are typically made, used, and viewed differently from other types of photographs, so they require separate consideration.").

202. *See* LANDES & POSNER, *supra* note 187, at 263 ("The court's insistence in *Bridgeman* that a finding of originality requires a 'distinguishable variation' between the original and copy that cannot be satisfied by a simple change in medium creates a perverse incentive to produce second-rate or poor-quality copies.").

amateur that unintentionally includes features of the surrounding gallery is probably subject to copyright protection, while a photograph taken by a professional photographer who painstakingly avoids capturing any surrounding context is denied such protection.

c. While Intended as a Document of a Painting, a Photographic Reproduction Can Also Be a Creative Work of Art

Another assumption underlying Butler's discussion is that if a photograph is to serve as a document, it is therefore inherently devoid of creativity and artistic quality. She states:

> The documentary photographer of two-dimensional works of art strives to make accurate copies, faithful to the original. The value of the copies is that they do not interpret or add or change, because the purpose of photographing two-dimensional artworks is largely to provide information about the work or a usable substitute for the work.[203]

In other words, Butler suggests the very value of such images is that they lack any input of the photographer's creativity.

To the contrary, the fact that an art reproduction is to serve as a document does not prevent it from embodying creative choices. Art historian Richard Shiff demonstrates that a documentary photograph can also be an artistic achievement.[204] Finding the "debate over whether photography is a matter of art or documentation" to be "unrewarding,"[205] Shiff looks to the work of documentary photographers such as Walker Evans and notes: "Photography became the art of documentation, and those who excelled at this art were attributed a genius for documentation."[206] Quoting from an essay by Lincoln Kirstein about Walker Evans, Shiff states:

> "Brush, paint and palette can scarcely be considered a machine—the camera can never have been thought of as anything else." Yet art enters into the camera's productions: "Although the camera is a machine and photography is a science, a large element of human judgment comes into the process, amounting to creative selection." Some selections may be better than others, especially when the "truth" of documentation is at stake . . . .[207]

Shiff understands what Butler, the Nimmers and the *Bridgeman* court fail to appreciate: the categories of "document" and "art" are not mutually exclusive. A photograph can be both. A photographic reproduction of a museum painting taken by a professional photographer inevitably involves creative choices requiring the exercise of judgment developed over many years. Museum photographers invest

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203. Butler, *supra* note 180, at 116.

204. Richard Shiff, *Phototropism (Figuring the Proper)*, *in* 20 STUDIES IN THE HISTORY OF ART 161 (Kathleen Preciado ed., 1989).

205. *Id.* at 172.

206. *Id.*

207. *Id.* (quoting Lincoln Kirstein, *Photographs of America: Walker Evans*, *in* AMERICAN PHOTOGRAPHS 183–92 (1938)).

time studying a painting before determining the best way to convey a high degree of truthful and accurate information about that artwork through a photographic reproduction.

How then can one explain the conclusion of *Bridgeman* and commentators that, in contrast to works of virtually any other photographer, photographic reproductions taken by professional photographers are inherently devoid of creativity? The art and visual theory presented above suggests a compelling explanation (if not a compelling defense) for this conclusion. Legal viewers are not immune to the ingrained cultural habits of ordinary viewers: in looking at a photographic reproduction, they tend to collapse the photographic image into the depicted painting. They see through the reproduction as though it were transparent and perceive only the painting. In doing so, they ignore the existence of the photographer behind the photographic image, and attribute all creativity to the painter of the depicted artwork; uniquely *photographic* creative choices of the photographer are effectively erased from their minds.[208]

Given the skill, expertise, choices and judgment involved in setting up the photographic shoot and in developing and printing (and/or digitally adjusting) the final product, the high quality photographic reproductions created by Bridgeman's

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208. With respect to the creativity and the photographer, the *Mannion* decision offers an important footnote to *Bridgeman*. In *Mannion*, decided eight years after *Bridgeman*, Judge Kaplan steps back from his conclusion that the actions of Bridgeman Art Library's photographers were completely devoid of creativity. He states:

> [C]ourts have not always distinguished between decisions that a photographer makes in creating a photograph and the originality of the final product. Several cases . . . have included in lists of the potential components of photographic originality "selection of film and camera," "lens and filter selection," and "the kind of camera, the kind of film, [and] the kind of lens."

Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005). He questions the precision of these statements:

> Decisions about film, camera, and lens, for example, often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original. "Sweat of the brow" is not the touchstone of copyright. *Protection derives from the features of the work itself, not the effort that goes into it.*

Id. (emphasis added). In light of this, he reflects upon his earlier decision in *Bridgeman*:

> This point is illustrated by *Bridgeman Art Library, Ltd. v. Corel Corp.*, in which this Court held that there was no copyright in photographic transparencies that sought to reproduce precisely paintings in the public domain. To be sure, a great deal of effort and expertise may have been poured into the production of the plaintiff's images, including decisions about camera, lens, and film. But the works were "slavish copies." They did not exhibit the originality necessary for copyright.

Id. In justifying his earlier decision, Judge Kaplan no longer denigrates the acts of Bridgeman Art Library's photographers as involving mere technical skill and effort, ceding that those acts also involve "a great deal of . . . expertise." Instead, the appearance of the photograph—"the features of the work itself"—becomes the critical issue for determining originality. If the photograph is an exact copy of an existing work, any input of personality or creativity entailed in the acts of the photographer becomes irrelevant. (This explains why the product of a highly talented Copying Painter is unoriginal.) Both of *Feist*'s criteria of originality must be met. If a new work is deemed a slavish, exact imitation of an existing work, one need not even consider *Feist*'s second criterion as to whether the minimal creative spark is present. The problem with Judge Kaplan's argument in *Mannion* is that, as demonstrated above, a photographic reproduction of a museum painting is *not* a slavish, exact imitation of the depicted painting.

photographers exhibit far more than the minimal "creative spark" necessary for copyright protection. Accordingly, such photographs do not satisfy the second criterion for slavish copying: lack of any creative input on the part of the photographer.

3. Intention to Copy: Bridgeman Art Library's Photographers Did Not Intend to Create Exact Imitations of the Artworks Depicted in Their Photographs

The third criterion of slavish copying requires that the act of imitation be intentional.

An author's intention plays no part in determining originality under the criteria set forth in *Feist*.[209] If an author intends to create an original work, but his final product is deemed to copy an existing work, it will not be original. In contrast, if an author intends to copy another work, but fails miserably because of lack of talent, he may well have created an original, copyrightable work.[210] If intent is irrelevant to originality, why did the *Bridgeman* Court bother finding that Bridgeman's photographers intentionally copied the paintings in creating photographic reproductions?

As noted above, the *Boucicault* Court lumped the slavish imitator together with the plagiarist and the literary thief, all of whom engage in intentional action.[211] On occasion, courts have also suggested that, like the plagiarist and literary thief, the acts of the slavish copier entail intentional deception.[212] In concluding that

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209. Similarly, intention is irrelevant to a determination of infringement. *See* PATRY, *supra* note 20, § 9:5 ("Copyright is a strict liability tort: as such, intent to infringe is not an element of plaintiff's prima facie case for most allegations of direct infringement."); *see also* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1085–91 ("As a principle of authorship . . . I believe an intent standard obscures more than it enlightens."). *But see* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 159 (2001) (arguing that the standard for authorship should include intent).

210. *See, e.g.*, Alfred Bell v. Catalda Fine Arts, 191 F.2d 99, 104–05 (2d Cir. 1951). In determining that the plaintiff's mezzotint art reproductions of old master paintings were original, the Court stated:

> [The mezzotints] "originated" with those who make them, and . . . amply met the standards imposed by the Constitution and the statute. There is evidence that they were not intended to, and did not, imitate the paintings they reproduced. But even if their substantial departures from the paintings were inadvertent, the copyrights would be valid. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it.

Id.

211. *See, e.g.*, Drop Dead Co. v. S.C. Johnson, 210 F. Supp. 816, 819 (S.D. Cal. 1962), *aff'd*, 326 F.2d 87, 90 (9th Cir. 1963) ("Defendants' original Promise label was copied from and is a slavish copy of plaintiff's Pledge label. The palpable copying of the wording on the label discloses the intention of defendants to appropriate plaintiff's Pledge label.").

212. *See, e.g.*, Car-Freshner Corp. v. Marleen Products Co., 183 F. Supp. 20, 45–46 (D. Md. 1960) ("Plaintiff has fully established beyond any doubt that . . . defendant slavishly and unnecessarily copied . . . plaintiff's product; and that defendant's imitation of plaintiff's product was initiated and executed with the intent to 'palm off' its product as plaintiff's product. Moreover, the record amply supports a finding of passing off and deception on the part of the defendant's dealers, jobbers and distributors.");

Bridgeman's photographers slavishly copied the paintings, the Court never implied that their acts were deceitful, but nonetheless found that Bridgeman had admitted to engaging in intentional acts: "[P]laintiff *by its own admission* has labored to create 'slavish copies' of public domain works of art."[213]

Common sense suggests that it would be bizarre for a party seeking copyright protection to admit to slavish copying. In fact, Bridgeman never made this admission. To support its finding, the *Bridgeman* Court relies upon deposition testimony of Lady Victoria Harriet Lucy Bridgeman, the managing director of the plaintiff organization:[214]

> **Corel's attorney**: "Is it fair to say that you strive for the larger transparency so that you can be as true to the original work as possible?"
>
> **Lady Bridgeman**: "That's what I was trying to say, yes, thank you."

To begin with, Lady Bridgeman's words are effectively put into her mouth by the defendant's lawyer. But more importantly, her statement comes as close as any in the record to recognizing a distinction between a document and a duplicate; it is far from an admission to slavish copying. Being "true to the original work" is an attribute of a photographic document that relates to the information the image conveys. The phrase is not synonymous with imitating or duplicating. To be fair, neither the Court nor the lawyers were armed with Savedoff's distinction between a document and a duplicate (a distinction that would have helped to clarify much confusion that arose throughout the case). Regardless, Lady Bridgeman's deposition statement does not support the Judge's finding that Bridgeman admitted to slavishly copying.

What advantage does the Court gain by imputing to Bridgeman's photographers an intent to slavishly copy? In effect, what the court does is ascribe to the Documenting Photographer the mental profile of the Copying Painter—the intention and motivation to create an imitative likeness of an artwork so close to the original that even an astute viewer cannot distinguish the original from the copy. The mental profile of the Copying Painter is illustrated by the website of an organization of professional painters who offer copying services with respect to paintings in Moscow's Hermitage Museum: "Our main aim is to achieve such a close likeness that not even a professional can visually distinguish our paintings

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Fitch v. Young, 230 F. 743, 745 (S.D.N.Y. 1916) ("I have not the least doubt that the story was a cheap and vulgar plagiarism. The parallelism is so complete and minute as to admit of not the slightest doubt that it was slavishly pirated in plot and characters . . . . ").

213. *Bridgeman II*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (emphasis added).

214. *Id.* at 199 n.54 ("Lady Bridgeman, plaintiff's principal, testified that the goal of the transparencies is to be as true to the original work as possible. (Bridgeman Dep. 15). The color bars (referred to in the prior opinion) are employed to make sure that "the transparency is a genuine reflection of the colors" of the original works of art. (Eichel Dep. 29). Plaintiff has argued "that in creating the transparencies. . . . Bridgeman strives to make the transparency look as identical to the underlying work of art as possible. . . .") (quoting Pl. Mem. in Opp. to Summary Judgment at 4)).

The author has searched the case record for the Plaintiff's Memorandum in Opposition to Summary Judgment, and the document is missing. Attempts to obtain that document from attorneys have proven unsuccessful.

from the originals."[215]

By attributing the Copying Painter's mental profile to Bridgeman's photographers, the Court significantly lessened its burden to justify concluding that photographic reproductions are unoriginal. If the plaintiff admits to slavish copying, it has effectively admitted that its images are not entitled to copyright protection. But, of course, imputing the Copying Painter's mental profile to a Documenting Photographer incorrectly describes his intentions and motivations. The Documenting Photographer does not intend to duplicate the original painting, in large part because the technology he employs is rarely capable of producing an exact imitation. A museum photographer is well aware of the strengths and weaknesses of his chosen medium of expression, and understands that a reproductive photograph will rarely be mistaken for the depicted painting. The strength of photography is its ability to document, and that is what Bridgeman's photographers intended to accomplish—to create extremely truthful documents (not duplicates) that convey a great deal of accurate information by illustrating precise details of the original painting. As such, photographic reproductions are maps, not slavish copies, of the depicted paintings.

V. MUSEUMS AND IMAGE VENDORS DO NOT FLOUT COPYRIGHT LAW IN CLAIMING COPYRIGHT PROTECTION FOR REPRODUCTIONS

Thus far, this Article has argued that most photographic reproductions of public domain paintings are original works deserving of copyright protection. I now turn to two policy concerns that have been proffered in opposition to this conclusion. The first suggests that extending copyright protection to such images will undermine the public domain and stifle creativity. The second suggests that recognizing such images as original will cause practical problems for courts in infringement actions.[216] Both concerns are ill conceived.

A. IT IS UNFAIR TO ASK THE PROFESSIONAL PHOTOGRAPHER TO SHOULDER THE BURDEN OF THE PUBLIC DOMAIN

As a result of digital technology and the Internet, the public has greater access to artworks than ever before—a development that promises to democratize art. But commentators see a lurking threat to this development: "Museums, collectors, and private companies impede this democratizing trend by controlling access to the original work of art and by asserting copyright protection in photographic or digital reproductions."[217] Professor Jason Mazzone goes so far as to accuse museums and private image vendors who assert copyright protection in photographic

215. THE ART STUDIO, http://www.artsstudio.com (last visited Feb. 23, 2012).

216. Combining such concerns, one commentator argues that extending copyright to such images will "allow reproducers to harass competitors, stifle competition within the market for art reproductions, and impede access to and use of images of public domain works of art." Matz, *supra* note 96, at 5.

217. *Id.* at 3.

transparencies and other reproductions of public domain artworks of "copyfraud"—"claiming falsely a copyright in a public domain work."[218] Bemoaning the fact that copyright law does not adequately protect the public's access to public domain works, he states:

> [P]ublishers and the owners of physical copies of works plaster copyright notices on everything. . . . [In doing so, they] restrict copying and extract payment from individuals who do not know better or find it preferable not to risk a lawsuit. These circumstances have produced fraud on an untold scale, with millions of works in the public domain deemed copyrighted and countless dollars paid out every year in licensing fees to make copies that could be made for free.[219]

To correct this situation, he recommends adopting civil penalties for fraudulent claims to a copyright in public domain works.[220]

In making these recommendations, Mazzone and others tend to lump together public domain paintings with public domain literary works and musical scores.[221] However, paintings are fundamentally different than literary and musical works, and thus deserve separate consideration.[222] One commentator explains:

> Even though the right to reproduce artworks in the public domain belongs ostensibly to anyone and everyone, in practical terms, it does not, and anyone requiring a quality reproduction of a public-domain image from a museum collection will have to deal with the museum. This is because artworks are not like literary works. An artwork is a tangible and unique object, and someone owns that object. Although a published literary work was once embodied in an original manuscript, that original is not the work in the way an original painting is. The literary work lives in its published copies. It exists in more than one place. The owner of the original manuscript of a published literary work cannot control access to the content of the work because others have access to that information through published copies. In contrast, the owner of a painting that has passed into the public domain can control access to the content of the work by controlling physical access to the original work.223

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218. Mazzone, *supra* note 1, at 1028.

219. *Id.* at 1030.

220. *Id.* at 1071.

221. *See, e.g.*, *id.* at 1029 ("In general, copyright belongs to the author of a published work and expires seventy years after the author's death. Yet copyright notices appear on modern reprints of Shakespeare's plays, on Beethoven's piano scores, and on greeting card versions of Monet's Water Lilies."); *id.* at 1040 ("Browse any bookstore, buy a poster or a greeting card, open up sheet music for choir or orchestra practice, or flip through a high school history text: Copyfraud is everywhere.").

222. *See* Tushnet, *supra* note 10, at 684–85 (discussing the law's tendency to conflate visual works with literary works: "Copyright is literal. It starts with the written word as its model, then tries to fit everything else into the literary mode. Protections for photographic, musical, audiovisual, and other modes of expression were added to the U.S. Code slowly and haphazardly, following economic rather than conceptual demands. Taking words as the prototypical subject matter of copyright has continuing consequences for copyright law, which often misconceives its object, resulting in confusion and incoherence.")

223. Butler, *supra* note 180, at 72–73. Similarly, comparing a public domain painting with a public domain musical composition, R. Anthony Reese notes:

> Because the pictorial work embodied in the painting, and the musical composition, are both in the public domain, copyright law would allow all of these people to make all of these uses of the

It is easy to understand why commentators condemn a publisher's placing a copyright notice on a new edition of a public domain literary work.[224] Such a practice might well mislead the public into wrongly believing that the *words* in the new edition (which constitute the public domain work) cannot be copied. It would be bizarre, however, to put a copyright notice on a physical painting after it has entered the public domain. Irrespective of copyright, the owner of the physical public domain painting has a level of control over that work that simply does not exist with respect to a literary or musical work that has entered the public domain. Ownership of the artwork alone enables a museum (or private owner) to impose whatever conditions it wishes on public access, irrespective of the copyright status of that artwork.

With respect to public domain paintings, the concern over charging "licensing fees to make copies that could be made for free" is directed not at the painting itself, but at art reproductions of that work. In effect, the claim is that the public should be free to "copy the copy," a claim based on the assumption that, if the painting is not entitled to copyright protection, neither is the art reproduction.[225]

Accordingly, when considering policy issues surrounding public domain paintings, one needs to separate three distinct concerns:[226]

1. Access to Painting: Because it owns the artwork, a museum (or private owner) may limit or condition the public's access to the public domain painting. Among the conditions that museums often impose on such access is that the painting not be photographed or that it be photographed only in certain ways.

2. Access to Art Reproductions: If high quality photographic transparencies or digital copies of a public domain painting exist, the owner of such transparencies or digital copies can limit and condition the public's access to these reproductions. In particular, the owner can charge a licensing fee for use of the reproduction and contractually limit a user's ability to copy and otherwise deal with the reproduction.

3. Asserting Copyright in Art Reproductions: Despite a painting's having entered the public domain, vendors of photographic transparencies, postcards

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> painted image or the song. . . . But while copyright law permits and encourages these uses of both the painting and the song, practical realities mean that the public will more likely be able to use the song than the painting.

Reese, *supra* note 14, at 1035–36.

224. *See, e.g.*, Butler, *supra* note 180, at 57–58.

225. *See* Justice Holmes's well-known statement in *Bleistein v. Donaldson Lithographing Co.*: "The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy." 188 U.S. 239, 249 (1903).

226. Reese summarizes these concerns as follows:

> The practical necessity of copying (directly or indirectly) from the museum's original painting will usually make it difficult to copy (and make further use of) even a public domain painting. Three factors combine to impede copying such public domain artworks: the museum's ownership of the original painting, the museum's claim to copyright in any photographic reproduction it makes of the painting, and the museum's control over access to the negatives, or transparencies, of any such photograph.

Reese, *supra* note 14, at 1036.

and posters of that artwork licensed or sold to the public may continue to assert a copyright notice in the reproductions.

To help think through these concerns, consider the following counterfactual: suppose a museum, lacking facilities and the necessary technology, enters into a contract with an independent vendor of art images (like The Bridgeman Art Library or Corel) to create photographic reproductions of the museum's public domain paintings. The vendor pays a fee to the museum for permission to photograph the artworks in exchange for which it is granted an exclusive right to create and license transparencies of the paintings. In addition, the vendor is also granted an exclusive right to create and sell postcards and posters of the artwork in the vendor's store, located across the street from the museum.[227]

In light of this counterfactual, let's consider the three concerns:

1. Access to Painting: Given the counterfactual, the concern that a painting's owner can limit access to public domain artwork can be leveled only at the museum (and private owners), not at the image vendor. After all, the image vendor does not control the actual painting. Several commentators have argued that a museum should not be allowed to prohibit the public from photographing public domain paintings,[228] but most accept that ownership of an artwork legally entitles a museum (just as it entitles any private owner of art) to control public access in any way it deems appropriate, including limiting or banning photography in the interest of protecting and preserving its art.[229]

2. Access to Art Reproductions: Some commentators have argued that, after *Bridgeman*, image vendors who "demand exorbitant 'copyright' fees from image users" violate copyright law and thereby undermine the public domain.[230] Given the counterfactual, the problems with this argument are twofold. First, irrespective of copyright status, the owner of the physical photographic transparency of artwork can contractually limit access to that image in any way it wishes.[231] Second, absent an economic incentive, image vendors have little

227. This is in fact one approach to creating digital libraries that some museums take. *See* Babette Aalberts & Annemarie Beunen, *Exploiting Museum Images*, *in* COPYRIGHT IN THE CULTURAL INDUSTRIES 221 (Ruth Towse ed., 2002).

228. *See, e.g.*, Cameron, *supra* note 98, at 58 ("Preventing others from taking photographs of public domain paintings does a disservice to the system of copyright, which was created to promote the progress of art and to encourage the creation of new works. New authors will not be able to use public domain images to create new works if museums keep public domain artwork locked away and claim copyright in the only available reproductions. By restricting access to public domain paintings, museums and art libraries becomes the singular or primary source of a reproduction of a public domain work. Through a claim of copyright in a reproduction, the nature of stewardship over a public domain painting changes from control over when and where the public can view the work (setting the visiting hours at the gallery) to what the public can view and how (becoming the sole providers of all images of the public domain painting). Thus, museums and art libraries actively stifle the creation of new works, rather than fostering a policy that promotes new art."); *see also* Wojcik, *supra* note 96, at 278–79.

229. *See, e.g.*, Reese, *supra* note 14, at 1036–37.

230. Wojcik, *supra* note 96, at 267, 268–70.

231. *See, e.g.*, Mazzone, *supra* note 1, at 1055–56 ("An archive, like other owners of physical copies of public domain works, is certainly free to make and sell copies of materials in its collection and to impose conditions on how those copies are used. It is free to refuse to provide reproductions and free to deny access to its collection to individuals who do not abide by the archive's terms. An archive can

reason to invest in creating high quality transparencies and other reproductions, such as postcards and posters. Such reproductions play an important role in modern culture, and this importance provides ample reason to extend such incentives to image vendors. R. Anthony Reese notes:

> We should want reproductions of public domain paintings to be made by capable photographers who can produce excellent copies that portray the original painting as exactly as possible in the photographic medium. . . . [A]rt reproduction photography seems to benefit the public significantly enough that we should be concerned if such photographs were not produced. But creating this kind of photograph requires some investment of resources, resources such as a skilled art photographer; cameras and other equipment; the time, labor, and security needed to move a painting from its gallery to a photo studio; and so forth.[232]

Because of the need for a return on their investment and because of their control over physical transparencies, image vendors can be expected to seek a fair market price for selling and licensing their products. Such private actors have no legal obligation to support the public domain by subsidizing the public's use of its transparencies or acquisition of its postcards or posters.

3. Asserting Copyright in Art Reproductions: Given the counterfactual, the true target of these commentators' concerns is an image vendor's claiming a copyright in photographic transparencies and art reproductions of public domain paintings that it licenses and sells.[233] In so doing, some argue that such vendors undermine the public domain.[234]

The central argument of this Article is that such photographic reproductions *are* entitled to copyright protection and, accordingly, that image vendors who claim this protection are fully within their rights. Though I will not repeat my arguments here, it is important to reiterate the thin nature of the copyright that a photographer has in an art reproduction. Because that copyright protects only against verbatim

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also sue for breach of contract for violations of conditions that the licensee agreed upon to access or use works in the collection."). The U.S. version of The Bridgeman Art Library's Terms and Conditions contains the following clause, among other conditions:

> The Reproduction of the Photographs is strictly forbidden without the specific written consent of the Supplier and subject always to paragraph Cancellation and Termination. In particular but without limitation electronic use, storage, communication to the public or transmission of Photographs is forbidden without the express, written permission of the Supplier and is subject to an additional contract.

Terms and Conditions, BRIDGEMAN ART LIBRARY, http://www.bridgemanart.com/terms-and-conditions-us (last visited Feb. 23, 2012).

232. Reese, *supra* note 14, at 1041.

233. *See, e.g.*, *id.* at 1033–34 ("Taking a photograph of a painting constitutes reproducing the painting, an act generally reserved to the owner of the painting's copyright (which in many cases is not the museum that displays the canvas). If the painting is in the public domain, though, then a photographer needs no copyright permission to photograph it. In that event, the main copyright issue is whether the photograph of the public domain painting is itself entitled to copyright protection.").

234. *See, e.g.*, Butler, *supra* note 180, at 57–58. Decrying the fact that museums both control access to photographing public domain art in their galleries and also attempt to assert copyright protection over the images of those works sold in museum stores, states: "This practice of controlling access to public-domain artworks and copyrighting reproductions of them is troubling because it thwarts the principle of the public domain by presenting the public from freely reproducing, adapting and publicly displaying images that now belong to everyone." *Id.*

copying of the image, anyone can buy a photographic reproduction in the form of a postcard or a poster and use that image as a model for creating his or her own version of the depicted public domain painting. They cannot, however, directly photocopy the art reproduction. In other words, they cannot make a photograph of the photograph—the paradigmatic case of slavish copying.

I have presented the counterfactual above to overcome commentators' tendency to conflate issues related to ownership of the physical artwork with issues surrounding the licensing and sale of photographic reproductions of that artwork. Leaving the counterfactual behind and returning to reality, consider that in real life museums often own (or at least control) the public domain painting and also produce, license and sell transparencies and art reproductions of that work.

It is this double whammy that incenses commentators who attack museums that assert a copyright in art reproductions.[235] They suggest that, because of physical control over the painting, a museum has an obligation to make art reproductions of those paintings readily available to the public, and in doing so to refrain from claiming any copyright in such images.[236] Certainly, these arguments may be sound as a matter of good museum policy. As stewards of the arts, museums have obligations that go beyond profit making; public education through broad dissemination of art images may be high on that list. Moreover, having monopoly control over both the physical artwork and the production and sale of reproductions may change a museum's economic calculus. For example, sales of postcards, posters and mugs in a museum's store may not only offset any loss from not asserting a copyright, but also have positive secondary effects on museum attendance, etc.[237]

But as the counterfactual suggests, policies related to licensing and sale of art reproductions are separate from those of access to physical paintings. Additionally, to the extent licensing and sales of reproductions are done by private actors, consideration of good museum practice is irrelevant. One reason courts and commentators tend to conflate issues related to the physical painting with issues related to the photographic reproduction of that painting hinges on the tendency

235. *See, e.g.*, Reese, *supra* note 14, at 1044 ("While we may want the museum to have some opportunity to recover its investment in producing its photograph, much of the price it is able to charge for the photo's use will be due to demand for the underlying painting depicted in the photo. But users will generally have few, if any, other photographs of the painting from which to choose, since the museum's ownership of the original painting will typically allow it to restrict others from making high-quality photographic reproductions. As a result, those who want to use an image of the public domain painting will generally have to pay a higher price than they otherwise would have in a competitive market for use of the museum's photograph.").

236. *See, e.g., id.* at 1045, 1046–47 ("[M]useums may have understandable motives as curators and art historians for imposing such restrictions on users. Perhaps they seek to ensure that reproductions of a painting are as faithful to the original as technology will allow, and that their own connection with the work is made known. Nonetheless, giving museums the ability to exercise that kind of control over the use of the image of a work of art seems entirely inappropriate in the case of public domain works. . . . But giving a museum exclusive rights over its photograph of a public domain painting may give the museum effective, but inappropriate, control over the public's ability to use that public domain work in ways that visually alter it.").

237. *See, e.g., id.* at 1042.

noted throughout this Article for ordinary viewers to collapse the photographic reproduction into the painting and equate the two images. It is this mistaken tendency that leads commentators to place the burden of protecting the public domain not on the owner of the painting, but on the creator of the photographic reproduction. As I have argued throughout, the painting and the art reproduction are separate images that deserve separate consideration.

B. CONSIDERING A PHOTOGRAPHIC REPRODUCTION ORIGINAL WILL CAUSE NO UNDUE PROBLEMS FOR DETERMINING INSTANCES OF COPYRIGHT INFRINGEMENT

Basing their reasoning on *L. Batlin & Sons, Inc. v. Snyder*, courts and commentators alike have suggested that allowing photographic reproductions to be deemed original will put major roadblocks in the way of a court's determining when one photograph infringes on another. [238] In *Batlin*, the Court stated:

> Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts—indeed, the constitutional demand . . . could hardly be served. To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.[239]

The Court suggests that, were originality extended to art reproductions that lack sufficient variation from the public domain artwork, the creator of the reproduction would be able to sue any other artist who relied directly on that artwork for infringement. In effect, the creator of the first reproduction could assert an effective monopoly over creating art reproductions of the public domain artwork.

William Landes and Richard Posner presented this argument more recently in their discussion of the *Bridgeman* case: "If the derivative work is only trivially different from the original . . . it may be impossible by the imperfect methods of litigation to make a reliable determination of whether an infringing work was copied from (and hence infringed) the derivative work, the original, or both."[240]

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238. 536 F.2d 486 (2d Cir. 1976).

239. *Id.* at 492. This quotation was relied upon by the *Bridgeman* Court. *Bridgeman II*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999). Relying on *Batlin*, Judge Posner presented a similar concern in *Gracen v. Bradford Exchange*:

> Suppose Artist A produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. B also makes a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. But if the difference between the original and A's reproduction is slight, the difference between A's and B's reproductions will also be slight, so that if B had access to A's reproductions the trier of fact will be hard-pressed to decide whether B was copying A or copying the Mona Lisa itself.

698 F.2d 300, 304 (7th Cir. 1983).

240. LANDES & POSNER, *supra* note 187, at 113–14. Elsewhere, they reiterate this concern: "[I]f the derivative work is indistinguishable from the original work, courts will have a devil of a time determining whether a subsequent work is a copy of the original or of the derivative work, a vital issue if the original work is in the public domain but the derivative work is copyrighted." *Id.* at 263.

They realize, however, that this policy concern may be problematic when applied to a photographic reproduction:

> [N]othing is gained, at least in terms of enhancing incentive to create expressive works, by allowing the identical copy to be copyrighted. But we must make a qualification for the case, illustrated by photography of works of art, where the creativity of the derivative work consists precisely in the fidelity with which it reproduces the visual impressive created by the original . . . .[241]

The question thus arises whether protecting photographic reproductions of artwork will actually cause significant practical problems for courts. In making that argument, commentators have ignored two critical points. First, because a photographer's copyright is thin and relates only to his incremental photographic contribution, he is protected only against verbatim copying of his images (which is exactly what Bridgeman alleged that defendant Corel had done). He gains no monopoly over photographing the depicted artwork.

Second, the photographer alleging that his image has been copied verbatim carries the burden of proof in an infringement action. To establish copyright infringement, a plaintiff must show that it owns a copyright in the work, that the defendant copied from that work and that what was copied constitutes a material amount of expression.[242] There is no presumption of copying, and similarity alone does not establish copying.[243] The plaintiff must show that the defendant had access to the work, but proving access "is not the same as, or a substitute for, proof of copying."[244] Accordingly, a plaintiff photographer alleging infringement will shoulder the rather difficult burden of proving that the defendant copied his art reproduction verbatim.[245]

In instances in which a photographic reproduction is readily available in a digital format through an online database such as Google Images, it will be virtually impossible for a plaintiff to meet this burden. Absent some watermark or other distinguishing feature on the surface of a plaintiff's image, in such instances the plaintiff's infringement action is likely to fall flat on its face.

The Bridgeman case itself illustrates how difficult it is for a photographer of an art reproduction to meet the burden of proving verbatim copying. In addition to claiming that Bridgeman owned no copyright in its images, Corel also asserted that the plaintiff had produced no evidence that its photographic reproductions had been copied. A review of deposition transcripts makes clear that Bridgeman could not establish that it owned the only available reproduction of many of the paintings in

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241. *Id.* at 112.

242. *See* PATRY, *supra* note 20, § 9.4, at 9-18.

243. *Id.*

244. *Id.* § 9:17, at 9-37. Robert Matz is thus wrong when he states that "[i]f Bridgeman had established access, Corel would have had the burden of proving that their images were copied from another source." Matz, *supra* note 96, at 17. There is no burden shifting in infringement actions. The plaintiff maintains the burden of proving copying. Access is one evidentiary fact that can be used to meet that burden.

245. *See* PATRY, *supra* note 20, § 9:16, at 9-34 (citing Hecke v. Clear Channel Commc'ns, Inc., No. 04 Civ. 1583(JSR), 2005 WL 975837, at *1 (S.D.N.Y. Apr. 27, 2005)).

issue. Accordingly, though the Court ultimately did not resolve this issue, it did note that "[t]here is substantial doubt as to whether plaintiff has made out even a *prima facie* case of access . . . ."[246] The Court stated:

> Plaintiff initially asked the Court to infer access on the theory that Bridgeman had the only images of the works in question and that the works themselves could not have been photographed anew. Ultimately, however, Bridgeman admitted that it is not the only possible source for 119 of the 120 images. But it still asks that copying of all 120 might be inferred on the basis that the 120th image must have been copied.[247]

It will only be in the rare instance that a plaintiff can prove that it maintained extraordinary control over the dissemination of its photographic image or that some special marking appears on the surface of such an image that an infringement claim of verbatim copying might succeed. The instant that a defendant can point to comparable art images available from another source, it will be nearly impossible for a plaintiff to convince a fact-finder that its photographic reproduction was copied.[248] Accordingly, *Batlin*'s concern about "mischievous copiers intent on appropriating and monopolizing public domain work" is greatly overstated, given the thin nature of an art photographer's copyright and the burden of proof in an infringement action.[249]

VI. CONCLUSION

Copyright law struggles to make sense of the resemblance between a photograph and the subject matter depicted in the image. Nowhere is this struggle more apparent than in the law's treatment of photographic reproductions of artwork. Despite extensive differences between a photograph and a painting, many courts and commentators conclude that photographing a painting amounts to slavish copying, rendering that photographic image unoriginal and unworthy of copyright protection—the legal equivalent of a photocopy.

This Article has argued that this conclusion is a mistake that results from ingrained cultural habits of ordinary viewers. In looking at a photographic reproduction of a painting, viewers tend to look *through* that photograph and perceive only the depicted artwork. In so doing, the photograph effectively disappears from the viewer's perception and, along with it, any awareness of the unique photographic attributes of that image and the very existence of a creative photographer behind the image.

In fact, professional museum photographers bring extensive training and experience to the task of creating reproductions of paintings. They also make creative choices throughout the process. Furthermore, these creative choices are

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246. *Bridgeman I*, 25 F. Supp. 2d 421, 428 (S.D.N.Y. 1998).

247. *Id.* at 428 n.50.

248. Robert Matz's claim that "[h]ad the court granted copyright protection to the[ ] images [in *Bridgeman*], Bridgeman could have used its copyright in the photograph to prevent the public from reproducing or distributing any image that was substantially similar" is greatly exaggerated. Matz, *supra* note 96, at 17.

249. *Batlin*, 536 F.2d 486, 492 (2d Cir. 1976).

the very choices courts have long relied upon to determine that a photograph can indeed be an original work entitled to copyright protection.

Although photographic reproductions can convey extremely truthful and accurate information about the original artwork, they are not slavish copies of paintings. I have suggested that a more fruitful way to think about the relationship between the photographic reproduction and the painting is to view the photograph as a *map* of the artwork. In the same way that an aerial photographic map can document and convey truthful information about the depicted landmass, so a photographic reproduction similarly documents and conveys truthful information about its subject matter, the painting. Nonetheless, each photograph does so without slavishly copying, duplicating or imitating either the landmass or the painting.

Whether in art history textbooks, on transparent slides in the classroom, or on museum postcards and posters, photographic reproductions provide a central means by which the public is exposed to the art world. Given the importance of such exposure, it is in the public's long-term interest to grant copyright protection to museum photographers as an incentive to create the highest quality art reproductions.