

## Restating Copyright Law's Originality Requirement

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## INTRODUCTION

In 2015, the American Law Institute (ALI) launched a project to create a Restatement of the Law, Copyright. Concern, objection, and disagreement about the ALI's Restatement projects is not new,<sup>1</sup> but the Restatement of Copyright project seems to be particularly controversial among industries dependent on copyright protection. The drafting group has now worked through several versions of some proposed sections; a handful of these have been approved by the ALI Council and are ready to go before the ALI general membership. So now is a good time for close analysis of the chunks of the projects that have crystallized.

This Article reviews the 2020 draft Restatement's presentation of American copyright law's threshold requirement for protection: that copyright protects only "original works of authorship," and how that "originality" requirement should be understood in light of the Supreme Court's 1991 decision in *Feist v. Rural Telephone*.<sup>2</sup> Copyright's originality requirement is a challenging subject for a Restatement because what is unquestionably agreed is that black letter law is limited, formulaic, and opaque. Not surprisingly, the Restatement's handling of this topic hews close to the words of the Supreme Court's modern pronouncement on the issue, sometimes to the detriment of a richer, potentially more enlightening discussion.

The discussion here is based principally on "Tentative Draft No. 1" of the Restatement, released on April 8, 2020,<sup>3</sup> but the discussion will also include consideration of the earlier "Council Drafts"<sup>4</sup> that led to the 2020 proposal.

Part I of the Article briefly describes the controversial beginnings of this Restatement project—and, as of 2021, the continuing animosity of copyright stakeholders to the project. Part II lays out the 2020 draft Restatement's core provisions on copyright originality, the modest evolution of these provisions since the 2017 draft, and some concerns with what these sections, Comments, and Reporters' Notes say. In broad strokes, the draft Restatement's take on copyright originality is faithful to the Supreme Court's 1991 *Feist v. Rural Telephone* decision, perhaps too much so. Part II.A explores the draft Restatement's presentation of

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1. See, e.g., Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447 (2019); Elizabeth Laposata et al., *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012); David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448 (2011); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 582 (1933).

2. 499 U.S. 340 (1991).

3. RESTATEMENT OF THE LAW, COPYRIGHT (AM. L. INST., Tentative Draft No. 1, Apr. 8, 2020) [hereinafter Restatement Tentative Draft No. 1 (2020)].

4. These earlier drafts were RESTATEMENT OF THE LAW, COPYRIGHT (AM. L. INST., Council Draft No. 3, Sept. 4, 2019) [hereinafter Restatement Council Draft No. 3 (2019)]; RESTATEMENT OF THE LAW, COPYRIGHT (AM. L. INST., Council Draft No. 2, Aug. 17, 2018) [hereinafter Restatement Council Draft No. 2 (2018)]; RESTATEMENT OF THE LAW, COPYRIGHT (AM. L. INST., Council Draft No. 1, Nov. 17, 2017) [hereinafter Restatement Council Draft No. 1 (2017)].

*Feist's* “modicum of creativity” requirement, raising some issues both with what the Reporters have said so far and equally with what the draft Restatement seems unwilling to say about minimal creativity. Part II.B discusses the draft Restatement's presentation of *Feist's* “independent creation” requirement; here the concern is that the draft may conflate independent creation with minimal creativity in a way that does not contribute to coherence in copyright law.

## I. THE RESTATEMENT OF COPYRIGHT: A LIMITED BACK STORY

Since the mission of the American Law Institute is to “produc[e] scholarly work to clarify, modernize, and otherwise improve the law,”<sup>5</sup> if you care deeply about an area of law, the whole idea of the ALI taking up that area can be disconcerting. That's especially true when the area of law is ideologically contested—as copyright is—and scholars writing in the field have been disproportionately on one side of the ideological struggle—as, again, they have been in copyright.

If a thorough origins account of the Restatement project is to be written, it will happen on other pages. But it is generally agreed that the project was rooted, in part, in Professor Pamela Samuelson's September 2013 recommendation to the ALI of a “principles project” for copyright law.<sup>6</sup> ALI Principles projects are more reform-minded works of advocacy primarily addressed to legislatures, administrative agencies, and other decision-makers. Samuelson's 2013 letter followed on the heels of a free-standing “Copyright Principles” project that she co-organized with Professor Jessica Litman;<sup>7</sup> the former ALI President, Michael Traynor, was a participant in the project,<sup>8</sup> providing another avenue by which copyright law might have come onto the ALI's radar.

A more direct recommendation for an actual Restatement of Copyright came in a 2014 symposium at Brooklyn Law School in which scholars discussed (with the ALI present) ideas for and against new Restatements and Principles projects.<sup>9</sup> At that

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5. Richard L. Revesz, *Clarifying the Nature of the ALI's Work*, ALI ADVISOR (Sept. 15, 2017), <https://perma.cc/RB3J-WF4T>.

6. Letter from Pamela Samuelson to ALI Dir. Lance Liebman (Sept. 12, 2013), <https://perma.cc/2HXX-NTAE> [hereinafter Samuelson 2013 Letter]. In the letter, Samuelson advocates mainly for a “Principles” project but leaves open the door for other formulations of the effort, calling for “a Principles of Copyright Project (or other type of project that the Institute thinks is appropriate).” *Id.* at 1. Earlier, in a review of two books advocating copyright reform, Samuelson reasoned that the ALI would be “well-suited to undertake a Copyright Principles project that would further contribute to sound foundations for copyright reform.” Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 767 (2013) (reviewing WILLIAM PATRY, *HOW TO REFORM COPYRIGHT* (2012) and JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF COPYRIGHT LAW* (2011)). Samuelson identified a wide range of issues that could be addressed in such a “principles” project, including some originality issues. *Id.* at 769–78.

7. Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1176 (2010).

8. *Id.* at 1180.

9. Anita Bernstein, Symposium Introduction, *Onlookers Tell an Extraordinary Entity What to Do*, 79 BROOK. L. REV. 381 (2014). Bernstein described the symposium as scholars “speak[ing] to the American Law Institute, giving it advice about what to do” and reports that “the American Law Institute welcomed what it could have written off as officious intermeddling.” *Id.* at 382.

symposium, Professor Ann Bartow presented a paper advocating for a Restatement of Copyright.<sup>10</sup> A September 2014 memo from Professor Christopher Sprigman (now the principal Reporter for the project) to ALI Director Ricky Revesz also advocated for a Restatement of Copyright based on Sprigman's belief that "by most accounts, copyright law is in a bad state, and has been for some time now"; that legislative reform was unlikely; and that "it falls to the federal courts to attempt to improve the fit between a mid-20th century copyright law and 21st century digital technologies."<sup>11</sup>

Fear in the copyright community was immediate: The concern was that a Restatement of Copyright would become a Trojan horse for reforms advocated by low-protectionist academics, who, to put it gently, "have had limited success in persuading either Congress or the courts to make needed changes"<sup>12</sup> (that is, changes academics perceive as needed). Some copyright holders saw the ALI project as an attempt by academics to shift the debate to a more favorable venue.<sup>13</sup>

And this rancor has continued. In January 2018, then-Acting Register of Copyrights Karyn Temple sent a letter to the ALI voicing significant concern over what she termed a "pseudo-version of the Copyright Act," and urged the ALI to reconsider the project entirely.<sup>14</sup> In December 2019, five members of Congress sent a letter to the ALI raising similar concerns. That letter was later endorsed by the Copyright Alliance, CreativeFuture, and the Association of American Publishers (AAP) and its CEO Maria Pallante.<sup>15</sup> On an ironic note, Pallante is a former Register of Copyrights and her statements in that role had been cited by those who advocated ALI take up a copyright project.

While the appointment of Professor Sprigman as the Reporter may have come from intra-NYU camaraderie, it exacerbated perceptions that the Restatement would be skewed in one direction; namely, towards a low-protection conception of copyright law.<sup>16</sup> Perceptions were also not helped by Sprigman's continued public

10. Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457 (2014). Bartow mainly recommends a Restatement because of her dissatisfaction with the Nimmer treatise and belief that "it is time for a new leading treatise." *Id.* at 498.

11. Memorandum from Chris Sprigman to Ricky Revesz 1–2 (Sept. 2, 2014), <https://perma.cc/B3DT-YWWY> [hereinafter Sprigman 2014 Memo].

12. Bartow, *supra* note 10, at 464.

13. A letter from eighteen copyright-related trade associations attributed the origins of the Restatement to Professor Samuelson's efforts and noted "In her letter to ALI, Professor Samuelson makes clear her view that advocacy in Congress and the courts will not have the same power to effect the changes she supports as will an ALI Restatement of Copyright." Letter from Am. Photographic Artists et al. to ALI Officers and Dirs. 1 (Oct. 14, 2015), <https://perma.cc/B3DT-YWWY> [hereinafter Copyright Trade Associations 2015 Letter].

14. Kevin Madigan, *Concerns over ALI Copyright Restatement Leave Project in Limbo*, CTR. FOR THE PROT. OF INTELL. PROP. (Jan. 31, 2018), <https://perma.cc/LCP6-DYYG>.

15. Devlin Hartline, *Members of Congress the Latest to Question ALI's Restatement of Copyright*, CTR. FOR THE PROT. OF INTELL. PROP. (Dec. 5, 2019), <https://perma.cc/U3LJ-KNDE>.

16. Copyright Trade Associations 2015 Letter, *supra* note 13, at 2 ("Our concern with this project is increased by ALI's choice of Professor Sprigman as lead Reporter. Professor Sprigman has, much like Professor Samuelson, consistently argued in favor of a limited scope of copyright and other forms of intellectual property. He has signed numerous amicus briefs or was himself counsel in various contentious copyright cases, always arguing for a more restrictive view of the rights conferred by the Copyright Act.").

statements and legal work contemporaneous to his role as the Reporter.<sup>17</sup> To an outsider, all of this could seem more corrosive vis-à-vis the ALI than constructive vis-à-vis copyright law, but perhaps this is just post-2016 American civic life in which blunt partisanship is *de rigueur* and even-handed neutrality is no longer the ideal for such jobs. In any case, the Restatement of Copyright is not the first time—and is unlikely to be the last time—that the ALI pushes the envelope on “the question of how far a private organization should enmesh itself in a heavy politicized branch of law.”<sup>18</sup>

## II. THE DRAFT RESTATEMENT PROVISIONS ON “ORIGINALITY” AND THEIR EVOLUTION

In idealized form, the inquiry involved in fashioning Restatement provisions contains four steps which recognize that, at least in grey areas, a Restatement project can move from “restating” the law toward reforming it:

The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.<sup>19</sup>

If all this sounds better suited to exploration of the common law, that remains one of the general criticisms of the project: Copyright is a statutorily codified, sometimes byzantine law, while Restatements have traditionally been in common law areas. But the response to this is that significant aspects of copyright law—including the most highly politically contested aspects in legal scholarship—remain very much in the spirit of common law interpretation.<sup>20</sup>

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But given a fair reading, Sprigman’s 2014 memo to ALI Director Revesz pitching himself as the project Reporter sounded much more concerned about effective copyright enforcement than his scholarly writings or hired engagements would suggest.

17. With understandably strong responses. See, e.g., Neil Turkewitz, *The Internet Archive, Chris Sprigman & the Remaking of America*, MEDIUM (Sept. 25, 2020), <https://perma.cc/HWW9-WM8G>.

18. Shapo, *supra* note 1, at 633.

19. AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 5–6 (2015), <https://perma.cc/CL3E-KHYH>.

20. Samuelson 2013 Letter, *supra* note 6, at 1 (“Many of the most important and contested issues of U.S. copyright law—among them, its originality standard, disputes over authorship, infringement standards, fair use, equitable or monetary compensation for infringement and preemption of state laws—are matters for statutory interpretation in a common law fashion that judges and lawyers must address with little or no help from the statute.”). Judge Pierre Leval has also noted that “for the most fundamental provisions of the copyright law, the statute is something quite different. The meaning of those doctrines comes from the common law process. Since 1710, when copyright was born, they have been shaped by

Indeed, no copyright law inquiry may be more in the spirit of the common law than copyright's threshold requirement of "originality." Whatever that meant prior to 1991, originality in American copyright law is now understood in terms of the two-part test established by the Supreme Court's decision in *Feist v. Rural Telephone*: "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."<sup>21</sup> The Court even more succinctly stated the two-prong test as "originality requires independent creation plus a modicum of creativity."<sup>22</sup>

Sections 5–7 form the 2020 draft Restatement's core discussion of this originality standard. Although the numbering has changed, these provisions have been pretty stable across the 2017–2020 drafts. Structurally, § 5 provides a general framework with § 6 elaborating on the "independent creation" requirement and § 7 elaborating on the "modicum of creativity" requirement. Although neither *Feist* nor the draft Restatement explain this, the two requirements actually align with the *Burrow-Giles* exposition of the meaning of "Authors" and "Writings" in the Copyright and Patent Clause.<sup>23</sup>

Section 5 in the 2020 draft Restatement has the following form:

**§ 5. Originality: In General**

(a) The Copyright Act grants protection to "original works of authorship."

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the common law process, which has brought big changes and revolutions." June M. Besek, Peter S. Menell, Irene Calboli, Devlin Hartline, Justin Hughes, Pierre N. Leval, and William F. Patry, *The ALI Copyright Restatement Project: A Horse of a Different Color?*, Proceedings of the Twenty-Sixth Annual Conference International Intellectual Property Law & Policy, Fordham University School of Law Skadden Conference Center, New York, New York, April 6, 2018, at 9. Many academics have also recognized the importance of common-law reasoning in much copyright case law. *See, e.g.*, Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012) (exploring substantial similarity analysis as common-law reasoning); Philip J. Weiser, *Regulatory Challenges and Models of Regulation*, 2 J. TELECOMM. & HIGH TECH. L. 1, 11 (2003) ("Like antitrust rules, the history of copyright policy largely reflects a reliance on judge made rules through common law adjudication"). At least in the early days of the 1976 Act, this may have caused some courts to "prefer[] to interpret the 1976 Act as if it had made no change in the 1909 Act, for which, at least, there [were] precedents." Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987).

21. 499 U.S. 340, 345 (1991). The standard applies directly to compilations of non-copyrightable information: "These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws." *Id.* at 348.

22. *Feist*, 499 U.S. at 346; *see also id.* at 362 (concluding that Rural's telephone book selection "lack[ed] the modicum of creativity necessary to transform mere selection into copyrightable expression").

23. In *Burrow-Giles*, the Court tells us that an "Author" in the Constitution is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature," *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (citation omitted), while by "Writings" the Framers "meant the literary productions of [an] author[]" including "all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression." *Id.* at 58.

(b) For a work to be original, the work must be independently created by its author, as discussed in § 6, and must embody expression that is at least minimally creative, as discussed in § 7.

(c) Because copyright protects only an author's independently created expression, only the elements of the work's expression that the author did not copy from any preexisting work can satisfy the minimal-creativity requirement, as discussed in § 7.<sup>24</sup>

Except for section numbering, the text here has been stable since the 2018 draft; subsection (a) and subsection (b) push off the substantive issues to §§ 6–7 while subsection (c) may be an unneeded appendage.<sup>25</sup> It is not clear why subsection (b) and subsection (c) could not be combined in a clearer manner: “For a work to be original, the work must embody expression that was both independently created by the work's author, as discussed in § 6, and is at least minimally creative, as discussed in § 7.”

Let us first consider the § 7 exposition of *Feist's* modicum of creativity requirement. After we have explored how the draft Restatement treats the modicum of creativity requirement, this Article turns to § 6 of the draft Restatement.

#### A. THE MODICUM OF CREATIVITY REQUIREMENT—§ 7

Section 7 is the true heart of the draft Restatement's originality exercise because it covers post-*Feist* copyright law's requirement that any protected work have expression with a “minimal degree” or “modicum” of creativity.<sup>26</sup> The Reporters have named this a “minimal-creativity requirement” (which might provide a long-term, anecdotal metric of the Restatement's influence<sup>27</sup>).

Section 7 in the 2020 draft Restatement has the following form:

##### § 7. Originality: Minimal-Creativity Requirement

(a) A work meets the minimal-creativity criterion for originality if the work embodies expression that is at least minimally creative.

(b) The requirement that a work embody expression that is at least minimally creative can be satisfied by an author's creative choices. In the case of a compilation, choices regarding the selection, coordination, or arrangement of elements can satisfy the minimal-creativity requirement even if those elements are not themselves original.

(c) The minimal-creativity requirement is not satisfied by choices that are routine, or by choices that are significantly constrained by external factors (such as the function the work is intended to serve, the tools used to produce the work, or practices or conventions standard to a particular type of work).

24. Restatement Tentative Draft No. 1 (2020) § 5, at 55.

25. Restatement Council Draft No. 2 (2018) § 1.06, at 76.

26. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–48 (1991).

27. That is, if the Restatement project is finalized, one could look at how many courts in coming decades use “minimal-creativity requirement” over “modicum of creativity” (or any other phrase the Supreme Court subsequently uses).

(d) The amount of time, labor, skill, or investment employed by the author in creating a work is not relevant to whether the minimal-creativity requirement is satisfied.<sup>28</sup>

This section is also unchanged from the 2019 draft.<sup>29</sup> It is not clear why the section uses different formulations of the requirement; the Reporters seem to favor a “minimal-creativity requirement,” but cannot seem to stick to that moniker.<sup>30</sup> It is also unclear why subsection (d) could not be formulated to be parallel to subsections (b) and (c).<sup>31</sup>

But these are minor quibbles compared to a larger observation of what is good about this section and, in that context, two meaningful concerns, including one which is a troubling change from the 2018 draft.

### 1. Emphasis on Creative “Choices” as a Nod To the Creative Process

First and foremost, § 7 is an exercise in legerdemain. While subsection 7(a) speaks of “expression that is . . . minimally creative,” subsections 7(b) and 7(c) speak of the author’s “choices,” not the actual expression that results from those choices. Some have criticized this sleight of hand,<sup>32</sup> but I think such criticism is misplaced. The shift in the draft Restatement from subsection 7(a) to subsections 7(b) and (c) is a shift from *what courts are supposed to do* to *what courts actually do*. The reason this happens is that courts must execute the *Feist* formula within a framework that the draft Restatement barely mentions and never explains: the Supreme Court’s reasoning in the 1903 *Bleistein v. Donaldson Lithographing Co.* decision.<sup>33</sup>

The problem is simple: *Feist* directs judges to search for “creativity”—and to do so by detecting small amounts with the accuracy of a Geiger counter. But Justice Holmes’s thundering admonition in *Bleistein*, taught to thousands of copyright students each year, was that judges are *not* to make aesthetic judgments:

28. Restatement Tentative Draft No. 1 (2020) § 7, at 63.

29. Restatement Council Draft No. 3 (2019) § 1.07, at 195.

30. The title says “Minimal-Creativity Requirement” but subsection (a) says “minimal-creativity criterion”; subsection (b) says the “requirement that a work embody expression that is at least minimally creative”; subsection (c) and (d) then return to “minimal-creativity requirement.” Restatement Tentative Draft No. 1 (2020) § 7, at 63.

31. Instead of its present wording, (d) could be more consistent with (b) and (c) by starting with the “minimal-creativity requirement,” for example, “(d) The minimal-creativity requirement is not satisfied by any threshold amount of time, labor, skill, or investment employed by the author in creating a work.” *See id.* § 7(d), at 63.

32. The Authors Guild criticized the 2018 draft as follows: “Here and, generally in Section [7], the Reporters reduce originality to a set of choices, conscious or not. While that may describe the creation of some creative works, such as compilations, it does not encompass all original creation, and there is no support in the statute for reducing all original creation to choices.” Letter from Mary E. Rasenberger, Authors Guild Exec. Dir., to ALI President David Levi et al., Re: Restatement of Law, Copyright—Council Draft No. 2, at 4–5 (Oct. 17, 2018), <https://perma.cc/6XAV-XYGZ>. While there may be some original expression that is not by choice, I would like to hear about a novel, feature film, computer program, sculpture, painting, ballet, or musical composition whose creation did not largely amount to “a set of choices.”

33. 188 U.S. 239 (1903). The *Bleistein* decision is mentioned only once in these sections of the 2020 draft Restatement and then only obliquely. Restatement Tentative Draft No. 1 (2020) § 7 reporters’ note b, at 70.



It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.<sup>34</sup>

The draft Restatement barely recognizes *Bleistein's* aesthetic non-discrimination principle, posing only the scholarly question whether judges are still making aesthetic judgments.<sup>35</sup> The *Feist* Court itself assumed that its two-part originality test and Holmes's prohibition were consistent, by interpreting Holmes's range of permissible judicial determinations—"the narrowest and most obvious limits"—as identifying the "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."<sup>36</sup>

But the tension between *Bleistein* and *Feist* is real—and shapes originality determinations *operationally*. The *Bleistein* admonition has been quoted by the Court itself as recently as the 2017 *Star Athletica* decision,<sup>37</sup> and it continues to animate trial court and appellate court thinking. In 2020 alone, it was quoted as a guidepost by the Second, Ninth, and D.C. Circuits.<sup>38</sup> In the 2020 words of a D.C. Circuit panel, *Bleistein* teaches that "a copyright holder's ability to defend [the right holder's] property interest does not turn on the subjective value judgments of a particular judge."<sup>39</sup>

The *Bleistein* admonition makes judges disinclined to say what expression *is creative* as well as what expression *is not creative*: exactly what *Feist* tells them to do.<sup>40</sup> A candid statement of the problem occurred in a 2011 case in which the trial

34. *Bleistein*, 188 U.S. at 251–52.

35. Justice Holmes's admonition is usually called a "non-discrimination" or "aesthetic neutrality" principle. See, e.g., Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405, 443 (2019) (explaining "*Bleistein's* non-discrimination principle"); Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 386 (2017); Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach To Trademark Law*, 84 IOWA L. REV. 611, 678 (1999) (discussing "the principle of aesthetic neutrality"); Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 309 (1991) (highlighting "*Bleistein's* non-discrimination principle"). See also Christine Haight Farley, *Judging Art*, 79 TULANE L. REV. 805, 811–15 (2005) (calling it a "'doctrine of avoidance' of artistic determinations").

36. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991).

37. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017). The admonition was quoted to justify the majority declining to embrace some of the judicial gloss appellate courts had added to determination of copyrightability of the artistic features of a useful item.

38. *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1209 (D.C. Cir. 2020); *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1086 (9th Cir. 2020) (Ikuta, J., concurring) (declining to create "some judicially constructed standard for 'holistic musical design'" (quoting *Bleistein*, 188 U.S. at 251)); *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020) ("[W]e are mindful of Justice Holmes's cautionary observation.").

39. *Strike 3 Holdings*, 964 F.3d at 1209.

40. Beebe, *supra* note 35, at 386 ("More often, courts appear to engage in aesthetic discrimination when they assess close questions under the originality requirement."); Brian L. Frye, *Against Creativity*,

court felt compelled to rule that a single sentence did not cross the minimal creativity threshold: “[T]he Court finds that Plaintiff’s one-sentence listserv post is devoid of creative effort and therefore uncopyrightable. Courts seldom resolve copyright infringement claims solely on that basis, however, in part because courts resist making aesthetic judgments for which they are ill-equipped.”<sup>41</sup> That candid, but cautious judge ordered briefing on § 107 and also found in favor of the defendant on grounds of fair use.<sup>42</sup>

The easiest way to resolve the tension between *Bleistein* and *Feist* is for judges to look to creative *processes*—that is, creative “choices”—as indicia of the presence of minimal creativity.<sup>43</sup> Hence, the shift from subsection 7(a)’s requirement of “expression that is minimally creative,” to the author’s “choices” in subsections 7(b) and 7(c); in this respect, the shift in focus within § 7 of the draft Restatement accurately reflects (though failing to explain) what courts are actually doing.

*a. The Choice of Tools and the Creative Process*

While the draft Restatement ably recognizes that judgments about the “modicum of creativity” in any work will often be made through consideration of the author’s choices, it does not always follow this insight rigorously. For example, one potential reading of § 7(c) says that “[t]he minimal creativity requirement is not satisfied by choices . . . such as . . . the tools used to produce the work.”<sup>44</sup> The Comments seem to endorse this reading: Comment *c* says, “[C]hoices do not reflect an author’s creative expression if they . . . are significantly constrained by external factors. External factors include . . . the tools used to produce [a work] (e.g., a sculptor’s marble and chisel) . . . .”<sup>45</sup>

Whatever the good intentions, this language is troubling. The artist’s choice of which tools to use is part of the creative process. The sculptor’s choice of which

11 N.Y.U. J.L. & LIBERTY 426, 442 (2017) (“Under the ‘aesthetic nondiscrimination’ doctrine, courts cannot consider the aesthetic value of an element of a work of authorship in determining whether it is protected by copyright, but under the ‘creativity’ requirement, courts must consider the aesthetic value of an element of a work of authorship in order to determine whether it is ‘original’ and thus protected by copyright.”); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001) (observing that courts often make aesthetic determinations and sometimes “have little choice but do so, because such an assessment is required either by the Constitution or by the Copyright Act”).

41. *Stern v. Does*, 978 F. Supp. 2d 1031, 1044 (C.D. Cal. 2011). The sentence was “Has anyone had a problem with White, Zuckerman . . . cpas including their economist employee Venita McMorris over billing or trying to churn the file?” *Id.* at 1037.

42. *Id.* at 1049.

43. Julie Cohen has keenly observed a similar substitution among commentators on intellectual property, innovation, and creativity. Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1162 (2007) (“Both rights theorists and economic theorists are deeply suspicious of the role of value judgments about artistic merit in justifying the recognition and allocation of rights. They have therefore struggled mightily to articulate neutral, process-based models of progress that manage simultaneously to avoid enshrining particular criteria of artistic and intellectual merit and to ensure that the ‘best’ artistic and intellectual outputs will succeed.”).

44. Restatement Tentative Draft No. 1 (2020) § 7(c), at 63.

45. *Id.* § 7 cmt. c, at 66.

chisel to pick up—width of blade, angle of blade, hardness of steel, etc.—may be an expressive choice. Same with the selection of marble: The sculptor may select the marble for its particular color or hue, for its particular translucence, or for the patterns she believes will emerge from the stone as she carves.

Comment *c*'s negative view of the choice of tools is in tension with Comment *e* which acknowledges that “[c]hoices made during the creative process . . . need not be made as conscious choices between various clearly identified options in order to qualify as minimally creative” and gives as an example “the movement of a paintbrush.”<sup>46</sup> So, the unconscious movement of a paintbrush can be an authorial choice that contributes to minimal-creativity, but the same artist’s choice of which chisel or brush to use cannot contribute to minimal-creativity? Illustration 15 obscures things further by giving the example of “[a]n artist creat[ing] paintings by *picking various brushes* and forcefully flicking those brushes to throw paint onto a canvas in what seem to be random patterns.”<sup>47</sup> This creative process is meant by the Reporters to be an indication of minimal creativity—and it rightfully is. But those twenty-six words describe what amounts to an iterative process of choosing “tools” and using them.

A professional painter will easily have a hundred different brushes;<sup>48</sup> three hundred is not unheard of.<sup>49</sup> Those brushes include bristle broads, bristle filberts, sable flats, brights, rounds, riggers, washes, mops, etc.<sup>50</sup> When she chooses among those brushes aiming for a particular effect—or even just experimenting to see what will work—that is an artistic choice.<sup>51</sup>

In the realm of photography, the author’s choice of “tools” has been repeatedly recognized by appellate courts as a source of creativity: The modicum of creativity is found, in part, in “decisions regarding . . . appropriate camera equipment and lens,

46. *Id.* § 7 cmt. e, at 68.

47. *Id.* § 7 cmt. e, illus. 15, at 68.

48. Painter Louise Hardy reports, “I have around a hundred brushes of all shapes, materials and sizes, some like old friends that I’ve had since college. . . . I own 5 palette knives.” Email from Louise Hardy to Justin Hughes (Dec. 6, 2020) (on file with author). Painter Derek Mueller reports, “100 brushes is reasonable” but admits “it looks as though I have over 200.” Email from Derek Mueller to Justin Hughes (Dec. 6, 2020) (on file with author). Painter Nick Cuthell also reports having 200 brushes and “during a painting session I can easily have 40 brushes on the go at once.” Email from Nick Cuthell to Justin Hughes (Dec. 13, 2020) (on file with author).

49. Painter Thomas Richards reports, “I have around 300 in my studio and another 100 that are part of my ready to go landscape/travel set-up. Sizes range from brushes with a couple of hairs up to things several inches wide. I would be skeptical of any professional painter with less than 100.” Email from Thomas Richards to Justin Hughes (Dec. 6, 2020) (on file with author).

50. See generally JOHN HOWARD SANDEN, *SUCCESSFUL PORTRAIT PAINTING* (1986); Ingrid Christensen, *10 Types of Paintbrushes Every Artist Should Know*, ARTSY (Nov. 14, 2018), <https://perma.cc/YLZ5-C42R>.

51. As painter Alec Cummings describes it, “Lots of considerations come into play—after years of painting you sort of almost sub-consciously consider specifics. . . . Things like resistance of the bristles against the canvas, the weight of the brush, length even . . . there’s a muscle memory you build up in certain brushes that [sic] you know the mark and the effect they will have on the surface of the painting just by looking at the brush. that’s [sic] how well i [sic] know my brushes.” Email from Alec Cummings to Justin Hughes (Dec. 8, 2020) (on file with author).

camera settings and use of the white background”;<sup>52</sup> in “selection of film and camera”;<sup>53</sup> and in “the choice of light sources, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques.”<sup>54</sup>

In short, the entirety of the originality discussion in the draft Restatement needs to be reviewed and tweaked to rigorously follow the basic insight that the presence of minimal creativity will often be established by evidence of court recognition of creative choices, not by judicial judgments about the expressive content.

*b. The True Purview of “Selection, Coordination, or Arrangement”*

A second problem with draft Restatement § 7 is also significant. Section 7(b) clearly seems intended to limit “selection, coordination, and arrangement” as possible bases for original expression to “compilation” works: “(b) The requirement that a work embody expression that is at least minimally creative can be satisfied by an author’s creative choices. *In the case of a compilation*, choices regarding the selection, coordination, or arrangement of elements can satisfy the minimal-creativity requirement even if those elements are not themselves original.”<sup>55</sup>

The intent here is clear because this is a change from the 2018 draft in which the parallel language did not have this limitation and was more open-ended: “(b) The requirement that a work embody expression that is at least minimally creative can be satisfied by an author’s creative choices, including choices regarding the selection, coordination, or arrangement of elements even if those elements do not satisfy the originality requirement.”<sup>56</sup>

The Reporters’ intent to limit selection, coordination, and arrangement as bases for minimal creativity to the category of “compilation” works is also made clear in changes to § 7 Comment *b* and § 5 Comment *a*. Section 7 Comment *b* in the 2020 draft says the following:

The requirement that a work embody at least minimally creative expression can be satisfied by an author’s creative choices. See Illustrations 2 and 3. In the case of a compilation, an author’s choices regarding selection, coordination, or arrangement of preexisting material can be minimally creative, even if the material selected, coordinated, or arranged is not itself original to the author.<sup>57</sup>

Again, the § 7 Comment in the 2018 draft was more open-ended:

52. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1230 (11th Cir. 2010).

53. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

54. *Marco v. Accent Publ’g Co.*, 969 F.2d 1547, 1551–52 (3d Cir. 1992); *see also* *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) . . .”). For a fuller discussion of originality in relation to photography, see generally Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339 (2012) [hereinafter Hughes, *Photographer’s Copyright*]; Justin Hughes, *Gorgeous Photograph, Limited Copyright*, in *THE ROUTLEDGE COMPANION TO COPYRIGHT AND CREATIVITY IN THE 21ST CENTURY* 78–91 (Michelle Bogre and Nancy Wolff eds., 2021).

55. Restatement Tentative Draft No. 1 (2020) § 7(b), at 63 (emphasis added).

56. Restatement Council Draft No. 2 (2018) § 1.08(b), at 30.

57. Restatement Tentative Draft No. 1 (2020) § 7 cmt. b, at 64.

The requirement that a work embody at least minimally creative expression can be satisfied by an author's creative choices regarding selection, coordination, or arrangement of preexisting material, even if the author selects, coordinates, or arranges material that is not itself original to the author.<sup>58</sup>

It would be better to merge these two versions of the Comment, saying that the minimal-creativity requirement “can be satisfied by the author's creative choices, including choices regarding selection, coordination, or arrangement of preexisting material . . .” This same narrowing (between the 2018 and 2019/2020 drafts) of the applicable realm of “selection, coordination, and arrangement” creativity also appears in § 5 Comment *a*.<sup>59</sup>

This intent to limit selection, coordination, and arrangement as bases for minimal creativity to the category of “compilation” works is *not* an accurate reflection of the case law. It is not even an accurate reflection of Supreme Court jurisprudence. How the chapters of a novel are *arranged* (perhaps a novel with a non-linear narrative or told from different viewpoints), is part of the original expression in that novel. The framing of a photograph of existing reality (do I include that tree, that bush, the top of the roofline?) is also a form of selection and arrangement—and part of the “original expression” of the photograph.

The Restatement's implicit denial of selection and arrangement as possible bases for “expression” in all works other than compilations is further confirmed by the strange way the Reporters' Notes describe the *Burrow-Giles* case. The Notes say “[i]n *Burrow-Giles*, the Court found a photograph of Oscar Wilde to be copyrightable subject matter due in part to the creative choices exercised by the photographer in capturing his subject. Those choices included setting, pose, costume, lighting, and accessories.”<sup>60</sup> Why “in part”? In fact, the *Burrow-Giles* Court described those elements of (minimally-creative) expression in terms of selection and arrangement. The original expression of the photograph was achieved:

[B]y posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.<sup>61</sup>

58. Restatement Council Draft No. 2 (2018) § 1.08 cmt. b, at 31.

59. Section 5 Comment *a* of the 2020 Draft Restatement says the following: “‘Expression’ is the particular way an author describes, explains, illustrates, or embodies his or her contribution, and it includes, *for a ‘compilation,’* as discussed in § 4, an author's selection, arrangement, and/or coordination of preexisting material and/or data.” Restatement Tentative Draft No. 1 (2020) § 5 cmt. a, at 55 (emphasis added). The corresponding sentence in that 2018 draft said “‘expression’ is the particular way an author describes, explains, illustrates, or embodies his or her creative contribution, and it includes an author's selection, arrangement, and/or coordination of preexisting materials and/or data.” Restatement Council Draft No. 2 (2018) § 1.06 cmt. a, at 22. This formulation at least covers the selection and arrangement in a photograph of pre-existing reality.

60. Restatement Tentative Draft No. 1 (2020) § 5 reporters' note a, at 57.

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

Because a photographic composition relies on *existing* things, such a composition involves “selection” and “arrangement” even though we do not think of a photograph as a compilation work.

Courts have recognized that creative choices in selection and arrangement are endemic to photographs, architectural works, audiovisual works, visual arts, and software—none of which are considered “compilation” works.<sup>62</sup> A musical “arrangement” is just that, but it may not be a compilation work. Given the ample case law and the theoretical consistency of applying selection and arrangement as potential creative choices across all works, it is difficult to understand why the Reporters’ consciously moved toward the narrower, inaccurate language.<sup>63</sup> If this remains unchanged, it will be up to courts to recognize that the Restatement does *not* reflect Supreme Court guidance and extensive appellate court decisions on how selection and arrangement are bases for protectable expression in copyright law.

## 2. Artistic Choices, Yes, but What More Does This Draft Tell Us About Creativity?

The answer to the above question is “not much.” Between the two *Feist* requirements, there is no question that the “minimal-creativity” threshold remains the more vexing, even as courts have turned to evidence of authorial processes and choices as stand-ins for judgments on actual expression. *Feist* only tells courts to look for thimblefuls of undefined “creativity.”<sup>64</sup>

If the draft Restatement is sparse on exposition about creativity, it is because it remains faithful to this *Feist*-ian silence. For example, the § 7 Comments dutifully repeat different *Feist* formulations—the minimal creativity requirement; “a modicum of creativity”; “some creative spark”; “the requisite level of creativity is extremely low”; and “some creative spark, ‘no matter how crude, humble, or obvious’ it might

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62. See, e.g., *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (concerning a sculpture, “a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship”); *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1445 (9th Cir. 1994) (considering software, “original selection and arrangement of otherwise uncopyrightable components may be protectable”); *Melchizedek v. Holt*, 792 F. Supp. 2d 1042, 1052 (D. Ariz. 2011) (“Plaintiff’s copyrights in the 1992 Video, the 1993 Videos and the Copyrighted Works extend to the original selection and arrangement of each work’s components.”).

63. After writing this critique, I discovered that Michele Kane and Keith Kupferschmid separately made similar observations in autumn 2019. Copyright Alliance Comments on Restatement of the Law, Copyright Tentative Draft No. 1, at 15–16 (June 30, 2020) [hereinafter Copyright Alliance 2020 Comments].

64. Not surprisingly, commentators have noted that the Supreme Court and appellate courts have done little to tell us what “creativity” is. See, e.g., Pamela Samuelson, *Functional Compilations*, 54 HOUS. L. REV. 321, 357 (2016) (“The Court in *Feist* gave scant guidance about which characteristics or factors to look for in making a judgment about the type and quantum of creativity necessary to satisfy copyright’s originality standard.”); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 830 (2010) (“But ‘creativity’ in *Feist*’s sense gives advocates and courts few tools for distinguishing what is, and what is not, creative.”); Ralph D. Clifford, *Random Numbers, Chaos Theory and Cogitation: A Search for the Minimal Creativity Standard in Copyright Law*, 82 DENV. U. L. REV. 259, 268 (2004) (“[T]he Court provided no clear guidance on what a ‘creative spark’ is.”).

be”—without ever describing the magic dust for which we search.<sup>65</sup> This can be frustrating for the reader, but it's all completely understandable given how little we know about the creative process.<sup>66</sup>

Section 7 of the draft Restatement does take some cautious steps to tell us what the Reporters think creativity is and is not, arguably with an emphasis on what creativity is *not*. The Comments to § 7 frame creativity in terms of choices made by the author—which this writer thinks is correct and valuable—but then makes no effort to organize their observations. At bottom, the Reporters' observations about what authorial choices contribute to minimal-creativity can be clustered into what does *not* count for minimal-creativity, what *can count* but is *not necessary* for minimal-creativity, and what *is necessary* for minimal-creativity:

Creativity cannot be—

- Author's choices that are “merely routine” cannot contribute to minimal-creativity;<sup>67</sup>
- Author's choices that are “significantly constrained by external factors” cannot contribute to minimal-creativity;<sup>68</sup>
- The amount of “time, labor, or investment employed by the author in creating a work does not constitute or generate the creativity necessary for a work to be original.”<sup>69</sup>

Creativity can be, but need not be—

- Author's choices do not need to be “artistic” or “aesthetic” to confer minimal-creativity;<sup>70</sup>
- Author's “choices [made] among options without being fully aware of those options” can contribute to minimal-creativity;<sup>71</sup>

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65. Restatement Tentative Draft No. 1 (2020) § 7 cmts. a–b, at 63–64. These all come from the *Feist* decision, the last being the *Feist* Court quoting MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08[C][1] (1990).

66. This is not to say that people have not researched creativity—a large book of small type could be filled with the titles of all the psychological and sociological research on creativity. But creative professionals themselves do not understand the creative process; as Cohen notes, “[t]here is broad agreement among creative individuals of all types that creativity is characterized pervasively by *a not knowing in advance* that encompasses both inspiration and production.” Cohen, *supra* note 43, at 1178 (emphasis added).

67. Restatement Tentative Draft No. 1 (2020) § 7 cmt. c, at 66.

68. *Id.*

69. *Id.* § 7 cmt. d, at 67.

70. *Id.* § 7 cmt. c, at 66.

71. *Id.* § 7 cmt. e, at 68. The Comment particularly identifies that “[c]hoices made during the creative process . . . need not be made as conscious choices between various clearly identified options in order to qualify as minimally creative.” *Id.* A grammarian would note that the proper phrase here should be “among various . . . options.”

- Author's choices "that may be characterized as 'arbitrary'" (as distinct from random);<sup>72</sup>
- Author's choices "need not have been made rationally";<sup>73</sup>
- Author's choices "need not have been made . . . with conscious awareness"<sup>74</sup> or "consciously."<sup>75</sup>

Creativity must be—

- Only author's choices which "involves expression" "are 'relevant' for minimal-creativity;<sup>76</sup>
- That author's choices that do contribute to minimal-creativity "are those that 'inhere[] in making non-obvious choices from more than a few options.'"<sup>77</sup>

This is a helpful, but imperfect list. For example, of some concern is the lack of nuance on the question of "labor" and "time."

In *The Trade-Mark Cases*—on which *Feist* relied heavily and the draft Restatement refers frequently—Justice Miller did say that constitutional "Writings" are "only such as are *original*, and are founded in the creative powers of the mind."<sup>78</sup> But he also equated "originality" with "intellectual labor": "The writings which are to be protected are *the fruits of intellectual labor*."<sup>79</sup> To muddle things further, he says that trademarks cannot be protected under the Copyright and Patent Clause because trademark rights do not depend on "any work of the brain" and require "no fancy or imagination, no genius, no laborious thought."<sup>80</sup>

Since much of the *Feist* decision was intent on distinguishing the originality standard from "sweat of the brow" protection, it is no wonder that "intellectual labor," "work of the brain," and "laborious thought" disappear from Justice O'Connor's exposition of *The Trade-Mark Cases*.<sup>81</sup> The draft Restatement is faithful to *Feist* in this respect, politely keeping all the "labor" discourse in *The Trade-Mark Cases* to one side.

Following *Feist*, we can all agree that "time, labor, or investment" spent by an author cannot itself constitute the minimal "creativity necessary for a work to be original."<sup>82</sup> But to the degree evaluation of the creative process is a stand-in for actual evaluation of the expression, perhaps it would be best to acknowledge that evidence of the author's creative choices may sometimes be conflated with evidence

72. *Id.* § 7 reporters' note c, at 71.

73. *Id.* § 7 reporters' note e, at 72.

74. *Id.*

75. *Id.*

76. *Id.* § 7 cmt. c, at 65.

77. *Id.* § 7 cmt. c, at 66 (quoting *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 674, 682 (2d Cir. 1998)).

78. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (emphasis in original).

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

80. *Id.*

81. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346–56 (1991).

82. Restatement Tentative Draft No. 1 (2020) § 7 cmt. d, at 67.



of the author's labors. After all, even Justices are prone to think this way: A decade after *Feist*, the dissent in *New York Times v. Tasini* tells us "[t]he primary purpose of copyright is . . . to secure the general benefits derived by the public from the labors of authors."<sup>83</sup>

Of much greater concern are the things on this list which, in composite, could be taken to raise the minimal-creativity threshold above what the Court told us in *Feist*. The Reporters need to be sensitive to this issue—it is the most obvious way tinkering with the originality standard could narrow the rights of copyright holders.<sup>84</sup> (And while raising the originality/creativity bar might narrow copyright's coverage, it probably would not much trouble advocates for copyright industries.)

On this count—the suspicious raising of the creativity bar—one thing that is definitely wrong in the § 7 Comments is the quotation from the Second Circuit's 1998 *Matthew Bender* decision that minimal creativity comes from "making non-obvious choices from more than a few options."<sup>85</sup> That appellate court dictum is *directly* contradictory to the Supreme Court's statement in *Feist* (quoting the Nimmer treatise) that the minimal-creativity requirement can be met by "some creative spark, 'no matter how crude, humble, or obvious' it might be."<sup>86</sup> Even if it were not contrary to Supreme Court teaching, the Reporters should know better than to gratuitously introduce a concept loaded with very specific meaning in patent law.

And what is a "merely routine" choice that is disqualified from contributing to minimal-creativity? The draft Reporters' Notes tell us that "choices reflecting 'practices or conventions standard to a particular type of work' do not contribute the necessary creativity."<sup>87</sup> This is fine. Of course, everyone needs to understand that when an author replicates "practices or conventions standard to a particular type of work" she is *already failing* the first requirement of *Feist* because she is "copying"—even if unconsciously—some form of expression she has already seen applied to the kind of work she is producing.<sup>88</sup>

The Reporters' Notes get into murkier waters in the next paragraph when they assert that "other types of choices, including those that might apply to a new type of

83. *New York Times Co. v. Tasini*, 533 U.S. 483, 519–20 (2000) (Stevens, J., dissenting). The phrasing comes from a pre-*Feist* decision, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

84. And something that *some* commentators have advocated. See, e.g., William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437, 461–68 (2016); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1506 (2009) (advocating a higher or varied standard for originality and noting "[t]he problem with the existing [law] is that by rewarding minimally original works and highly original works alike, the law incentivizes authors to produce works containing just enough originality to receive protection—but not more."); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451 (2009); Ryan Litrell, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193 (2001).

85. Restatement Tentative Draft No. 1 (2020) § 7 cmt. c (quoting *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 674, 682 (2d Cir. 1998)).

86. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08[C][1] (1990)).

87. Restatement Tentative Draft No. 1 (2020) § 7 reporters' note c, at 70.

88. *Id.* § 7(c), at 63.

work but are routinely made by authors of other relevant categories of works, do not contribute the necessary creativity for a work to qualify for federal copyright protection.”<sup>89</sup> The Reporters’ use the example of a “list arranged in alphabetical or numerical order” to support their statement.<sup>90</sup>

But the statement is too broad. Bringing a “practice” or “convention” from one “category of works” into a different category of works may or may not involve a modicum of creativity. Since the Reporters seem unbothered by confusing patent law terminology, bringing a technique or component common to one “category of technology” into a different category of technology *may or may not be* ‘non-obvious’ in patent law. The problem here is that the *most* customary organizational patterns—alphabetical, chronological, ascending or descending numeric order—cannot give us practical guidance on what broader range of “customs” and “practices” are so routine and garden-variety as to foreclose a choice being a choice that contributes to minimal-creativity.

While critics of the Restatement project will be reviewing the text for ways it might quietly attempt to narrow or weaken copyright, we also need to acknowledge places where the draft may strengthen copyright, including broadening the range of what counts for minimal creativity. On this count, the Notes’ discussion about authorial choices “that may be characterized as ‘arbitrary’” is particularly noteworthy.<sup>91</sup> The draft Reporters’ Notes say that arbitrary choices that count for minimal-creativity are “the result of some human will” and represent “a choice based on options based on the author’s whim”; the draft contrasts such choices with “content that is generated randomly—for example, a string of random numbers.”<sup>92</sup>

This is a helpful addition to the discussion, although some will see it as a stretch.<sup>93</sup> There may also be a few raised eyebrows at the citation of French case law.<sup>94</sup> But there is no question that many authors do intentionally introduce some arbitrariness into their creative process—for example, Brion Gysin, William S. Burroughs, and David Bowie all employed a “cut-up” writing technique to combine words in new,

89. *Id.* § 7 reporters’ note c, at 70.

90. *Id.* § 7 reporters’ note c, at 71.

91. *Id.*

92. *Id.*

93. There are many reasons for this. Not only does the case law not draw this distinction (as the Notes recognize), but courts deciding copyrightability questions have at least sometimes used “arbitrary” and “random” to mean the same thing. *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1374 (10<sup>th</sup> Cir. 1997) (“We agree with the district court that ‘the random and arbitrary use of numbers in the public domain does not evince enough originality to distinguish authorship.’”); *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1213 (8<sup>th</sup> Cir. 1986) (“The random and arbitrary use of numbers in the public domain does not evince enough originality to distinguish authorship.”). Of course, that does not mean courts should use the two words synonymously, and the distinction drawn in the Reporters’ Notes is certainly a valid one.

94. It is not unheard of for Restatements to cite foreign law, but usually from common law jurisdictions. For example, the Reporters’ Note for § 351 of the Restatement (Second) of Contracts cites *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. (1854) in support of Illustration 1 in Comment *a* and cites *Victoria Laundry (Windsor) v. Newman Industries*, 2 K.B. 528 (1949) in support of Illustration 5 in Comment *b*. And many think American law should be more receptive to comparative analysis. See, e.g., STEPHEN BREYER, *THE COURT AND THE WORLD* 91 (2016).

interesting, and evocative ways.<sup>95</sup> A fair reading of the psychological and sociological literature on creativity can lead one to believe that the “creative” is human activity somewhere between the deterministic (including “significantly constrained by external factors”) and the random.<sup>96</sup>

### 3. What More Does This Draft NOT Tell Us About Creativity?

If anything, the draft Restatement should say more about what creativity *can be*, including (1) a discussion of how choices that manifest individual personality are paradigmatically protectable original expression and (2) recognition that “intellectual” choices are part of the minimal-creativity equation. Not surprisingly, those are elements of originality of American copyright emphasized in decisions that the draft Restatement avoids or references only selectively.

For me, the most serious shortcoming in the discussion of minimal creativity in § 7 is what appears to be an effort by the Reporters to erase *Bleistein v. Donaldson Lithographic Co.* from the history books.<sup>97</sup> As Professor Barton Beebe observed in 2017, “*Bleistein* is arguably the most influential copyright opinion the Court has ever produced”<sup>98</sup>—yes, arguably more important than *Feist*. No one questions that the *Bleistein* Court directly connected “originality” with personal expression.<sup>99</sup> Considering a set of circus posters, Justice Holmes reasoned that the “least pretentious picture has more originality in it than directories and the like, which may be copyrighted,” that such a picture is “the personal reaction of an individual upon nature,” and that there was “no reason to doubt that these prints . . . are the original work of the plaintiffs’ designer.”<sup>100</sup>

The continued cogency of *Bleistein*’s connection between creativity and personality can be seen in the post-*Feist* case law. For example, to suss out whether there was a modicum of creativity in photographs of a vodka bottle, the Ninth Circuit

95. As Bowie described it, “You write down a paragraph or two describing several different subjects, creating a kind of ‘story ingredients’ list, I suppose, and then cut the sentences into four or five-word sections; mix ‘em up and reconnect them. . . . You can get some pretty interesting idea combinations like this. . . . You can use them as is or, if you have a craven need to not lose control, bounce off these ideas and write whole new sections.” *Songwriting Tips: Try David Bowie’s ‘Cut-Up’ Method of Writing Lyrics*, SONGWRITING: THE HIT FORMULA (April 30, 2013), <https://perma.cc/CSY4-ZDWN>. This “cut-up” process might be considered to be one in which “random” results become “arbitrary” human choices through the author’s adoption of the random combination.

96. Justin Hughes, *The Personality Interest of Authors and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 106 (1998) (“In other words, creativity/originality requires a transformation not arising from the background order, whether that order is considered random or deterministic.”). See also *id.* at 113–114.

97. Restatement Tentative Draft No. 1 (2020) § 7 cmts. a–g, at 63–70.

98. Beebe, *supra* note 35, at 329.

99. While many commentators assume that Holmes’ low threshold for originality was tied to his aesthetic non-discrimination principle, Beebe reasons that “[i]n conformity with American thinking of the time, then, Holmes’s invocation of personality resulted not in a ‘restrictive and technical’ originality requirement but rather in one that was broadly inclusive and emphatically liberal, egalitarian, and humanistic—and American.” *Id.* See also Hughes, *Photographer’s Copyright*, *supra* note 54, at 369 (*Bleistein* gives us a “deeply egalitarian, democratic copyright law.”).

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

panel in its 2000 *Ets-Hokin v. Skyy Spirits* decision turned to “Learned Hand’s comment that ‘no photograph, however simple, can be unaffected by the personal influence of the author.’”<sup>101</sup> The Circuit also cited *Bleistein* directly in its recognition of copyright in the videotapes of the sites of an airplane crash and a train wreck.<sup>102</sup> The “personal influence of the author” has figured in many twentieth century cases, some of them classic, on the minimal-creativity question.<sup>103</sup>

As a second wish for improvement of the draft Restatement’s § 7 discussion, I would hope for express recognition that “intellectual” choices are also part of the minimal-creativity equation. Again, the relevance of “intellectual” choices for copyright creativity is beyond peradventure. If the filter of *Feist* makes Justice Miller’s “labor” rhetoric in *The Trade-Mark Cases* unfashionable,<sup>104</sup> we should still be able to salvage the “intellectual” in intellectual labor. The *Feist* Court itself *twice* quoted *Burrow-Giles* to the effect that the author seeking copyright protection “must ‘prove ‘the existence of . . . intellectual production, of thought, and conception.’”<sup>105</sup>

Indeed, “originality” is not the touchstone of copyrightability in *Burrow-Giles* so much as something embodying or representing “the intellectual conception of its author.”<sup>106</sup> According to *Burrow-Giles*, photographs can be protected by copyright when “they are representatives of original intellectual conceptions of the author,” and a photograph cannot be protected when there is “no originality of thought or any novelty in the intellectual operation” connected with the photograph’s creation.<sup>107</sup> Similarly, the Court’s 1973 *Goldstein v. California* decision speaks of copyright encouraging “intellectual and artistic creation”<sup>108</sup> and reasons that “Writing” in the Copyright and Patent Clause can be “any physical rendering of the fruits of creative intellectual or aesthetic labor.”<sup>109</sup> In short, “intellectual conception” or “intellectual

101. 225 F.3d 1068, 1076 (9th Cir. 2000) (quoting *Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921)).

102. *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 792 (9th Cir. 1992).

103. See, e.g., *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (“the personal influence of the author”); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (Choices made by Zapruder in film of Kennedy assassination showed the personal influence of the author); *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 679 F. Supp.2d 312, 318 (E.D.N.Y. 2010) (quoting *Bleistein* for threshold requirement for originality); *Garcia v. Google, Inc.*, 786 F.3d 733, 751 (9th Cir. 2015) (Kozinski, J., dissenting). William Fisher observes that many judges “would be loath” to abandon the aesthetic non-discrimination principle because it reflects “powerful themes in U.S. law”: sensitivity to institutional competence, anti-elitism, hostility to paternalism, and acceptance of the absence of objective criteria for art. Fisher, *supra* note 84, at 458–59.

104. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

105. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346–347, 362 (1991) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884))

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

107. *Id.* at 58.

108. 412 U.S. 546, 555 (1973).

109. *Id.* at 562.

production” continue to have purchase as part of minimal-creativity,<sup>110</sup> and the Restatement should reflect that fact.<sup>111</sup>

### B. THE INDEPENDENT CREATION REQUIREMENT—§ 6

Let us turn back to the first prong of *Feist*, where the draft Restatement also makes some missteps. While the second prong of “originality” is that the work has a “modicum of creativity,” the *Feist* court formulated the first prong of “originality” as “mean[ing] only that the work was independently created by the author (as opposed to copied from other works).”<sup>112</sup> An English teacher might immediately see the problem: The first prong describes the author as *doing some activity* using the verb form (“to create”) which produces something embodying the noun form (a work with a modicum of “creativity”). Is *Feist* one requirement or two?

To keep the copyright universe on the right trajectory as we have understood it since 1991, § 6 admirably restates the first requirement as:

110. See, e.g., *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 CIV. 9248 (HB), 1999 WL 816163, at \*4 (S.D.N.Y. Oct. 13, 1999) (authorship depended on film footage being “the product of Lindsay’s ‘original intellectual conceptions’”). For courts repeating the “intellectual conception” formula from *Burrow-Giles* and *Feist*, see *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1409 (11<sup>th</sup> Cir. 2015) (quoting *Feist* for the proposition that copyright is “limited to original intellectual conceptions of the author”); *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 914 (7<sup>th</sup> Cir. 2007) (“What is required for copyright protection is ‘some minimal degree of creativity,’ or ‘the existence of . . . intellectual production, of thought, and conception.’” (quoting *Feist* quoting *Burrow-Giles*)); *New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 113 (2d Cir. 2007) (“Originality has been described as . . . evidencing ‘intellectual production, . . . thought, and conception.’” (quoting *Burrow-Giles*)); *Alexander v. Take-Two Interactive Software, Inc.*, 18-CV-966-SMY, 2020 WL 5752158, at \*2 (S.D. Ill. Sept. 26, 2020) (“‘the existence of . . . intellectual production, of thought, and conception’ is required for copyright protection.” (quoting *Feist*)).

111. Another reason that these concepts should be included is that “intellectual creation” is the standard in international copyright norms that is the counterpart to “originality” in American copyright law. See, e.g. *Berne Convention for the Protection of Literary and Artistic Works*, art. 2(5), Sept. 9, 1886, as revised July 24, 1971, and as amended Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986) (requiring copyright protection for “[c]ollections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations”); *World Intellectual Property Organization Copyright Treaty*, art. 5, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) (requiring copyright protection for “[c]ompilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations”); *TRIPS Article 10(2)* repeats this standard as the standard for copyrightability of “[c]ompilations of data.” *Agreement on Trade-Related Aspects of Intellectual Property Rights*, art. 10(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197. European Union law directly connects the two concepts. See *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights*, art. 6 (“Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for [copyright] protection.”)

112. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

### § 6. Originality: Independent-Creation Requirement

A work meets the independent-creation criterion for originality if the author has contributed some expression to the work without copying that expression from any preexisting work.<sup>113</sup>

This formulation is ok,<sup>114</sup> but things become a little muddled as soon as we get into the attendant Comment *a*, which tells us that “[f]or expression to be independently created, it must come from the mind of the author.”<sup>115</sup> This arguably conflates the two *Feist* prongs; the conflation in the Comment is supported by a quotation of the *entire* originality tests from *Feist* and a vague general quotation from *The Trade-Mark Cases*.<sup>116</sup>

Comment *b* continues the possible conflation of the two *Feist* requirements by saying that to meet the independent-creation requirement “the expression need not be novel or unique.”<sup>117</sup> That is true, but we also distinguish the modicum of creativity standard by saying it is not a requirement of novelty, further blurring the two requirements.

The independent-creation requirement is *only* that the expression comes from *this* author without having been copied from somewhere else. Removing “to create,” the independent *production* requirement is that *the expression be made or brought into the world by a person who had not experienced the same expression previously*. It is not necessary that it “come from the mind of the author.” If a person throws a set of dice one hundred times and writes down the resulting dice totals from each roll on a list, that list was “independently-created” under *Feist*; it is arguably “expression,” but it is not clear that the list of numbers (or any one number) “comes from the mind” of anyone.<sup>118</sup>

If a person accidentally knocks a marble block off its stand and it breaks into an interesting, evocative shape, the marble shape does not come “from the mind of the author”—but it arguably was “independently-created.” Some might quibble that the person *caused* the evocative shape, but did not *create* it. After the marble has broken all over the floor, we may turn to her and say “you certainly caused a mess here” but we might also say “you certainly created a mess here.” The difference between the dice role example and the fallen marble example presses on how much we believe human intention must be involved in the “independent creation” prong of *Feist*. The

113. Restatement Tentative Draft No. 1 (2020) § 6, at 58.

114. Professor Robert Brauneis offered a better formulation for the black letter law intended to be embodied in § 6: “For a work to be independently created, the author must have contributed to the work one or more elements, or a selection, coordination, or arrangement of elements, that the author did not copy from any preexisting work.” Letter from Professor Robert Brauneis to ALI Dir. Richard L. Revesz et al, Re: Comments on Restatement of Law, Copyright, Council Draft No. 2, at 6 (Oct. 4, 2018) [hereinafter Brauneis Letter].

115. Restatement Tentative Draft No. 1 (2020) § 6 cmt. a, at 58.

116. *Id.*

117. *Id.* § 6 cmt. b, at 58. After writing this critique, I discovered that Robert Brauneis made a similar observation. Brauneis Letter, *supra* note 114, at 6.

118. The reader may quibble that it is “information” but not “expression,” but it *is* “expression.” The author is expressing her account of the history of the dice rolls, part of her life history.

person writing down the dice throws is engaged in an intentional program to produce those random numbers and create a record thereof; the person who knocks over the marble did not have an intention to produce random broken marble shapes.

### 1. Care in the Use of “Novelty”

As to the discussion of “novelty,” § 6 Comment *b* and the Reporters’ Notes make a valuable point, but one that might be misunderstood as it is currently presented. Comment *b* to § 6 says “the expression need not be novel or unique” for the first requirement to be met.<sup>119</sup> The Reporters’ Notes elaborate on this by explaining that “[i]ndependent creation is distinct from novelty. That is works that are not copied from other works satisfy the independent-creation requirement even if they do not differ from prior works in the way that patent law’s novelty standard requires.”<sup>120</sup>

The Notes then discuss a confusing 1850 district court decision, *Jollie v. Jaques*, followed by Learned Hand’s beautiful “Ode to a Grecian Urn” example from his 1936 Second Circuit opinion in *Sheldon v. Metro-Goldwyn-Mayer*.<sup>121</sup>

To present this point with minimal confusion, the Restatement might consider eliminating the “novelty” discussion from Comment *b*—the word is just too loaded with patent law baggage—indeed, the *Feist* Court distinguished the doctrines imprecisely.<sup>122</sup> It is fine to introduce the distinction between copyright and patent law in the Reporters’ Notes, but only after Comments and Notes have made the more basic point: Copyright’s independent-creation requirement does not mean that the thing cannot already exist in the world (that is, effectively, patent law’s “novelty” standard.)<sup>123</sup> Under copyright’s independent-creation standard, the same expression can already exist in the world, *but the author must not have experienced that*

119. Restatement Tentative Draft No. 1 (2020) § 6 cmt. b, at 58.

120. *Id.* § 6 reporters’ note b, at 60.

121. *Id.* § 6 reporters’ note b, at 60–61 (discussing *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.N.N.Y. 1850) and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)). As one of the small percentage of copyright cases that will be cited in the Restatement, the *Jollie* case is confusingly unhelpful because it involved a claim of copyright over the title of a musical composition, something that would not be seriously argued under today’s standards.

122. The imprecision can be forgiven because the *Feist* Court did not expressly state patent law’s novelty standard when they discussed novelty. The Court said: “Originality does not signify novelty; a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). But the novelty standard of patent law (35 U.S.C. § 102) by which an invention is *anticipated* by the “prior art” requires that “each and every element as set forth in the [patent] claim is found, either expressly or inherently described, in a single prior art reference.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (quoting *Verdegaal Bros. v. Union Oil*, 814 F.2d 628, 631 (Fed. Cir. 1987)). *See also* *Structural Rubber Products Co. v. Park Rubber Co.*, 749 F.2d 707, 715 (Fed. Cir. 1984). In other words, the “novelty” standard in patent law more closely approximates what philosophers would call “identity” than a “closely resembles” standard.

123. 35 U.S.C. § 102 has not always judged a new invention’s “novelty” against *everything* that has existed in the world. For example, prior to the America Invents Act (2011), a claimed invention was judged against all “printed publication[s] in this or a foreign country” but only as against pre-existing *use* of the invention “in this country.” 35 U.S.C. § 102 (2010). After 2011, the applicable prior art includes anything “in public use” anywhere in the world. 35 U.S.C. § 102 (2020).

*expression*. Even if the same expression already exists, if the author did not encounter that expression before, she can “independently create” that expression. Learned Hand’s pithy sixty-two words explain this better than any fleeting glance to patent law. Better still, is the *Feist* Court’s own words with the novelty part eliminated: “A work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying.”<sup>124</sup>

## 2. Copyright and “Nonhumans”

The Comments and Reporters’ Notes to § 6 devote an unusual amount of space to *human* authorship. The draft Restatement takes the view that “[t]o qualify for copyright protection, a work of authorship must be authored by a human being,” and “not, for example . . . works created by nonhuman animals.”<sup>125</sup> The limited case law in this area is sufficiently nuanced as to make one wonder if the Reporters are trying to eliminate preemptively the possibility of “authorship” by artificial intelligence, but this is apparently not their intent. Recognizing that “[a] computer program might someday produce an output so divorced from the original human creator,” the “Restatement does not take a position on” authorship by artificial minds.<sup>126</sup>

The case law on nonhuman authorship is basically of two sorts. First, there are the cases in which the literary work in question was allegedly authored by sentient beings of a divine, celestial, or spiritual nature; I will call these the “spiritual being cases.” Second, there is one case—the 2018 *Naruto v. Slater* decision—in which the visual works in question (photos) were arguably authored by a nonhuman primate.<sup>127</sup>

The *Naruto* decision was a fairly singular exercise. People for the Ethical Treatment of Animals (PETA) attempted to bring suit on behalf of Naruto, a crested macaque monkey, against the publisher (and copyright claimant) of a book called *Monkey Selfies*.<sup>128</sup> Both the district court and Ninth Circuit panel concluded that animals do not have standing under Title 17 using “a simple rule of statutory interpretation” previously crafted by the Ninth Circuit: “[I]f an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.”<sup>129</sup> This does not really strike me as a principle of copyright law. It was a ruling that nonhuman animals do not have standing under federal law when the law is silent on that issue, not a holding that, as the draft Restatement represents, “[t]he photographs taken by [nonhuman animals] do not qualify for copyright protection

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

125. Restatement Tentative Draft No. 1 (2020) § 6 cmt. c, at 59.

126. *Id.* § 6 cmt. c, at 60.

127. 2016 WL 362231 (N.D. Cal. 2016), *aff’d on other grounds* 888 F.3d 418 (9th Cir. 2018).

128. *Naruto*, 888 F.3d at 420.

129. *Id.* at 426. The previously crafted rule was articulated in *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004). True, the *Naruto* panel also inferred the exclusion of nonhuman animals from component parts of Title 17: “The [statutory] terms ‘children,’ ‘grandchildren,’ ‘legitimate,’ ‘widow,’ and ‘widower’ all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law.” *Naruto*, 888 F.3d at 426. But this was not the holding.



because they were not authored by a human being.”<sup>130</sup> Moreover, the connection between the *Naruto* fact pattern and the spiritual being cases was only made by the *Naruto* trial court, not the Ninth Circuit.

It is true that the spiritual being cases have pondered the question of whether a work “claimed to embody the words of celestial beings rather than human beings[] is copyrightable at all.”<sup>131</sup> But we are adrift in terms of direct answers that are *holdings* and not *dicta*.<sup>132</sup> Instead, when originality can be attributed to combined activities of humans and sentient nonhumans, courts will conclude that the human participant(s) added enough original expression to support a copyright. For example, in the Ninth Circuit’s 1997 *Urantia Foundation v. Maaherra* decision, the panel found that humans “pos[ing] specific questions to the spiritual beings,” then selecting and arranging the spiritual beings’ answers was sufficiently creative to confer a copyright.<sup>133</sup>

Similarly, in the 2000 *Penguin Books v. New Christian Church of Full Endeavor* decision, a judge in the Southern District of New York considered a “defense of lack of originality” based on the human originator of a book—Helen Schucman—testifying that “she began to hear a ‘Voice’ that would speak to her whenever she was prepared to listen”; that the Voice told her to take notes; and that, for seven years, “she filled nearly thirty stenographic notebooks with words she believed were dictated to her by the Voice.”<sup>134</sup>

But she also made revisions with a (human) collaborator, William Thetford. In addition, “at least some of the editing and shaping of the manuscript was initiated by Schucman; the manuscript went through two additional drafts, one edited by Schucman, one edited by Schucman in collaboration with Thetford; and during this process sections were “rewritten so that the text would flow smoothly and communicate clearly its intended message.”<sup>135</sup> Another colleague, Kenneth Wapnick, later made additional editorial suggestions.<sup>136</sup>

Concluding that the arrangement of the materials had been determined by the human contributors, that the text “reflect[ed] many of Schucman’s personal interests and tastes,” and that all the editorial changes “were *initiated* by Schucman, Thetford,

130. Restatement Tentative Draft No. 1 (2020) § 6 cmt. c, illus. 4, at 59. Judge Margaret McKeown observed the same inaccuracy in the draft Restatement in 2018. Copyright Alliance 2020 Comments, *supra* note 63, at 14.

131. *Urantia Foundation v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

132. For example, in *Urantia Foundation* the appellate panel said that “[I]n this case some element of human creativity must have occurred in order for the Book to be copyrightable. At the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity.” *Id.* at 958.

133. *Id.* at 957. See also *id.* at 959 (“We hold that the human selection and arrangement of the revelations in this case could not have been so ‘mechanical or routine as to require no creativity whatsoever.’ . . . We conclude, therefore, that the ‘extremely low’ threshold level of creativity required for copyright protection has been met in this case.”).

134. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV. 4126 (RWS), 2000 WL 1028634, at \*2 (S.D.N.Y. July 25, 2000). Soon “Schucman identified the Voice as ‘Jesus,’ and she thereafter apparently thought of herself as a scribe taking down the words of Jesus.” *Id.*

135. *Id.* at \*2.

136. *Id.* at \*3.

or Wapnick,” the court found that there was enough creativity to support human authorship (regardless of whether there was divine joint authorship).<sup>137</sup> But the *Penguin Books* court went further, offering the alternative reasoning that the work was, plain and simple, “a literary work authored by Schucman” and that, “[as] a matter of law, dictation from a non-human source should not be a bar to a copyright.”<sup>138</sup>

Perhaps the only other spiritual beings case of note is a 1941 district court decision, *Oliver v. St. Germain Foundation*, in which the copyright owner, Frederick Spencer Oliver, describes himself as the amanuensis to whom “letters” were dictated by Phyllos the Thibetan, a spirit.<sup>139</sup> But the court does not directly hold that the work is uncopyrightable because of the spiritual being source of the expression. Instead, the court treats the spiritual being’s words as “facts” being reported by Frederick Spencer Oliver, analogous to an author of a series of interviews (with humans), who would not have copyright over the words of the interviewees.<sup>140</sup> The *Oliver* court also reasons that the defendant copied neither prose nor style and arrangement of the plaintiff’s work,<sup>141</sup> intimating that those might be protected as original expression from the human contributor to the project.<sup>142</sup>

Does any of this belong in a Restatement of Copyright? I doubt it. The Copyright Office Compendium says that the office will not register works by nonhumans,<sup>143</sup> but we do not need an ALI Restatement to regurgitate an agency regulation that is not binding on courts.<sup>144</sup> The day sentient refugees from some intergalactic war arrive on Earth and are granted asylum in Iceland, copyright law will be the least of our problems. But I am confident that once those sentient aliens are “nationals” in a Berne country, nothing in *Naruto*, *Urantia*, *Penguin Books*, or *Oliver* will keep them from being treated as “authors” under American copyright law.

Similarly, once some AI is sentient enough to demand its own civil rights and protection under the Thirteenth Amendment, my guess is that “person” in copyright law will not be limited to *homo sapiens*. (Since the Reporters apparently agreed to

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137. *Id.* at \*10–11.

138. *Id.* at \*11–12.

139. *Oliver v. St. Germain Foundation*, 41 F. Supp. 296, 297 (S.D. Cal. 1941).

140. *Id.* at 299.

141. *Id.* (“There is no charge of infringement here based upon style or arrangement, but it is upon the subject matter or stories of two earthly creatures receiving from the spiritual world messages for recordation and use by the living. There is no plagiarism or copying of words and phrases as such, but only slight similarity of experiences in that the parties became agencies for communicating between the spiritual and material worlds, of things which happened in other ages.”).

142. At least that is how the *Urantia* court understood *Oliver*: “The defendant in *Oliver* had not copied that arrangement and selection, but simply had written another text using the same divine ‘facts.’ . . . The court in *Oliver* made it clear that, had the claim been that the selection and arrangement of the divine revelations had been infringed, the plaintiff’s copyright infringement claim might have had merit.” *Urantia Foundation v. Maaherra*, 114 F.3d 955, 959 (9th Cir. 1997).

143. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (“Works That Lack Human Authorship”) (3d ed. 2014) (rev. Sept. 29, 2017).

144. As the Supreme Court found, “the Compendium is a non-binding administrative manual that at most merits deference under *Skidmore v. Swift* . . . That means we must follow it only to the extent it has the ‘power to persuade.’” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020).

defer to the future on the question of AI authorship, some bits and pieces of the 2020 draft—like Illustration 6 to § 6—should probably be dropped.<sup>145</sup>). Same for the day when a chimeric half human/half horse is proven to be sentient; “person” in copyright law will include them. These issues are fun conjecture for academics, but such issues are so rarefied as to wonder why the draft Restatement discusses them at all.

### III. CONCLUSION

The ALI's Restatement of Copyright project was inspired by academics who felt the pace of reform of copyright law—in Congress and in the courts—has been too slow, in the wrong direction, and definitely without enough appreciation of all the great ideas in law review articles. But as a vehicle to introduce principles into American law, Restatement projects may be as slow or slower than legislative processes and major court decisions—that's just the nature of writing by committee with review by a cast of hundreds (I mean the Restatement, not how legislation is passed on Capitol Hill). The process of writing and revising a Restatement is and will be far slower than the pace at which American copyright law's three excellent treatises are revised, particularly in response to new court decisions and Congressional action.

As a vehicle to introduce *new principles* or *modified principles*—a gently admitted role of these projects—Restatements must hone a very narrow road indeed. When it comes to the draft sections on originality, the Reporters seem to understand this. Sections 5–7 with their Comments and Reporters Notes generally stick to a centrist, sometimes minimalist, narrative of *Feist's* two-step framework.

Still, there are some occasional missteps. For example, the draft Restatement should deemphasize terminology from the case law—and definitely *not* add terminology—that now serve as important concepts in patent law (“novelty,” “invention,” “obvious”); in truth, the Supreme Court tended to use those terms in copyright cases *before* the words came to be workhorses in patent law. The commentary on how tools do and do not contribute to creative choices also needs to be cleaned up. Some mention of “intellectual” conceptions and expressions of personality would help the Comments and Reporters' Notes better reflect the Supreme Court's body of thinking on originality in copyright law.

There are also a few points of genuine concern—as with the seeming intentional (and mistaken) narrowing of when selection and arrangement can constitute authorial choice that contribute to minimal creativity. Those things need to be fixed; otherwise, the ALI would promulgate a Restatement that is not a wholly accurate account of American copyright law.

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145. Restatement Tentative Draft No. 1 (2020) § 6 cmt. c, illus. 6, at 60.