NOTES

MERGING PHOTOGRAPHY'S COPYRIGHT

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Photography has exploded into the most accessible mode of creative production of our time: Over one trillion photographs will be taken this year. Yet despite the medium's dramatic expansion, catalyzed by advances in technology, the copyrightability of photography remains controlled by a Supreme Court precedent that is over one hundred years old, Burrow-Giles Lithographic Co. v. Sarony. *The long-standing interpretation of* Burrow-Giles *in the lower courts has rendered nearly every litigated photograph copyrightable, even though the factual foundation of* Burrow-Giles *is remarkably inconsistent with how most photography is produced today. With protracted, low-value, and often frivolous copyright litigation over photographs increasingly clogging up federal courts' dockets, it is high time to reconsider photography's copyright.*

This Note argues that a revitalization of copyright's merger doctrine—long ignored or dismissed in the realm of photography's copyright—could be the vehicle for this reassessment. Theorizing photographs as mergeable does not render the medium per se uncopyrightable, but captures the spirit of the Supreme Court's now 150-year-old instruction to permit photography's copyright, while correcting for changes in photographic technology to better uphold the Court's simultaneous mandate that "ordinary" photographs should not receive copyright protection.

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INTRODUCTION

Almost anyone who was of voting age in the United States in 2008 will remember this indelible image: then-Senator Barack Obama, rendered in patriotic paint-by-numbers, gazing upward resolutely, one word emblazoned below him in bold capital letters: "HOPE." This image, widely circulated as a free poster during the 2008 presidential campaign, became a lasting visual icon of the Obama presidency. One prominent cultural critic described it as "the most efficacious American political illustration since 'Uncle Sam Wants You.'"[1] The poster's style—itself reminiscent of earlier iconic political images[2]—has since been appropriated in other political and pop culture contexts.[3]

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[1] Peter Schjeldahl, *Hope and Glory: A Shepard Fairey Moment*, NEW YORKER (Feb. 15, 2009), https://www.newyorker.com/magazine/2009/02/23/hope-and-glory [https://perma.cc/N4FK-Q8UB]; *see also* Anthony Wood, Opinion, *Design With a Cause: Graphics in a Polarized World*, THE HILL (April 13, 2019, 1:00 PM), https://thehill.com/opinion/campaign/438765-design-with-a-cause-graphics-in-a-polarized-world [https://perma.cc/A8Q3-TXDH] (describing the Obama image as "inextricably linked to the heady days preceding the 2008 presidential election"). For a classic discussion of the power of electoral portraits, see ROLAND BARTHES, *Photography and Electoral Appeal*, *in* MYTHOLOGIES 91, 91–93 (1972).

[2] Jenna Wortham, *'Obey' Street Artist Churns Out 'Hope' for Obama*, WIRED (Sept. 21, 2008, 11:33 AM), https://www.wired.com/2008/09/poster-boy-shep [https://perma.cc/4PP9-XNQG] (noting that Fairey was inspired by Alberto Korda's well-known photograph of Cuban revolutionary Che Guevara); *see* Orlando Luis Pardo Lazo, *The Story Behind Che's Iconic Photo*, SMITHSONIAN JOURNEYS TRAVEL Q. (Nov. 3, 2016), https://www.smithsonianmag.com/travel/iconic-photography-che-guevara-alberto-korda-cultural-travel-180960615 [https://perma.cc/5UY3-H95D].

[3] *See, e.g.*, Ben Travers, *'Veep' Season 5 Poster Offers Hope For . . . Well, Hope*, INDIEWIRE (Mar. 23, 2016, 3:55 PM), https://www.indiewire.com/2016/03/veep-season-5-poster-offers-hope-for-well-hope-55850 [https://perma.cc/W5EX-7UB2] (illustrating a poster for the political satire comedy television series *Veep* that riffs on the *Hope Poster*).

The *Hope Poster* (as it came to be called)[4] was created by street artist, designer, and activist Shepard Fairey. The underlying source photograph of Obama, though, did not originate with Fairey. It was taken by an Associated Press (AP) wire photographer named Mannie Garcia, who captured the shot in April 2006 at a National Press Club event at which actor George Clooney was speaking on the humanitarian crisis in Darfur.[5] Clooney was accompanied by then-Senator Obama, who was ten months shy of announcing his bid for the presidency.[6] Although Garcia's assignment was to shoot Clooney, Obama "wound up in a few of Mr. Garcia's shots."[7]

In 2009, under the threat of a copyright infringement lawsuit, Fairey filed an action for a declaratory judgment that his appropriation of the Garcia image was either noninfringing or a fair use, seeking to enjoin the AP[8] from asserting its copyright against him and his company.[9] During its pendency, the litigation primarily was discussed for the issues it raised (never resolved, as the parties settled) with respect to copyright's fair use doctrine.[10] The dispute is now well known for Fairey's criminal contempt conviction for destroying and fabricating documents in an attempt to conceal the true source image

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4 *See* Schjeldahl, *supra* note 1.

5 Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), https://www.nytimes.com/2009/03/24/arts/design/24photo.html [https://perma.cc/Z4JA-TZ9W].

6 *Id.*

7 *Id.*

8 Although Garcia intervened to assert copyright ownership of the photograph, he voluntarily dismissed his claim prior to the case's disposition. *See* Stipulation of Discontinuance with Prejudice, Fairey v. The Associated Press, No. 09-cv-01123 (S.D.N.Y. Aug. 20, 2010), ECF No. 139. The AP presented evidence that it owns the copyright in Garcia's image as a work made for hire under 17 U.S.C. § 101. *See* Answer and Cross Claim ¶¶ 80, 210, *Fairey*, No. 09-cv-01123 (S.D.N.Y. Aug. 14, 2009), ECF No. 36; *see also* Dave Itzkoff, *Judge Urges Resolution in Use of Obama Photo*, N.Y. TIMES (May 28, 2010), https://www.nytimes.com/2010/05/29/arts/design/29arts-JUDGEURGESRE_BRF.html [https://perma.cc/J95V-X528].

9 Complaint for Declaratory Judgment and Injunctive Relief at 10–12, *Fairey*, No. 09-cv-01123 (S.D.N.Y. Feb. 9, 2009), ECF No. 1 [hereinafter *Fairey* Complaint].

10 *See, e.g.*, Cohen, *supra* note 5 ("Copyright lawyers have been arguing over Shepard Fairey's appropriation of a news photograph of Barack Obama for his 'Hope' campaign poster and whether it constitutes 'fair use.'"); Randy Kennedy, *Shepard Fairey Is Fined and Sentenced to Probation in 'Hope' Poster Case*, N.Y. TIMES: ARTSBEAT (Sept. 7, 2012, 11:46 AM), https://artsbeat.blogs.nytimes.com/2012/09/07/shephard-fairey-is-fined-and-sentenced-to-probation-in-hope-poster-case [https://perma.cc/L2EL-QS68] ("Until the settlement between Mr. Fairey and The Associated Press, the case was watched closely as one that might define more clearly the murky issues surrounding the fair-use exceptions to copyright protections.").

for the poster.[11] But the case—through the lens of the parties' briefs—also tells a story about the nature of photography and its copyrightability.[12]

According to the AP, Garcia was a hero. He acted as a studious painter might, carefully constructing a planned image just so. In its Answer to Fairey's Complaint, the AP described Garcia's effort to "consciously and deliberately capture[] now-President Obama at a specific moment in time, one for which he had patiently waited."[13] Although he had been assigned to shoot Clooney, Garcia "focused on then-Senator Obama for several of his photographs, positioning himself in such a way that he was able to illustrate the charismatic junior Senator at a unique and expressive angle against the patriotic backdrop of the American flag."[14] But as Fairey told it, the Garcia image was simply "snapped."[15] It was a "literal depiction" of reality, which Fairey then seized as raw factual material and "transformed . . . into a stunning, abstracted and idealized visual image that creates powerful new meaning."[16]

Some may chalk up this dichotomous tale of a photograph—one version of the picture an author's inimitable creative expression, the other a brute fact in the world—to skillful lawyering. After all, both Fairey and the AP were represented by intellectual property litigation powerhouses.[17] Consider, however, that Garcia's *own* story of the birth of his image aligns not with that of his employer, the AP, but with that of the AP's adversary, Fairey. In an interview shortly after the beginning of the litigation, Garcia admitted to not initially recog-

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[11] *See* Kennedy, *supra* note 10. Fairey initially believed that the source photograph for *Hope Poster* was not Mannie Garcia's, but when he discovered that it was, he attempted to cover up the fact. *See id.*

[12] *Cf. infra* Section I.A (discussing the similar story of photography told through the parties' briefs in the Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*).

[13] Answer, Affirmative Defenses and Counterclaims of Defendant, The Associated Press at 25, *Fairey*, No. 09-cv-01123 (S.D.N.Y. Mar. 11, 2009), ECF No. 13.

[14] *Id.*

[15] *Fairey* Complaint, *supra* note 9, at 4.

[16] *Id.*

[17] Fairey was initially represented by the San Francisco litigation boutique firm Durie Tangri and the Fair Use Project at the Center for Internet and Society at Stanford Law School, and then by law firm Jones Day and William Fisher, an intellectual property law professor at Harvard Law School. *See Fairey* Complaint, *supra* note 9; *Fair Use Project Helps Artist Sue AP*, STANFORD REP. (Feb. 12, 2009), https://news.stanford.edu/news/2009/february18/shepard-fairey-obama-poster-021809.html [https://perma.cc/S2XD-DHU6]; Amended Complaint for Declaratory Judgment and Injunctive Relief, *Fairey*, No. 09-cv-01123 (S.D.N.Y. Nov. 13, 2009), ECF No. 59; *see also* William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 244, 244 (2012). The Associated Press was represented by Dale Cendali of law firm Kirkland & Ellis, a renowned intellectual property litigator. *See* Itzkoff, *supra* note 8.

nizing the image at the center of the controversy as one of his own creation. He remarked that "as a freelance photographer," he had likely taken a thousand pictures that "relatively light day."[18] Generally, "[i]n the normal course of business," Garcia stated, "we make a lot of photographs in a year. I don't remember every single photograph that I make."[19] And even after enjoying commercial success in the fine art market on the tail of the case, Garcia expressed discomfort with being labeled an "artist": "I want to avoid calling myself an artistic photographer—'wire guy,' I am comfortable with that."[20]

Culturally and legally, photographs have long defied neat categorization. Are photographs mere facts, truthful recordings of reality, or are they "as much an *interpretation* of the world as paintings and drawings are"?[21] Roland Barthes, the French philosopher who wrote prolifically on photography in the last year of his life, described the medium as "a magic, not an art."[22] For his part, photographer Richard Avedon presented the question as simply unanswerable: "All photographs are accurate. None of them is the truth."[23] And in its only case ruling on a photograph's protectability under copyright law, the United States Supreme Court recognized this complexity when addressing the argument that a photograph is a mere "reproduction on paper of the exact features of some natural object or of some person."[24] But whatever troubled the Court on photography's first

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[18] *Mannie Garcia: The Photo That Sparked 'Hope*,' NPR (Feb. 26, 2009, 10:42 AM), https://www.npr.org/programs/fresh-air/archive?date=2-26-2009 [https://perma.cc/ZB24-DLJY].

[19] *Id.*

[20] Cohen, *supra* note 5 (noting that Garcia sold a limited edition of the photograph at a New York City art gallery for $1,200 per print, "and at least one has been purchased by a fine-arts museum").

[21] SUSAN SONTAG, ON PHOTOGRAPHY 6–7 (1977) (emphasis added). While a full discussion of the theorization of photography is beyond the scope of this Note, numerous writers have chronicled these perplexing dualities. *See generally id.*; ROLAND BARTHES, CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY (Richard Howard trans., 1980) [hereinafter BARTHES, CAMERA LUCIDA]; Peter Galassi, *Cover* preceding BEFORE PHOTOGRAPHY: PAINTING AND THE INVENTION OF PHOTOGRAPHY (1981) (arguing that photography "was not a bastard left by science on the doorstep of art, but a legitimate child of the Western pictorial tradition"); JOHN BERGER, WAYS OF SEEING (1972); Tom Gunning, *What's the Point of an Index?, or Faking Photographs*, *in* STILL MOVING: BETWEEN CINEMA AND PHOTOGRAPHY (Karen Beckman & Jean Ma eds., 2008); *cf.* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (1935), *reprinted in* ILLUMINATIONS (Hannah Arendt, ed., Harry Zohn, trans., 1969).

[22] BARTHES, CAMERA LUCIDA, *supra* note 21, at 88.

[23] RICHARD AVEDON, EVIDENCE 1944–1994, at 97 (1994).

[24] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884); *see also* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUSTON L. REV. 1, 181 n.901 (2001) ("Since the days of Napoleon Sarony, photography has posed peculiar problems to copyright doctrine.").

appearance seems to have fallen away. It is exceedingly rare today that a court will deem a photograph uncopyrightable. As one scholar has put it, "[c]urrently, there is almost no lower bound on the copyrightability of photographs."[25] The slippery nature of photography, however, is evergreen—only more so as technology allows the medium to pervade and dominate our visual culture. While it seems absurd that one trillion *copyrightable* photographs could be produced this year—meaning that one trillion copyrights could be infringed and litigated in federal courts[26]—that is the logical conclusion of copyright law as it stands.

The question of where to draw the line between copyrightable and uncopyrightable photographs—and the specter of an avalanche of photography copyright litigation—is not just an academic puzzle. In recent years, courts have entertained photography copyright lawsuits initiated by paparazzi,[27] celebrity subjects,[28] and "copyright trolls."[29] One court has even grappled with a lawsuit brought on behalf of an animal.[30] Intellectual property scholars have critiqued copyright doctrine on photography as overbroad.[31] Suggested reforms range from a

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[25] Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 715 (2012).

[26] *See* 17 U.S.C. § 501(a)–(b) (providing that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright" and that the "legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it"). Federal courts have exclusive jurisdiction over cases arising under the Copyright Act. 28 U.S.C. § 1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to . . . copyrights.").

[27] *See, e.g.*, Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (paparazzo suit against publisher over image of celebrity and rapper Cardi B); Xclusive-Lee, Inc. v. Hadid, No. 19-CV-520, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (suit against model Gigi Hadid for reposting paparazzo's photo to her own Instagram account).

[28] *See, e.g.*, Natkin v. Winfrey, No. 99 C 5397, 2000 WL 1800641 (N.D. Ill. July 25, 2000) (Oprah Winfrey's counterclaim against set photographers seeking declaration of copyright authorship and ownership).

[29] *See infra* Section II.B.3 (describing copyright troll Richard Liebowitz and lawsuits he has initiated).

[30] *See* Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018) (affirming the dismissal of a copyright lawsuit brought on behalf of a monkey).

[31] *See, e.g.*, Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 342 (2012) (arguing that copyright doctrine has "distorted our idea of originality to accommodate photography"); Tushnet, *supra* note 25, at 713, 716 (arguing that photography is the rare case where "creators of images get treated better than creators of words" and that "[i]n the end, what courts protect as original in photography . . . are the elements of a photograph that simply indicate that it *is* a photograph" (citing Eva E. Subotnik, *Originality Proxies, Toward a Theory of Copyright and Creativity*, 76 BROOKLYN L. REV. 1487 (2011))); *cf.* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 392 (2004) (arguing that "the *Burrow-Giles* solution is unhelpful in more recent controversies involving photographs"); Subotnik, *supra*, at 1552

near-wholesale rejection of photography's copyright,[32] to reducing its scope to a pure reproduction right.[33] One country's lawmakers—the Serbian Progressive Party—have even proposed prohibiting copyright in photographs altogether.[34]

This Note suggests another path forward to address the distorted photography copyright landscape. It seeks to honor the Supreme Court's original holding that photographs may receive copyright protection, while making sense of its dicta that no "ordinary" photograph so qualifies[35]—a prescient direction that has become all the more urgent as photographic technology advances apace. Copyright's merger doctrine, which holds that no copyright may attach to a work in which ideas and expressions inextricably blend,[36] has been ignored and dismissed in the realm of photography as courts proceed under the assumption that nearly all photographs, no matter how rote, merit copyright protection.[37] This Note argues that merger, an existing and respected doctrine of copyright law with an important policy foundation and a robust history of use in other subject-matter areas, could be an important tool in managing photography's exploding copyright.

I
The Problem of Photography: 150 Years of Photography's Copyright

Like much of intellectual property today, the legal foundation for the copyright protection of photography predates the medium's invention. The United States Constitution permits "Congress . . . [t]o pro-

(arguing "against a presumption of protectability for photography"). *But see* Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality*, 25 Fordham Intell. Prop., Media & Ent. L.J. 869, 878, 937 (2015) (arguing that expansive copyright protection for photographs is doctrinally correct and normatively desirable); Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. Irvine L. Rev. 405 (2019) (interviewing photographers to argue in favor of copyright protection).

[32] *See* Hughes, *supra* note 31.

[33] *See* Tushnet, *supra* note 25, at 740 ("[T]he reproduction right has been stretched beyond its capacity.").

[34] *See* Aleksandar Vasovic, *Serbian Photojournalists Appeal Against Threat to Copyright*, Reuters (Jan. 25, 2016, 12:21 PM), https://uk.reuters.com/article/uk-serbia-media-copyright/serbian-photojournalists-appeal-against-threat-to-copyright-idUKKCN0V328N [https://perma.cc/J6JM-SJXV] ("Dusica Stojkovic of the Progressive Party, submitting the motion last week, said the aim was to distinguish between authentic artistic creations and 'selfies . . . (or) photos made in public places every day.'").

[35] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884).

[36] *See, e.g.*, Mason v. Montgomery Data, Inc., 967 F.2d 135, 138 (5th Cir. 1992) ("In some cases . . . it is so difficult to distinguish between an idea and its expression that the two are said to merge.").

[37] *See infra* Section I.C.

mote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[38] Congress first applied this power to photography in the Copyright Act of 1865, in which it elected to "extend [copyright] to . . . include photographs and the negatives thereof . . . and . . . enure to the benefit of authors . . . in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings."[39]

In 1884, the Supreme Court squarely confronted the constitutionality of photographic copyright in *Burrow-Giles Lithographic Co. v. Sarony*, holding that photographs—at least some of them—contain sufficient traces of authorial originality to merit protection under copyright law.[40] Despite momentous changes in the technology of photography and the increasing ease and ubiquity of photography creation and consumption today, the Supreme Court has never revisited this question or clarified *Burrow-Giles*'s crucial dicta: the hypothetical, unprotectable "ordinary" photograph about which the Court "decide[d] nothing."[41] The resulting view of photography's copyright upon which courts have coalesced has been "expansive[] and generous[]"[42]: "Almost any photograph 'may claim the necessary originality to support a copyright.'"[43] Very few cases have found that a photograph is insufficiently creative to receive a copyright,[44] and courts have struggled with exactly what qualifies a photograph for copyright protection.[45] The answer increasingly has become: *anything*.[46] As Professor Rebecca Tushnet explains, "[t]he history of the

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[38] U.S. CONST. art. I, § 8, cl. 8.

[39] Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

[40] 111 U.S. 53 (1884).

[41] *Id.* at 59.

[42] Kogan, *supra* note 31, at 937.

[43] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2000) (quoting 1 NIMMER ON COPYRIGHT § 2.08); *accord* Tushnet, *supra* note 25, at 715 ("Currently, there is almost no lower bound on the copyrightability of photographs."); Subotnik, *supra* note 31, at 1493 (describing "near-presumptive copyright protection" for photography).

[44] *See, e.g.*, Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[45] *See, e.g.*, *Mannion*, 377 F. Supp. 2d at 458–61 (noting the difficulty of evaluating photography under copyright standards developed for other subject matter); SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (noting the "difficulty in identifying a common set of protectible elements" in a photograph); Bill Diodato Photography, LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 393–94 (S.D.N.Y. 2005) (citing *Mannion* in a discussion of the originality of the photograph in question).

[46] *See, e.g.*, Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1076 (9th Cir. 2000) ("When . . . the minimal threshold for copyright protection is combined with the minimal standard of originality required for photographic works, the result is that even the slightest artistic touch will meet the originality test for a photograph."); Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 519 (7th Cir. 2009) ("Federal courts have historically applied a generous

law of photography contains numerous conceptual maneuvers allowing claims of copyright in what would otherwise seem to be noncreative or nonauthored works."[47] This Part documents that history.

A. Burrow-Giles Lithographic Co. v. Sarony

The story of photography in copyright jurisprudence begins with a figure well-cognizant of the unique power of the visual image: Oscar Wilde.[48] In 1882, New York City society portrait photographer Napoleon Sarony shot a suite of photographs of Wilde, who was visiting New York to promote an operetta in which he was satirized.[49] One of the photographs, *Oscar Wilde No. 18*, shows Wilde, "his features not yet bloated by self-indulgence and high living . . . lean[ing] toward the viewer as though engaging him in dialogue, the appearance and calculated pose of the dandy secondary to the intelligence and spontaneous charm of the conversationalist."[50]

The Burrow-Giles Lithographic Company printed 85,000 unauthorized reproductions of *Oscar Wilde No. 18*, selling the copies to retailers for use as trade cards advertising various wares, such as hats and cigars.[51] Burrow-Giles, in response to the copyright infringement lawsuit launched by Sarony, lodged a constitutional defense: the company argued that Congress's extension of copyright protection to photographs in the Copyright Act of 1865[52] was unconstitutional because photographs are not the "writings" of an "author" as the Framers contemplated in Article I, section 8, clause 8 and as courts had theretofore interpreted that provision, today known as the Intellectual

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standard of originality in evaluating photographic works for copyright protection."); *cf. SHL Imaging*, 117 F. Supp. 2d at 310 ("The technical aspects of photography imbue the medium with *almost limitless* creative potential." (emphasis added)); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, *and almost any other variant involved*." (emphasis added)).

47 Tushnet, *supra* note 25, at 714.

48 Oscar Wilde was an Irish playwright in the latter half of the nineteenth century. Known for his flamboyance, Wilde was a proponent of aestheticism—a defender of art for art's sake. *See Oscar Wilde, 1882*, METROPOLITAN MUSEUM OF ART, https://www.metmuseum.org/art/collection/search/283247 [https://perma.cc/5ZML-63R8]. Wilde's ideas on the supremacy of art and beauty are captured in his only novel, *The Picture of Dorian Gray*, which tells the story of a man who successfully transfers the burden of aging to his portrait, freeing himself to live a hedonistic life in perpetual youth. *See generally* OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1891).

49 MARK ROSE, *Creating Oscar Wilde:* Burrow-Giles v. Sarony *(1884)*, *in* AUTHORS IN COURT: SCENES FROM THE THEATER OF COPYRIGHT 64, 70–72 (2016).

50 *Oscar Wilde, 1882*, *supra* note 48.

51 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884); ROSE, *supra* note 49, at 73.

52 *See supra* note 39 and accompanying text (quoting the Copyright Act of 1865).

Property or Copyright Clause.[53] "[T]he true author is the sun—not the photographer," Burrow-Giles wrote in its brief.[54] Perhaps drawing upon the skepticism of photography's status as an art that prevailed in artistic circles in England and France at the time,[55] Burrow-Giles continued forcefully, "the camera, acting by UNCHANGEABLE LAWS OF NATURE, represents the scene AS IT IS; *nothing is added, nothing omitted*."[56]

For his part, Sarony argued that "no such picture or scene . . . existed until Sarony placed the same in order."[57] He made a direct analogy to the authorial acts of painters, engravers, and sculptors to rebut Burrow-Giles's claim that he had contributed nothing to the image. Once Sarony had "set in order the whole scene," he could just as well have recorded it "as an oil painting . . . as a drawing in chalk or charcoal . . . he might have engraved or etched it . . . he might have made a statue of it."[58] "[I]n any of these forms," Sarony argued, and Burrow-Giles conceded,[59] "his right to protection could not be questioned."[60]

The Court declined to merit Burrow-Giles's arguments, and it largely mirrored Sarony's brief in constructing its decision.[61] While momentarily recognizing that "[t]he constitutional question is not free from difficulty,"[62] the Court quickly satisfied whatever qualms it harbored, holding just two pages later: "We entertain no doubt that the

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53 U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"); *Burrow-Giles*, 111 U.S. at 56 (discussing the defendant's argument that "a photograph[,] being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author").

54 Statement and Brief for Plaintiff in Error at 8, *Burrow-Giles*, 111 U.S. 53 (No. 1071).

55 *See* ROSE, *supra* note 49, at 76–78 (summarizing the contemporary sentiment as: "How could a machine be an artist?"); Charles Baudelaire, *Salon of 1859* ("If photography is permitted to supplement some of art's functions, they will forthwith be usurped and corrupted by it, thanks to photography's natural alliance with the mob."); 2 WALTER BENJAMIN, *Little History of Photography* (noting "violent reaction to the encroachments of . . . photography"), *in* WALTER BENJAMIN: SELECTED WRITINGS 507, 527 (1999). Kogan, *supra* note 31, at 879–85; SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 306–10 (S.D.N.Y. 2000) (documenting the cultural and legal history of photography).

56 Statement and Brief for Plaintiff in Error, *supra* note 54, at 16.

57 Brief on the Part of the Defendant in Error at 12, *Burrow-Giles*, 111 U.S. 53 (No. 1071).

58 *Id.*

59 *See* Statement and Brief for Plaintiff in Error, *supra* note 54, at 14–15 (acknowledging that painters, engravers, and sculptors are entitled to copyright protection).

60 *Id.*

61 *See* Kogan, *supra* note 31, at 894–95 (positing that the Supreme Court essentially copied from Sarony's brief in writing its decision).

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

Constitution is broad enough to cover an act authorizing copyright of photographs."[63]

The *Burrow-Giles* Court's analysis can be summarized in three stages. First, the Court recognized that the Intellectual Property Clause of the Constitution cannot be construed so narrowly as to permit protection of only "writing in the limited sense of a book and its author."[64] The Court defined an author, relying on a contemporary dictionary, as one "to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[65] It thus follows that the Constitution's contemplated "writings," too, must be similarly "susceptible of a more enlarged definition."[66] "[S]ubjects . . . to which authors are to be secured," the Court continued, "include all forms of writing, printing, engraving, etching, [etc.], by which the ideas in the mind of the author are given visible expression."[67]

Next, the Court turned to the particular problem that photography posed in relation to the other visual subjects of copyright, such as paintings, drawings, and engravings. The Court articulated concerns about photographs that have long driven discussions of the medium in aesthetic circles[68]: that a "photograph is the mere mechanical reproduction of the physical features or outlines of some object," that "the process is merely mechanical, with no place for novelty, invention or originality," and that photography at its core is "simply the manual operation" of an "instrument[]," not an art at all.[69] But here the Court punted: all of that "may be true in regard to the *ordinary* production of a photograph."[70] In "such [a] case," a photograph would likely receive "no protection."[71] But as to that counterfactual, the Court proclaimed, "we decide nothing."[72]

For *Oscar Wilde No. 18* was no "ordinary . . . photograph."[73] In its final pivot, the Court referred to the district court's finding that Sarony had produced a "useful, new, harmonious, characteristic, and graceful picture . . . entirely from his own original mental conception."[74] He had done so through his conduct prior to clicking the

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63 *Id.* at 58.

64 *Id.* at 57.

65 *Id.* at 57–58 (internal citation omitted).

66 *Id.* at 57.

67 *Id.* at 58. The Court noted that photographs were excluded by Congress in earlier copyright statutes "probably" because "they did not exist." *Id.*

68 *See supra* note 55.

69 *Id.* at 58–59.

70 *Id.* at 59 (emphasis added).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 60 (internal quotation marks omitted).

shutter[75]: "selecting and arranging the costume,"[76] "draperies," and "accessories"; "disposing the light and shade"; "posing the said Oscar Wilde" "so as to present graceful outlines"; and "suggesting and evoking the desired expression."[77] In a later court's words, Sarony "created the subject"[78] of Oscar Wilde out of whole cloth, indeed a remarkable feat given the sitter's commanding and distinctive personality. One might wonder whether the Court would have come to such a charitable conclusion had its own Sarony portrait been under consideration; in 1890, six years after the *Burrow-Giles* decision, Sarony photographed the nine justices of the *Burrow-Giles* Court in his New York studio.[79]

B. The "Ordinary" Photograph?: Bridgeman Art Library, Ltd. v. Corel Corp.

After *Burrow-Giles*, photography's copyright hummed along, practically undisturbed for over a century. Courts confirmed copyright in a broad array of photographs,[80] largely declining to deal with the

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[75] *Burrow-Giles* originates the idea that a photographer's "pre-shutter" activities are the primary indicia of photography's copyright-qualifying authorship. *See* Farley, *supra* note 31, at 427 (discussing how the Court, unwilling to credit "the labor or innovation involved in the production of a photograph," located the "human trace" of photography in these "pre-shutter" activities). The Court failed to acknowledge that Sarony did not operate his camera at all—he often "bragged that he knew nothing about the mechanical or chemical aspects of photography. . . . He would dress, light, and pose his subject, then turn away and gaze out the window while his assistant . . . exposed the plate." ROSE, *supra* note 49, at 68. Printing and mounting were similarly relegated to staff members. *Id.* at 69. Professor Farley argues that the Court structured its opinion as such, at least in part, to preserve the belief in the objectivity of photographs used as legal evidence. *See* Farley, *supra* note 31, at 390–91, 437.

[76] *Burrow-Giles*, 111 U.S. at 60. Yet Sarony did not, in fact, choose Wilde's clothing: "Wilde appeared in Sarony's studio dressed in the attire he would wear at his lectures: a jacket and vest of velvet, silk knee breeches and stockings, and slippers adorned with grosgrain bows—the costume he wore as a member of the Apollo Lodge, a Freemason society at Oxford." *Oscar Wilde, 1882*, *supra* note 48.

[77] *Burrow-Giles*, 111 U.S. at 60.

[78] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 453 (S.D.N.Y. 2005); *see infra* note 115 and accompanying text.

[79] ROSE, *supra* note 49, at 83–84. It was the first time such a portrait had been taken outside of Washington, D.C. *Id.*

[80] *See, e.g.*, Bolles v. Outing Co., 77 F. 966, 970 (2d Cir. 1897) (finding copyrightable a photograph of a sailing yacht, which "required the photographer to select and utilize the best effects of light, cloud, water, and general surroundings, and combine them under favorable conditions for depicting vidily and accurately the view of a yacht under sail"), *aff'd*, 175 U.S. 262 (1899); Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914) (affirming copyright in a photograph of a nude woman reclining, in which "a distinctly artistic conception was formed, and was made permanent as a picture in the very method which the Supreme Court indicated in [*Burrow-Giles*] . . . would entitle the person producing such a picture to a copyright"); Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916) (protecting a photograph of a New York City street scene including the New York

undesirable that the Supreme Court left untouched—the "ordinary" photograph.[81] Writing in 1921, Judge Learned Hand questioned the Supreme Court's hypothetical exception: "The suggestion that the Constitution might not include all photographs seems to me overstrained."[82] While he recognized that the *Burrow-Giles* Court "left open an intimation that some photographs might not be protected," Judge Hand expressed his belief that "no photograph, however simple, can be unaffected by the personal influence of the author."[83] He went on to note that his ruminations were, in any case, "beside the point": not one case since 1909, in his research, had held a photograph to be unprotected.[84]

Judge Hand grounded his argument in one of the Supreme Court's later copyright cases, *Bleistein v. Donaldson Lithographic Co.*,[85] arguing that it obviated *Burrow-Giles*'s "ordinary photograph" dicta by lowering the bar for copyright originality and introducing the "aesthetic non-discrimination" principle to copyright law, which holds that the legal standard for copyright protection does not inquire as to a work's aesthetic value.[86] Judge Hand's thinking was taken up by other courts, which noted that "[t]he commentators, or at least most

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Public Library, noting that "[i]t undoubtedly requires originality to determine just when to take the photograph," that "[t]he photograph in question is admirable" and "[t]he background . . . is most pleasing, and the lights and shade are exceedingly well done"); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (finding protectable the frames from the Zapruder film of the assassination of John F. Kennedy due to Zapruder's selection of camera, film, lens, location, and time of shooting); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (protecting a photograph of a couple holding puppies in light of the photographer's "inventive efforts in posing the group for the photograph, taking the picture, and printing" the picture).

[81] *Burrow-Giles*, 111 U.S. at 59.

[82] Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 935 (S.D.N.Y. 1921) (Hand, J.), *aff'd*, 281 F. 83 (2d Cir. 1922).

[83] *Id.* at 934.

[84] *Id.* at 934–35.

[85] 188 U.S. 239 (1903).

[86] *See Jewelers' Circular*, 274 F. at 934; *Bleistein*, 188 U.S. at 251 ("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."); L.A. News Serv. v. Tullo, 973 F.2d 791, 793 (9th Cir. 1992) ("[In *Jewelers' Circular*,] Judge Learned Hand suggested the question left open in *Burrow-Giles*—whether *all* photographs are sufficiently original by their nature to merit copyright protection—had been answered in the affirmative by *Bleistein* . . . ."); *see also* ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS AND COPYRIGHT IN A NUTSHELL 331 (6th ed. 2018) (noting how "after *Bleistein*, such a claim" of a photographer "invest[ing] his pictures with serious artistic consideration and creative effort" "seemed unnecessary and photographs are deemed copyrightable not because of any artistic creative effort but simply because they are the work of 'one man alone'"); *Bleistein*, 188 U.S. at 250 ("Personality . . . expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."). For an extended treatment of *Bleistein* and its influence on copyright law, see Barton

of them, have concluded that any photograph may be the subject of copyright."[87] This belief in near-categorical protection for photographs has been used to justify the extension of copyright to even pictures that faithfully recorded real-life events, "no matter how . . . extemporaneous they may be."[88] However, no part of *Burrow-Giles* has been explicitly overruled, and prominent jurists continued to maintain even after *Bleistein* that some photographs should not receive copyright protection.[89]

A moment of reckoning over the "ordinary" photograph arrived in the Southern District of New York case *Bridgeman Art Library, Ltd. v. Corel Corp.*, reviving the Supreme Court's ignored *Burrow-Giles* dicta about ordinary photographs.[90] If the photograph in

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Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

[87] Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 142–43 (S.D.N.Y. 1968) (first quoting *Jewelers' Circular*, 274 F. at 934; then quoting NIMMER ON COPYRIGHT 99 (n.d.); and then quoting Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1597–98 (1963) (contemporaneously arguing that all photographs merit copyright protection); *see also* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 n.13 (2d Cir. 1951) (citing with approval Judge Hand's argument); Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1076–77 (9th Cir. 2000) (noting that Judge Hand's categorical approach has been adopted by a majority of courts); MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2A.08(E)(3) (Matthew Bender rev. ed., 2021) (providing an up-to-date reference for Nimmer's authority on the topic that the *Time* court cites). *But cf.* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) (acknowledging Judge Hand's "often quoted" statement but cautioning that "this statement should not be read as a comment that all photographs are *per se* copyrightable").

[88] *Time*, 293 F. Supp. at 142 (quoting Gorman, *supra* note 87, at 1598); *id.* at 144 (finding a valid copyright in photographic stills of the famous Zapruder film of the assassination of John F. Kennedy). As Judge Frank Easterbrook has remarked, "[a] photograph may be copyrighted, although it is the work of an instant and its significance may be accidental." Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, Inc., 768 F.2d 145, 148 (7th Cir. 1985).

[89] *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 254 (1918) (Brandeis, J., dissenting) ("The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection."); *SHL Imaging*, 117 F. Supp. 2d at 309 (Pauley, J.); *cf. Tullo*, 973 F.2d at 794 (leaving open the question of "[w]hether or not every photograph . . . is original").

[90] Bridgeman Art Libr., Ltd. v. Corel Corp. (*Bridgeman I*), 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *on reconsideration*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999). Although it is a district court case that was never appealed, *Bridgeman* has been influential. *See* Terry S. Kogan, *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J.L. & ARTS 445, 460–61 (2012) (explaining *Bridgeman*'s reach); *see also* Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1140 (2017) (describing *Bridgeman* within the context of museums attaching copyright notices to photographs inconsistent with the case's holding); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1042 (2006) (same); Tushnet, *supra* note 25, at 715 & n.143 (describing *Bridgeman* as establishing the lower bound on photographic copyright). A contemporaneous but less-discussed case found generic photographs of Chinese food used to illustrate restaurant menus to be uncopyrightable. *See* Oriental Art Printing, Inc. v. Goldstar Printing Corp., 175 F. Supp. 2d

Burrow-Giles—to credit the defendant's losing argument—was merely a copy of nature,[91] then *Bridgeman* involved a *copy* of a copy of nature. The parties in the case disputed the copyrightability of photographic transparencies of public domain artworks owned by museums and other cultural organizations.[92] The explicit goal of the photography that the Bridgeman Art Library commissioned and catalogued was painstaking verisimilitude: each photograph was intended to be "a genuine reflection of the original work as it existed in the circumstances in which it was photographed."[93] Bridgeman's images were licensed for educational and commercial purposes. Corel, a Canadian software producer, produced a set of CD-ROMs containing images of famous paintings in art history. Bridgeman claimed that 120 of Corel's program's images were lifted from their transparencies and reproduced without authorization, allegedly infringing their copyrights.[94]

In the *Bridgeman* decision, Judge Lewis A. Kaplan substantially reaffirmed *Burrow-Giles*'s holding and importantly alluded to that precedent's potentially enormous scope. Judge Kaplan noted that "[t]here is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection."[95] But the transparencies produced by Bridgeman fell outside that vastly protective space and instead into the elusive[96] *Burrow-Giles* carveout: "ordinary" pictures, to which no copyright protection may attach.[97] Judge Kaplan remarked that while

542, 546 (S.D.N.Y. 2001) ("The Court finds that this is the rare case where the photographs contained in plaintiffs' work lack the creative or expressive elements that would render them original works subject to protection under the Copyright Act."), *aff'd in part, appeal dismissed in part sub nom.* Oriental Art Printing Inc. v. GS Printing Corp., 34 F. App'x 401 (2d Cir. 2002). During his time as a circuit judge, Justice Gorsuch wrote a decision that carefully analyzed *Burrow-Giles* and supported its distinction on ordinary photographs, using the example of photography (including under *Bridgeman*) to deny copyright to digital models. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., 528 F.3d 1258, 1263–65, 1269 (10th Cir. 2008) (Gorsuch, J.).

[91] *See supra* notes 54–56 and accompanying text (quoting Burrow-Giles's brief).

[92] *Bridgeman I*, 25 F. Supp. 2d at 423–24. The facts are drawn from the district court's first opinion in the case, which was later reissued with a choice of law analysis, reaching the same result under UK copyright law. *See* Bridgeman Art Libr., Ltd. v. Corel Corp. (*Bridgeman II*), 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[93] *Bridgeman I*, 25 F. Supp. 2d at 423–24.

[94] *Id.* at 423–24.

[95] *Bridgeman II*, 36 F. Supp. 2d at 196. *Contra* Hughes, *supra* note 31, at 342 ("[T]he vast majority of the world's photographs cannot be protected under copyright's originality standard.").

[96] *See supra* notes 80–87 and accompanying text (describing longstanding judicial skepticism that any photograph could be found *un*protectable under copyright law).

[97] *See Bridgeman II*, 36 F. Supp 2d at 197; *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884).

great "skill and effort"[98] may have been required to produce such faithful images of public domain artworks, copyright law declines to protect so-called "sweat of the brow" effort alone.[99] Bridgeman itself had conceded that "the point of [its] exercise was to reproduce the underlying works with absolute fidelity," which left the court unable to unearth any "spark of originality" sufficient to confer copyright protection.[100]

C. Bridgeman*'s Aftermath and the Rendition-Timing-Creation Test*

Despite *Bridgeman*'s prominence and promise in academic circles,[101] it has wrought little change in photographic copyright as applied in practice.[102] In fact, it is possible that *Bridgeman* has had the opposite of the constricting effect it portended—courts have interpreted *Bridgeman*'s articulation of *some* outer limit to be a definitive statement of photographic copyright's *lowest* bound,[103] and this slippage may have further ballooned photography's copyright by inviting courts to find copyrightable elements in any photograph that does but little more than "slavish[ly] cop[y]" as in *Bridgeman*.[104] Courts have cited *Bridgeman* not to deny copyright to photographs but to grant it, to pictures as routine—as "ordinary"—as documentary images of fabric swatches,[105] before-and-after shots of cosmetic dental procedures,[106] and amateur iPhone snaps of newsworthy events.[107]

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98 *Bridgeman II*, 36 F. Supp. 2d at 197.

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

100 *Id.* The court's characterization of Bridgeman's photographic goals closely tracks the language that the *Burrow-Giles* Court used to describe an unprotectable, "ordinary" photograph: "the visible representation of some existing object, the accuracy of this representation being its highest merit." *Burrow-Giles*, 111 U.S. at 59.

101 *See supra* note 90 (collecting academic commentary on *Bridgeman*'s importance).

102 *See, e.g.*, Katyal, *supra* note 90, at 1140 (describing museums' refusal to recognize *Bridgeman* by publicly claiming copyright in a large number of images that are likely unprotectable under its holding); Mazzone, *supra* note 90, at 1042 (describing the museum practices discussed in Katyal's work as one example of sweeping "copyfraud").

103 *See* Tushnet, *supra* note 25, at 715 (describing *Bridgeman* as establishing that "*only* a (successful) photographic attempt to reproduce an existing two-dimensional work will be considered to add so little originality . . . as to be uncopyrightable" (emphasis added)).

104 *Bridgeman II*, 36 F. Supp. 2d at 197.

105 *See* Schiffer Pub., Ltd. v. Chronicle Books, LLC, No. CIV.A. 03-4962, 2004 WL 2583817, at *8 (E.D. Pa. Nov. 12, 2004) (distinguishing plaintiffs' reproductions because they "did not attempt to replicate fabric swatches as precisely as possible" whereas in *Bridgeman* the "stated purpose was to 'reproduce precisely' the underlying works of art'" (quoting *Bridgeman I*, 25 F. Supp. 2d at 426)).

106 *See* Pohl v. MH Sub I LLC, 770 F. App'x 482, 488 (11th Cir. 2019) (reversing the district court, which had found that the dentist's technique used "the most rudimentary and basic task for photographers since the era of the daguerreotype" (quoting Pohl v. MH Sub I, LLC, 314 F. Supp. 3d 1225, 1231 (N.D. Fla. 2018)).

The district judge who decided *Bridgeman*, Judge Kaplan, has been influential in the law of photography.[108] In the latest of an important trio of cases addressing photographic copyright,[109] Judge Kaplan provided additional structure to the doctrine by enumerating the factors judges should consider when evaluating a photograph for copyright protection. The case, *Mannion v. Coors Brewing Co.*, involved a close-up photograph of basketball star Kevin Garnett decked out in platinum, gold, and diamond jewelry against a cloudy blue sky.[110] Coors recreated the photograph with another model for an advertising campaign, superimposing the text "ICED OUT" on the image.[111] In evaluating the copyrightability of the original photograph to determine whether infringement could follow and finding earlier judicial accounts of copyright in photography to be "somewhat unsatisfactory,"[112] Judge Kaplan broke down the legitimate bases for photographic copyright into three "not mutually exclusive" categories: (1) "Rendition," which includes technical decision-making such as angle, light, shade, exposure, filters, and developing;[113] (2) "Timing," as "[i]t undoubtedly requires originality to determine just when to take the photograph;"[114] and (3) "Creation of the Subject," which involves posing and arranging the scene or subject.[115] Though still nascent, Judge Kaplan's *Mannion* analysis has been taken up by several other courts and is regarded as generally indicative of photography's copyrightability in commentary.[116]

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[107] *See* Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 465 (E.D.N.Y. 2020) (framing *Bridgeman* as the "rare case[] . . . 'where a photograph . . . amounts to nothing more than slavish copying'" (quoting *Bridgeman II*, 36 F. Supp. 2d at 196)). For other examples of cases that have cited *Bridgeman* while extending copyright protection to seemingly ordinary photographs, see Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 519 (7th Cir. 2009) (photographs of toys for advertising materials); Psihoyos v. Pearson Educ., Inc., 855 F. Supp. 2d 103, 119 (S.D.N.Y. 2012) (direct photograph of a public domain artwork); Cooley v. Penguin Grp. (USA) Inc., 31 F. Supp. 3d 599, 608 n.52 (S.D.N.Y. 2014) (photograph of a sculpture).

[108] *See* Subotnik, *supra* note 31, at 1511.

[109] *See Bridgeman II*, 36 F. Supp. 2d 191; Kaplan v. Stock Mkt. Photo Agency, Inc., 133 F. Supp. 2d 317 (S.D.N.Y. 2001); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

[110] 377 F. Supp. 2d at 447.

[111] *Id.* at 447–48; *id.* at 466 (illustrating the Coors advertisement).

[112] *See id.* at 451.

[113] *Id.* at 452.

[114] *Id.* at 452–53 (quoting Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916)).

[115] *Id.* at 453–54. The court continued, "an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium." *Id.* at 454.

[116] *See, e.g.*, Harney v. Sony Pictures Television, Inc., 704 F.3d 173, 180–81 (1st Cir. 2013) (relying in part on *Mannion*'s approach to the different factors indicating originality); Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 519 (7th Cir. 2009) (same);

Though some judges have conceived of technology as offering infinite creative opportunity for originality in photography,[117] it is a simple fact that most photographic processes today are fully automatable.[118] With more and more elements of creative choice withdrawn from the photographer—or never hers to begin with—photography has further blurred the crucial distinction between the realm of copyrightable creative expression and the universe of unprotected fact or idea. Judge Kaplan recognized as much, but he found the problem to be so intractable that it simply should be jettisoned from copyright's analysis: "In the visual arts, the [idea/expression or fact/creation] distinction breaks down."[119] The next Part documents technological advances as part of photography's broader history. It then examines several new breeds of copyright litigation that flow from these advances, demanding renewed attention to the problem of photography.

II
One Trillion Copyrights: The Problem of Photography, Redux

The history of photography, and in particular its most recent technological advances, can help determine where to situate the medium vis-à-vis copyright law. This Part first surveys the history of and recent developments in photography, and, with that background in mind, then turns to several case studies to illustrate anew the problem of photography for copyright law.

A. Photography's Technology

Photography as we know it was invented in the early nineteenth century.[120] The earliest surviving photograph was taken in 1826 or 1827, and in 1839 Louis-Jacques-Mandé Daguerre invented the

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Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 464 (E.D.N.Y. 2020) (invoking explicitly the rendition-timing-creation test); Tushnet, *supra* note 25, at 715 (describing *Mannion* as "the most extensive judicial discussion of photographic copyright in recent years").

117 *See, e.g.*, SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) ("The technical aspects of photography imbue the medium with almost limitless creative potential.").

118 *See infra* note 145.

119 *Mannion*, 377 F. Supp. 2d at 458; *id.* at 461 ("In the context of photography, the idea/expression distinction is not useful or relevant."); *see also infra* Part III.

120 This Note utilizes a limited definition of "photography" as image-making processes aided by a camera that include and postdate the daguerreotype. However, at least one art historian has argued that the *Shroud of Turin*, which dates between 1260 and 1357, is in fact the first known "photograph." *See* Nicholas Peter Legh Allen, *Is the* Shroud of Turin *the First Recorded Photograph?*, 11 S. Afr. J. Art Hist. 23 (1993); *Is This the World's First*

daguerreotype, the first commercially viable photographic process and the foundation from which modern photography sprung.[121]

In comparison to today's photographic processes, making a daguerreotype was a crude undertaking. The cameras used had no shutters: exposures were achieved by removing the lens cap for an extended period of time. Even in sunlight, exposures took at least one minute; they could last as long as eight on a cloudy day. Subjects were physically trapped by the camera: arrangements, poses, and even facial expressions had to be completely static to achieve a clear image. Having one's picture taken was accordingly often a painful ordeal: portrait sitters had their heads held stationary by clamps attached to the back of a chair, with their faces subjected to glaring light to achieve the sharpest result.[122]

Daguerreotypes simultaneously fascinated and alarmed the public: "[p]eople accustomed to hand-drawn portraits that flattered the sitter were startled by the camera's direct representation."[123] French novelist Honoré de Balzac went so far as to suggest that every time a daguerreotype was taken, the subject lost a layer of spiritual skin that was transferred into the image, never to be replaced.[124] And although the goal of the daguerreotype process was this very "magical realism,"[125] daguerreotyping was no automatic art: "A daguerreotype was planned and *made* rather than carefully *taken*."[126] Because of the necessarily long exposure time, the captured image necessarily was a premeditated construction of its creator.

By the late nineteenth century, science had reduced the size of the camera and the required exposure time, and in turn photography's expense. Film replaced the burdensome metal photographic plates required of the daguerreotype and other early methods. Cameras became handheld and easily operated, making it possible for even

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Photograph?, SMITHSONIAN MAG., https://www.smithsonianmag.com/videos/category/smithsonian-channel/is-this-the-worlds-first-photograph [https://perma.cc/H6ED-Z4UN].

121 ROBERT HIRSCH, SEIZING THE LIGHT: A HISTORY OF PHOTOGRAPHY 12–13 (2000). Even earlier photographic processes took several days to obtain the necessary exposure—daguerreotypes required only minutes. *Id.*

122 *Id.* at 29, 31.

123 *Id.* at 33.

124 *Id.* at 32 (citing Nadar, *My Life As A Photographer*, *in* OCTOBER: THE FIRST DECADE, 1976–1986, at 19 (Annette Michelson et al. eds., 1987)).

125 *Id.*; *cf.* E.S. Hayden, *Splendid Daguerreotype Miniatures, Taken in Every Style, 1850*, UNIV. MASS. AMHERST SPECIAL COLLECTIONS & UNIV. ARCHIVES, https://credo.library.umass.edu/view/full/murb034-i002 [https://perma.cc/EJ9M-VP9E] (advertising broadside) ("All those wishing a perfect likeness of themselves, or their friends, would do well to call *soon* . . . .").

126 HIRSCH, *supra* note 121, at 28 (emphasis in original).

children to achieve successful image capture.[127] The world was introduced to the first mass-market snapshot camera, the Kodak, in 1888. It hit the scene with an advertising slogan that betrayed the staged, crafted photography of the past: "You press the button, we do the rest."[128]

Film photography reigned for the next century, and its advent prompted a sea change in the subject matter recorded by photographers. Armed with mobile cameras and their greatly increased shutter speed and other technological accessories such as autofocus and built-in light meters, photographers became less inclined to capture carefully constructed scenes or portraits, and more interested in reducing complex visual situations to a single moment in time.[129] The film camera "permitted photographers to be in the flow of events as they unfolded, trapping moments from time, instead of being outside and having to forge happenings for the sake of the camera."[130] This conception of image-as-instant can be seen in the new applications of photography that came to the fore in the twentieth century, from the ascent of celebrity paparazzi[131] to the possibility of war reportage and other photojournalism.[132]

The next major (and for this Note's purposes, the final, pivotal) step in the history of photography occurred a century after the invention of film: the birth of digital. The first digital photograph was created in 1957.[133] Two decades later, digital photography exploded.[134] In 1978, Kodak obtained a patent on the first digital camera,[135] and by

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127 *Id.* at 300.

128 MATTIE BOOM, RIJKSMUSEUM, EVERYONE A PHOTOGRAPHER: THE RISE OF AMATEUR PHOTOGRAPHY IN THE NETHERLANDS 1880–1940, at 121 (Sue Hart ed., Karen Gamester trans., 2019). Boom writes of George Eastman, the proprietor of Kodak, as being "intent on mechanizing every part of production . . . whether it was the film, the holder, the camera or the developing and printing service." *Id.* Eastman also "carefully manipulated" consumers' use of the camera through advertising: "the Kodak user was told exactly what to photograph, which was, above all, important moments in their own and their family's lives." *Id.*

129 *See* HIRSCH, *supra* note 121, at 300–01.

130 *Id.* at 301.

131 *See id.*; *see also* discussion *infra* Section II.B.2 (reviewing paparazzi litigation).

132 *See* HIRSCH, *supra* note 121, at 329–37; SONTAG, *supra* note 21, at 167 ("War and photography now seem inseparable . . . .").

133 *Fiftieth Anniversary of First Digital Image Marked*, NIST (May 24, 2007), https://www.nist.gov/news-events/news/2007/05/fiftieth-anniversary-first-digital-image-marked [https://perma.cc/57YZ-WSDN].

134 *See* James Estrin, *Kodak's First Digital Moment*, N.Y. TIMES: LENS (Aug. 12, 2015), https://lens.blogs.nytimes.com/2015/08/12/kodaks-first-digital-moment [https://perma.cc/HB5N-PANS] (telling the story of Steven Sasson, a young engineer at Eastman Kodak and the inventor of the digital camera).

135 *Id.*

the mid-1990s digital cameras were widely available to the public.[136] In 2000, the first camera phone, produced by Samsung, hit the market.[137] The modern history of photography—for the moment—ends with a new market player: Apple. The first iPhone was released in 2007, "transform[ing] photography from a hobby to a part of everyday life."[138]

The impact of the invention of digital photography—and particularly the camera phone—on photographic productivity is clear. In 2011, according to one source, 400 billion digital photographs were taken worldwide; fifty percent of those were captured on a camera phone.[139] In 2017, the total number of digital photographs taken was estimated to be 1.2 trillion, with eighty-five percent of those phone-captured.[140] To gain perspective on this volume, consider that today, "[e]very two minutes, humans take more photos than ever existed in total 150 years ago"[141]—around the time the Supreme Court issued its seminal decision in *Burrow-Giles*.[142] What was then a rare magic[143] has become commonplace. We now live in an "image-world" dominated by photographs,[144] presented to us in a dizzying, ever-increasing number of traditional and social media formats. As one critic has stated, "The art of the past no longer exists as it once did. Its authority is lost. In its place there is a language of images."[145]

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136 Steve Brachmann, *The Evolution of Digital Cameras—A Patent History*, IPWATCHDOG (Oct. 28, 2014), https://www.ipwatchdog.com/2014/10/28/the-evolution-of-digital-cameras-a-patent-history [https://perma.cc/V4SH-JH7R].

137 Simon Hill, *A Complete History of the Camera Phone*, DIGITAL TRENDS (Aug. 11, 2013), https://www.digitaltrends.com/mobile/camera-phone-history [https://perma.cc/58MU-8H7F].

138 Rani Molla, *How Apple's iPhone Changed the World: 10 Years in 10 Charts*, VOX (June 26, 2017, 11:24 AM), https://www.vox.com/2017/6/26/15821652/iphone-apple-10-year-anniversary-launch-mobile-stats-smart-phone-steve-jobs [https://perma.cc/N9BW-Y8NB].

139 *Id.*

140 *Id.*

141 Rose Eveleth, *How Many Photographs of You Are Out There in the World?*, ATLANTIC (Nov. 2, 2015), https://www.theatlantic.com/technology/archive/2015/11/how-many-photographs-of-you-are-out-there-in-the-world/413389 [https://perma.cc/LAJ4-S6YJ]; *cf.* Nimmer, *supra* note 24, at 178 n.903 (documenting the number of photographs estimated to have been taken in 1996 (17 billion) and suggesting that "[v]irtually all would seem to be nominally subject to copyright protection").

142 *See supra* Section I.A.

143 *See supra* notes 22, 125 and accompanying text.

144 *See* SONTAG, *supra* note 21, at 153–80 (discussing the new hegemony of photographic images). *See generally* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

145 BERGER, *supra* note 21, at 33. One of the primary reasons that photography has become so pervasive is its ever-increasing automatism, a fact that complicates several tenets of Judge Kaplan's test. *See supra* Section I.C. For example, the iPhone's "Portrait Mode" feature estimates a photograph's depth of field using machine learning,

B. Monkeys, Paparazzi, and Trolls: Today's Photography in the Courts

Photography's ubiquity has reached the courts. While some of the photography that is litigated in copyright cases today recalls the romantic artistry that the Supreme Court saw in Napoleon Sarony's images,[146] the vast majority of it edges closer to *Burrow-Giles*'s "ordinary" exception.[147] This Section presents three case studies in recent photographic copyright litigation that reveal the extent to which the ease of photography's copyright has been seized upon and exploited toward goals that are inconsistent with copyright's purposes.

1. Monkeys

A mid-nineteenth century French fable tells the story of a monkey named Topaz who, although training to become a painter, suffered an utter lack of creativity. At the advice of colleagues who suggested he pursue a career in another medium, the monkey turned to the recent invention of the daguerreotype and became a master of photography.[148] It seems fitting, then, that consideration of nonhuman photographic copyright arises with the story of a real monkey—Naruto, a crested macaque. In 2011, wildlife photographer David Slater left his camera unattended in a wildlife reserve in Indonesia. While Slater was gone, Naruto pressed the shutter several times, resulting in a number of compelling "Monkey Selfies" that Slater later published in a book. Slater and his publisher were sued for copyright

automatically "separat[ing] the subject of a photo from the background, allowing for the blurred" effect. Mike Peterson, *Portrait Mode on iPhone SE Relies Only on Machine Learning*, APPLE INSIDER (Apr. 27, 2020), https://appleinsider.com/articles/20/04/27/portrait-mode-on-iphone-se-relies-only-on-machine-learning [https://perma.cc/BDG5-LXTJ]. Judge Kaplan's test, to its credit, does recognize that "[d]ecisions about film, camera, and lens . . . often bear on whether an image is original[,] [b]ut . . . do[] not alone make the image original[,]" however photography's automatism troubles even the test's more expression-driven factors, such as "specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, [and] developing techniques[.]" Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 451–52 (S.D.N.Y. 2005).

146 *See, e.g.*, LaChapelle v. Fenty, 812 F. Supp. 2d 434, 438 (S.D.N.Y. 2011) (denying in part defendant's motion to dismiss in a case brought by commercial and fine art photographer David LaChapelle against Rihanna, alleging appropriation of his images in her *S&M* music video). For examples of LaChapelle's visually complex and highly staged works, see DAVID LACHAPELLE, https://www.davidlachapelle.com [https://perma.cc/7KCV-B64R].

147 *See, e.g.*, *infra* Section II.B.3 (discussing photography litigations brought by copyright trolls).

148 *Topaz the Portrait-Painter*, *in* PUBLIC AND PRIVATE LIFE OF ANIMALS 162, 162–65 (J. Thomson ed., 1876).

infringement by People for the Ethical Treatment of Animals on behalf of Naruto.[149]

The Ninth Circuit, presented with an appeal by Naruto, affirmed the district court's dismissal of the suit on the grounds that the monkey lacked statutory standing under the Copyright Act.[150] The lawsuit was frivolous by any measure[151]—the Copyright Office has long interpreted the Supreme Court's treatment of copyright authorship to refer to human authorship exclusively,[152] and it is doubtful that granting copyright to animals could ever comport with copyright's constitutional purpose of promoting expressive progress—animals do not need economic incentives to create works of art.

Because it dismissed the suit on justiciability grounds, the Ninth Circuit never had a chance to opine as to whether the Monkey Selfies were copyrightable at all. In addition to the litigation with PETA, Slater was engaged in disputes with websites, such as Wikimedia Commons and Techdirt, that refused to recognize his purported copyright in the image—they argued that the photograph was in the public domain as the work of a nonhuman author.[153] As to Slater's personal creative contribution possibly qualifying for a copyright, commentators were divided. Many practitioners agreed that under existing copyright doctrine, Slater's action of setting up the camera and forming a relationship of trust with the monkeys should have qualified the work for his copyright ownership, much like the Supreme Court found Napoleon Sarony to have formed a relationship of trust with Oscar

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149 Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

150 *Id.* at 420, 425–26.

151 The Ninth Circuit panel said as much. *Id.* at 428 (Smith, J., concurring in part).

152 *See* Naruto v. Slater, No. 15-CV-04324, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418.

153 *See* Mike Masnick, *Can We Subpoena the Monkey? Why the Monkey Self-Portraits Are Likely in the Public Domain*, TECHDIRT (July 13, 2011, 12:56 PM), https://www.techdirt.com/articles/20110713/11244515079/can-we-subpoena-monkey-why-monkey-self-portraits-are-likely-public-domain.shtml [https://perma.cc/4BC3-FPDT] (explaining the background of Techdirt's legal dispute); Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, NEWSWEEK (Aug. 21, 2014, 9:31 AM), https://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961 [https://perma.cc/842T-AJ43] (explaining Wikimedia's dispute). The U.S. Copyright Office suggests that copyrightable works "must be created by a human being" and states that the "Office will not register works produced by nature, animals, or plants" nor those "purportedly created by divine or supernatural beings." U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021), https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/AW54-UMCM]. It should be noted, however, that Copyright Office guidelines generally receive only *Skidmore* deference: they are binding on a court "only to the extent that those interpretations have the power to persuade." Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co., 747 F.3d 673, 684–85, 685 n.2 (9th Cir. 2014) (quoting Inhale, Inc. v. Starbuzz Tobacco, Inc., 739 F.3d 446, 449 (9th Cir. 2014)).

Wilde in order to coax "the desired expression."[154] But academics argued that Slater had insufficiently contributed to the work as a matter of authorial causation—"in terms of creative process, [Slater] relied entirely on the undirected activities of the macaque monkey for the ultimate expression. Even if the primate's actions were completely predictable, courts should treat the photographer as disqualified from protection under this prong."[155]

According to Susan Sontag, "[p]hotography has powers that no other image-system has ever enjoyed because, unlike the earlier ones, it is *not* dependent on an image-maker."[156] The advance of photographic technology forces us to consider whether certain types of images are really the result of human creative activity—the kind that the Constitution cares about—at all. Consider, for example, Google Street View, a compendium of images on Google Maps captured automatically by photographic technology mounted atop Google vehicles driven on public streets.[157] Several artists have appropriated Street View content, resulting in a "murky analysis of who gets to claim credit for a Google Street View image, or modifications thereof."[158] While the most prominent of these artists, Jon Rafman,[159] has opined that he's "reached the point where [he's] somewhat safe" from copyright infringement litigation,[160] Google still appends a copyright notice to each Street View image on Google Maps and asserts that

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154 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884); *see* Stewart, *supra* note 153 (noting that Slater "remain[ed] mindful of the 'monkey etiquette'" that he had learned from previous experiences photographing the animals, "let[ting] them groom him for a while, increasing their comfort in his presence," and citing intellectual property litigators who agreed with Slater for this reason).

155 Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 65 (2017). *But cf.* Neal F. Burstyn, Note, *Creative Sparks: Works of Nature, Selection, and the Human Author*, 39 COLUM. J.L. & ARTS 281, 292–97 (2015) (arguing that Slater should have been granted copyright protection).

156 SONTAG, *supra* note 21, at 158 (emphasis added). Sontag continues, "[h]owever carefully the photographer intervenes in setting up and guiding the image-making process, the process itself remains an optical-chemical (or electronic) one, the workings of which are automatic, the machinery for which will inevitably be modified to provide still more detailed and, therefore, more useful maps of the real." *Id.*; *cf. supra* note 145 (discussing photography's automatism).

157 Melissa Lafsky, *Google Maps Project Manager Speaks Out on "Street View*," FREAKONOMICS: BLOG (June 5, 2007, 4:17 PM), https://freakonomics.com/2007/06/05/google-maps-project-manager-speaks-out-on-street-view [https://perma.cc/WZ5W-VBDU].

158 Pete Brook, *Navigating the Puzzle of Google Street View 'Authorship*,' WIRED (Aug. 19, 2011, 10:25 AM), https://www.wired.com/2011/08/google-street-view-and-the-anatomy-of-authorship-in-the-age-of-digital-images [https://perma.cc/4RXR-W8NH].

159 *See Jon Rafman*, 9EYES, https://9-eyes.com [https://perma.cc/WHX8-85FA].

160 Walter Forsberg, *Jon Rafman*, INCITE! (June 7, 2012), https://www.incite-online.net/rafman.html [https://perma.cc/27U4-EUM5].

"Street View imagery may not be used for any print purposes,"[161] leaving open the door for potential litigation. Similar academic legal debates have arisen with respect to content generated using artificial intelligence (AI).[162]

2. *Paparazzi*

In late 2020, an article penned by model and actress Emily Ratajkowski for *New York Magazine*'s *The Cut* made waves in the art and fashion worlds. In *Buying Myself Back*, Ratajkowski details myriad struggles she's faced over the years in controlling the dissemination of her own image, from appropriation by fine artists to outright exploitation by photographers and leaks of intimate images by hackers.[163] In many ways, Ratajkowski's story is undergirded by fundamentals (and some may argue, failings) of intellectual property law, which she confronts head on when faced with a lawsuit by a paparazzo for her posting of an image taken by him, of her, on her social media. As Ratajkowski recounts, "I posted the photograph . . . on my Instagram because I liked what it said about my relationship with the paparazzi, and now I was being sued for it."[164]

Ratajkowski's saga is just one in a recent spate of copyright suits brought by paparazzi against celebrities for allegedly infringing photographs of themselves by sharing them on social media websites.[165] While these cases are so new that the law on the subject is unsettled, defenses actually raised and suggested in academic commentary have ranged from implied license,[166] suggestions of joint authorship,[167] to

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[161] *Google Maps, Google Earth, and Street View*, GOOGLE, https://about.google/brand-resource-center/products-and-services/geo-guidelines/#street-view [https://perma.cc/Y99H-G7A9].

[162] Mike Masnick, *Not Everything Needs Copyright: Lawyers Flip Out that Photos Taken By AI May Be Public Domain*, TECHDIRT (Apr. 2, 2018, 6:27 AM), https://www.techdirt.com/articles/20180325/00424039493/not-everything-needs-copyright-lawyers-flip-out-that-photos-taken-ai-may-be-public-domain.shtml [https://perma.cc/DTS8-396W] (providing background on the debate and arguing for a non-traditional approach to AI-generated content). *See generally* Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887 (2019) (establishing a legal framework for AI, particularly in the copyright context).

[163] *See* Emily Ratajkowski, *Buying Myself Back: When Does a Model Own Her Own Image?*, THE CUT (Sept. 15, 2020), https://www.thecut.com/article/emily-ratajkowski-owning-my-image-essay.html [https://perma.cc/6M5F-4VAV].

[164] *Id.*; *see* O'Neil v. Ratajkowski, No. 19-CV-09769 (S.D.N.Y. Oct. 23, 2019).

[165] *See* Jeanne C. Fromer, *The New Copyright Opportunist*, 67 J. COPYRIGHT SOC'Y U.S.A. 1, 8 (2020) (counting infringement cases against Khloé Kardashian, Justin Bieber, Jennifer Lopez, Gigi Hadid, Victoria Beckham, Nicki Minaj, and Ariana Grande).

[166] *See id.* at 10 (detailing the implied license argument made by Gigi Hadid); Annemarie Bridy, *A Novel Theory of Implied Copyright License in Paparazzi Pics*, LAW360 (Aug. 6, 2019, 11:43 AM), https://www.law360.com/articles/1185445/a-novel-theory-of-implied-copyright-license-in-paparazzi-pics [https://perma.cc/3S95-7KXC].

wholesale rejections of paparazzi photographs' originality under the *Burrow-Giles*/*Mannion* paradigm.[168] In her motion for summary judgment, Ratajkowski argued in this last vein: "The O'Neil Photograph is not original in any of [*Mannion*'s] respects. Plaintiff merely took the O'Neil Photograph when and where he happened to allegedly inadvertently cross paths with Ms. Ratajkowski, rather than choosing the timing or location of the photograph based on any sort of creative vision."[169]

We often revere photographs not for what they say about the photographer's personality, as *Burrow-Giles* and *Mannion* contemplate in their focus on the photographer's effort and input, but for what they reveal about the subject's. Recall the *Hope Poster* case described in the Introduction. Even though Shepard Fairey failed to obtain permission from AP "wire guy" Mannie Garcia to use the source photograph of President Obama,[170] he did seek the approval of someone else: the candidate himself. "I didn't want to act without permission and have it be seen as undermining Obama's goals in any

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167 *See* Fromer, *supra* note 165, at 10. Courts confronted with this argument to date have approached it with skepticism. *See* Natkin v. Winfrey, No. 99 C 5397, 2000 WL 1800641, at *6–7 (N.D. Ill. July 25, 2000) (concluding that photographers were the "sole authors" of pictures of Oprah Winfrey); Eva E. Subotnik, *The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia*, 39 COLUM. J.L. & ARTS 449, 452–58 (2016) (discussing three cases contemporaneous to *Burrow-Giles* in which the defendants (the subjects) asserted their authorial contributions as a defense); *cf.* Garcia v. Google, Inc., 786 F.3d 733, 741–42 (9th Cir. 2015) (en banc) (rejecting an actor's analogous authorship claim in her performance in a film). One court went so far as to claim that the subject had "lost her personality in the character she ha[d] assumed, as interpreted in the pose chosen by the" photographer. Falk v. Donaldson, 57 F. 32, 34 (C.C.S.D.N.Y. 1893). *But see* BARTHES, CAMERA LUCIDA, *supra* note 21, at 10 ("[O]nce I feel myself observed by the lens, everything changes: I constitute myself in the process of 'posing,' I instantaneously make another body for myself, I transform myself in advance into an image."). Academics have long questioned whether Oscar Wilde should qualify as an author of the photograph considered in *Burrow-Giles*. *See* Subotnik, *supra*, at 451–52; Nimmer, *supra* note 24, at 11 n.28.

168 *See* Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendants' Motion for Summary Judgment and Attorney's Fees at 3–6, *O'Neil*, No. 19-CV-09769 (Nov. 4, 2020), ECF No. 50.

169 *Id.* at 4. "O'Neil had no control over Ms. Ratajkowski's clothes, expression, pose, makeup, posture, position on the street, what she was holding, or who else was in the photograph." *Id.*; *see supra* Part I (setting out the *Burrow-Giles* and *Mannion* precedents). The court denied Ratajkowski's motion for summary judgment with respect to infringement, rejecting her argument and noting that "[c]ourts have found paparazzi photographs original" and that "the [p]hotograph meets the 'extremely low' standard for originality." O'Neil v. Ratajkowski, No. 19-CV-09769, 2021 WL 4443259, at *3 (S.D.N.Y. Sept. 28, 2021). The court reserved the determination of fair use, however, for a jury. *Id.* at *7.

170 *See supra* Introduction.

way," Fairey explained.[171] Professor Jeanne Fromer similarly explains the contribution of celebrities to paparazzi photos: "[C]elebrities[] [have a] systemic role in paparazzi photographs. Their presence creates the value the photographs have."[172]

3. Trolls

As the case studies above make clear, photographic copyright's unexpected applications continue to vex scholars, cultural observers, and courts. But how extensive is the issue? Perhaps courts are managing photography copyright cases just fine, efficiently and adequately resolving them with the tools available, however imperfect they may be. As one commentator stated in opposition to Serbia's proposed elimination of photography from the country's copyright law,[173] "[t]he US has automatic copyrights, a low threshold of originality, trillions of 'amateur' photographs, a vibrant professional, art, and journalism class of photographers; and our courts are not overrun with infringement cases in these works."[174] That might swiftly be changing: enter the copyright troll.

A copyright troll is a serial plaintiff or lawyer "more focused on the business of litigation than on selling a product or service or licensing their [copyrights] to third parties to sell a product or a service."[175] While the term most notably has been used to describe plaintiffs alleging copyright violations against anonymous users on file sharing services,[176] it has been employed recently by one influential federal district court to describe the behavior of plaintiffs and plaintiffs' firms that bring a large volume of copyright litigation over low-

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171 Ben Arnon, *How the Obama "Hope" Poster Reached a Tipping Point and Became a Cultural Phenomenon: An Interview with the Artist Shepard Fairey*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/how-the-obama-hope-poster_b_133874 [https://perma.cc/S5BN-BSVK].

172 Fromer, *supra* note 165, at 10. Adjacent to Emily Ratajkowski's writing, the dark side of paparazzi photography was on display in the *New York Times*'s recent documentary *Framing Britney Spears*. The film details the role that paparazzi, at the behest of tabloid magazines, played in the singer's mental health crises and subsequent conservatorship. *See* Julia Jacobs, *'Sorry, Britney': Media Is Criticized for Past Coverage, and Some Own Up*, N.Y. TIMES (Apr. 27, 2021), https://www.nytimes.com/2021/02/12/arts/music/britney-spears-documentary-media.html [https://perma.cc/VB4P-NBMH].

173 *See supra* note 34 and accompanying text.

174 David Newhoff, *On the Serbian Proposal to Abolish Photography Copyright*, ILLUSION MORE (Feb. 5, 2016), https://illusionofmore.com/serbian-proposal-abolish-photography-copyright [https://perma.cc/26RJ-5V3V].

175 Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015).

176 *Id.* at 1107–08.

or no-value works, namely photographs.[177] The best-known of these "trolls" is Richard Liebowitz, an attorney barred in 2015 who has filed approximately three thousand copyright infringement lawsuits on behalf of photographer clients in the span of three years, over one thousand of those in the Southern District of New York alone.[178] Liebowitz's firm is behind the infringement lawsuit against Emily Ratajkowski[179] and many other celebrity-paparazzo cases,[180] as well as suits by photojournalists, commercial photographers, and even one-time amateurs.

Liebowitz's litigation strategy follows a strict formula: sue first, negotiate later.[181] In this manner, Liebowitz has been able to extract settlements that far exceed the negligible potential licensing value of his clients' photographs.[182] He has been censured by judges in the Southern District of New York for the volume of cases filed and quickly settled, consuming courts' time and resources despite no prospect of real litigation, as well as for failing to comply with court orders and for evading discovery obligations among other serious misconduct.[183] One judge noted that "there may be no sanction short of dis-

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177 *See* McDermott v. Monday Monday, LLC, No. 17cv9230, 2018 WL 5312903, at *2–3 (S.D.N.Y. Oct. 26, 2018).

178 *See* Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368, 2020 WL 3483661, at *1, *19 (S.D.N.Y. June 26, 2020) (describing Liebowitz's litigation history and imposing sanctions), *aff'd*, Liebowitz v. Bandshell Artist Mgmt., 6 F.4th 267 (2d Cir. 2021); *McDermott*, 2018 WL 5312903, at *3 ("As evidenced by the astonishing volume of filings coupled with an astonishing rate of voluntary dismissals and quick settlements in Mr. Liebowitz's cases in this district, it is undisputable that Mr. Liebowitz is a copyright troll."); Justin Peters, *Why Every Media Company Fears Richard Liebowitz*, SLATE (May 24, 2018, 5:52 AM), https://slate.com/news-and-politics/2018/05/richard-liebowitz-why-media-companies-fear-and-photographers-love-this-guy.html [https://perma.cc/7Z6S-PQ8Y] (describing Liebowitz as "the shame of many in the copyright bar" but also "the salvation of the underpaid photographer").

179 *See supra* note 164.

180 *See From Bella and Gigi Hadid to Goop and Virgil Abloh: A Running List of Paparazzi Copyright Suits*, FASHION L. (Feb. 15, 2021), https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits [https://perma.cc/EZA3-E3RG] (noting the key role that Liebowitz has had in the filing of these suits).

181 *See* Peters, *supra* note 178; Maria Abreu, *Photographer's Avenger, Judge's Nightmare: The Case of Copyright Lawyer Richard Liebowitz*, BEDFORD + BOWERY (Jan. 4, 2021), https://bedfordandbowery.com/2021/01/photographers-avenger-judges-nightmare-the-case-of-copyright-lawyer-richard-liebowitz [https://perma.cc/48XU-XD6E] (explaining that Liebowitz "doesn't think sending a letter or trying to contact the infringer is effective"); *McDermott*, 2018 WL 5312903, at *2 ("In the over 700 cases Mr. Liebowitz has filed since 2016, over 500 of those have been voluntarily dismissed, settled, or otherwise disposed of before any merits-based litigation. In most cases, the cases are closed within three months of the complaint filing.").

182 *See* Peters, *supra* note 178.

183 *See* Rice v. NBCUniversal Media, LLC, No. 19-CV-447, 2019 WL 3000808, at *1 (S.D.N.Y. July 10, 2019) ("[I]t is no exaggeration to say that there is a growing body of law

barment that would stop Mr. Liebowitz from further misconduct."[184] In late 2020, the Committee on Grievances for the Southern District of New York suspended Liebowitz indefinitely from the practice of law within the District pending the outcome of its investigation into his conduct, citing the lawyer's "unwillingness to change despite 19 formal sanctions and scores of other admonishments and warnings from judges across the country."[185] In November 2021, Liebowitz was further suspended indefinitely from the practice of law in the entire state of New York.[186] Liebowitz's suspension is unlikely to stem the relentless tide of his firm's trolling litigation, however; a partner at his firm has continued filing new copyright cases in the Southern District of New York,[187] and Liebowitz himself has continued litigating in other federal courts.[188]

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in this District devoted to the question of whether and when to impose sanctions on Mr. Liebowitz alone."); *McDermott*, 2018 WL 5312903, at *2 (collecting instances of Liebowitz's misconduct within the district, including "fail[ure] to prosecute his clients' claims," "unorthodox litigation practices," "misstat[ing] key dates," "repeating arguments" baselessly, "failing to comply with court orders" and "failing to produce materials during discovery").

184 Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368, 2020 WL 3483661, at *19 (S.D.N.Y. June 26, 2020), *aff'd*, Liebowitz v. Bandshell Artist Mgmt., 6 F.4th 267 (2d Cir. 2021).

185 *In re* Liebowitz, 503 F. Supp. 3d 116, 117 (S.D.N.Y. 2020); *see, e.g.*, *Usherson*, 2020 WL 3483661, at *22–27 (collecting numerous instances of Liebowitz's litigation misconduct in federal courts throughout the country, including filing matters in order to harass defendants, violating discovery orders, signing documents without the authorization of his clients, failing to cite adverse precedent, failing to investigate evidence, presenting frivolous arguments with no basis in copyright law, and even misrepresenting the date of a family member's death to justify missing a court date).

186 *In re* Liebowitz, 200 A.D.3d 124, 139 (N.Y. App. Div. 2021). The Northern District of Texas then suspended Liebowitz in turn. Mary Anne Pazanowski, *New York Copyright Lawyer Barred from Federal Court in Texas*, BLOOMBERG LAW (Dec. 9, 2021, 11:33 AM), https://news.bloomberglaw.com/litigation/new-york-copyright-lawyer-barred-from-federal-court-in-texas [https://perma.cc/A2NP-2PSJ].

187 *See, e.g.*, Complaint, Carman v. Gannett Satellite Info. Network, LLC, No. 21-cv-04531 (S.D.N.Y. May 20, 2021), ECF No. 1; Complaint, Sands v. Ziff Davis, LLC, No. 21-cv-03004 (S.D.N.Y. Apr. 8, 2021), ECF No. 1; Complaint, Polaris Images Corp. v. Fox News Network, LLC, No. 21-cv-1569 (S.D.N.Y. Feb. 22, 2021), ECF No. 1; Complaint, Hogan v. Robert Knighton N.Y. LLC, No. 21-cv-00534 (S.D.N.Y. Jan. 21, 2021), ECF No. 1.

188 *See* Jamieson v. Hoven Vision LLC, No. 20-cv-1122, 2021 WL 1564788, at *2 (D. Colo. Apr. 21, 2021) (imposing sanctions on Liebowitz for filing a complaint in the District of Colorado without a basis for personal jurisdiction over the defendant); *see also, e.g.*, Complaint, Vila v. Nice Kicks Holdings, LLC, No. 21-cv-37 (W.D. Tex. Jan. 12, 2021), ECF No. 1. The recent enactment of the Copyright Claims Board to adjudicate copyright claims under $30,000 may impact Liebowitz and his firm's ability to continue to litigate in federal courts; however, at present, adjudication of claims by the CCB is intended to be voluntary. *See Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/small-claims [https://perma.cc/BFN2-59PL] (discussing

The ease of today's photography, in turn, makes the job of the copyright troll easy. The trillion-plus photographs taken annually are liberally afforded protection under a system in which "[a]lmost any photograph 'may claim the necessary originality to support a copyright,'"[189] creating inexhaustible opportunities for enterprising litigants. To sample the photography litigated by Liebowitz's firm most recently: a stock image of a leaf;[190] a pixelated iPhone snap of an arrest in progress;[191] a photograph of pork;[192] a photograph of a taxidermy animal;[193] a shot of the exterior of a Home Depot store;[194] and a photograph of fish tacos.[195] These are the photographs that would have posed hard questions for the Supreme Court in *Burrow-Giles* given their very ordinariness, yet none of these cases has been disposed on the grounds of copyright invalidity.

III
Merger's Promise for Photography's Copyright

As the preceding Parts show, the combination of new photography technology and old law establishing liberal protection has led to an unexpectedly distorted copyright litigation landscape. Several scholars have offered proposals for reining in photography's copyright. Professor Justin Hughes has made a compelling case for the treatment of photographs as databases or compilations of fact, a subject matter that is copyrightable only in regard to originality in the underlying material's selection and arrangement, arguing that under such a standard the overwhelming majority of contemporary photog-

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the passage of the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act) and noting that the CCB is expected to be functioning by December 2021).

189 Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2000) (quoting 1 Nimmer on Copyright § 2.08(E)(1)); *see also* Cruz v. Am. Broad. Cos., No. 17-cv-8794, 2017 WL 5665657, at *1 (S.D.N.Y. Nov. 17, 2017) (Kaplan, J.) (stating the same in a case brought by Liebowitz).

190 Steeger v. JMS Cleaning Servs. LLC, No. 17cv8013, 2018 WL 1136113, at *1 (S.D.N.Y. Feb. 28, 2018), *modified on other grounds*, 2018 WL 1363497 (S.D.N.Y. Mar. 15, 2018).

191 Cruz v. Cox Media Grp. LLC, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020); *Cruz v. Am. Broad.*, 2017 WL 5665657, at *1.

192 Adlife Mktg. & Commc'ns Co. v. Buckingham Brothers, LLC, No. 19-CV-0796, 2020 WL 4795287, at *1 (N.D.N.Y. Aug. 18, 2020).

193 Dermansky v. Tel. Media, LLC, No. 19-CV-1149, 2020 WL 1233943, at *1 (E.D.N.Y. Mar. 13, 2020).

194 Sadowski v. Ziff Davis, LLC, No. 20cv2244, 2020 WL 3397714, at *1 (S.D.N.Y. June 19, 2020).

195 Adlife Mktg. & Commc'ns Co. v. Popsugar, Inc., No. 19-CV-00297, 2020 WL 1478379, at *1 (N.D. Cal. Mar. 26, 2020).

raphy would be rendered uncopyrightable.[196] Professor Rebecca Tushnet has written on the other side of the equation; taking as given that all photographs are and will likely continue to be copyrightable, she suggests that the least we can do is reduce the infringement inquiry to a test of pure reproduction.[197] The proposal advanced in this Part draws inspiration from these arguments, but it charts a different path forward, one rooted in a fundamental principle of American copyright law: revitalizing copyright's merger doctrine. This argument proceeds in direct opposition to *Mannion* and other authorities that have instructed that doctrines like merger have no place in the copyright analysis of visual works.[198] This Note argues that they do, and that reconsidering merger offers hope for recalibrating photography's copyright to better account for technology's continuing frustration of the law.

A. Introduction to the Merger Doctrine

It is black letter law that copyright does not protect pure facts or ideas.[199] While indeed any copyrightable work has at its core an idea of the author or a plain truth about the world, copyright "protection is given only to the *expression* of the idea—not the idea itself."[200] Often called the idea/expression dichotomy, this distinction has been around since the early days of copyright.[201] Consider, for example, *Baker v. Selden*, which held that while books may be copyrighted with respect to expressive elements such as their prose or narrative flourish, the information they convey may not be.[202] Determining how to distin-

196 *See* Hughes, *supra* note 31, at 342; *cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (discussing the copyrightability of a compilation of facts).

197 *See* Tushnet, *supra* note 25, at 739 ("A reproduction right that is truly a *reproduction* right would cover only pure copying and copying so nearly exact that observers would be inclined to see two works as the same."). Other scholars have also looked to infringement analyses. Professor Eva Subotnik, for example, has suggested that copyright's existing originality standard for photography should likely remain, but that follow-on photographers be granted "wide latitude to stage and shoot similar subject matter found in earlier photographs." Subotnik, *supra* note 31, at 1552.

198 *See supra* note 119 and accompanying text.

199 *See* 17 U.S.C. § 102(b) ("In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

200 Mazer v. Stein, 347 U.S. 201, 217 (1954) (emphasis added).

201 *See Feist*, 499 U.S. at 349–50 ("This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship."); Tushnet, *supra* note 25, at 702 (describing Judge Learned Hand's "classic explanation of copyright's idea/expression dichotomy" in *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119, 122 (2d Cir. 1930)).

202 101 U.S. 99, 102–03 (1880); *see also Feist*, 499 U.S. at 349–50 (describing the idea/expression dichotomy).

guish between idea and expression, however, is a difficult task. It has long been recognized as so by courts. Writing in 1930 as to the copyrightability of various elements of a play, Judge Hand described idea/expression line drawing as a futile exercise: "Nobody has ever been able to fix that boundary, and nobody ever can."[203]

Sometimes, the idea/expression boundary is not just impossible to pin down—it does not exist. The merger doctrine, an outgrowth of the idea/expression dichotomy, recognizes that in some potentially copyrightable works, there simply is no line to be drawn. The merger doctrine provides that expression may not be protected by copyright "in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself."[204] In a merged work, expression and fact or idea are inextricably bound—they "appear to be indistinguishable."[205] A textbook copyright case, *Morrissey v. Procter & Gamble Co.*,[206] helps to illustrate the doctrine. In *Morrissey*, the plaintiff claimed copyright in a set of rules for a mail-in sweepstakes. He sued Proctor & Gamble for copying, almost precisely, the text of one of the rules in the materials for its own sweepstakes contest.[207] The text of the rule contained generic instructions as to the information an entrant had to include for eligibility and grounds for disqualification.[208] The court held for the defendant, finding the plaintiff's copyright invalid.[209] The court reasoned that when an idea, such as a sweepstakes rule, is so narrow as to accommodate "if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party . . . could exhaust all possibility of future use."[210] The court quipped, "[w]e cannot recognize copyright as a game of chess in which the public can be checkmated."[211]

To correctly apply the merger doctrine, a court must engage in a two-step inquiry. First, the court "must . . . define the plaintiff's

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203 *Nichols*, 45 F.2d at 120–21.

204 Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991). The term "merge" was first used in *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983). *See* Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 419–20 (2016) (offering the scholarly literature's most comprehensive account of the merger doctrine and dispelling numerous "myths" about merger).

205 Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

206 379 F.2d 675 (1st Cir. 1967).

207 *Id.* at 676.

208 *Id.* at 678.

209 *Id.*

210 *Id.*

211 *Id.* at 679.

idea."[212] This step is critical, as a court "cannot determine whether an idea is capable of a variety of expressions until [it] first identif[ies] what that idea is."[213] Second, the court must "determine whether there are enough ways to express that idea, such that the merger doctrine does not apply."[214] Although some courts have stated that merger may only be found if there is only *one* way to express a particular idea, most courts reject[215] that formulation in favor of the broader standard of "so few ways of expressing an idea."[216]

In considering the definition of the plaintiff's idea and the range of its possible expressions, a court should be cognizant of the underlying purposes of copyright law: "[P]olicy considerations weigh heavily in determining the appropriate application of the merger doctrine."[217] These considerations include whether the plaintiff's productivity requires the economic incentives that copyright provides and whether the plaintiff has coopted "a larger private preserve than Congress intended to be set aside in the public market."[218]

If, after conducting this two-step inquiry animated by policy considerations, "the court concludes that the idea and its expression are inseparable, then the merger doctrine applies and the expression will not be protected."[219] In such circumstances, "copying the expression will not be barred, since protecting the expression . . . would confer a monopoly of the idea upon the copyright owner."[220]

Several commentators and courts have declared the idea/expression dichotomy and related copyrightability doctrines, including merger, an imperfect fit for the assessment of visual works, as the ideas embodied in such works "can be depicted visually in innumer-

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212 Churchill Livingstone, Inc. v. Williams & Wilkins, 949 F. Supp. 1045, 1051 (S.D.N.Y. 1996).

213 Mason v. Montgomery Data, Inc., 967 F.2d 135, 140 (5th Cir. 1992).

214 *Churchill Livingstone*, 949 F. Supp. at 1051.

215 *See* Samuelson, *supra* note 204, at 425–28 (surveying cases that support that "merger may be found even if there is more than one way to express an idea"); 4 NIMMER ON COPYRIGHT § 13.03(B)(3)(c).

216 N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 117 & n.9 (2d Cir. 2007) (internal quotation marks omitted) (quoting Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991)) (noting that the Second Circuit "ha[s] never foreclosed application of the merger doctrine when there was a limited number of expressions of the idea, albeit greater than one").

217 *Id.* at 118.

218 Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

219 Mason v. Montgomery Data, Inc., 967 F.2d 135, 139 (5th Cir. 1992); 4 NIMMER ON COPYRIGHT § 13.03(B)(3)(a) ("[W]hen expression *merges* with idea, the former may be freely copied.").

220 *Herbert Rosenthal Jewelry*, 446 F.2d at 742 (internal quotation marks omitted).

able ways."[221] Judge Kaplan in *Mannion* expressed agreement with this interpretation of the merger doctrine. Recognizing the difficulties that the idea/expression dichotomy has posed since Judge Hand's first analysis in 1930,[222] he described merger and related doctrines as at best applicable only in cases that involve textual works, for

> [i]n the visual arts, the [idea/expression] distinction breaks down. For one thing, it is impossible in most cases to speak of the particular "idea" captured, embodied, or conveyed by a work of art because every observer will have a different interpretation. Furthermore, it is not clear that there is any real distinction between the idea in a work of art and its expression. An artist's idea, among other things, is to depict a particular subject in a particular way. As a demonstration, a number of cases from this Circuit have observed that a photographer's "conception" of his subject is copyrightable. By "conception," the courts must mean originality in the rendition, timing, and creation of the subject—for that is what copyright protects in photography. But the word "conception" is a cousin of "concept," and both are akin to "idea." In other words, those elements of a photograph, or indeed, any work of visual art protected by copyright, could just as easily be labeled "idea" as "expression." . . . In the context of photography, the idea/expression distinction is not useful or relevant.[223]

As the following Section explains, this discomfort with the merger doctrine's application in the context of visual works is misplaced.

A final word about the definition of merger that this Note employs in the analysis that follows: Several courts have held that the merger doctrine is only appropriately used in the context of evaluating whether infringement has occurred,[224] granting merged works "thin"

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221 Michael D. Murray, *Copyright, Originality, and the End of the* Scènes À Faire *and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 798–848, 858 (2006) (surveying the United States Courts of Appeals' treatment of merger with respect to visual media and arguing that merger should not apply to visual works).

222 *See supra* note 203 and accompanying text.

223 Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 458–59, 461 (S.D.N.Y. 2005); *see* Tushnet, *supra* note 25, at 715 (summarizing *Mannion* as "conclud[ing] that the idea of a photograph is often its expression"); *see also* Harney v. Sony Pictures Television, Inc., 704 F.3d 173, 180 n.7 (1st Cir. 2013) (collecting authorities that express skepticism as to idea/expression doctrines' applicability to visual works).

224 *See* Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1358 (Fed. Cir. 2014) (surveying courts' disagreement as to merger's application); *see also* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000) (holding that merger is a defense to infringement, not an issue of copyrightability); Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) ("Our Circuit has considered this so-called 'merger doctrine' in determining whether actionable infringement has occurred, rather than whether a copyright is valid, an approach the Nimmer treatise regards as the 'better view.'" (internal citations omitted)); *accord* 4 NIMMER ON COPYRIGHT § 13.03(B)(3)(d) ("[I]t is the opinion of this treatise that

copyright instead of no protection.[225] Other courts operate a stricter, hard-edged version of merger, using the doctrine to deny copyrightability to a work as a whole.[226] This Note's argument primarily relies on the latter application of the merger doctrine: merging photography's copyright on the front end, to deny copyrightability to an image in the first instance. It falls on this less forgiving side of the merger circuit split for two reasons. First—as exemplified by Richard Liebowitz's litigation—many photography copyright cases are direct reproduction cases.[227] Applying merger so as to give "thin" protection[228]—but still a copyright—to a photograph does nothing to mitigate the effects of such litigation, as thinly copyrighted works are still (and often only) protected from literal or direct reproduction.[229] Even if used successfully to dispose of claims that are not direct reproduction claims, this use of the doctrine consumes more judicial resources than would be expended by knocking out a claim as illegitimate from the start. Second, this Note finds that the hard-edged application of merger is doctrinally correct: It accords with the Copyright Act's clear instruction that ideas are *unprotectable* subject matter from the start, not merely when infringement is alleged.[230]

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the better view is to treat the merger doctrine under the rubric of substantial similarity, evaluating the inseparability of idea and expression in the context a particular dispute, rather than attempting to disqualify certain expressions from protection *per se*."). *But see Kregos*, 937 F.2d at 714 (Sweet, J., concurring in part) ("I disagree with the majority's characterization of how the merger doctrine is applied in this Circuit.").

225 *See* JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 64 (2020).

226 *See* Mason v. Montgomery Data, Inc., 967 F.2d 135, 138 n.5 (5th Cir. 1992) (rejecting the argument that merger applies only to the infringement analysis and stating "this court has applied the merger doctrine to the question of copyrightability"); *accord* Lexmark Int'l Inc. v. Static Control Components, Inc., 387 F.3d 522, 538–39 (6th Cir. 2004); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 801–02 (5th Cir. 2002). *See generally* Samuelson, *supra* note 204 (describing courts' approaches to the merger doctrine).

227 *See supra* Section II.B.3; Peters, *supra* note 178 (describing Liebowitz as capitalizing on online publishers' or bloggers' "mistakes" in hastily reproducing photographs without permission).

228 *See* 4 NIMMER ON COPYRIGHT § 13.03(A)(4) (noting that some copyrights "reflect only scant creativity" and when that is the case, "[t]he Supreme Court labels protection . . . 'thin'" (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)).

229 *See id.* ("At the limiting case of 'the thinnest of copyright protection,' entire duplication would be required."); Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994) (concluding that when a copyright is thin, "only . . . protection[] against virtually identical copying is appropriate"); Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 766 (9th Cir. 2003). This is where this Note departs from Professor Tushnet's proposal to abandon substantial similarity in favor of a pure reproduction test. *See supra* note 197.

230 17 U.S.C. § 102(b) ("*In no case* does copyright protection . . . extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied . . . ." (emphasis added)); *see* Kregos v. Associated Press, 937 F.2d 700, 716 (2d Cir. 1991) (Sweet, J., concurring in part) ("The more common approach, in which merger is considered as part of the determination of copyrightability, absolves even a defendant who has directly

B. Why Photographs Merge

Contrary to the merger skeptics' view,[231] visual works are not impervious to analysis.[232] As Professor Tushnet writes, "pictures are [not] unchallengeable, but rather . . . we routinely fail to challenge them."[233] The conundrum that Judge Kaplan identified in *Mannion*—that "[i]n the visual arts, the [idea/expression] distinction breaks down"[234]—in fact counsels strongly *in favor* of merger's application in the context of photography as a near presumption, for it is this very inextricability of idea and expression that merger is designed to probe.[235] Photographs are a natural fit for the merger doctrine, as they blend—*merge*—the real and the expressive, no matter how much creative effort is put into their making. As Susan Sontag writes:

> However carefully the photographer intervenes in setting up and guiding the image-making process, the process itself remains an optical-chemical (or electronic) one, the workings of which are automatic, the machinery for which will inevitably be modified to provide still more detailed and, therefore, more useful maps of the real. The mechanical genesis of these images, and the literalness of the powers they confer, amounts to a new relationship between image and reality.[236]

This blending is inevitable, but some photographs are infused with sufficient creativity to overcome their factual root.[237] These are photographs in which idea or fact *is* separable from expression: those in which a photographer chose from one of many aesthetic options envisioned by and available to them in giving expressive life to their idea. But just because in theory "[t]here is never a single way to depict some thing visually"[238] does not mean that *a particular author* had

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copied the plaintiff's work if the idea of that work is merged in the expression. I believe this approach accords more fully with both the language and purpose of § 102(b), and serves to focus consideration on the proper definition of the idea at the outset of the inquiry." (internal citations omitted)); *accord* Samuelson, *supra* note 204, at 435 ("[I]t is simply not true that merger is only a defense to infringement and never a limit on copyrightability.").

231 *See supra* notes 221–23 and accompanying text.

232 *Cf.* Tushnet, *supra* note 25, at 687, 719 (arguing that a "gestalt" approach to visual copyright that fails to seriously dissect images expands protection unpredictably and expressing skepticism that images are "indivisible").

233 *Id.* at 690.

234 Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 458, 461 (S.D.N.Y. 2005).

235 *Accord* Tushnet, *supra* note 25, at 715 ("[Judge Kaplan's] analysis would seem to defeat copyright protection for photographs, since ideas are excluded by statute and policy from the subject matter of copyright.").

236 SONTAG, *supra* note 21, at 158.

237 As photographer Edward Weston helpfully put it, "[o]nly with effort can the camera be forced to lie[.]" *Id.* at 186.

238 Murray, *supra* note 221, at 848.

innumerable authorial opportunities or infinite creative vision. As *Burrow-Giles* instructs, some photographs do not hold such limitless potential; some photographs are "ordinary."[239] An ordinary photograph, under merger's definition, is a photograph in which the photographer's intent to record a fact—their idea—cannot be extricated from whatever expression that intent is given.

Ignoring idea/expression doctrines in the realm of photography—and indeed all visual works—not only overlooks the fact that visual works are analyzable as a factual matter. It also neglects the very purpose of copyright law: to promote expression.[240] Excising these doctrines from a huge portion of copyright's subject matter—indeed, visual works are one of the most prominent modes of communication today—has grave speech and expression implications. As courts have frequently noted in opinions on the constitutional tailoring of copyright law,[241] idea/expression doctrines "strike[] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts."[242] The late Justice Ginsburg was a staunch believer in this theory, expressing in a pair of important Supreme Court decisions that idea/expression doctrines are one of copyright's "built-in First Amendment accommodations," its "own speech-protective . . . safeguards."[243] While this Note is skeptical of the assertion that idea/expression doctrines *perfectly* account for the

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

240 *See* U.S. CONST. art. I, § 8, cl. 8 (providing that Congress may grant copyrights only insofar as they "promote the Progress of Science"); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright's purpose is to promote the creation and publication of free expression." (emphasis omitted)).

241 In addition to the Intellectual Property Clause's internal constraints, such as the requirement that copyrights may only be secured for "limited times" to "authors of writings" in order "to promote the progress of Science," *see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1994) (noting that originality is a constitutional requirement deriving from "authors" and "writings"), copyright law must comport with other constitutional provisions with which it might conflict—namely, the First Amendment. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 2–3 & n.6 (2001) ("[C]opyright's potential for burdening speech has long been recognized in U.S. case law, legislation, and commentary."); Alfred C. Yen, *Rethinking Copyright's Relationship to the First Amendment*, 100 BOSTON U. L. REV. 1215, 1217 n.1 (2020) (collecting the voluminous academic commentary on this issue).

242 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 201 (2d Cir. 1983)); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 801 (5th Cir. 2002) (quoting *Harper & Row* specifically in relation to the merger doctrine).

243 *Eldred*, 537 U.S. at 218–19; Golan v. Holder, 565 U.S. 302, 328–39 (2012); *see also* Subotnik, *supra* note 31, at 1542, 1546 (arguing similarly that application of merger to visual works is "essential to upholding the principles of *Feist*" and that "photography should [not] be closed off to the free use of ideas").

tension between copyright law and free speech,[244] it is certain that ignoring them altogether would only worsen constitutional strain.[245]

This argument for merger, admittedly, sidesteps the issue of photographic originality. As this Note has documented, *Burrow-Giles* and its progeny have set forth an originality standard that has allowed nearly every photograph in existence to receive copyright protection. If photography's copyright is bloated, isn't first order originality where we should target the critique? The question is fraught. Unlike many of the naysayers and skeptics at the time of *Burrow-Giles*,[246] we understand now that while photography may be an increasingly automatic art, it is surely not entirely devoid of creative potential. In addition, courts generally have avoided constructing inconsistent originality analyses across different subject matter,[247] and a wholesale reconsideration of the originality threshold across subject matter is outside the scope of this Note, although other scholars have thoughtfully considered such reforms.[248] More fundamentally, it is difficult to reject outright Judge Hand's musing that "no photograph, however simple, can be unaffected by the personal influence of the author."[249] It may be true that a great deal of—perhaps even all—photographs *do* have the requisite constitutional minimum of "some creative spark, no

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244 *See* Netanel, *supra* note 241, at 4 (noting that while the judicially-approved view that "conflict between copyright and free speech is generally ameliorated by copyright's role in incentivizing new expression and by copyright's 'internal safety valves'" may have been tenable when first formulated by Professor Nimmer in 1970, "courts have largely ignored subsequent developments in both copyright law and First Amendment doctrine" in continuing to cite this argument, and that as "copyright owner prerogatives have steadily become more bloated" in recent years, copyright law no longer perfectly fits its "incentive-for-original expression rationale" and "has also imposed an increasingly onerous burden on speech" (internal citations omitted)); *see also id.* at 12–30 (expanding on this thesis by pointing to recent developments in copyright law such as the extension of the copyright term and confusion over the boundaries of the idea/expression dichotomy and fair use).

245 *See* Yen, *supra* note 241, at 1217 (noting the view that heightened First Amendment scrutiny toward copyright law clearly "would make sense . . . if Congress removed two specific doctrines—the idea/expression dichotomy and fair use—from the Copyright Act"). Although Professor Yen posits that "[t]his will probably never happen," ignoring merger—an established subdoctrine of the idea/expression dichotomy—is a step in that direction. *See id.*

246 *See supra* note 55.

247 *See, e.g.*, Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 520–22 (7th Cir. 2009) (holding that the originality standard is not heightened for derivative works).

248 *See* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451 (2009).

249 Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (S.D.N.Y. 1921); *see supra* notes 82–84.

matter how crude, humble or obvious it might be,"[250] and yet that many of those remain unprotectable under the merger doctrine.[251]

C. Merging Photography's Copyright: A Test Case

Would merger really solve the problem of photography's copyright? This Section examines a test case drawn from one of Richard Liebowitz's litigations, applying the merger doctrine to its facts as if a court were looking at them anew. The result shows that applying merger in photographic copyright cases captures the original thrust of *Burrow-Giles*—it protects the extraordinary photograph, leaving the ordinary behind.[252] In a world of one trillion photographs, merger is a helpful and necessary legal tool.

Consider the following case. In October 2017, a New York City resident named Alex Cruz was walking down the street in Manhattan's Tribeca neighborhood. He heard a "commotion" and observed a man acting unusually as police officers approached to apprehend him. Cruz grabbed his iPhone and caught a photograph of the scene, which turned out to be the arrest of Sayfullo Saipov, a man suspected of committing a terrorist attack with a vehicle along a bike path in the neighborhood, killing eight people and injuring eleven others.[253] Cruz's iPhone snap was a grainy, poor-quality image, but it was one of the only photographs capturing the moment of Saipov's arrest.[254] Cruz, whose friend posted the photograph on social media, was quickly approached by numerous media outlets expressing interest in publishing the photograph. Other news organizations used the photograph without obtaining Cruz's permission or entering into a

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250 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (internal quotation marks omitted).

251 *Cf.* Tushnet, *supra* note 25, at 716 ("There certainly are original photographs, and originality may sometimes even lie in the techniques of production. But, perhaps because of their discomfort with visual art, courts have gone well beyond nondiscrimination and crossed the line into protecting that which would be readily recognized as unprotectable in a literary work.").

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

253 Cruz v. Cox Media Grp., LLC, 444 F. Supp. 3d 457, 461–62 (E.D.N.Y. 2020); *see* Benjamin Mueller, William K. Rashbaum & Al Baker, *Terror Attack Kills 8 and Injures 11 in Manhattan*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/nyregion/police-shooting-lower-manhattan.html [https://perma.cc/2EZP-NM2E].

254 *See Cruz*, 444 F. Supp. 3d at 462 (noting how many media organizations sought to republish Cruz's photography); *see also* Andrea Cavallier, Andrew Ramos & Mary Murphy, *Sayfullo Saipov Identified as Suspect in NYC Terror Attack*, PIX11 (Oct. 31, 2017, 6:37 PM), https://pix11.com/news/sayfullo-saipov-identified-as-suspect-in-nyc-terror-attack [https://perma.cc/6F9V-T7DT] (using Cruz's photo); Tina Moore, *Cops ID Suspected Terrorist in Deadly Downtown Truck Rampage*, NY POST (Oct. 31, 2017, 5:06 PM) https://nypost.com/2017/10/31/nypd-investigating-downtown-carnage-as-possible-terror-attack [https://perma.cc/DSE4-FZKP] (same).

licensing agreement with him, and a couple of litigations initiated by Richard Liebowitz against these outlets followed.[255]

One of the defendants argued that Cruz's photograph was insufficiently original to receive any copyright protection. The court declined to merit this argument, citing *Bridgeman* for the principle that all photographs save "slavish cop[ies]" merit copyright protection, and *Mannion* for its "timing" prong: in this case, Cruz's "recognition" of the scene and his "decision to take the [p]hotograph when he did" alone were sufficient bases for copyright protection.[256] The court held this despite Cruz's own declaration that "he had taken a 'simple picture' of somebody who appeared to be 'acting crazy.'"[257]

Applying the two steps of the merger analysis to Cruz's photograph, merger doctrine should bar its copyright. First, the court must "identify[] the 'idea' that might be merging with its expression."[258] What is the idea underlying Cruz's photograph? As Cruz testified, his intent was to take a "simple picture" with his iPhone to capture a "big commotion" that he had observed on the street, to document someone he witnessed "acting crazy."[259] Given the little information Cruz had at the point of his image capture—his friends testified that even upon his arrival at their apartment after the attack, he was not aware of the gravity of the scene he had just photographed—it is impossible to ascribe a more precise idea delineation to Cruz.[260]

Second, the court must "determine whether there are enough ways to express that idea, such that the merger doctrine does not apply."[261] In what other ways could Cruz have expressed the idea of making a quick and accurate record of a commotion unfolding before him? Cruz had no control over the substance of his scene,[262] and at best *de minimis* control over the photographic technique he used in portraying it given the setting, his single, fully automated camera, and the urgency with which he had to snap the picture to capture what was

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255 *See Cruz*, 444 F. Supp. 3d at 462–63; *see also* Cruz v. Am. Broad. Cos., No. 17-CV-8794, 2017 WL 5665657, at *1 (S.D.N.Y. Nov. 17, 2017).

256 *Cruz*, 444 F. Supp. 3d at 465.

257 *Id.* at 462.

258 N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 117 (2d Cir. 2007); *see* Churchill Livingstone, Inc. v. Williams & Wilkins, 949 F. Supp. 1045, 1051 (S.D.N.Y. 1996); *see also* Mason v. Montgomery Data, Inc., 967 F.2d 135, 140 (5th Cir. 1992) (underscoring the importance of defining the idea).

259 *Cruz*, 444 F. Supp. 3d at 462 (internal quotation marks omitted).

260 *Id.*

261 *Churchill Livingstone, Inc.*, 949 F. Supp. at 1045.

262 *See* Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 453–54 (S.D.N.Y. 2005) (creation prong).

happening;[263] few, if any, *Mannion* options were available to him. And although the court in *Cruz* does recognize that photographs may be copyrightable in respect to their timing,[264] Cruz was not lying in wait, searching for the perfect moment in time to capture his shot.[265] While there may have been a range of seconds, or perhaps a minute, in which Cruz could have captured his idea, the merger doctrine does not require that the author's utilized expression be the *only* way of expressing the idea, but that there be "only one *or so few ways* of expressing an idea that protection of the expression would effectively accord protection to the idea itself."[266] Captured at another time, Cruz's photograph would have been a different idea. His picture is conceptually flat, his intent to document the specific scene unfolding before him formed near-simultaneously with the image's capture. The idea and expression contained in the image are fully merged. Copyright should not inhere in the photograph, and a news outlet should not be liable for infringement for using it.[267] The image is exactly what Justice Brandeis warned against protecting as Judge Hand's argument for universal copyright protection in photographs gained traction[268]: "The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection."[269]

Critics may argue that such a determination would withdraw copyright from professional photographers, particularly photojournalists, as a class. But that is not so. Professional photojournalists make creative decisions from the moment they set forth in their work for the day, beginning with the selection of their equipment, the locations they choose, the techniques they employ when capturing their images. The photojournalist is armed with a sufficient variety of expressive

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263 *See id.* at 452 (rendition prong); *see also supra* note 145 (discussing photography's automatism). While this Note rejects *Mannion*'s test as the arbiter of photography's copyright, its elements provide a useful survey of the range of expressive techniques *available* to photographers.

264 *Cruz*, 444 F. Supp. 3d at 465 ("As with almost any photograph, the Photograph reflects creative choices . . . . Indeed, Cruz's recognition of what he considered a 'big commotion' and his decision to take the Photograph when he did . . . were sufficient creative choices to meet the low threshold required for copyright protection.").

265 *Cf. infra* text accompanying note 274.

266 Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (emphasis added); *accord* N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109, 117 & n.9 (2d Cir. 2007); Samuelson, *supra* note 204, at 425–28.

267 *See Kregos*, 937 F.2d at 716 (Sweet, J., concurring in part) (arguing that when merger is found, it denies copyrightability to a work as a whole, "absolv[ing] even a defendant who has directly copied the plaintiff's work").

268 *See supra* notes 82–88 and accompanying text.

269 Int'l News Serv. v. Associated Press, 248 U.S. 215, 254 (1918) (Brandeis, J., dissenting).

choices that make it unlikely for any individual image to merge.[270] And even unexpected events recorded by amateur photographers may merit protection under merger if significant expressive choice is involved in their documentation.[271] For example, the Zapruder frames of President John F. Kennedy's assassination would likely remain protected, as they were held to be in 1968, in consideration of the court's consistent reference to the numerous options the author considered in furthering his (initial) idea to capture President Kennedy's motorcade.[272] And to bring our story full circle, what about "wire guy" Mannie Garcia? How would his photograph of President Obama fare under a merger doctrine for photography's copyright? Despite Garcia's tendency to situate his work more in the world of fact than that of art, his photograph would likely remain protected.[273] Garcia's own words reveal a dizzying number of expressive considerations:

> I'm just trying to make a nice, clean head shot. And I'm waiting. I'm looking at the eyes. I mean, sure, there's focus, and I want the background to be a little bit soft. I wanted a shallow depth of field. I'm looking and waiting. I'm waiting for him to turn his head a little bit. I'm just patiently making a few pictures here and there, and I'm just looking for a moment when I think is right, and I'm taking some images as I'm going along, and then it happened. Boom, I was there. I was ready.[274]

Compare Garcia's image with what might happen if someone like Cruz had snapped the photograph from the crowd. Professor Eva Subotnik provides one piece of evidence: In her article exploring photography copyright's "originality proxies," she compares Garcia's image to one of her own snaps from an Obama campaign event. Rebutting the suggestion, aired at the time of the *Hope Poster* epic, "that anyone could have taken a photographic shot equal in quality to Mannie Garcia's," Subotnik describes her process and result: "I had

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[270] *See* Silbey, *supra* note 31, at 417–19.

[271] Such expressive choices might indeed include many of the factors outlined in *Mannion*'s Rendition-Timing-Creation test—such as selection of equipment and developing techniques, arrangement of subject, lighting, and scene, and even creative timing. *See supra* Section I.C. But courts should be cognizant of the automatic capabilities of modern photographic equipment, probing deeper into the photographer's actual process on a case-by-case basis, and choices counted as creative should rise above the mere intent to capture a particular image (idea), which collapses—merges—the distinction between expression and idea. *Cf.* Tushnet, *supra* note 25, at 716 (critiquing the current state of the law on copyright in photography, which protects "the elements of a photograph that simply indicate that it *is* a photograph: it was taken at some angle, it was taken under some lighting conditions, and so on").

[272] Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (discussing Zapruder's "testing several sites" among other decisions).

[273] *See supra* notes 1–20 and accompanying text.

[274] *Mannie Garcia: The Photo That Sparked 'Hope,' supra* note 18.

the access, and I took about forty shots[.] . . . I am happy to have [the image], but it probably would not have inspired a campaign poster."[275]

What else does merging photography's copyright take away? Consider photographs captured with necessarily predetermined formats: mug shots, passport photographs, the postcard art reproductions that continue to claim copyright protection in museums across the world,[276] satellite or surveillance images. Consider medical documentary photographs,[277] stock photographs,[278] Google's Street View,[279] Emily Ratajkowski's paparazzo foe's snap,[280] or the monkey's (or your, or my) selfie.[281] All of these "ordinary" photographs over which copyright has been litigated are likely candidates for merger, exiting the territory of photography's copyright that *Burrow-Giles* demarcated 150 years ago. They are ordinary.

Conclusion

Oscar Wilde, speaking just days in advance of Napoleon Sarony's fateful capture of *Oscar Wilde No. 18*, remarked that society has "recogni[zed] . . . a separate realm for the artist, a consciousness of the absolute difference between the world of art and the world of real fact[.]"[282] Photography blurs—*merges*—the starkly divided universes that Wilde envisioned. Photographs are art: There are doubtless highly original and creative photographs that merit copyright protection. Yet all photographs simultaneously live in the realm of uncopyrightable fact. The increasing ubiquity of photography brought on by technology's advance impresses the urgency of retheorizing photography's copyright: In a world of one trillion photographs, not all can—or should—feasibly be protected. This Note proposes a realignment rooted in existing copyright law: revitalizing copyright's merger doctrine as applied to photographic copyright cases.

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275 Subotnik, *supra* note 31, at 1552.

276 *See supra* notes 90, 102.

277 *See* Pohl v. MH Sub I LLC, 770 F. App'x 482 (11th Cir. 2019) (finding originality in dentist's photographs of cosmetic procedures).

278 *See, e.g.*, *supra* notes 190–95 and accompanying text (listing examples of Richard Liebowitz's litigations).

279 *See supra* notes 157–61 and accompanying text.

280 *See supra* notes 164, 169 and accompanying text.

281 *See supra* Section II.B.1.

282 Oscar Wilde, *The English Renaissance of Art*, *reprinted in* Essays and Lectures by Oscar Wilde 128 (4th ed. 1913).