STILL LIFE WITH "SPARK" AND "SWEAT": THE COPYRIGHTABILITY OF CONTEMPORARY ART IN THE UNITED STATES AND THE UNITED KINGDOM

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"In art the highest success is to be the last of your race, not the first.
Anybody, almost, can make a beginning: the difficulty is
to make an end—to do what cannot be bettered."[1]

I. INTRODUCTION

In 2001, installation artist Martin Creed was awarded the Turner Prize, one of Britain's most prestigious art accolades, for his work *The Lights Going On And Off*, which consisted of an empty gallery containing a pair of flashing lights.[2] He won £20,000, as well as a jeer from humor writer Dave Barry. Regarding Creed's oeuvre, Barry wrote:

> Another of [Martin Creed's] works is entitled "A sheet of A4 paper crumpled into a ball." It's a piece of paper crumpled into a ball. Perhaps you're thinking: "How come when I crumple paper, it's trash, but when this guy does it, it's art?" The answer is that Creed has an artistic asset that you don't have: the fervent admiration of professional art twits. For example, one critic wrote that Creed's ball of paper "is not simply a sheet of A4 paper, it is a beautifully crumpled piece of A4 paper."[3]

Perhaps unbeknownst to Barry, a veritable stew of debate was bubbling over whether that beautifully done crumpling might give Creed another asset: a copyright. The fact that anyone can crumple up a piece of paper and call it

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1. George Bernard Shaw, *quoted in* ALEXANDER LINDLEY, PLAGIARISM AND ORIGINALITY 18 (1952).

2. *Critics Split over Turner Winner*, BBC NEWS ONLINE, Dec. 10, 2001, *available at* http://news.bbc.co.uk/2/hi/entertainment/1701400.stm.

3. Dave Barry, *One Man's Junk Is Another Man's Art*, NEWSDAY, Feb. 18, 2002, at B03.

contemporary art[4] underpins this debate. One of the principal aims of copyright law is encouraging individual authors to create, and works like Creed's are arguably highly creative, in conception at least, precisely because they push the envelope.[5] But copyright law also seeks to promote the public's interest in having

4. This Note uses the term "contemporary" to refer to today's art, in part to avoid complications arising from debate over the terms "modern" and "postmodern." The modernist period is often seen to have begun with the French painters Gustave Courbet and Édouard Manet in the mid-nineteenth century. TONY GODFREY, CONCEPTUAL ART 427 (1998). Modernism focused on the idea of progress and the changing nature of urban, industrialized life. *Id.*; *see also* PAM MEECHAM & JULIE SHELDON, MODERN ART: A CRITICAL INTRODUCTION 1 (2000). The postmodern period is often defined as emerging amidst the political and social upheaval of the 1960s, during which rapid change led to a questioning of modernism. MEECHAM & SHELDON, *supra*, at 1. However, many of modernism's defining characteristics still influence postmodern art, making the line between the two difficult to draw. *Id.* Thus, this Note uses the term "contemporary," as it encompasses works that have been made in the postmodern period, but do not necessarily employ irony, simulacra (creating a copy of a copy), or appropriation of preexisting works—the "favored techniques" of postmodernism. GODFREY, *supra*, at 427. For a far more detailed description of the ways of defining modernism, see generally MEECHAM & SHELDON, *supra*. The online interactive map of the London's Tate Modern gallery, available at http://www.tate.org.uk/modern/explore (last visited Sept. 25, 2006), provides a helpful basic guide to art produced since 1900, complete with images from the gallery's collection.

5. Mr. Creed admitted that he did not know what his prize-winning work meant. "I can't explain it," he told the BBC in a 2001 interview. "The lights go on and off. I like it, it's full of life. I don't know what other people think of it." *Critics Split over Turner Winner*, *supra* note 2. Certainly the idea that a work has no preconceived meaning may be a meaning in itself. The jury that awarded the prize issued a joint statement that said it "admired the audacity in presenting a single work in the exhibition and noted its strength, rigour, wit and sensitivity to the site." *Id.* Others in the London art community disagreed fervently. Members of the Stuckists, a traditionalist art group, protested outside the Tate Modern, making their feelings known by flashing hand-held torches on and off. *Id*. The Stuckist perspective on conceptualism is actually an interesting one for purposes of this Note. The group describes itself as a "remodernist" movement that is "anti-anti art," and sees true art as only those works that manifest expression: "It is the Stuckist's duty to explore his/her neurosis and innocence through the making of paintings and displaying them in public, thereby enriching society by giving a shared form to individual experience." *See* Stuckist Manifesto, http://www.stuckism.com/stuckistmanifesto.html#manifest (last visited Mar. 8, 2007). The group continues to criticize the Turner Prize. In May 2005, Scottish artist Simon Starling was awarded the prize for his work entitled *Shedboatshed*—a boat shed he found on the shores of the Rhine River in Germany. Starling claimed to have dismantled the shed, sailed it down the Rhine, and then put it back together. One of the Stuckists' co-founders told the *Times of London* that the Turner Prize should be renamed the "BQ do-it-yourself prize" in honor of B&Q, a home-and-garden retailer that is basically the U.K. equivalent of the Home Depot. Dalya Alberge, *One Man and His Boat Shed Sail into a Storm over the Turner*, TIMES (London), Dec. 6, 2005, *available at* http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/article746088.ece.

a maximum number of creative works disseminated as widely as possible.[6] Granting an author the right to control reproduction of a minimalist work, like flashing lights or crumpled paper, might deny artists-in-the-making access to whole swaths of the raw material of expression, and could actually reduce a culture's net creativity.[7] Moreover, some commentators have argued that though today's definition of art may well be limitless, a copyright law with no limits would be unworkable at best.[8]

Others believe the problem is fueled by an aesthetic bias inherent in copyright. Some critical legal scholars contend that copyright law's originality requirements rely on a romantic conception of a "genius" author—a "uniquely sensitive sou[l], valiantly transcending the prosaic routines and necessities of everyday life to express [his or her] genius in works of the imagination."[9] Many contemporary artists deliberately rebel against this archetype. In fact, they rebel so completely that some contemporary art is thought up by one person and executed by another. During a 1966 interview, Andy Warhol said to his interviewer, "Why don't you ask my assistant Gerard Malanga some questions? He did a lot of my paintings."[10] Warhol later told a critic:

> I think somebody should be able to do all my paintings for me. I haven't been able to make every image clear and simple and the same as the first one. I think it would be so great if more people took up silk screens so that no one would know whether my picture was mine or somebody else's.[11]

In light of this perceived disconnect between the law and art worlds, scholars in the romantic-bias camp posit the syllogism, "the romantic author is dead; copyright is about romantic authorship; copyright must be dead, too."[12]

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6. *See* discussion of the intent of the American Copyright Clause *infra* Part III.A.1.

7. Lori Petruzzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 115, 145 (1995).

8. *Id.*

9. Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368, 368 (2002) (presenting a comprehensive argument rejecting the romantic-bias school of thought).

10. Andrew Wilson, *'This Is Not by Me': Andy Warhol and the Question of Authorship*, *in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE 375, 375 (Daniel McClean & Karsten Schubert eds., 2002). The works of Japanese artist On Kawara provide another example. Since 1966, Kawara has made his "date paintings," which consist of the date on which the work was made on a monochrome background, using four or five layers of paint to create a perfectly flat surface that shows no sign of individual expression. Kawara is never photographed or interviewed, and does not even attend his own exhibitions. GODFREY, *supra* note 4, at 156.

11. Wilson, *supra* note 10, at 375.

12. Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1065 (2003).

Scholars who disagree with this argument contend that copyright law has never required authors to be especially talented, and that artistic merit, at least in theory, has never been a prerequisite to copyright.[13] As we shall see, the copyright laws in Britain and the United States agree that it is unwise for the law to attempt aesthetic judgments.[14] Further, copyright law has a long, solid history of adapting to accommodate new categories of works.[15]

With this optimism in mind, this Note will address the following questions: Is it time to change the law again, this time to accommodate contemporary visual art, and would this be consistent with the aims of copyright? If so, how exactly should it be changed? This Note addresses these questions by comparing the American and British copyright statutes and the originality-standard case law in each country. The author believes this approach is valuable because each country defines originality differently, and much contemporary art balances on the knife-edge between those definitions. Whether or not Mr. Creed's "beautiful crumpling" of his medium imparted sufficient originality to make his work copyrightable may very well depend on where he was when he crumpled it. And interesting though it may be to imagine the adventures of a forum-shopping paper-crumpler, this is not simply an intellectual exercise. New York City and London are the two main hubs of the world's fine art market, which of late has manifested a spike in prices paid at auction for contemporary works.[16] Further,

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13. *Id.*

14. *See* discussion *infra* Part II.A.

15. For a brief history of the American categories that have been added over time, see EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 131-50 (2000).

16. According to the most current data available from Artprice, a company that provides art market information for investors, the United States dominates, with U.S. auction houses in New York accounting for 43.1% of the global fine art market turnover in 2005. ARTPRICE, ART MARKET TRENDS 2005, at 8 (2006), *available at* http://img1.artprice.com/pdf/Trends2005.pdf [hereinafter ARTPRICE 2005]. London comes in second worldwide with a 28.4% market share, and is number one in Europe for fine art auctions. *Id.* The market for contemporary art is growing: Prices on Artprice's contemporary art segment rose 17% over the twelve months of 2004, and the segment accounted for 6.4% of total revenue, up from 4.4% the previous year. ARTPRICE, ART MARKET TRENDS 2004, at 9 (2005), *available at* http://press.artprice.com/pdf/Trends2004.pdf. Sales of four contemporary artists, including Jeff Koons and Damien Hirst, accounted for the bulk of the growth in 2004—together, they had twenty-two sales above the $1 million mark. *Id.* The highest price paid in the segment was $4.9 million for Jeff Koons's sculpture *Jim Beam J.B. Turner Train* (1986). *Id.* (For a photo of the work and the auction house's description, see Robert Brown, Christie's, *Seductively Decadent: The Ultimate Symbol of Conspicuous Consumption*, http://www.christies.com/promos/may04/1373_pwaEvening/specialist.asp?article=3 (last visited Mar. 15, 2007)). Contemporary art saw record auction sales of $102 million in 2004; 2005 sales outstripped that record by $31.7 million. ARTPRICE 2005, *supra*, at 7. In May of 2005, David Smith's *Cubi XXVIII* (1964), a large, geometric steel sculpture, sold for $21.25 million and became the most expensive contemporary piece ever sold at auction. *Id.* at 9.

installation art, which used to be thought of as tied to a specific site, is now frequently paid for, packed up, and moved to increasingly far-flung locations.[17] Contemporary art is a valuable commodity, and it is going global.

Part II of this Note outlines the challenges contemporary art poses for the American and British copyright schemes. It briefly addresses the preliminary problem of statutory enumeration of protected works (Is a piece of A4 paper crumpled into a ball a "sculpture"?) and the consequences of copyright's fixation requirement for certain contemporary forms that lack permanence. In addition to these requirements, both countries extend copyright protection only to works of authorship that are found to be "original."[18] However, this protection extends only to original expression, not to original ideas. A problem arises for contemporary art because in many works, the idea is inextricable from the expression, and the expression may fail to meet the originality requirement. The end of Part II provides several examples of contemporary art in an effort to help frame this problem.

Part III details the development of the originality requirements in the United States and Britain. It evaluates the case law in each country, and determines which criteria judges in each country use when deciding whether works are original. It concludes that although the originality standards in both countries are somewhat difficult to pin down, the American standard sets a higher bar than the traditional British standard. In the United States, a work meets the originality standard if it displays at least a minimal "spark" of creativity.[19] In Britain, the traditional originality standard is often referred to as the common law "sweat" standard. It requires authors to expend labor to receive protection, but does not require that labor to be creative.[20] This Part also details how international copyright agreements may be helping convert Britain to more of a "spark" approach to originality.

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17. JULIAN STALLABRASS, ART INCORPORATED: THE STORY OF CONTEMPORARY ART 24 (2004). Even if it is not sold, artists and dealers regularly use installation art as a loss-leader for more marketable products. *Id.* at 24-25. Painting is the most saleable form of art and continues to be made and sold successfully depending on the state of the economy. *Id.* But installation art has two main advantages that allow it to "tak[e] the limelight" and "circulat[e] internationally in the heights of the cosmopolitan art world." *Id.* at 25. First, installations by nature compete with mass culture. Although installations can include wide-screen televisions and video recordings, you still actually have to go to a museum or other site to experience walking through an installation. Relatedly, the commissioning of an installation for a particular site ensures that viewers have to go there. *Id.* Thus, the biennale, where collections of such works by important artists are shown, has a powerful draw on art-world attention, and they are increasingly being held internationally: "Since this is now the regular strategy, being there—not only in Venice, Basle, and Madrid but now in Sao Paulo, Dakar, and Shanghai—has become another way to confirm social distinction on the viewer." *Id.* at 26.

18. *See* discussion *infra* Part III.

19. *Id.*

20. *Id.*

Part IV pits the "spark" and "sweat" standards against each other in mortal combat, asking: Which standard best serves to motivate contemporary artists while remaining true to the policy aims of copyright? The author concludes that while the "spark" standard wins out in the United States, the answer may not be so clear for the United Kingdom. Part IV also addresses the effect that maintaining the "spark" standard may have on the law's aesthetic neutrality, and stresses that empirical research into what drives today's artists to create would be invaluable to further analysis done in this area of the law.

II. LAW, MEET ART

The copyright laws of both the United States and the United Kingdom explicitly agree on at least one doctrine: When law and art chance a meeting, they should do their best to avoid each other. British and American jurisprudence both stress the importance of the law remaining aesthetically neutral. British courts have excluded any artistic-merit criteria from determination of copyright protection.[21] U.S. courts often rely on Justice Oliver Wendell Holmes Jr.'s century-old opinion in *Bleistein v. Donaldson Lithographic Co.*[22] There, Holmes admonished that "[i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves the final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[23]

Underlying this judicial reluctance to address the "What is art?" question are several motivations, including the fact that judges generally have no special training in assessing artistic merit, and the law's formal commitment to neutrality.[24] Further, there is the risk that the rule of *stare decisis* might lock a particular conception of art into place.[25] Perhaps the most intuitive rationale has already been introduced by Mr. Barry's column. Defining art is a matter of taste, and one person's masterpiece can be another's trash—sometimes literally.[26]

Despite this purported reluctance, the day-to-day work of the law often does define art, and sometimes in very concrete ways. In the United States, for example, works of art are exempted from customs duties by statute.[27] Thus,

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21. Barron, *supra* note 9, at 379.
22. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 815-19 (2005).
23. Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 251 (1903).
24. Farley, *supra* note 22, at 819.
25. *Id.* at 813-14.
26. Dave Barry also details an incident regarding Damien Hirst, another Turner Prize winner. After a party at a London gallery Hirst arranged some of the party trash, including beer bottles and coffee cups, into an installation. The next morning, the gallery janitor threw it away. When the gallery staff arrived, they separated the installation trash from the regular trash and reproduced the work with the help of photographs taken the night before. Barry, *supra* note 3.
27. Farley, *supra* note 22, at 822.

courts in customs litigation are sometimes required to adjudicate art. In *Brancusi v. United States*, the court had to determine whether Constantin Brancusi's minimalist work *Bird in Flight*—a four-and-one-half-foot-tall highly polished piece of bronze—was a duty-free work of art, or a "manufacture of metal" subject to customs at 40% *ad valorem*.[28] In addition, U.S. federal tax law prohibits depreciation deductions for works of art because art is not expected to depreciate in value.[29] American law also defines art in potentially more restrictive ways. Obscenity falls outside the protection of the First Amendment, but material that has "serious . . . artistic . . . value" is not considered obscene.[30] The National Endowment for the Arts (NEA) assesses artistic excellence and merit in awarding grants.[31] And following the Supreme Court's 1998 decision in *NEA v. Finley*, the NEA must follow a congressional amendment to its enabling statute, requiring it to consider "general standards of decency" in establishing procedures for evaluating artistic merit.[32]

Copyright law, as mentioned above, attempts to eschew these types of substantive judgments about art. In the United States, this effort is inspired not only by the principle of aesthetic neutrality, but also by a strong policy interest in disseminating as many forms of expression as possible to the public.[33] When it comes to contemporary art, however, the law's attempt to avoid aesthetic determinations can end up denying protection to whole categories of contemporary work. Today's artists face two main roadblocks: the restrictive statutory list of copyrightable works coupled with a requirement that a work be "fixed," and the idea-expression dichotomy embedded in the notion of originality.

A. Enumeration and Fixation

Instead of defining an overarching conception of art, the American and British copyright statutes enumerate specific categories of protected works. The American list is illustrative,[34] while the British list is restrictive.[35] The lists of

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28. *Id.* at 822-23.
29. *Id.* at 823.
30. Miller v. California, 413 U.S. 15, 24 (1973).
31. Lackland H. Bloom, Jr., NEA v. Finley*: A Decision In Search of a Rationale*, 77 WASH. U. L.Q. 1, 1-3 (1999).
32. 524 U.S. 569, 572-73 (1998) (referring to 20 U.S.C. § 954(d)(1) (1994)).
33. *See* discussion of the intent of the American Copyright Clause, *infra* Part III.A.1.
34. Copyright Act of 1976, 17 U.S.C. § 102(a) (2005):

> Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;

categories have been added to over time as new forms of art have developed.[36] Each time, of course, courts must determine whether or not a work of art fits into a category—a decision that becomes increasingly difficult as art moves further away from traditional forms. One commentator has argued that because of this enumerative approach, the restrictive British statute cannot protect installation art (in which the art is defined by its spatial location instead of the materials used), video art, body art (in which the body and its products are used as materials), land art (art "completed by the forces of nature"), performance art, mixed-media work, and most conceptual art.[37]

In addition, both the British and American lists have fixation requirements. American law extends protection to "original works of authorship fixed in any tangible medium of expression."[38] British courts assume a fixation

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(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

35. Copyright, Designs and Patents Act, 1988, c. 48, § 1(1) (U.K.) [hereinafter CDPA]:

> Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—
> (a) original literary, dramatic, musical or artistic works,
> (b) sound recordings, films, broadcasts or cable programmes, and
> (c) the typographical arrangement of published editions.

The Act defines "artistic work" as: (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship. *Id.* § 4(1).

36. *See* SAMUELS, *supra* note 15, at 131-50.

37. Barron, *supra* note 9, at 380-81.

38. 17 U.S.C. § 102. "A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* § 101. Just how "permanent" or "stable" does the work have to be, and how long is a "transitory duration"? In *MAI Systems v. Peak Computer, Inc.*, the Ninth Circuit Court of Appeals held that software stored in a computer's RAM (random access memory) met the fixation requirement. 991 F.2d 511, 518 (9th Cir. 1993). Some scholars believe that the recognition of fixation in this sort of temporary medium could be used to argue for extending copyright to ephemeral works of art. *See* Russ VerSteeg, *Copyright in the Twenty-First Century: Jurimetric Copyright: Future Shock for the Visual Arts*, 13 CARDOZO ARTS & ENT. L.J. 125, 132 (1994).

requirement.[39] Thus, in both countries, works lacking permanence may not qualify for protection.[40]

B. The Originality Requirement

In order for a work to receive copyright protection in either of our two countries, the work must be adjudicated "original."[41] Part III of this Note focuses on sorting out who exactly an author is, and what exactly originality means, in each copyright scheme. The definitions are hard to pin down, even within one country. Professor Jane Ginsburg, who has considered the originality requirement in a comparative context, comprehensively defines an author as "a human creator who, notwithstanding the constraints of [his or her] task, succeeds in exercising minimal personal autonomy" in fashioning a work.[42] However originality is defined, copyright protection extends only to original expression, not to original ideas.[43] Here, "idea" refers to the concept that animates a work, while "expression" refers to its actual, literal expression.[44] So, for example, a play that tells the story of two star-crossed lovers is copyrightable expression, but the idea of a story about two star-crossed lovers is not protected.[45]

A problem arises for contemporary art here because contemporary works frequently blur, and sometimes eviscerate, the line between idea and expression.

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39. Daniel McClean, *Introduction* to DEAR IMAGES: ART, COPYRIGHT AND CULTURE, *supra* note 10, at 11, 19. Note that artistic works are not expressly mentioned in the CDPA section on fixation: "Copyright does not subsist in a literary, dramatic or musical work until it is recorded, in writing or otherwise . . . ." CDPA, *supra* note 35, § 3.2. This adds weight to the criticism that the Act's definition of "artistic work" does not contemplate nontraditional mediums.

40. *See* McClean, *supra* note 39, at 19 (citing Komeraroff v. Mickle, [1988] R.P.C. 2204 (Eng.) (device producing sand patterns was denied protection as a sculpture); Merchandising v. Harpbond, [1983] F.S.R. 32 (Eng.) (makeup on the face of pop star Adam Ant was denied protection as a painting)).

41. In the United States, the originality requirement is closely linked to the constitutional mandate that protected works be "writings" of "authors." *See* discussion *infra* Part III.

42. Ginsburg, *supra* note 12, at 1064.

43. 17 U.S.C. §102(b) ("In no case does copyright protection for an original work of authorship 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."). The distinction between form and idea is also articulated in the British and French copyright laws. W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 333 (3d ed. 1996); Nadia Walravens, *The Concept of Originality in Contemporary Art*, *in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE, *supra* note 10, at 171, 172.

44. Petruzzelli, *supra* note 7, at 119.

45. *Id.*

To help outline some concrete examples of this, your author has arranged a contemporary gallery tour, beginning with several key conceptual[46] works. No flash photography, please.

1. Minimalist Art

First up is Polish artist Roman Opalka, a man who "has painted 'time' exclusively since 1965."[47] His *oeuvre* consists of sequences of numbers painted on a black canvas with white paint.[48] With each successive work, Opalka systematically reduces the tone of the black background by one percent.[49] He estimates by the time he turns seventy, the canvas will be completely white-on-white.[50] Opalka's idea is surely original—his works are meant to represent "the irreversibility of time."[51] But in terms of physical expression, his final canvas will be the same as minimalist artist Kasimir Malevich's *White on White*, a monochromatic white canvas Malevich made to express the idea of absolute artistic purity.[52]

Having fun? Next we turn to German artist Hans Haacke. His *Manet Project* consists of panels listing all of the people who bought and sold Manet's *Bunch of Asparagus* from 1880 until the Wallraf-Richartz Museum in Cologne acquired it.[53] The idea behind his work was an examination of business transactions within the art world.[54] Yet the physical expression of his idea consists only of a compilation of pre-existing data—a form that, at least at first blush, seems about as original as a phone book.[55]

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46. Conceptual art can be defined as art that "challenges the traditional status of the art object as unique, collectable, or saleable," and may take a variety of forms. GODFREY, *supra* note 4, at 4. Conceptual art can be said to have reached its high point in the years 1966-1972, though it can be argued that the discipline has existed since the early 1900s, with its earliest manifestations in Marcel Duchamp's readymades: "Before *Fountain*, people had rarely been made to think what art actually was, or how it could be manifested; they had just assumed that art would be either a painting or a sculpture." *Id*. at 6. Many contemporary artists incorporate conceptual strategies into their works; it is unclear whether their work should be seen as late conceptual, post-conceptual, or neo-conceptual. *Id*. at 7.

47. Roman Opalka The Millennium Project, http://www.jointadventures.org/opalka (last visited Mar. 13, 2007).

48. *Id.*

49. Petruzzelli, *supra* note 7, at 124-25.

50. *Id*.

51. Roman Opalka The Millennium Project, *supra* note 47.

52. Petruzzelli, *supra* note 7, at 122, 125.

53. *Id*. at 121-22.

54. *Id.* at 122.

55. Whether or not a phone book is original enough to receive copyright protection is precisely the issue taken up in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499

And we certainly should not leave this wing before you examine the nothing hanging there to your right. In 1958, French artist Yves Klein began experimenting with the idea of "impalpable works."[56] In his conceptual work *La Vague* (*The Void*), Klein painted the walls of a Paris gallery white, and invited prospective purchasers to buy the "zones of immaterial, pictorial sensitivity" (i.e., invisible canvases) that hung on the walls.[57] The purchaser paid in gold.[58] After the exchange, Klein saved part of the gold to use in his Monogold works.[59] The rest he scattered into the Seine as the purchaser burned the receipt.[60]

Each one of these works occupies an important place in the still-unfolding history of contemporary art. But it is questionable whether any of them would be protected under current copyright law. In minimalist art, the idea itself may constitute a work, and it is in that idea, not its expression, where the originality lies.[61] Because copyright law only protects original expression, artists like Opalka, Malevich, Haacke, and Klein are out of luck. This has led some to argue that the idea-expression dichotomy embedded in current copyright law neglects the nature of contemporary creation, and thus discourages contemporary artists from producing works that challenge traditional forms.[62] Other commentators have argued that extending copyright law to protect conceptual

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U.S. 340 (1991), the leading American case on the originality requirement. *See infra* Part III.A.

56. Walravens, *supra* note 43, at 182.

57. *Id.*

58. *Id.* at 183.

59. *Id.*

60. *Id.* Other artists since Klein have experimented with the concept of an empty gallery. One example: For his final degree assessment in 1992, Gavin Turk, a sculpture student at the Royal College of Art, left nothing in his studio except a circular, blue plaque made to look like those placed on London buildings where famous people have lived, embossed with the words "Gavin Turk, sculptor, worked here, 1989-1991." His teachers promptly failed him. He was soon signed by a leading London gallery, and afterwards a plastic version of the plaque was sold in a limited edition of 100. GODFREY, *supra* note 4, at 382.

61. Walravens, *supra* note 43, at 175.

62. As one commentator on the French originality standard put it:

> When you focus on the form of the work, its concrete execution, it is as though you were insensitive to the intellectual, critical aspect of the work (its "questioning" component) and reacted (stupidly) only to the plastic sensations; as though, instead of adoring the creator, you become infatuated with the craftsman; as though, by analogy with music, you preferred one of the many performers of the composer's works to the composer.

C. Francblin, *L'art Conceptuel Entre les Actes*, ART PRESS 139, 1989, at 45, *quoted in* Walravens, *supra* note 43, at 182.

works would offer artists no new incentive to produce, precisely because the thought and emotion behind these works are what make them distinctive—a collector doesn't want to buy Malevich's *White on White* because there is no giant white square just like it, but instead because the collector appreciates the conception and personality behind the physical work.[63]

2. Appropriation Art

In 1919, French artist Marcel Duchamp painted a large, black moustache and a small goatee on an otherwise exact reproduction of Leonardo da Vinci's Mona Lisa, and changed the title of the work to the initials *L.H.O.O.Q.*[64] Thus began a long line of parodies featuring the most famous female face in Western art.[65] It includes Andy Warhol's *Thirty are Better than One*, which consists of identical reproductions of the Mona Lisa in rows six across and five down. With his work, Warhol intended to critique "a consumer society that loves quantity more than quality and can use a popular icon of highbrow art as a mass-produced product."[66]

Duchamp's and Warhol's parodies present a variation on the idea-expression dichotomy that minimalist art encounters. Contemporary artists frequently create what copyright law calls derivative works: creations that borrow, transform, or appropriate existing work.[67] These types of works include parodies, collage, montage, and even appropriation of entire images.[68] Courts apply the same originality requirements to derivative works that they do to other works.[69] Detailed discussion regarding how each country approaches originality is nearly upon us. But for now, suffice it to say both countries agree that at the very least, a

63. Petruzzelli, *supra* note 7, at 124.

64. Duchamp's modifications, though small, are what give his parody its punch. The initials serve as a French acronym that translates loosely as "She has a hot ass." In French phonetics, it stands for the phrase "Elle a chaud au cul," which translates as "She has hot pants." The initials can also be pronounced phonetically in English as the single word "look." Geri Yonover, *The "Dissing" of Da Vinci: The Imaginary Case of Leonardo v. Duchamp*, 29 VAL. U. L. REV. 935, 973-74 (1995).

65. Other twentieth-century artists who have parodied the Mona Lisa include Charles Addams (*Monster Rally 89*, 1950 (a cartoon of Mona Lisa sitting in a movie theater)); Robert Rauschenberg (*Mona Lisa*, 1958); Jasper Johns (*Figure 7*, 1969); Tom Wesselman (*Great American Nude #35*, 1962); Philippe Halsman (*Mona Dali: What Dali sees when he looks at Mona Lisa*, 1954); Marisol (*Mona Lisa*, 1961-62); Robert Arneson (*George Washington and Mona in the Baths of Coloma*, 1976); Shusako Arakawa (*Portrait of Mona Lisa*, 1971); and Peter Max (*Mona Lisa*, 1991). *Id.* at 972.

66. *Id.*

67. Petruzzelli, *supra* note 7, at 126.

68. Johnson Okpaluba, *Appropriation Art: Fair Use or Foul?*, *in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE, *supra* note 10, at 197, 197.

69. Petruzzelli, *supra* note 7, at 126.

"slavish copy" is not copyrightable.[70] In the context of derivative works, the originality determination will be based solely on the contribution that the artist's additional material makes to the underlying work.[71] This contribution must be distinguishable and non-trivial.[72] Further, to secure a copyright in a derivative work, the derivative work author must either borrow from a public domain source or obtain permission from the owner of the copyright in the underlying work.[73] Some appropriation artists may be able to rely on copyright law's fair use provisions, which allow certain limited reproduction of copyrighted works without permission.[74] However, fair use is unlikely to benefit the artist whose variations are minimal or non-existent in expression, but represent an original idea nonetheless. American artist Jeff Koons's sculpture *A String of Puppies* represents this problem at its extreme. Koons bought a postcard bearing a black-and-white photograph by Art Rogers, which depicted a happy couple sitting on a park bench and holding eight German Shepherd puppies.[75] The back of the postcard bore Rogers's copyright notice. Koons tore it off and sent the image to his fabricators in Italy, who reproduced it faithfully. Koons displayed the sculpture in his exhibition "The Banality Show."[76] When Rogers sued Koons for copyright infringement, the artist argued that the sculpture was "designed to

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70. *See* discussion *infra* Part III.

71. ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 68 (2003). For the British approach, see LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 86 (2001).

72. BENTLEY & SHERMAN, *supra* note 71, at 86. In the United States, the standard is articulated in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) (stating that the author of a derivative work must contribute "something more than a merely trivial variation . . . [n]o matter how poor artistically the author's addition, it is enough if it be his own.").

73. SCHECHTER & THOMAS, *supra* note 71, at 67.

74. The American Copyright Act's fair use provision allows reproduction of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107, and sets out a number of factors to be considered when determining whether a particular use is fair use, including:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. The British "fair dealing" provision, codified in Chapter III of the CDPA, includes similar elements. *See generally* CORNISH, *supra* note 43, at 378-83.

75. Okpaluba, *supra* note 68, at 202.

76. *Id*. at 203.

provide a critique of the conspicuous consumption, greed, and self-indulgence of modern consumer society."[77]

Some artists may even use appropriation art to directly comment on the law by infringing for infringement's sake. In 2000, British artist Damien Hirst agreed to pay "an undisclosed sum" to prevent a copyright suit by the makers of a £14.99 toy. Hirst admitted that his 20-foot-tall bronze sculpture *Hymn*, which had been described by one critic as "a masterpiece" and "the first key work of British art for the twenty-first century," was an enlarged copy of his son Connor's anatomy set.[78] While discussing the work in an interview with *The Economist*, Hirst acknowledged that he anticipated a lawsuit. "I might even get sued for it," he said. "I expect it. Because I copied it so directly. It's fantastic."[79]

3. Readymade Art or Useful Object?

Just two years before he created *L.H.O.O.Q.*, Marcel Duchamp found a urinal in the trash in New York City.[80] He named it *Fountain* and submitted it to the New York Society of Independent Artists' 1917 exhibition.[81] Since then, many artists have incorporated readymade objects—items used by an artist that the artist neither designed nor created—into their works.[82] Examples include Joseph Kosuth's *One and Three Chairs*, an exhibit containing a chair, a photograph of a chair, and a printed dictionary definition of a chair; and Christo's 1991 work *Umbrellas*, which was comprised of 1760 20-foot-tall yellow umbrellas erected near Los Angeles and 1340 similarly sized blue umbrellas erected near Tokyo.[83] Further, artists have used the forms of readymade art to

77. Okpaluba, *supra* note 68, at 203 (citing Rogers v. Koons, 751 F. Supp. 474, 476 (S.D.N.Y. 1990)). The district court ruled in Rogers's favor, holding that the sculpture was an infringing derivative work, and that Koons's use of the photograph was not fair use. For an analysis of the court's rationale, see *id.* at 205-06. For a critique of the decision and commentary on Koons's other legal battles, see Arjun Gupta, Comment, *"I'll Be Your Mirror": Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 U. DAYTON L. REV. 45 (2005).

78. Celia Lury, *Portrait of the Artist as a Brand*, *in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE, *supra* note 10, at 313, 319.

79. *Id.* (quoting Hirst's statements in *Portrait of the Artist as a Brand*, ECONOMIST, Feb. 10, 2001); *see also* Clare Dyer, *Hirst Pays Up for Hymn That Wasn't His*, GUARDIAN, May 19, 2000, *available at* http://www.guardian.co.uk/print/0,,4019792-103690,00.html.

80. J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. & ARTS 159, 159 (1993).

81. *Id.* The society rejected it. *Id.* at 164.

82. *Id*. at 159.

83. *Id.* More recent examples of readymades were presented at the 2003 "Shopping" exhibition at the Tate Liverpool. Swiss artist Sylvie Fleury presented fashionable shoes and clothes placed on pedestals, as well as gilded shopping carts. STALLABRASS, *supra* note 17, at 81. One gallery was turned into a branch of the supermarket chain Tesco by

subvert the conceptual tradition. For example, in 1991, Sherrie Levine commented on Duchamp's *Fountain* by casting her own version in bright, shiny bronze.[84]

In this wing we again encounter the idea-expression dichotomy, since a found object will often not manifest individual expression. Readymades also encounter another copyright problem: To merit protection, a readymade piece of art must possess aesthetic aspects that are separate from the object's functional elements.[85] But when aesthetics and function are one in the same, as is the case with *Fountain*, a readymade work may fall short of the requirement.

III. THE ORIGINALITY REQUIREMENT IN COMPARATIVE PERSPECTIVE: "SPARK" V. "SWEAT"

Before we start the heavy lifting necessary to address the originality requirements in each country, it is worth noting that both of them acknowledge that there is nothing new under the sun. "Original," in the copyright sense, certainly does not mean "first." Common sense seems to tell courts that if the opposite were true, virtually no work would merit protection.[86]

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artist Guillaume Bijl. The market was run by Tesco staff members who would rearrange and reprice items on the shelves. The shelves were lit with museum lights, and no one could actually buy anything. *Id.* at 81-82. Highlights from the "Shopping" exhibition can be viewed at Tate Liverpool, Past Exhibitions, http://www.tate.org.uk/liverpool/exhibitions/shopping (last visited Mar. 8, 2007).

84. GODFREY, *supra* note 4, at 401.

85. The 1976 U.S. Copyright Act protects works of "applied art," a category that includes works that have an attractive appearance, but also have a useful purpose. SCHECHTER & THOMAS, *supra* note 71, at 56. However,

> [T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101. Since the 1976 Act was adopted, several courts have struggled to formulate a workable test for "conceptual separability." SCHECHTER & THOMAS, *supra* note 71, at 59. For a brief summary of these approaches, see *id.* at 59-61.

86. Justice Story's comments in *Emerson v. Davies* provide one example:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout . . . If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should

Beyond that general consensus, however, originality proves to be a very slippery concept. One dictionary definition provides five different meanings:

> orig·i·nal (adj.)
> 1. FIRST existing first, from the beginning, or before other people or things
> 2. NEW completely new and not copied or derived from something else
> 3. CREATIVE possessing or demonstrating the ability to think creatively
> 4. NOT TRADITIONAL representing a departure from traditional or previous practice
> 5. SOURCE FOR COPIES relating to or being something from which a copy or alternative version has been made.[87]

Thus, in defining the term "original," courts are faced with a number of options. "Original" might mean a work is novel or imaginative. It might mean that an individual and personal quality is present in the work. American author Brander Matthews would agree with this definition—he once described the artist as a person "with a special pair of spectacles," whose way of reacting to life experience makes up the core of personal expression.[88] Or maybe it just means "not a copy." Indeed, copyright jurisprudence has considered all of these definitions, and has come up with its own special terminology to describe originality. In the United States, modern courts characterize originality as a

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> be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.

8 F. Cas. 615, 619 (C.C. Mass. 1845).

87. ENCARTA WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 2004) (illustrative sentences omitted). Alexander Lindley provides an illuminating list of famous writers' takes on originality:

> To Voltaire, originality is nothing but judicious imitation; to Lamb, "that individualizing property which should keep the subject distinct in feature from every other subject, however similar, and to common apprehensions almost identical"; to Poe, the ability to bring out "the half-formed, the reluctant, or the unexpressed fancies of mankind"; to James Russell Lowell, "the indefinable supplement" that makes a thought fresh again; to Emerson, the extent to which one steals from Plato; to Faulkner, the capacity "to create out of the materials of the human spirit that which did not exist before"; to C.E.M. Joad, little more than skill in concealing origins.

LINDLEY, *supra* note 1, at 18.

88. LINDLEY, *supra* note 1, at 20.

"spark" of creativity.[89] In Britain, the requirement has traditionally been satisfied so long as the author "sweats," or expends labor.[90] We now turn to the development of these requirements.

A. United States: The "Spark"

1. The Copyright Clause and the Framers' Intent

The origin of the U.S. Constitution's Copyright Clause can be traced to England's 1710 Statute of Anne, which was enacted in response to a long history of censorship by the Crown and Church.[91] In 1557, the Crown issued a charter to a guild of printers called the Stationer's Company ("the Company"), which granted it certain powers to control publication of expressive works.[92] Centralizing authority in this manner was part of an effort to suppress political, philosophical, and religious dissent.[93] It was also meant to prevent printers outside of the Company from competing with it.[94]

The Company had two key powers. First, it enforced early copyright law, which prohibited copying another printer's product.[95] Second, it required all publishers to register their printed works with the Company.[96] This allowed the Company to decide which printer would print what, and gave it the power to force printers to divulge what they intended to publish.[97] The Company's power declined in the second half of the seventeenth century, in part because the Court of Star Chamber and the High Commission of 1641, which had enforced the decrees that gave the Company power, were abolished.[98] The Company's monopoly was then drastically undermined with the Statute of Anne in 1710, which first introduced the author into British copyright law.[99] In it, Parliament gave the rights to expressive works not to the Company or to individual publishers, but to the author.[100]

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89. *See infra* Part III.A.
90. *See infra* Part III.B.
91. Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause* 5 (Cardozo Sch. of Law, Yeshiva Univ., Occasional Papers in Intellectual Prop., Paper No. 5, 1999), *available at* http://www.cardozo.yu.edu/news_events/papers/5.pdf.
92. *Id.* at 5-6.
93. *Id.*
94. *Id.* at 5.
95. *Id.* at 7.
96. *Id.*
97. Hamilton, *supra* note 91, at 7.
98. *Id.* at 8.
99. *Id.*
100. *Id.*

Many early American state constitutions patterned their copyright statutes after the Statute of Anne, placing copyright in the author's hands.[101] This "patchwork" approach to protection under the Articles of Confederation became inconvenient and led to a consensus that the federal government should handle copyright.[102] Thus, one of the powers the Framers' new Constitution gave Congress was the power to enact copyright law.[103]

The Copyright Clause empowers Congress "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."[104] Though the Clause does not use the terms "copyrights" and "patents," it covers both forms of intellectual property. Use of the words "writings" and "authors" to refer to copyright was a stylistic choice.[105]

What exactly the Framers meant by "promote the Progress of Science" is the subject of some debate. Some argue that they intended the Clause to foster learning.[106] In general, scholars have concluded that "science" means knowledge, and that the Framers believed the progress of knowledge was in the national interest.[107] This interest would be served, they reasoned, through the creation of new expressive works.[108]

Why the Framers thought granting authors limited rights to their works would foster new expression—that is, the theory of property that lies behind the Copyright Clause—is the subject of even more debate. Professor Marci Hamilton has argued that the decision to give authors copyright was a purely political decision made out of distrust of concentrated authority.[109] She posits that the Framers decided to reward authors "not for their personal characteristics, their labor, or their relationship to the work, but rather because, out of the available choices, they are the least likely to wield tyrannical power."[110] The Statute of Anne's formula was thus convenient for the Framers because it decentralized authority.[111] This decentralization became even more radical when placed in a constitution that also protects freedom of religion, speech, and expression.[112]

Hamilton also argues that the Copyright Clause, especially as interpreted by the Supreme Court in the landmark case of *Feist Publications, Inc. v. Rural*

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101. *Id.* at 9.
102. *Id.*
103. Hamilton, *supra* note 91, at 9.
104. U.S. CONST. art. I, § 8, cl. 8.
105. ROBERT GORMAN & JANE GINSBURG, COPYRIGHT: CASES AND MATERIALS 4 (5th ed. 1999).
106. Hamilton, *supra* note 91, at 13.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Hamilton, *supra* note 91, at 12.

Telephone Service Co.,[113] squares best with the theory of modern capitalism and its Protestant, and particularly Calvinist, roots, as analyzed by Max Weber.[114] Under this theory, the tie between producer (artist) and product (expressive work) does not matter at all, since what is important is accumulating wealth in order to gain favor with God.[115] Professor Jane Ginsburg disagrees with Hamilton's approach. Right before *Feist* was decided, Ginsburg published the definitive defense of the "sweat" conception of copyright.[116] Her conception, which has the author-work connection at its center, rests on the assumption that "copyright law is a system of incentives intended to prod authors to create useful works for the polity," and posits that John Locke's conception of property as a reward for labor underpins American copyright law.[117] With this philosophical framework in mind, she argues that pre-*Feist*, a de facto dual system of copyright protection existed: one standard applied to works of "high authorship," which depend on creative choices and "implicat[e] both the spirit and the flesh," and another protected the labor and resources invested in creating works of "low authorship."[118] As it turns out, these two conceptions of copyright are key to our comparative originality-standard analysis. In addition to representing a tension in American copyright law, they also represent the main difference between the British and American standards.

2. Key American Statutory Provisions

The first federal Copyright Act was adopted in 1790; another came in 1802; the next was passed in 1909, and remained in force for nearly seventy years.[119] The Copyright Act of 1976 is the copyright statute currently in force in the United States.[120] It was passed to revise and modernize the Copyright Act.[121] As mentioned above, the Act extends copyright protection to "original works of authorship fixed in any tangible medium of expression."[122] In addition, the Visual Artists Rights Act of 1990 (VARA), now codified in part in the Copyright Act,

113. *See* discussion *infra* Part III.A.4.

114. Hamilton, *supra* note 91, at 23-26.

115. *Id.* at 26.

116. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990), *discussed in* Hamilton, *supra* note 91, at 14.

117. Hamilton, *supra* note 91, at 14.

118. Jane C. Ginsburg, *No "Sweat"?: Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 339 (1992).

119. GORMAN & GINSBURG, *supra* note 105, at 4-6.

120. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.).

121. GORMAN & GINSBURG, *supra* note 105, at 4-6.

122. Copyright Act of 1976, 17 U.S.C. § 102(a) (2002).

grants limited moral rights to a narrowly defined group of visual artists.[123] Though VARA does not directly factor into the American originality analysis, it still represents a significant change in the country's copyright scheme and deserves a mention at this point.

American copyright law has historically protected authors' pecuniary interests—that is, their economic rights in their creations.[124] Many countries—most notably France—also protect authors' moral rights.[125] The concept of moral rights rests upon the idea that artists express their unique personalities through their works.[126] Thus, countries with moral rights systems give authors rights that protect the integrity of their works (the right of integrity) and require recognition of the author as creator (the right of attribution).[127] In any given country, these rights may also include the right of disclosure (an exclusive right to decide whether or not a work should be publicly disseminated), the right of withdrawal (the ability to recall all existing copies of a work), and the right to prevent excessive criticism of an author.[128] In many countries, moral rights are considered inalienable, and the author retains them even after, and in spite of, a transfer of economic rights.[129] A famous case involving French painter Bernhard Buffet's refrigerator illustrates the power moral rights can give authors. Buffet painted all six sides of a refrigerator but only signed one panel, confirming he thought of the

123. Pub. L. No. 101-650, 104 Stat. 5128 (codified in part at 17 U.S.C. § 106A). The statute gives limited moral rights to "the author of a work of visual art." *Id*. The Copyright Act defines "work of visual art" as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101. For an interesting analysis of the circumstances surrounding VARA's passage, see Yonover, *supra* note 64, at 964-68.

124. Yonover, *supra* note 64, at 944.

125. *Id*. at 948.

126. *Id*. at 947.

127. *Id*.

128. *Id*.

129. GORMAN & GINSBURG, *supra* note 105, at 537.

finished piece as one painting.[130] When a collector tried to auction off one of the panels, Buffet sued, arguing that the collector had violated his right of integrity in the whole refrigerator.[131] The Paris Court of Appeals and the Court of Cassation agreed, and ordered that there be no separate sale of one panel.[132]

Though the additional rights VARA grants are not nearly as strong as the rights protected in other countries—they are, for example, still subject to the Copyright Act's fair-use provisions—they do include rights of attribution and integrity.[133] There have been some disputes about the Act's coverage, but it is rarely asserted in litigation.[134] Still, its existence raises the stakes for receiving copyright protection, since a work that does not meet the originality standard is unlikely to fall within VARA's scope, either.

3. American Originality Case Law

a. *Burrow-Giles Lithographic Co. v. Sarony* (1884)

Sarony helps illustrate the flexible nature of American copyright law in accommodating new forms of art.[135] In this case, the Supreme Court held that a

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130. *See* Yonover, *supra* note 64, at 949 (citing Buffet v. Fersing, Cour d'appel [CA] [regional court of appeal] Paris, May 30, 1962, D. Jur. 570, *aff'd*, Cass. 1e civ., July 6, 1965).

131. *Id*. at 949.

132. *Id*.

133. *See* 17 U.S.C. § 106A. These rights mirror the rights specified in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic works, to which the United States adhered in 1989:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, *last amended* Sept. 28, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. Nations that are members of the Berne Convention are required to meet the minimal levels of protection set out in article 6*bis*. WORLD INTELLECTUAL PROP. ORG. [WIPO], INTERNATIONAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS 3, *available at* http://www.wipo.int/copyright/en/activities/pdf/international_protection.pdf (last visited Mar. 20, 2007) [hereinafter WIPO Document].

134. GORMAN & GINSBURG, *supra* note 105, at 540.

135. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). For a helpful parallel discussion of this case and the others in this section, see Ryan Littrell, Note,

photo of Oscar Wilde was sufficiently original to receive copyright protection.[136] The Court first decided that a photograph is a "writing" that is the production of an "author," thus allowing photographs to fall within the protection of the Copyright Clause.[137] In doing so, the Court relied on the construction placed on the Constitution by the first two Copyright Acts, since their adoption was contemporaneous with the Constitution's formation.[138] Because the two acts included "maps, charts, designs, engravings, etchings, cuts, and other prints" on their lists of protected works, the Court reasoned that Congress must have intended the word "writing" to cover "all forms of writing, printing, engraving, etching, [etc.], by which the ideas in the mind of the author are given visible expression."[139] It concluded that the only reason photographs were not included on the revised 1802 list was because they had not yet been invented.[140]

The Court then addressed the question of whether or not a camera's mechanical reproduction of images present in nature could qualify as the original work of an "author."[141] The Court emphasized that it did not reach the authorship question with respect to the "ordinary production of a photograph," in which the photographer snaps the picture and does nothing else.[142] But the photographer who took the Oscar Wilde photo had done more than that—he had chosen the costume, set, and lighting; he had posed Wilde in front of the camera and "suggest[ed] and evok[ed] the desired expression."[143] In short, the photographer created the photo "entirely from his own mental conception, to which he gave visible form" by making various aesthetic choices.[144] In addition, the Court found the photograph to have artistic merit, stating that the photograph was a "useful,

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Toward a Stricter Originality Standard for Copyright Law, 43 B.C. L. REV. 193, 196-204 (2001).

136. *Sarony*, 111 U.S. at 60. The photo in question was produced in 1882 by Napoleon Sarony, a prominent portrait photographer based in New York City. Sarony had studied painting in Paris and had come to New York by way of England. He specialized in celebrity photography and is reported to have made more than 40,000 celebrity portraits, including those of Mark Twain and Sarah Bernhardt. Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 406 (2004). See this article for more on the photographer, as well as a thorough and fascinating description of the attitude toward photography as art around the time *Sarony* was decided.

137. *Sarony*, 111 U.S. at 57.

138. *Id.*

139. *Id*. at 58.

140. *Id.*

141. *Id.* at 58-59.

142. *Id.* at 59.

143. *Sarony*, 111 U.S. at 60.

144. *Id.*

new, harmonious, characteristic, and graceful picture."[145] These two findings led the Court to adjudicate the photo an original work of authorship.[146]

b. *Bleistein v. Donaldson Lithographic Co.* (1903)

Bleistein laid the foundation for the modern American originality definition in two important ways.[147] First, it established the tenet that artistic merit plays no part in determining whether a work is copyrightable.[148] The Supreme Court reversed the Sixth Circuit Court's decision, which had denied copyright protection to three color chromolithographs (images fixed on a stone or metal plate) used to advertise a circus.[149] The Sixth Circuit had held that the advertisements had "no connection with the fine arts" to give them "intrinsic value," and thus did not meet the Copyright Clause's requirement of promoting the progress of science and useful arts.[150] The Supreme Court, in a famous opinion by Justice Oliver Wendell Holmes, held that original expressive works used purely for commercial purposes may be copyrighted.[151] Justice Holmes rejected the idea that originality should be decided with reference to artistic merit, reasoning that "[i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves the final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[152]

In addition to excluding artistic merit from the originality equation, *Bleistein* helped spark the, well, "spark" standard. Each chromolithograph depicted the owner of the circus in one corner, as well as various circus scenes.[153] The Court explained that the illustrations did not lose protection just because they reproduced images present at the circus:

> The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it

145. *Id.*
146. *Id.*
147. Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903); SCHECHTER & THOMAS, *supra* note 71, at 25.
148. *Bleistein*, 188 U.S. at 251.
149. *Id.* at 239.
150. *Id.* at 252-53 (Harlan, J., dissenting).
151. *Id.* at 251 (majority opinion).
152. *Id.*
153. *Id.* at 248.

> something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[154]

This deferential approach paved the way for a low, but personality-centered, American originality standard.[155]

c. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* (1951)

In *Catalda*, the Second Circuit Court of Appeals used the *Bleistein* standard to determine the originality of mezzotint engravings.[156] The mezzotints were "fairly realistic reproduction[s]" of well-known eighteenth- and nineteenth-century oil paintings that had fallen into the public domain.[157] Engravers produced the mezzotints by etching the outlines of the paintings onto copper plates.[158] The plates were then coated in colored ink and used to print reproductions.[159] The district court had found that "[t]he work of the engraver upon the plate requires the individual conception, judgment and execution by the engraver on the depth and shape of the depressions in the plate."[160] Because of this element of discretion, the court reasoned, "[n]o two engravers can produce identical interpretations of the same oil painting."[161]

The Second Circuit agreed that the *Bleistein* test was satisfied.[162] It reasoned that in copyright law, unlike in patent law, a work need not be novel, innovative, or involve "a step beyond the prior art" to merit protection.[163] Instead, originality "means little more than a prohibition of actual copying."[164] Further, the court held that a work may be adjudicated original even if the author did not intend to create an original work.[165] A new version of a work in the public domain that contains a "distinguishable variation" on the old work is copyrightable, even if the variation was an accident.[166] "A copyist's bad eyesight

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154. *Bleistein*, 188 U.S. at 249-50 (citations omitted).

155. *Id.*; *see also* SAMUELS, *supra* note 15, at 128.

156. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

157. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 74 F. Supp. 973, 975 (S.D.N.Y. 1947), *aff'd*, 191 F.2d 99 (2d Cir. 1951).

158. *Id*.

159. *Id.*

160. *Id.*

161. *Id.*

162. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

163. *Id.* at 104 (quoting A.C. Gilbert Co. v. Shemitz, 45 F.2d 98, 99 (2d Cir. 1930)).

164. *Id.* at 103 (quoting Hoague-Sprague Corp. v. Frank C. Mayer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929)).

165. *Id.* at 104.

166. *Id.* at 103-04.

or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may . . . copyright it."[167]

d. *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991)

In *Feist*, the Supreme Court was asked to address the copyrightability of telephone book listings.[168] Feist Publications, a company specializing in telephone books covering large geographic areas, had used some of the listings produced by Rural Telephone Service, a local telephone company serving northwest Kansas, without a license.[169] In an opinion by Justice Sandra Day O'Connor, the Court held that Rural Telephone's white pages listings could not be protected by copyright because the facts underlying the listings were not copyrightable, and because Rural Telephone's arrangement of the data was not sufficiently original to merit protection.[170] Both of these reasons for the Court's decision merit some unpacking.

First, the Court held that facts, whether presented alone or as part of a compilation, may not be copyrighted.[171] A factual compilation may merit copyright protection if it shows sufficient originality in selection or arrangement of the data, but even then, copyright protection only extends to the selection and arrangement, not to the underlying facts.[172] This holds true even if the compiler expended considerable effort in gathering the facts in the first place.[173] In so holding, the Court flatly rejected the "sweat of the brow" doctrine of copyright protection, which holds that the purpose of copyright is to reward authors for their work:

> The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.[174]

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167. *Id.* at 104.
168. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 340 (1991).
169. *Id.* at 342-43.
170. *Id.* at 363-64.
171. *Id.* at 350.
172. *Id.* at 348.
173. *Id.* at 349.
174. *Feist*, 499 U.S. at 349. In her analysis of the philosophical underpinnings of the Copyright Clause, Professor Marci Hamilton argues that the Court's rejection of the "sweat

Before *Feist*, some lower courts had applied the "sweat of the brow" doctrine in factual-compilation cases.[175] The Court explained that these lower courts had misconstrued ambiguous language in the 1909 Copyright Act as not requiring originality for factual compilations.[176] Further, the Court stated that the 1976 revisions to the Copyright Act "[left] no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works."[177] Originality, the Court said, is the *sine qua non* of copyright and is required by the Constitution.[178] "For a particular work to be classified 'under the head of writings of authors,' . . . 'originality is required'. . . and originality requires independent creation plus a modicum of creativity."[179] Thus, to be adjudicated original, a work must pass a two-part test:

> To qualify for copyright protection, a work must be original to the author . . . . Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.[180]

The Court then applied this test to Rural Telephone's listings.[181] Though it acknowledged that the originality standard does not require facts to be selected or arranged in a novel way, a compiler's choices "cannot be so mechanical or routine as to require no creativity whatsoever."[182] The Court found that Rural's arranging subscribers' basic information—name, town, and telephone number—alphabetically by surname fell short of this standard.[183] Such arrangement is a

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of the brow" doctrine is also tinged with First Amendment concerns. Hamilton says the Court was worried about the impact on speech because "[c]opyright chills repetitive speech, and the Court is clearly loathe to chill speech that contains facts." Hamilton, *supra* note 91, at 16-17. Hamilton likens the Court's approach here to its approach in *New York Times Co. v. Sullivan*. In that case, the Court reasoned that speech about public officials is too important to permit fear of liability making people reluctant to speak. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). It thus established that in order to win a defamation case, a public official must prove knowing falsity or reckless disregard for the truth on the part of the speaker. *Id*. at 279. Though *Feist* does not explicitly refer to the First Amendment, Hamilton posits that "the structure and tone of the underlying argument is highly reminiscent of the First Amendment cases addressing defamation." Hamilton, *supra* note 91, at 16-17.

175. *Feist*, 499 U.S. at 352.
176. *Id.*
177. *Id.* at 359-60.
178. *Id.* at 345-46.
179. *Id.* at 346.
180. *Id.* at 345 (citations omitted).
181. *Feist*, 499 U.S. at 362.
182. *Id.*
183. *Id.* at 363-64.

"time-honored tradition," one that is "so commonplace that it has come to be expected as a manner of course . . . It is not only unoriginal, it is practically inevitable."[184] The Court reasoned that it had to draw the line between original and unoriginal somewhere—some works must fail the originality test, and the Court stated that it "[could not] imagine a more likely candidate."[185]

e. Recent Originality Cases

Several cases concerning the originality standard have been decided since *Feist*, but a few in particular are worth examining.

In *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, the Second Circuit Court determined that a telephone directory Key Publications compiled specifically to serve the Chinese-American community in New York City met the *Feist* test.[186] Although the Key directory contained listings previously printed in a Chinese restaurant directory, the court found it to be, on the whole, original in data selection.[187] It relied on district court findings establishing that the compiler, Ms. Wang, had made conscious choices in selecting which businesses to list, excluding those that she did not think would remain open for very long.[188] The court also held the directory was original in data arrangement because some of the categories listed in the yellow pages section, such as "BEAN CURD & BEAN SPROUT SHOPS," were of particular interest to the Chinese-American community.[189] This arrangement "entailed the *de minimis* thought" needed to meet the *Feist* standard.[190]

Ets-Hokin v. Skyy Spirits, Inc., decided by the Ninth Circuit Court of Appeals in 2000, shows just how far the categorization of art has come since *Sarony*.[191] In this case, the court said it found "no difficulty" reaching the conclusion that the photographs the plaintiff took of a Skyy Vodka bottle were original.[192] In so holding, it recounted much of the case law surveyed here, and adopted the view that photographs generally satisfy the originality requirement.[193] The court explained that:

> The vast majority of works make the [creativity] grade quite easily, as they possess some creative spark, "no matter how

184. *Id.* at 363.
185. *Id.* at 364.
186. 945 F.2d 509, 513 (2d Cir. 1991).
187. *Id.*
188. *Id.*
189. *Id.* at 514.
190. *Id.*
191. 225 F.3d 1068 (9th Cir. 2000).
192. *Id.* at 1077.
193. *Id.* at 1076.

> crude, humble or obvious" . . . In assessing the "creative spark" of a photograph, we are reminded of Judge Learned Hand's comment that "no photograph, however simple, can be unaffected by the personal influence of the author."[194]

The court described the conscious, personal choices that contributed to the photographs' originality:

> In all three photos, the bottle appears in front of a plain white or yellow backdrop, with back lighting. The bottle seems to be illuminated from the left (from the viewer's perspective), such that the right side of the bottle is slightly shadowed. The angle from which the photos were taken appears to be perpendicular to the side of the bottle, with the label centered, such that the viewer has a "straight on" perspective. In two of the photographs, only the bottle is pictured; in the third, a martini sits next to the bottle.[195]

Though these cases seem to focus on the primacy of creative choices, some scholars argue that courts continue to invoke the "sweat of the brow" doctrine in spite of its flat rejection in *Feist*. Professor Denise Polivy cites two cases that she contends equate effort with originality.[196] In *U.S. Payphone, Inc. v. Executives Unlimited of Durham, Inc.*, the Fourth Circuit Court of Appeals held that U.S. Payphone's guidebook to the coin-operated telephone market was copyrightable.[197] The district court had found that the guidebook was "the result of hundreds of hours of reviewing, analyzing, and interpreting state tariffs and regulations of the fifty states and the District of Columbia," and that Payphone ultimately organized those findings into "a 'simple and readable' format of fifty-one pages."[198] Though this arrangement sounds a bit like the commonplace, almost perfunctory one that was denied protection in *Feist*, the Fourth Circuit found that U.S. Payphone's selection and organization met the "spark" standard.[199] Five years later, in *Publications International, Ltd. v. Meredith Corp.*, the Seventh Circuit Court of Appeals, a "sweat of the brow" circuit pre-*Feist*, held that the ingredient lists for recipes contained in a cookbook protected by a compilation copyright were not copyrightable because they were statements

194. *Id.* (citations omitted).

195. *Id.* at 1071-72.

196. Denise R. Polivy, Feist *Applied: Imagination Protects, but Perspiration Persists – The Bases of Copyright Protection for Factual Compilations*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 773, 830-32 (1998).

197. U.S. Payphone, Inc. v. Executives Unlimited of Durham, Inc., 18 U.S.P.Q. 2049 (4th Cir. 1991).

198. *Id.* at 2050-51.

199. *Id.* at 2051.

of fact.[200] But in discussing the principles of compilation copyright, the court focused on the effort involved in making a compilation, not the creativity.[201] It stated that "a compilation's originality flows from the efforts of 'industrious collection' by its author,"[202] citing its decision in *Schroeder v. William Morrow & Co.*,[203] which in turn cited *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*—a seminal "sweat of the brow" case identified by Justice O'Connor in *Feist* as a case that misunderstood the 1909 Copyright Act.[204] These cases demonstrate that drawing the line between creative labor and just plain old labor can be a difficult task. It's one we dive into straightaway in the next section.

B. The United Kingdom: "Sweat"

1. The 1988 Copyright, Designs and Patents Act

Britain's 1988 Copyright, Designs and Patents Act (CDPA), the copyright statute currently in force in the United Kingdom, states that "[c]opyright is a property right which subsists . . . in the following descriptions of work—original literary, dramatic, musical or artistic works."[205] The word "original" was not present in the country's first Copyright Act, enacted in 1842.[206] The requirement was added in a revised version enacted in 1911.[207] But the definition of "work," as fleshed out by the courts as British copyright law developed, is closely linked to the definition of "original."[208]

Two pertinent differences between the CDPA and the American Copyright Act should be noted here. The first difference is found in the British moral rights provisions, which, as mentioned in the American analysis, raise the stakes for gaining copyright protection. Unlike the U.S. Copyright Act as amended by VARA, which limits moral rights to a narrow class of visual artists, the current U.K. moral rights code extends to all copyright works protected by the statute.[209] However, the British protections contain broad exceptions and

200. 88 F.3d 473 (7th Cir. 1996).

201. Polivy, *supra* note 196, at 831.

202. Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480 (7th Cir. 1996).

203. Schroeder v. William Morrow & Co., 566 F.2d 3, 5 (7th Cir. 1977).

204. Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 87-88 (2d Cir. 1922).

205. CDPA, *supra* note 35, § 1(1)(a). The CDPA applies to the whole of the United Kingdom, which includes England, Wales, Scotland, and Northern Ireland. *Id.* § 157.

206. CORNISH, *supra* note 43, at 334.

207. *Id.*

208. *Id.* at 333.

209. CDPA, *supra* note 35, § 2(2) provides:

qualifications, as well as provisions that make moral rights more easily waived than the American statute allows.[210]

Second, and more important to this analysis, is that the CDPA has been amended in the process of implementing the EU Database Directive.[211] In the area of data compilations, the Act now only protects works that are the author's "own intellectual creation," which seems to hold compilations to a *Feist*-like standard.[212] Outside the realm of compilations, however, the standard has traditionally been lower than the *Feist* standard.

2. British Originality Case Law

a. The Traditional Approach: No Creative "Sweat" Required

According to the traditional understanding of originality, in order to achieve copyright protection under the CDPA, the author must satisfy what is often referred to as the common-law "sweat" standard: He or she must expend sufficient "skill, judgement and labour," or "selection, judgement and

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> In relation to certain descriptions of copyright work the following rights conferred by Chapter IV (moral rights) subsist in favour of the author, director or commissioner of the work, whether or not he is the owner of the copyright—
>
> (a) section 77 (right to be identified as author or director),
> (b) section 80 (right to object to derogatory treatment of work), and
> (c) section 85 (right to privacy of certain photographs and films).

210. *See generally* Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 245-63 (1995).

211. The EU Database Directive requires European Union member countries to harmonize their laws regarding copyright protection for databases, which it defines as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20, art. 1.2, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML. The Directive seems to set out a standard that is equivalent to the *Feist* standard: "[D]atabases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright." *Id.* art. 3.1.

212. The Copyright and Rights in Databases Regulations, 1997, S.I. 3032/1997 (U.K.), amended the CDPA by adding databases to the list of protected literary works in section 3(1), and by adding section 3(A), which provides: "For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation."

experience," or "labour, skill and capital" in creating it.[213] This last formulation comes from the Privy Council's[214] opinion in *Macmillan v. Cooper*.[215] In *Macmillan*, the plaintiffs claimed that their abridged translation of Plutarch's *Life of Alexander*, to which they had added marginal notes for students, deserved copyright protection.[216] The text itself reduced the original translation by about 20,000 words.[217] The Privy Council, led by Lord Atkinson, held that while the abridgement of the original text was not copyrightable, the marginal notes were, because they "[made] the book more attractive, the study of it more interesting and informing, enhance[d] its efficiency, and consequently increase[d] its value as an educational manual."[218] He followed this with a basic definition of the "sweat" standard:

> To secure copyright it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.[219]

Walter v. Lane,[220] which was decided more than twenty years before *Macmillan*, stands for the proposition that this change in the "quality or character" of the raw material does not have to be the result of creative work. In this case, the House of Lords found that a reporter for the *Times of London* who feverishly transcribed a series of speeches delivered by politician Lord Rosebury was the author of the verbatim account of the speeches.[221] Rosebury did not hold the copyright because he had not fixed the speeches in any medium.[222] Instead, the reporter was entitled to authorship status, because he had fixed the speeches, and

213. CORNISH, *supra* note 43, at 333.

214. The British Privy Council is the court of final appeal for many Commonwealth countries that were formerly part of the British Empire, as well as Britain's remaining overseas possessions. Privy Council decisions are not binding on courts in Great Britain. However, since the Council judges are usually the same judges who sit in the House of Lords (the final court of appeal in Great Britain), its decisions are considered highly persuasive. More information is available at Privy Council Office, www.privy-council.org.uk.

215. (1924) 130 L.T.R. 675 (U.K.), *cited in* Ronan Deazley, *Photographing Paintings in the Public Domain: A Response to Garnett*, 23 EUR. INTELL. PROP. REV. 179, 180 (2001).

216. *Id.*, *cited in* Deazley, *supra* note 215, at 180.

217. *Id.*, *cited in* Deazley, *supra* note 215, at 180.

218. *Id.* at 681, *quoted in* Deazley, *supra* note 215, at 180.

219. *Id.* at 678-79, *quoted in* Deazley, *supra* note 215, at 180.

220. [1900] A.C. 539 (H.L.) (appeal taken from Eng.) (U.K.).

221. *Id.*

222. *Id.*

because "an 'author' may come into existence without producing any original matter of his own."[223]

Under this definition, "original" basically means "not a copy."[224] Like the "modicum" of creativity that must be present to qualify for protection under the American "spark" standard, a threshold measure of skill, labor and judgment must be present for copyright protection to extend in Britain.[225] The Chancery Division's decision in *University of London Press, Ltd. v. University Tutorial Press, Ltd.*[226] is sometimes cited as the classic statement of the British originality definition.[227] In it, Justice Peterson explained:

> The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.[228]

In other words, under the traditional British approach to the originality standard, an author need not be creative at all, so long as he or she works to make something other than a copy. British law does not require that the work manifest aesthetic or creative choices like those stressed in *Sarony*.[229] Even a simple, casual snapshot is protected.[230] In fact, under the decision in *Graves' Case*, which was handed down several years before *Sarony*, a photograph that is nothing more than a faithful reproduction of an existing work of art is protected.[231] Further, in deciding whether this minimal standard of effort has been met in the literary realm, courts may consider even commercial skill.[232] In one case, the Privy Council found that a fixed-odds soccer pool form qualified as a protected literary

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223. Walter v. Lane, [1900] A.C. 539 (Lord James of Hereford, Judgment 3).

224. CORNISH, *supra* note 43, at 337.

225. *Id.* at 334-35.

226. (1916) 2 Ch. 601 (U.K.), *cited in* CORNISH, *supra* note 43, at 334-35.

227. CORNISH, *supra* note 43, at 334.

228. Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd., (1916) 2 Ch. 601, 608-09, *quoted in* CORNISH, *supra* note 43, at 334-35.

229. CORNISH, *supra* note 43, at 339. Also, recall the American standard as articulated in *Sarony*. *See supra* Part III.A.3.a.

230. CORNISH, *supra* note 43, at 339.

231. Graves' Case, (1869) L.R. 4 Q.B. 715 (U.K.).

232. CORNISH, *supra* note 43, at 334.

work because of the skill exercised in selecting the particular forms of bet used.[233] Similarly, the case law regarding copyright for visual works of art holds the requisite skill, labor, and judgment to be minimum. Courts have extended copyright to a drawing of a human hand used to show voters where to mark their ballots,[234] a simple label design for a candy tin,[235] and a few decorative lines arranged on a package label.[236]

b. Moving Toward a "Spark" Standard?

There is considerable debate over whether the traditional "sweat" standard should continue to be the originality requirement in Britain, especially in light of the country's obligations under international copyright agreements. In fact, there is considerable debate over whether the definition of "sweat" is as unambiguous as traditionalists assert it is. The U.S. District Court for the Southern District of New York's 1998 decision in *Bridgeman Art Library Ltd. v. Corel Co.*,[237] which considered both the American and British originality standards, has galvanized the issue. The next two sections take these matters in turn.

i. The Influence of International Agreements

The United Kingdom is party to all of the major international copyright agreements, including the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[238] Both of these agreements impose supranational rules on signatory countries, including certain substantive minimum standards for protection.[239] The term "originality" is not defined in these treaties,

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233. Ladbroke v. William Hill, [1964] All E.R. 465 (H.L.) (U.K.).

234. Kenrick v. Lawrence, (1890) 25 Q.B.D. 99 (U.K.).

235. Tavener Rutledge v. Specters, (1957) R.P.C. 498 (U.K.).

236. Walker v. British Picker, (1961) R.P.C. 355 (U.K.).

237. 36 F. Supp. 2d 241 (S.D.N.Y. 1998).

238. GORMAN & GINSBURG, *supra* note 105, at 848-49; *see also* Berne Convention, *supra* note 133; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

239. The Berne Convention provides two basic elements of protection: (1) "national treatment," which provides that a member state must extend works that originate in another member state the same protection as works created by its own nationals, and (2) minimum rights, which means that the laws of individual member states must provide the minimal protections set out in the Convention. WIPO Document, *supra* note 133, at 4. It also provides that copyright protection may not be made conditional upon compliance with any

and the requirement that a work be "original" is not mentioned, either.[240] However, the history of the Berne Convention may be used to inform its textual interpretation.[241] Some scholars have argued that the traditional "sweat" standard is incompatible with the Berne Convention's definition of originality as informed by this history, and may also be incompatible with the TRIPS Agreement, since TRIPS incorporates most of the Berne Convention's substantive provisions.[242] Specifically, Professor Daniel Gervais has posited that the Berne Convention uses the term "original" to mean a work to which the author has given "a personal and original character."[243] This formulation originated during the Berlin Revision

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formality, including registration and deposit of copies. *Id.* The TRIPS Agreement incorporates articles 1 through 21 of the Berne Convention by reference with one exception—it excludes the moral rights provisions of Berne Convention, article 6*bis*. TRIPS Agreement, *supra* note 238, pt. II, § 1, art. 9(1).

240. The Berne Convention provides a lengthy illustrative list of protected works, but does not on its face require originality:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Berne Convention, *supra* note 133, art. 2(1).

At various later points in the Convention, the word "original" is used, but its meaning is unclear. For example, article 2(3) provides that "[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to copyright in the original work." Article 8 then provides that "[a]uthors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works." Articles 11(2), 11*ter*(2), and 14(2) contain similar language. *See generally* Daniel J. Gervais, *The Compatibility of the Skill and Labour Originality Standard with the Berne Convention and the TRIPs Agreement*, 26 EUR. INTELL. PROP. REV. 75 (2004).

241. Gervais, *supra* note 240, at 79 (explaining that article 32 of the Vienna Convention on the Law of Treaties allows preparatory work for an international instrument to be considered).

242. *Id.* at 75-80.

243. *Id.* at 77.

Conference in 1908, where signatory countries considered whether cinematographic productions[244] should be protected by the Convention.[245] Cinematographic productions were not added to the Convention's list of protected works until 1928, but as a temporary solution, the Berlin Conference drafted the following article: "Cinematographic productions shall be protected as literary or artistic works if, by the arrangement of the acting [or] of the combination of the incidents represented, the author has given the work a personal and original character."[246] This article is considered the predecessor of the Berne Convention's article 14*bis*, which states that "a cinematographic work shall be protected as an original work."[247] Gervais concludes that the legislative history of this article, as well as two others in the Berne Convention, suggest the drafters meant for the Convention's definition of originality to be more personality-centered than the traditional British definition.[248] Whether the British standard would also have to be changed to bring its copyright system into compliance with the TRIPS Agreement requires a somewhat more complex analysis, but it is analysis worth completing—a violation of TRIPS may lead to the establishment of a dispute-resolution panel, which can issue a binding decision backed up by the possible application of tariff-based and other trade sanctions.[249]

This potential incompatibility has also prompted the conclusion that the "sweat" standard is perhaps not as firmly rooted in the British tradition as previously believed. For example, one main policy objective behind the "sweat" standard is to protect investment of labor and capital that result in an expressive work.[250] In this way, the granting of copyright in Britain is often used to compensate for lack of an adaptable unfair competition law.[251] Professor Gervais posits that using the originality standard as a substitute for a sufficiently strong unfair competition law is "a historic error."[252] That is, if early courts, like those who decided *Walter*, *Macmillan*, and *University of London Press*, "had been able to use the weapon of the tort of misappropriation," it would not have been necessary for them to define originality in terms of minimal skill, labor, and judgment.[253] Further, he argues that the "sweat" standard is inconsistent with the

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244. A.k.a. movies, which were new technology at the time. *Id.*

245. *Id.*

246. *Id.* (quoting the article text as reprinted in WIPO, BERNE CONVENTION CENTENARY 1886-1986, at 229 (1986)).

247. Gervais, *supra* note 240, at 77.

248. *Id.*

249. *Id.* at 78 (citing TRIPS Agreement, *supra* note 238, art. 64).

250. CORNISH, *supra* note 43, at 335.

251. *Id.*

252. Gervais, *supra* note 240, at 78.

253. *Id.* Gervais points to the U.S. Supreme Court's controversial 1918 decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918), which protected news reports by applying the tort of misappropriation rather than copyright, to argue that equating originality with skill, labor and judgment was a product of practical applications

intent behind the passage of the 1710 Statute of Anne, which was enacted for the "encouragement of learned men to compose and write useful books."[254] If this language is interpreted as valuing creativity, not utility, then the Statute of Anne might function similarly to the American constitutional requirement that copyright "promote the Progress of Science."[255]

ii. *Bridgeman Art Library, Ltd. v. Corel Corp.* and Its Implications

Prompted by the decision of the U.S. District Court for the Southern District of New York in *Bridgeman Art Library, Ltd. v. Corel Corp*., which found that an exact photographic representation of a painting in the public domain is not an original work under the British standard,[256] scholars in the United Kingdom have started debating the existence of originality in such photos.[257] Bridgeman, an English company with an office in New York City, took color photographs of a number of famous works of art.[258] It distributed the images on transparencies, as well as digitally in CD-ROM format, to clients who paid licensing fees.[259] Bridgeman alleged that Corel, a Canadian company that distributed similar CD-

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of British law, not deeply held convictions about intellectual property. Gervais, *supra* note 240, at 78.

254. Gervais, *supra* note 240, at 76; Preamble to the Statute of Anne, 1710, 8 Anne c. 19 (Eng.).

255. *See supra* Part III.A.

256. 36 F. Supp. 2d 241 (S.D.N.Y. 1998).

257. Ginsburg, *supra* note 12, at 1083. Creating painted reproductions of photos is common practice among contemporary artists, and the merit of the technique is a hot topic in the artistic community. *See generally* Linda Yablonsky, *Slides and Prejudice*, ARTNEWS, Apr. 2006, *available at* http://artnews.com/issues/article.asp?art_id=2020.

258. Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 423 (S.D.N.Y. 1998). In response to a flurry of post-judgment submissions, the court revisited the issues in this case early the following year. Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999). Bridgeman moved for reargument and reconsideration in late 1998, asserting that the court erred on the issue of originality by misconstruing British law in failing to follow *Graves' Case*. *Id.* at 192. Around the same time, the court received a letter from Professor William Patry, the author of a copyright treatise, which argued that the court erred in applying U.K. law to the originality question. *Id.* In a memorandum opinion, the court concluded that U.S. law governed the originality question, and that the photos were not original under the American standard. *Id.* at 195-97. It went on to say that Bridgeman's copyright claim would fail even if U.K. law governed, due to "the antiquity of *Graves' Case* and the subsequent development of the law of originality in the United Kingdom." *Id.* at 197. The court cited *Interlego A.G. v. Tyco Industries, Inc.*, discussed below, to support its reasoning. *Id.* at 198.

259. *Bridgeman*, 25 F. Supp. 2d at 423.

ROMs, had copied Bridgeman's transparencies.[260] Corel had distributed some of its CD-ROMs in the United States, so some of the alleged infringements occurred in the United States.[261] The district court found that the Berne Convention could not be the source of law for the decision because the Convention is not self-executing.[262] It concluded that American law governed the infringement claims, but that British law governed the question of copyrightability.[263]

In determining that Bridgeman's reproductions were not copyrightable, the district court relied heavily on the dictum of Lord Oliver in *Interlego A.G. v. Tyco Industries, Inc.*,[264] a case heard by the Privy Council.[265] *Interlego* concerned reproductions of design drawings made to plan the manufacture of plastic Lego blocks.[266] The Council rejected copyright protection for the reproductions, finding that:

> It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, . . . [however] no one would reasonably contend that the copy painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality. . . . There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work.[267]

The district court cited this passage, commenting on British law's "substantial similarity" to American law in the originality area, and concluded that it would have reached the same decision under American law.[268]

So, is Britain's traditional "sweat" standard on its way out the door? If the *Bridgeman* scenario came before the U.K. courts today, what would the result be? The answers to these questions are highly important to our inquiry, since the originality of many contemporary works teeters on the border between creative labor (which includes some discernable manifestation of the author's personality) and just plain old labor (which might be as simple as hanging a blank canvas on a gallery wall). Direct authority on the issue is scant, but scholars have posited that the law could develop in two different ways.[269]

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260. *Id.*
261. *Id.*
262. *Id.* at 425.
263. *Id.* at 425-26.
264. [1989] A.C. 217, 262-63 (U.K.).
265. *Bridgeman*, 25 F. Supp. 2d at 426.
266. *Id.*
267. *Id.* (citing Interlego A.G. v. Tyco Indus., Inc. [1989] A.C. 217, 262-63).
268. *Id.* at 427.
269. Deazley, *supra* note 215, at 181.

First, courts could continue the traditionalist interpretation of originality. This approach gets support from the bedrock decisions in *Walter v. Lane* and *Graves' Case*, and dismisses the New York District Court's reliance on dictum in *Interlego*.[270] The holding in *Walter v. Lane* was affirmed by the Chancery Division's 1990 opinion in *Express Newspapers Plc v. News (U.K.) Ltd.*, a case that mirrored *Walter*'s facts, albeit in the flashier context of a pilfered tabloid scoop.[271] There, the court held that the newspaper *Today* secured a copyright for its report of an interview with Miss Marina Ogilvy, a member of the Royal Family, which provided the inside dish on her pregnancy and her relationship with other Family members.[272] A subsequent story published by the *Daily Star*, which included several of Miss Ogilvy's verbatim statements but no acknowledgement of their source, was found to infringe that copyright.[273] In a 2005 decision regarding the copyrightability of performing editions of musical compositions that had fallen into the public domain, the Civil Division Court of Appeal cited *Express Newspapers* in holding that *Walter v. Lane* "remains good law."[274]

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270. *Id*.

271. [1990] F.S.R. 359 (Ch) (Eng.).

272. *Id.* at 361-62.

273. In so holding, the court rejected the argument that *Interlego* changed the originality standard:

> It was, I think, suggested that that decision might have impliedly modified the law as laid down in *Walter v Lane*. But *Walter v Lane* was not referred to in argument, and the Privy Council were there considering quite a different point on originality which does not, in my judgment, touch on *Walter v Lane*.
>
> I therefore approach this case on the basis that *Walter v Lane* is undeniably still good law. On that footing, if skill, labour and judgement was put into the reporting of Miss Ogilvy's words in the *Today* newspaper, copyright will subsist in the report of those words even though the words themselves are Miss Ogilvy's.

Id. at 366.

274. Sawkins v. Hyperion Records Ltd., [2005] EWCA (Civ) 565, ¶ 33 (Eng.). Dr. Lionel Sawkins, a musicologist and expert on the composer Michel-Richard de Lalande, created editions of Lalande's works so they could be performed by modern musicians. *Id.* ¶¶ 7-8. Lalande was the principal court composer for Louis XIV and Louis XV, and most of his original manuscripts have been lost. *Id*. ¶¶ 1, 7. The court concluded that the considerable "sweat" Dr. Sawkins expended made his editions copyrightable:

> In my judgment, on the application of *Walter v Lane* to this case, the effort, skill and time which the judge found Dr Sawkins spent in making the 3 performing editions were sufficient to satisfy the requirement that they should be "original" works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande); (b)

In the visual-art context, this approach is also bolstered by dictum in *Antiquesportfolio.com Plc v. Rodney Fitch & Co.*[275] In that case, Justice Neuberger, writing for the Chancery Division, decided that a photograph of a single, static item would be copyrightable, since "the positioning of the object (unless it is a sphere), the angle at which it is taken, the lighting and the focus, and matters such as that, could all be matters of aesthetic or even commercial judgment, albeit in most cases at a very basic level."[276] This sounds almost exactly like the explanation of why the photo in *Sarony* met the American "spark" standard. But Justice Neuberger then goes on to articulate what seems to be a lower standard, finding that "a purely representational photograph of a two-dimensional object such as a photograph or a painting" could meet the British originality requirement "if the photographer in such a case could show that he had in fact used some degree of skill and care in taking the photograph."[277] Though this suggests the traditionalist approach should apply to faithful photographs of artistic works, dictum it remains—the Justice stressed that this was not a point he needed to decide.[278]

On the other hand, courts could adopt the standard articulated in *Interlego*, which would make the British originality requirement look a lot like the American originality requirement. The reasoning of scholars like Professor Gervais would support this approach. However, proponents of converting Britain to the "spark" standard need to deal with *Walter v. Lane* and *Graves' Case* somehow. Accordingly, they argue that the standard articulated in *Walter v. Lane* is inapplicable to the definition of "original" in the modern CDPA, because it was decided eleven years before the term was added to the British copyright statute.[279] If this is so, then *Express Newspapers* may have to be reconsidered.[280] The authority in *Graves' Case* is more difficult to dispute. However, in a case decided nearly twenty years after *Graves' Case*, the Westminster County Court held that faithful photographs of an ink drawing, which were taken to prepare prints of the drawing, were not copyrightable.[281] Instead, the Court found them to be "only part of the process of multiplying copies." Proponents of this convert-to-"spark" approach say this shift can be attributed to a change in attitude toward

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> Lalande's works are out of copyright; and (c) Dr Sawkins had no intention of adding any new notes of music of his own.

Id. ¶ 36.

275. [2001] F.S.R. 23, 353 (Ch) (Eng.).

276. *Id.*

277. *Id.*

278. *Id.*

279. Daniel Gervais, Feist *Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 958-59 (2002).

280. *Id.* at 959.

281. Deazley, *supra* note 215, at 181.

photography, which, in the time since *Graves' Case*, had become easily accessed by many amateur photographers, not just a handful of artists.[282]

IV. ANALYSIS: ADVANTAGE, "SPARK"?

As we have seen, much contemporary art makes its home on the fuzzy line between the "spark" and "sweat" standards. For the contemporary artist, often the only way to express a creative idea will be through creating a work that is so simple, or so fully derived from another work, that it will not meet the "spark" standard. The British standard, as traditionally understood, would protect a larger swath of modern art. Virtually any type of art that is displayed or published requires some type of labor to produce: You must sweat, at least a little, to crumple up a piece of A4 paper and get it displayed at the Tate Modern. Even if the amount of physical or commercial labor is minimal, more art would pass muster under the "sweat" standard, since the intellectual labor leading up to a very simple or duplicative piece of art might indeed be lengthy and intense. Marcel Duchamp's *L.H.O.O.Q.* was such an effective parody because he knew what he was rebelling against. That kind of creation can take study and contemplation, and the time taken for both comes at an opportunity cost. Thus, the anti-"spark" argument goes, that by trying to promote creativity, the "spark" standard actually stifles it by removing economic incentives for modern artists to produce new works.

We have also seen that due to the influence of international copyright agreements, Britain might be moving toward adopting its own version of the "spark" standard. This begs the question: Is this progression toward a wider use of the "spark" standard really that detrimental to the works and careers of today's artists? Should they start lobbying the House of Commons to stop the change now?

This author submits that the "spark" standard is not such a dismal prognosis for contemporary art in terms of economic incentives, and, since the "spark" standard does a good job of promoting creativity in the aggregate, that it should not be lowered to accommodate an art movement that may not need it so much. That said, increased use of the "spark" standard may serve to undermine the law's aesthetic neutrality. In light of these competing policy interests, this Note concludes that empirical analysis of the contemporary art market would be helpful to judges and lawmakers in both the United States and the United Kingdom.

Not much scholarly work has been done on the theoretical framework for a comparison of "sweat" and "spark" in the contemporary-art context. However, we may be able to draw helpful cues from analysis of how the Supreme Court's

282. *Id.* at 180.

decision in *Feist* affects the market for factual compilations. In her overview of post-*Feist* compilation cases, Denise Polivy frames the comparison succinctly:

> [T]he choice between creative originality and sweat of the brow can be characterized as a choice between, on the one hand, encouraging the creation of useful compilations and the free use of pre-existing material while not guaranteeing cost recoupment, and, on the other hand, ensuring that significant investments in compilation efforts will be recovered while not expressly encouraging the creation of useful compilations or the free use of existing material.[283]

In general, the "spark" standard helps promote work that is creative and not just labor-intensive. Polivy points out that if the "sweat" standard applied to factual compilations, companies could profit long-term from strictly re-hashing existing compilations, and thus would have no incentive to develop new technology or research methods.[284] The same reasoning can be applied to art production. If artists who produce near-copy derivative works can consistently profit from doing so, they are less likely to search out other techniques or subject matter, or to build on previous works in new ways. Further, application of the "spark" standard preserves the simple building blocks of art (a white canvas, an empty gallery, a pile of trash) from being excluded from the body of raw artistic material artists can draw upon. This analysis is especially powerful in the United States, where the Constitution, as interpreted by the Supreme Court in *Feist*, articulates the encouragement of creative and useful works—not works that merely took effort to produce—as the primary goal of copyright. It seems that if the American system is balancing aggregate creativity against the individual artist's cost recovery, there is at least a finger on the scale in favor of aggregate creativity.

It remains true that in theory, use of the "spark" standard makes it less likely that a modern artist will be able to recoup the cost of labor expended in creation. But this conclusion might rely on incorrect assumptions about what truly motivates modern artists to create, as well as how the contemporary-art market works. It is not clear that the market for contemporary art depends on works being different in expression. Some argue that it is the idea, story, emotion, or personality behind a piece of modern art that gives it value.[285] If that is the case, my blank canvas and your blank canvas are equally marketable, even if I spent years coming up with the meaning for mine, and you spent minutes, since it is really our ideas we are selling. Extending copyright protection to the work's form would have no effect on artist motivation or earnings.

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283. Polivy, *supra* note 196, at 800-01.
284. *See id.*
285. Petruzzelli, *supra* note 7, at 124.

The same commentators suggest that minimalist and conceptual art have indeed thrived without the help of copyright protection—so much so, in fact, that they may be becoming passé.[286] This is, at least in part, because when you step into the world of minimalist and conceptual art, there are just not that many original expressive forms available. Some art critics believe that contemporary art may reach a point where very few variations on abstraction will be possible.[287] One has written that the "deliberate sparseness" of minimalism and abstraction have been "worn through overuse."[288] Critic Thomas McEvilley, in a review of a conceptual work that was strikingly similar to another, has commented that "the conceptual vocabulary, like painting before it, is getting cramped and going around in circles a bit."[289] In other words, minimalist and conceptual works may be on their way out, but they are dying of natural causes. It is the nature of the movement, not the law, that discourages new works. Surely modern artists create in the shadow of copyright—some, if you'll remember back to our gallery tour, even gain their inspiration from gleefully violating it. Still, the anti-"spark" analysis may overestimate the importance of receiving copyright protection in the eyes of contemporary creators.

In light of this description of the contemporary-art world, it does not appear that the risk of unrecouped labor costs discouraging new works is particularly great. When we weigh this low risk against the social good that comes from encouraging creativity in general, the "spark" standard wins out. The originality standard should not be lowered to accommodate one branch of visual art that does not need copyright protection much anyway, when doing so might seriously undermine aggregate creativity. To this conclusion your author adds two caveats. First, it works better in the United States than it does in the United Kingdom, because the U.S. Supreme Court has interpreted the Constitution as charging Congress with encouraging creativity. As discussed in Part III.B, the protection of expended labor has played a far greater role in the development of U.K. law. The British Parliament may not place as much importance on encouraging creativity as a policy goal. Second, this conclusion obviously rests on the assumption that due to the nature of the movement and the market, a majority of contemporary artists will create freely and still manage to support themselves, with or without the prospect of copyright protection.

Although this author concludes that the "spark" standard is no great threat to the economic viability of contemporary artists, it may undermine the law's neutrality, especially when it deals with contemporary works. Analysis borrowed from database cases is a helpful tool, but works of visual art and databases are still very different creative animals. In particular, the policy considerations that stem from databases being "useful" do not fully translate into

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286. *See id.* at 122.
287. *Id.*
288. *Id.* at 122 (quoting Thomas Lawson).
289. *Id*. at 123 (quoting Thomas McEvilley).

the visual-art context. Requiring a modicum of creativity for protection, however small, requires judges to determine which choices are creative and which are not.[290] Thus, the "spark" standard is more likely to introduce aesthetic judgments into copyright considerations than the "sweat" standard does. And in the area of contemporary art, this may prove to be quite a problem. Professor Amy Cohen has argued that because of the idea-expression dichotomy, aesthetic judgments in visual-art copyright cases are inevitable.[291] She concludes that:

> The most important doctrinal point that has emerged from [the] attempt to find a principled way to draw the line between an idea and its expression is the notion that even where two works are nearly identical in appearance, if those similarities in appearance are held to have necessarily resulted from the defendant's use of the same idea as that used by the plaintiff, there will be no infringement.[292]

Professor Cohen then presents a series of cases to support the argument that a court's view of what constitutes the "idea" of a work is influenced by how novel the court considers the work to be, its relative commercial success, and even the reputation of its creator.[293] If she is correct, contemporary-art cases decided under

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290. Intuitively, there is something troubling about evaluating an artist's creativity, which Justice Holmes's admonition in *Bleistein* reflects. This consideration is not present in the database context. *See generally* VerSteeg, *supra* note 38, at 133-34. "Although Feist itself was not a computer case, the amazing speed with which a digital computer can alphabetize hundreds of thousands of names surely influenced the Court's concept of how we should assess originality as we enter the twenty-first century," and that influence may be inappropriately applied to visual art. *Id.* at 134. For example, "[a]rguably, a typical art student's still life oil painting or sketch is mechanical, entirely typical, garden-variety, obvious, an age-old practice rooted in tradition, and so commonplace as to be expected as a matter of course," but it would be strange to deny copyright to such a work. *Id.* Accordingly, it would better serve visual art if computer copyright cases were construed narrowly. *Id.* at 137. *But cf.* Diane Leenheer Zimmerman, *It's An Original!(?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 211-12 (2005) (pointing out that though it would be challenging to develop originality standards based on qualitative norms, some reasonable agreement might be reached through a system of precedent and appellate review, and that strict neutrality should not necessarily be required when, as in copyright, the government is encouraging speech rather than restricting it).

291. Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990).

292. *Id.* at 211.

293. *Id.* at 212. Cohen gives the decision in *Herbert Rosenthal Jewelry Corp. v. Kalpakian* as one example. *Id.* In that case, the plaintiff's copyright in a jewel-covered bee pin was held not to be infringed by a nearly identical pin made by the defendants. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971). The Ninth Circuit Court of Appeals concluded that there was little creativity involved in the plaintiff's design

the "spark" standard will be highly susceptible to aesthetic judgments, since the most difficult cases will likely involve works that blur the idea-expression line. Perhaps, then, the biggest copyright challenge for contemporary artists is not an originality standard that is too high, but rather one that is applied inconsistently.

Finding the best originality standard to apply to works that consistently blur the line between idea and expression will be difficult, since that line is notoriously hard to see in the first place.[294] Professor Ginsburg has pointed out that because of this uncertainty, defining idea and expression often comes down to a policy choice:

> In copyright law, an "idea" is not an epistemological concept, but a legal conclusion prompted by notions—often unarticulated and unproven—of appropriate competition. Thus, copyright doctrine attaches the label "idea" to aspects of works which, if protected, would (or, we fear, might) preclude, or render too expensive, subsequent authors' endeavors.[295]

Accordingly, empirical research into what motivates creativity, as well as how the contemporary-art market really works in both countries, would be helpful to judges and lawmakers in both the United States and the United Kingdom.

V. CONCLUSION

For now, the question of whether savvy contemporary creators should hop a plane to Britain remains undecided. If and when it is decided, the impact of a heightened originality standard on today's artists should be considered. While the "spark" and "sweat" standards both have their benefits (encouraging aggregate creativity and discouraging aesthetic judgments, respectively), those benefits need to be weighed against potential detriments to the creativity of individual contemporary artists. In comparing the two standards, we should also factor in the main policy aims of copyright identified by both the U.S. and U.K. legislatures. Empirical research on what motivates today's artists, as well as what drives the contemporary-art market, would be helpful in deciding the question of whether Britain should convert to a "spark" approach.

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since it closely replicated the court's idea of a real bee, and that the finding of non-infringement may have had to do with the defendants' "standing as designers of fine jewelry." *Id.* at 741.

294. In an often-quoted passage from an American copyright case, Judge Learned Hand cautioned that "[n]o principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression' . . . . Decisions must therefore inevitably be ad hoc." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F. 2d 487, 489 (2d Cir. 1960).

295. Ginsburg, *supra* note 118, at 346.