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COPYRIGHT AS A RULE OF EVIDENCE

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ABSTRACT

Many copyright doctrines serve to exclude from the copyright regime cases particularly prone to evidentiary complexity. The implicit logic is that, for these cases, the social costs of litigation would likely outweigh the social benefits derived from offering copyright protection in the first place. Doctrines that serve this evidentiary function include some doctrines for which an evidentiary purpose is readily apparent (for example, the requirement that eligible works be fixed in tangible form), and some for which the link is quite subtle (for example, the rule against protecting work that lacks creativity). Understanding these doctrines in this light helps to refine their proper scope and application. It also makes clear a problem facing copyright law more generally: the increasing divergence between the logical justifications for various copyright doctrines and their actual use by courts and commentators.

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INTRODUCTION

I teach an introductory copyright course at the University of Chicago Law School, and, in that course, I find myself repeatedly talking about evidence. I talk about the obvious evidentiary topics, for example, the elements required to establish a *prima facie* case of infringement and the various limitations on the use of expert testimony. But I also talk about evidence in many settings where evidentiary issues might not readily come to mind.

For instance, it is now well accepted that a work of authorship must show at least a modicum of creativity in order to qualify for copyright protection.¹ Students typically find this requirement intuitive. Novels, plays, and musical compositions are at the core of copyright, after all, so naturally some bit of creativity is required. I nevertheless ask my students to defend creativity as a legal, as opposed to artistic, threshold—in essence, asking them to explain why a well-designed copyright regime would exclude works that lack creative spark. That conversation inevitably leads toward a discussion of evidence.

1. The origins of this requirement are discussed *infra* Part I.

Of course, no one starts there. The first responses typically come from students who argue that copyright favors creative work because uncreative work is not valuable to society. Obviously copyright excludes run-of-the-mill expression, these students tell me; why incur the costs of administering a complex legal regime with respect to worthless work? The class usually accepts this argument for a few minutes, but then someone offers an example of an uncreative yet valuable work and the argument begins to unravel. The phone book lacks creative spirit, but telephone listings certainly serve an important function in society. In fact, a creatively organized phone book—say, one organized by the named party's height—would likely be less valuable than a traditional, alphabetical one. Databases similarly are often uncreative but valuable. The *Kelley Blue Book* greatly assists purchasers of used cars by gathering information about the market value of various vehicles, but it is definitely not the kind of book that makes for interesting bedtime reading. The American Bone Marrow Donor Registry similarly lacks imagination but nonetheless performs a valuable service.

Rejecting the idea that creativity is a filter for social value, the class traditionally turns next to an argument about costs. Maybe the reason why copyright excludes uncreative work is that uncreative work is inexpensive to create. There is no point in incurring the costs of the copyright regime with respect to works that are cheap to create, the class tells me this time; even without protection, firms and individuals would still find it worthwhile to produce inexpensive work. This argument falls more quickly than the first, mainly because the same examples that debunk the social value theory serve to undermine the cost theory as well. There are significant up-front costs associated with compiling new phone books and researching new databases. Thus, while it is true that uncreative expression is sometimes cheap to produce, that is not true across the board, and, overall, there is no reason to think that creativity is a particularly good proxy for production costs. Uncreative work can be expensive (think databases), and creative work can be cheap to produce (think romance novels).

The arguments from here get more sophisticated. For example, sometimes students suggest that copyright excludes uncreative work as a way of encouraging authors to focus on creative work. Increasing the reward for uncreative work might distract authors, causing them to spend more time developing dictionaries and databases and less time writing *Moby Dick* and *Canterbury Tales*. This distraction argu-

ment does have appeal in certain instances, but, like the previous arguments, this one seems too narrow to justify a broad rule against uncreative work. For starters, it is hard to imagine that Mark Twain was torn between working on the phone book or penning American classics. A change in the legal regime might affect the decisions made by investors, publishers, and similar business entities, then, but it would probably not much impact the decisions made by authors themselves. Framed that way, of course, the argument is not particularly strong. If legal rules were to change so as to make any business less attractive—from cattle ranching to, yes, database production—that would, at the margin, slightly increase the allure associated with investments in creative expression. Yet surely no one argues against federal farm subsidies on the ground that a more precarious cattle industry would lead to better Hollywood scripts. Just the same, while the argument is a little stronger as applied to database production, it does not seem all that compelling unless (again) uncreative expression either is of extremely low social value or is extremely inexpensive to produce.²

Note that, during the conversation in which all of these hypotheses are in turn brought forward and rejected, my class is inevitably forced to admit that creativity is a hopelessly subjective standard. When considering whether creativity is a proxy for social value, for example, students naturally offer what they believe to be no-brainer examples of uncreative work. Yet, in every case, at least someone in the room disagrees with the example as offered. Is Piet Mondrian's painting *Composition with Yellow Patch* really a work of creative art, or is it just a few ordinary squares painted in black with one small patch of yellow? Can Campbell's Soup cans ever be anything more than boring cupboard material? As Justice Holmes said in an earlier era, it is "a dangerous undertaking for persons trained only [in] the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."³

But then I point the class back to an explanation tied to something judges are quite competent to evaluate: evidence. My argument is simple. If the copyright system were to recognize rights in uncreative work, courts would be overwhelmed by difficult evidentiary disputes. Two parties would come forward with remarkably similar

2. For further elaboration on this point in the patent context, see Douglas G. Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 MINN. L. REV. 693, 717–18 (1997).

3. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

works of authorship, and the court would find it virtually impossible to determine whether one copied from the other (impermissible infringement) or whether, instead, any similarity between the works was just a natural outgrowth of the fact that both works lack creativity. Ask four college students to create a directory of Asian restaurants in Chicago and, whether they copy or not, the four will likely produce markedly similar directories. A creativity requirement, then, empowers courts to exclude from the copyright system a particularly messy class of cases: those in which courts would not be able to use similarity as the basis for even a weak inference regarding the likelihood of impermissible copying.

This argument applies specifically to copyright's creativity requirement. As I unfold more fully in this Article, however, similar evidentiary concerns help to explain many of copyright law's central doctrines. Why does federal law require that a work be fixed in some stable form before protection will begin?⁴ Or deny protection in cases where there are only a limited number of ways to express a given idea?⁵ Or deny protection to descriptive details that flow naturally from a given plot element?⁶ There are many reasons, it turns out, but a principal one is that each of these doctrines helps to mitigate what would otherwise be a difficult problem with respect to proof. In short, copyright law is in part a rule of evidence. Many copyright doctrines serve to exclude from the copyright regime cases where evidentiary issues would so increase the costs of litigation that those costs would likely outweigh the social benefits derived from offering copyright protection in the first place.

I proceed as follows. Part I continues the discussion begun in this Introduction, and, thus, considers the combined constitutional and statutory requirement that a work be original. This is one of the two main prerequisites to federal copyright protection, and it is today interpreted to mean not only that the work was not copied from another source, but also that the work demonstrates at least a modicum of creativity. I argue that requiring creativity makes sense in part because of evidentiary concerns. That is, a sensible copyright system would distinguish between creative and uncreative work, and one reason it would do so is because that distinction helps to identify and exclude cases that would otherwise present extreme problems of proof.

4. *See infra* Part II.

5. *See infra* Part III.A.

6. *See infra* Part III.B.

Part II turns attention to the second of the two main prerequisites for federal copyright protection: the requirement that a work be fixed in a tangible medium of expression. Under current law, a work qualifies for protection only after it has been captured in some stable form, such as a typewritten manuscript, a video or audiotape, or even sufficiently detailed handwritten notes. There are many possible justifications for this requirement. For instance, its purpose might be to encourage the dissemination of creative work, the intuition being that something captured in physical form can be passed more easily from person to person, place to place, and generation to generation. I argue, however, that the evidence theory offers a better explanation: extending protection to include unfixed expression—say, oral remarks—would pose extraordinary difficulties with respect to proof. In making this argument, I explain where other justifications fall short, and I identify some possible reforms that would help the fixation requirement to better serve an evidentiary purpose.

Part III offers a brief survey of three other copyright doctrines on which the evidence theory sheds light. In particular, I consider the merger doctrine, the doctrine of *scènes à faire*, and the federal registration procedure. Finally, the Conclusion uses the preceding analysis to expose a larger problem facing the copyright regime, namely, that copyright doctrines are today often used in ways largely unrelated to their logical justifications.

I. THE CREATIVITY REQUIREMENT

In copyright, works that demonstrate a modicum of creativity are eligible for protection, but works that lack creativity are not. Works typically denied protection due to a lack of creativity include phone books,⁷ food recipes,⁸ databases,⁹ and computer protocols.¹⁰ The ques-

7. *E.g.*, *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1446 (11th Cir. 1993) (noting that a telephone directory publisher did not violate copyright law “[b]y copying the name, address, telephone number, business type, and unit of advertising purchased” from another directory); *Ill. Bell Tel. Co. v. Haines & Co.*, 932 F.2d 610, 611 (7th Cir. 1991) (holding that a publisher’s adaptation of subscriber information in the white pages of another telephone directory was “entirely typical” and not an instance of copyright infringement).

8. *E.g.*, *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 482 (7th Cir. 1996) (finding no violation of copyright law because recipes do not contain “even a bare modicum” of creative expression); *Sassafras Enters., Inc. v. Roshco, Inc.*, 889 F. Supp. 343, 347 (N.D. Ill. 1995) (observing that information regarding the use and care of food preparatory mechanisms lacks the requisite originality).

9. *E.g.*, *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1520–21 (11th Cir. 1997) (observing that the method used to select communities represented in a directory of cable

tion I address in this Part is whether these sorts of exclusions are justified. That is, I ask whether there is any good reason for federal copyright law to distinguish creative from uncreative work.

The Part proceeds in four Sections. Section A traces the origins of the creativity requirement. As I explain, it is today widely accepted that creativity is a constitutional requirement, although that interpretation did not take hold until the 1991 Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹¹ Section B considers standard explanations of, and justifications for, this line between creative and uncreative work. For example, some previous commentators have argued that creative work should be favored because it is more valuable to society, while others have argued that uncreative work should be disfavored because it is inexpensive to produce. Section C articulates the evidence theory and analyzes several criticisms thereof. A handful of courts have indicated that evidentiary concerns drive the distinction between the creative and the uncreative. Those opinions have been sharply—and, I argue, unfairly—criticized by copyright commentators. Finally, Section D concludes with implications, focusing in particular on cases where the modern creativity requirement is used to deny protection even though there is no reason to do so from an evidentiary perspective.

A. Foundations

Article I, Section 8, Clause 8 of the United States Constitution recognizes in Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹² The clause is today interpreted to authorize both copyright and patent law, with “authors” and “writings” referring to copy-

television systems was not a proper subject for copyright); *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 493 (9th Cir. 1985) (holding that the publisher of a radiator catalog did not have a cause of action for copyright infringement where “only facts” were copied).

10. *E.g.*, *Secure Servs. Tech., Inc. v. Time & Space Processing, Inc.*, 722 F. Supp. 1354, 1365 (E.D. Va. 1989) (holding that “handshake protocols” allowing fax machines to communicate with each other “lack the requisite authorship and originality” necessary to invoke copyright protection). *But see* *Superchips, Inc. v. St. & Performance Elecs., Inc.*, 58 U.S.P.Q.2d (BNA) 1849, 1855 (M.D. Fla. 2001) (holding that substantial deviations from a generally accepted computer program design may involve the “sufficient quantum of originality needed to be entitled to copyright protection”).

11. 499 U.S. 340, 346 (1991).

12. U.S. CONST., art. I, § 8, cl. 8.

right, and “inventors” and “discoveries” referring to patent. Congress has frequently invoked this power to promulgate federal copyright statutes. The current one is the Copyright Act of 1976,¹³ although that statute has been significantly amended in the years since 1976, in particular by the Berne Convention Implementation Act in 1989,¹⁴ and by both the Sonny Bono Copyright Term Extension Act¹⁵ and the Digital Millennium Copyright Act¹⁶ in 1998. Nowhere in all this statutory and constitutional language does there appear any explicit reference to creativity, however. The closest language is in section 102(a) of the 1976 Act, which states that only “original works of authorship” are eligible for protection.¹⁷ That phrase was left undefined in the 1976 Act, however, and the legislative history suggests that it was “intended to incorporate without change the standard of originality” that had been previously developed by the courts.¹⁸

Just what was this previously developed standard? Unfortunately, courts had not really developed a clear standard at the time of the 1976 Act. In fact, all that was clear back then was that, at a minimum, an eligible work had to derive in some way from the would-be copyright claimant. A work slavishly copied from another source was not eligible for protection. Copyright was reserved only for “originator[s]” and “maker[s]”; “he to whom anything owes its origin.”¹⁹ This was an originality requirement not in the sense of requiring “freshness of aspect, design, or style,”²⁰ but rather in the more literal sense of requiring that the work at issue originate with the author in question. Originality of this sort was a foundational principle. As the Second Circuit stated in 1976, “the one pervading . . . prerequisite to

13. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (amending 17 U.S.C.).

14. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.) (eliminating and simplifying many copyright formalities).

15. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending scattered sections of 17 U.S.C.) (increasing copyright duration).

16. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending scattered sections of 17 U.S.C.) (limiting indirect liability for certain types of online activities and introducing new prohibitions against the circumvention of copyright management technologies).

17. 17 U.S.C. § 102(a) (2000).

18. HOUSE COMM. ON THE JUDICIARY, 94TH CONG., COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

19. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

20. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 820 (10th ed. 1996).

copyright protection' . . . is the requirement of originality—that the work be the original product of the claimant."²¹

Beyond this one aspect, the originality standard as of 1976 was murky at best. The trouble came in articulating what it meant to say that a work originated with a particular author. No expression is completely the independent work of its author; every author to some degree builds upon the work of those who have come before. Thus, courts had to further define originality in such a way as to distinguish permissible from impermissible evolution. Was it enough if an author made significant contributions of time, skill, or expense? Did originality presuppose a minimum level of artistic achievement or creative effort? These questions were not easily resolved, and it was in the struggle to answer them that courts first began to distinguish uncreative works from works that exhibit some degree of imagination, vision, or spark.

One of the earliest and most influential opinions on point was the Supreme Court's opinion in the *Trade-Mark Cases*.²² The opinion was a consolidated response to several appeals, all asking that specific trademark violations be excused on the ground that federal trademark law was beyond Congress' constitutional powers. In analyzing the case, one of the arguments the Court had to address was the government's contention that the constitutional language authorizing copyright law could be read to authorize trademark law as well. The Court rejected this argument.²³

The relevant analysis is only a paragraph in length, and it contains no citations to any history, document, or lower court decision. The thrust of the passage is that there are important distinctions to be drawn between constitutionally protected "writings" on the one hand and mere trademarks on the other. Writings, the Court explains, are "founded in the creative powers of the mind" and are the "fruits of intellectual labor."²⁴ Trademarks are "often the result of accident rather than design" and can be "something already in existence."²⁵ A writing results from "novelty, invention, discovery, or any work of the

21. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 489–90 (2d Cir. 1976) (quoting 1 MELVILLE B. NIMMER, *THE LAW OF COPYRIGHT* § 10, at 32 (1975)).

22. 100 U.S. 82 (1879).

23. *Id.* at 82.

24. *Id.* at 94.

25. *Id.*

brain.”²⁶ A trademark, by contrast, requires “no fancy or imagination, no genius, no laborious thought,” just the use of a word or symbol in commerce.²⁷

What all this meant for copyright’s creativity requirement was unclear. In some sentences, the Court seemed to be saying nothing more than what other courts had said and would continue to say about “authorship”: copyright requires, at a minimum, that a would-be author make a nontrivial contribution to the work at issue. This was the difference between writings and trademarks; writings had to be the work of their authors, but trademarks could be plucked from existing words and symbols. In other sentences, however, the Court seemed to require something more, distinguishing trademarks on the ground that they lack “imagination” and “genius,” and thus seemingly implying that copyright-eligible works must demonstrate these qualities. If this was what the Court had in mind, note that these extra requirements were being tied to the constitutional word “writings,” and not to the constitutional word “authors” or to any language from the copyright statute in effect at the time of the case.

The Supreme Court revisited these issues a few years later in *Burrow-Giles Lithographic Co. v. Sarony*.²⁸ At issue was a photograph of the playwright Oscar Wilde. The photographer had posed Wilde, adjusted the background lighting, chosen Wilde’s wardrobe, and ultimately operated the camera that captured Wilde’s image.²⁹ The defendant—in court because he had made an unauthorized lithograph based on the photo—argued that these many activities did not amount to authorship for constitutional purposes: “[A] photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought, or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.”³⁰ The implication was that photographers were not authors, and Congress therefore did not have the constitutional authority to protect photographs.³¹

26. *Id.*

27. *Id.*

28. 111 U.S. 53 (1884).

29. *Id.* at 55.

30. *Id.* at 59.

31. The defendant also argued that a photograph could not be a “writing” for constitutional purposes; that term was supposedly limited to include only items such as books and pamphlets that are literally written by an author. *Id.* at 57. The Court rejected this argument, stating

As a technical matter, the *Burrow-Giles* Court did not address this argument. The photograph of Wilde was not some mechanical rendering completely devoid of “originality of thought” or “novelty in the intellectual operation.” Quite the opposite, the trial court had found as a matter of fact that the photograph was “useful, new, [and] harmonious,” and that the “plaintiff made the same . . . entirely from his own original mental conception.”³² Some photographs might lack these indicia of originality, and those would pose a more difficult question. But that was not the case before the Court, and the Court therefore refused to speak to the issue. “On the question as thus stated we decide nothing,” wrote Mr. Justice Miller for a unanimous Court, refusing to answer the hypothetical question of what would have happened had the photograph been a “mere mechanical reproduction.”³³

In dicta, however, the *Burrow-Giles* Court expressed doubt that any fair interpretation of the constitutional language could make creativity or artistic accomplishment a prerequisite to copyright protection. As the Court pointed out, the first Congress of the United States, “sitting immediately after the formation of the Constitution,” had passed a copyright act that explicitly included within its purview maps and charts as well as books.³⁴ By any definition, these were works of negligible creativity, yet in 1790 Congress deemed them eligible for copyright. “The construction placed upon the Constitution . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.”³⁵

In 1903, the Supreme Court again spoke on the issue of what an author had to contribute in order to produce work eligible for copyright protection, this time in the case of *Bleistein v. Donaldson Lithographing Co.*³⁶ The plaintiff had produced a series of lithographs rep-

that the term should be read broadly and noting that photographs did not even exist at the time the constitutional language was written. *Id.* at 57–58.

32. *Id.* at 54–55 (discussing, but not formally citing, trial court findings).

33. *Id.* at 59.

34. *Id.* at 56. The word “charts” likely referred to navigational charts, the creation of which was obviously a priority during the nation’s early years.

35. *Id.* at 57. Professor Jane Ginsburg offers a rich account of this history and its implications in her article, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873–93 (1990).

36. 188 U.S. 239 (1903).

resenting images from the circus.³⁷ There was some dispute as to how similar the images were to the various real-life circus acts depicted, but, importantly, the Court held that this detail was not relevant to the issue of copyright eligibility. “Even if [the lithographs] had been drawn from the life,” wrote the majority, the resulting images would still be the “personal reaction” of the individual who created them and, as such, eligible for protection.³⁸ “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the [federal statute.]”³⁹ Thus, while the *Trade-Mark Cases* and many lower court opinions had seemed to flirt with the idea that the Constitution requires more than mere origination—“fancy,”⁴⁰ “imagination,”⁴¹ “genius,”⁴² “laborious thought”⁴³—in *Bleistein*, as in the dicta of *Burrow-Giles*, the Supreme Court seemed ready to accept almost any contribution as sufficient.

Lower courts over the next many years understandably wavered between requiring creativity and suggesting that any nontrivial contribution could suffice. Consider, for example, two prominent and contemporaneous Second Circuit decisions: *Chamberlin v. Uris Sales Corp.*⁴⁴ and *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*⁴⁵ In *Chamberlin*, the Second Circuit evaluated a game board similar to that used for the game backgammon.⁴⁶ The court focused on creativity, explicitly stating that “the Constitution does not authorize [copyright] to one whose product lacks all creative originality.”⁴⁷ The opinion was light in terms of its detail or reasoning, but it did seem to follow the language of the *Trade-Mark Cases*, rather than the looser requirements articulated in *Burrow-Giles* and *Bleistein*.

Just six years later, however, the Second Circuit changed course. The new case was *Alfred Bell*, and at issue was a set of engravings de-

37. *Id.* at 248.

38. *Id.* at 249–50.

39. *Id.* at 250.

40. *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

41. *Id.*

42. *Id.*

43. *Id.*

44. 150 F.2d 512 (2d Cir. 1945).

45. 191 F.2d 99 (2d Cir. 1951).

46. 150 F.2d at 512.

47. *Id.* at 513.

signed to mimic several preexisting oil paintings.⁴⁸ The engravings had been carved with great skill and meticulous care, but their basic purpose and effect was simply to reproduce the original images. The question was whether, on balance, this was adequate originality for copyright purposes. The Second Circuit held that it was. “All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably his own. Originality in this context means little more than a prohibition of actual copying.”⁴⁹

The Second Circuit went on to say that the aforementioned more-than-trivial variation could be completely accidental. Bad eyesight or “a shock caused by a clap of thunder” could yield authorship in the constitutional sense, despite the obvious lack of any intentional mental process.⁵⁰ The contrast between *Chamberlin* and *Alfred Bell* was thus dramatic. In *Chamberlin*, it was “obvious” to the Second Circuit that the “Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality.”⁵¹ A scant six years later, copyright was available no “matter how poor artistically the ‘author’s’ addition,” so long as “it be his own.”⁵²

Outside the Second Circuit, things were not any clearer, as courts throughout the country struggled to articulate what it was that the Constitution implicitly required. One popular approach was to deem the constitutional demand satisfied by significant effort—“sweat of the brow”—even in the absence of other touchstones. In *Toksvig v. Bruce Publishing Co.*,⁵³ for example, the plaintiff had invested considerable effort researching a biography of Hans Christian Andersen; there were flights to Denmark, interviews with people who knew Andersen at various stages of life, translations of information from Danish to English, and so on.⁵⁴ After the biography came out, another author decided to write a biography of Andersen as well. But instead of researching Andersen herself or negotiating a license with the first author, the second author just took what she needed from the earlier

48. 191 F.2d at 99.

49. *Id.* at 102–03.

50. *Id.* at 105; *cf.* *Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304, 305 (S.D.N.Y. 1968) (“The accidental or laboriously contrived creation, if it qualifies objectively, is doubtless enough.”).

51. 150 F.2d at 513.

52. *Alfred Bell*, 191 F.2d at 103.

53. 181 F.2d 664 (7th Cir. 1950).

54. *Id.* at 666.

work and used it as her own.⁵⁵ This, to the *Toksvig* Court, was copyright infringement.⁵⁶ The plaintiff's significant efforts gave him rights in his resulting research. Another biographer could rediscover those facts or strike a bargain with the original biographer, but blatant unauthorized copying was not to be permitted.⁵⁷

Not all courts thought labor sufficient to meet the constitutional requirement, however. An influential opinion on this side of the debate was the Fifth Circuit's opinion in *Miller v. Universal City Studios, Inc.*⁵⁸ At issue this time were the facts associated with the 1968 kidnapping of a college-aged girl. The plaintiff had worked with the victim to gather the facts of her story and had written a book revealing those details. The defendant allegedly used the book without permission to develop a made-for-television movie.⁵⁹ Assuming for the purposes of appeal that the book did indeed require significant effort in its production, the *Miller* court considered whether significant research efforts alone could make a work eligible for copyright. The court held that they could not.⁶⁰

The *Miller* court was very careful to note that it was not basing its decision on policy, but was instead following what it thought to be unavoidable limitations inherent in copyright law.⁶¹ Specifically, the court read *Burrow-Giles* to require that "an 'author' is one 'to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'"⁶² And the *Miller* court refused to believe that a fact could "originate" with a person, even one who put in significant efforts to uncover it. "The discoverer merely finds and records. He may not claim that the facts are 'original' with him."⁶³ Note that the panel did seem to understand the possible argument on the other side. The majority opinion explicitly points out that the court

55. *Id.*

56. *Id.* at 667.

57. *Id.*

58. 650 F.2d 1365 (5th Cir. 1981).

59. *Id.* at 1367.

60. *Id.* at 1372.

61. *Id.* at 1369 ("The issue is not whether granting copyright protection to an author's research would be desirable or beneficial, but whether such protection is intended under the copyright law.").

62. *Id.* at 1368 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

63. *Id.* at 1368 (quoting 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.03(E), at 2-34 (1980)).

below had focused on “time and money” as the basis for the plaintiff’s claim.⁶⁴

Debates about the various metrics for measuring authorship might have continued indefinitely but for the Supreme Court’s 1991 ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁶⁵ There, the Supreme Court held that creativity was an absolute prerequisite to copyright protection.⁶⁶ Time, effort, and expense were not enough, nor was skill, nor, presumably, those random variations caused by bad eyesight or claps of thunder. The necessary element—implicit in the constitutional words “authors” and “writings”—was creativity.

The facts in *Feist* were straightforward. Rural was a local telephone company and, in the course of providing telephone service, it had assigned telephone numbers to its various subscribers.⁶⁷ Rural published that information in the form of two telephone directories, an alphabetically organized White Pages, and a Yellow Pages that was organized by category.⁶⁸ Feist, meanwhile, was not a telephone company, but it also published telephone directories.⁶⁹ For one of them, it wanted to list Rural’s customers in addition to listing telephone customers served by other local firms.⁷⁰ Rural refused to license this use of its directory, however, so Feist sent employees to gather the relevant information anew.⁷¹ Feist ultimately independently confirmed approximately 3,600 of the 4,935 entries it needed, but it then copied the remaining entries directly from Rural’s telephone books.⁷² Rural sued for copyright infringement.⁷³

The Supreme Court rejected Rural’s copyright claim, reasoning that what Feist took was not protected expression. To qualify for protection, the Court explained, a work must be original. And original,

64. *Id.* at 1369.

65. 499 U.S. 340 (1991).

66. *Id.* at 345.

67. *Id.* at 343.

68. *Id.* at 342.

69. *Id.* at 342–43.

70. *Id.* at 343.

71. *Id.* at 343–44.

72. *Id.*

73. *Id.* at 344. More specifically, Rural presented two related theories. First, Rural argued that it had created each name/number pair, and thus held copyright in each and every listing. Second, Rural argued that it had also created the White Pages and the Yellow Pages, and thus had earned protection for each of those compilations (taken as a whole) above and beyond any rights in the individual entries. *Id.* at 361–62.

“as that term is used in copyright, means . . . that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.”⁷⁴

The first half of the Court’s definition echoed well-established doctrine. For two hundred years, courts had been saying that, under federal law, an eligible work must in some sense derive from the would-be copyright claimant. But, as the discussion in this Section makes clear, the second half of the Court’s definition had previously been in considerable dispute. The Court ended that dispute with its holding, and it did so by primarily relying on two of the Supreme Court decisions I just introduced: the *Trade-Mark Cases* and *Burrow-Giles*.

The Court read the *Trade-Mark Cases* to support the proposition that the constitutional term “writings” includes only such works as “are founded in the creative powers of the mind” and “are the fruits of intellectual labor.”⁷⁵ Those are of course accurate quotes; but in the context of the *Trade-Mark Cases*, they are subject to two alternative readings. They can be read to require creativity, or they can be read along with other passages in the case to require more narrowly that authors make some nontrivial contribution to the work at issue. Without discussion, the *Feist* Court adopted the creativity interpretation—interestingly, adding that only a “minimal degree” of creativity is necessary, even though the *Trade-Mark Cases* opinion itself contains no such qualifying language.

The *Feist* Court similarly read *Burrow-Giles* to require creativity, albeit this time because of the constitutional word “authors.” *Feist* does not quote any of the contrary language from *Burrow-Giles*, for example, the passage where the *Burrow-Giles* Court explicitly refuses to decide this issue,⁷⁶ or the discussion where it notes that the first federal copyright statute had extended protection to (arguably) uncreative works like maps and charts.⁷⁷ Instead, *Feist* simply quotes a passage from *Burrow-Giles* that describes copyright as applying to “original intellectual conceptions,”⁷⁸ and then quotes a later section where copyright is said to require “intellectual production . . .

74. *Id.* at 345.

75. *Id.* at 346 (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (emphasis omitted)).

76. *See supra* note 33 and accompanying text.

77. *See supra* note 34 and accompanying text.

78. 499 U.S. at 346 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

thought, and conception.”⁷⁹ These passages, according to the *Feist* Court, “emphasize[] the creative component of originality.”⁸⁰

With the rule thus established, the *Feist* Court dutifully searched Rural’s telephone listings for the required creativity.⁸¹ Understandably, the Court did not find it. When considering each telephone entry in isolation, the Court put forward the proposition earlier introduced in *Miller*—the idea that “facts do not owe their origin” to any particular party and thus cannot satisfy the constitutional language.⁸² When considering the telephone books each as a whole, the Court recognized that, in some cases, the selection and arrangement inherent in a compilation would constitute authorship for constitutional purposes, but held that the alphabetical listings at issue were not sufficiently creative.⁸³

B. Rationales

Copyright commentators have long endeavored to explain why a sensible copyright regime would deny protection to uncreative work. One theory is that uncreative work is not sufficiently valuable to society to warrant the administrative costs associated with copyright protection. Running a copyright regime is costly. The resources that the government invests in copyright disputes surely could be used in more productive ways; and the same is true for the resources invested by private parties. This latter point is tricky in that private parties voluntarily invest in litigation, and so, at first blush, one might be tempted to think that their investments must be socially efficient. But that is not necessarily true. After all, two parties might fight over a \$100 bill found on the street, but for society that effort is pure waste, because nothing useful is accomplished in the struggle; its effects are only distributional. Thus, there is a lot of waste associated with copyright litigation, and if uncreative works lack value, it might be in society’s in-

79. *Id.* at 347 (quoting *Burrow-Giles*, 111 U.S. at 59–60).

80. 499 U.S. at 346.

81. *Id.* at 361–63.

82. *Id.* at 347.

83. *Id.* at 362–63. Even if the Court had deemed the phone books sufficiently original, there would still have been some dispute over whether *Feist* took those original elements or, instead, merely took the name/number pairs independent of any original arrangement that Rural might have superimposed.

terest to minimize waste by excluding these works from the copyright regime.⁸⁴

There are two responses to this argument, and both seem to undermine it significantly. The first is simply to question whether creativity is a good proxy for value. As I note in the Introduction to this Article, uncreative but valuable works are common. The *Kelley Blue Book* and the American Bone Marrow Donor Registry both fit that description, as do telephone listings and legal databases like Westlaw and Lexis. That said, some commentators apparently think creativity is a reasonable touchstone. Judge Benjamin Kaplan, for example, wrote in his popular copyright monograph that the creativity requirement is justified because it ensures that an author must “deposit more than a penny” before the “copyright turnstile” will revolve.⁸⁵

The second response is that, even if uncreative work does lack value, that is not a reason to deny it copyright protection, because copyright neither encourages the creation of valueless work, nor encourages litigation over it. The insight here is simple: copyright is not a government-sponsored cash prize; it is instead a legal right that makes it easier for an author to sell his intellectual wares without falling victim to freeriding rivals. Were copyright a cash prize, worries about valueless work would make sense. The cash prize would be an incentive to create this work and then litigate with respect to its ownership—and that would be a bad deal for society if uncreative work were indeed valueless. But copyright is not cash and, as such, it does not have this effect. If a work turns out to lack value, copyright or no, the relevant author will earn only the pittance he deserves. There is no built-in reward for copyright ownership; value, even for copyrighted work, is determined by market forces. This market check is particularly strong for uncreative work because, almost by definition, markets for uncreative work are vulnerable to entry. If the work is obvious, or if it can be created with just an investment of time, money, or labor, rivals typically will be able to make those investments and come up with substitute, competing goods. Even with copyright protection, then, there would not be much of an incentive

84. Granted, authors of uncreative work might waste some resources even if their works are denied copyright protection. For instance, an author denied protection might compensate by using encryption, secrecy, and other forms of self-help. This type of waste is almost impossible to avoid.

85. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 46 (1967).

to create valueless work, and there would similarly not be much of an incentive to litigate over its ownership.

A related argument sometimes offered in support of the distinction between creative and uncreative work is that uncreative work tends to be inexpensive to produce, and therefore it does not require legal protection. Professors L. Ray Patterson and Craig Joyce have made this claim, arguing that “by correlating protection with creativity, [modern law] makes the rewards of copyright commensurate with the type of effort each author puts forth.”⁸⁶ This intuition might also have influenced Copyright Office regulations, one of which provides that “short phrases,” including “slogans” and “mere variations of typographic ornamentation, lettering or coloring,” are not eligible for protection.⁸⁷

The low-cost rationale is no more satisfying than was the low-value rationale, however, because uncreative work is not systematically inexpensive. As the “sweat of the brow” cases make plain, effort itself can come at a hefty price. In fact, a critical similarity between uncreative and creative work is that both are subject to the public goods problem routinely associated with information products.⁸⁸ That is, in both cases, the cost to the author of producing the first embodiment can be high, but the costs to anyone of producing additional copies based on that first embodiment are often low. The high startup cost might be an investment in creativity, as is likely the case when an author sets out to write a new novel or a director attempts to stage a new movie or play. But the high startup cost might have nothing to do with creativity, as was surely the case when a group of entrepreneurs first set out to capture electronic versions of all federal opinions ever

86. L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 808–09 (1989). Professor Robert Denicola has similarly argued that creativity is supposed to filter out works where little effort is involved, although Professor Denicola recognizes that creativity is probably not very good at accomplishing this task. See Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 522 (1981) (“The short phrase or the insubstantial variation in a public domain work does not automatically acquire creativity as the number of words or variations increases. [Situations not justifying copyright protection] can be better ascribed to a failure to evince a minimum quantity, rather than quality, of authorship.”).

87. Registration of Claims to Copyright, 37 C.F.R. § 202.1(a) (2002).

88. Public goods are goods for which one consumer’s consumption does not in any way diminish another consumer’s ability to consume. Information is a public good, and much of intellectual property law is an attempt to harness this natural benefit while at the same time ensuring that there are adequate incentives to create and disseminate information products in the first place.

published, or when a group of doctors first gathered what ultimately became the bone marrow donor registry's lifesaving data.

Without copyright, all of these putative authors would lose money. They would incur the relevant first-copy costs only then to see their rivals make and sell competing copies based on the first. That competition would drive prices down toward marginal cost, and the initial authors would never be able to earn revenues sufficient to offset their first-copy costs. This public goods problem is the traditional economic justification for copyright, and it applies equally well to creative and uncreative work. It is no wonder, then, that cost-based arguments fail to justify a distinction between these two categories. The cost-related arguments turn out to be identical in the two settings.⁸⁹

Another unsatisfying explanation frequently put forward to justify the distinction between creative and uncreative work simply states that copyright is designed to reward contributions to culture. Professor Marshall Leaffer seems to adopt this perspective, writing in his thorough and thoughtful copyright treatise that the creativity requirement is a "*quid pro quo* for the copyright monopoly," ensuring that the law "reward[s] with a copyright only an author who has contributed to our fund of culture."⁹⁰

This argument ultimately fails for two reasons. First, as a descriptive matter, it is inconsistent with the history of copyright law—for instance, the fact that the first copyright act explicitly included maps and charts, two types of work that are routinely uncreative.⁹¹ Second, as a normative matter, it does not explain why cultural contributions should be favored over other authored works. As I have already argued in this Section, cultural and uncreative works both merit protection in that both can be valuable, both can be expensive to produce, and both are subject to a real freerider problem. To say that copyright is meant to focus on culture is to state a conclusion, not to explain why it is justified.

So what is the justification? Of the traditional explanations, the most compelling is that copyright excludes uncreative work because

89. It is of course true that, in both settings, there are certain advantages to being first even without copyright protection. The first party to create an information good might enjoy reputation benefits, for example, or might be able to sell the information product at a high price while rivals gear up to compete. The point is merely that all of these arguments apply with equal force to creative and uncreative work.

90. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 58 (3d ed. 1999).

91. See *supra* note 34 and accompanying text.

the public has a strong interest in making full use of factual information. This argument most often arises in cases like *Toksvig*, where an author attempts to protect facts that have been discovered through significant expense. Courts deny protection in these cases on the ground that the public interest is best served by a legal regime where facts are free for all to use. As one court asserted, “[t]o grant copyright protection [to uncreative work] would risk putting large areas of factual research material off limits and threaten the public’s unrestrained access to information.”⁹² Another court similarly stated that “[t]he public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright” in uncreative work.⁹³ The Supreme Court has also made this sort of argument, asserting that “[t]he very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains,” but that “this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”⁹⁴ Importantly, this was the rationale put forward in *Feist*, too: “[R]aw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”⁹⁵

This sort of argument has allure, but it is subject to an important limitation: copyright simultaneously increases and decreases the amount of information available to the public. Copyright increases the available information to the extent that it gives authors an added incentive to develop and disseminate useful work. Copyright decreases the available information to the extent that it allows authors to limit the use of information by charging a price above marginal cost. If a court’s purpose is to increase the free flow of a particular type of information, then, it is not by any means clear that the best option is to deny copyright protection to that class of work. Instead, the best option might be to increase protection, and, in that way, increase the incentive to gather and share it. Everything depends on which of the two effects dominates, and there is certainly no reason to

92. *Fin. Info., Inc. v. Moody’s Inv. Serv., Inc.*, 808 F.2d 204, 207 (2d Cir. 1986).

93. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980).

94. *Baker v. Selden*, 101 U.S. 99, 103 (1879).

95. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

believe that the right answer for all or even most types of uncreative work is to deny protection.⁹⁶

Of course, this is not to say that uncreative work raises exactly the same incentive/access tradeoff as that raised by creative work. Quite the opposite, one can easily distinguish uncreative from creative work along this dimension. For example, it is possible that the public has a stronger need for access to factual rather than fictional information, because important public policy decisions often turn on factual data. On this argument, former President Gerald Ford should be accorded less protection for the facts presented in his autobiography than Orson Welles receives for the creative elements inherent in *Citizen Kane*. President Ford's memoir, after all, reveals important details about Watergate and the pardon of President Richard Nixon.⁹⁷ The opposite point, however, can be made as well, namely, that the public has a weaker need for mandatory access to factual information than it does for fictional information because, in most cases, a second author can invest his own time, money, and energy to independently gather any factual information that might be of interest. On this argument, it might be harder to create a substitute for *Citizen Kane* than it would be to reinvestigate the facts surrounding the crash of the German airship *Hindenburg*.⁹⁸ The point here is simply that, overall, there is no reason to believe that the incentive/access tradeoff is skewed completely to one side for uncreative work. The scope of protection should depend in part upon the nature of a given work, but the fact that the public often values factual information certainly does not mean that uncreative work should be left unprotected as a general rule.

C. *The Evidence Theory*

Up to this point, I have surveyed a number of possible explanations for, and justifications of, copyright's distinction between creative

96. The tradeoff between incentives and access is a familiar one in intellectual property law. See, e.g., Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1024-46 (1989) (summarizing the arguments and then applying them to the question of whether patent law should offer an experimental use exemption).

97. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (analyzing a copyright claim in President Ford's memoirs, and noting that there is a "greater need to disseminate factual works than works of fiction or fantasy").

98. Cf. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (analyzing a copyright claim regarding the facts of the *Hindenburg* downing).

and uncreative work. In particular, I have discussed the argument that uncreative work is of particularly low social value, and, hence, is not worth protecting; the related argument that uncreative work tends to be inexpensive to produce, and, therefore, is also unworthy of protection; the argument that copyright is meant to focus exclusively on cultural contributions; and the argument that denying protection to uncreative work increases societal welfare by making important information free for all to use. Only the last of these conventional explanations turns out to have significant normative appeal, although each offers at least some insight into why uncreative work might be excluded from the copyright regime.

Consider now the evidence theory. The basic logic is straightforward: one reason a sensible copyright regime would distinguish uncreative from creative work is that uncreative work introduces extraordinary problems of proof. Were two litigants to step forward with remarkably similar uncreative works, a court would find it virtually impossible to determine whether one copied from the other (impermissible infringement), or whether instead any similarity simply resulted from the fact that both works lack creativity. As mentioned in the Introduction, if I were to ask four students to create a directory of Asian restaurants in Chicago, the four would likely produce markedly similar directories, whether they copied or not. An originality requirement, then, empowers courts to exclude from the copyright system a particularly messy class of cases: cases in which courts would not be able to use similarity as the basis for even a weak inference regarding the likelihood of impermissible copying.

A few courts have flirted with this sort of explanation for copyright's creativity requirement. The first was the Second Circuit in *L. Batlin & Son, Inc. v. Snyder*.⁹⁹ At issue was a toy bank made in the shape of the legendary patriotic figure, Uncle Sam. Banks of this sort had long been available to the public, but they were always made out of cast iron, whereas the one in question was made out of plastic.¹⁰⁰ The plaintiff presented evidence designed to show that changing from a cast iron to a plastic medium was difficult and time-consuming; and the lower court ultimately found that "a degree of physical artistic skill" was indeed necessary for the transformation.¹⁰¹ The question on

99. 536 F.2d 486 (2d Cir. 1976).

100. *Id.* at 488.

101. *L. Batlin & Son, Inc. v. Snyder*, 394 F. Supp. 1389, 1390 (S.D.N.Y. 1975), *aff'd*, 536 F.2d 486 (2d Cir. 1976).

appeal, then, was whether a demonstration of this sort of “physical” skill was sufficient for copyright purposes, or whether artistic accomplishment was the touchstone of authorship.

Surveying prior cases (including *Bell*, a case discussed in Part I.A) the *Batlin* court found that in comparable instances works were awarded protection only when they exhibited more than “‘merely trivial’ variation[s]” from preexisting works.¹⁰² Unfortunately, that was not this case. The plastic bank at issue was extraordinarily similar to the conventional cast iron version in shape and detail. And while there were some minor differences, the court found that those were “functional”—that is, they were changes made to accommodate the use of plastic.¹⁰³ Thus, to find originality here, the court would have needed to say that physical skill sufficed even in the absence of non-trivial variations. This the court would not do: “If there be a point in the copyright law pertaining to reproductions at which sheer artistic skill and effort can act as a substitute for the requirement of substantial variation, it was not reached here.”¹⁰⁴

The *Batlin* court’s rationale can be seen as an early articulation of the evidence theory:

Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts—indeed, the constitutional demand—could hardly be served. To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.¹⁰⁵

The last line of the court’s analysis is a tentative version of the evidence theory. It seems to say that evidentiary issues would be too complex if courts were to allow copyright in minuscule variations. Courts would find it difficult to distinguish permissible copying of the underlying work from impermissible copying of the nearly identical copyrighted work. That would indeed put “in the hands of mischie-

102. 536 F.2d at 490 (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)).

103. *Id.* at 489.

104. *Id.* at 491.

105. *Id.* at 492 (citation omitted).

vous copiers” a dangerous power: the power to interfere with permissible copying of the unprotected underlying work.¹⁰⁶

The most famous and complete articulation of the evidence theory came a few years after *Batlin*, specifically in the form of Judge Posner’s opinion in *Gracen v. Bradford Exchange*.¹⁰⁷ Like *Batlin*, *Gracen* concerned the copyright eligibility of a derivative work—that is, a work based on a preexisting original. This time, the preexisting work was a copyrighted movie, and the derivative work under consideration was a collector’s plate featuring a likeness of the film’s lead actress.¹⁰⁸ The question presented was whether the artist who painted the plate could acquire rights in the likeness and ultimately wield those rights against a second artist also hired to make a line of collector’s plates. Writing for the Seventh Circuit, Judge Posner worried about evidence:

[A]s applied to derivative works, the concept of originality in copyright law has as one would expect a legal rather than aesthetic function—to prevent overlapping claims. Suppose Artist A produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. B also makes a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B’s defense is that he was copying the original, not A’s reproduction. But if the difference between the original and A’s reproduction is slight, the difference between A’s and B’s reproductions will also be slight, so that if B had access to A’s reproductions the trier of fact will be hard-pressed to decide whether B was [impermissibly] copying A or [permissibly] copying the Mona Lisa itself.¹⁰⁹

Interestingly, in *Gracen*, Judge Posner explicitly limited his articulation of the evidence theory to apply only to those cases where the work at issue is based on another copyrighted work: “We are speaking . . . only of the requirement of originality in derivative

106. The Second Circuit also discussed the evidence theory in *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980). There, the court again made reference to the “practical” difficulties associated with distinguishing between permissible copying from one source and impermissible copying from a virtually identical source. *Id.* at 910–11.

107. 698 F.2d 300 (7th Cir. 1983).

108. *Id.* at 301.

109. *Id.* at 304 (citation omitted). Note that *Gracen* could have been resolved by better contracting, because the film production company enjoyed rights superior to those held by each individual plate artist. See 17 U.S.C. § 103(a) (2000) (providing that the author of a derivative work does not enjoy protection for “any part of the work in which [copyrighted] material has been used unlawfully”).

works.”¹¹⁰ As Judge Posner himself would later realize, however, the same basic point applies much more broadly. Consider, for example, Judge Posner’s opinion in *Ty, Inc. v. GMA Accessories, Inc.*¹¹¹ One part of that litigation concerned two beanbag animals, both described by their firms as pigs.¹¹² Judge Posner points out that, if either beanbag pig had at all resembled a real pig, the copyright issue would have been a difficult one.¹¹³ The court in that instance would have had a hard time determining whether one pig was copied from the other (impermissible), or whether instead any similarity simply resulted from the fact that both firms were trying to create a pig in beanbag form. Fortunately, in *Ty*, neither beanbag pig looked remotely like a real pig, and, thus, the evidence issue turned out to be straightforward.¹¹⁴

Gracen has been subject to a great deal of criticism in the years since the opinion first issued. Professors Melvin and David Nimmer, for example, have questioned how often these sorts of evidentiary puzzles are likely to occur in practice.¹¹⁵ Was *Gracen* a fluke for presenting a case where two derivative works were so similar that it was unclear whether the relevant authors copied from one another, or, instead, both borrowed from the same original work? The Nimmers think so. In their words, it is “factually unjustified” to assume that “any slight . . . variation that a given derivative work makes to a particular underlying work is likely to be similar to any slight variation to the same underlying work made by a different derivative work author.”¹¹⁶ Whether this criticism sticks is, in the end, an empirical question. But the Nimmer argument focuses on the special case of derivative work, and one thus wonders whether they have accounted for uncreative work more generally. After all, while fact patterns like that from *Gracen* might sound far-fetched, it seems very reasonable to ex-

110. 698 F.2d at 305.

111. 132 F.3d 1167 (7th Cir. 1997).

112. *Id.* at 1169.

113. *Id.* at 1170.

114. Whimsically, and just to amplify this point, Judge Posner included in the published opinion a picture of two real pigs, along with pictures of the two beanbag pigs. *Id.* at 1174–75. His message: this really was an easy case, as neither beanbag pig at all resembled the real pigs. For another opinion written by Judge Posner that raised similar evidentiary issues, see *Pickett v. Prince*, 207 F.3d 402, 406 (7th Cir. 2000) (“Whether Prince’s guitar is a copy of his copyrighted symbol or a copy of Pickett’s guitar is likewise not a question that the methods of litigation can readily answer with confidence.”).

115. 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.03[A] (2002).

116. *Id.*

pect that different authors will routinely produce nearly identical street maps, recipes, telephone books, and databases.

Professor Peter Jaszi is another prominent critic of *Gracen*, although his objections seem more like refinements than significant challenges to the theory. One of his concerns is purely semantic. In *Gracen*, Judge Posner held that a derivative work must be “substantially different from the underlying work” to avoid the evidence quagmire.¹¹⁷ Professor Jaszi worries that this language, taken out of context, might lead courts to demand too much from derivative work,¹¹⁸ and thus he prefers earlier court language requiring only that a derivative work be “distinguishable” from its predecessor.¹¹⁹ This is a fair point as far as it goes, but it certainly does not refute Judge Posner’s basic argument.

Another of Professor Jaszi’s objections is that the use of expert testimony can solve any evidence problem.¹²⁰ This seems to miss the mark on several dimensions. First, it might not be true that experts can readily determine the lineage of a given work or, more important, that a finder of fact can evaluate dueling expert claims reliably. Second, even if experts are helpful, that point is not inconsistent with the evidence theory. The theory, after all, is that certain categories of copyright cases are so expensive to litigate that society might be better off excluding them from copyright’s purview. Professor Jaszi helpfully identifies one culprit for those high costs—experts—and he is right about that. In certain cases, litigants will find it in their private interest to incur significant litigation expenses, including the hiring of experts, even though those expenses are socially unjustified. The creativity requirement works to exclude some of these pricey cases from the system.¹²¹

Professor John Wiley is the third copyright authority to criticize *Gracen*. His concern is with cases where an author’s purpose is to cre-

117. 698 F.2d at 305.

118. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 461 n.18 (describing Judge Posner’s standard as a “quantum leap” from earlier decisions).

119. *Id.* at 461 n.19.

120. *Id.* at 462 n.20.

121. Interestingly, Professor Jaszi does ultimately find a rationale for the result in *Gracen* by arguing that Judge Posner’s real motivation was an “implicit recognition of a hierarchy of artistic productions.” *Id.* at 462. As Professor Jaszi interprets the case, “it is easier to recognize and reward as an ‘author’ one who paints on canvas with inspiration from nature than one who paints on china with inspiration from old movie stills.” *Id.* at 463.

ate a work that accurately mimics an existing work. On the evidence theory, such a work might be denied protection; to Professor Wiley, this sounds absurd. As interpreted in *Gracen*, “the copyright requirement of originality makes no sense because it claims variation as a virtue, while authors of many objects of copyright protection rightly regard variation as a vice.”¹²² In *Gracen*, for example, the artist’s purpose in creating the plates was to create an image recognizable to anyone who saw the movie on which the plates were based. “Yet . . . faithful accuracy doomed *Gracen*’s copyright suit,” Professor Wiley complains, “for Judge Posner thought her painting looked hardly different from the movie.”¹²³

Professor Wiley is correct: evidentiary concerns might lead courts to deny protection to some works that are intentionally designed to be faithful reproductions. But that is not an unforeseen consequence. Instead, Professor Wiley points to one type of case where copyright might rationally deny protection. The justification is not that faithful reproductions are less valuable to society than other, more distinctive works; nor is it that faithful reproductions are easier to accomplish or in any other way less meritorious. The justification is simply that these cases can be quite costly to litigate, and so a sensible copyright regime might choose to exclude them on the theory that the social costs seem likely to outweigh the social benefits.¹²⁴

D. Implications

As applied to most uncreative work, the evidence theory alone is sufficient to justify denying protection. For example, while reasonable minds might disagree over whether food recipes should be denied

122. John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 137 (1991).

123. *Id.* at 136–37. Judge Posner himself was not blind to this objection; in an article published a few years after *Gracen*, Posner expresses concern over cases where “the creativity of the derivative work consists precisely in the fidelity with which it reproduces the impression created by the original.” William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 357 (1989).

124. Elsewhere in his analysis, Professor Wiley argues that evidentiary problems should not lead to exclusion, but should, instead, be resolved by a higher standard of proof. “If difficult questions of proof indeed arise in future cases, the appropriate solution is a high standard of proof for plaintiffs—not a definition of originality that punishes them for successfully achieving a goal that is socially deserving and efficient.” Wiley, *supra* note 122, at 137. I agree that this is another viable approach. It would discourage litigation in instances of evidentiary complexity, but it would still leave copyright as a possibility in appropriate cases. The modern registration requirement works exactly this way. *See infra* Part III.C.

protection because of their arguably low social value or, quite the opposite, because of the public's strong interest in free access to this information, the evidence theory moots the debate. No matter what the right answer to the social value and public access questions, recipes should be excluded because copyright protection in this instance would present an extraordinary problem with respect to proof. The social costs of resolving those evidentiary difficulties would likely outweigh any social benefits that might accrue from protecting recipes in the first place.

Ironically, the main implications of the evidence theory therefore come in cases where the evidence theory is not compelling, and, because of that, the only way to justify the search for creativity is to lean on one of the traditional but more troubling explanations. *Feist* is one such case. There was no evidence problem in *Feist* because Rural had planted in its original directory a handful of fictitious listings—entries that were included for the very purpose of detecting unauthorized copying.¹²⁵ Had *Feist* compiled its own telephone listings, or had it even simply confirmed the listings provided by Rural, it would have detected the false entries and eliminated them. *Feist* did neither. Four fake listings thus survived in *Feist*'s directory, testifying to the fact of copying and also suggesting its approximate extent.¹²⁶

This does not mean that Rural should have won its copyright case. But it does mean that the only way to justify the Court's reliance on creativity is to tell a compelling story about social value, production costs, or the public's interest in free access to telephone information. That, frankly, is hard to do. The telephone directory at issue was obviously expensive to create and valuable once created, so those rationales do not work. That leaves only one plausible rationale, namely that copyright was in this case rightly denied because of the public's strong interest in free telephone information. But even that is open to debate. Local telephone companies must earn revenues sufficient to cover the substantial fixed costs of the telephone plant. It might be in

125. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

126. The false entries in *Feist* did no harm because no consumer was ever going to look up a nonexistent neighbor. The same might not be true for false entries on a map or in a research database. Thus, the use of fictional information is only plausible for certain types of work.

Note, too, that in *Feist*, an independent copyright claim could have been raised with respect to the false listings. They were creative, after all, and one could thus argue that at least those entries should have been protected by copyright. Rural likely did not advance this argument because (1) the copying probably would have been deemed *de minimis*, and (2) Rural would have had a hard time showing that any damages flowed from this copying.

the public interest to recognize copyright in telephone directories and, in that way, allow telephone companies to earn some of the necessary revenue through the sale of Yellow Page advertisements. After all, the alternative is to deny copyright and thereby force regulators to approve higher telephone rates.¹²⁷

Whatever one thinks of this argument, it certainly makes clear that creativity itself says nothing about the right answer in this case. It is possible that Rural should have won, and it is possible that Rural should have lost. But it borders on the absurd to decide the case by asking whether telephone listings are creative.

One might be tempted to dismiss all this as much ado about nothing. No legal regime works perfectly, and, thus, the fact that the Court decided one case on seemingly irrelevant grounds is only so important. But it turns out that there is a large category of work for which this same problem recurs: works, like telephone directories, that are for the most part collections of facts. For these works, the creativity requirement is today a significant obstacle to protection. Yet there is typically no evidence problem. And, while sometimes valid in particular cases, concerns about public access, social value, and production costs do not justify a blanket rule barring protection.

Think about evidence first. Evidentiary issues are typically quite manageable in these cases because fact-intensive research generates a rich paper trail. Suppose, for example, that two biographers each decide to write the life story of boxer Lennox Lewis. True, the resulting works would both likely tell a similar tale of a young man who grew up in London and went on to win Olympic Gold in Seoul. But a court would have no trouble determining whether the biographers copied from one another as opposed to working independently. After all, the very act of researching Lewis's life should generate evidence in the form of airline tickets, taped interviews, and the like, evidence that

127. Judge Greene adopted this position in *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983), the decision that accepted, with modifications, the consent decree that settled the government's antitrust case against the Bell Telephone Company, *id.* at 225–26. One issue at play was the question of whether postdivestiture local telephone carriers should be allowed to continue producing Yellow Page directories. Judge Greene thought they should, his explanation being that “the Yellow Pages provide a significant subsidy to local telephone rates,” and that the “loss of this large subsidy” would lead to higher rates, a result “clearly contrary to the goal of providing affordable telephone service for all Americans.” *Id.* at 193–94. For a fuller discussion of how best to recover the fixed costs of the telephone network, see STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 621–23 (2001) (discussing Ramsey pricing); KENNETH E. TRAIN, OPTIMAL REGULATION 117–40 (1991) (same).

would clearly and easily distinguish cases of innocent similarity from those of impermissible copying.

If evidence does not justify exclusion, do any of the other theories explain why all factual works should be denied protection? Surely not the social value and production cost rationales, because factual works are often of great value and are often expensive to create. As for the public's strong interest in having access to factual information, I have already argued that this interest cuts both ways.¹²⁸ If the goal is to increase the public's access to factual information, it is not clear whether the best approach is to offer copyright, and thereby increase the incentive to gather and disseminate this material, or deny copyright, and thereby maximize public access to information that is or will be made available. At best, then, this rationale justifies denying protection in some fraction of the cases, but surely not all of them.

Are there other concerns, then, that justify a ban on protection? Courts have in the past worried that, by recognizing copyright in facts, copyright law would create patent-like monopolies in factual information.¹²⁹ But that is not true. Copyright stops only unauthorized borrowing. So, even if one party were to hold copyright in some particular fact it discovered, another party could always return to primary sources and re-gather that same information. Recognizing copyright in a biography of Lennox Lewis would therefore not mean that there would be only one book about his life; it would simply mean that later authors would either have to confirm the various factual claims themselves or (more likely) cut a deal with the first author. The exact scope of permissible borrowing would need to be worked out—it would be hard, for example, to negate all the benefits that a second researcher inevitably enjoys—but no matter how the nuances are resolved, it is clear that one can recognize copyright in these instances without creating monopolies in factual material.

Courts have also worried that, in certain settings, a second-comer might not be able to reconfirm a first author's factual claims. That is admittedly an important special case, and it might be that the fair use

128. See *supra* notes 92–96 and accompanying text.

129. See, e.g., *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 204 (2d Cir. 1983) (worrying that copyright might inadvertently allow an individual to be “the owner of an important political event merely by being the first to depict that event in words”), *rev'd on other grounds*, 471 U.S. 539 (1985); *Moore Publ'g, Inc. v. Big Sky Mktg., Inc.*, 756 F. Supp. 1371, 1379 (D. Idaho 1990) (“By placing ideas and facts beyond copyright protection, while allowing protection for the expression of those ideas or the arrangement of those facts, the Copyright Act prevents monopolization of facts or ideas . . .”).

doctrine should be available to excuse unauthorized borrowing in such circumstances.¹³⁰ It would be impossible, for example, for a second videographer to capture footage of President John F. Kennedy's assassination, and, certainly, that fact is relevant when considering the appropriate scope of protection for the original video images.¹³¹ Similarly, some factual research might be so expensive that it exhibits natural monopoly properties.¹³² The costs of sending an unmanned vehicle to explore the *Titanic* wreckage are exorbitant even given modern technology; so, while it is technically feasible for a second exploration, the economics might mean that the *Titanic* example should be thought of as parallel to the President Kennedy example. But, again, these are special cases that would likely justify special exceptions. In most situations, facts can be independently gathered by multiple parties, and, thus, copyright would not yield monopoly.

Another concern that must be accounted for is the worry that protection of factual information will lead to wasteful duplication of research.¹³³ The possibility of Coasian bargaining calls that claim into question; the fact that the second-comer can re-gather the information should set up a dynamic where the first party licenses to the second and thereby avoids any wasteful duplication. But many respected commentators worry that transaction costs, strategic behavior, and other forms of market breakdown will block the bargain; and, in cases where that seems plausible, again, intellectual property rules could be tailored accordingly.¹³⁴

130. The fair use doctrine excuses infringement in instances where leniency seems appropriate on policy grounds. The doctrine was codified in 1976, but it nevertheless remains a free-wheeling policy inquiry, allowing flexible responses to exceptional situations like those identified in the text. See 17 U.S.C. § 107 (2000) (offering a nonexclusive list of factors to consider).

131. Cf. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 132 (S.D.N.Y. 1968) (rejecting the argument that the Kennedy footage "could not be the subject of copyright because . . . to allow copyright would result in the appropriation of the subject matter," but nevertheless finding unauthorized copying to be fair use).

132. A market exhibits the properties of a natural monopoly in instances where a single firm can satisfy market demand at a lower total cost than can two or more firms. Among the policy implications are: (1) competition in such a market is wasteful, because total costs are greater than they could be in its absence; and (2) there is some danger that only one firm can survive economically, and, thus, natural monopoly markets might in the long term tend to become monopolized. For a general discussion, see BENJAMIN ET AL., *supra* note 127, at 374–80.

133. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) ("It is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent.").

134. Professor Jane Ginsburg, for example, questions the viability of market forces in this setting and advocates the use of compulsory licenses. Ginsburg, *supra* note 35, at 1916–37.

My claim with respect to factual works, then, is not that all factual work should be protected, or even that factual work, when protected, should be accorded exactly the same scope of protection that is accorded creative work. Instead, my claim is only that a lack of creativity is not itself a good reason to deny these works protection. False facts and rich paper trails both operate in this context to minimize any evidentiary concerns, and none of the other rationales justify a general prohibition. Moreover, there are strong arguments to be made in favor of at least some narrow form of protection. After all, the same freerider problem that (from an economic perspective) justifies copyright protection for creative work seems to justify protection for factual work as well.

The details here of course require more thought. For instance, maybe protection should extend only to certain classes of facts, or maybe it should apply only to facts that are captured in database form.¹³⁵ Federal copyright law today cannot adequately explore these details because the Constitution has been interpreted to require that copyright analysis stop at the question of whether a work is creative. This yields a blanket rule denying protection to factual works, and precludes the more careful analysis that the topic deserves.

Worse, this is not just a problem for copyright law, but, in fact, threatens to be a problem for federal law more generally. Consider, for example, Congress's recent attempts to use its authority under the Commerce Clause to protect databases from certain types of unauthorized duplication.¹³⁶ Many scholars think that copyright law's creativity requirement renders this legislation unconstitutional. Their logic: under *Feist*, the Constitution authorizes Congress to award copyright protection only to works that demonstrate some modicum of creativity; the proposed legislation must, therefore, be unconstitutional, because it allows Congress to skirt the constitutional limitation imposed by the Copyright Clause simply by invoking the Commerce

135. For some interesting lessons from the European experience with database protection, see Stephen M. Maurer et al., *Europe's Database Experiment*, 294 *SCIENCE* 789, 790 (2001) (arguing that Europe's experiment "has eroded the public domain, overprotected 'synthetic value' of doubtful worth [e.g., telephone number listings], and has raised new barriers to data aggregation").

136. *E.g.*, Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998); Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996).

Clause.¹³⁷ If this argument holds, then *Feist* in effect bars all forms of federal protection for uncreative work, and it does so without any policy rationale capable of supporting that result.

II. FIXATION

There are two main prerequisites to federal copyright protection. The first, which Part I considers, is the requirement that an eligible work be original to the author in question. The second, and the subject of this Part, is the requirement that an eligible work be “fixed in any tangible medium of expression.”¹³⁸

The key statutory provision is section 102(a) of the Copyright Act. That provision states, in relevant part, that federal copyright protection begins when original expression is captured in a physical form from which it can be “perceived, reproduced, or otherwise communicated.”¹³⁹ To take some simple examples, a playwright satisfies this requirement by preparing a typewritten manuscript or by filming a performance of his play on videotape, and a composer satisfies the requirement by creating sheet music or recording an album. Fixation is a broad concept. The statute defines acceptable fixations to include “any tangible medium . . . now known or later developed, from which [expression] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁴⁰

The most striking aspect of the fixation requirement is that an acceptable tangible embodiment does not need to survive for any significant period of time. Fixation is like a trigger. Copyright protection commences the moment there exists a physical embodiment “sufficiently permanent or stable to permit [the associated expression] to

137. For discussion, see Paul J. Heald, *The Extraction/Duplication Dichotomy: Constitutional Line-Drawing in the Database Debate*, 62 OHIO ST. L.J. 933, 935–41 (2001) (examining Supreme Court jurisprudence in the area of implied limitations on Congressional power and applying it to the Collections of Information Antipiracy Act); 1 PAUL GOLDSTEIN, COPYRIGHT § 2.2.1, at 2:10 (2d. ed. 1998) (interpreting *Feist* to implicitly authorize this use of the Commerce Clause).

138. 17 U.S.C. § 102(a) (2000).

139. *Id.*

140. *Id.* This was not always true. For example, right before Congress clarified the issue in the 1909 Act, the Supreme Court interpreted the preexisting copyright statute such that piano rolls did not constitute a physical “copy” of their associated musical works. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908). The Court did so because piano rolls were not directly accessible to humans, but were, instead, parts of a machine that produced musical tones only after being connected to the rest of the mechanism. *Id.* at 18. Today, by contrast, piano rolls would surely constitute adequate fixations.

be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁴¹ Thus, expression captured in a computer’s memory can be sufficiently fixed even though the expression would be immediately lost were the computer to lose power,¹⁴² and an author can intentionally destroy the fixation on which his copyright is based without in any way endangering his statutory rights.¹⁴³ In short, fixation does not imply permanence. Once a physical embodiment exists, copyright begins, and nothing more turns on the continued existence of that physical embodiment.

Fixation is easily accomplished for most works. Books, paintings, and motion pictures are all natural ways for an author to communicate expression to others, and—even if quickly lost or destroyed—these embodiments all adequately fix expression for the purposes of federal copyright eligibility. Sheet music and sound recordings are similarly natural ways to communicate musical compositions, and these, too, typically suffice. The fixation requirement turns out to be a significant hurdle only with respect to a narrow category of works, primarily those that are performed but not recorded.¹⁴⁴ Certain types of choreography might fall into this category,¹⁴⁵ as might impromptu performances like standup comedy and interactive theater.¹⁴⁶ Also excluded from copyright on this ground are purely oral communications like folk tales and unrecorded radio broadcasts,¹⁴⁷ and certain evanescent art forms such as sand castles, ice carvings, and, arguably,

141. 17 U.S.C. § 101 (defining “fixed”).

142. See, e.g., *Advanced Computer Servs. v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (considering whether copies of computer software stored in RAM are “fixed” for copyright purposes).

143. See, e.g., *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1498–99 (11th Cir. 1984) (recognizing copyright even though the author knowingly destroyed his own copy of the work).

144. Note that unfixed work can still be protected under state law. See 17 U.S.C. § 301(b)(1) (explicitly declining to preempt state law as applied to unfixed works).

145. For discussion particular to choreography, see Leslie Erin Wallis, Comment, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1456 (1986) (noting that choreography will often fail to meet the fixation requirement).

146. On interactive theater, see Gregory Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1367 (1997) (arguing that “the fixation requirement of federal copyright law should be relaxed to bring improvisational artists within the fold of federal copyright protection”).

147. See, e.g., *Fritz v. Arthur D. Little, Inc.*, 944 F. Supp. 95, 101–02 (D. Mass. 1996) (excluding oral lectures from copyright protection); *Falwell v. Penthouse Int’l, Ltd.*, 521 F. Supp. 1204, 1207 (W.D. Va. 1981) (noting that “[t]he existence of common law copyright protection for the spoken word has not been established by any court,” and declining to “set an unprecedented departure from the state of the law as it presently exists”).

graphical displays that appear on but then disappear from computer screens.¹⁴⁸

This Part argues that the main justification for the fixation requirement is that unfixed work would present considerable challenges with respect to proof. The analysis proceeds in three Sections. Section A considers the history of the fixation requirement in federal law. The purpose of this historical survey is to better understand how fixation currently works, and what purposes lawmakers might have thought it would serve. Section B considers a variety of possible rationales for the fixation requirement, for example the argument that fixation serves to create an archive of society's cultural accomplishments. Finally, Section C articulates the evidence rationale and uses it to criticize the modern fixation requirement.

A. Foundations

The phrase "fixed in any tangible medium of expression" was first introduced into copyright law by the 1976 Act, but the basic idea of requiring a tangible embodiment was part of federal copyright law right from the start. The Constitution authorizes Congress to protect "writings,"¹⁴⁹ and almost any definition of that term would seem to require a physical rendering. This would certainly have been true had the word been interpreted literally, and, thus, taken to include only objects like books, letters, and other paper documents from which words are directly accessible to readers. Even as courts and Congress adopted more generous interpretations, however, the common thread was always (and quite naturally) an assumption that "writings" had to be in physical form.

Thus, in the same opinion where it reminded lower courts that the term "writings" is not to be construed in its "narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles," the Supreme Court limited the term to mean only "physical rendering[s]" of expression.¹⁵⁰ Similarly, in a different

148. This has been and continues to be a contentious issue, for example in cases involving the visual output of computer video games. *See, e.g.,* *Advanced Computer Servs. v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (considering whether copies of computer software that "disappear[] from RAM the instant the computer is turned off" are fixed); *Digital Communications Assocs., Inc. v. Softklone Distribution*, 659 F. Supp. 449, 463 (N.D. Ga. 1987) (holding that a "status screen" is a "compilation . . . copyrightable to the extent of its arrangement and design of parameter/command terms").

149. U.S. CONST. art. I, § 8, cl. 8.

150. *Goldstein v. California*, 412 U.S. 546, 561 (1973).

case, Judge Learned Hand wrote a dissent to argue that the relevant majority had taken too narrow a view of copyright's permissible subject matter, but, even there, Judge Hand drew the line at physical manifestation. Any work can be a constitutional writing, argued Judge Hand, provided that the expression can be "embodied in a physical form capable of being copied."¹⁵¹ Congress has never pushed this boundary. While federal law has over time significantly expanded the categories of what is deemed eligible for copyright—the earliest statute focused on maps, books, and charts, while the modern statute includes motion pictures, sculpture, and the like—no federal copyright statute has ever attempted to protect completely intangible expression.¹⁵² In the courts and implicitly in Congress, then, the Constitution itself has been interpreted to establish a basic fixation requirement, and that interpretation took hold long before the 1976 Act formally introduced the fixation requirement into federal law.

The Copyright Act of 1909 also foreshadowed what would become the modern Act's fixation requirement.¹⁵³ Under the 1909 Act, the primary means by which an author could trigger copyright protection was by "publication" of an original expressive work.¹⁵⁴ In particular, an author could secure copyright through publication so long as each published copy contained a notice of copyright that complied with various statutory formalities.¹⁵⁵ Publication was a critical moment under the 1909 Act both for acquiring and for forfeiting copyright rights: publication with adequate copyright notice would immediately bring a work into the federal regime, but publication without adequate notice would immediately inject the work into the public do-

151. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting in part) (favoring the copyright eligibility of sound recordings).

152. There is one possible exception, namely, a statute passed in 1994 that prohibits the unauthorized recording of live musical performances. See *Unauthorized Fixation and Trafficking in Sound Recordings and Music Videos*, Pub. L. No. 103-465, 108 Stat. 4974 (1994) (codified at 17 U.S.C. § 1101 (2002)). I exclude it from consideration in the text because it is generally not considered to be a copyright statute. Nevertheless, the statute is interesting in that, on the one hand, it creates rights in an intangible (a live performance), yet, on the other hand, those rights are only relevant in instances where someone has fixed the work, and, at that, fixed it during the actual performance in question. The statute thus has a fixation requirement of sorts, the only difference being that fixation under this statute is not accomplished by the relevant author or his agent, but is accomplished by some would-be pirate. For further discussion of this antbootleg provision, see LEAFFER, *supra* note 90, at 50–52.

153. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

154. *Id.* § 9, at 1077.

155. 17 U.S.C. § 10 (repealed 1976).

main.¹⁵⁶ How does this tie into the fixation requirement? Under the relevant case law, “publication” could occur only after the relevant expression was put in tangible form. As one influential commentator summarized the cases, a work was published only when “the original or tangible copies . . . [were] sold, leased, loaned, given away, or otherwise made available to the general public.”¹⁵⁷ Thus, oral remarks,¹⁵⁸ public performances,¹⁵⁹ and even radio broadcasts¹⁶⁰ were not publications for copyright purposes, whereas mass distributions of books or pamphlets¹⁶¹ obviously were.

156. Detailed case law arose to define with precision the concept of publication. In fact, courts developed two parallel definitions: a relatively permissive definition that was typically applied in cases where an author wanted to show that he had published his work and thereby triggered protection (“investive” publication), and a narrow definition that was applied in cases where the author wanted to show that he had not published and hence it did not matter that he had failed to give adequate copyright notice (“divestive” publication). See *Hirshon v. United Artists Corp.*, 243 F.2d 640, 645 (D.C. Cir. 1957) (“[I]t takes more in the way of publication to invalidate any copyright . . . than to validate it.” (emphasis omitted)). For a helpful overview of investive and divestive publication, see ROBERT GORMAN & JANE GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 384–87 (5th ed. 1999).

157. 1 NIMMER & NIMMER, *supra* note 115, § 4.04. The term “publication” was not explicitly defined in the 1909 Act. In the 1976 Act, a definition was included, and the House Report for the 1976 Act states that this new definition was added to make “plain that any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work.” HOUSE COMM. ON THE JUDICIARY, 94TH CONG., *COPYRIGHT LAW REVISION*, H.R. REP. NO. 94-1476, at 138 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5754.

158. See 17 U.S.C. §§ 5(c), 12 (both repealed 1976) (establishing by negative implication that oral delivery alone cannot constitute publication); *Nutt v. Nat’l Inst. for the Improvement of Memory, Inc.*, 31 F.2d 236, 238 (2d Cir. 1929) (“A public performance of a dramatic or musical composition is not an abandonment of the composition to the public.”); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 107 (S.D.N.Y. 1963) (“The ‘oral delivery’ of his speech . . . no matter how vast his audience, did not amount to a general publication of his literary work.”). *But see* *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1354 (N.D. Ga. 1998) (holding that the King speech represents an exception to this general principle due to the scope of the public oration).

159. See, e.g., *Ferris v. Frohman*, 223 U.S. 424, 437 (1912) (holding that public presentation of a dramatic composition which had not been printed or published did not end a common law copyright); *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027 (9th Cir. 1981) (holding that a pre-release screening of a motion picture “was not a publication divesting the work of its common law copyright”); *Burke v. NBC*, 598 F.2d 688, 693 (1st Cir. 1979) (holding that making a copy of a film available for use in lectures and on an educational television program does not constitute publication).

160. See Michael B. Landau, “*Publication, Musical Compositions, and the Copyright Act of 1909: Still Crazy After all these Years*,” 2 VAND. J. ENT. L. & PRAC. 29, 33 (2000) (explaining why radio broadcasts were not treated as publications, and criticizing the result).

161. See, e.g., *J.A. Richards, Inc. v. N.Y. Post, Inc.*, 23 F. Supp. 619, 620 (S.D.N.Y. 1938) (holding that no copyright existed because the pamphlet at issue was published without adequate notice).

The 1909 Act implicitly required fixation in another way as well. Section 13 of the 1909 Act stated that, after an author triggered federal protection through publication with notice, the author had to deposit with the Copyright Office “two complete copies” of the published work.¹⁶² Exceptions to this deposit obligation were recognized for cases where it was “impracticable to deposit copies because of their size, weight, fragility, or monetary value,” but, even in these instances, a photograph or other identifying physical reproduction was required.¹⁶³ Deposit was thus in practical effect another fixation requirement. The requirement was not particularly strict—the statute stated that copies should be deposited “promptly,”¹⁶⁴ but the Supreme Court held that deposit could be made any time prior to the filing of an infringement action¹⁶⁵—yet it was a statutory obligation that un-fixed expression could not satisfy, and it thus further reinforced the notion that intangible works were ineligible for protection under the 1909 Act.

The discussion thus far focuses on published work, but statutory provisions applicable to unpublished work further established an implicit fixation requirement. Other than publication with notice, the only way to claim federal copyright under the 1909 Act was to register an unpublished work with the government.¹⁶⁶ Not all categories of unpublished expression were eligible for protection by registration; the statute included a specific list of eligible categories.¹⁶⁷ Even for eligible works, however, fixation was a precondition to registration. Again, this was not an explicit requirement set forth in the statute; but the only way to register an unpublished work was to submit to the Copyright Office a copy of the work in tangible form.¹⁶⁸ Thus, fixation was in practice mandatory. Interestingly, unpublished works did not have to be completely fixed in order to be registered under the 1909 Act. An unpublished motion picture, for example, could be registered by the submission of just “one print taken from each scene or act.”¹⁶⁹

Building on this base, the 1976 Act introduced fixation as a separate prerequisite to federal protection. The House Report for the

162. 17 U.S.C. § 13 (repealed 1976).

163. *Id.*

164. *Id.*

165. *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 42 (1939).

166. 17 U.S.C. § 12 (repealed 1976).

167. *Id.*

168. *Id.*

169. *Id.*

1976 Act suggests that the new provision “perpetuates the existing requirement that a work be fixed in a tangible medium of expression,”¹⁷⁰ and, although the Report does not draw these analogies, the modern fixation requirement does indeed seem to be modeled after the 1909 Act’s publication, registration, and deposit provisions. For example, the fact that fixations are not required to survive much beyond their first moments of existence suggests that lawmakers were thinking about publication when crafting the fixation requirement. Publication under the 1909 Act was a discrete act that took place at the start of the copyright term. By interpreting fixation as they did, lawmakers gave fixation a similar feel: fixation marks the start of the copyright term, but it is not an obligation that lasts much beyond that triggering event.

At the same time, the new fixation requirement did represent a significant change from the fixation requirement previously implicit in the publication, deposit, and registration provisions. Under those provisions, fixation alone was never enough. To qualify for protection through publication, for example, an author had to not only capture his expression in tangible form, but also engage in an appropriate form of public dissemination with notice. Registration similarly conditioned protection on fixation plus an additional act, in this case, deposit of that fixation with the government. The 1976 copyright revision eliminated these additional requirements, recognizing copyright on the basis of fixation alone. That greatly expanded the number of works eligible for federal protection, and it was therefore a significant re-envisioning of fixation’s role in the copyright regime.¹⁷¹

170. HOUSE COMM. ON THE JUDICIARY, 94TH CONG., COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

171. Even under the 1976 Act, publication, registration, and deposit continued to be important concepts. Publication remained relevant because, until the law changed again in 1989, an author could still forfeit federal rights if he published his protected work without adequate notice. *See* Copyright Act of 1976, § 401(a), Pub. L. No. 94-553, 90 Stat. 2541, 2576 (1976) (establishing general notice requirements). That risk was eliminated by the Berne Convention Implementation Act, sec. 7, § 405, Pub. L. No. 100-568, 102 Stat. 2853, 2857-58 (1988) (amending the act to eliminate the strict notice requirement). Today, publication remains relevant in a variety of contexts, such as in establishing the term of copyright for anonymous and pseudonymous works. *See* 17 U.S.C. § 302(c) (2000) (establishing for these works a copyright “term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first,” but allowing the regular provisions to take effect if the author’s identity is revealed). Registration, too, continues to play a role in the federal system. For example, authors who register their work enjoy certain evidentiary presumptions as to the validity of their copyrights, and also have the option to pursue additional remedies specially available to registered works. *See infra* Part III.C. Deposit survived as a requirement after 1976 as well, playing basi-

B. Rationales

One virtue of fixation is that it increases the likelihood that the relevant expression will be passed from place to place, person to person, and generation to generation. Unrecorded expression—say, a folk tale—is difficult to transfer over time and space. Fixed expression, by contrast, is durable and transferable. One possible rationale for the fixation requirement, then, might be that it increases the nation’s cultural stockpile, enriching society by making expression more accessible and long-lasting.¹⁷²

Such an explanation would be consistent with copyright’s deposit requirement. As was explained in the previous Section, copyright holders have long been required to deposit copies of their published works with the Copyright Office. Those copies are then passed to the Library of Congress, and, from there, the public can access them. The House Report on a copyright revision act from 1989 explicitly justifies deposit on cultural grounds, explaining that deposit creates “a strong and dynamic national library . . . that acquires, preserves and makes accessible . . . the material expressions of our national cultural life.”¹⁷³

Of course, if cultural preservation really were the goal, both deposit and fixation could do more. Deposit, for example, is today enforced only by a system of modest fines.¹⁷⁴ The requirement would have significantly more bite if failure to deposit would result in, say, the complete loss of copyright protection. Similarly, fixations are deemed acceptable even if they last only a short period of time. Fixation would be more effective at preserving expression if tangible embodiments were required to survive for a longer period. All this can be explained, however. Modern copyright law in many ways has attempted to ease the burdens associated with qualifying for and maintaining copyright.¹⁷⁵ Thus, the leniency built into the modern fixation

cally the same role post-1976 as it did prior to that time. See 17 U.S.C. § 407 (2000) (maintaining the requirement of depositing “two complete copies of the best edition” or “complete phonorecords of the best edition” within three months of publication).

172. For a fuller articulation of this argument, see Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 773–79 (2001).

173. HOUSE COMM. ON THE JUDICIARY, 100TH CONG., BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H.R. REP. NO. 100-609, at 44–45 (1988).

174. 17 U.S.C. § 407(d) (assessing a fine of \$250 for failure to deposit within three months and a fine of \$2500 “if such person willfully or repeatedly fails or refuses to comply with such a demand” to deposit).

175. See, e.g., Berne Convention Implementation Act, sec. 7, § 405, 102 Stat. at 2857–58 (eliminating notice as a prerequisite to protection).

and deposit requirements might just be the result of a balance between the desire to have a long-lasting written archive and the desire to avoid any rules that might make it too difficult to qualify for or maintain federal rights.

One might similarly ask why the law would use both fixation and deposit to further the goal of cultural preservation when deposit, it seems, could accomplish this goal by itself. The answer most likely is that the Copyright Office cannot reasonably handle the full burden. Even today, a time when only published works are subject to the deposit requirement, many works are removed from the collection after five years due to limited storage space.¹⁷⁶ This practical difficulty would grow exponentially worse were deposit extended to include all the many unpublished works that today are fixed but not deposited. Thus, fixation can be defended from this criticism by noting that fixation is a valuable supplement to deposit.

A more devastating criticism is that the archival rationale turns on an errant assumption, namely, the assumption that the fixation requirement is effective at encouraging authors to fix expression. After all, the archival rationale explains fixation only if, by requiring fixation, the law increases the number of works that are fixed and thereby increases the cultural archive. But that seems unlikely. Even without the fixation requirement, fixation is already cheap, easy, and significantly in an author's own interest. A videotape is a sufficient fixation, and even that inexpensive embodiment would significantly help an author prove his case in the event of infringement litigation. Thus, there is already a strong incentive to fix, and the extra pressure brought on by the fixation requirement likely has little marginal impact.

A second and more promising rationale for the fixation requirement is that it helps to distinguish authors whose expressive activities were motivated by copyright from authors for whom copyright was an afterthought. Drawing this sort of distinction would be desirable because, while copyright is likely worth its costs in instances where it encourages expressive production, copyright might not be worthwhile in cases where the promise of protection did not in any way increase the incentive to create.¹⁷⁷ Given how easy it is to fix expression, it is

176. Policy Statement on Deposit Retention Schedule, 48 Fed. Reg. 12,862, 12,862-63 (Mar. 28, 1983).

177. Copyright protection is designed to encourage dissemination as well as creation. Thus, there might be reason to recognize copyright even in instances where the relevant author was

reasonable to assume that authors who fail to fix their works within a certain period of time are not thinking about copyright protection and, hence, should be excluded from the federal regime. Such exclusions would benefit society (because this expression would be free for all to use) without diminishing expressive production (because, in these instances, copyright was not a relevant incentive in the first place).

This rationale in essence treats fixation as a signal, and that is both a strength and a weakness. The strength is that, if fixation is just a signal, then it is easy to see why fixations need only last a short period of time. Once an author fixes his work, the signal is given, and there is little reason to demand that the resulting tangible object survive for a long time thereafter. The weakness: fixation seems too simple an act to serve as an effective signal, in that it generates too many false positives. Consumers write down their shopping lists, after all, yet, by that act, they are in no way meaning to imply that copyright law motivates their expression. If copyright law really were trying to establish a signal that would reveal author motivations, a better approach would be to choose a less conventional act as the relevant signal. The 1909 Act did this through its requirement that authors put a copyright notice on all published works. Copyright notice was such an unusual combination of markings—typically, the letter “c” inside a circle, plus the author’s name and the date of first publication, all placed at a location specified by the statute¹⁷⁸—that the resulting signal was cumbersome but unambiguous. Anyone who was motivated by copyright law could (in theory) give the signal,¹⁷⁹ but anyone not thinking of copyright was unlikely to stumble into protection through good fortune alone.¹⁸⁰

not originally motivated by the allure of copyright protection. Similarly, copyright law is also designed to discourage wasteful forms of self-help, for example, the creation of elaborate encryption schemes. Discouraging this waste might be another reason to recognize copyright, even if copyright was not a motivating factor with respect to the work’s original creation.

178. 17 U.S.C. § 19 (repealed 1976).

179. For many years, lawmakers debated whether the notice requirement was too technical, leading to “arbitrary and unjust forfeitures” of copyright in cases where an author was caught unaware by the notice obligation, or erred in trying to satisfy it. HOUSE COMM. ON THE JUDICIARY, 94TH CONG., COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 143 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5759.

180. The House Report on the 1976 Act lists as one of the “principal functions” of the notice requirement that it places “in the public domain a substantial body of published material that no one is interested in copyrighting.” *Id.* Of course, the notice requirement served other purposes as well. For example, it served to “inform[] the public as to whether a particular work is copyrighted.” *Id.*

Other possible rationales for fixation focus on various practical ramifications that are loosely associated with fixation. For example, fixation exposes a work to greater risk of infringement because, with physical embodiments available, an author will have a hard time monitoring access to and use of his work. This increased risk might justify increased protection. Similarly, fixation increases an author's ability to profit from his work because fixed versions can be sold, leased, and otherwise profitably transferred. That might explain why federal law starts the copyright term at the moment of fixation. Such a policy supports the author's profit-seeking activities in the short term, but ensures that, after a period of profit-making activity, copyright will end and the work will be dedicated to the public. These types of practical explanations were often used to justify the 1909 Act's publication requirement,¹⁸¹ and, as I will explain now, they have some allure when it comes to explaining fixation as well.

Consider, first, the argument that the act of fixation puts a work at increased risk of infringement and thus justifies increased legal protection. This logic would explain fixation but for the fact that fixation is such a poor proxy for risk.¹⁸² Publication was a plausible proxy for risk, because there actually is increased risk the moment a work leaves the immediate control of its author and is instead made available to some fraction of the general public.¹⁸³ But fixation? Expression can be fixed but nonetheless remain in its author's tight control, as it

Comparing the notice requirement to fixation reveals another important difference: notice had to be accomplished at or near the moment of publication, whereas fixation can occur any time before the filing of an infringement action. The stricter timing obligation inherent in the notice requirement makes it a better signal. Everyone, after all, is thinking about copyright right before they file suit; the interesting question is whether a given author was thinking about publication when he first created (or disseminated) his expressive work.

181. See, e.g., LEAFFER, *supra* note 90, at 147 (explaining "publication" as the moment when an author begins to earn the economic fruits of his labor, and, in exchange, the moment when the clock starts to run on protection).

182. The risk argument does make sense of the fact that fixations are required to last only for periods of nontransitory duration. After all, once the genie is out of the bottle, the author remains at risk even if the original fixation is destroyed.

183. As Professors Gorman and Ginsburg point out, however, the concept of publication was "not always coterminous with the general notion of 'making public,'" but was, instead, often a "rather technical construct." See GORMAN & GINSBURG, *supra* note 156, at 384.

does, for example, with a personal diary. Conversely, expression can be unfixed and yet significantly at risk, as it is with expression made available in playhouses or broadcast over the airwaves via radio and television. Thus, if copyright law really were looking to identify a moment of increased risk to an author, it would be odd to focus on the moment of fixation instead of, say, publication or dissemination.¹⁸⁴

As for the second argument—that fixation marks the start of significant financial returns, and, thus, should also mark the start of the copyright term—this argument was much stronger as applied to publication than it is as applied to fixation. Under the 1909 Act, copyright terms were measured from the moment of first publication. A work first published in 1958, for example, was (under 1909 law) free for all to use a maximum of fifty-six years later.¹⁸⁵ Under modern law, by contrast, copyright expires a given number of years after the relevant author's death, regardless of when any specific work was first fixed.¹⁸⁶ Thus, if the *quid pro quo* is that the author begins to earn profits, but, in exchange, must start to see his copyright term run, modern law does not implement the bargain.¹⁸⁷ No matter when each work was fixed, copyright for all of an author's works end at the same time.¹⁸⁸

184. At the time of the 1976 Act, the Register of Copyrights advocated the use of “dissemination” as the standard instead of “publication” or, presumably, “fixation.” REGISTER OF COPYRIGHTS, REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961), reprinted in 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. at 14-4 (1992).

185. See 17 U.S.C. § 24 (repealed 1976). Due to the 1976 revisions, a work first published in 1958 has actually ended up with a term of ninety-five years. See *id.* § 304(a)(1)(B) (2000):

Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured [and in] the case of [specified works] the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

186. See *id.* § 302 (providing copyright protection for the life of the author and for seventy years after the author's death).

187. One caveat: the 1976 Act does preempt state law that might have otherwise recognized perpetual rights. See *id.* § 301 (“[N]o person is entitled to any such right or equivalent right in any work under the common law or statutes of any State.”). Thus, federal protection starts the clock on an author's rights in the limited sense that, prior to qualifying for federal protection, in at least some states the author would have enjoyed perpetual protection, either under state statutes or under common law copyright. This seems like a trivial sacrifice, however, given how long federal copyright terms today last.

188. This could be changed, of course, but such a change would open up a wide range of additional policy issues related to the relative benefits of fixed versus relative copyright terms. See HOUSE COMM. ON THE JUDICIARY, 94TH CONG., COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 133-37 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5750 (explaining why duration should be tied to the life of the author rather than the date of first publication).

Some cynical observers might be tempted to explain fixation as a ploy through which copyright increases the number of works in the public domain. This was a common explanation for the notice provisions that were in effect until 1989. Under the 1909 Act, notice was subject to so many complicated formalities that many authors who attempted to include adequate notice nevertheless failed, thereby forfeiting their federal rights. Those works fell into the public domain, enriching the stockpile of expression that was free for all to use.¹⁸⁹ Obligations under an international copyright treaty ultimately forced Congress to eliminate notice as an obstacle to protection,¹⁹⁰ but one could argue that fixation has perhaps taken over the role.

This cynical argument is ultimately untenable, however. First, while works published without notice fell directly into the public domain under pre-1989 law, unfixed works do not today become part of the public domain. Instead, unfixed works simply are not eligible for federal protection. Section 301 of the modern Act makes this clear by explicitly declining to preempt state law that might protect unfixed work.¹⁹¹ Many such state protections exist. A California statute, for example, protects “any original work of authorship that is not fixed in any tangible medium of expression.”¹⁹² Thus, unlike work published without notice, unfixed works are not necessarily free for all to use.

Second, even if unfixed works were immediately thrust into the public domain, it is unclear how valuable that would be. After all, under 1909 law, consumers could readily determine which works were free for all to use. A consumer had only to inspect the published work and determine whether it had adequate notice. If it did not, that work

189. The renewal provisions were equally tricky, and they had a similar effect. For example, Frank Capra's classic film, *It's a Wonderful Life*, fell into the public domain because the company that held its copyright failed to file a renewal application during the film's twenty-eighth year of protection. See GORMAN & GINSBURG, *supra* note 156, at 355 (explaining that the film production company that held the copyright was bankrupt at the time the renewal was to be filed).

190. Most industrialized nations and many developing countries are signatories to the Berne Convention, a multilateral treaty that, among other things, forbids formalities that might make it difficult for foreign authors to qualify for copyright protection in member nations. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, art. 5(2), 25 U.S.T. 1341, 1346, 828 U.N.T.S. 221, 233. Several statutes have gradually adjusted United States law to meet obligations under the Berne Convention, most prominently the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

191. 17 U.S.C. § 301(b)(1).

192. CAL. CIV. CODE § 980(a)(1) (West Supp. 2003).

was probably in the public domain.¹⁹³ Unfixed works, by contrast, are not readily identified. A patron at a playhouse, for example, has no way of knowing whether the play was written out beforehand or is, instead, completely unfixed. Similarly, an audience member at a comedy performance can never be sure that the performance is not being audiotaped from backstage. Thus, fixation does not seem to be a particularly helpful mechanism by which to increase the public domain, because consumers would never know which works are, and which works are not, free for use.

Lastly, several sources suggest that the real purpose of the fixation requirement is to narrow copyright's purview. The court in *Falwell v. Penthouse International, Ltd.*¹⁹⁴ raised this point, worrying that, if copyright were to include unfixed expression, "every utterance" would be protected, and "the courts would be inundated" with copyright claims.¹⁹⁵ "[S]uch a result would run counter to the firmly established constitutional guarantees of freedom of speech and of the press."¹⁹⁶ Professor Wendy Gordon has similarly argued that fixation serves to distinguish protected expression from "the ordinary stream of speech," in that way making sure that copyright applies only to a "limited set of intellectual products."¹⁹⁷

This rationale has some force, but, as with several of the others, this one is vulnerable to the criticism that fixation is not a very limiting doctrine. So much expression is fixed—personal correspondence, school reports, even messages left upon telephone answering ma-

193. The 1909 Act excused some accidental omissions of copyright notice, 17 U.S.C. § 21 (repealed 1976), so, in some cases, a consumer could pick up a copy of a work, see no copyright notice, duplicate the work, and still turn out to have infringed copyright. Instances of this sort were rare, however, because courts refused to recognize this statutory exception in cases where the omission was due to "neglect or oversight," *Sieff v. Cont'l Auto Supply, Inc.*, 39 F. Supp. 683, 688 (D. Minn. 1941), or due to mistake of law, *Wildman v. N.Y. Times*, 42 F. Supp. 412, 415 (S.D.N.Y. 1941). Even in cases where accidental omission was excused, however, alleged infringers were only liable to the extent that they had actual notice of the relevant copyright. As a functional matter, then, these works were in the public domain.

Note that federal copyright law ultimately adopted a more forgiving policy than that available under 1909 law. For example, 17 U.S.C. § 405 creates exceptions for *de minimis* omissions and for works registered within five years of any omission, and 17 U.S.C. § 401 fully eliminates the notice requirement for all works published after 1989.

194. 521 F. Supp. 1204 (W.D. Va. 1981).

195. *Id.* at 1207.

196. *Id.* at 1208.

197. Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1382 (1989); see also *Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 252–56 (N.Y. 1968) (raising similar concerns about recognizing copyright in unfixed expression).

chines—that it simply does not resonate to say that fixation is designed to solve the problem of an overly inclusive copyright regime. The notice requirement was a valuable limiting doctrine in that it actually did serve to exclude from copyright all sorts of casual expression that was not disseminated with copyright in mind. But fixation is much less effective in that it cuts out only a tiny fraction of the relevant expression. Thus, while this argument is correct as far as it goes, it does not seem to go very far toward explaining the fixation requirement.

C. *The Evidence Theory*

Several commentators have previously suggested that the fixation requirement is in reality motivated by evidentiary concerns. “One of the most important reasons for requiring fixation . . . as a condition precedent to copyright protection is to ensure that a copyright claimant will be able to provide a court documentary evidence of the copyrightable subject matter,” writes one commentator.¹⁹⁸ Without fixation, “copyright law would forever be mired in disputes over the definition and boundaries of the works claiming copyright protection,” suggests another.¹⁹⁹ Professor Marshall Leaffer’s copyright treatise puts it this way: “[W]hen a work is embodied in a tangible medium of expression, one can point to something, enabling a court to determine whether infringement has taken place.”²⁰⁰ A guide to the requirements of the Berne Convention published by the World Intellectual Property Organization similarly offers that the purpose of the fixation requirement is to “prove[] the existence of the work.”²⁰¹

The popularity of the evidence theory is easy to understand. Copyright endeavors to protect an intangible—“expression”—yet intangibles by their very nature raise difficult issues with respect to proof. It is not surprising, then, that an evidentiary justification is ascribed to the one copyright doctrine that associates the intangible with some form of a tangible medium. Much as a patent marks the

198. 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); see also ROBERT MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 367 (2d ed. 2000) (asserting that a “persuasive argument for fixation” is that it “helps in proving authorship”).

199. Donat, *supra* note 146, at 1400.

200. LEAFFER, *supra* note 90, at 55–56.

201. WORLD INTELLECTUAL PROP. ORG., *GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 18 (1978).

boundaries of a claimed invention, and a deed makes clear the borders associated with land, a fixation makes plain what is being claimed and allows that claim to be recorded as of a certain date.²⁰²

The evidence rationale resonates for another reason, too: in copyright, it is critically important to know the exact content of protected expression. Close is simply not good enough, and the reason is copyright's idea/expression dichotomy. As readers familiar with copyright law already know, copyright protects only the expression of an idea, not the idea itself.²⁰³ For example, Alice Sebold's copyright in the book, *The Lovely Bones*, recognizes in Sebold certain exclusive rights with respect to her specific language, her particular characters, her exact settings, and so on; but the copyright does not give her any protection for the broad concept of a story where the main character has moved on to the afterlife and narrates the book as events continue to unfold on Earth. Copyright, in other words, recognizes rights in the narrow, concrete, expressive embodiment of an idea but leaves the idea itself free for all to use.²⁰⁴

This links in with evidentiary concerns as follows. If the federal copyright regime were forgiving when it came to evidentiary issues, the boundaries of any given copyright claim would be unsure. That would be troubling, because the whole point of the idea/expression dichotomy is to recognize rights in the specific expression an author uses to write, sing, or code his inspiration, all without granting rights to the abstract ideas communicated thereby. Without solid evidence, however, expression blurs into idea. Think of a copyright claim re-

202. Professor Wendy Gordon expands on this basic point as applied to several areas of intellectual property law. See Gordon, *supra* note 197, at 1381–83 (“Although they are not physically ‘crossable,’ the fixation and marking requirements and the limits on protectable intellectual products and copyright owners’ rights function as boundaries in the same way as the edges on personal property or physical boundaries around realty do.”). Notice, however, that much of copyright law is focused on the exact opposite task: that of trying to disassociate the intangible from its tangible embodiment. Section 202 of the 1976 Act, for example, announces that “ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied,” thus establishing both that the copyright owner does not own all embodiments of his work and that a party who happens to own an embodiment of the work does not necessarily also hold copyright in that work. 17 U.S.C. § 202 (2000). This had previously been a contentious issue in cases in which one party held possession of the first embodiment of another party's expression. See, e.g., *Forward v. Thorogood*, 985 F.2d 604, 605–06 (1st Cir. 1993) (rejecting the argument by the owner of a band's demo tapes that ownership of the original fixation carries with it ownership of the associated copyright).

203. 17 U.S.C. § 102(b).

204. Obviously, the idea/expression dichotomy is more of a vague spectrum than a precise line. For a fuller introduction, see LEAFFER, *supra* note 90, at 77–90.

lated to a professor's unfixed lectures. Give that lecture enough times, and the overlapping claims begin more and more to approximate the underlying idea. "Transaction costs are a bitch," becomes the copyrighted intuition, not the details of the particular professor's eloquent expression thereof. In short, the idea/expression dichotomy cannot operate at a high level of imprecision, hence evidentiary concerns are of particular importance for copyright.²⁰⁵

The fixation requirement works to address this evidentiary problem, although the logic here is a little less straightforward than it might at first appear. The wrinkle is that the fixation requirement does not serve evidentiary goals by encouraging authors to fix their expression. True, encouraging fixation would serve evidentiary goals. But, as a practical matter, the fixation requirement probably does not encourage fixation. Even without the fixation requirement, fixation is already cheap, easy, and significantly in an author's own interest. The legal requirement is thus superfluous when it comes to incentives; even without the added pressure of the requirement, there is a sufficiently strong incentive to fix, and any author who thinks of it will do so regardless of the legal rule. What the fixation requirement does accomplish is to serve as a prophylactic remedy in cases where there never was any physical evidence of the claimed expression. The fixation requirement excludes these cases from consideration. The reasoning is the same as that articulated with respect to uncreative works: in these cases, the social costs of litigation likely exceed the social benefits derived from offering copyright protection in the first place.

Of course, if the fixation requirement really is best understood as a rule designed to address evidentiary issues, the modern requirement has been implemented in a shockingly unambitious fashion. The trouble is that the modern requirement excludes only those cases where there never was *any* physical evidence of the claimed expression; it does not exclude cases where there was evidence at some point in time, but that evidence was later lost or destroyed. Stated another way, federal law requires that fixations survive for a period of "more than transitory duration," but it does not require that fixations survive, say, until the moment of litigation.²⁰⁶ So, if a work was fixed in

205. Thanks to Professor James Boyle for a helpful exchange on this point.

206. One way to implement such a rule would be to say that copyright expires at the earlier of two dates: the date specified under the current duration provision, 17 U.S.C. § 302, or the date that the fixation is destroyed.

paper form in 1980, but the relevant papers were destroyed in 1981, modern law would nevertheless deem the work to be sufficiently fixed to support litigation in 1982 or even 1990. From an evidentiary perspective, this is difficult to defend. There is barely any difference between a case where there was never any fixation at all, and a case where there was a fixation that was destroyed before the relevant litigation commenced. Yet that is exactly the line drawn by the modern fixation requirement.

One can offer a halfhearted justification, namely, that addressing these additional issues would require a more complicated fixation rule. For instance, because copyright terms today extend so long, and tangible objects naturally degrade over time, lawmakers might be reluctant to adopt a fixation rule that simply required, without exception, that fixations survive until the moment of litigation. Such a rule would serve evidentiary goals, but it would also punish authors whose works were lost through accident or natural wear, and it would thus have the practical effect of (randomly) shortening copyright duration. To avoid these effects, the rule would have to carve out exceptions. For example, perhaps the rule would require authors to exert “reasonable efforts” to protect at least one fixation throughout the copyright term, thereby excusing authors whose fixations naturally degrade, but requiring authors in normal circumstances to either preserve their work or forfeit protection. Alternatively, the law could require survival but allow the requirement to be satisfied by the continued existence of any fixation, no matter whether it is the original fixation or a duplicate thereof. For published works, this would represent a significant relaxation of the otherwise harsh rule because, upon publication, typically a large number of fixed copies are produced and disseminated, and it would be the unusual case where all of those embodiments were destroyed.

Any of these rules would serve evidentiary goals better than the current rule, and the only drawback is that they would entail at least slightly increased administrative costs. If those costs are not justified, one can understand why modern law takes the unambitious position it takes. But that, in turn, calls the fixation requirement itself into question. Either there are significant efficiencies to be gained by excluding cases where there is no meaningful physical evidence, and, hence, the modern rule plus these more complicated adjustments are all likely justified; or all of this is small potatoes and fixation should therefore not be required. But the current position—to exclude cases where there is absolutely no physical evidence but welcome cases where the

evidence existed for any period of more than transitory duration—seems an untenable middle ground, unsupported by the evidence rationale, or, indeed, any of the rationales surveyed in this section.²⁰⁷

III. OTHER COPYRIGHT DOCTRINES

The previous Parts combined to take an in-depth look at the two main prerequisites to copyright protection: the requirement that a work be original, and the requirement that a work be fixed in tangible form. This Part offers a lighter survey of three additional copyright doctrines on which the evidence theory sheds light: the merger doctrine, the doctrine of *scènes à faire*, and the federal registration procedure. In each case, I argue that, while the doctrine at issue might additionally serve other purposes, one primary function is to discourage litigation in instances where evidentiary concerns would otherwise overwhelm.

A. *The Merger Doctrine*

As I discuss briefly in Part II.C, a basic principle of copyright law is that copyright protects only the expression of an idea, not the idea itself.²⁰⁸ An author who writes a book on how to lose weight, for example, can invoke copyright to protect her particular turns of phrase, but she cannot invoke copyright to protect the actual weight loss strategy she describes. Similarly—and this is the example I used earlier—Alice Sebold’s copyright in the book, *The Lovely Bones*, recog-

207. One possible explanation for the current fixation requirement might be that this is the best that Congress can do. After all, the constitutional term “writings” has been interpreted to require some form of a physical manifestation. Congress cannot completely eliminate the fixation requirement, then, and Congress might thus have chosen to do the next best thing: adopt the weakest fixation requirement imaginable, namely, one that recognizes as fixed any work that is even briefly captured in physical form. This explanation is consistent with the sweeping language currently in effect, both in section 102, which states that acceptable media include those “now known or later developed, from which [expression] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,” 17 U.S.C. § 102(a), and in section 101, which defines as fixed any expression that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration,” 17 U.S.C. § 101. Indeed, it is difficult to imagine more permissive definitions than these that would still pass constitutional muster.

208. See *supra* note 203 and accompanying text. This distinction is today codified at 17 U.S.C. § 102(b), but it was an integral principle long before. See, e.g., *Baker v. Selden*, 101 U.S. 99, 103 (1879) (“[W]here the art [a copyrighted book] teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public . . .”).

nizes in Sebold certain exclusive rights with respect to her specific language, her particular characters, her particular settings, and so on; but the copyright does not give her any protection for the broad concept of a story narrated from the afterlife.

The merger doctrine supplements this basic distinction between idea and expression. It states that copyright protection will be denied in instances where there are only a few ways to express a given idea.²⁰⁹ That is, contrary to the general rule, in these cases even expression will not be protected. If there is only one way to articulate a given idea,²¹⁰ or if there are only a handful of ways to articulate that idea, no one can protect any of the available alternatives.²¹¹ Expression and idea are said to “merge.” Courts typically explain that protection is denied in order to “prevent an author from monopolizing an idea merely by copyrighting a few expressions of it.”²¹²

The merger doctrine originated with the First Circuit decision in *Morrissey v. Procter & Gamble Co.*²¹³ In dispute was the copyright associated with the rules for the plaintiff’s “sweepstakes” promotional contest. The defendant attempted to conduct the same basic promotion, and the plaintiff sued on the ground that the defendant had

209. See, e.g., *Allen v. Academic Games League of Am.*, 89 F.3d 614, 617–18 (9th Cir. 1996) (applying the merger doctrine to prevent copyright of the underlying ideas in a series of academic games, because the expression of the rules of the games could not be distinguished from the idea of the games themselves); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1076 (2d Cir. 1992) (holding that the merger doctrine did not apply to prevent the copyright of a nine-pointed star illustrating personality traits, because there were many other ways to illustrate the nine traits).

210. In cases where there is only one way to express the idea, some copyright authorities identify the doctrine as “the doctrine of *Baker v. Selden*,” in that way reserving the term “merger” for cases where there are only a few, but more than one, ways of expressing the idea. See, e.g., 1 NIMMER & NIMMER, *supra* note 115, at § 2.18[B]–[D] (explaining the basic merger principle set forth in *Baker v. Selden*, and providing illustrations of how subsequent courts have enlarged upon it).

211. There is an ongoing circuit split over whether merger is a bar to copyright eligibility in the first instance or, instead, an affirmative defense that must be raised against a specific charge of infringement. Compare *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1460 (5th Cir. 1990) (holding that, because the idea and its expression merge, “the maps at issue are not copyrightable”) with *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) (applying the merger doctrine to “determin[e] whether actionable infringement has occurred, rather than whether a copyright is valid”). While practical implications do attach to this distinction, none are relevant to the discussion here.

212. *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). Several courts have picked up this exact language. E.g., *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir. 1992); *Hart v. Dan Chase Taxidermy Supply Co.*, 884 F. Supp. 71, 76 (N.D.N.Y. 1995); *Fin. Control Assoc. v. Equity Builders, Inc.*, 799 F. Supp. 1103, 1118 (N.D. Kan. 1992).

213. 379 F.2d 675, 678–79 (1st Cir. 1967).

copied the plaintiff's rules.²¹⁴ The claim was plausible. The defendant, for example, had published a rule stating that entrants "should print name, address and Social Security number on a Tide boxtop, or on plain paper,"²¹⁵ whereas the plaintiff's rule had required that entrants "should print name, address and social security number on a boxtop, or a plain paper."²¹⁶

A traditional copyright response to the case would have been to recognize copyright in the plaintiff's expression, but to announce that the defendant was free to copy the underlying idea. This would have made it impermissible for the defendant to copy the rules but perfectly acceptable for the defendant to run a similar or identical contest. The court refused to take this approach, however, worrying that protecting the expression in this instance would inevitably protect the idea, too. Wrote the court:

When the uncopyrightable [idea] is very narrow, so that the topic necessarily requires, if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the [idea].²¹⁷

This the court would not allow. Copyright, the court explained, was not "a game of chess in which the public can be checkmated."²¹⁸

In the years since *Morrissey*, the merger doctrine has been frequently invoked. In *Allen v. Academic Games League of America*,²¹⁹ for example, it was applied to limit the protection offered a variety of educational board games on the ground that the rules for the games and the ideas behind the games would in certain instances merge.²²⁰ In *Computer Associates International, Inc. v. Altai, Inc.*,²²¹ it was similarly applied to limit the protection offered to computer programs, the argument being that there are only a limited number of ways to efficiently code particular functions and concepts.²²² And in *Tensor*

214. *Id.* at 676.

215. *Id.* at 678 (emphasis and alterations omitted).

216. *Id.*

217. *Id.* (quotation and citations omitted).

218. *Id.* at 679.

219. 89 F.3d 614 (9th Cir. 1996).

220. *Id.* at 617-18.

221. 982 F.2d 693 (2d Cir. 1992).

222. *Id.* at 707-08.

Group, Inc. v. Global Web Systems, Inc.,²²³ the court struggled to decide whether merger should be invoked to deny copyright to engineering drawings, the logic this time being that there are just a limited number of ways to faithfully represent a complicated machine.²²⁴ In all of these cases, the same concern drives the analysis. Where there are only a few ways to express a given idea, courts worry that “rigorously protecting the expression [will] confer a monopoly over the idea itself,” a result directly contrary to the fundamental principle that copyright does not protect ideas.²²⁵

This standard account of the merger doctrine says nothing about evidence. Yet I submit that the merger doctrine is at least in part motivated by an evidentiary concern. Think again about *Morrissey*. Why was the court in that case so reluctant to recognize copyright in the plaintiff’s expression? The court says that “by copyrighting a mere handful of forms, [the plaintiff] could exhaust all possibilities of future use” of the sweepstakes idea.²²⁶ But that is not true. Copyright would not have stopped the defendant from hearing about the plaintiff’s sweepstakes promotion and then coming up with its own rules. Copyright would only have stopped the defendant from copying the plaintiff’s rules. Indeed, just as readers of the Sebold book are allowed to write their own stories about life after death, the defendant would have been perfectly free to conduct an identical contest promotion. All that the defendant would not have been allowed to do was copy the plaintiff’s expression.

But the court rejected this approach on the ground that there are only a few ways to express the sweepstakes idea. Why does this matter? Evidence. If the defendant in *Morrissey* had done exactly what traditional analysis would have allowed him to do—if he had borrowed the idea, but then written his own expression—he would still likely have ended up with expression that looked an awful lot like the plaintiff’s expression. As the court pointed out, there are only a few

223. No. 96-C-4606, 1998 U.S. Dist. LEXIS 19,596 (N.D. Ill. Dec. 9, 1998).

224. *Id.* at *3–5.

225. *Marshall & Swift v. BS&A Software*, 871 F. Supp. 952, 961 (W.D. Mich. 1994) (quoting 3 NIMMER & NIMMER, *supra* note 115, § 13.03[B][3]); *Fin. Control Assocs., Inc. v. Equity Builders, Inc.*, 799 F. Supp. 1103, 1118 (D. Kansas 1992) (same); *see also* *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 147 n.6 (2d Cir. 1997) (noting that merger operates when “protection of the expression would effectively accord protection to the idea itself” (citations omitted)); *Warren Publ’g v. Microdos Data Corp.*, 115 F.3d 1509, 1518 n.27 (11th Cir. 1997) (same).

226. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678 (1967).

ways to express this basic idea. That would have led to an evidentiary quagmire. The defendant's expression would have looked similar to the plaintiff's, and the court would have been hard-pressed to determine whether that similarity was evidence of impermissible copying or, instead, innocent happenstance given the limited number of options available.

This is a problem that applies generally to merger cases. Courts cannot reliably distinguish permissible from impermissible behavior in these instances because, no matter what, the resulting expression will typically look the same. So of course courts worry that protection of expression in these cases will "effectively accord protection" to the relevant underlying ideas. Without the merger doctrine, courts in some number of cases would mistakenly find impermissible copying where, in truth, only the unprotected idea was taken. As a practical matter, that would restrict the use of ideas in these settings. Merger thus denies protection in cases where there are only a limited number of expressive options.

B. *Scènes à Faire*

Copyright does not protect "stock" or standard literary devices. For example, no one can claim rights to a shadowy private investigator who wears a trenchcoat, smokes cigarettes, and enjoys a certain rapport with female clients, nor can anyone claim protection for stereotypical dramatic elements like the use of military slogans, flags, and armored vehicles as a backdrop for a motion picture about war. Courts refer to these unprotected elements as "*scènes à faire*," a French term that literally translates to mean "scenes which 'must' be done."²²⁷ A common definition states that these are "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."²²⁸ This is a court-made doctrine, typically explained by the observation that "it is virtually impossible to write about [certain] historical era[s] or fictional theme[s]" without sometimes employing standard characters and motifs.²²⁹

227. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945).

228. *E.g.*, *Wright v. Warner Books, Inc.*, 953 F.2d 731, 742 (2d Cir. 1991) (Van Graafeiland, J., concurring); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Churchill Livingstone, Inc. v. Williams & Wilkins*, 949 F. Supp. 1045, 1052 (S.D.N.Y. 1996).

229. *See, e.g.*, *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) ("Because it is virtually impossible to write about a particular historical era or fictional theme

There are two main reasons why a sensible copyright regime would deny protection to *scènes à faire*. One is that, by making it easy for authors to rely on familiar and well-worn elements, the doctrine helps authors communicate basic information to their readers quickly. An author does not need to invest any energy coming up with his own background characters or suggestive details; an author can borrow familiar elements from other sources, and thereby readily set the stage for whatever new material the author wishes to contribute. This justification frames the doctrine as a subsidy to writers; the costs of original expression are lower because familiar background characters and scenes can be borrowed without worry from preexisting sources.

The second reason, however, is evidence. If authors were allowed to copyright stock characters and settings, courts would frequently find themselves facing the by-now-familiar evidentiary puzzle: upon seeing two works with similar expressive elements, courts would find it difficult to determine whether there was impermissible copying of those elements, or whether, instead, any similarities innocently derive from the fact that, in both instances, the overlapping details flow naturally from the setting at issue. Like the merger doctrine, then, the doctrine of *scènes à faire* excludes these troubling cases from the copyright regime.

C. Registration

Sections 408 through 412 of the Copyright Act combine to offer authors the option of registering their works with the Copyright Office.²³⁰ Registration involves the payment of a modest fee, the deposit of (usually) two copies of the work, and the submission of an application that reveals some basic information about the work, such as the name of its author and the date on which it was completed.²³¹ Registration is not an evaluative process. While the Register of Copyright can deny registration in instances where the Register believes the work is ineligible for protection,²³² in general the Register just archives copyright applications and defers to the courts any serious evaluation of copyright claims.

without employing certain ‘stock’ or standard literary devices, we have held that *scènes à faire* are not copyrightable as a matter of law.”).

230. 17 U.S.C. §§ 408–412 (2000).

231. These requirements are set out in the statute. For example, 17 U.S.C. § 409 lists the categories of information that an applicant must disclose on a registration form, and 17 U.S.C. § 408 explains the deposit requirement as it applies in the context of registration.

232. 17 U.S.C. § 410(b).

For authors, there are two primary benefits to registration. First, an author who registers his work within five years of its first publication enjoys certain evidentiary presumptions as to the validity of his copyright and the accuracy of the information supplied on his application.²³³ This makes it easier for the author to win any later infringement action. Second, registration qualifies an author to pursue additional remedies with respect to infringements that take place after registration.²³⁴ For example, an author who has registered his work has the option of pursuing statutory damages instead of actual damages, and such an author can also recover attorney's fees.²³⁵ These expanded remedies are particularly valuable in cases where actual damages would be difficult to prove with sufficient specificity.²³⁶

There are a number of possible explanations for the registration procedure. For example, I pointed out earlier that copyright law might want to distinguish authors whose expressive activities are motivated by copyright from authors for whom copyright was an afterthought.²³⁷ Drawing this sort of distinction is desirable because, while copyright is likely worth its costs in instances where it encourages expressive production, copyright might not be worthwhile in cases where the promise of protection does not increase the incentive to create. Registration partially accomplishes this goal by offering expanded remedies to authors who signal, through registration, that copyright is important to them. Registration is not an extreme approach in that even unregistered works are protected, but registration does distinguish between the two categories of authors, and, thus, it furthers the goal of calibrating the level of protection to the likely incentive effect.

Another virtue of registration is that it increases the nation's cultural archive. By conditioning various advantages on registration,

233. *Id.* § 410(c).

234. *Id.* § 412. A work that is registered within three months of its first publication enjoys the full protection of a registered work even if the infringement at issue occurred prior to registration. *Id.* § 412(2).

235. *Id.* § 412.

236. Although not discussed in the text, note that registration is, as a technical matter, a precondition to the filing of almost any infringement action. *Id.* § 411. This is not discussed, however, because it is in reality just a formality. Right before a litigant files suit, he can submit the appropriate materials to the Copyright Office. Thus, in practical effect, copyright litigation begins with the submission of a form to the Copyright Office and then proceeds with the normal progression of filings to the appropriate court.

237. *See supra* note 177 and accompanying text (offering this as a possible rationale for the fixation requirement).

modern law encourages authors to submit copies of their works to the Copyright Office. From there, many of these works are passed along to the Library of Congress, and, in turn, made available to the public. True, registration could accomplish this even more effectively by requiring that all works be registered; but, as was noted earlier, modern copyright law is reluctant to impose strict requirements for fear that they will trip up foreign authors and authors who are not well versed in the nuances of the law. Most of copyright law is thus implemented through carrots, not sticks, and, on this view, registration is consistent with the overall approach of the law.

Registration can also be at least in part explained by reference to evidentiary issues. The presumptions that take hold if a work is registered within five years of its first publication make it easier for the relevant copyright holders to litigate their cases. Cases where the work was not registered within five years of publication, conversely, are much harder to win. The presumptions thus have the effect of discouraging litigation in cases where there is not good evidence—namely, cases where either (1) no copy of the work was deposited, or (2) a copy was deposited, but only after a long time had passed since the work was first made public. Note that, unlike all of the previous copyright doctrines considered, registration does not exclude cases that lack good evidence. Instead, registration simply sets the evidentiary burdens so as to discourage litigation in these instances.

Some courts and commentators have argued that registration does not serve an evidentiary purpose because the Copyright Office is not obligated to preserve copies of all registered works.²³⁸ Section 704(d) explicitly states that copies of published works need only be maintained for “the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress,”²³⁹ and in 1983 the Copyright Office announced that, due to a lack of storage space, published works would typically be discarded after five years.²⁴⁰ These limitations admittedly lessen the evidentiary value of the registration procedure, but that effect should not be overstated. First, an archive for published works is only so important because, by

238. See, e.g., *Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 485 (7th Cir. 1982) (“Deposited copies may be destroyed . . . and this is incompatible with the notion that copies are now required in order that the subject matter of protected works may always be available for information and to prevent unconscious infringement.”).

239. 17 U.S.C. § 704(d).

240. Policy Statement on Deposit Retention Schedule, 48 Fed. Reg. 12,862, 12,862 (Mar. 28, 1983).

definition, copies of published works are widely available, and, thus, there is naturally good evidence available with respect to these works. Second, the rules about discarding deposited works do not apply to unpublished works. For unpublished works, the evidentiary value of registration is greater, and the statute correspondingly requires that the copies not be “knowingly or intentionally destroyed” during the copyright term unless a duplicate copy is archived.²⁴¹

CONCLUSION

This Article set out to explore an evidentiary perspective on copyright law and, more importantly, to argue that copyright’s threshold inquiries into originality and fixation serve important evidentiary goals. The main implications are two: first, that copyright needlessly denies protection to databases and other factual material; second, that the modern fixation requirement should either be taken more seriously or completely discarded.

This Article has a secondary purpose, however, and that is to expose a problem of increasing import to federal copyright law: copyright doctrines today each serve so many different functions that they have become almost uselessly imprecise. That is, while doctrines like originality, fixation, and *scènes à faire* might once have been valuable shorthands for particular policy arguments, to invoke one of these doctrines today communicates almost no information. Originality, for example, is sometimes about the costs of expression, sometimes about the value of expression, sometimes about the importance of public access, and, yes, sometimes about evidence. Courts almost never make clear which issue is at play.

The quality of copyright decisions could be dramatically improved if courts were to take serious interest in articulating the logical justifications for the copyright doctrines they invoke. For instance, if the doctrine of *scènes à faire* is going to serve as the shorthand for several different policy rationales, that might be fine, but courts invoking the doctrine should then further specify which specific set of issues and arguments they mean to call to mind. Alternatively, the doctrine could be matured to match up with only one policy rationale, leaving separate doctrines to be associated with whatever policy arguments remain.

241. 17 U.S.C. § 704(d).

The imprecision of the current approach is hard to defend, and, indeed, dangerous to the functioning of the law. It is at least in part to blame for what has happened to the originality requirement; that doctrine was once a potentially valuable proxy for rational policy goals but today invites a meaningless hunt for creativity itself. It similarly has undermined the fixation requirement. The modern fixation requirement is associated with over a half dozen rationales; lost in an identity crisis, it serves none of them well. In short, doctrines that accrue multiple meanings in time can end up with no meaning at all. This is the warning implicit in the story of the originality and fixation requirements, and it is the secondary theme of this Article.