De-sanctified Novelties: The Museum Gift Shops After Bridgeman

J. Hunter Summerford
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by

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I. Introduction:

The gift shop is now a fixture of the museum. It’s the last room on the tour—impossible to bypass, difficult to escape. And of course the shop isn’t limited to brick and mortar. Museums such as the Metropolitan Museum of Art (MET) now peddle their wares through e-commerce worldwide.¹

The vast collections of museums can thus be exploited by means other than the price of admission, and no player is in a better position to profit from the ever growing market for art novelties. If Britney Spear’s face can move merchandise, why not Van Gogh’s visage—captured and immortalized in one his self-portraits—perhaps imprinted on a coffee mug or pillow or tie or T-shirt or calendar or post-card?

With suburban satellite shops scattered in at least a dozen locales² around the country and world, as well as a bustling on-line gift ship, the MET reported revenues of $80 million from merchandising in 2006, accounting for more than 25% of total revenues—including endowed support.³ To put that number in perspective, of the approximately 1650 members of the Museum Store Association, only 23% generate more than $500,000 in gross revenues a year.⁴ Still, according to a 1999 survey, of the 1800

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museums of the Museum Association of America, gift shop and publication revenues on average accounted for 25.5% of earned income.\(^5\) Whether or not the gift shop is big business—as it is for the MET—it’s clearly increasingly critical for the museum.

And, like any good businessman the museum does what it can to protect its interest and there’s no better way to ensure profitability than to operate without competition. While most enterprise must do what it can to survive, some fortunate firms benefit from governmentally mandated monopolies—e.g. electrical transmission companies and . . . museum gift shops? To promote the progress of arts and sciences, the constitution authorizes congress to grant to authors for a limited period monopolies over their writings.\(^6\) So, to the extent that the museum produces works of authorship, its gift shop can enjoy monopoly margins for a limited time; begging the question: to what extent, if any, do the wares of the gift shop qualify as original works of authorship?

Claiming copyright in such works has always been in the playbook of museums.\(^7\) In fact, prior to the arrival of a more legally savvy artist, museums claimed that acquisition of a work from an artist also meant acquisition of the underlying copyright in that work.\(^8\) Currently, for a museum to exploit a work in its collection in which a valid copyright still persists, it must acquire either the entire bundle of rights or particular

\(^5\) See supra, note 2.
\(^6\) U.S. Const. art. I, § 8, cl. 8.
\(^7\) Franklin Feldman et. al, Art Law 140 (1986).
\(^8\) Art Law Handbook 21 (Roy S. Kaufman ed. 2000). This is of course at odds with a basic tenet of copyright law, the doctrine of separability, which states that ownership of the physical object and ownership of the underlying copyright in that object are two entirely different things. That said, clearly an artist can grant his bundle of exclusive rights or any one among them to a museum. However, this cannot be presumed. Such right must be specifically conveyed in a written agreement. See Nicholas D. Ward, Copyright in Museum Collections; An Overview of Some of the Problems, 7 J.C. & U.L. 297 (1981), reprinted in Law, Ethics, and Visual Arts, 414-416 (John H. Merryman and Albert E. Elsen, Kluwer Law International 2002).
rights of exploitation from the copyright holder. Conversely, works in which the copyright has expired are committed to the public domain and anyone may exploit the work as he chooses. Caravaggio’s *The Musicians* is now everyone’s. The MET may own it, but anyone may copy, adapt, or transform it. Such public domain works, dedicated to all but exploited by few—particularly museums—are the subject of this note.

Copyright in reproductions or other exploitations of such works has always been presumed—genuinely or not—by museums. And though anyone may copy, reproduce, or exploit a work which has fallen into the public domain, few effectively ever get the chance. Ownership means control over access. That control can be extensively and profitably leveraged—e.g. by prohibiting all photography of *Starry Night*, the MET could monopolize the *Starry Night* derivative goods market. If the gift shop goods are protected by copyright and a competing poster or tie appears, the MET could have it enjoined as a violation of its copyright in the poster or tie. The critical input of any derivative good is the underlying work, and the gatekeeper of that input is the museum owning that underlying work. As such, copyright in a reproduction translates into a monopoly of the public domain image expressed in the underlying work.

Concededly, this is a pretty ingenious business plan and until *Bridgeman Library, Ltd. v. Correl Corp.* it was business as usual. The art world—and particularly those with rents to loose—looked on as the influential Federal Court for the Southern District

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9 Feldman, supra note 7, at 139.
10 *Id.* at 140.
12 Feldman, supra note 7, at 140
of New York\textsuperscript{14} did much to jeopardize the breezy status quo. In denying copyright protection for digital photographs of paintings which were themselves in the public domain, the court called into question the viability of all claims to copyright in derivative reproductions—i.e. the posters and mugs and many wares of the museum gift shop. This note will analyze the prudence of that holding and attempt to assess the fallout for the gift shops of the art world. To put Bridgeman in context I will first outline copyright law relevant to the holding.

II. Background:

\textit{a. Copyright- Generally—}

The basis of copyright law in the U.S. is constitutional.\textsuperscript{15} Generally, the Constitution delegates to Congress the power to grant a monopoly of limited scope to “Authors” “to promote the Progress of . . . useful Arts.”\textsuperscript{16} Predicated on this power Congress passed the Copyright Statute of 1791.\textsuperscript{17} It has accumulated numerous amendments since—the Copyright Act of 1976 being the most recent.\textsuperscript{18} According to the act, regardless of the category of work—e.g. literary, pictorial, derivative—protection extends only to “original works of authorship fixed in any tangible medium of expression.”\textsuperscript{19}

It is from the courts’ construction of “authors” that copyright jurisprudence springs. In spite of the fact that it is the Copyright Act that extends protection only to

\textsuperscript{15} 1030 Art Law supra note 7
\textsuperscript{16} See supra note 6.
\textsuperscript{17} Ralph E. Lerner & Judith Bresler, Art Law 1030 (3d ed. 2005).
\textsuperscript{18} Id. at 1031.
“original works of authorship,” the Court in *Feist* asserts the Constitution mandates originality as a prerequisite for copyright protection.\(^{20}\) This due to the fact that authorship presupposes originality—if the Constitution grants only a power to protect authors, then it also only grants a power to protect original works.\(^{21}\)

\(b.\) **Originality and Creativity**—

The sine qua non of copyright is originality—only original works are allowed copyright protection.\(^ {22}\) But, what constitutes originality remains fluid and is somewhat nebulous. At its broadest, originality might merely require that the work originate from an author—i.e. a work of authorship.\(^ {23}\) Essentially, that highly deferential position—deferential to authors—is the foundation of copyright jurisprudence.

*Bleistein v. Donaldson Lithographing Co.* demonstrated the essentially boundless subject matter worthy of copyright protection and summarily quashed any idea of the judge as curator.\(^ {24}\) As the primary defense to a charge of copying the plaintiff’s lithographic circus posters, the defendant asserted that such prosaic circus images—ballet dancers, men performing on bicycles, and mimes—were unworthy of copyright protection.\(^ {25}\) But, according to Justice Holmes, “[p]ersonality always contains something unique . . . a very modes grade of art has in it something irreducible which is one man’s

\(^{21}\) *Id.* at 347.
\(^{22}\) *Id.* at 345
\(^{24}\) *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239, 251 (1903).
\(^{25}\) *Id.* 248.
alone.”26 Furthermore, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . .”27

The emphasis is on “origin creativity” as opposed to “intellectual creativity.”28 Such a broad construction of originality means a broad swath of works subject to copyright protection. Consider Holmes epigram, also from Bleistein, “[o]thers are free to copy the original. They are not free to copy the copy.”29 In other words, since a copy originates from an author, a copy is itself original for the purposes of copyright law and is thus subject to protection.

The more recent—and more exclusionary—construction of originality laid down by Justice O’Connor in Feist “requires independent creation plus a modicum of creativity.”30 In Feist, the disputed work was a telephone book that was subsequently amalgamated into larger phone book through copying by the defendant.31 Though the phone book originated from the plaintiff, the work lacked the modicum of creativity necessary to receive protection—collations and alphabetization lack the “creative spark” which is the sine qua non of originality.32

Perhaps creativity, as Justice O’Connor intimates, was always critical the originality calculus.33 According to her The Trade-Mark cases “emphasized the creative component of originality” in limiting copyright protection to “original intellectual

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26 Id. 250.
27 Id. 251.
28 See Ralph D. Clifford, Random Numbers, Chaos Theory, and Cogitation: A Search for the Minimal Creativity Standard in Copyright Law, 82 Denv. U.L. Rev. 259 (2004) (using the terms origin creativity and intellectual creativity to designate the two ways which an author can be identified by—as someone “responsible for expressing the work in a physical form” and “as the individual who had at least one idea that is expressed in the perceivable work,” respectively.)
29 Bleistein, supra note 24, at 249
30 Feist, supra note 20, at 346
31 Feist, supra note 20, at 343
32 Feist, supra note 20, at 363.
33 See Feist, supra note 20, at 346-347.
conceptions of the author.” And arguably, creativity isn’t precluded from Holmes’s construction of originality. His phrase “[p]ersonality always contains something unique . . .” might be construed to say that if the work is original—in the sense that it originates with an author—then it is also necessarily creative as it contains the “personality” or “intellectual labor” of the originator. However, any suggestion that Feist doesn’t somehow elevate the quantum of originality beyond the necessary personality that flows from anything originating with an author is untenable. Even assuming creativity as outlined in Feist is an implicit component of originality, until Feist is was presumed as long as the work originated from an author’s independent creation.

Judges had largely “took the copyrightability of an object on trust,” and in so doing they had avoided the role of curator. As Holmes stated in Bleistein, “[i]t would be a dangerous undertaking for person trained only to the law to constitute themselves final judges of the [artistic] worth.” However, in the drawing the line at creativity—where the “the fruits of intellectual labor” must be demonstrated—the discerning eye of the judge-curator is invited if not unavoidable. Essentially by focusing on the quantum of creativity, the judge must decide how much creativity is enough. For example, while conceding that selection, coordination, and arrangement could satisfy the creativity threshold, alphabetization, the Court in Feist concluded, is not creative enough.

34 Feist, supra note 20, at 346
36 See Bleistein, supra note 24; Time, Inc. v. Bernard Geis Assoc., 293 F. Supp 130, 141-143 (S.D.N.Y. 1968); Atari, supra note 23.
38 Bleistein, supra note 24, at 251
39 Feist, supra note 20, at 346, (quoting the Trade-Mark Cases 100 U.S. 82, 94 (1879)).
40 Id. at 362.
Post-*Feist*, what creativity is for purposes of copyright is now critical. The *Feist* standard was not limited to the narrow facts of the case—factual compilation, “sweat of the brow” work—but rather announced a constitutional requirement effecting all copyrightable subject matter.\(^41\) The sine qua non of copyright is originality and the sine qua non of originality is independent creation plus a modicum of creativity.\(^42\) However, just what it means remains at best hazy. Since *Burrow-Giles* courts focused almost solely on independent creation.\(^43\) No thoughtful judicial exposition of creativity can be found because a de minimis quantity previously sufficed.\(^44\) *Feist* is typical of other cases denying copyright on the basis of insufficient creativity—stating only that Rural’s method of selection and arrangement lacks creativity, rather than delineating a clear, working definition.\(^45\)

c. *Originality and Photography*—

Specific mention of photographs as copyrightable subject matter was made in an amendment to the copyright statute in 1865.\(^46\) Nonetheless, because of the unique properties of photographs—namely the nexus of man and machine in authorship—they have received special scrutiny.\(^47\) Since the emergence of the photographer, jurors and

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\(^42\) See id.
\(^43\) See supra note 36.
\(^44\) Id.
\(^45\) See generally Tuchman, supra note 37, at 295 (citing Sec 4952, Rev. St.)
\(^46\) Tuchman, supra note 37, at 295 (citing Sec 4952, Rev. St.)
commentators have debated his authorial status—a quintessential man versus machine argument.48

Like every category of work subject to protection, the photograph must be original.49 Burrow-Giles Lithographing Co. vs. Sarony established—in harmony with the 1865 amendment—that photographs were generally subject to copyright protection.50 The photograph—a portrait of Oscar Wilde—due to authorial choices, such as posing of subject and selection and arrangement of costume, was determined to be an original work of authorship and thus within the language and protection of the copyright statute.51

Whether all photographs necessarily obtained copyright as original works of authorship was left unanswered in Burrow-Giles.52 However, such a broad extension seems quite natural and in consonance with copyright jurisprudence especially considering the subsequent construction of originality by Holmes in Bleistein. If “[p]ersonality always contains something unique . . .”53 then every photo would also seem to be original—since use of a machine could not preclude authorship.54 Thanks to Judge Hand, such reasoning did in fact become doctrine.55 In Pagano v. Chas. Beseler Co. where a photograph of the New York City Public Library was held copyrightable as “[i]t undoubtedly requires originality to determine just when to take the photograph . . . .”56 Later—and more explicitly—in granting copyright protection to photographic

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48 Id. at 295
51 Id. at 55.
52 Id. at 59.
53 Bleistein, supra note 24, at 250
54 Tuchman, supra note 46.
56 Pagano, at 964.
illustrations of bathtubs, Hand stated “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”

Consider that *Feist*—decided seventy years later—essentially rejects such reasoning: no longer can creativity be presumed from independent creation. Also, consider that despite statutory recognition, the copyrightability of photographs was continually challenged. Intuitively, a photographic portrait seems less worthy of copyright protection than a painted one. On the balance—in terms of time, skill, and quantum of choice—it’s easy to understand why any lay person, perhaps especially so in the late 19th century, would hold the painting of a man as opposed to the photograph of the same man in higher esteem: the machine overshadows the man. Therefore, it’s not surprising that the ramifications of a more stringent creativity prong would be intimately felt as we shall see below in *Bridgeman*. This is not to say that the a photograph is not creative or that a photograph cannot be more creative than a painting of the same subject. But, when creativity is defined as intellectual labor, the quantum of creativity involved in accurately depicting—e.g. a man’s likeness—will seem greater, at least facially.

d. Derivative Works and Reproductions—

According to the Copyright Act a derivative work is “a work based on one or more preexisting works such as . . . art reproduction . . . in which a work [has been]

57 Jewelers, at 934.
58 See Feist, supra note 30.
59 See Burrow-Giles, supra note 50; Time, supra note 36.
60 See Tuchman, supra note 37.
recast, transformed or adapted."61 Alva Studios stands for the proposition that reproductions of works already in the public domain can themselves qualify for copyright protection as derivative works.62 The qualifying work was a to-scale reproduction of Rodin’s Hand of God.63 Originality was predicated on the smaller size—18 ½ inches compared to 37 for the original—and the closed—as opposed to open—rear side base.64 The court also made much of the high level of skill and almost singular craftsmanship involved in the reproduction.65 In sum the reproduction was deemed sufficiently original.66

That ruling stands in stark contrast to Batlin another Second Circuit decision decided a few years later.67 Again the disputed work involved a reproduction of public domain material—the iconic cast-iron Uncle Sam toy bank.68 The reproduction involved numerous variations on the original—e.g. plastic rather cast iron, 9 as opposed to 11 inches, leaves rather than arrows in the eagle’s talons, smooth rather than rough exterior.69 The quantity and extent of variation as compared to the work in Alva is undoubtedly greater yet the court ruled that the originality threshold had not been met.70

Other factual difference having little to do with originality perhaps account for the differing decisions. Namely, only a highly skilled artist could so accurately replicate Rodin’s Hand of God.71 The replication was an achievement in and of itself. By contrast,

63 Id. at 266.
64 Id. at 267.
65 Id. at 266.
66 Id. at 267.
68 Id. at 488.
69 Id.
70 Id.
71 Alva, supra note 65.
Batlin involves mass produced reproductions of toy banks where the variations between the replica and the original are due to functional exigency rather than artistic choice.

Batlin and Alva demonstrate the continuum between uncopyrightable knock-off and copyrightable reproduction. In concert the two cases underscore what might be a reasonable distinction between protected and unprotected works—i.e. skill. However, this is a distinction that simply doesn’t exist in copyright jurisprudence. As outlined above, protection isn’t supposed to turn on the author’s ability, it is supposed to turn on authorship—i.e. originality.

Essentially, whether or not the museum exploitations of public domain works receive protection depends upon whether or not they are deemed derivative works. Indeed, a derivative work is itself an original work of art that receives copyright protection. However, protection—as with all copyrightable subject matter—only extends to original contribution. Therefore, to the extent that a derivative work is based upon and in fact copies a work in the public domain it is not protected. Only additional, original contribution may an author claim protection in.

Marcel Duchamp’s L.H.O.O.Q. provides an instructive example. First, as a derivative work based upon a preexisting work in the public domain—Leonardo Da Vinci’s Mona Lisa—and second, as a stark example of original contribution by a subsequent artist to a preexisting work. The preexisting work—since it is copied nearly

72 See Feist, supra note 20 (dismissing sweat of the brow doctrine).
74 Id. at 3.04[A].
75 Id.
76 Id.
identically—throws Duchamp’s salient, though minimal, contribution into relief—a go-
tee and mustache. At best, such a work would receive thin copyright protection.78

Though any given work might satisfy the originality threshold for copyright
protection, the degree of protection any given work receives is not constant.79 Because
works are only protected to the extent of original contribution there is a continuum of
protection.80 As such, the Mona Lisa would receive a greater degree of protection—i.e.
proving infringement would be easier—than Duchamp’s L.H.O.O.Q. because of the
greater quantum of originality contributed.81 Therefore, to the extent that the wares of the
museum gift shop receive protection as derivatives reproductions of public domain
works, the thinness principle is crucial to the metes and bounds of their property in any
infringement claim.82

e. Sweat of the Brow Works—

The term connotes a category of works that require expenditures of time, effort,
and possibly technical or artistic skill, but perhaps lack the necessary spark of creativity
to receive copyright protection.83 Reproductions—like that found in Alva—might be
considered sweat of the brow works, particularly an exact replica of an underlying
original work where there’s an absence of creative choice.84 The court concluded the
reduction in size as well as the differing base to be sufficient original contribution;

78 See Apple Computer Inc. v. Microsoft Corp., 35 F.3d 1435, 1439 (9th Cir. 1994) (“When the range of
protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual
identity.”).
79 Id.
80 Id.
81 Id.
82 Nimmers, supra note 73, at § 13.03[A].
83 See generally Feist, supra note 20(discussing sweat of the brow works in the context of factual
compilations at length).
84 Nimmer, supra note 73, at § 3.04[B]1.
however, the great effort spent in creating the reproduction undoubtedly buttressed the holding.\textsuperscript{85}

\textit{Feist} provides another example of such a work.\textsuperscript{86} There, the plaintiff expended significant resources compiling a comprehensive list of phone numbers in its service area.\textsuperscript{87} However, collating and alphabetizing names, addresses, and phone numbers lacks the modicum of creativity to meet the originality requirement.\textsuperscript{88} By establishing or emphasizing a creativity requirement, \textit{Feist} limited copyright protection for such works to the extent of originality in selection, arrangement, coordination.\textsuperscript{89} But, as \textit{Alva} demonstrates, courts in the past were sometimes willing to extend such works copyright protection.

The argument for protection of such works is economic and parallels the utilitarian incentive\textsuperscript{90} that underlies copyright protection in general—i.e. in order to incentivize the creation of works Congress is granted the power to extend monopolies to authors for a limited time.\textsuperscript{91} A phone book is a useful and efficient product from which society benefits. Without some form of protection the incentive to produce such a work is vitiated and society is perhaps deprived of a valuable good.\textsuperscript{92}

\section*{III. \textit{Bridgeman}:

\textsuperscript{85} See \textit{Alva}, supra note 62.
\textsuperscript{86} \textit{Feist}, supra note 20.
\textsuperscript{87} \textit{Feist}, supra note 31.
\textsuperscript{88} \textit{Feist}, supra note 32.
\textsuperscript{89} \textit{Feist}, supra note 20, at 350.
\textsuperscript{90} The utilitarian justification theory is outlined infra sec. V.
\textsuperscript{92} Arguably, protection is more justified for this category of work as compared to the more \textit{creative} categories of works which receive protection without reference to the investment of time or resources or the necessity of skill. So-called \textit{artistic} works carry other, personal incentives which sweat of the brows likely don’t. It’s fair to assume that many the worlds great works of art would have been created in the absence of an intellectual property regimes whereas a phone book may not have been.
In *Bridgeman*, the elements of the previous discussion intersect: the creativity fallout of *Feist*, the perennially suspect domain of photography, the inherently limited originality of public domain derivatives, and the unfavored sweat of the brow category of works. The plaintiff, Bridgeman Art Library, is a United Kingdom company that acquires photographic reproductions of public domain works of art—generally paintings—owned by museums and other collectors. The reproductions are maintained in large format high resolution color transparencies and low resolution digital files—both of which it claims copyright in. Bridgeman’s business model involves distributing the low resolution digital images on CD-ROM catalogs free of charge and then licensing the use of high resolution transparencies. Bridgeman alleges that Correl Corporation—a computer software company—copied a number of low resolution digital images and included them in a series of its own CD-ROM products.

Disposition of the suit involved two decisions. In the first, the District Court for the Southern District of New York entered summary judgment against Bridgeman on its copyright claims applying British law. On reconsideration the court affirmed the holding that the digital photographic reproductions of public domain works were not copyrightable; however, in the second decision the court applied U.S. copyright law. The court deemed the photographic copies not sufficiently original to receive copyright protection. In quoting Learned Hand—“a very modest expression of personality will constitute sufficient originality”—the court conceded that the scope for

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94 *Id.* at 423.  
95 *Id.* at 424.  
96 *Id.*  
97 See supra note 93.  
99 *Id.* at 197.
copyright in photographs is broad. Still, photographs like other writings require originality to receive protection. “[P]osing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved” might very well satisfy the modest quantum of originality required.

But, the court then referenced Nimmers in suggesting that in at least two situations copyright in a photograph should be denied. The one relevant to the facts of Bridgeman is “where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying.” Again referencing Nimmers, the court concluded that rejecting copyright in photographs of paintings was in consonance with the Second Circuit’s *in banc* decision in *Batlin* where the court analogously rejected copyright protection for want of originality in the toy reproduction of the Uncle Sam banks which had fallen into the public domain. Finally, the court relied on *Feist* in concluding that even though technical skill and effort is undoubtedly involved in producing accurate reproductions of paintings “ ‘sweat of the brow’ alone is not the ‘creative spark’ which is the sine qua non of originality.”

**IV. A Critique of Bridgeman:**

*Bridgeman* turned on the absence of creativity in the reproductions in concluding them not sufficiently original to qualify for copyright protection. Post-*Feist*—and in conformity with *Batlin*—the decision seems correctly decided. On the other hand, if

100 *Id.*
102 Bridgeman, supra note 98, at 196 (quoting Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992)).
103 *Id.* at 196.
104 *Id.* at 196 (quoting Nimmer, supra note 73, at § 2.08[E][2]).
105 *Id.*
106 *Id.* at 197 (citing Feist, supra note 20).
107 See Bridgeman, supra note 98.
independent creation were enough or if creativity was satisfied merely by the personality of independent creation, then the holding would likely have been different. Still, due to the relative dearth of jurisprudence on the criteria of creativity, whether or not a particular work satisfies the quantum of creativity is debatable. Furthermore, in supplementing “the requirement of independent effort” with “a minimal element of creativity” an inherently objective inquiry becomes a nebulous one that is unavoidably inured with subjectivity. Identifying the intellectual conception or the creative spark that is enough to meet the modest threshold requires a difficult line-drawing exercise.

Nonetheless, as O’Conner states in Feist, “the vast majority of works make the grade quite easily …” It is argued by one commentator that no difference exist between photographing a painting as realistically as possible and photographing a scene from nature as realistically as possible. The implication is that by using creativity as the dividing line between the protected and unprotected, traditional works of art might not survive scrutiny either. This simply proves too much. Originality—as now colored by creativity since Feist—speaks of the “fruits of the [author’s] intellectual labor.” To the extent that intellectual labor is a matter of authorial choice, the intellectual choice required in reproducing through photograph the Mona Lisa is not of the same quantum as involved in reproducing Vernon Falls in Yosemite Park—selection of subject matter

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108 See supra note 36 (outlining cases which suggest de minimis creativity requirement sufficed pre-Feist).
109 Nimmer, supra note 73, at § 10.2
110 Feist, supra note 20, at 345
112 Feist, supra note 20, at 346.
aside. Most basically, there is only one angle from which to accurately reproduce a two dimensional painting. Obviously, the choices in nature are not so confined. Moreover, there is an intuitive, common sense distinction between a photograph of a Monet and the Monet itself. Granted both are attempting to reflect or communicate their respective choice of subject matter, but a reproduction merely repeats—with no appreciable measure of recasting or transformation—something that has already been said.

Distinguishing between works on the basis of creativity concededly lacks precision, fosters ambiguity and thus lessens predictive value, but a common sense methodology can nonetheless produce reasonable distinctions. Furthermore, the class of works potentially cut by the creative standard is highly circumscribed. Distinctions—both technical and intuitive—can be made between a painting and a photograph of that painting. At the margins, some worthy derivatives might not receive protection. Alva—with its minimal variations from Rodin’s original—may lack the requisite creative quantum to survive scrutiny in a post-Bridgeman world. But, arguably this creates better results—in terms of the ultimate aim of copyright law—than the former approach which “took the copyrightability of an object on trust.”

V. A Broader Critique of Bridgeman:

114 And, subject matter is perhaps the paramount exercise of creative choice in photography. The choice between a Monet and Manet hardly approximates the choice a photographer must make regarding the natural world.
115 See Feist, supra note 20, at 345 (“The vast majority of works make the grade quite easily, as they possess some creative spark . . . .”).
116 Tuchman, supra note 37, at 291.
Copyright cases almost invariably reference the broader policy rationales underlying copyright law. Apart from the vagaries of the creativity requirement, might the broader policy aims of copyright law militate in favor of protection for the works in *Bridgeman*? Intangible property as a non-excludable good carries a heightened risk of misappropriation. To the extent that an original work can be copied and exploited without authorial compensation, the incentive to create such works is vitiating. In order to promote the creation of literary, scientific, and artistic works—deemed inherently valuable to the public at large—the Constitution authorizes Congress to craft legislation to effectuate that end.

There are various theories about the underlying justification of the copyright law, but there is clearly a utilitarian element—rights are granted to promote creation. Essentially, the proprietary interest established is incidental to the public good. Monopoly rights are tolerated rather than inherently just.

Accepting the utilitarian framework, the goal of copyright law is to match the incentives for creation of works of art with the optimal dissemination and use of those works. Since the monopoly right impedes dissemination and maximum public use, the right granted should be no greater than is necessary to promote creation—enough

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119 Id.
120 *Twentieth Century*, supra note 117, at 156.
122 Id. at 992. This is contrary to copyright regimes predicated on moral rights which deem ownership the natural right of the creator.
124 Id. at 430.
incentive to create and nothing more.\textsuperscript{125} The logical extreme of a copyright regime that recognizes copyright in photographic reproductions is the potential appropriation of an image from the public domain—the business strategy of Bridgeman Library being the realization of that fear.\textsuperscript{126} Since its digital images are the only authorized reproductions of some of the works, “by inference and logical conclusion, the images in Corel’s CD-ROMs must be copies of Bridgeman’s transparencies.”\textsuperscript{127} Undoubtedly, such photographs and compilations of such photographs are of significant value to the public at large, but it seems highly antithetical for a copyright regime premised on a utilitarian exchange between the public and authors to allow what amounts to the re-copyrighting of a work which has passed into the public domain. The costs are more or less doubled as the public has already endured the original author’s monopoly. “To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischevious copiers intent on appropriating and monopolizing public domain work.”\textsuperscript{128}

\textsuperscript{125} Id. But, clearly the optimal balance depends on numerous factors—e.g. the type of work, the ease of reproduction, etc. Much art obviously predates copyright regimes. Even without copyright protection some authors will simply be undeterred. Also, replicating a Jackson Pollack to scale with the same materials is neither easy nor costless. However, instantaneous, infinite, and essentially costless reproduction is what some authors must contend—e.g. sound recordings. It’s of course easy to see why some authorship might be effectively deterred in absence of copyright protection. The point is that the incentive necessary to create exist along a continuum. It thus seems like a one size fits all approach is thus fatally flawed. See Ginsburg, supra note 91. Furthermore, assuming the complications involved categorization preclude a more particularized approach, it’s of course debatable whether or not creativity—as a unifying concept—is desirable for optimizing the cost-benefit tradeoff of copyright law. See Pessach, supra note 41. Those broader questions are beyond the scope of this note. For this note, the question is whether or not Bridgeman using creativity to deny copyright for photographic reproductions is optimal from a cost-benefit perspective.

\textsuperscript{126} Bridgeman, supra note 98, at 196.

\textsuperscript{127} Bridgeman, supra note 93, at 424.

\textsuperscript{128} Batlin, supra note 67, at 492.
Proponents of proprietary interests in such photographic reproduction attempt to frame the choice as between copyrighted reproduction and no reproduction.\textsuperscript{129} But, is copyright protection truly necessary to incentivize the gift shop or the digital compilation? A reproducer won’t receive monopoly profits but might they still see a return? It is anomalous to equate the absence of a monopoly incentive as the absence of any incentive. In terms of any particular reproduction there will be a valuable lead time.\textsuperscript{130} Granted, digital images can be instantaneously and practically costlessly copied; however, as for other products—e.g. a coffee mug with a Van Gogh self portrait imprinted on it or Bridgeman’s high resolution transparencies—lead time is material advantage that shouldn’t be dismissed.\textsuperscript{131} For some period such firms will operate without competition. As long as that period is sufficient for the MET or Bridgeman to recover its costs of reproduction or exploitation plus one dollar, the incentive argument is inapposite.

Furthermore, even in the absence of a copyright regime altogether, there will always be creation and even reproduction. Granted a museum lacks the same personal incentive that compels an artist to create irrespective of financial recoupment. However, as the stewards—self-appointed or statutorily mandated—of cultural property, they do have an analogous moral incentive independent of financial reward.\textsuperscript{132} Even assuming a museum can’t cover the cost of reproduction solely through sales of reproductions and

\textsuperscript{129} See Pessach, supra note 41; Allan, supra note 109.
\textsuperscript{130} Goldstein, supra note 118, at § 1.14.1.
other exploitations, why isn’t the social mandate enough of an incentive to compile and digitalize?

Most museums in the U.S. are organized and maintained as charitable trusts, charitable corporations, or non-profit corporations.¹³³ That preferred status comes with numerous benefits including exemption from federal and often state and local property taxes.¹³⁴ Furthermore, in some states—including California and New York—museum purchases are exempt from sales and use taxes.¹³⁵ Museums have significant operational advantages; is a monopoly income stream for reproductions of public domain works for which the public has already had to endure a monopoly period necessary or—more fundamentally—justified?

Regardless, no affected party has established that slavish reproduction in the absence of copyright protection is uneconomical. Perhaps it is. Perhaps the MET’s constellation of gift shops will no longer contribute 25% to annual income.¹³⁶ But, merely speculating that absent monopoly margins the museum sponsored reproduction industry will belly-up and thus the public will gravely suffer shouldn’t be enough to allow these entities to re-copyright public domain images.

VI. Outlook and Conclusion:

Although copyright decisions produced from the Southern District of New York carry a great deal of weight nationwide, *Bridgeman* is obviously not controlling

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¹³³ Law, Ethics, and Visual Arts, supra note Error! Bookmark not defined., at 1057.
¹³⁴ *Id.*
¹³⁵ *Id.*
¹³⁶ See *MET*, supra note 132.
elsewhere.\textsuperscript{137} Also, the facts were particularly unfavorable from the plaintiff’s perspective. Firstly, Bridgeman unapologetically did exactly what the court in \textit{Batlin} admonished against—attempted to appropriate and monopolize public domain works.\textsuperscript{138} Even if \textit{Bridgeman} and \textit{Feist} are not satisfactorily buttressed by copyright jurisprudence, they might best be construed as a doctrinal ‘line in the sand’: some works, like phone books and slavish copies of public domain works, are simply undeserving of 95 or 120 year monopolies.\textsuperscript{139} Secondly, the only conceded variation between the originals and the reproductions was the change in medium, widely considered to be insufficient to meet the originality requirement for derivative status.\textsuperscript{140} It might well be that other items peddled in the gift shop—\textit{Nighthawks} mugs,\textsuperscript{141} Several Circles ties,\textsuperscript{142} or Starry Night Night Lights\textsuperscript{143}—meet the minimum creativity requirement that the digital photographs in \textit{Bridgeman} failed. Arguably, each contributes some measure of originality absent from the slavish copies of \textit{Bridgeman}. Then again, the underlying Several Circles image reproduced from the original Kandinski—according to \textit{Bridgeman}—is not copyrightable, and anyone, including a competitor, may exploit Several Circles on a tie as the idea of using Several Circles on a tie is uncopyrightable.\textsuperscript{144} The issue narrows to whether or not the Guggenheim has contributed something original in its adaptation of Several Circles to

\textsuperscript{137} See supra note 14.
\textsuperscript{138} Batlin, supra note 67, at 492.
\textsuperscript{139} See Ginsburg, supra note 90 (arguing for the creation of a new categories of ‘low authorship’ works to receive less protection than traditional ‘high authorship’ works).
\textsuperscript{140} Nimmer, supra note 73, at § 2.208[C][2].
\textsuperscript{144} Art Law Handbook, supra note 8, at 12 (describing the idea-expression dichotomy).
a neck tie. Cropping the original to a narrow sliver fit for a tie that’s still pleasing to the eye might very well suffice.

Perhaps of greater importance, the more demonstrable the variation between the underlying public domain work and the particular exploitation, the more legitimate is the claim to copyright. However, fear of criminal prosecution for fraudulent copyright notice probably does not enter into the calculus.¹⁴⁵ More persuasion than Bridgeman will be necessary to curtail a long-standing and lucrative practice. Be sure, most museums continue—unfazed—to attach a © to their wares, ¹⁴⁶ and, of course, the little © has a normative effect irrespective of the claim’s legitimacy were it to be litigated. A ‘no trespass’ sign will undoubtedly deter some entry, even if staked on a public beach.

¹⁴⁵ See 17 U.S.C. 506 (c) (stating “any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $ 2,500”).