

HOW MUCH IS ENOUGH?

by ALFRED STEINER*

The author conducted an experiment to determine where the United States Copyright Office draws the line between copyrightable pictorial works and pictorial works that lack sufficient creativity to merit registration. This article describes the experiment and its results and reproduces the ten works used to conduct the experiment. Questioning the adage that “a picture is worth 1,000 words,” the article also adapts the works into concise written descriptions, which become useful proxies for judging the magnitude of creativity involved. The article concludes with a few observations and suggestions for further research.

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INTRODUCTION

Long before the recent hubbub about the copyrightability of works created by generative artificial intelligence models like ChatGPT and Midjourney,¹ and even before the controversy surrounding the copyrightability of works created or assembled by algorithm,² many people have wondered just how much creativity is required for a work of authorship to be copyrightable. From photography³ to drip paintings,⁴ courts and commentators have long debated where to draw the line.

* All works shown in this article (especially *How Much Is Enough? I.1*) © 2020 Alfred Steiner. This article © 2024 Alfred Steiner.

¹ See, e.g., Tony Analla, *Zarya of the Dawn: How AI is Changing the Landscape of Copyright Protection*, JOLT DIG., 6 Mar. 2023. Available at: <https://jolt.law.harvard.edu/digest/zarya-of-the-dawn-how-ai-is-changing-the-landscape-of-copyright-protection> (Last visited: 25 July 2024, 16:42 ET).

² See, e.g., Brian L. Frye, *Are CryptoPunks Copyrightable?*, 2021 PEPP. L. REV. 105 (2022). Available at: <https://digitalcommons.pepperdine.edu/plr/vol2021/iss1/4> (Last visited: 25 Jul. 2024, 16:47 ET).

³ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

⁴ See Dan L. Burk, *Thirty-Six Views of Copyright Authorship*, by Jackson Pollock, 58 HOUS. L. REV. (2020). Available at: <https://houstonlawreview.org/article/18011-thirty-six-views-of-copyright-authorship-by-jackson-pollock> (Last visited: 25 Jul. 2024, 17:06 ET).

To test the United States Copyright Office's (the "Office") minimum threshold for creativity,⁵ on November 23, 2020, I filed an application to register the ten⁶ unpublished pictorial works pictured on the pages that follow, titled *How Much Is Enough? 1.1 through 1.10*, each of which is identical to the previously-numbered image except for one new element.⁷ On January 14, 2021, the Office sent me a letter refusing to register the first seven works as insufficiently creative, but agreeing to register the last three.⁸ Because my goal was to test the Office's creativity threshold, I didn't bother arguing that it should have drawn the line elsewhere.

For purposes of this article, I've presented each of these works along with an adaptation into another medium, namely a written paragraph. It's instructive to consider whether these paragraphs—each of which I've written as concisely and precisely as possible while trying to avoid extravagant pedantry—would satisfy copyright's minimum creativity threshold and to compare that answer with the Office's determination for the work of visual art. (I gave up my attempt at absolute precision in *How Much Is Enough? 1.6*.) Please consider each pair of works in turn and draw your own conclusions.

⁵ While the bar is notoriously low, to be eligible for copyright protection in the United States, a work of authorship must "display at least some minimal degree of creativity." *See* *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 at 358 (1991).

⁶ The Office allows authors to submit a single group application containing up to ten unpublished works of visual art.

⁷ Except for the first one, of course.

⁸ Reg. No. VAu001416912 / 2020-11-2.

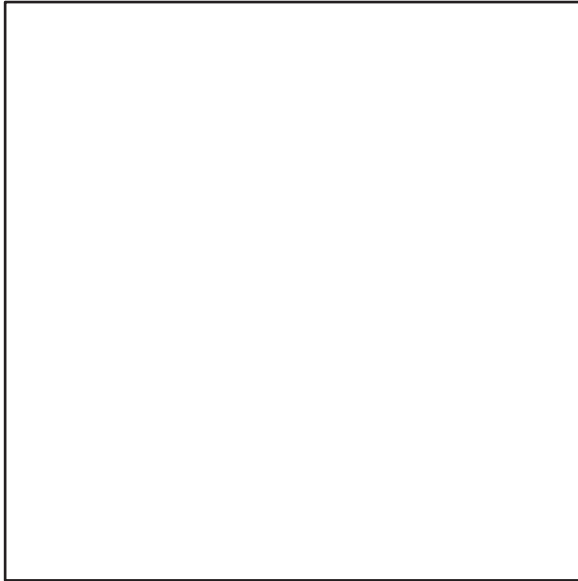
I. HOW MUCH IS ENOUGH? THE WORKS

Figure 1: How Much Is Enough? 1.1

A white⁹ square.

⁹ #FFFFFF. Each six-digit hexadecimal number in this article precisely identifies one of 16,777,216 colors for purposes of displaying such colors on computer monitors (and for other purposes) using two digits for each of red, green, and blue, i.e., #RRGGBB. *See generally*, <https://htmlcolorcodes.com/> (Last visited: July 17, 2024, 15:10 ET). As a painter with a degree in mathematics, I can say with some confidence that the American Academy of Ophthalmology grossly overestimates the number of colors that humans can distinguish at ten million. *See* <https://www.aao.org/eye-health/tips-prevention/how-humans-see-in-color#:~:text=Scientists%20estimate%20that%20humans%20can,reflects%20the%20rest%20of%20it> (Last visited: July 17, 2024, 15:15 ET). The point here is that I am precisely identifying the colors in each work.

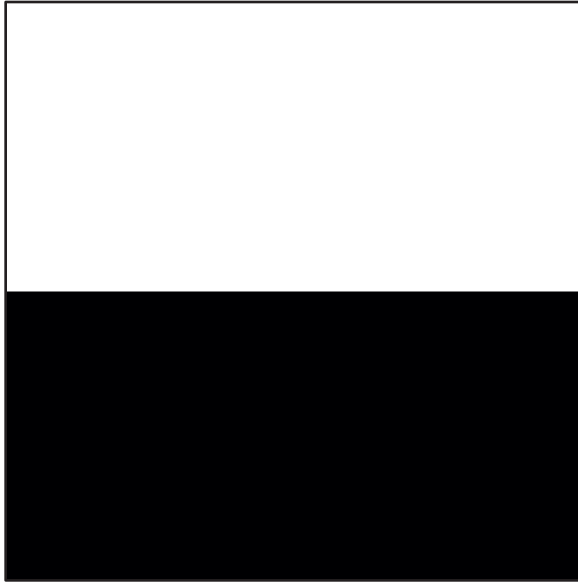


Figure 2: How Much Is Enough? 1.2

A square equally divided horizontally into upper white and lower black¹⁰ halves.

¹⁰ #000000.

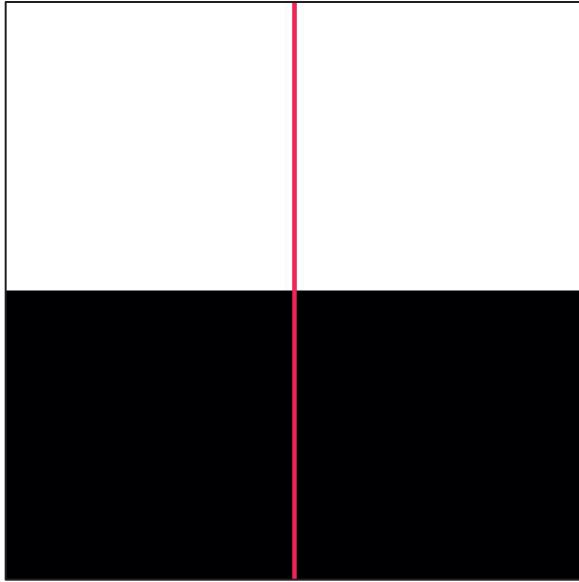


Figure 3: How Much Is Enough? 1.3

A square equally divided horizontally into upper white and lower black halves with a thin ($1/128^{\text{th}}$ of the square's breadth), centered, vertical, red¹¹ line.

¹¹ #FF0048.

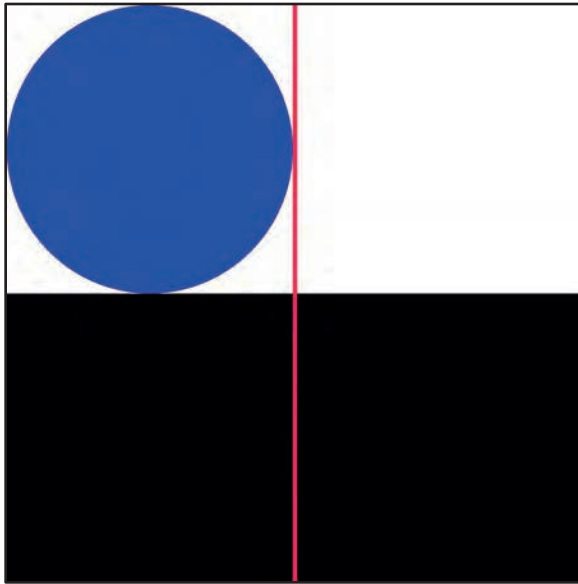


Figure 4: How Much Is Enough? 1.4

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; and a blue¹² disc that spans the upper-left quadrant.

¹² #2100FF.

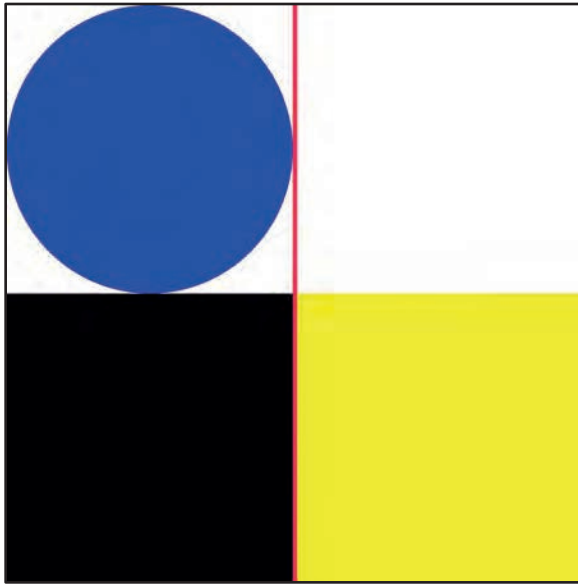


Figure 5: How Much Is Enough? 1.5

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; and a lower-right quadrant that replaces black with yellow.¹³

¹³ #FFFC01. It's worth noting that up to this point, anyone who strictly follows the instructions in this and each of the preceding descriptive paragraphs would have no choice but to create the corresponding image exactly.

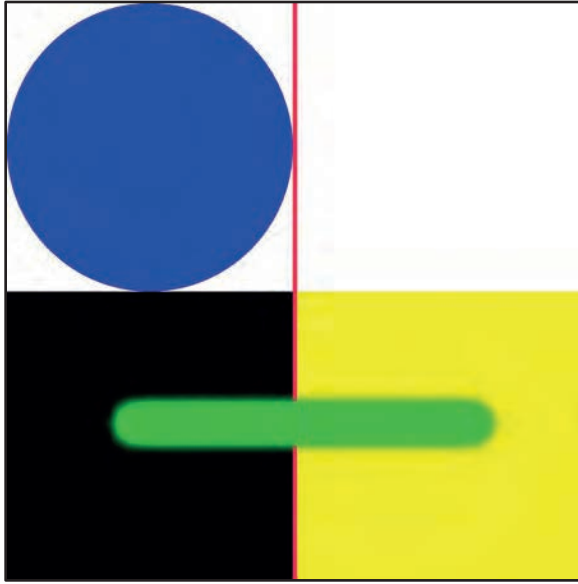


Figure 6: How Much Is Enough? 1.6

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; a lower-right quadrant that replaces black with yellow; and a long ($\frac{2}{3}$ of the square's breadth), thin ($\frac{1}{13}^{\text{th}}$ of the square's height), green¹⁴ oval with blurred edges centered on the vertical axis and positioned slightly above the center of the lower half.

¹⁴ #00D03A.

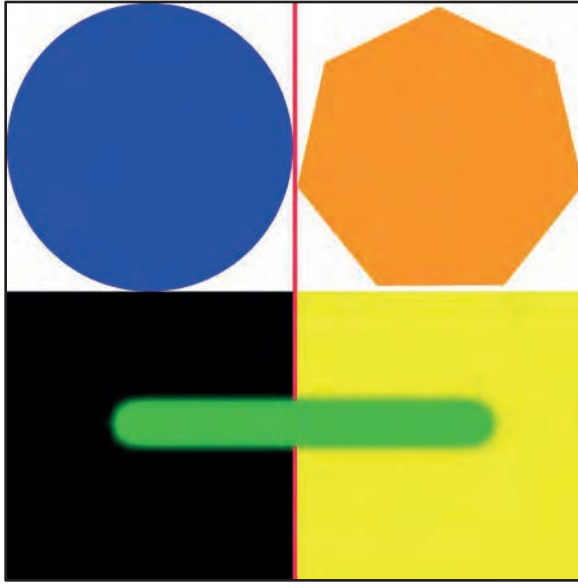


Figure 7: How Much Is Enough? 1.7

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; a lower-right quadrant that replaces black with yellow; a long, thin, green oval with blurred edges centered on the vertical axis and positioned slightly above the center of the lower half; and a regular, orange¹⁵ heptagon with its lower side parallel to the bottom of the image, vertically centered in the upper-right quadrant, the widest extremity of which spans the quadrant.

¹⁵ #FF9600.

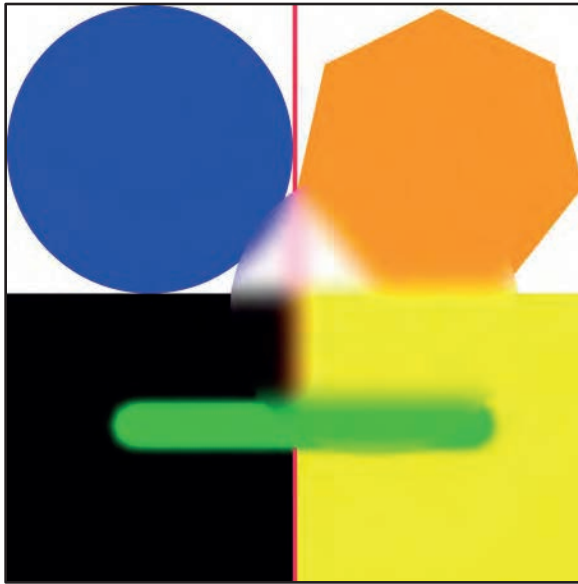


Figure 8: How Much Is Enough? 1.8

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; a lower-right quadrant that replaces black with yellow; a long, thin, green oval with blurred edges centered on the vertical axis and positioned slightly above the center of the lower half; a regular, orange heptagon with its lower side parallel to the bottom of the image, vertically centered in the upper-right quadrant, the widest extremity of which spans the quadrant; and a blurred, disc-shaped region about half the height of the whole composition positioned slightly below the horizontal center line and somewhat more to the right of the vertical center line.

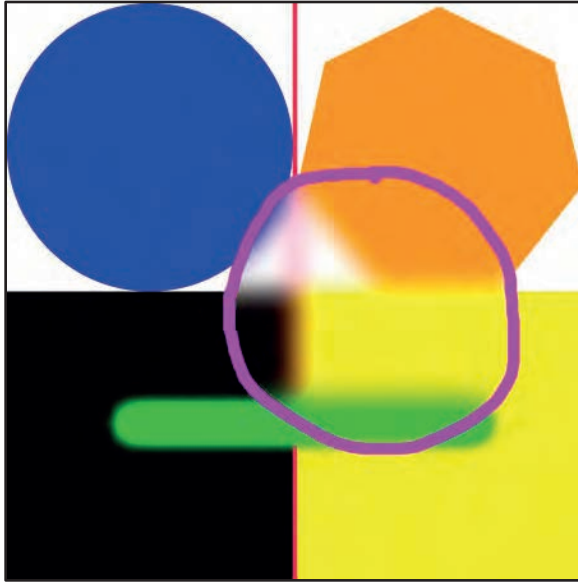


Figure 9: How Much Is Enough? 1.9

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; a lower-right quadrant that replaces black with yellow; a long, thin, green oval with blurred edges centered on the vertical axis and positioned slightly above the center of the lower half; a regular, orange heptagon with its lower side parallel to the bottom of the image, vertically centered in the upper-right quadrant, the widest extremity of which spans the quadrant; a blurred, disc-shaped region about half the height of the whole composition positioned slightly below the horizontal center line and somewhat more to the right of the vertical center line; and a rough, mouse-drawn, pink¹⁶ border around the blurred region.

¹⁶ #FC00FB.

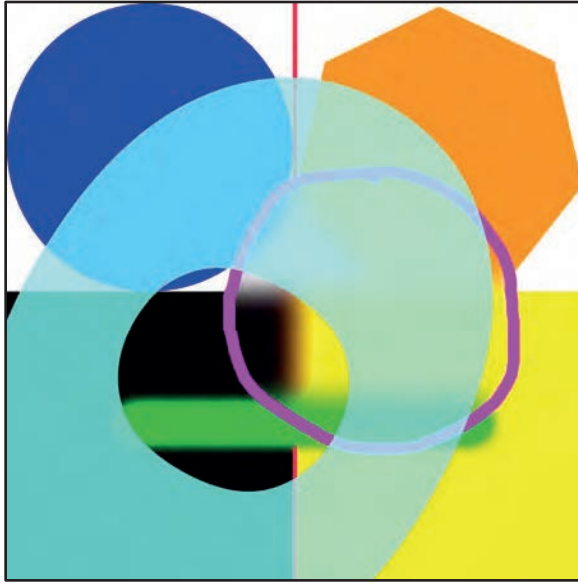


Figure 10: How Much Is Enough? 1.10

A square equally divided horizontally into upper white and lower black halves with: a thin, centered, vertical, red line; a blue disc that spans the upper-left quadrant; a lower-right quadrant that replaces black with yellow; a long, thin, green oval with blurred edges centered on the vertical axis and positioned slightly above the center of the lower half; a regular, orange heptagon with its lower side parallel to the bottom of the image, vertically centered in the upper-right quadrant, the widest extremity of which spans the quadrant; a blurred, disc-shaped region about half the height of the whole composition positioned slightly below the horizontal center line and somewhat more to the right of the vertical center line; a rough, mouse-drawn, pink border around the blurred region; and a large, semi-transparent, cyan letter “o” that is cropped by the lower-left corner and runs diagonally from there approximately three quarters of the way to the far corner.

II. REGISTRATION RESULTS

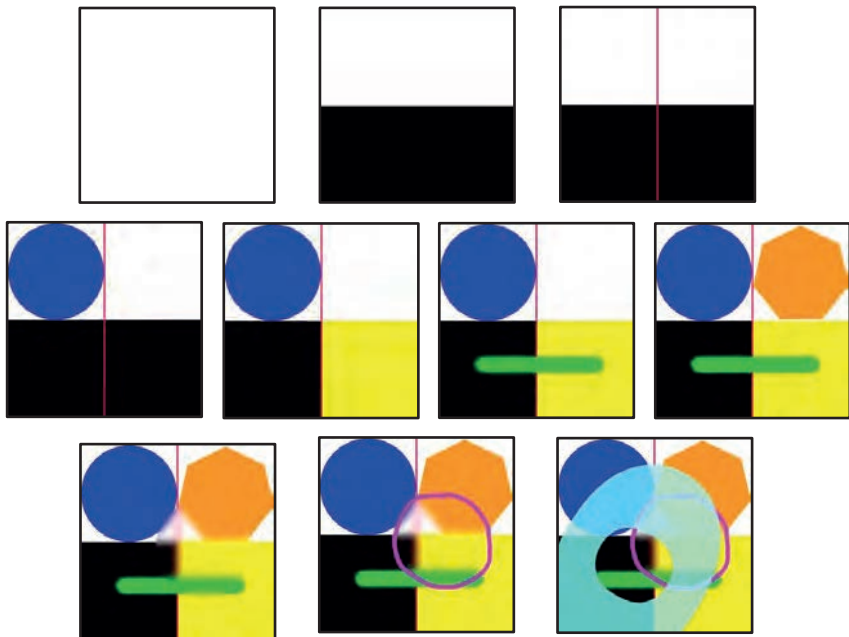


Figure 11: *How Much Is Enough?* 1.1 through 1.10

Now that *How Much Is Enough?* 1.8 through 1.10 are registered, I can institute a civil action in federal district court for infringement of those works.¹⁷ Of course, the same goes for the unregistered works under 17 U.S.C. §411(a) because the Office refused to register those works, but they would not benefit from the presumption of validity accorded to the registered works¹⁸ or allow me to recover attorney's fees or statutory damages.¹⁹

¹⁷ In *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. 269 (2019), the Supreme Court resolved a split among federal courts of appeal, requiring a valid registration to file a suit for copyright infringement in federal district court (or the Office's refusal to register). Of course, in the wake of the *Copyright Alternative in Small-Claims Enforcement Act of 2020* (17 U.S.C. §1501 *et seq.*), no registration is required to file an infringement claim before the Copyright Claims Board, although there are important differences in remedies available between the two forums.

¹⁸ See 17 U.S.C. §410(c).

¹⁹ See 17 U.S.C. §412.

CONCLUSION

If I were to repeat this experiment, I would create images that are more amenable to precise written description, leaving absolutely no room for interpretation. That would include avoiding indefinite elements like the fuzzy green bar, the blurred disc, and the pink mouse-drawn circle. Using such images might strengthen the case for measuring their magnitude of creativity by the number of words it takes to describe them, making it more difficult for the Office to refuse to register works like *How Much Is Enough?* 1.6 and 1.7 as insufficiently creative—I probably would have allowed those works had I been making the decisions.

Like some of my other projects,²⁰ *How Much Is Enough?* could be considered a template, in this case designed to prompt others to create similar sets of increasingly complex works to test the Office's boundaries. I think we'd all benefit, for example, from a *How Much Is Enough?* 2.0 that takes advantage of the Office's policy allowing authors to register up to 750 published or unpublished photographs in a single application.²¹

Of course, doing a similar experiment with photographs would involve some difficult yet revealing problems. First, it would be challenging to scale up the expressive content in a series of photographs in a similarly precise manner, or at least in a manner that would amount to something different than what I did with *How Much Is Enough?* Second, in *How Much Is Enough?*, each expressive decision that I made is more or less discernable.²² By contrast, it's often difficult or impossible to discern what, if any, expressive content a photograph contains.²³ Consider, for example, an edition from another one of my works, *Your Non-creative Photograph* (2015), which was taken by fellow artist and lawyer, Sergio Muñoz Sarmiento:

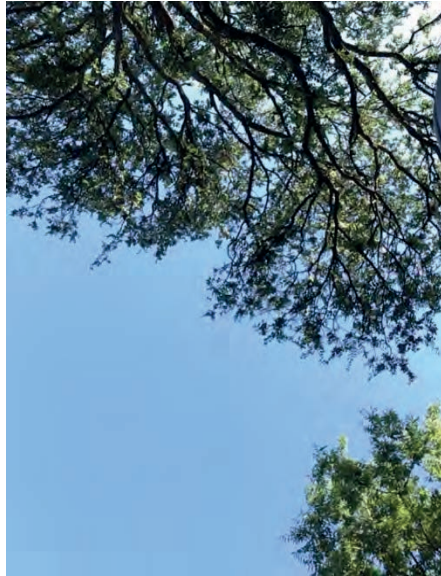
²⁰ See, e.g., Cait Munroe, *These 5 Inspired Installations Make Spring/Break Art Show Unforgettable*, ARTNET, 1 Mar. 2016. (Discussing my project, *LV DIY*, 2016.) Available at <https://news.artnet.com/market/spring-break-art-show-2016-438809> (Last visited: 25 Jul. 2024, 17:45 ET).

²¹ Compare fn 6 above. I see no rational basis for the difference in treatment between works of visual art and photographs, other than that photographers may have a more powerful lobby. I've begun work to rectify this injustice, which could put billions of dollars into the pockets of visual artists that would otherwise be uneconomical to recover.

²² Some might argue that these works might have been created by an algorithm, which would be a fair point.

²³ Arguably, this would only be a problem for the baseline photograph, that is, the first and simplest photograph in the hypothetical series, as expressive content in subsequent photographs could be determined with reference to that baseline.

Although the Office (and courts) would readily accept this photograph as meriting copyright protection without knowing more about it, consider that Sarmiento Muñoz took the photograph by following these instructions:



Place your camera-enabled mobile phone screen-up on the nearest approximately flat, horizontal surface, without regard to the phone's orientation. Open the standard camera application for your phone. Select the camera lens that faces up. Press the shutter button with your dominant hand's index finger. Follow these instructions as quickly as possible, without introducing any decisions of your own, e.g., intentionally orienting the phone sideways. Failure to do so voids any resulting photograph's status as an edition of the work.

Because the would-be author robotically followed instructions to create the photograph, without introducing any decisions of his own,²⁴ it contains no expression and is not copyrightable.²⁵

Copyrightable subject matter better suited to similar experiments would include literary works²⁶ (adding one new word at a time), choreography (adding

²⁴ One might argue that the would-be author chose the location, but if this were not already addressed in the “without introducing any decisions of your own” wording, it could be addressed with an additional instruction.

²⁵ See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 313.4 (3d ed. 2021).

²⁶ Are haikus copyrightable? What about “Excommunicate/Anesthesiologists/Immediately”? Probably not according to the Office,

one new step or move at a time), and musical compositions (adding one new note at a time). The Office’s procedure for registering groups of unpublished works ... (or “GRUW”) ... allows authors to register up to ten unpublished works at a time or up to 20 sound recordings registered together with their underlying musical compositions.²⁷ The latter option would allow an even more subtle gradation toward the minimal creativity threshold given the availability of 20 steps, although I’m still holding out for some problem-solving photographer to come up with a way to stretch it to 750 steps.

which says, “The [Office] cannot register ... brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words.” See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 313.4(C) (3d ed. 2021).

²⁷ In what appears to be yet another concession to a political lobby more economically significant than visual artists, namely, the recorded music industry. Compare FN 21 above and see U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 1106.1 (3d ed. 2021).