COPYRIGHTING STYLE

by CHRISTOPHER BUCCAFUSCO[1]

Does copyright law protect an artist's style? The federal courts that have considered the question are equally split. They all agree, however, that the answer to the question resides in copyright law's idea/expression distinction. According to this doctrine, ideas, techniques, and methods cannot be copyrighted, but expressions of ideas can be. The question courts have faced, then, is whether artistic style is an idea or a matter of expression. The answer, perhaps unfortunately, is that style is both.

This is unfortunate because, this Article argues, copyright law's idea/expression distinction is inadequate to the task of determining the copyrightability of style. Instead, it proposes a new way forward, grounded in aesthetic philosophy and a much-derided precedent, that embraces style's dual nature. Just as style is both a matter of content and of form, so too is the copyrightable work both a matter of idea and of expression. On this understanding, defendants should only be found liable for infringement when they have copied both the plaintiffs' expressive formal features and the ideas, content, or subject matter to which they have been applied.

Solving this problem is essential in light of the recent lawsuits against generative artificial intelligence platforms that make it trivially easy to produce images and text "in the style of" various artists. Copyright law needs a more coherent approach to this problem than it has achieved with its reliance on the idea/expression distinction.

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INTRODUCTION

Imagine that a young artist, Leo, spends countless hours poring over the work of one of his predecessors, Frida, trying to learn how she meticulously rendered shadows, trees, and the glimmer of sunset on a field of grain. After all this effort, Leo finally produces his own painting, using the style and techniques he learned from Frida, but depicting a new vista, his hometown in Oregon, one that she had never seen, let alone painted. He places the painting in his gallery and offers it for sale.

Throughout most of human history and across virtually all cultures, this sort of learning by copying was both commonplace and encouraged.[2] In the twenty-first century, however, our aspiring artist might find himself on the receiving end of a cease-and-desist letter or, worse, the defendant in a copyright infringement case. The accomplished artist who had committed years to refining her art, might not take kindly to an upstart and potential competitor knocking off her style.

Now, imagine a different scenario. Here, the "learning" is done by a generative artificial intelligence (AI) model that has been trained on Frida's work, as well as millions of other artworks.[3] Using an incredibly complicated set of probability calculations, the model can produce an artwork "in the style of" Frida when prompted by a user. Leo now asks the model to generate a picture of his Oregon hometown in Frida's style. He prints a copy of the image and offers it for sale in his gallery.[4]

If Frida sued either of these hypothetical Leos, who would win? The answer would likely depend on how the court interpreted copyright law's idea/expression distinction. According to this doctrine, copyright only attaches to a work's expression but not to its underlying ideas or technique.[5] The doctrine is meant to reward expressive activity while also preserving essential aspects of culture for everyone.[6] Authors receive a copyright in their particular expression of an idea, but the idea remains available to others to express as they see fit.[7]

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[2] *See e.g.* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 352 (2018) (explaining the creativity and learning involved in copying); WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENCE. INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995) (describing the value placed on artistic copying in Chinese history).

[3] For an account of how AI model training works and its implications for the law, *see* Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295 (2023).

[4] For purposes of these hypotheticals, assume that Leo sells both works as his original efforts and does not try to deceive purchasers that they are really by Frida. That sort of deception raises issues more typically handled by trademark law, and I bracket it for this Article. *See* Laura A. Heymann, *The Birth of the Authornym: Authorship, Psuedonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1437-39 (2005) (discussing some of these issues).

[5] *See* discussion *infra* Part I.A.

[6] Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) ("This principle attempts to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter.").

[7] *Id.*

So which is artistic style: expression or idea? Across all of the courts that have considered the issue, the results are fairly evenly split.[8] According to several prominent opinions, artistic style is a matter of expression.[9] It is the *way* that authors express ideas, and copyright is fundamentally about the manner in which authors create.[10] But just as many opinions, including a foundational nineteenth-century Supreme Court opinion,[11] treat artistic style as an unprotectable idea or technique.[12] Granting exclusive rights to a style like Cubism or Impressionism, these courts claim, would give authors too large a share of the creative landscape and unduly hinder future creators.

This would be a shorter Article if I could simply explain which of these two views is correct. Unfortunately, both are. Stylistic features of works are clearly part of how authors express their ideas. Their choices about line, shadow, and color or about diction, syntax, and meter are fundamental features of their expression. But, just as clearly, styles, at some level of generality, are also techniques that should not be monopolized. Moreover, recognizing copyrightable style is often the result of two conceptual errors: attaching copyrights to authors rather than to works and granting greater copyright scope to famous authors than nonfamous ones.[13]

The problem is that copyright law's idea/expression distinction is ill-equipped to address the issue of style. Courts hunt in vain for "the point" where stylistic features are sufficiently precise that they tip into expression. Instead, copyright law should embrace style's inherent duality. Style is *both* expression and idea. To arrive at this point, this Article introduces the work of philosopher Nelson Goodman and others who reject the typical distinction in aesthetics between form and content. That distinction equates form with style (*how* something is said) and distinguishes it from content or subject (*what* is said). For Goodman, style is a matter both of what an author says and of how she says it.[14]

From this, I offer a solution to the morass that is copyright's treatment of style. Copyright attaches to works, and works of authorship represent the union or combination

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[8] Counting opinions isn't an easy task. It involves complex questions like how many district court opinions is one Supreme Court opinion worth. As I show below, there are important and compelling precedents on both sides of this issue.

[9] *See infra* Part I.B.

[10] Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991) ("[I]n determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) ("By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.").

[11] Baker v. Selden, 101 U.S. 99 (1879).

[12] *See infra* Part I.C.

[13] *See infra* Parts II.B and II.C.

[14] *See infra* Part III.A. *See* Nelson Goodman, *The Status of Style*, 1 CRITICAL INQUIRY 799, 801 (1975) (hereinafter *Style*) ("For sometimes style *is* a matter of subject. I do not mean merely that subject may influence style but that some differences in style consist entirely of differences in what is said.") (emphasis in original).

of expression and idea, of form and content.[15] The copyright relates to what I call the authorial symbol—the unity of formal expressive features and underlying idea, subject, or content. Thus, an author's copyright reflects both her expression and the idea or subject that she expressed. It is both the *how* and the *what*.

In a suit for copyright infringement, then, the plaintiff should only prevail if the defendant's work is substantially similar to all relevant aspects of the plaintiff's work, that is, both the work's expression and its subject. In the hypothetical examples above, the second artist would not have infringed the first artist's copyright, because although he used the same expressive technique, he applied it to a different subject matter that she had never painted. The approach I propose, in fact, has its roots in a much-derided case from 1977 involving the characters from McDonaldland, like Mayor McCheese and Grimace.[16] I show how that case can be reinterpreted to generate the optimal approach to copyrighting style–whether the defendant used artificial intelligence or not..

The emergence of generative AI has brought the issues discussed in this Article to increasing prominence. Now, anyone with a smartphone can create an image of their pug in the style of Frida Kahlo[17] or a poem about online dating in the style of William Carlos Williams.[18] Unsurprisingly, many artists are deeply concerned about these developments, and they object to having their characteristic styles copied by millions of people.[19] Several ongoing lawsuits raise precisely these issues, and courts will have to resolve them over the coming years.[20] This is the first paper since the release of the new generation of AI platforms that proposes a normative resolution to the issue.[21]

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[15] For recent work on the nature of copyrightable authorship *see* Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016); Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017).

[16] Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) [hereinafter *Krofft*].

[17] *See* Pug in the Style of Frida Kahlo, CREATIVE FABRICA, https://www.creativefabrica.com/product/pug-in-the-style-of-frida-kahlo-7/.

[18] ChatGPT offers the following:

> *Swipe*
>
> so much depends
> on a pixelated smile–
>
> a message left
> unanswered,
>
> a match fading
> to nothing.

[19] Melissa Heikkilä, *This Artist is Dominating AI-Generated Art. And He's Not Happy about It,* MIT TECH. REV. (Sept.16,2022), https://www.technologyreview.com/2022/09/16/1059598/this-artist-is-dominating-ai-generated-art-and-hes-not-happy-about-it/ (last visited).

[20] Getty Images (US), Inc. v. Stability AI, Inc., No. 1:99-mc-09999 (D. Del. Feb. 3, 2023); Sarah Andersen et al. v. Stability AI Ltd. et al., No. 3:23-cv-00201 (N.D. Cal. Jan. 13, 2023).

[21] For a recent descriptive paper on this subject, *see* Benjamin Sobel, *Elements of Style: Copyright, Similarity, and Generative AI*, 38 HARV. J.L. & TECH, at 7 (forthcoming 2025) ("this paper's project

My proposal also offers a new direction for copyright law's treatment of satire. Satire has been a second-class citizen compared to parody in fair use law, because, courts assert, satirists do not need to use the plaintiffs' works to make their points.[22] Seen through the lens of my proposal, however, many satires are simply uninfringing, and fair use need not enter the picture. Often, satires reproduce an author's style but apply it to a new subject or theme.[23] Doing so does not substantially reproduce the copyrighted work, understood as the union of expression and idea. When that's the case, the defendant should win *prima facie*.

This Article begins by introducing copyright law's idea/expression distinction and the roles it is meant to play both incentivizing new expression while preserving ideas and techniques for further use. I then explore the cases holding that style is copyrightable expression, followed by the cases holding that style is uncopyrightable idea or technique. Part II argues that both of these strands of cases are correct, in the sense that artistic style has features of both expression and idea. It continues, then, with a discussion of two conceptual errors that can arise from treating style merely as expression. First, several of the cases doing so also seem to grant authors inappropriately broad scope by recognizing copyrights in authors' *oeuvres*, or bodies of work. Second, these cases tend to assign greater copyright scope to famous authors with recognizable styles than they would to nonfamous authors.

Part III lays out the Article's proposal, beginning with an introduction to the aesthetic philosophy of Nelson Goodman and others who argue that artistic style is a matter of both form and content. *What* an author says is just as much a part of her style as *how* she says it. Building on this work, I suggest that courts recognize copyrighted works as authorial symbols–combinations of expression and idea. It is this combination that copyright protects. Thus, only when defendants copy both aspects of the authorial symbol–expression and idea–do they infringe. Finally, this Part concludes by applying the proposed test to various cases, including those arising from generative AI and via satire.

I. IDEA OR EXPRESSION: WHICH IS STYLE?

The key to understanding the copyrightability of style is the idea/expression doctrine, which, in its simplest form indicates that ideas are not copyrightable, but expressions of ideas are. So, which is artistic style: an abstract idea or a particularized means of expressing an idea? This Part explores the tension between ideas and expressions in copyright law. It first argues that the law has adopted the traditional distinction in aesthetics between content (idea) and form (expression). Next, it examines a series of cases in which the copyrightability of style has been litigated. Perhaps unsurprisingly, given the tensions at the heart of the doctrine, many cases indicate that style is copyrightable, while a similar number assert the opposite.

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is descriptive, not normative"). Sobel and I come to similar conclusions about the role of the idea/expression distinction in solving these sorts of issues.

[22] Roger L. Zissu, *Expanding Fair Use: The Trouble with Parody, the Case for Satire*, 64 J. COPYRIGHT SOC'Y USA 165 (2017).

[23] *See infra* Part III.C.

A. It's Never What You Do but How It's Done[24]

The idea/expression doctrine is, very possibly, copyright law's most important doctrine. It divides the protectable from the unprotectable and, thereby, preserves essential aspects of culture and speech for everyone. Unfortunately, it is also possibly copyright law's murkiest doctrine.

The idea/expression doctrine is often traced to the U.S. Supreme Court's 1879 opinion in *Baker v. Selden*.[25] There the Court rejected the plaintiff's attempt to use copyright law to secure exclusive rights in a bookkeeping method that he had described in a book on the subject. The Court distinguished between "the book, as such, and the art which it is intended to illustrate," explaining that the plaintiff would have needed a patent to prevent others from using his method.[26]

In explaining the difference between the book's copyrightable content and its unprotectable ideas, the Court offered several examples from artistic practice that are worth considering further. For example, it explained that "A treatise on the … mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective,—would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art …described therein."[27] The Court, here, is referring to the technique of illustrating a scene via linear perspective, the dominant mode of realistic painting in the West since the fifteenth century.[28] This technique, which uses vanishing points and foreshortening to realistically depict spaces, was first conceived and perfected by Filippo Brunelleschi and other Italian artists in the early fifteenth century.[29] However novel this style of painting was, *Baker* suggests that it would not have been copyrightable:

> The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully

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[24] NAS, *No Idea's Original*, *on* STILLMATIC (Columbia Records 2001).
[25] Baker v. Selden, 101 U.S. 99 (1879).
[26] *Id.* at 102 ("The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.").
[27] *Id.*
[28] Perspectival illustration relies on the use of "vanishing points" where parallel lines are seen to converge. It is generally thought to have emerged in Europe in the early fifteenth century with the work of Filippo Brunelleschi. *See* SAMUEL Y. EDGERTON, THE MIRROR, THE WINDOW, AND THE TELESCOPE: HOW RENAISSANCE LINEAR PERSPECTIVE CHANGED OUR VISION OF THE UNIVERSE (2009). For the relationship between linear perspective and the law, *see* Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Digital Evidence in Perspective*, 58 UNIV. OF MIAMI L. REV. 609 (2004).
[29] EDGERTON, *supra* note 28, at 12.

> draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book.[30]

To the Court, an artist's manner of drawing is uncopyrightable—it is a technique like one used for mixing chemicals or performing mathematical operations and, thus, the province of patent law.[31]

Importantly, though, *Baker* distinguished uncopyrightable techniques from "pictorial illustrations addressed to the taste."[32] Rather than having "their end in application and use,"[33] for these illustrations, "their form is their essence, and their object, the production of pleasure in their contemplation."[34] The Court seems to be imagining a beautiful rendering of a landscape or a moving depiction of a historical battle scene. These, it doesn't doubt, would be copyrightable, even if they were included in a text to illustrate how the landscape or battle looked.

From the origin of the idea/expression doctrine, then, we sense the murkiness at its heart. Illustrations addressed to the taste are copyrightable, but those used to illustrate a system or method of illustration, apparently, are not. It seems relatively clear, at least, that the Court deems the method, technique, or style of illustrating a scene in linear perspective to be fundamentally uncopyrightable, however copyrightable the given pictures made using the technique would be.

Baker v. Selden is the progenitor of the modern instantiation of copyright law's idea/expression distinction: §102(b) of the 1976 Copyright Act. First, §102(a) explains that copyright subsists in "original works of authorship," and it lists eight categories thereof.[35] This seems like an expansive grant of copyright to all sorts of works. But then, §102(b) claws back some of that breadth, explaining:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[36]

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[30] 101 U.S. at 103.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 104.
[34] *Id.* at 103-04.
[35] 17 U.S.C. §102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").
[36] 17 U.S.C. §102(b).

Section 102(b) is the principal statutory hook for delimiting the scope of copyrighted works.[37] It clarifies that just because some creative thought or effort is embodied in an otherwise copyrighted book, painting, or choreographic work, the thought or effort isn't necessarily copyrightable.[38] If it falls into one of the prohibited categories (e.g., idea, procedure, or concept), it doesn't fall within the scope of the author's copyright.[39] Thus, Einstein's efforts to establish mass-energy equivalence were undoubtedly creative, and the paper he published explaining $E=MC^2$ is surely copyrightable.[40] But the copyright did not give him exclusive rights to the discovery.[41]

Section 102(b) is a complex provision, and, according to scholars, it targets several overlapping goals.[42] First, it delimits the appropriate province of copyright law from that accorded to patent law.[43] As *Baker* explained, it would be a "surprise and fraud on the public" if creators could secure exclusive rights under copyright for inventions, discoveries, and methods of operation.[44] While patents require examination for novelty and nonobviousness and last for twenty years, copyrights are valid upon fixation, protectable if minimally creative, and last for the life of the author plus seventy years.[45] Thus, §102(b) operates to prevent "backdoor patents."[46]

A second strand of §102(b) doctrine relates to separating copyrightable content from things that should remain in the public domain and stay freely available to all.[47] This is the embodiment of the idea/expression doctrine. Some creations are "the common property of humanity" and cannot be owned by an individual author.[48] Copyright law

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[37] Other common law doctrines like merger, *scenes a faire*, and the infringement standards also do this work. *See* Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y USA 417 (2016).

[38] Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements*, 66 IND. L.J. 175, 219 (1990).

[39] *Id.*

[40] Albert Einstein, *Ist die Trägheit eines Körpers von seinem Energiegehalt abhängig?*, 18 ANNALEN DER PHYSIK. 639 (1905).

[41] Or concept or principle or whatever it is. Moreover, it is doubtful that he could have patented it either. *See* 35 U.S.C. §101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.").

[42] *See* JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT: CASES AND MATERIALS 62 (6th ed. 2024) (noting three distinct aspects of the doctrine: "the process-expression distinction, the idea-expression distinction, and the historical fact-expression distinction").

[43] *Id.*

[44] *Baker*, 101 U.S. at 102.

[45] David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677 (2012) (discussing the differences between patent and copyright validity).

[46] Christopher Buccafusco, Mark A. Lemley & Jonathan S. Masur, *Intelligent Design,* 68 DUKE L.J. 75 (2018) (discussing the risks of "backdoor patents").

[47] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 68 (2008) ("We restrict the scope of intellectual property rights, so that they cannot cover raw facts or general ideas, only the range of innovation and expression in between.").

[48] Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) ("General plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind.").

promotes the progress of culture—its constitutional mandate[49]—by preserving certain building blocks of creativity from the assertion of exclusivity, allowing every author to make use of them.

For example, no author can claim exclusivity for the idea of "star-crossed lovers." As Judge Learned Hand explained in *Nichols v. Universal Pictures Corp*., "there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; … the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'"[50] But the author's particularized expression of those ideas would be the appropriate subject of copyright. If someone copied J.K. Rowling's novel and changed the main character to Larry Cotter, it would surely infringe her copyright.[51]

The trouble for copyright law is immediately apparent: When does a creative act become sufficiently specific that we will label it "expression" and grant it copyright? Or when is a creative act too abstract, such that it must remain in the public domain? Judge Hand offered his famous "abstractions test" to solve the problem, but even he was forced to admit that "[n]obody has ever been able to fix that boundary, and nobody ever can."[52]

Fundamentally, granting copyrights to abstract levels of authorship would give to authors too great a swath of the creative landscape, unduly hindering others from generating their own expressions. As Barton Beebe has argued, copyright law's theory of cultural progress is largely accumulationist.[53] That is, rather than reward only the best creators (perhaps an impossible aesthetic task), copyright law prefers the creation of as

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[49] The Constitution gives Congress the power to "promote the Progress of Science," which, in the eighteenth century meant "knowledge." U.S. CONST. ART. I, §8, CL.8. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. *1771* (2005). I prefer to refer to it as promoting cultural progress. On the concept of cultural progress *see* Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

[50] Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

[51] *Id.* at 121. Judge Hand explains, "If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species." *Id.*

[52] *Id.* at 121. Hand explains the abstractions test: "But when the plagiarist does not take out a block in suit, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended." *Id.*

[53] Beebe, *supra* note 47, at 331 ("In *Bleistein*'s aftermath, the law adopted for the aesthetic, as it has for the scientific and technological, an 'accumulationist' model of progress, one which defines aesthetic progress as simply the accumulation over time of more and more aesthetic things.").

many expressions of an idea as possible.[54] The idea/expression doctrine supports this goal by preventing exclusivity for creativity's building blocks.[55]

The standard way to understand copyright's idea/expression distinction is that it distinguishes between *what* a work is about and *how* the work was made. A work's "ideas" relate to an abstract statement of its content.[56] This is uncopyrightable. The work's copyrightable "expression" relates to the manner in which the author combined various formal features that express or illustrate the idea.[57] Expression is the way in which authors "clothe their ideas."[58] For example, in *Rentmeester v. Nike, Inc.*, the copyrightable expression in the plaintiff's photograph of Michael Jordan dunking a basketball involves "the various creative choices the photographer made in composing the image—choices related to subject matter, pose, lighting, camera angle, depth of field, and the like."[59] Via these techniques, the plaintiff represented the underlying uncopyrightable form of Michael Jordan.[60] This approach to copyright divorces copyrightable expression from uncopyrightable ideas, form, or subject.[61]

In this respect, copyright law's idea/expression doctrine maps directly onto the distinction in aesthetic philosophy between *content* and *form*.[62] Noel Carroll explains, "Content is the matter; form is the manner."[63] Each medium has its own formal features from which artists select the appropriate means. For example, photography's formal features include color, depth of focus, shading (chiaroscuro),[64] and angle, while music's

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[54] *Id.*

[55] *Skidmore*, 952 F.3d at 1069 ("Nor does copyright extend to common or trite musical elements, or commonplace elements that are firmly rooted in the genre's tradition. These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.").

[56] Christopher Buccafusco, *Authorship and the Boundaries of Copyright: Ideas, Expressions, and Functions in Yoga, Choreography, and Other Works*, 39 COLUM. J.L. & ARTS 421 (2016).

[57] *Id.*

[58] *See e.g.* Lampert v. Hollis Music, Inc., 105 F. Supp. 3, 4 (E.D.N.Y. 1952) ("the form of expression adopted to clothe a given idea or concept, between plaintiff's alleged composition").

[59] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1119 (9th Cir. 2018). While none of these choices was itself copyrightable, the original combination of them could be. *Id. See* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. L. & TECH. 339, 350–51 (2012).

[60] *Rentmeester*, 883 F.3d at 1121 ("But Rentmeester's copyright does not confer a monopoly on that general 'idea' or 'concept'; he cannot prohibit other photographers from taking their own photos of Jordan in a leaping, *grand jeté*-inspired pose.").

[61] Copyright law's treatment of "subject matter" in photography cases is notoriously slippery. *See* Hughes, *supra* note 57, at 350.

[62] Noel Carroll, *Film Form: An Argument for a Functional Theory of Style in the Individual Film*, 32 STYLE 385, 391 (1998) ("One of the most common ways of thinking about artistic form in general and film form in particular is to conceive of form as one half of a couplet—the distinction between form and content. Many try to clarify this contrast by turning it into the distinction between meaning and mode of presentation.").

[63] *Id. See also* Aaron Meskin, *Style, in* THE ROUTLEDGE COMPANION TO AESTHETICS 447 (Berys Gaut & Dominic Lopes, eds. 2005) ("The commonplace that style is not a matter of what is said but how something is said, as well as the thought that style rests on the possibility of synonymy … further suggest this.").

[64] *See* Joel Snyder, *Picturing Vision*, 6 CRITICAL INQUIRY 499, 502 (1980).

include melody, rhythm, and harmony.[65] For literature, an author chooses among formal features such as diction, syntax, pacing, character, mood, etc.[66]

Thus, two painters might portray the same content—a tree covered landscape, for example—but select different formal features to do so.[67] One might use clean straight lines, bold primary colors, and stark contrasts, while the other might select hazy, wavering lines, muted colors, and a murky aspect. It's still the same tree, but the forms by which it is represented differ. The two works, in effect, are synonyms for one another.[68] They share the same underlying idea but express it in different ways.[69]

Consider, for example, a description of Impressionistic painting as practiced by Claude Monet and others towards the end of the nineteenth century:

> Impressionists preferred to paint en plein air in the countryside outside of Paris; this approach required the artists to work quickly but allowed them to capture the fleeting impressions of light. The artists used short, visible dabs of paint to capture the overall impression of their subject, choosing not to pay particular attention to the fine details. Instead of using black and gray paint to depict shadows, the painters paired complementary colors. The paints themselves were also brighter than those used in previous eras, due to the invention of synthetic pigments. The artists applied new layers of paint over layers that were still wet, which softened the forms and supplied a unique intermingling of colors. The layers were rarely transparent – instead, the application added opaque dimensions of color.[70]

From the perspective of aesthetic philosophy's content/form distinction, this description of Impressionism seems to land squarely on the side of form. A painter might choose this approach to represent various kinds of content, including water lilies, a cathedral, or ballerinas. It is, after all, the *manner* by which painters represent their subjects. This is an account of style as "adverbial," according to the philosopher Authur Danto. It "emphasizes 'how'—the manner in which something is represented—rather than the 'what,' or representational content."[71]

Does this mean, then, that the Impressionist style is copyrightable expression? If the style corresponds to the manner by which authors express their ideas, then the answer must be yes. But cases like *Baker* and *Nichols* warn about granting copyrights to aspects of a work that are too "abstract," and allowing the first practitioner of Impressionism,

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[65] Roger Scruton, The Aesthetics of Music (1997).

[66] To Jenefer Robinson, literary style is a way of doing certain things. She lists "describing people, portraying landscape, characterizing personal relationships, manipulating rhythms, organizing patterns of imagery, and so forth." Jenefer Robinson, *General and Individual Style in Literature*, 43 J. Aesthetics & Art Criticism 147, 148 (1984).

[67] That two works may use different features to express the same idea or content is known as "synonimy" or "synonimity." E. D. Hirsch, Jr., *Stylistics and Synonymity*, 1 Critical Inquiry 559 (1975) (defending a view of synonymy).

[68] *Id.* at 560.

[69] *Id.*

[70] *Impressionism*, Sotheby's, https://www.sothebys.com/en/art-movements/impressionism#:~:text=What%20is%20Impressionism%3F,accurate%20depiction%20of%20natural%20light (last visited Feb. 10, 2024).

[71] Stephanie Ross, *Style in Art, in* The Oxford Handbook of Aesthetics 228, 234 (Jerrold Levinson, ed., 2009).

Cubism, or Suprematism to exclusively control those techniques seems problematic.[72] Perhaps unsurprisingly, then, the case law on style's copyrightability is deeply inconsistent. Next, I will address some of the cases indicating that style is copyrightable, and the following section will detail those reaching the opposite conclusion.

B. Style is Copyrightable

A number of well-known opinions have asserted that an author's "style" is an aspect of their copyrightable expression. Perhaps most prominent is *Steinberg v. Columbia Pictures Industries*.[73] The plaintiff, Saul Steinberg, was a famous illustrator who had published hundreds of cartoons in *The New Yorker* magazine, including producing dozens of covers.[74] The case involved his most famous work, a highly myopic depiction of New York City with the rest of the world laid out behind it in impossibly dramatic foreshortening.

The defendant hired an illustrator to produce a poster for its film "Moscow on the Hudson" that was modeled on Steinberg's work.[75] The poster, however, was oriented in the opposite direction, including somewhat different depictions of the city, and included images of three characters from the movie.

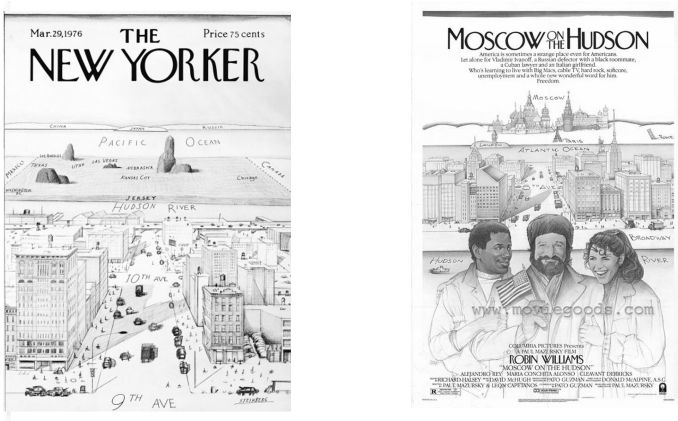

Figure 1: Plaintiff's (left) and Defendant's (right) images from Steinberg

To the court, "The whimsical, sketchy style and spiky lettering are recognizable as Steinberg's."[76] But this was more than evidence that the defendant had copied from

[72] We can more or less accurately associate the founding of Suprematism with Kazimir Malevich starting around 1913. ALEKSANDRA SHATSKIKH, BLACK SQUARE: MALEVICH AND THE ORIGIN OF SUPREMATISM, 1-2 (2012).
[73] Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987).
[74] Joel Smith, *Preface*, *in* STEINBERG AT THE NEW YORKER, 7 (2005).
[75] Steinberg v. Columbia Pictures Indus., 663 F. Supp. at 710.
[76] *Id.*

Steinberg—it was also an inappropriate reproduction of his expression.[77] According to Judge Stanton, "Even at first glance, one can see the striking stylistic relationship between the posters, and *since style is one ingredient of 'expression,'* this relationship is significant. Defendants' illustration was executed in the sketchy, whimsical style that has become one of Steinberg's hallmarks."[78] The picture's unprotectable "idea," according to the court, was "a map of the world from an egocentrically myopic perspective,"[79] but Steinberg used his distinctive style to represent that idea in his own original expressive manner.[80]

Steinberg is repeatedly cited for the assertion that "style is one ingredient of expression."[81] The court treats New York City, or at least some aspect of it, as the work's underlying idea or content, and then accepts Steinberg's manner of depicting it—the narrow blue wash to represent the sky, the red band indicating the horizon, and the "childlike, spiky block print"—as his copyrightable expression.[82]

Interestingly, the court seems to care that these features are "recognizable" as "Steinberg's hallmarks."[83] These features are distinctive of Steinberg's style, differentiating his expression from other artists'. He is known for this style of illustration, and that seems to carry extra weight with the court. But how does the court know about Steinberg's style? Were his other *New Yorker* posters in the record, or did the judge take judicial notice of his reputation for this kind of work? Either way, the court seems to be building up a sense of Steinberg's "style" that refers to more than this particular work.

Courts have also treated Theodor Geisel, a.k.a. Dr. Seuss, as having a recognizable and, thus, copyrightable style.[84] In a recent case from the Ninth Circuit, the defendants' published a mash-up of Star Trek characters visiting a planet that is visually similar to Dr. Seuss's illustrations in *Oh, the Places You'll Go!*[85]

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[77] Unfortunately, the court did not appreciate the differences between copyright infringement's distinct elements of (1) copying-in-fact and (2) unlawful appropriation. Skidmore v. Led Zeppelin, 952 F.3d 1051, 1068–69 (9th Cir. 2020) (en banc); Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018). It seems to have determined infringement largely on its finding of the former. For example, the court applied a test asking whether an ordinary observer would recognize the defendant's work as having been appropriated from the plaintiff. *Steinberg*, 663 F.Supp. at 712. Nonetheless, the court clearly treats Steinberg's style as a protectable aspect of his work.

[78] Steinberg v. Columbia Pictures Indus., 663 F. Supp. at 712 (emphasis added).

[79] *Id.*

[80] *Id.* ("Both illustrations represent a bird's eye view across the edge of Manhattan and a river bordering New York City to the world beyond. Both depict approximately four city blocks in detail and become increasingly minimalist as the design recedes into the background. Both use the device of a narrow band of blue wash across the top of the poster to represent the sky, and both delineate the horizon with a band of primary red.").

[81] *See e.g.*, Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc., 674 F. Supp. 671, 678 (D. Minn. 1987); Kerr v. New Yorker Magazine, 63 F. Supp. 2d 320, 325-26 (S.D. NY 1999); Reece v. Marc Ecko Unltd., 2011 U.S. Dist. LEXIS 102199 (S.D.N.Y. 2011); Bandana Co. v. TJX Cos., 2005 U.S. Dist. LEXIS 17342, at 7 (W.D. Ky 2005).

[82] 663 F. Supp. at 712-13.

[83] *Id.* at 710, 712.

[84] Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

[85] *ComicMix*, 983 F.3d at 448.

Figure 2: Images from Oh, the Places You'll Go! *and* Oh, The Places You'll BOLDLY Go!

Importantly, the court, in finding the copying an infringement rather than a fair use, treated the plaintiff's copyright as emerging not just from *Oh, the Places You'll Go!*, but also to "other Dr. Seuss works that are at issue—*How the Grinch Stole Christmas!* (Grinch) and *The Sneetches and Other Stories* (Sneetches)—[that] also remain well-recognized."[86] It referred to the works collectively as "*Go!*" for "simplicity," although each work is separately and independently copyrighted.[87] As in *Steinberg*, the court assembles a sense of the author's style from a number of different works, and both cases stress the recognizable—i.e., famous—nature of the plaintiff's style.[88]

Not all of the cases treating style as copyrightable expression involve famous plaintiffs, though. In an entertaining case from 1987, the producer of a series of commercials for a newspaper that featured the actress Deborah Shelton sued an advertising firm that made a series of commercials for eyewear also featuring Shelton.[89] Although the texts of the two series were very different, the plaintiff alleged that the "non-textual" elements of the works, including "the rapid-edit style and use of close-ups," were protectable and infringed.[90] The question for the court was whether these features were "non-copyrightable advertising themes or concepts or rather expressions of an idea entitled to copyright protection."[91]

According to the court, the style of the plaintiff's commercials should be treated as copyrightable expression rather than uncopyrightable idea: "the expressive aspects of the [plaintiff's] commercials extend to the individual artistic choices such as a particular montage style, camera angle, framing, hairstyle, jewelry, decor, makeup and background."[92] The court distinguished these from the commercials' ideas: "a one-on-one

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[86] *Id.* at 449.
[87] *Id.*
[88] In addition, a retelling of the O.J. Simpson saga in style of Dr. Seuss's *The Cat in the Hat* was an infringing satire and not a fair use, because "Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold his style up to ridicule." *Penguin Books*, 109 F.3d at 1401.
[89] Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc., 674 F. Supp. 671 (D. Minn. 1987).
[90] *Id.* at 676. I haven't been able to locate either the plaintiff's or defendant's commercials, but this one for Kicks 101.5 radio station in Atlanta seems like a close match to those described in the opinion: https://www.youtube.com/watch?v=DL_SEwoPnDw (last visited).
[91] *20/20 Advert.*, 674 F. Supp. at 676.
[92] *Id.* at 677.

celebrity spokesperson (Shelton) puffing a particular product as [plaintiff] urges, or simply the idea that Shelton is a beautiful actress whatever she happens to be selling."[93]

Cases like these associate the style of the plaintiffs' works with their copyrightable expression.[94] Their style is a matter of the formal expression of otherwise uncopyrightable ideas and content. Artistic choices about how to represent content—including with respect to line, color, shading, and editing—are the manner by which authors express ideas. On this view, style is expression.

C. Style is Not Copyrightable

The cases treating style as copyrightable expression are more famous than their counterparts expressing the opposite view, but there are likely just as many that clearly state that style is not copyrightable and is, instead, an abstract idea free for others to use or, as *Baker* suggests, an unprotectable technique.[95] Here, I will mention a few of them.

The most recent case addressing the issue is Kadrey v. Meta Platforms, Inc, the lawsuit brought by a number of fiction and nonfiction authors against Meta, Inc. for the unauthorized use of their works to train its generative AI model, Llama.[96] In response to Meta's defense that copying works to train an AI is fair use, the plaintiffs argued that Meta's use was not transformative, because "Llama will output material that 'mimics' the plaintiffs' work or writing styles if prompted to do so."[97] But according to Judge Chhabria, such a claim is insufficient to establish that Llama "repackages" plaintiffs' copyrighted works. At most, he held, "this evidence shows that Meta wanted Llama to be able to generate text in certain styles. But style is not copyrightable—only expression is."[98] In a footnote, Judge Chhabria distinguished Meta's use of plaintiffs' works from one in which an LLM was "designed to be used to create works substantially similar to those on which it was trained."[99] This would be a less transformative use.[100] Although note that it's still unclear which aspects of the works would be substantially similar if style isn't one of them.

Earlier cases, from before the advent of generative AI, also assert that style is not copyrightable. In *Dave Grossman Designs, Inc. v. Bortin*, the plaintiff sued the defendant for copying its statues of children, alleging that they had the same design and style.[101] In explaining that copyright law only protects the plaintiff's expression and not the ideas being expressed, the court clearly placed "style" on the ideas side of the ledger:

> For example, Picasso may be entitled to a copyright on his portrait of three women painted in his Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif,

[93] *Id.* at 678.
[94] *See* Sobel, *supra* note 21, at 48.
[95] *Baker*, 101 U.S. at 103.
[96] Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026 (N.D. Cal. 2025)
[97] *Id.* at 1045.
[98] The court here cites 17 U.S.C. § 102(b) and *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 916 (9th Cir. 2010).
[99] *Kadrey*, 788 at 1060, footnote 6..
[100] *Id.*
[101] Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1156 (N.D. Ill. 1972).

> including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not substantially copy Picasso's specific expression of his idea.[102]

Here, the court treats Cubism as a motif, which is to say, a theme or dominant idea in the work.[103] Cubism isn't *how* Picasso chose to represent ideas, but rather it was the idea behind his representational technique.

Similarly, in *Jewelry 10, Inc. v. Elegance Trading Co.*, the court echoed *Baker* in treating stylistic choices as uncopyrightable technique rather than copyrightable expression.[104] In rejecting the plaintiff's claim to infringement of the style of its jeweled pins, the court held that the "elements of style or technique" in the design of the pins "can be seen as the ideas implicit in a work, which are not subject to exclusive ownership under the copyright."[105] The court offered as an example "a painter who develops a style or technique, such as the rendition of perspective, impressionism, pointillism, fauve coloring, cubism, abstraction, psychedelic colors, minimalism, etc., [who] cannot prevent others from adopting those ideas in their work. On the other hand, the artist is entitled to protection from copying of his particular expression of the ideas."[106] Again, artistic styles are treated as ideas or techniques rather than manners of expression.

A number of courts have also been skeptical of plaintiffs' assertions to a distinctive "style" that emerges across a body of work. In *Hayuk v. Starbucks Corp*., the plaintiff artist did not allege that any of the commercials created by the coffee manufacturer were close copies of any particular work of hers.[107] Instead, she claimed that Starbucks misappropriated "what she characterizes as the 'core' of her works."[108] The court rejected this contention, noting that the plaintiff had not "explained how her artistic 'core' appropriation concept differs from an assertion that Defendants have copied her style or elements of her ideas, neither of which are protected by copyright law."[109] To the court, "what the Plaintiff has described as the 'core' of her work in the aggregate, namely the use of overlapping colored rays, and colors and shapes, is tantamount to a set of unprotectible concepts or methods over which there can be no copyright monopoly conferred."[110]

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[102] *Id.* at 1156-57.
[103] *Motif*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/motif#:~:text=1,dominant%20idea%20or%20central%20theme (last visited Feb. 10, 2025) ("a usually recurring salient thematic element (as in the arts) especially: a dominant idea or central theme").
[104] Jewelry 10, Inc. v. Elegance Trading Co., 1991 U.S. Dist. LEXIS 9988 (S.D.N.Y. 1991).
[105] *Id.* at 11.
[106] *Id.*
[107] Hayuk v. Starbucks Corp., 157 F. Supp. 3d 285, 291 (S.D.N.Y. 2016).
[108] *Id.* at 291.
[109] *Id.*
[110] *Id.* at 292.

Similar efforts were rejected in *Judith Ripka Designs v. Preville*,[111] *Dean v. Cameron*,[112] and *Todd v. Montana Silversmiths, Inc.*[113] In the last of these, the plaintiff encouraged the court to consider the "creative gestalt" of her *oeuvre*. The court declined the invitation, asserting "Although a work's 'creative gestalt' is fundamental to aesthetic criticism, when evaluating copyrightability, the concept lacks the precision necessary to maintain predictability in the law. Like all good art, Plaintiff's jewelry has an emotional appeal that cannot be described solely with reference to its component pieces. But 'creative gestalt' is too inchoate a concept for courts to use if they are to fashion a consistent copyright jurisprudence."[114] These courts rejected the idea that the plaintiff could assert infringement outside of the boundaries of particular copyrighted works, even if they all shared certain stylistic features.

Across a number of cases, courts have rejected plaintiffs' claims that their copyrights extend to the style of their works. Unlike those in the prior section that held style to be an element of copyrighted expression, to these courts, style is either an abstract idea about representation or a mere technique for doing so. While these cases are less well known than *Steinberg* or the Dr. Seuss cases, they are grounded in the Supreme Court's opinion in *Baker* that treated perspectival drawing as an unprotectable idea or technique. Moreover, a number of courts reject the additive or reputational approach to style that *Steinberg* and the Dr. Seuss courts exemplify, whereby an author's reputation can generate a copyright that is "more than the sum of its parts."

* * *

Copyright law's idea/expression distinction exists to protect creativity and speech from excessive claims of exclusivity.[115] To most courts that have considered the issue, correct application of the idea/expression distinction is the key to resolving claims about the copyrightability of style. The problem, as this Part has shown, is that courts can't seem to agree about which one style is, idea or expression.

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[111] Judith Ripka Designs v. Preville, 935 F. Supp. 237, 248 (S.D.N.Y. 1996) ("Plaintiff's introduction of many pieces of jewelry and photographs, sketches and advertisements picturing slightly different pieces that have the same "look" suggests that Plaintiff seeks protection for a style of jewelry design. The copyright laws do not protect styles, but only particular original designs.").

[112] Dean v. Cameron, 53 F. Supp. 3d 641, 647 (S.D.N.Y. 2014) ("Finally, to the extent relevant here, a court must not 'aggregate' a plaintiff's work, but must consider each allegedly infringed work independently. … Nothing in the Copyright Act or Second Circuit case law supports the view that a plaintiff's entire oeuvre, or even an aggregated portion of it, may be used as the point of comparison where the works included therein bear little or no relation to one another beyond 'style.'") *Id.* at 647.

[113] Todd v. Mont. Silversmiths, Inc., 379 F. Supp. 2d 1110, 1113 (Dist. Colo. 2005).

[114] *Id.* at 1113.

[115] Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) (explaining how the idea/expression distinction supports First Amendment values).

II. THE CHALLENGE OF STYLE

Which of these claims is correct: that style is an aspect of copyrightable expression or that style is an unprotectable abstract idea or technique? The answer is both. Stylistic choices are clearly aspects of an artist's expression of an idea—they are the manner by which she expresses herself. But granting a single artist exclusivity over a broad swath of creative technique just as clearly poses problems for creativity that *Baker* was wary of.[116] The challenge is that copyright law's idea/expression distinction isn't a useful tool for solving the problem.

In this Part, I will first address critiques by courts and scholars of the idea/expression distinction's capacity to solve the problems presented by artistic style. Next, I will address two concerns that were raised in the prior section and that deserve further attention: that copyright applies to works not to *oeuvres*, and that famous people don't get special copyrights.

A. Idea/Expression's Limits

Courts and scholars have questioned the capacity of the idea/expression distinction to address the challenges of artistic style, including going so far as to suggest jettisoning the doctrine altogether. No doubt the most famous case to do so is Judge Kaplan's opinion in *Mannion v. Coors Brewing Co.*[117] There, the plaintiff submitted a photograph to be used in a commercial for the defendant's beer. After seeing the photo, the defendant hired another photographer to reshoot the image, altering some of the details. The defendant argued that the two images were similar only with respect to their ideas: "the generalized idea and concept of a young African American man wearing a white T-shirt and a large amount of jewelry."[118]

Judge Kaplan allowed that the idea/expression distinction could make sense for literary works, where, for example, two authors might separately describe the theory of special relativity in their own words.[119] But he claimed that the distinction fails to have explanatory power for visual arts:

> For one thing, it is impossible in most cases to speak of the particular 'idea' captured, embodied, or conveyed by a work of art because every observer will have a different interpretation. Furthermore, it is not clear that there is any real distinction between the idea in a work of art and its expression. An artist's idea, among other things, is to depict a particular subject in a particular way.[120]

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[116] Sobel, *supra* note 21, at 6 ("Because style has such a broad meaning, it undoubtedly encompasses generic attributes of works that are beyond copyright's monopoly, like "vanitas" or "anime."9 But in the visual arts in particular, "style" can also refer to more particularized expression that does fall within the scope of an artist's copyright.").

[117] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

[118] *Id.* at 455.

[119] *Id.* at 458.

[120] *Id.*

According to Judge Kaplan, the failure of the idea/expression distinction isn't simply that it involves uncertain line drawing along a varied spectrum. Rather, the problem is the notion that ideas and expressions are distinct phenomena in visual arts.[121] The question of infringement could more easily be solved, he claims, by a comparison of the similarity between the protected elements of the two photographs.[122]

Notice, though, that for Judge Kaplan, the principal way in which photographs and other visual art are copyrightable is with respect to their *rendition*, that is, the manner in which they represent some subject.[123] He refers to rendition as "not *what* is depicted, but rather *how* it is depicted."[124] But this simply reinstates the challenge from above. Is the style of famous photographers like Man Ray, Annie Leibovitz, or Ansel Adams an aspect of *how* they shoot their images? If it is, as it must be, does that mean they can prevent others from using the same style?

Numerous copyright scholars share Judge Kaplan's concerns about the ability of the idea/expression distinction to solve problems of artistic style. Allen Rosen, for example, has argued that the line drawing problem at the heart of the doctrine isn't just a general matter of applying legal standards. He claims that the distinction is fundamentally arbitrary, claiming "it is useless to search for any single point at which an idea is distinguishable from its expression: there is always an indefinitely large number of gradations between a general idea and highly articulated elaborations of that idea."[125] Ultimately, he argues, the terms *idea* and *expression* are entirely conventional, and can only be resolved by criteria that the law chooses to impose upon them.[126]

Rebecca Tushnet argues that the law's attempts to separate representational styles from underlying facts or ideas is hopelessly fraught.[127] Courts fail to understand how some representational strategies, like realism, are fundamentally artistic choices about representation. For example, she notes that "reality is itself a style (or series of styles), the great success of which comes when we don't notice the stylizing operations performed on

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[121] *Id.* at 461 ("I recognize that those principles sometimes may pose a problem like that Judge Hand identified with distinguishing idea from expression in the literary context. As Judge Hand observed, however, such line-drawing difficulties appear in all areas of the law. The important thing is that the categories at issue be useful and relevant, even if their precise boundaries are sometimes difficult to delineate. In the context of photography, the idea/expression distinction is not useful or relevant.").

[122] *Id.* ("[A]t what point do the similarities between two photographs become sufficiently general that there will be no infringement even though actual copying has occurred? But this question is precisely the same, although phrased in the opposite way, as one that must be addressed in all infringement cases, namely whether two works are substantially similar with respect to their protected elements.").

[123] *Id*. at 452 ("such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc." I will refer to this type of originality as originality in the rendition because, to the extent a photograph is original in this way, copyright protects not *what* is depicted, but rather *how* it is depicted." Emphasis in original.).

[124] *Id*.

[125] Allen Rosen, *Reconsidering the Idea/Expression Dichotomy*, 26 U. Brit. Colum. L. Rev. 263, 274-75 (1992).

[126] *Id*. at 280.

[127] Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 719 (2012).

the image."[128] Because courts fail to notice the representational aspects of some styles, they treat particular visual styles, including more abstract ones, as more protectable than others.[129] She writes, "Conventional applications of the idea/expression divide to images fail to account for the variety of ways to represent what 'is' in the world, and courts should generally not be in the business of elevating one form of realism over another."[130] Tushnet's solution is elegant, if unlikely to persuade courts: the scope of visual art copyrights should be so narrow that they extend only to exact duplication.[131] Were that the case, we wouldn't have to worry about separating idea from expression anymore.

Other scholars have objected to the way that the idea/expression distinction reifies the work as a stable object,[132] or how it asserts that "ideas" have a separate existence outside of expression.[133] And several scholars have pointed out the hopelessness of applying the content/form distinction to highly abstract and nonrepresentational forms of art, including music and architecture, that aren't *about* anything.[134] All of these concerns, including those by Judge Kaplan in *Mannion*, point to the inherent challenges of looking to the idea/expression distinction to solve the problem of copyrightable style.

B. Copyright for Works not Oeuvres

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[128] *Id*. at 729.
[129] *Id*. at 724.
[130] *Id*.
[131] Copyright law does this in some areas, including sound recordings, and it's not impossible to think (or hope) that it could happen to images as well. 17 U.S.C. §114(b) ("The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording."). *See also* VMG Salsoul, LLC v. Cicone, 824 F.3d 871, 883 (9th Cir. 2016) (holding that copyright in a sound recording only extends to exact duplication of the sounds on the phonorecord).
[132] Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 727 (1993) ("Copyright law, rather, embraces the notion of the 'work'--purportedly an autonomous entity akin to an object. According to copyright law, the 'work' supposedly has immutable characteristics that allow judges and juries to determine originality, scope of protection, substantial similarity, and fair use merely by interpreting the words on the page (or the pictures on the screen or the sounds on the recording).").
[133] Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1173 (2007) ("One might think that the cumulative weight of these difficulties would cast doubt on the 'abstractions' heuristic. Rather than provoking a general reexamination of the notion that ideas have a separate existence, however, each of these analytical processes cements the privileged status accorded to abstraction.").
[134] Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements,* 66 IND. L.J. 175, 212 (1990) ("The artist who uses a nontraditional or nonrepresentational style of depicting the basic subject matter will have a stronger claim to copyright because the judge will not be forced to conclude that the basic subject matter dictated that particular style of expression."); Rosen, *supra* note 119, at 267 ("The more abstract and nonrepresentational a work of art, the more the creator's style tends to merge with the content or subject matter of the work."); Rob Kasunic, *The Problem of Meaning in Non-Discursive Expression*, 57 J. COPYRIGHT SOC'Y U.S.A. 399 (2010).

When most people think of the word "style" as applied to art, they think of it as a property of multiple works created by some person or group of people that have consistent, identifiable features. Much of the aesthetics literature focuses on this sort of understanding of style.[135] According to philosopher Meyer Schapiro, "By style is usually meant the constant form—and sometimes the constant elements, qualities, and expression—in the art of an individual or group."[136] In this sense, a style—whether of an individual or a group—cannot emerge via a single work. It only comes into being across numerous works that share certain typical features.[137]

Copyright law could, then, recognize authors' styles independently of the particular works that make them up, granting greater scope to a series of similarly styled works than it would to the works individually. I argue that it should not do so, for both doctrinal and prudential reasons.

According to §102(a) of the 1976 Copyright Act, copyright "subsists in original works of authorship."[138] Each work represents a separate and distinct copyright interest. Importantly, copyright does not attach to the artist. It isn't a right in a given person.[139] Contrary to the suggestion of the Dr. Seuss opinions above, an author's copyright interest is never "more than the sum of its parts." The scope of an author's copyright doesn't change if she creates more works in a similar style.

First, the work is the locus of copyright ownership.[140] The original expressions fixed in a tangible medium define the work, and it is the copyright in the work as such that can be infringed.[141] Owners of copyrights have the exclusive right "to reproduce *the work* in copies."[142] Plaintiffs must (or, at least, should be made to) point to a specific copyrighted

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[135] *See e.g.*, James S. Ackerman, *A Theory of Style*, 20 J. Aesthetics & Art Criticism 227, 227 (1962) ("we must find certain characteristics which are more or less stable, in the sense that they appear in other products of the same artist(s), era or locale, and flexible, in the sense that they change according to a definable pattern when observed in in- stances chosen from sufficiently extensive spans of time of geographical distance."); Carroll, *supra* note 62, at 385 ("the concept of style can be applied to so many different kinds of things at so many different levels of generality. One might use 'style' to refer to whole periods of filmmaking, speaking, for example, of the German Expressionist style, or Hollywood studio style in the thirties. Or one might apply the concept of style to the work of a particular filmmaker's oeuvre, referring, for instance, to the style of Stanley Donnen or Yvonne Rainer or Theo Angelopoulos."); Ernst Gombrich, *Style*, 15 Int'l Encyc. Soc. Sci. 352, 352 (David L. Sills, ed. 1968) ("Style is any distinctive, and therefore recognizable, way in which an act is performed or an artifact made or ought to be performed or made.").

[136] Quoted in Ross, *supra* note 71, at 229.

[137] *See* Carroll, *supra* note 62, at 385-86 ("Both general style and personal style refer to groups of film; their domain is a body of work.").

[138] 17 U.S.C. §102(a).

[139] Note, for example, that copyrights can be (and usually are) sold to others. Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 Berk. Tech. L.J. 1447 (2015). I discuss the challenges of multiple owners of copyrights below.

[140] Sobel, *supra* note 21, at 48.

[141] 17 U.S.C. §106(1) (granting the copyright owner the exclusive right to reproduce *the work* in copies).

[142] 17 U.S.C. §106(1) (emphasis added).

work that is substantially similar to the defendant's work. As noted above, several courts have rejected plaintiffs' efforts to expand their copyrights to cover a "creative gestalt" or "expressive core" of their works that is different from some particular work or works.

Consider the following example. Imagine that six different artists produce one painting each. Those paintings have a given scope established by copyright's infringement doctrines.[143] We can graphically depict the scope of those copyrights as follows:

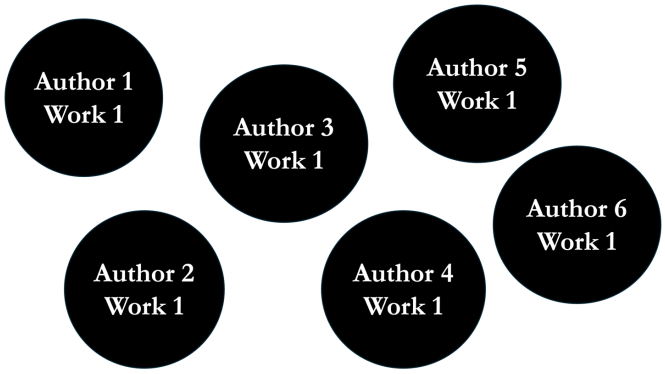

Figure 3: Copyright scope of six separate works by six different authors

Now, imagine that instead, the same artist created all six paintings. Allowing the artist to claim her artistic style across the works would expand the scope of each copyright. The stylistic gestalt copyright, now owned by a single artist, would look more like the following:

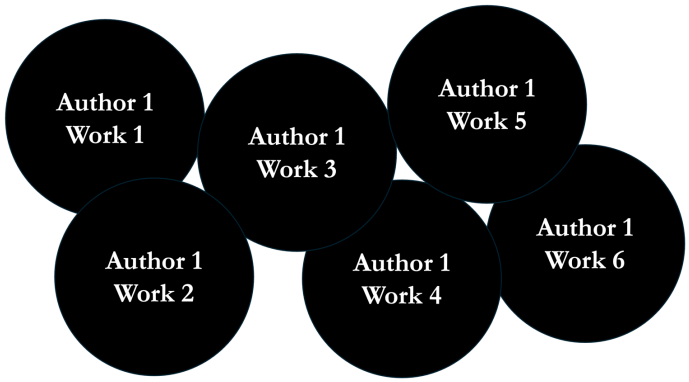

Figure 4: Gestalt copyright scope of six separate works by the same author

[143] For the most part, each copyright has a scope that prevents substantially similar copies from being made. *Rentmeester*, 883 F.3d at 1121.

But because copyrights attach to works rather than to artists, the scope of an individual copyright does not depend on who created the work. Six otherwise identical works should receive the same copyrights, irrespective of who their creators were.

The challenges of holding otherwise are apparent in *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor, Co*.[144] The plaintiff owned the copyrights to sixteen James Bond films, and it sued the maker of a satirical car commercial that wasn't especially similar to any particular scene in one of those movies. Nonetheless, the court allowed the plaintiff to assert its copyright interest across the film series as the style that those films represented: "a hybridize[d] the spy thriller with the genres of adventure, comedy (particularly, social satire and slapstick), and fantasy."[145] The awkwardness for the plaintiff was that it did not own the copyright in two other James Bond films which share a similar style—the first "Casino Royale" and "Never Say Never Again."[146] So who owns the "style" of the James Bond films?

A similar problem arose in *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc*., in which a visual artist sold the copyright in one of his works to the defendant and then produced another, very similar work.[147] Who owned the artist's style: the artist himself or the purchaser of the artist's copyright interest? Through some decidedly unusual doctrinal twists, the court avoided holding the artist liable for infringing his own work,[148] but the challenges of gestalt style copyright scope become apparent. Even if copyright doctrine recognized copyrights that extend across multiple works, doing so would present unappealing situations in which multiple parties might have a claim to the artist's style.

C. Copyright Does Not Reward Fame

Does every artist have a style? At least in the sense of having a recognizable set of characteristic features that are distinctly her own, the answer seems to be no.[149] Dr. Seuss

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[144] Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor, Co., 900 F. Supp. 1287 (C.D. Cal. 1995).
[145] *Id*. at 1294.
[146] *Id*. at 1293. The first "Casino Royale" film is meaningfully different from the other Bond films, because it is a satirical send-up of the spy genre. *Casino Royale* (1967 film), WIKIPEDIA, https://en.wikipedia.org/wiki/Casino_Royale_(1967_film) (last visited Feb. 10, 2024). But "Never Say Never Again" is a fairly standard Bond movie.
[147] Franklin Mint Corp. v. Nat'l. Wildlife Art Exch., Inc., 575 F.2d 62, 63–64 (3d Cir. 1978).
[148] It's not entirely clear how the court reached this result. Here is a major chunk of its reasoning: "There was also testimony on the tendency of some painters to return to certain basic themes time and time again. Winslow Homer's schoolboys, Monet's facade of Rouen Cathedral, and Bingham's flatboat characters were cited. Franklin Mint relied upon these examples of "variations on a theme as appropriate examples of the freedom which must be extended to artists to utilize basic subject matter more than once. National vigorously objects to the use of such a concept as being contrary to the theory of copyright. We do not find the phrase objectionable, however, because a 'variation' probably is not a copy and if a 'theme' is equated with an 'idea,' it may not be monopolized. We conceive of 'variation on a theme,' therefore, as another way of saying that an "idea" may not be copyrighted and only its 'expression' may be protected."*Id.* at 66. Rebecca Tushnet discusses this case at length. *See* Tushnet, *supra* note 121, at 726-29.
[149] *See* Ross, *supra* note 71, at 235-36 (discussing philosophers' views on whether all artists or all painters have "a style").

had a style. Saul Steinberg had a style. But what of the authors of the millions of copyrighted works who are not household names? Are their copyrights different, because they do not have a distinctive style? Again, the answer is—or should be—no.

For the vast majority of copyrighted works, the law does not and should not treat them differently depending on whether they were made by famous artists or nonfamous artists. As explained above, copyrights attach to works, not to people, and the scope of a copyright does not change based on the author's fame. Consider, again, Figures 3 and 4 above, but now imagine that the six works are made by a famous artist rather than a nonfamous one.[150] Because copyrights attach to the works, their scopes are the same. Or consider a situation in which an author's work is infringed before and after she has come to have a recognizable style. There is no reason for copyright law to treat the scope of the same work differently simply because the author's status has changed.

The Visual Artists Rights Act (VARA) is the exception that proves the rule, although it doesn't even go so far as to recognize artistic fame. Under VARA, the author of a work of visual art "of recognized stature" can prevent the intentional or grossly negligent destruction of the work.[151] VARA is anomalous in U.S. copyright law for two reasons. First, it treats some works as more important and, thus, worthy of more rights than other works based on their stature or reputation.[152] And second, the rights that it creates run with the artists, even though they may have transferred their copyrights to others.[153] But note that the extra rights that VARA creates are based on the stature of *the work*, not on the stature *of the artist*.[154] Thus, although Jean-Michel Basquiat was a famous artist with a distinctive visual style, the additional VARA rights against destruction would not attach to an unimportant work of his. Even when copyright law is most responsive to artistic fame, then, it still does not treat more famous artists differently from less famous ones.

Finally, it's worth drawing attention to the recent litigation involving Andy Warhol's image of the singer Prince.[155] Warhol's silkscreen was based on a photograph of Prince by Lynn Goldsmith, and she sued the Andy Warhol Foundation for copyright infringement. The district court found the silk screen to be a noninfringing fair use, because it transformed the photography's aesthetic. To the district court, the work "is immediately

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[150] Just as the scope of a copyright in a particular work doesn't expand as an author creates more works in the same style, nor does the scope of a copyright in a work expand if the author is or becomes famous.

[151] 17 U.S.C. §106A(a)(3)(B) ("the author of a work of visual art…shall have the right…to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.").

[152] Christopher J. Robinson, *The Recognized Stature Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935 (2000).

[153] 17 U.S.C. §106A(e)(2) ("Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a).").

[154] Robinson, *supra* note 66, at 1940.

[155] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

recognizable as a 'Warhol.'"[156] But the Second Circuit Court of Appeals rejected this approach, noting "that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others. But the law draws no such distinctions…"[157]

If celebrity artist defendants are not entitled to greater fair use privileges due to their fame, then nor should celebrity artist plaintiffs be entitled to greater copyright scope due to theirs.

* * *

Copyrighting artistic style raises a number of doctrinal, conceptual, and practical challenges. The idea/expression distinction is woefully ill-equipped to place stylistic choices on one side of the spectrum or the other. Style is inevitably both idea and expression.[158] Moreover, copyright only attaches to works and not to authors, so copyright scope should not grow as an author adds more works in the same style or as an author becomes more famous. The law should not recognize gestalt copyrights, nor should famous artists receive broader copyrights than nonfamous ones.

III. CLARIFYING COPYRIGHT'S SCOPE

This Part offers a way out of the morass that is copyright law's idea/expression distinction as applied to artistic style. The solution is to recognize the copyrighted work as an expressive unit that includes *both* formal features and underlying content or subject matter. An author's copyrighted work, on this view, represents the relationship between its formal, expressive features and its content. Because that unity defines the work, the copyright does not extend to the application of the same formal features (i.e., the author's style) to other content or subject matter.

To make this argument, I rely on the philosopher Nelson Goodman's work on style. But this is not just a philosophical argument. My approach is quite similar to that taken by an old—and largely reviled—Ninth Circuit case, *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*. Although I share the usual criticisms of that opinion,[159] it nonetheless contains important insights for thinking about the copyrightability of artistic style.

First, I lay out Goodman's theory of style, and then I develop it as a copyright concept involving the work as a unit of form and content or expression and idea. I show how this approach is consistent with the court's insights in *Sid & Marty Krofft* and how

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[156] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019).

[157] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 44 (2d Cir. 2021).

[158] Sobel, *supra* note 21, at 28 ("'You can't copyright a style' is on some level necessarily true, and on some level utterly false. My essential contention, therefore, is that the phrase is an unhelpful shibboleth: because it is ambiguous and therefore uninformative, the slogan risks providing AI users with a false sense of security and misinforming copyright holders about the extent of their legal rights.").

[159] These are discussed *infra* notes 194-204.

those can be brought to bear to clarify copyright scope. Finally, I show how this approach to copyright and style should alter the law's treatment of satire as fair use.

A. Style as Form and Content

The opening lines from Nelson Goodman's treatment of style immediately mark it out as distinct from most others: "Obviously, subject is what is said, style is how. A little less obviously, that formula is full of faults."[160] As discussed above, most philosophers distinguish style or form from content. This is the adverbial approach to style, where style is the manner by which artists represent content.[161] But to Goodman, this account misses both important aspects of style and misrepresents how artworks have meaning.

Nelson Goodman was one of the leading American philosophers in the twentieth century,and his work covered a wide range of interests and questions, including formal logic, the philosophy of science, and aesthetics.[162] Goodman's aesthetic theory is part of his larger theory of symbols, which incorporates not just art but science and language as well.[163] For Goodman, each of these symbolic systems is a distinct way of understanding the world around us.[164] Moreover, each of them is entirely conventional—there are no correct or incorrect ways of symbolizing the world.[165] For Goodman, all of the ways of symbolizing, of creating meaning and expression, must be learned.[166] None of them is more "real" or "true" than another.[167]

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[160] Goodman, *Style*, *supra* note 13, at 799. Among the faults of the standard form/content distinction, as we have seen with copyright law's idea/expression distinction, are the challenges of applying it to nonrepresentational arts. He writes, "Architecture and nonobjective painting and most of music have no subject. Their style cannot be a matter of how they say something, for they do not literally say anything; they do other things, they mean in other ways." *Id.*My citations are to Goodman's article in the journal *Critical Inquiry*. The work is largely identical to the chapter he later published in his monograph *Ways of Worldmaking* (1978). Because the former is likely to be more easily accessible to readers, I cite to it.

[161] *See supra* notes 62-71.

[162] For a detailed discussion of Goodman's work see the excellent entry in the Stanford Encyclopedia of Philosophy. Cohnitz, Daniel and Marcus Rossberg, "Nelson Goodman", *The Stanford Encyclopedia of Philosophy* (Spring 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/spr2024/entries/goodman/>.

[163] Goodman, *Style*, *supra* note 13, at 806 ("I think the so-called intrinsic stylistic features of a work are among those possessed properties that are manifested, shown forth, exemplified…[T]he features here in question, whether structural or nonstructural, are all properties literally exemplified by a work.").

[164] Giovannelli, Alessandro, "Goodman's Aesthetics", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/goodman-aesthetics/>.

[165] Id.

[166] Nelson Goodman, Languages of Art: An Approach to a Theory of Symbols 38 (1968) (hereinafter LA) ("Realistic representation…depends not upon imitation or illusion or information but upon inculcation.").

[167] W.J.T. Mitchell, Iconology: Image, Text, Ideology 64-65 (1986) (noting that Goodman's constructivism could be construed as "absolute relativism"). Mitchell explains: "He denies that there is a world to test our representations and descriptions against; he denies that photographs and

Artworks fit within one such symbol system. Artworks, for Goodman, symbolize or "refer to" something else.[168] Helpfully for this Article, Goodman differentiates between the various ways in which symbol systems, especially the visual arts, operate. For example, most paintings "denote" or label something: a painting is "a painting of Abraham Lincoln."[169] Moreover, paintings "exemplify" or "express" certain features. Some of these are features that the painting *literally* expresses—the weight of its line, the darkness of its shadows.[170] But other features are ones that the painting *metaphorically* exemplified—a painting may seem "gloomy" or "happy." Using a different artform, he explains: "A symphony that expresses feelings of tragic loss does not literally have those feelings; nor are the feelings expressed those of the composer or spectator; they are feelings that the work has metaphorically and refers to by exemplification."[171]

On this account of artworks as symbols, Goodman builds his notion of style. As noted above, Goodman objects to the classic differentiation between content (*what* is said) and style (*how* it is said).[172] He explains: "For sometimes style *is* a matter of subject. I do not mean merely that subject may influence style but that some differences in style consist entirely of differences in what is said."[173] Part of what counts as a poet's style, for example, consists of what he says: "of whether he focuses on the fragile and transcendent or the powerful and enduring, upon sensory qualities or abstract ideas, and so on."[174] The same could be true of painters. Goodman offers as an example how the different choices of subjects by Dutch painters Vermeer, de Heem, and van der Heyden are aspects of their respective styles. The different subjects are different ways of expressing the domestic quality of 17th-century Holland.[175]

Although Goodman's goal is primarily to understand style as a means of associating an artwork with an author, period, or school,[176] his approach is helpful here because it explains how style operates as part of a symbolic system. Standard accounts of style that treat it solely as form tend to rely on concepts of choice and synonymity.[177] Artists' styles are understood as reflecting their choices between alternative ways of saying the same

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realistic pictures depend for their status as representation on resemblance to the way things look; he reduces all symbolic forms, and perhaps even all acts of perception, to culturally relative constructions and interpretations." *Id*. at 65.

[168] *See* GOODMAN, LA, *supra* note 167, at 30.

[169] *See* discussion in Servaas van der Berg, *Towards Defending a Semantic Theory of Expression in Art: Revisiting Goodman*, 31 S. AFR. J. PHIL. 600, 601-02 (2012).

[170] Goodman, *Style*, *supra* note 14, at 806.

[171] Nelson Goodman, *Routes of Reference*, 8 CRITICAL INQUIRY 121, 126 (1981).

[172] Goodman, *Style*, *supra* note 14, at 799.

[173] *Id*. at 801.

[174] *Id*. Goodman offers another example: "Suppose one historian writes in terms of military conflicts, another in terms of social changes; or suppose one biographer stresses public careers, another personal lives. The differences between the two histories of a given period, or between the two biographies of a given person, here lie not in the character of the prose but in what is said. Nevertheless, these are differences in literary style no less pronounced than are differences in wording." *Id.*

[175] *Id*. at 806.

[176] *Id*. at 808.

[177] Leonard B. Meyer, *Toward a Theory of Style, in* THE CONCEPT OF STYLE, 3, 6 (Berel Lang, ed. 1979).

thing.[178] Content or ideas, on this view, are subject to any number of equally plausible manners of expression. But Goodman rejects the roles of both choice and synonymy in style, i.e., the claims about style as "adverbial" discussed above.[179] For Goodman, "[S]tyle is not exclusively a matter of how as contrasted with what, does not depend upon synonymous alternatives or upon conscious choice among alternatives, and comprises only but not all aspects of how and what a work symbolizes."[180]

A. Copyright, Style, and the Authorial Symbol

Goodman's insight that, as a matter of style, form and content coexist and interact is the key to understanding how copyright law should treat assertions that the defendant misappropriated the style of the plaintiff's work. Applying Goodman, the copyrighted work should be seen as a single expressive unit—an authorial symbol—through which the author has expressed in formal features the relevant underlying content or ideas. The copyrighted work represents the marriage or blending of form and content, expression and idea.[181]

Contrary to the standard readings of the idea/expression distinction above, the work isn't merely its expressive features. In applying that doctrine, our goal should not be to hunt for "the point" at which "expression" becomes sufficiently particularized that it no longer feels like "an idea." Copyrightable authorship is the merging of expression with idea or content. On this view, expression is not some free floating set of formal features that could be applied to this or that subject. Rather, it is the application of a particular set of formal features to a particular subject.

This approach derives from the Supreme Court's most well established principles of copyrighted authorship. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court found that a photograph could be a "writing" of an "author" as the Constitution demands of copyright law.[182] In doing so, it announced a theory of the copyrighted work, explaining: "By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., *by which the ideas in the mind of the author are given visible expression.*"[183] The copyrighted writing or work is the product that results from giving

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[178] *Id*.

[179] Goodman, *Style*, *supra* note 14, at 799-800.

[180] *Id.* at 808. Goodman is not the only philosopher to make these claims. Graham Hough writes, "The work of literary art is seen as an organic unity, in which matter and manner, thought and expression are indissolubly one…" GRAHAM HOUGH, STYLE AND STYLISTICS 4 (1969). *See also* Meyer, *supra* note 167, at 6.

[181] Susan Sontag, *On Style, in* AGAINST INTERPRETATION 15, 17 (1966) ("To speak of style is one way of speaking about the totality of a work of art.").

[182] 111 U.S. 53, 58 (1884) ("We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.").

[183] *Id*. (emphasis added).

visible expression to mental ideas.[184] The authorial work is the symbol represented in the union of form and content. These are the work's authorial properties.[185]

Combining *Sarony* and Goodman, then, the relevant properties of a copyrighted work are all of its authorial properties, both form and content. And because copyrights attach to works and not to authors,[186] the copyright in a work represents the combination of its authorial properties—how the formal features express a given subject or idea. This is what the owner of the copyright possesses, the exclusive right to reproduce the original union of expression and content in copies.[187]

When a plaintiff sues for copyright infringement, the appropriate comparison between the plaintiff's and defendant's works is between the original combination of authorial properties in the plaintiff's and those in defendant's work. That is, only when *all* of the relevant properties of a work—both form and content—are substantially similar should we say that the copyright has been infringed.

To be very clear, this does not mean that the author has a copyright in the work's subject or content. Those aspects are not original to the author and cannot be copyrighted. The author's copyright represents the union of subject and expression, and works that represent the same content but that do not share its formal features would not infringe. Consider, for example, *Rentmeester v. Nike, Inc.*[188]:

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[184] *See* Buccafusco, *supra* note 14, at 1233 ("to be an author of a writing, one must intend to produce some mental effect in an audience").

[185] Of course, the authorial properties are only copyrightable if they are original. *Feist*, 499 U.S. at 345 ("The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.…Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

[186] *See* discussion *supra* notes 139-150.

[187] 17 U.S.C. §106(1).

[188] *Rentmeester*, 883 F.3d at 1111.

Figure 5: Plaintiff's (top) and Defendant's (bottom) photos in Rentmeester v. Nike. Inc.

Although the plaintiff's photograph on the left shares the same subject matter as the defendant's image on the right, the two images are substantially different with respect to their formal features—their angle, lighting, exposure, and framing.[189] Thus, the defendant's work is properly characterized as noninfringing.

Rather than expanding the scope of plaintiff's rights, then, recognizing that the subject, content, or idea of the work is part of the copyright, is, in fact, a limitation on them. The copyright only reflects the complete operation of the work as authorial symbol—as both expression and content. Copyright infringement should only be found when the defendant has substantially similarly copied the complete authorial symbol.[190]

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[189] *Id*. at 1121 ("We conclude that the works at issue here are as a matter of law not substantially similar. Just as Rentmeester made a series of creative choices in the selection and arrangement of the elements in his photograph, so too Nike's photographer made his own distinct choices in that regard. Those choices produced an image that differs from Rentmeester's photo in more than just minor details.").

[190] Under some circumstances, the relevant scope of plaintiff's copyright isn't "substantial similarity" but rather "virtual identicality." *See* Satava v. Lowry, 323 F.3d 805, 813 (9th Cir. 2003) ("Satava possesses a thin copyright that protects against only virtually identical copying."). Nothing

The approach proposed here bears a strong resemblance to one of the foundational cases of copyright infringement: *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*[191] The hamburger chain was interested in developing a marketing campaign to sell Happy Meals to children. It initially approached the creators of the popular children's television program H.R. Pufnstuf to license its characters. When negotiations broke down, McDonald's hired designers (including former employees of the plaintiff) to create "McDonaldland" and its memorable cast of characters, Mayor McCheese, the Hamburglar, and Grimace.[192]

Figure 6: H.R. Pufnstuf (left) and Mayor McCheese (right)

Evaluating the plaintiff's infringement claim, the Ninth Circuit expressed anxiety about prior statements of the elements of copyright infringement that required only access to the plaintiff's work and substantial similarity between the two works.[193] The court worried that such a simple approach could result in liability for copying "a cheaply manufactured plaster statue of a nude" because most such works would share the same basic features.[194] Something more was needed, and the court's solution was the idea/expression distinction.[195]

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is different in such cases other than the degree of similarity required between the original aspects of the plaintiff's work as authorial symbol and the defendant's work.

[191] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

[192] *Id*. at 1162. For extensive discussion of the McDonaldland world and its characters, see *McDonaldland*, WIKIPEDIA, https://en.wikipedia.org/wiki/McDonaldland (last visited Feb. 10, 2024).

[193] *Krofft*, 562 F.2d at 1162.

[194] *Id*.

[195] *Id*. at 1163 ("Clearly the scope of copyright protection does not go this far. A limiting principle is needed. This is provided by the classic distinction between an 'idea' and the 'expression' of that idea.").

Numerous courts and scholars have objected to the way in which the *Krofft* court articulated the idea/expression distinction, to the two-part extrinsic and intrinsic analyses that it created, and to its characterization of the audience for the works.[196] These are valid criticisms. But they should not mask an important and useful feature of the court's analysis.

The court explained that the plaintiff must prove "substantial similarity not only of the general ideas but of the expressions of those ideas as well."[197] I read this as requiring, as proposed above, an inquiry into the union of expression and idea in the plaintiff's work. The copyright isn't infringed if only the idea is copied *or* if only the expression is copied. The court returned to its example of a nude statute and explained that a "statue of a horse or a painting of a nude would not embody this idea and therefore could not infringe."[198] The painting of a nude would embody the same underlying content but express it differently, while the statue of a horse might reflect the same expressive form but apply them to different content or ideas. Because neither would be substantially similar to the combination of form and content in the plaintiff's work, neither would infringe the copyright.

Krofft offers some guidance on how to conduct the comparison between the "general ideas" of the two works.[199] It suggests that the fact finder consider "specific criteria which can be listed and analyzed," and it includes "the type of artwork involved, the materials used, the subject matter, and the setting for the subject."[200] These features all make up the way in which the copyrighted work operates as an authorial symbol, and they are to be considered along with the formal features—shape, line, color, texture, degree of abstraction, etc.—of the plaintiff's expression.[201] Consider, for example, that H.R. Puffnstuff and Barney the Dinosaur share the same generalized content or subject, since both are vaguely lizard-like creatures. No one would assert, though, that they share the same formal features, because their color, shape, and clothing are all manifestly different.

The proposed test stresses the relationship between the formal expressive features of the work and its underlying content or subject matter. Factfinders should focus on the work's literal features and avoid comparing features that are metaphorically exemplified, to use Goodman's term.[202] That is, courts should generally avoid reference to how the

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[196] *See e.g.*, Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y USA 719 (2009); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement,* 107 NW. U. L. REV. 1821 (2012); Carys J. Craig, *Transforming "Total Concept and Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. LJ 603 (2020). On the question of audience, *see* Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251 (2013).

[197] *Krofft*, 562 F.2d at 1164.

[198] *Id*.

[199] It refers to this test as the "extrinsic" test. *Id*. I think this language occludes more than it clarifies and will not bother with it here.

[200] *Id*.

[201] Obviously, for works in other media the fact finder would consider other formal features. See discussion *supra* notes 62-69.

[202] Goodman, *Style*, *supra* note 14, at 801.

works "feel" or the sorts of moods or emotions that they produce.[203] All of the relevant analytic criteria are encompassed by the combination of literal formal features and underlying content,[204] and courts should not resort to higher levels of abstraction.[205]

This test also focuses the fact finder's attention on specific works of the plaintiff. Plaintiffs won't be able to assert a copyright in their stylistic gestalt or claim a copyright that is more than the sum of its parts. Copyright attaches to works as authorial symbols—as distinct units of expression and idea/content/form. Plaintiffs should not be able to claim that the defendant's work falls within the (otherwise as yet uncopyrighted) interstices of their works. Courts must compare one or more specific copyrighted works with the defendant's work and ask whether the defendant's work is substantially similar in both protected formal expressive features and underlying content or form in the plaintiff's work.

This is not to say that making these comparisons will be easy or that it will never involve challenging line drawing. Some cases are relatively straightforward though. *Steinberg* would still come out the same way, because the defendant applied substantially similar formal elements to substantially the same view of New York City. But Steinberg's copyright in his representation of New York shouldn't extend to similar approaches to representing Washington, D.C. or Beijing.

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[203] One example that produces the correct outcome with an improper method is *Kerr v. New Yorker Magazine*: "Here, the two figures have an entirely different 'concept and feel.' Kerr's pen and ink drawing has a sketchy, edgy feel to it, while Kunz's cool colors and smooth lines gives a more serene and thoughtful impression. These different 'feels' are sufficient support for a finding that the two images are not substantially similar." 63 F. Supp. 2d 320, 325-26 (S.D. NY 1999). *See also* Cariou v. Prince, 715 F.3d 694, 711 (2nd Cir. 2013) ("Graduation combines divergent elements to create a sense of discomfort"); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp 3d 312, 326 (S.D.N.Y. 2019) (holding that the Prince Series photographs are transformative since they "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure.").

[204] *See infra* notes 220-224 for discussion of works without underlying content or subject matter.

[205] Consider the repeated references to the "somber tone" and the "neutral somber feel" in the plaintiff's and defendant's works in *Roberts*. F. Supp. 3d at 5-6.

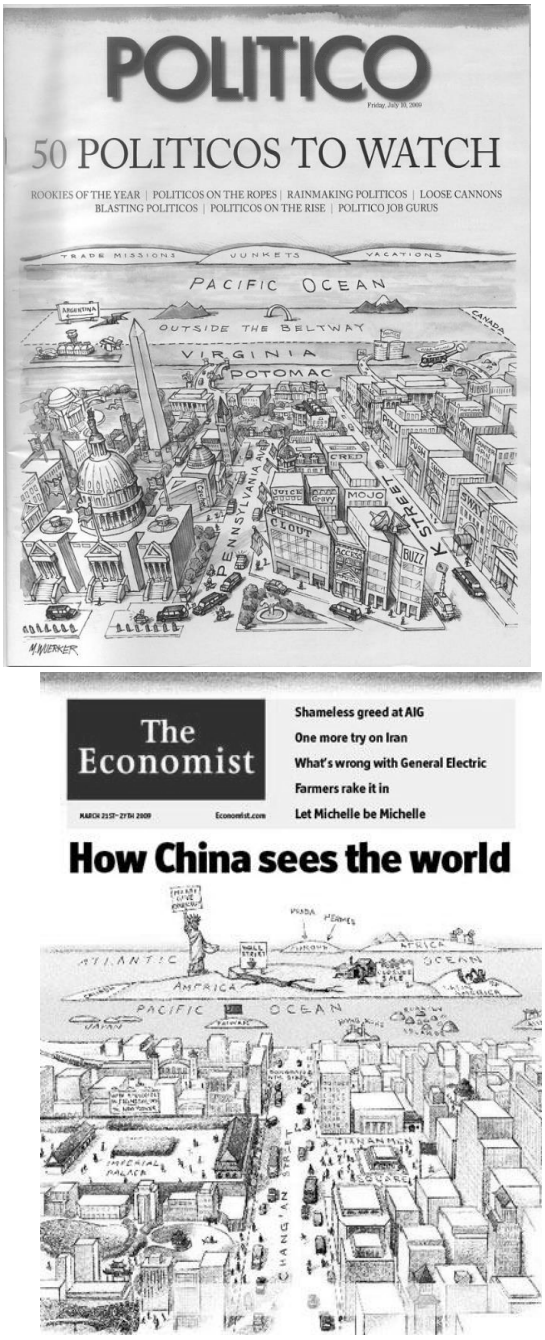

Figure 7: Steinberg-style Representations of Washington, D.C. and Beijing

Or, imagine that Claude Monet had sold the copyright in his first Impressionist painting of waterlilies. Whether or not the new owner of the copyright could prevent him from painting additional substantially similar paintings of waterlilies,[206] they could not stop him from producing Impressionist paintings of roses, violets, or orchids. Similarly, we would expect *Krofft* to result in a finding of noninfringement, because applying cartoony formal features to a giant lizard is not substantially similar to applying them to a humanoid creature with a giant cheeseburger head.[207] But when both the plaintiff and defendant create female fashion dolls with exaggerated proportions, the question will be whether the formal features in the defendant's work are substantially similar to the original protected formal features in the plaintiff's.[208]

This approach would limit copyright infringement claims against "in the style of…" users of generative AI.[209] For example, the owners of copyrights in paintings by Jean-Michel Basquiat would fail in a copyright infringement action against someone who used Midjourney or Stable Diffusion to create a picture of "Snoop Dogg in the style of Jean-Michel Basquiat." Basquiat, as far as we know, never painted Snoop Dogg, so the content of the defendant's image would necessarily differ from any particular image created by Basquiat.[210] If the AI user queried an image of "Fab 5 Freddy in the style of Jean-Michel Basquiat," the situation would be different, because Basquiat created a portrait of his friend and colleague.[211] Now, we would ask if the two images, which share the same subject, express it in the same visual form—which they might or might not.[212]

Connecting copyright to the complete authorial symbol of expression and idea best achieves a balance between the interests of current copyright holders and those of future artists and the public.[213] Copyright owners will still be able to maintain infringement

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[206] *See* Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 63–64 (3d Cir. 1978) (where the plaintiff sold the copyright in one of his paintings and then produced a second painting that was similar to the first).

[207] Interestingly, McDonald's admitted that it had copied the plaintiff's ideas, understood as "basically a fantasyland filled with diverse and fanciful characters in action" 562 F.2d at 1165. Given the court's ultimate holding, this was probably the wrong approach. A lizard and a cheeseburger man are at least as different as the court's example of a nude human and a horse.

[208] *See* Mattel, Inc. v. MGA Ent., Inc., 616 F.3d 904, 915 (9th Cir. 2010). The reference to protectible features above indicates that not all of the formal aspects of the plaintiff's doll are copyrightable, because they might be unoriginal, *scenes a faire*, or functional. *Id*. at 914.

[209] For background on AI and style, *see* Sobel, *supra* note 21, at 15–20.

[210] *See* Julianne McShane, *How Basquiat and Street Artists Left Their Mark on Hip-Hop Culture*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/06/24/arts/design/basquiat-street-artists-hip-hop.html. (last visited).

[211] *Id.*

[212] Carys Craig has suggested a different but related approach to these questions, asking first whether the two works share the same total concept and feel and only if the answer is yes, asking whether the two works share substantially similar formal features. Craig, *supra* note 186, at 603.

[213] Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."").

actions against AI users who produce and sell works that compete with their own by representing the same subject or content in the same manner. But users will be free to explore the vast creative possibilities that generative AI presents by applying various styles to their desired content.[214]

Living artists are, of course, free to continue to apply their characteristic styles to whatever content and forms they choose, and they will receive copyrights for each of those works. But there is no reason to allow them to monopolize all of the various subject matter to which particular formal elements could be applied.[215] There is even less reason to grant such monopolies to the estates of dead artists who, we know, will not apply their styles to new subjects.[216]

The proposed approach to copyrighting style makes the most sense for works of authorship with relatively concrete subjects, content, or ideas such as representational paintings, movies, sculptures, and photographs or literary works like most novels, plays, and nonfiction. The authorial symbol in these works is the original combination of formal expressive features and underlying subject or content.

The approach is less easily applied to nonrepresentational works like music, architecture, or nonobjective paintings that do not have any easily statable content or subject.[217] For such works, then, the inquiry into content simply drops out of the analysis. A painting by Jackson Pollock wouldn't infringe the copyright in one by Wassily Kandisky, because the two images do not share substantially similar formal features. Their uses of color, line, texture, shape, shading, etc. are not remotely similar. If a court were asked to evaluate whether another abstract expressionist painting violated Pollock's copyright, it would simply analyze whether, in light of the scope of the plaintiff's copyright, the formal features of the defendant's work were substantially similar.[218]

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[214] *See* Mark A. Lemley, *How Generative AI Turns Copyright Upside Down*, 25 COLUM. SCI. & TECH. L. REV. 190, 196 (2024) ("increasingly, the things humans contribute in a collaboration with generative AI will be ideas and high-level concepts").

[215] For example, we shouldn't think that copyright law's exceptionally broad derivative works right applies to narrower claims about aesthetic style. However appropriate it is to give J.K. Rowling the exclusive right to any Harry Potter story created for the rest of her life plus seventy years, it certainly isn't appropriate to give an artist the exclusive right to paint any given subject matter just because she painted one subject in a particular style. On copyright law's expansive derivative works right *see* Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2012).

[216] Because they are dead. Of course, the estates might claim the rights to license new artists to continue using the deceased's style, but the same arguments would apply to them as to living artists, and they would be yet stronger.

[217] NELSON GOODMAN & CATHERINE Z. ELGIN, RECONCEPTIONS IN PHILOSOPHY AND OTHER ARTS AND SCIENCES, 32 (1988) ("With some interesting exceptions, architectural works do not denote—that is, do not describe, recount, depict or portray. They mean, if at all, in other ways.").

[218] For present purpose, I will leave aside questions of how broad the scope of a Pollock painting's copyright should be.

Figure 8: Wassily Kandisky's "Swinging" and Jackson Pollock's "No. 5, 1948"

The situation for musical works is–or should be–similarly straightforward. The copyright in a musical work represents the original combination of lyrics, melody, and rhythm.[219] If the court is asked to compare two instrumental jazz tunes, for example, the only question is whether they share substantially similar melody and rhythm. If lyrics also exist, they would be added to the mix. The key here is maintaining an appropriately narrow level of abstraction that focuses on the existence or nonexistence of melodic, rhythmic, or lyrical similarities.

No musician should be able to assert exclusive rights in a particular musical "style," at least to the extent that style means something like "genre" or "type."[220] The songs on Taylor Swift's "Evermore" album all share the same basic style, genre, or type. The same is true of the songs on Bob Marley's album "Exodus." But because each of those songs has a distinct melody, rhythm, and lyrics, no one song would infringe the copyright of

[219] Joseph P. Fishman, *Music as a Matter of Law,* 131 HARV. L. REV. 1861 (2018). *See also* Gray v. Perry, 2020 WL 1275221, *10 (C.D. Cal. 2020) (noting that individually unprotectable musical elements such as lyric, rhythm, and pitch may be entitled to a copyright in the combination of these elements so long as the "mix is sufficiently original."); Peabody & Company, LLC. v. Wayne, 2024 WL 552495, *3 (S.D.N.Y. 2024) (describing how the selection and arrangement of various unprotected musical elements can be copyrightable so long as the elements are "numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (quoting Structured Asset Sales, LLC v. Sheeran, 673 F. Supp 3d 415, 421 (S.D.N.Y. 2023).

[220] Joseph P. Fishman, *Tonal Concept and Feel*, 38 CARDOZO ARTS & ENT. L.J. 655 (2021); Olivia Lattanza, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of* Williams v. Gaye *on Creativity in Music*, 35 TOURO L. REV. 723 (2019); Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. CAL. L. REV. POSTSCRIPT 67 (2018): 67.

any other song on either album if the copyrights were held by different people. The problem is solved by clear analysis of the formal features of these works.[221]

B. A New Approach to Satire

In addition to clarifying the scope of copyrighted works, my approach also reframes copyright law's treatment of satire. At least since *Campbell v. Acuff-Rose*, courts have been more likely to find satire infringing than parody.[222] My account of authorial symbols suggests that satire should be given similar creative breathing room, because most satires, while they reproduce a copyrighted work's formal features, apply those features to new subjects that the original author would never have created.

In the archetypal parody, a defendant reproduces a portion of the plaintiff's work to "target" or poke fun at the plaintiff or the plaintiff's style.[223] The fair use doctrine provides leeway to parodists to copy works, because reproduction of the plaintiffs' work is necessary for the parody to land.[224] In a typical satire, by contrast, the defendant reproduces a portion of the plaintiff's work to make a point about society, culture, or some larger issue.[225] Because satire is not targeted at the plaintiff, the defendant has less need to use the plaintiff's work and, thus, is less able to claim fair use.[226] For example, in *Campbell*, 2 Live Crew needed to reproduce Roy Orbison's "Oh Pretty Woman" to comment on Orbison and his song,[227] but the author of *The Cat NOT in the Hat* did not need to copy Dr. Seuss to comment on the O.J. Simpson saga.[228]

My approach would begin with a different question, first establishing whether the defendant infringed the plaintiff's copyright now understood as the combination of expressive formal features and underlying content or subject matter. For some satires, at least, the result of that inquiry will be a finding of noninfringement *prima facie*. Because many satires apply a style to different, incongruous, or humorous subject matter that the

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[221] The Copyright Act defines the formal features of architectural works: "The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." 17 U.S.C. §101.

[222] Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 580-81 (1994) ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.").

[223] *Id*. at 597 (Kennedy, J., concurring) ("The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."); *Penguin Books*, 109 F.3d at 1400-01.

[224] *Id*., *see also* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 532 (2023) ("a use may be justified because copying is reasonably necessary to achieve the user's new purpose.").

[225] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 597 (1994) (Kennedy, J. concurring).

[226] *Id*. *See also* Roger L. Zissu, *Expanding Fair Use: The Trouble with Parody, the Case for Satire*, 64 J. COPYRIGHT SOC'Y USA 165 (2017).

[227] *Campbell*, 510 U.S. at 582–83.

[228] Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

original author did not, those satires will not be substantially similar to both the plaintiff's expression and content or subject. The court will never have to consider fair use.[229]

Consider the O.J. Simpson/Dr. Seuss case discussed above.[230] If the only similarities between the works were the defendant's use of Dr. Seuss's rhyming style and cartoonish drawing, then the court should find the defendant's work to be noninfringing, because Dr. Seuss never applied his expressive style to O.J. Simpson. In reality, at least some of the images in the defendant's work might be substantially similar in both formal features and underlying content.[231] And this is definitely true for some of the images in the Star Trek/Dr. Seuss mash up discussed above.[232] But when the satire only involves applying the plaintiff's expressive features to new content, it should be absolved of infringement.

CONCLUSION

The Article presents a comprehensive account of copyright law's treatment of style, and it argues that the current approach to the idea/expression distinction is hopelessly insufficient to the task. Accordingly, it offers a new path, one grounded in the recognition that authorial style is inherently both form and substance, expression and idea. Only by reproducing both the plaintiff's expression and the ideas to which it has been applied has the defendant infringed the copyright.

The arguments presented here potentially resolve some aspects of the ongoing litigation about generative AI.[233] At least with respect to the outputs of AI, assertions of copyright infringement should fail when someone uses an AI platform to produce works "in the style of" an author but of a subject the author did not address. Only if the user generates a work that copies both the author's expression and content does it infringe. Returning to the examples in the Introduction, assertions of copyright infringement against defendants who, either through their own effort or with the aid of artificial intelligence, reproduce the plaintiff's style should fail unless the defendants' works are substantially similar to the form and content of some existing work by the plaintiff. If the plaintiff can only show that her style was applied to new content or ideas, the claim should be rejected.

These arguments also form the basis for my next article, co-authored with Sari Mazzurco, addressing claims of trademark and trade dress infringement related to artistic style.[234] In some respects, trademark seems like the more proper home for style protection claims, because it inherently concerns distinctiveness and fame. But in other respects, trademark law generally avoids involving itself in matters that are fundamentally creative and, thus, the province of copyright law.

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[229] Inaccurately, courts treat fair use as an affirmative defense. *Campbell*, 510 U.S. at 590 ("since fair use is an affirmative defense"). Lydia Pallas Loren, *Fair Use: An Affirmative Defense*, 90 WASH. L. REV. 685, 700-02 (2015) (arguing that, as a matter of legislative history, fair use is not an affirmative defense).

[230] *Penguin Books*, 109 F.3d at 1401.

[231] *Id*. at 1405.

[232] Dr Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020).

[233] Some aspects of these cases will involve decisions about fair use related to the works that were copied to train the algorithms. *See* Sag, *supra* note 2, at 303; Benjamin L.W. Sobel, *Artificial intelligence's Fair Use Crisis*, 41 COLUM. JL & ARTS 45 (2017).

[234] Christopher Buccafusco & Sari Mazzurco, Style Marks (2025) (manuscript on file with author).