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AGAINST CREATIVITY

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ABSTRACT: According to the Supreme Court, copyright requires both independent creation and creativity. The independent creation requirement provides that copyright cannot protect an element of a work of authorship that is copied from a previously existing work. But scholars disagree about the meaning of and justification for the creativity requirement.

The creativity requirement should be abandoned because it is irrelevant to the scope of copyrightable subject matter and distorts copyright doctrine by encouraging inefficient "creativity rhetoric."

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The purpose of copyright is to encourage the production of economically valuable works of authorship, not creativity.

INTRODUCTION

Originality is the essence of copyright. According to the Supreme Court, originality requires both independent creation and some kind of creativity.[1] However, the Court has failed to provide a coherent definition of or justification for either requirement. In particular, many scholars have struggled with the definition and propriety of the creativity requirement.[2] Some have tried to provide a legal definition of creativity;[3] others have argued that creativity is an ideological term, derived from the Romantic concept of authorship.[4] Some have argued that copyright may promote creativity by discouraging copying;[5] others argue that creativity should be irrelevant to copyright because it excludes factual works from protection.[6]

The creativity requirement is indeed irrelevant, because it does not actually affect the scope of copyrightable subject matter, but it should still be explicitly abandoned because it encourages inefficient

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[1] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

[2] *See, e.g.,* Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 830 (2010) ("But 'creativity' in Feist's sense gives advocates and courts few tools for distinguishing what is, and what is not, creative.").

[3] Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 824 (1993) ("The only logical approach to embracing Feist's creativity requirement is to fashion a legal definition for the word 'creativity.'").

[4] *See, e.g.,* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991).

[5] Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015).

[6] Mark K. Temin, *The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN. ST. L. REV. 263 (2006) ("The concept of creativity should be irrelevant in determining the scope of copyright protection for factual works, which is explained by the purpose of such works: the communication of information.").

"creativity rhetoric." The purpose of copyright is to encourage the production of economically valuable works of authorship, not creativity. The creativity requirement encourages courts to overvalue existing works of authorship and undervalue new works of authorship.

I. THEORIES OF COPYRIGHT

Scholars have advanced many different theories of copyright,[7] but the prevailing theory of copyright is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship by making them partially excludable.

Classical economics predicts that free riding will cause market failures in public goods.[8] In theory, government can solve market failures in public goods by subsidizing the production of those goods. Nevertheless, the Coase Theorem and public choice economics both predict that the resulting transaction costs will also cause "government failures" in public goods or market failures that government cannot solve because it does not know which public good to subsidize. Specifically, the Coase Theorem observes that information costs limit government's ability to determine which subsidies will be efficient,[9] and public choice economics observes

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[7] *See generally* PETER S. MENELL, 2 INTELLECTUAL PROPERTY: GENERAL THEORIES, ENCYCLOPEDIA OF LAW & ECONOMICS (Boudewijn Bouckaert & Gerrit de Geest eds. 2000) (surveying theories of copyright).

[8] "Market failures" are inefficiencies in the market for a good; "public goods" are goods that are nonrival and nonexcludable; and "free riding" is the consumption of a good without paying the marginal cost of production.

[9] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141 (2014).

that politics limit government's ability to provide efficient subsidies.[10]

Works of authorship are quintessential public goods because they are perfectly nonrival and nonexcludable. Consumption of a work of authorship does not diminish the supply of the work, and in the absence of copyright, authors cannot limit consumption of a published work of authorship. Accordingly, classical economics predicts market failures in works of authorship caused by free riding. Marginal authors will not invest in the creation of works of authorship because they cannot recover production costs.

Of course, government can solve some of those market failures by directly subsidizing the production of works of authorship, but direct subsidies are vulnerable to transaction costs that will still cause government failures. The Coase Theorem predicts that information costs will cause government failures because the government often has less information than market participants about the demand for works of authorship, rendering direct subsidies inefficient.[11] Public choice economics predicts that rent-seeking will also cause government failures by encouraging producers to compete for subsidies, rather than consumer demand.

Thus, the economic theory holds that copyright is justified because it solves both market failures and government failures in works of authorship by indirectly subsidizing their production, and thereby reducing the transaction costs associated with direct subsidies. Copyright indirectly subsidizes works of authorship by making them partially excludable, enabling copyright owners to prevent free riding. Therefore, copyright solves market failures in

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[10] *See, e.g.*, Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WESTERN ECON. J. 224 (1967); Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

[11] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141 (2014).

works of authorship by ensuring that the authors of economically valuable works of authorship can recover their production costs, and copyright solves government failures in works of authorship by ensuring that the economic risk associated with investing in the production of works of authorship is borne by authors, rather than the government.

However, copyright itself may impose transaction costs if authors do not behave like rational economic actors. Many authors systematically overvalue the works of authorship they create[12] and discount economic incentives.[13] Moreover, copyright owners may collectively engage in rent-seeking by requesting broader copyright protection and a longer copyright term.

Notably, the economic theory of copyright is explicitly consequentialist, holding that copyright is justified because it increases net economic welfare. The copyright "quid pro quo" assumes that authors invest in the production of works of authorship in exchange for copyright protection. In other words, the economic theory assumes that copyright provides salient incentives for marginal authors to invest in the creation of works of authorship. It holds that copyright is justified because the economic cost of granting copyright protection is smaller than the economic benefit generated by the additional works of authorship.

But the economic theory also implies that copyright is justified if and only if it increases net economic welfare. Thus, if copyright is justified because it increases net economic welfare, it is not justified when it decreases net economic welfare. Under the economic theory, copyright increases net economic welfare by providing salient incentives for marginal authors to invest in the production of works

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[12] *See, e.g.*, Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011).

[13] *See, e.g.*, JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY (2014).

of authorship. So, if and when copyright does not provide a salient incentive to marginal authors, it is not justified. Moreover, if and when the marginal cost of copyright protection exceeds the marginal benefit, it is also not justified.

There are many alternative theories of copyright. Some are consequentialist but consider non-economic welfare. Others are deontological and consider the natural or expressive rights of authors.[14] But the Supreme Court has explicitly and repeatedly held that the Intellectual Property Clause adopted the economic theory:

> 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.'[15]

Accordingly, this Article uses the economic theory to evaluate the justification for the "creativity" requirement. It assumes that if copyright can increase net economic welfare by encouraging "creativity," then copyright should require "creativity;" but if copyright cannot increase net economic welfare by encouraging "creativity," then copyright should ignore "creativity."

II. THE SUBJECT MATTER OF COPYRIGHT

Copyright only protects original works of authorship. [16] According to the Supreme Court, "[o]riginality is a constitutional requirement" for copyright protection. [17] As a consequence, the

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[14] *See generally* MENELL, *supra* note 7.
[15] Eldred v. Ashcroft, 537 U.S. 186 (2003) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).
[16] 17 U.S.C. § 102 (2015).
[17] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

"originality" requirement defines the subject matter of copyright. Oddly, however, the meaning of "originality" for copyright purposes is unclear. Historically, originality required only independent creation. Copyright could protect any work of authorship that was not a copy of a previously existing work of authorship. As Justice Holmes observed, "Others are free to copy the original. They are not free to copy the copy."[18] But in *Feist*, the Supreme Court held that originality requires not only independent creation, but also "creativity": "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."[19] Unfortunately, the Court failed to define "creativity" or meaningfully explain what it requires.

III. FEIST V. RURAL

Rural Telephone Service Company, Inc. provided telephone service to several communities in northwest Kansas. Pursuant to state regulation, Rural published and distributed free of charge to its subscribers a telephone directory. Rural's directory consisted of "white pages" and "yellow pages." The white pages listed all of Rural's subscribers in alphabetical order, along with their town of residence and telephone number. The yellow pages listed all of Rural's commercial subscribers in alphabetical order by category, accompanied by paid advertisements of varying sizes.

Feist Publications, Inc. published and distributed free of charge regional telephone directories that consisted of white pages and yellow pages. Feist typically licensed the relevant white pages listings from telephone service providers and competed with them for yellow pages advertisements. In 1978, Feist decided to publish a

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[18] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).
[19] *Feist*, 499 U.S. at 345.

regional telephone directory for Northwest Kansas. The region covered by Feist's directory included many of Rural's subscribers, as well as the subscribers of ten other telephone service providers. Feist offered to license the relevant white pages listings from the telephone service providers, but Rural refused, so Feist copied Rural's white pages listing without permission.

Suspecting Feist of copying its white pages listings, Rural inserted six fictitious listings into its 1982-1983 white pages directory. When Feist used Rural's directory to update its 1983 Northwest Kansas Area-Wide Telephone Directory, it copied four of the fictitious listings.

Rural, tipped off by the fictitious listings, sued Feist for copyright infringement. The district court granted summary judgment to Rural, holding that copyright does protect telephone directories, and the circuit court affirmed.[20] The Supreme Court reversed, holding that copyright could not protect the elements of Rural's white pages directory copied by Feist because they lacked originality. Specifically, the Court found that the individual listings copied by Feist lacked originality because they were "facts" and therefore not "independently created" by Rural; and the compilation of listings copied by Feist lacked originality because its creation did not require any "creativity."[21]

A. ORIGINALITY

The Court began by observing that copyright can only protect the original works of authorship: "The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be

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[20] Rural v. Feist, 663 F. Supp. 214, 218 (D. Kan. 1987), *aff'd*, 916 F. 2d 718 (10th Cir. 1990), *rev'd* 499 U.S. 340 (1991).
[21] *Feist*, 499 U.S. at 342..

original to the author." [22] Originality "is a constitutional requirement," because the Intellectual Property Clause only authorizes Congress to grant copyright protection to original works of authorship.[23]

The Court also held that copyright can only protect the original "elements" of a work of authorship:

> The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.[24]

By implication, a "work of authorship" may—and typically does—consist of both original elements that are protected by copyright and unoriginal elements that are not. The Copyright Act defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[25] In other words, the Copyright Act defines a "compilation" as a work of authorship created by compiling unoriginal *elements* in an original *way*. Copyright cannot protect the unoriginal elements, but can protect the original way in which they are compiled. However, if copyright independently protects each original element of a work, then every "work of authorship" is effectively a "compilation" of original and

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[22] *Feist*, 499 U.S. at 345 (emphasis in original).
[23] *Id.* at 346 (1991) (citing U.S. CONST. art. I, § 8, cl. 8; *In re* Trade-Mark Cases, 100 U. S. 82 (1879); and Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1884)).
[24] *Id.* at 348 (emphasis in original).
[25] 17 U.S.C. § 101 (2015).

unoriginal elements, which copyright may also protect as an original selection, ordering, or arrangement of those elements.[26]

Notably, the Court's conclusion that copyright can only protect the original elements of a work of authorship renders the reproduction and adaptation rights redundant. The reproduction right gives copyright owners the exclusive right "to reproduce the copyrighted work in copies or phonorecords" and the adaptation right gives copyright owners the exclusive right "to prepare derivative works based upon the copyrighted work."[27] A "derivative work" is a work that copies one or more original elements of a copyrighted work.[28] In other words, the adaptation right gives copyright owners the exclusive right to reproduce the original elements of a copyrighted work. So, if the reproduction right attaches only to a "copyrighted work" as a whole, then it merely gives copyright owners a subset of the rights given by the adaptation right. Accordingly, if the reproduction right attaches to each original element of a "copyrighted work," then it is congruent with the adaptation right.

In any case, the Court held that "originality" requires both "independent creation" and some degree of "creativity":

> Original, as the term is used in copyright, means only that the work was independently created by the author (as

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[26] *See, e.g.,* Comput. Assocs. Intern., Inc. v. Altai, Inc., 982 F. 2d 693 (2d. Cir. 1992). *See also* Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169 (2008) ("However, if a very literal approach is taken, there is likely no work of authorship that is not a compilation under the statutory definition.").

[27] 17 U.S.C. §§ 106(1)-(2) (2015).

[28] MELVILLE NIMMER, NIMMER ON COPYRIGHT § 3.01 (1963) (stating "a work will be considered a derivative work only if it would be considered an infringing work if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work").

> opposed to copied from other works), and that it possesses at least some minimal degree of creativity.[29]

The Court reached the correct result under the economic theory of copyright, because Rural did not need a copyright incentive to produce its white pages listings. But unfortunately, it failed to provide a coherent explanation of why either the independent creation or creativity requirements precluded copyright protection of the white pages listings copied by Feist.

1. Independent Creation

First, the Court held that the individual white pages listings lacked "originality" because they were "facts" and therefore not "independently created" by Rural. The "independent creation" requirement provides that copyright can only protect the elements of a work that are not "copied" from another work.[30] In other words, copyright can only protect the elements of a work of authorship that were actually created by an author of that work. If an element of a work is copied from a pre-existing work, the copyright in that element, if any, belongs to the author of the pre-existing work.

The Court held that the independent creation requirement precludes copyright protection of "facts," because they are not created by an author:

> "No one may claim originality as to facts." This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow

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[29] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (emphasis in original).
[30] *Id.* at 345-47 (1991)

> from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." "The discoverer merely finds and records."[31]

Accordingly, the Court held that copyright could not protect Rural's white pages listings, because they were "facts" that Rural discovered and reported, but did not create.[32]

> [D]id Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "ow[e] its origin" to Rural. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory.[33]

This is nonsense. To begin with, Rural did not "discover and report the names, towns, and telephone numbers of its subscribers." It assigned telephone numbers to its subscribers, thereby creating the "fact" that a particular telephone number was associated with a particular subscriber. And Rural created new "facts" every time it added a new subscriber, changed a subscriber's telephone number, or removed a former subscriber.

More importantly, the Court failed to define "facts" or provide a coherent explanation of why they cannot be protected by copyright. Presumably, by "facts" the Court meant something like "true

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[31] *Id.* at 347 (internal citations omitted) (citing NIMMER, *supra* note 28, §§ 2.11[A], 2.03[E], and then *Burrow-Giles*, 111 U. S. at 58).
[32] *Id.*
[33] *Id.* at 361 (1991) (internal citation omitted).

statements about the world."[34] Yet, on that definition, at least some of the listings copied by Feist were not "facts." For example, Feist copied four fake listings created by Rural in order to detect copying. Were those fake listings "facts"? If not, were they protected by copyright? Presumably, at least some of the listings copied by Feist were inaccurate. Were those inaccurate listings "facts"? If not, were they protected by copyright? What about telephone listings reported in a fictional work?[35]

2. The Idea-Expression Dichotomy

Luckily, the idea-expression dichotomy provides a coherent explanation of why copyright cannot protect "facts." The idea-expression dichotomy provides that copyright can protect particular expressions of an idea, but cannot protect the idea itself. It began as a common law doctrine that Congress eventually codified.[36] As the Copyright Act provides: "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." [37] For example, under the idea-expression dichotomy, copyright cannot protect a bookkeeping system because it is an idea, but it can protect an explanation of a bookkeeping system because it is a particular expression of an idea.[38]

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[34] *See, e.g.,* Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007).
[35] *See, e.g., Id.* (observing that "social facts" are generated by original expressions); Temin, *supra* note 6 (arguing that the listings were not "facts" at all, but "literary works" independently created by Rural).
[36] Baker v. Selden, 101 U.S. 99 (1879).
[37] 17 U.S.C. § 102(b) (2015).
[38] Baker v. Selden, 101 U.S. 99 (1879).

The so-called "merger doctrine" is essentially a gloss on the idea-expression dichotomy. It provides that when an idea can only be expressed in a limited number of ways, the idea and expression "merge," and copyright then cannot protect particular expressions of that idea.[39] Essentially, the idea-expression dichotomy and the merger doctrine express different versions of the principle that copyright cannot protect abstractions, but can protect particular expressions.

A fact is simply an idea that inherently can only be expressed in a limited number of ways. As a consequence, copyright cannot protect particular expressions of such ideas. For example, a telephone listing expresses the idea: "name, address, telephone number." Accordingly, copyright cannot protect a telephone listing because it is reduced to the very idea it expresses. The same is true of a fake or inaccurate telephone listing. Likewise, a mathematical equation expresses an idea. Copyright cannot protect a mathematical equation because it reduces to the idea it expresses, whether or not that idea is true. As Justin Hughes has observed, "[W]hen a distinguished judge or scholar just says facts are not protected by copyright law, he or she is engaged in a form of shorthand that is more than just imprecision. It is a subconscious application of copyright's merger doctrine."[40]

B. CREATIVITY

Second, the Court held that the compilation of white pages listings copied by Feist also lacked "originality" because its creation did not require any "creativity." Specifically, the Court held that copyright cannot protect "facts," but can protect a "compilation of

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[39] Morrissey v. Procter & Gamble, 379 F. 2d 675 (1st Cir. 1967); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738 (9th Cir. 1971).

[40] Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 56 (2007).

facts," so long as its ordering, selection, or arrangement of those facts is both independently created and sufficiently creative:

> Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.[41]

The Court explicitly recognized the tension between this "creativity" requirement and its longstanding "aesthetic nondiscrimination principle," which provides that courts may not consider the aesthetic value of a work of authorship when determining whether it is protected by copyright.[42] The Court adopted the aesthetic nondiscrimination principle in *Bleistein v. Donaldson*, holding that copyright could protect posters used to advertise a circus. As Justice Holmes observed:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had

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[41] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

[42] *Id.* at 359 (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903)). *See generally* Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 BELMONT LAW REVIEW 29 (2016).

> learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.[43]

Notably, no court has ever used the term "aesthetic nondiscrimination." Nevertheless, courts have universally adopted Holmes's minimalistic definition of originality, and the aesthetic nondiscrimination principle has come to define the scope of copyrightable subject matter.[44] As Holmes explained:

> The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[45]

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[43] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).
[44] *See* Diane Leenheer Zimmermann, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J. L. & ARTS 187, 204 (2005).
[45] *Bleistein*, 188 U.S. at 250.

In other words, copyright can protect any original expression, no matter how banal or trivial. Or rather, as Brad Greenberg has observed, copyright is like an Oprah giveaway: everybody gets one.[46]

The Court recognized this tension. Under the "aesthetic nondiscrimination" doctrine, courts cannot consider the aesthetic value of an element of a work of authorship in determining whether it is protected by copyright, but under the "creativity" requirement, courts must consider the aesthetic value of an element of a work of authorship in order to determine whether it is "original" and thus protected by copyright.

The Court tried to reconcile the "aesthetic nondiscrimination" doctrine and the "creativity" requirement by holding that originality requires only a "minimal" amount of "creativity."[47] It noted that even the aesthetic nondiscrimination principle articulated in *Bleistein* explicitly excluded at least some works from copyright protection.[48] And it tried to reconcile the tension between the aesthetic nondiscrimination doctrine and the creativity requirement by holding that originality requires vanishingly little "creativity":

> [T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that

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[46] Brad A. Greenberg, Copyright and Trademark Troll: Fable or Fact?, Panel Remarks at Chapman University School of Law, Law Review Symposium (Jan. 30, 2015) (audio recording 19:34–19:53), available at http://ibc.chapman.edu/Mediasite/Play/5fee649a60414522a5a1c1627f222ff81d.

[47] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358-59 (1991).

[48] *Id.* (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.")).

> selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent . . . .[49]

> As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. As this Court has explained, the Constitution mandates some minimal degree of creativity, and an author who claims infringement must prove "the existence of . . . intellectual production, of thought, and conception."[50]

Nevertheless, the Court concluded that copyright could not protect Rural's white pages directory as a "compilation of facts" because Rural's selection, ordering, and arrangement of its white pages listings lacked any creativity whatsoever.

> The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data

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[49] *Id.* at 358-59.

[50] *Id.* at 362 (internal citations omitted) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884)).

> provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.
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> Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original . . . .
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> Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.[51]
>
> We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter,

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[51] *Id.* at 362-64 (internal citations omitted).

> copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U. S. C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

Unfortunately, the Court failed to define "creativity," or provide any explanation of what "creativity" requires. As a consequence, lower courts have struggled to apply the "creativity" requirement or even to understand its purpose.[52] In practice, lower courts typically recognize that "originality" requires both "independent creation" and "creativity," but ignore the "creativity" requirement.[53]

This is entirely understandable since the "creativity" requirement is irrelevant.[54] The Court adopted the "creativity" requirement in order to address the facts before the Court and explain why copyright cannot protect the selection, ordering, and arrangement of the listings in a white pages telephone directory. However, the Court could have achieved the same result by simply

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[52] *See generally* Temin, *supra* note 6; Omri Rachum-Twaig, *Recreating Copyright: The Cognitive Process of Creation and Copyright Law*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287 (2017).

[53] *See* Karjala, *supra* note 26, at 186 ("After *Feist* was decided, it was predictable that courts seeking to prevent market failures for 'sweat of the brow' works would broaden their search for creativity in an effort to maintain the incentive to create works valued by society, such as many maps and compilations that lack the stamp of authorial creativity on their face.").

[54] *Cf.* Temin, *supra* note 6,.

applying the idea-expression dichotomy. As explained above, the idea-expression dichotomy provides that copyright cannot protect an *individual* telephone listing because there is only one way to express the idea: name, address, telephone number. Furthermore, the idea-expression dichotomy also provides that copyright cannot protect the *selection*, *ordering*, and *arrangement* of the listings in a white pages telephone directory for the same reason. The selection, ordering, and arrangement of the listings in Rural's white pages telephone directory expressed the idea: Rural's telephone subscribers in alphabetical order. There is only one way to express this idea and so it cannot be protected by copyright.

In the alternative, the Court could have held that copyright cannot protect a white pages telephone directory as a compilation of facts because the selection, ordering, and arrangement of those facts is purely functional.[55] The Copyright Act excludes the functional elements of a work of authorship from copyright protection.[56] The selection, ordering, and arrangement of the listings in a white pages telephone directory are not expressive in any way. They are instead functional because they serve the purpose of enabling a user of the directory to locate the desired listing.

In any case, the Court presumably intended the "creativity" requirement to limit the scope of copyright protection by ensuring that copyright cannot protect trivial or banal expressions.[57] Unfortunately, it accomplished exactly the opposite. The Court tried

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[55] *See* Karjala, *supra* note 26, at 179; Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 468-69, n.119 (2003)

[56] 17 U.S.C. § 102(b) (2015) ("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.").

[57] *See generally* Zimmermann, *supra* note 44; *see also* Temin, *supra* note 6 (predicting that Feist would cause market failures by preventing copyright protection of valuable factual works); Karjala, *supra* note 26, at 179 (predicting the same).

to reconcile the "aesthetic nondiscrimination" doctrine and the "creativity" requirement by requiring only a "minimal" amount of "creativity." But it set the "creativity" bar so low that essentially anything but a white pages telephone directory qualifies as "creative." Indeed, even a yellow pages telephone directory is sufficiently "creative" for copyright protection. The Court itself suggested that copyright could protect not only Rural's yellow pages listings, but also some elements of Rural's white pages listings that Feist did not copy.[58] Lower courts subsequently held that copyright could protect an ethnic telephone directory and an automobile price guide.[59] If the Court intended the "creativity" requirement to limit the scope of copyrightable subject matter, it failed miserably.

IV. "CREATIVITY RHETORIC"

After *Feist*, the nature of copyrightable subject matter went from purely descriptive to both descriptive and normative. Under the aesthetic nondiscrimination doctrine, a work of authorship simply was or was not protected by copyright. Whether copyright protected a work of authorship did not imply any normative judgment about the value of the work. By contrast, under the "creativity" requirement, a work of authorship implicitly either should or should not be protected by copyright. Suddenly, copyrightable subject matter acquired a subtle normative tinge. Yet since every work of authorship is in practice protected by copyright, it follows every work of authorship "should" be protected by copyright.

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[58] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) ("Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet. for Cert. 9.").

[59] Key Publ'ns v. Chinatown Today Pub. Ent., 945 F. 2d 509 (2d. Cir. 1991); CCC Info. Serv. v. Maclean Hunter Mkt. Rep., 44 F. 3d 61 (2d. Cir. 1994).

While the "creativity" requirement itself is functionally irrelevant, it encouraged the use of "creativity rhetoric," which has profoundly affected copyright doctrine. Under the aesthetic nondiscrimination doctrine, original works of authorship received copyright protection, irrespective of their aesthetic value. Accordingly, copyright protection carried no implication of aesthetic value. But under the "creativity" requirement, a work of authorship is "original" and entitled to copyright protection if and only if it has a "creative" element, no matter how trivial. As a result, copyright protection does imply aesthetic value, even though the "creativity" requirement does not actually require it.

"Creativity rhetoric" assumes that the purpose of copyright is to promote creativity. This is readily apparent in both judicial opinions and copyright scholarship.[60] For example, many courts have opined that the purpose of copyright is to promote creativity.[61] And many scholars agree, although they disagree about whether it is successful. Some argue that copyright reduces creativity by prohibiting copying

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[60] See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007) ("Creativity is universally agreed to be a good that copyright law should seek to promote"); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1, 40 (2013) ("[I]n no uncertain terms the Court has articulated a view of copyright that defines the primary objective of copyright as creativity or originality (which turns on creativity)."); Omri Rachum-Twaig, *Recreating Copyright: The Cognitive Process of Creation and Copyright Law*, FORDHAM INTELL. PROP., MEDIA & ENT. L. J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776292 (stating that "copyright's primary goal is to promote creativity").

[61] See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 223 (2003) (observing that exclusive intellectual property rights are "intended to encourage the creativity of 'Authors and Inventors'"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating that the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good").

and preventing productive re-use.[62] Others argue that it increases creativity by discouraging copying and encouraging novelty.[63]

Creativity rhetoric is broadly compatible with many theories of copyright. Deontological theories of copyright can coherently embrace creativity rhetoric, especially insofar as it argues that copyright should protect aesthetically valuable works of authorship. And at least some consequentialist theories of copyright can coherently embrace creativity rhetoric, insofar as they argue that promoting creativity will increase happiness or net welfare. However, creativity rhetoric may be incompatible with the economic theory of copyright.

V. AGAINST CREATIVITY

The economic theory of copyright holds that copyright is justified because it increases net economic welfare by solving market and government failures in works of authorship. In other words, under the economic theory, the purpose of copyright is to increase the efficiency of the market for works of authorship by encouraging marginal authors to satisfy consumer demand for works of authorship.

By contrast, creativity rhetoric assumes that the purpose of copyright is to promote "creativity," which is typically associated

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[62] *See, e.g.*, LARRY LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

[63] Fishman, *supra* note 5,. *But see* Dan L. Burk, *The "Creating Around" Paradox*, 128 HARV. L. REV. FORUM 118 (2015).

with novelty.[64] "Creativity is the art of the new."[65] For example, Fishman argues that copyright promotes "creativity" by constraining copying and encouraging novelty.[66] Likewise, Parchomovsky and Stein argue that copyright should promote creativity by granting more protection to novel works and less protection to generic works: "The problem with the existing design is that by rewarding minimally original works and highly original works alike, the law incentivizes authors to produce works containing just enough originality to receive protection—but not more."[67]

There is no reason to assume that consumers demand "creativity." In fact, the market for works of authorship suggests the opposite.[68] In general, consumers tend to prefer works that are generic and familiar, and tend to reject works that are unusual and unfamiliar.[69] For example, genre fiction is often popular, but

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[64] *See, e.g.*, *Creativity*, ENCYCLOPEDIA BRITTANICA, https://www.britannica.com/topic/creativity; Zimmermann, *supra* note 44, at 208 ("On the one hand, as I noted earlier, Justice O'Connor wrote that she and her colleagues were not demanding novelty. In the next breath, however, she went on to explain that Rural's failure to be original lay in the fact that it organized the names and telephone numbers of its subscribers using a trite, "entirely typical" methodology. A problem of lack of novelty, perhaps?").

[65] Madison, *supra* note 2, at 824.

[66] Fishman, *supra* note 5.

[67] Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009). Notably, Karjala suggests that is already the case. Karjala, *supra* note 26, at 178-79 ("[C]reativity is often not merely a necessary condition for copyright protection, but for many courts it is also a sufficient condition. Moreover, the scope of protection runs to the creativity the court finds in the work."). But see Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, *in* ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT 69-101 (Reginald McGinnis, ed., 2008).

[68] See, e.g., *Planet Money, Episode 288: Manufacturing The Song Of The Summer*, NATIONAL PUBLIC RADIO (Jul. 10, 2015), http://www.npr.org/sections/money/2015/07/10/421874671/episode-288-manufacturing-the-song-of-the-summer (observing that hit songs are typically similar to but slightly different from previous hit songs).

[69] *See* Omri Rachum-Twaig, *A Genre Theory of Copyright*, 33 SANTA CLARA HIGH TECH. L.J. 34 (2016).

experimental fiction is rarely popular.[70] Pop music is often popular, but experimental music is rarely popular.[71] Genre films are often popular, but experimental films are rarely popular.[72] And so on. While "creativity" may be aesthetically valuable, it is rarely popular; and while banality may not be aesthetically valuable, it is often quite popular. Of course, there are innumerable exceptions—many generic and familiar works fail to sell while some unusual and unfamiliar works are best-sellers. However, in general, the most popular works are generic and familiar, while most unusual and unfamiliar works are unpopular.

In other words, creativity rhetoric is inconsistent with the economic theory of copyright. While creativity rhetoric assumes that the purpose of copyright is to encourage creativity, the economic theory of copyright assumes that the purpose of copyright is to solve market failures in works of authorship demanded by consumers. And it appears that creativity is negatively correlated with consumer demand. For better or worse, consumers tend to favor familiar works of authorship and disfavor creative ones.

This inconsistency suggests that copyright may cause market failures, rather than solve them. For example, Fishman argues that copyright encourages creativity by discouraging copying.[73] If he is right, then copyright may discourage the production of works consumers demand, and encourage the production of works they do not. In other words, by increasing creativity, copyright may decrease

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[70] *See* New York Times' Bestsellers' List, N.Y. TIMES, July 30, 2017 available at https://www.nytimes.com/books/best-sellers/ (last visited July 24, 2017).
[71] *See* Billboard Hot 100, BILLBOARD, July 29, 2017 available at http://www.billboard.com/charts/hot-100 (last visited July 24, 2017).
[72] *See* Variety Box Office, VARIETY, http://variety.com/v/film/box-office/ (last visited July 24, 2017).
[73] Fishman, *supra* note 5.

economic efficiency. Notably, authors can and do use licensing to solve this government failure caused by creativity rhetoric, but they are constrained by transaction costs.[74]

Making matters worse, creativity rhetoric further decreases the efficiency of copyright law by inducing courts to narrow the scope of the fair use doctrine. In theory, the creativity requirement limits copyrightable subject matter, and transformativeness limits the fair use doctrine. In practice, the creativity requirement is irrelevant because the aesthetic nondiscrimination doctrine prevents courts from considering the aesthetic value of a work of authorship. But the aesthetic nondiscrimination doctrine doesn't apply to fair use. When a court considers a fair use defense, it must determine whether the use is transformative, which necessarily requires the court to consider the aesthetic value of the use. This double standard discriminates in favor of copyright owners and against users.[75]

Creativity rhetoric exacerbates the problem by encouraging copyright normativity. The economic theory of copyright is purely consequentialist. It holds that copyright is justified when it increases net economic welfare and unjustified when it does not. But creativity rhetoric is profoundly normative. It suggests that copyright owners deserve to own a copyright in their works of authorship because they are creative. And it suggests that fair use is justified only if the use is sufficiently creative to outweigh the copyright owner's moral rights. In other words, creativity rhetoric encourages courts to adopt a jaundiced view of fair use, in which copyright claims are presumptively valid, and fair use claims are presumptively invalid. Under the economic theory, the only relevant question should be whether allowing the use would increase or decrease net economic welfare.

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[74] See Burk, *supra* note 63.
[75] Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 BELMONT L. REV. 29 (2016)

Ironically, while copyright probably does solve some market and government failures in works of authorship, it is ill-suited to promoting creativity. The economic theory of copyright assumes that authors are rational economic actors who want to satisfy consumer demand for works of authorship. To the extent that is true, it probably increases the efficiency of the market for works of authorship. For example, marginal corporate authors are unlikely to invest in the production of certain works of authorship if they cannot prevent free riding. Rational economic actors invest in the production of works of authorship only if they expect to earn a profit. But they also invest in the production of works of authorship that consumers demand, i.e., familiar works of authorship.

By contrast, copyright rarely provides salient incentives to authors interested in producing genuinely creative works of authorship. [76] While creative authors may respond to certain economic incentives, they rarely respond to copyright incentives. Recall, the more "creative" a work of authorship, the lower its typical economic value. If anything, copyright encourages marginal authors to invest in the production of less "creative," more generic works of authorship, assuming they are rational economic actors.

Copyright is largely irrelevant to most marginal authors interested in producing "creative" works. For example, fine artists are among the most "creative" authors. But as Amy Adler has observed, copyright is largely irrelevant to fine artists.[77] If anything, they welcome reproduction, as the art market depends on scarcity, not reproduction.[78] Moreover, their "creativity" effectively becomes a form of trademark or trade dress. The same is true of avant-garde

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[76] *See generally* JESSICA SILBEY, THE EUREKA MYTH (2014).
[77] Amy Adler, *Fair Use and the Future of Art*, N.Y.U. L. REV. (2016).
[78] *Cf.* WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION (1936).

writers and musicians. Effectively, they sell their "creativity" as a distinct brand, rather than selling copies of their works of authorship.

Relying on copyright to encourage creativity is highly inefficient, because it imposes a high economic cost and provides only a low social benefit. Copyright increases the cost of generic and familiar works of authorship by providing broader and longer rights than are necessary to provide salient incentives to marginal authors, and it does not provide a salient incentive to the most creative authors, who respond to very different market signals.

CONCLUSION

The adoption of the "creativity" requirement and the rise of "creativity rhetoric" are unfortunate developments in copyright doctrine and scholarship because they are a distraction from the purpose of copyright, which is to increase net economic welfare. Copyright should ignore "creativity" and instead focus on economic value.