

REFORMING COPYRIGHT INTERPRETATION

ZAHR K. SAID

ABSTRACT

This Article argues that copyright law needs to acknowledge and reform its interpretive choice regime. Even though judges face potentially outcome-determinative choices among competing sources of interpretive authority when they adjudicate copyrightable works, their selection of interpretive methods has been almost entirely overlooked by scholars and judges alike. This selection among competing interpretive methods demands that judges choose where to locate their own authority: in the work itself; in the context around the work, including its reception, or in the author's intentions; in expert opinions; or in judicial intuition. Copyright's interpretive choice regime controls questions of major importance for the parties, such as whether an issue is a matter of law or fact; whether an issue may be decided at summary judgment; whether expert testimony is allowed; and whether a use is fair or not (among multiple other doctrinal issues). Currently, the lack of transparency that characterizes copyright's interpretive practices creates unpredictability and unfairness for the parties, because method selection often matters to outcomes. As a function of interpretive choice, works of art may escape destruction if found non-infringing (*Cariou v. Prince*); movies may get made, or languish as legal disputes get ironed out (*Sheldon v. Metro-Goldwyn Pictures*; *Effie v. Murphy*); novels may get banned, or declared a fair use (*Salinger v. Colting*; *Suntrust v. Houghton-Mifflin*); fan works may be threatened (*RDR v. Warner Bros*). Ultimately, understanding interpretive choice helps evaluate the proper allocation and scope of decisional authority, assist in the proper characterization of issues, and identify the best tools to use in copyright's interpretive work. The Article concludes with a call for greater methodological transparency, and it offers a few modest prescriptions about which interpretive methods might be best adopted, by whom, when, and why. It proposes a rule-based, two-tiered approach to copyright adjudication, a process-based formalism that would constrain judicial discretion and could produce greater consistency and fairness.

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Zahr K. Said[†]

Copyright law has an interpretation problem in need of reform. Judges routinely face complex interpretive choices when they resolve disputes over potentially copyrightable works. Judges choose whether to resolve an issue as a matter of law; whether to admit—perhaps, require—extrinsic evidence that may be relevant to their interpretation; and whether they will rely on judicial intuition in their decision-making. In the case of copyright, these decisions are bound up with methodological choices about how to interpret expressive works. Yet judges often do not discuss these legally determinative choices transparently, as byproducts of interpretive methods. These implicit interpretive choices structure judicial analysis and influence outcomes, but they exist among a range of possible methods of interpretation, no one of them necessarily more correct than another. Judges can apply formalist, contextualist, intuitionist, and other interpretive lenses, and indeed, they do.¹ More concretely, judges can decide to prioritize the works, or “texts” at issue, over other forms of authority, such as authorial intention, context, or expert testimony.² Judges decide whether to admit expert testimony, and how much how much weight should they accord it. Judges also effectively decide whether, and how centrally to feature hypothetical audience response to a work, in the form of the lay observer standard.

Most importantly, interpretive choices lie at the heart of substantive and evidentiary questions on which a given case may turn: for instance, does the work, considered by itself, dictate a particular analysis, or, can the work not be properly understood and adjudicated in the absence of evidence that lies outside the work’s four corners? These interpretive choices may also dictate whether questions may be resolved by the judge as a matter of law, or whether they require further consideration by a jury or a judge acting as trier of fact. Furthermore, interpretive choice may determine what level of constraint a judge will impose on her own analysis to ensure its legitimacy: is judicial fiat (or gestalt) sufficient, or must the judge “show her work,” that is, to “give reasons?”³

Interpretive choice is an important legal issue because it is effectively “a choice among possible means to attain stipulated ends.”⁴ It matters to outcomes. These legally-determinative questions of interpretive method are ones that other areas of law assume are critically important. In interpreting contracts, wills, statutes, and the United States Constitution for instance, there are lively disagreements over what count as proper

[†]Assistant Professor, University of Washington School of Law. [Individual and institutional acknowledgements here]

¹ Alfred Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

² When this Article refers to “texts,” it means any kind of copyrightable work at issue, including works of literature, music, film, visual art, and so on.

³ Frederick Schauer, *Giving Reasons*, 43 STAN. L. REV. 633 (1995).

⁴ See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000).

methods of interpretation.⁵ Judges explicitly decide to ground their interpretive authority either in the text (whether it is a contract, a will, a statute, and so on), or in something ostensibly beyond or outside the text's "four corners," such as the drafter of the document's intent, extrinsic evidence about the parties' intentions, or industry custom.⁶ Typically, judges explain their logic, "give reasons," or follow a prescribed analytic path to safeguard procedural fairness.⁷ Sometimes they discuss why they weight particular authority more heavily, thus highlighting their methodological decision-making. In this way, the methods and reasoning the judge uses for her interpretive analysis become part of the case's proper disposition; the methods may even become the subject of contestation on appeal or in later case law.

Curiously, however, this transparent treatment of interpretive methodology does not occur in copyright law. Issues of judicial authority are, of course, crucial ones to the fate of litigation of all kinds. In copyright cases, however, their force is multiplied because works that require interpretation are at the heart of every dispute, thus bringing interpretive choice to the forefront of many, if not most, copyright cases.

In case after case, these interpretive issues can be seen as playing an important—sometimes dispositive—role. In *Shaw v. Lindheim*, the decision to use a formalist approach over a gestalt or intuitionist approach made the legal difference in defendants' win in the lower court but loss on a summary judgment motion, on appeal.⁸ In *Salinger v. Colting*, Judge Deborah Batts's decision to rely on a combination of authorial intention and judicial intuition and to ignore expert testimony arguably made the difference between a finding of fair use, and the banning of an unauthorized sequel to *The Catcher in The Rye*.⁹ In a single dismissive sentence, Judge Batts ruled that the infringing work "contains no reasonably discernable rejoinder or specific criticism of any character or

⁵ See, e.g. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 853 (2000)(summarizing what makes contractual interpretation "correct" and evaluating different theories for how best to reach that correctness); Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision Making*, 45 N.Y.L. SCH. L. REV. 389 (2002)(critiquing Vermeule's *Interpretive Choice* and attempting to offer a competing theory of what interpretive choice should look like); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000); Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 Colum. L. Rev. 496 (2004); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); Russell B. Hill & Frank P. Cote, *Ending the Federal Circuit Crapshoot: Emphasizing Plain Meaning in Patent Claim Interpretation*, 424 IDEA 1 (2002); and Craig Allan Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1 (2000).

⁶ Caleb Nelson, *What is Textualism?* 91 VA. L. REV. 347, 352 (2005).

⁷ See generally, Schauer, *supra* note 3; T.R.S. Allan, *Procedural Fairness and the Duty of Respect* (1998) 18 OXFORD J. LEG. STUD. 497, 499 (1998).

⁸ *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

⁹ *Salinger v. Colting*, 641 F.Supp.2d 250, 255 (2010), *Salinger v. Colting*, 607 F. 3d 68 (2d Cir. 2010)(remanding on other grounds, but affirming the logic on the merits).

theme of *Catcher*.”¹⁰ She offered nothing to explain this statement, even in light of the five pro-defendant expert opinions, which included well-informed testimony by Professors Robert Spoo and Martha Woodmansee, experts in law and literature.

The cases are not simply all over the map within their own analysis, they often directly contradict each other. For instance, *Sheldon v. Metro-Goldwyn Pictures*, had it been decided by the later *Arnstein v. Porter* court, also of the Second Circuit, would likely have yielded a different conclusion, based on the choice of interpretive approach. *Sheldon* displays formalism; *Arnstein* blends formalism with a second-step of analysis which relies on audience reception, or the ordinary observer standard.¹¹ Signally, the lower court's opinion in *Sheldon* inclines toward a reception-based approach, which is overturned under the formalist approach, along with a win for defendants, on appeal.¹²

These are each landmark cases in their own right, yet they point in different interpretive directions. There are, to be sure, other ways to distinguish the cases; this analysis cannot claim conclusively that interpretive choice is the single most important factor in any litigation. Nonetheless, comparing interpretive choices across cases illuminates the underexamined malleability of interpretive choice's role in copyright law. At times the choice will not simply be different in kind (say, formalist instead of intuitionist); at times the choice will be different in weight, that is, how important the choice of interpretive approach is to be.

Because interpretive choice is not a transparent feature of copyright case law, it creates confusion and inconsistency. Submersion, manipulation, or abdication of interpretive choice, has the capacity to distort, or produce, particular outcomes. Others have noted the inconsistencies inherent in copyright law, both within and across circuits; in particular, essays by Pam Samuelson and Mark Lemley drive home just how confused, illogical, and counterproductive aspects of copyright infringement analysis have become.¹³ Arguably, a central part of the confusion derives from uncertainty about who should interpret the works under adjudication, and how they should do so.

Copyright's interpretive choice regime occurs in the absence of a framework for analyzing and evaluating the process of making interpretive choices. More importantly, it has the capacity to clarify much of the confusion discussed cogently by scholars taking aim at copyright's unclear infringement analysis. In articles by Rebecca Tushnet, Shyam Balganes, Irina Manta, and others, existing ways to assess copyright infringement have come under scrutiny. Tushnet's work, in particular, has shown how judges avoid meaningful analysis of visual works by treating works as either interpretively transparent,

¹⁰ *Salinger v. Colting*, 641 F. Supp. 2d 250, 258 (S.D.N.Y. 2009) vacated, 607 F.3d 68 (2d Cir. 2010).

¹¹ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

¹² I discuss *Sheldon* more thoroughly, *infra*, p. 14.

¹³ Pam Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1832 (2013); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 739 (2010).

or opaque.¹⁴ Copyright's unclear tests for determining substantial similarity, its lack of clarity around when, and how much, to rely on the ordinary observer standard, and its lack of guidance on how to satisfy that standard, are all features of the discussion. Importantly, all of these issues interweave with questions of interpretive method.

Thus this Article recasts interpretive choices as integral to copyright law: they make the law operate properly. These choices are embroidered into the fabric of copyright's procedures and substance. In contract law, inquiring into how to construe a contract is not extraneous, philosophical, purely ideological, or reflective of mere personal preference: interpretive issues arise in nearly all contract cases, and they make the litigation operate properly.¹⁵ Similarly, copyright's adjudication *requires* judges to adopt interpretive methodologies, whether or not they address them explicitly.¹⁶ Once interpretive method surfaces as a choice judges face at multiple points during litigation, it can offer some explanation for the great divergence in outcomes and reasoning seen in infringement analysis more generally.

Relatedly, exploring interpretive choice's impact on copyright litigation helps expose two pernicious assumptions that recur in case law: first, that copyrightable works that are non-technical are not complex; second, that analyzing such works is not difficult. In fact, the reigning view transmitted through cases is that judges in copyright litigation over non-technical works have it easy.¹⁷ In reality, judges, even in so-called non-technical copyright cases, often operate under interpretive conditions of considerable "empirical uncertainty."¹⁸ It is no surprise, then, that they may seem unclear about the import of their methodological selection when they interpret the works at issue. When they locate the grounds for their interpretive authority, judges variously prioritize: the text;¹⁹ the

¹⁴ Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

¹⁵ Katz, *supra* note 5, at 496.

¹⁶ Both Farley and Yen discuss the range of possible aesthetic (or interpretive) theories, from intentionalism through aesthetic pragmatism. But neither of them focuses on how these theories reflect interpretive methodologies that, elsewhere, the law recognizes as legally significant choices. I concur with Professor Yen that each "move to a new analytical perspective is itself a decision of aesthetic significance," but I am more interested in the fact that shifts in perspective point to unacknowledged, legally relevant choices about interpretive method. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 845-846 (2006). Yen, *supra* note 1, at 253-266.

¹⁷ See, e.g. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir.1991); *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010) *aff'd sub nom. Gable v. Nat'l Broad. Co., Inc.*, 438 F. App'x 587 (9th Cir. 2011) ("the Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training").

¹⁸ "Many debates over interpretive doctrine are of this character, and should be reframed as problems of choosing optimal interpretive doctrine under conditions of severe empirical uncertainty." Vermeule, *supra* note 4, at 76 (citation omitted).

¹⁹ See, e.g. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434 (S.D.N.Y. 1985) *aff'd*, 784 F.2d 44 (2d Cir. 1986); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57 (2d Cir. 2010).

author's intentions about it;²⁰ the expert's testimony about it;²¹ the lay observer or audience's reception of the text;²² or the judge's own intuitions, or impressions, of the work.²³ Just as, per Professor Peter Lee, patent law requires "technical engagement" of judges, copyright law requires a kind of interpretive engagement, in the form of selecting interpretive methods.²⁴ The range of interpretive methods receives fuller treatment in Part I, but in brief, I classify these to include: formalism, contextualism, and intuitionism. Formalism focuses on the work, and evidence "internal" to it; contextualism focuses on the context "external" to the work, such as statements of authorial intention, evidence of reader response, and expert opinions; and intuitionism sets aside the internal/external binarism and allows the judge to appeal to gestalt, or intuition, in making a determination about the work.

Accordingly, this Article seeks to make several contributions. First, it offers a descriptive theory of copyright's interpretive practices by showing multiple points at which judges do and indeed must make complex but often unacknowledged interpretive decisions.²⁵ I frame these analytical moments as "interpretive forks," that force judges to select one line over another, and I offer these to show the ubiquitous and complex nature of interpretive choice in copyright cases. Second, it shows that judges make legally meaningful, but inconsistent decisions about interpretive methods in copyright cases. Finally, it argues that a solution based largely on what Professor Timothy R. Holbrook has called, in the context of patent law, process-based formalism, could help render the law in this area clearer, more predictable, and fairer for parties.²⁶ Process-based formalism, per Holbrook, refers to a rules-based system of analysis that avoids the pitfalls of both outcome-driven analysis and harsh, overly rigid rules regimes. Instead, it adopts tools such as rebuttable presumptions, to provide predictability and procedural fairness but to build in some flexibility.²⁷ Copyright law could benefit from a similar kind of formalism, an interpretive approach focused first on the work, that then allows a reasonable "escape route," or methodological second tier, to soften the possible harshness of the rule-based approach.

²⁰ See, e.g. *Rogers v. Koons*, 960 F.2d 301 (2d Cir.1992); *Cariou v. Prince*, 784 F.Supp.2d 337, 343 (S.D.N.Y. 2011).

²¹ See, e.g. *Dawson v. Hinshaw*, 905 F.2d 731 (4th Cir. 1990), cert. denied, U.S. 111 S.Ct. 511 (1990); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003). *Tisi v. Patrick*, 97 F. Supp. 2d 539 (S.D.N.Y. 2000).

²² *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

²³ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

²⁴ Peter Lee, *Patent law and the Two Cultures*, 120 YALE L. J. 2, 7 (2010).

²⁵ Even avoiding interpretation and aesthetic theories reflects an implicit methodological decision, a tendency toward "intuitionism" and conclusory analysis.

²⁶ Timothy R. Holbrook, *Substantive Versus Process-Based Formalism in Claim Construction*, 9 LEWIS & CLARK L. REV. 123, 146 (2005).

²⁷ *Id.* at 126-127.

Part I shows how interpretive forks are built into copyright law, and introduces the reader to the methods available to judges. Part II provides examples of cases in which judges rely on different interpretive sources of authority, in ways that can affect outcomes. It shows that there is little coherence or consistency in what judicial method selection, and confusion about what might even count as a method. Part III argues against the reigning view that so-called non-technical copyright cases are somehow interpretively simpler than technical ones, such as software cases. Part IV proposes a turn to formalism and away from intuitionism, embedded within a larger process-based formalism. Part V concludes.

PART I. INTERPRETIVE CHOICES ARE EMBEDDED IN COPYRIGHT DOCTRINE

Copyright adjudication requires that judges exercise interpretive choice in order to resolve the basic issues at the heart of any dispute. A range of possible interpretive methods exist, including formalism, contextualism, and intuitionism. These interpretive issues are embedded in doctrinal and procedural questions in copyright. The need to make all these methodological decisions is, under current law, an inevitable part of copyright law's infringement analysis and defenses. The inevitability of interpretive engagement underscores the significance of understanding where these choices arise and what judges do and should do when they encounter them. Copyright scholarship has only begun to acknowledge the extent to which judges may be making or avoiding interpretive decisions. Professor Tushnet's pioneering scholarship on judicial interpretation of images has shown that judges do make what amount to methodological choices about visual works they confront in copyright cases.²⁸ Professor Yen's work laid crucial groundwork by showing that aesthetic theories parallel judicial reasoning in copyright law, thus showing that judges necessarily make interpretive choices.²⁹ Professor Farley's scholarship, similarly, has revealed a substantial role played by judicial intuition in the adjudication of works of art, thus underscoring the ubiquity of judicial choice.³⁰ Other work has contributed to a scholarly conversation largely focused on aesthetic issues and objectivity in copyright adjudication.³¹ The interpretive problem I see is broader than that. It is methodological, not purely aesthetic or evaluative. Further, it is not confined to one particular method's approach,³² nor to one class of works, such as visual or musical

²⁸ Tushnet, *supra* note 14.

²⁹ Yen, *supra* note 1, at 250. I note that Yen's footnotes draw mostly on primary sources (cases) and on secondary sources external to law (such as art theory). I take that as evidence that the state of scholarship on copyright's interpretive practices was underdeveloped before Fred's seminal, interdisciplinary article.

³⁰ Farley, *supra* note 30, at 845-846.

³¹ See, e.g. Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 305-7 (1991); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 184-95 (1990); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS. L. REV. 719 (1987).

³² See, e.g. Laura Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 452 (2008); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20 (2013); H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV.

works, where earlier scholars have focused.³³ Most crucially, method selection plays a direct role in litigation, or at least it can.

In my view, all potentially copyrightable works force judges to grapple with interpretive questions that copyright scholarship has all but overlooked as a legally relevant methodological issue.³⁴ The extant literature on interpretive choice in copyright law is thus promising but incomplete. In order to understand the scope of copyright's interpretive choice regime, it is first necessary to situate these choices in copyright law. Part I.A sketches the trajectory of a standard copyright infringement case and shows that, at multiple "forks," built into copyright's analytic trajectory, the adjudication of expressive works *requires* that judges make decisions about the method of interpretation they will use. Part I.B fleshes out the types of interpretive methods judges could select, and provides examples. Part I provides background for readers unfamiliar with copyright law, to highlight the necessity of interpretation to the judicial enterprise in adjudicating expressive works. It also offers an introduction to interpretive methods, in a taxonomy tailored to this Article's concerns. Those who already possess familiarity with interpretive methods, and a background in copyright law, or who need no convincing of the premise that copyright demands interpretive choice of judges, can skip to Part II.

A. COPYRIGHT CASES FOLLOW AN ANALYTICAL TRAJECTORY

This Article argues that interpretive choice is a feature, not a bug, in copyright law. In order to proceed to the argument, then, the reader must have an overview of the relevant doctrine: this Part provides that. To assert a valid claim for copyright infringement, a plaintiff must show "(1) ownership of a valid copyright and (2) copying ... of protectable elements of the work."³⁵ The first step is typically straightforward. Once copyright ownership of a registered copyright has been proven, the analysis in a copyright infringement claim involves two distinct inquiries: whether a work was copied, and whether any such copying was improper.³⁶ The first inquiry can be answered with defendant's admission or other direct evidence of copying, but, in practice, this is rarely

J.L. & TECH. 335, 366-367 (2011); Elizabeth Winkowski, *A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art*, 12 J. MARSHALL REV. INTELL. PROP. L. 746, 764 (2013);

³³ See, e.g. Tushnet, *supra* note 14; Melissa M. Mathis, *Note, Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law*, 22 CARDOZO L. REV. 595 (2001); Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAV. L. REV. 477 (2007); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Jessica Silbey, *Images in/of Film*, 57 N.Y. L. SCH. L. REV. 171 (2012-2013).

³⁴ Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet's Worth a Thousand Words*, 16 STAN. TECH. L. REV. 349 (2013).

³⁵ *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir.1999).

³⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

available.³⁷ More typically, copying is proven through a two-pronged inferential analysis: (1) proof of defendant's access to the copied work, plus (2) substantial similarity between the plaintiff's and the defendant's work.³⁸ The term substantial similarity is confusing because it arises at two different stages; first, when plaintiffs must prove copying, then second, when they must prove that the copying was improper. The general rule is that expert evidence may be admissible on the question of substantial similarity on the first inquiry (copying), when it is sometimes helpfully referred to as *probative* similarity, to distinguish it from the second round of substantial similarity analysis (improper copying).³⁹ In the Ninth Circuit's formulation, which has been adopted by other appellate courts, this phase is called "extrinsic analysis," or "dissection" of the works. This first inquiry, into copying is a question of law, deemed to be an objective inquiry and well-suited for disposition by a judge.⁴⁰

The second inquiry determines whether the copying was the sort that is legally actionable or not.⁴¹ Not all copying is actionable.⁴² The court must determine, as a question of fact, that the similarities between the works pertain to copyrightable material, not simply to unprotectable ideas.⁴³ At this stage, the court again considers the substantial similarity of plaintiff's and defendant's works, only, this time, the standard is typically that of the lay observer, not the expert.⁴⁴ In fact, expert testimony is, for the most part, inadmissible on this point.⁴⁵ Again per the Ninth Circuit, this second phase is called "intrinsic analysis" and it is governed by a gestalt, impression-based theory: substantial similarity is something the ordinary observer can and must discern without the aid of an expert witness.⁴⁶ It is considered a subjective inquiry that goes to the jury unless a judge finds

³⁷ Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir.2003); Boisson v. Banian, 273 F.3d at 267-68 (citing Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir.1992)).

³⁸ Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980, 97 S.Ct. 492 (1976); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

³⁹ Krofft, 562 F.2d at 1164; Alan Latman, "*Probative Similarity*" as *Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990).

⁴⁰ Herzog v. Castle Rock Entertainment, 193 F.3d 1241, 1248 (11th Cir.1999).

⁴¹ 4-13 NIMMER ON COPYRIGHT, § 13.01.

⁴² *Feist*, 499 U.S. at 361.

⁴³ *Hoehling v. Universal City Studios, Inc.* 618 F.2d 972, 977 (2d Cir.), cert. denied, 449 U.S. 841 (1980).

⁴⁴ *Arnstein*, 154 F.2d at 473.

⁴⁵ An exception exists where works, such as software, are thought to be sufficiently complex that a jury or factfinder would be unable to make a determination without expert assistance. Lemley, *supra* note 13, at 733-737.

⁴⁶ *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990). *See also* *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.* 150 F.3d 132, 139 (2d Cir. 1998); *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257, 1266 (11th Cir. 2001).

that no reasonable juror could find substantial similarity.⁴⁷ In practice, judges often make the determination of substantial similarity on early motions, and also in lieu of a jury. This brief outline describes the analytic trajectory for a judge to follow in a copyright infringement case.⁴⁸

Within this trajectory, doctrinal questions, such as idea/expression, merger, conceptual separability, and *scènes à faire*, *inter alia*, also make interpretive demands on judges. Take, as but one example, copyrightability, a threshold inquiry in copyright law. Each of the core requirements for copyright protection implicates some aesthetic or interpretive theory. Copyright protection extends only to “original works of authorship fixed in any tangible medium of expression.”⁴⁹ The qualifying requirements of copyright can thus be enumerated as follows: originality; status as a work; authorship as the Act defines the term; and fixation in a tangible medium.⁵⁰ How does one find originality? What counts as a work? What are the boundaries of authorship? What does fixation look like in the digital world? Or in the natural world? Each of these issues creates an interpretive fork for judges to select an interpretive method, grounded in one source of authority or another.

Copyrightability provides fertile terrain for exploring interpretive forks because it is both a threshold inquiry for copyright law and up to the judge to decide. Because copyrightability is a question of law, it empowers judges to determine the question with considerable discretion and without the need for factfinding.⁵¹ Efforts by parties to include expert testimony on this question have often been unsuccessful, and judges continue to assert their own authority, independent of expert guidance. Delightful examples of turf-protecting dicta populate cases, such as: “If the court determines that mannequin heads are copyrightable subject matter, the jury will be so instructed...There is no need for expert testimony on this subject; in a trial there is only one legal expert—the judge.”⁵²

⁴⁷ *Swirsky v. Carey*, 376 F.3d 841, 844-845 (9th Cir. 2004).

⁴⁸ My account here is intended as a descriptive, uncontroversial account of the way copyright cases are structured, and it draws on the dominant accounts of copyright law found in the most oft-cited opinions and treatises. However, other scholars have lamented many aspects of the structure of copyright infringement analysis, and their critiques populate the footnotes of this Article. Notably, one scholar has called one aspect of substantial similarity analysis—the admissibility of expert evidence—“exactly backwards.” Lemley, *supra* note 13, at 735. Another writes that “[o]ur current treatment of infringement, which asks whether there is “substantial similarity” between two works, makes impossible and self-contradictory demands on factfinders.” Tushnet, *supra* note 14, at 687-688.

⁴⁹ 17 U.S.C. §102(a).

⁵⁰ 3-12 NIMMER ON COPYRIGHT § 13.03.

⁵¹ 3-12 NIMMER ON COPYRIGHT § 12.10.

⁵² *Pivot Point Int’l v. Charlene Prods.*, 932 F. Supp. 220, 225, 1996 U.S. Dist. LEXIS 10991, 14-15 (N.D. Ill. 1996).

Yet folded into the determination of originality are necessarily interpretive decisions about which not all judges are explicit; some seem to disregard them altogether. Others recognize them but seek to avoid them for fear of getting them wrong. As one judge cautioned, “[j]udges can make fools of themselves pronouncing on aesthetic matters... Artistic originality is not the same thing as the legal concept of originality in the Copyright Act.”⁵³ These interpretive matters are not straightforward, either. Determining a work's copyrightability may require all of the above: determination of its originality; inquiry into whether its form and existence in context qualify it for copyright's fixation requirement; determination of whether its form and existence in context are useful, and thus excluded from copyright protection; and idea-expression analysis, including a filtering of elements that should remain in the public domain (such as ideas or *scènes à faire*) from those that can be protected under copyright. To resolve these inherent copyright issues, judges make legally meaningful interpretive choices, with no guidance about how to do so, and many competing options at their disposal.

B. MANY INTERPRETIVE METHODS EXIST

Interpretive issues are tightly interwoven with most of the substantive questions that make up a copyright infringement case, such as a work's copyrightability; whether a subsequent work copied it, and whether, if so, that copying was improper; and whether any defenses may apply. These questions do not exhaust the interpretive forks that arise in copyright law, but most forks that arise can be considered subsets of these three main groupings: copyrightability, improper copying; and limitations and defenses. Interpretive forks, like these ones, are present, and inevitable, in copyright doctrine. And at each of these forks, judges may select from among a number of possible interpretive methods.

The range of interpretive methods corresponds, roughly, to different aesthetic theories of art. The seminal article on this topic is Professor Yen's: he categorizes the major schools of interpretive theory as formalism, intentionalism, and institutionalism, and then he tracks their deployment in copyright cases.⁵⁴ Yen's article draws on art history, and his categories make sense in that context. For the purposes of this Article, a broader classification divides interpretive methods into formalism (which focuses on what lies within the work); contextualism (which allows into analysis that which lies beyond the work); and intuitionism (which takes judicial assessment of, or gestalt about, the work, as the basis for judgment).⁵⁵ This Part discusses each of those three methods, and it provides brief examples of each, drawn from copyright law.

⁵³ *Gracen v. Bradford Exchange*, 698 F.2d 300, 304 (7th Cir. 1983).

⁵⁴ Yen, *supra* note 1, at 274.

⁵⁵ This paradigm is neither purely literary (that would require more categories) nor purely legal (that would require engagement with existing, but heavily overdetermined terms, like textualism, originalism, and purposivism). Instead, it draws on literary and aesthetic theories, but it addresses itself to the realities of copyright litigation. For example, this interdisciplinary classification reflects awareness of the role

Formalism. Formalism refers to an interpretive method that emphasizes as the source of interpretive meaning the work itself (really, the *form* of the work, hence the method's name).⁵⁶ Works are interpretively "free-standing, self-subsistent objects" whose analysis can be objective, correct, and devoid of evidence from outside the text.⁵⁷ A literary scholar might call a strict formalist approach "New Critical," referring to a school of thought that developed in the early decades of the twentieth century and reached a zenith of influence near mid-century.⁵⁸ It cast itself as scientific, concrete, non-subjective, and ahistorical.⁵⁹ New Criticism was known for its emphasis on the text as a work of art whose meaning was self-contained and self-referential.⁶⁰ Its proponents generally disavowed the kind of literary scholarship that had preceded New Criticism (such as historical exegesis and philological analysis) and they rejected the premise that either authorial intention or audience reception held the key to understanding works of art.⁶¹ Though many issues external to the text might under a different approach hold interpretive relevance, a formalist approach views the internal features as carrying dispositive weight. This approach parallels the "four-corners" approach to contracts in legal analysis. In the context of patent law, Craig Nard has called such an approach "hypertextual."⁶²

Many classic copyright cases display some version of formalist analysis. By way of example, consider *Nichols v. Universal*, a case in which Nichols claimed that Universal's movie, *The Cohens and the Kellys*, infringed her play, *Abie's Irish Rose*.⁶³ The case has been widely cited, and thoroughly discussed in scholarship, and I do not rehash it here.⁶⁴ In *Nichols*, Judge Learned Hand embraced a formalist, even New Critical approach to the two works at issue, *Abie's Irish Rose* and *The Cohens and the Kellys*. Indeed, Professor Yen has called *Nichols* "a formalist tour de force."⁶⁵ However, Yen acknowledges the

evidence admissibility plays, as well as the legal significance of allocating decision-making power, and it focuses on the practical importance of interpretive theories for copyright's substance and procedure.

⁵⁶ *Id.* at 261.

⁵⁷ Jeffrey Malkan, 19 *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, __ (1998); Yen, *supra* note 1, at 262.

⁵⁸ Jeffrey Malkan, *Law on A Darkling Plain-Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, by James Boyd White. Madison: University of Wisconsin Press 1985, 101 HARV. L. REV. 702, 712 (1988).

⁵⁹ John Henry Raleigh, *The New Criticism as an Historical Phenomenon*, 11 COMP. LIT. 21, 27 (1959).

⁶⁰ Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 735 (1993).

⁶¹ Malkan, *supra* note 58, at 712.

⁶² Nard, *supra* note __ at 4.

⁶³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

⁶⁴ Pam Samuelson, *supra* note 13, at 1835-1836.

⁶⁵ Yen, *supra* note 1, at 295.

“subjective” quality of the use of formalism here, and indeed, it is a version of formalism inflected with intuitionism. The court’s “considered impressions,” rather than expert testimony, guided the *Nichols* court’s formalism; indeed, scholars have noted that the court expressed its disdain for expert testimony.⁶⁶ Still, *Nichols* illustrates the choice of a formalist approach instead of a contextualist or historicist approach.⁶⁷

Similarly, in *Sheldon v. Metro-Goldwyn Pictures Corp.*, the court resolved in a distinctly formalist manner a dispute over a play that had, itself, been based on a biographical account of a gruesome Scottish murder.⁶⁸ Its methodological commitment to formalism is striking, if not entirely surprising: the opinion is authored by Judge Learned Hand, whose opinion in *Nichols*, six years earlier, had demonstrated the same strong formalist proclivities. The court performed formalist analysis of the works at issue: the book containing the account of the murder; plaintiff’s play based on that account; the defendants’ film script; and a novelized version of the murder on which the defendants had based their script. The bulk of the opinion lies in exposition and dissection of these works and their relevant overlap. The court rejected defendants’ attempts to minimize the scope of plaintiffs’ copyright by historicizing the devices, facts, and other unprotectable elements in the works, and ultimately found defendants to have infringed by copying the non-historical variants plaintiffs added to their version of the story.

Sheldon’s formalism becomes clearer still in comparison with the case’s less rigid disposition by the trial court. The lower court in *Sheldon* took a remarkably different tack, producing a few paragraphs of terse summary with none of the meticulous detail that would follow in the appellate court’s opinion. Instead, it led with an annotated timeline of relevant dates documenting interaction between the parties, probing their intentions, and noting the dates of publication and dissemination of the various works. In another noteworthy difference, the opinion stressed the inquiry into impact on readers and audiences as a way of determining substantial similarity: “The inherent drama of the three principal scenes above mentioned and *their effect on readers* of the story of the Trial, on audiences of the Play, and on readers of the Novel is necessarily substantially the same... The Picture plays on the same emotions but in a slightly different manner...”⁶⁹

⁶⁶ Yen, *supra* note 1, at **, and Samuelson, *supra* note 14, at **.

⁶⁷ Judge Learned Hand spends only a single sentence on the historical provenance of the plays, and none whatsoever on their reception. He writes: “A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.” There is no other mention of the extent to which these stories draw inspiration from *Romeo and Juliet*, even though they are clearly patterned on them. Given the amount of scholarly time spent on source material and on historical context in some cases from the past 30 years, this omission is all the more remarkable.

⁶⁸ 81 F.2d 49 (2d Cir. 1936).

⁶⁹ *Sheldon v. Metro-Goldwyn Pictures Corporation*, 7 F.Supp. 837 (S.D.N.Y. 1934)(my emphasis).

This reader-centered view of interpretation was not a mere tactic designed to dispose of the present case, but arguably reflects its author, Judge Woolsey's, views on literary aesthetics. In his emphasis on audience perception of the work, he was returning to some of the same interpretive ground he had covered in the celebrated decision not to ban James Joyce's *Ulysses*, a decision on which the Second Circuit had affirmed him unanimously.⁷⁰ There, Judge Woolsey had drawn attention for using as a test for obscenity a standard rather like what was to become copyright's ordinary observer standard: "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion *as to its effect on a person with average sex instincts*—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law."⁷¹ Here he distinctly juxtaposed the reasonable reader with the trier of fact, who, he worried, may tend to be too idiosyncratic and insufficiently representative of the modern man: "The risk involved in the use of such a reagent arises from the inherent tendency of the trier of facts, however fair he may intend to be, to make his reagent too much subservient to his own idiosyncrasies."⁷² In both the *Ulysses* and *Sheldon* cases, Judge Woolsey arrived at his holding by grounding his interpretive authority in part in what is now referred to as reception theory, or reader response theory.⁷³ This interpretive method was insufficient as a method on its own, however, as Judge Woolsey acknowledged. For the purposes of separating the protectable from the unprotected, he disavowed the ordinary observer standard:

The Copyright Office does not, when a book is offered for copyright, study any prior art, as does the Patent Office when a patent is sought. It grants the copyright, thus putting the protection of the law not only over the copyrighted book as an entirety, but over the original content of the book. It is then left to the courts, if litigation ensues, to say what that original content is, and to define the zone in which the copyright owner is protected. In defining that zone it always has to be determined: (1) Whether some part of the zone claimed is not a part of a common ground, the heritage of all mankind, usually referred to as the public domain; or (2) whether some of the infringement claimed is not of matter which is not protected by copyright for some other reason. Naturally the plaintiff always seeks to widen his protected zone and the defendant to narrow it. It follows that the approach of a court to the problem of the infringement of a play *cannot be purely*

⁷⁰ *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933) *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See, e.g.* HANS ROBERT JAUSS, *TOWARD AN AESTHETIC OF RECEPTION* (Timothy Bahti trans., 1982); WOLFGANG ISE, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* (1978); JANE TOMPKINS, ED, *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* (1980).

that of an ordinary playgoer, for such a playgoer presumably has not the opportunity to determine the limits of the protected zone by the principles above outlined.⁷⁴

Judge Woolsey's analysis implicates the appropriate scope of judicial authority in interpretive matters in copyright law: it is for the court to determine copyrightability and idea/expression, but for the jury or trier of fact to determine similarity once a judge has clarified the "protected zone" within a work. Judge Woolsey's interpretive approach, formalist filtering by the court as a matter of law, followed by a contextual analysis of the authors' interrelationship and an audience-centered analysis by the trier of fact, led him to dismiss plaintiffs' complaint: the only similarities to be perceived by the lay observer were ones that would have been filtered out by the judge's insistence on defining the scope of protection precisely first. The Second Circuit's opinion papered over Judge Woolsey's discussion of the proper scope of the reader's role and its relationship to a larger aesthetics of literary and artistic works, and replaced it with an unmistakably formalist analysis. This pair of opinions illustrates the tension between courts when interpretive methods do not align, and it helps isolate interpretive method as one of many potentially important deltas between court dispositions. While formalism triumphed as the interpretive method in *Nichols* and *Sheldon*, it should not be naturalized as the only possible choice of interpretive method; it is but one of many choices.

Contextualism. This Article uses the term contextualism as an umbrella term to refer to all the interpretive methods—or reading strategies—that either allow, or require, that interpreters move beyond the work itself for a full interpretation of it. In contrast with a formalist approach, which starts and ends with the formal analysis of the work, contextualism may start outside the work, say, in the historical era that produced it; in the unequal power dynamics the work reflects, or entrenches; in biographical analysis that shows the author's life parallels or diverges from the work; in statements of authorial intention; in the material conditions of the book's publication and dissemination; and so on. Many different contextualist interpretive methods exist, including historicism, Marxism, feminism, post-structuralism, biographical criticism, critical bibliography, post-colonial theory, and queer theory, among others.

Indeed, contextualist interpretive methods predominate in non-legal realms, where a backlash against formalism has occupied the humanities since the late 1940s, perhaps in response to the strictures of the New Criticism mentioned above.⁷⁵ The strictest formalists tend to believe that these contextualist methods irresponsibly vest interpretive authority in sources not clearly contained within the work, so that, for example, a postcolonial reading of Jane Austen's *Mansfield Park*, or even a Freudian reading of *Hamlet*, would import into the work foreign and unwelcome elements. For their part, contextualists often believe that contextual evidence may be the best tool to uncover

⁷⁴ *Sheldon v. Metro-Goldwyn Pictures Corporation*, 7 F.Supp. 837, 843-844 (S.D.N.Y. 1934).

⁷⁵ FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* 3-5 (1983).

elements of the work that are already contained within it, but not discernable without use of contextual tools.⁷⁶ Contextualism thus denies the rigid distinction between evidence internal to a work and external to it. Contextualists are perhaps analogous to archaeologists who believe the work is a fragment, a potsherd; their efforts will help reconstruct the larger vessel.

For law, the distinction between the work's four corners, and the world beyond it, offers a helpful, bright-line division of evidence. When judges have before them the works at issue, they can, under one theory, simply adjudicate those with nothing beyond the parties' pleadings.⁷⁷ Except that, as we have seen, such an approach is formalist, not an inevitable way to proceed; alternatives do exist. For instance, a court could find that an author's statements about his work, found *outside* the work itself, trump what the court finds in the work of its own accord. It did so in *Blanch v. Koons*, for instance, granting deference to Jeff Koons, the appropriation artist who had made unauthorized use of the image of a sandal shot by fashion photographer Andrea Blanch. In the court's words, "we need not depend on our own poorly honed artistic sensibilities" when there is "no reason to question [Koons's] statement that the use of an existing image advanced his artistic purposes."⁷⁸ In so finding, it downplayed formalist dissection, judicial intuition, and audience responses.

Likewise, in *Suntrust v. Houghton-Mifflin*, the court chose a contextualist approach over other possible methods. The dispute concerned an unauthorized sequel to Margaret Mitchell's *Gone with The Wind*. Alice Randall's work, *The Wind Done Gone*, was found to be infringing by the trial court and enjoined, using a formalist interpretive lens.⁷⁹ On appeal, the Eleventh Circuit vacated the preliminary injunction and held that Randall was likely to prevail on the question of fair use, largely because Judge Birch shifted interpretive gears from formalism to contextualism, and seemed to recognize in Randall's efforts a larger social critique of slavery. Birch's opinion deals with defendant's work generously. He characterizes Randall's defenses right out of the gates as "persuasive," and cites to her stated purpose affirmingly: "[Randall] persuasively claims that her novel is a critique of *GWTW*'s depiction of slavery and the Civil-War era American South. To this end, she appropriated the characters, plot and major scenes from *GWTW*."⁸⁰ Birch's

⁷⁶ To that extent, the binarism between text and context, internal and external, is an artificial construct. Yet as a construct it does important limiting work for evidentiary purposes in copyright litigation, and I rely on it for those purposes.

⁷⁷ *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 59 (2d Cir. 2010).

⁷⁸ *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006).

⁷⁹ *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001).

⁸⁰ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

summary of her use as directed toward critique is, in some sense, a legal conclusion. To lead with it suggests an awareness of the larger critical context in which it was written.⁸¹

Judge Birch acknowledges the difficult—and subjective—undertaking of finding fair use, but does not do much to minimize his own subjective input.⁸² Judge Marcus's concurrence goes further and adds more robust contextualist analysis: "Like a political, thematic, and stylistic negative, *The Wind Done Gone* inverts *Gone With the Wind*'s portrait of race relations of the place and era."⁸³ Judge Marcus emphasizes the way that *The Wind Done Gone* has positioned itself as an inversion of the prior work, which necessarily takes account of the way the book is intended to be received, and its larger critical context. He calls the case an easy one for fair use, but stresses the relevance of the books' "two literary worldviews of... perfect polarity," and their embeddedness in controversies outside the four-corners of the works themselves.⁸⁴

Given the concurrence of views between Judge Marcus and Judge Birch, who seem to differ mostly in degree, it is interesting to note their departure from Judge Pannell's far more formalist opinion in the lower court. Judge Pannell offered more textual analysis and he placed less reliance on the social critique of slavery: he wrote that "[t]his new vision [of defendant], however, does not simply comment on the antebellum South by giving the untold perspective of a mulatto slave who is sold from the plantation, develops a relationship with a caucasian [*sic*], lives well and travels the world. Rather, the new work tells *Gone With the Wind*'s story, using its characters, settings, and plot."⁸⁵ Judge Pannell's formalist analysis was responsible for finding a likelihood for plaintiff to prevail on the merits, and an injunction issued. Perhaps based on the sheer volume and quality of the amount copied, Pannell's opinion found that Randall's story "told" or in some sense, stole, Mitchell's story, using materials created by the latter. Formalism stressed the works' similarity; contextualism stressed the need for so much borrowing. The Eleventh Circuit opinion shows that a contextualist approach that takes full consideration of the critical context, including the author's statements about her critical purpose—which seemed quite plausible in this case—necessitated a defendant-friendly outcome.

⁸¹ *Id.* at 1270.

⁸² *Id.* at 1273 ("we must determine whether the use is fair. In doing so, we are reminded that literary relevance is a highly subjective analysis ill-suited for judicial inquiry. Thus we are presented with conflicting and opposing arguments relative to the amount taken and whether it was too much or a necessary amount.")

⁸³ *Id.* at 1279-1280.

⁸⁴ *Id.* at 1278.

⁸⁵ *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001) vacated, 252 F.3d 1165 (11th Cir. 2001) and rev'd, 268 F.3d 1257 (11th Cir. 2001).

Intuitionism. Intuitionism refers to the judicial tendency to rely on intuition rather than analysis, hunch rather than data. I use the term to encompass two related forms of intuitionist analysis: first, gestalt intuitionism and second, intuitionism about the ordinary observer standard. The gestalt, or holistic approach, holds that the whole may be greater than or different from the sum of the parts. Copyright's total concept and feel approach, for instance, has operated to create a copyrightable whole out of noncopyrightable parts.⁸⁶ The term gestalt, or gestaltism, comes from psychological theories having to do with practices of mind: one can conjure the whole and may have difficulty discerning the individual parts.⁸⁷ The second intuitionist area for copyright interpretation lies in judicial speculation about the ordinary observer standard. In theory, the lay observer (or ordinary observer) functions much like the reasonable person in tort law. In practice, copyright often allows judges to decide what the ordinary observer would do, whereas in tort law, this is more commonly a jury question informed by the commonplace experiences of 12 different people. In copyright law, this determination is often little more than a judicial pronouncement of what one judge believes the ordinary person would take to be the work's "aesthetic appeal"; in short, it is little more than intuitionism.⁸⁸

Shaw v. Lindheim is a classic copyright case that took aim at intuitionism; its holding arguably hinges on a shift in interpretive method. Lou Shaw was a successful television scriptwriter who argued that his program, "The Equalizer," had been unlawfully copied by defendants' pilot script for their television series, "Equalizer." Defendants conceded access to the work because Richard Lindheim, an executive at NBC, had reviewed Shaw's script before NBS declined to purchase it. Thereafter, Lindheim left NBC and created his own series, conceding that he copied his title from Shaw's script.⁸⁹ Thus the case hinged on whether the two works were substantially similar to support a finding of improper appropriation. The district court had held that the works in question were not substantially similar, as a matter of law.⁹⁰ Shaw appealed, arguing that a reasonable trier of fact could have found substantial similarity, and thus summary judgment was improper. Judge Alarcon in the Ninth Circuit Court of Appeals agreed, and he reversed and remanded. *Shaw* favored a combination of formalist and reader-response approaches to interpret the works, thus requiring that it reverse and remand a judgment for

⁸⁶ Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

⁸⁷ Gestaltism is "The theory in psychology that the objects of mind come as complete forms or configurations which cannot be split into parts; e.g., a square is perceived as such rather than as four discrete lines." STEDMANS MEDICAL DICTIONARY (27th ed. 2000).

⁸⁸ Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)(my emphasis)("[T]he patterns in which these figures are distributed to make up the design as a whole are not identical. However, the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their *aesthetic appeal* as the same"); accord Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir.2001).

⁸⁹ *Id.* at 1355.

⁹⁰ *Id.* at 1355 (quoting *Shaw v. Lindheim*, 908 F.2d 531, (C. D. Cal. 1988).

defendants, whose motion for summary judgment had previously been granted when the lower court prioritized a gestalt approach to interpretation.

At issue in the debate over whether the two works were substantially similar was essentially what interpretive method to use. In *Shaw*, the Ninth Circuit trained its attention on its own prior, much-criticized analysis in *Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp.*, which provided a framework for conducting substantial similarity analysis.⁹¹ *Krofft* had set out a bifurcated analysis: Step 1 was confined to what it called the “extrinsic” analysis, or “dissection” of the works, that is, in my paradigm, formalist analysis. A court, perhaps in reliance on expert guidance, could produce analysis of the “plot, themes, dialogue, mood, setting, pace, and sequence,” and as well as any other “concrete” elements in a literary work, so as to determine similarity of ideas as a matter of law.⁹² Step 2 consisted of an “intrinsic,” more intuitionist analysis by the trier of fact, based on the ordinary reasonable person’s perception of the works. This second phase focused on the *expression* of the work’s ideas. *Krofft*’s tests made little sense.⁹³

Shaw seized upon the ways in which *Krofft*’s distinction between extrinsic and intrinsic analysis was flawed, especially *Krofft*’s rule that the two phases should correspond to similarity of ideas and expression, respectively. Instead of framing Steps 1 and 2 as, respectively, extrinsic/ideas (1) and intrinsic/expression (2), *Shaw*’s framed the binarism as objective (1) and subjective (2), both geared toward analysis of expression.⁹⁴

Shaw sought to correct *Krofft*’s mistaken bifurcation, and to minimize the impact of the subjective, manipulable part of infringement analysis. Indeed, *Shaw* expressly criticized judicial discretion to substitute judicial gestalt or intuitionism in place of actual assessment by a jury or trier of fact using the standard of the ordinary reasonable person: “a judicial determination under the intrinsic test is now virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two literary works are or are not similar.”⁹⁵

This subjective judgment was improper partly due to the rules of civil procedure, and the judicial scope of authority at that stage, because “at the summary judgment stage, the judge’s function is not [herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”⁹⁶ *Shaw* thus rejected a

⁹¹ 562 F.2d 1157 (9th Cir. 1977).

⁹² *Id.* at 1164.

⁹³ See, e.g., Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L.REV. 321, 416 (1989), and Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L.REV. 719, 757 (1987).

⁹⁴ *Shaw*, 919 F.2d at 1357.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1360 (quoting *Anderson v. Liberty Lobby*).

gestalt, or intuitive approach, specifically lamenting its lack of meaningful analysis. For support, *Shaw* cited to cases whose analysis was more conclusory pronouncement than thoughtful deliberation, such as *Berkic v. Crichton*, which “reach[ed] a result under the intrinsic paragraph test in one paragraph.”⁹⁷ Further, *Shaw* referred to an “absence of legal analysis” as “frustrat[ing] appellate review of the intrinsic test.”⁹⁸

In *Shaw*, a change in interpretive method could be said to constitute the main holding on appeal, even though *Shaw* did not cast its decision explicitly in those terms.⁹⁹ Notwithstanding that defendants won again on remand when new facts came to light, *Shaw* would have come out differently on the original facts, had the court applied a different interpretive method. It illustrates, therefore, the use of intuitionism (by the lower court) and its critique and rejection in favor of a more process-based formalism (in the appellate court).

The intuitionism in copyright cases a long shadow, through the gestalt and ordinary observer interpretive approaches. The interpretive issues surrounding the lay observer standard deserve an Article unto themselves, thus this Part will simply sketch out the main, overarching problem I discern. Copyright's reliance on the “lay observer standard” would lead one to believe that the observer (or imagined audience) does a significant amount of work in copyright law.¹⁰⁰ Yet actual observers play little to no role in copyright law, and it is not clear that they should.¹⁰¹ Instead, the judge substitutes her own judgment for what the lay observer can be presumed to think about the work, thus making the lay observer standard (and even the variations on it, such as the more discerning observer standard) actually more a function of judicial intuitionism than readerly authority. A judge is expressly expected not to bring her own level of perception and knowledge to the task at hand, and she is expected, instead, to step into the shoes of the average audience member.¹⁰² Yet that perception is effectively speculation by a judge, usually uninformed by empirics about the particular audience in question. The lay observer standard plays a crucial role in determining infringement since it often decides the issue of substantial similarity.¹⁰³ Consequently, a great deal rides on what a judge imagines is an ordinary observer's likely reaction to the works.

⁹⁷ *Id.* at 1357 (referring to *Berkic*, 761 F.2d at 1294, and *Olson*, 855 F.2d at 1453).

⁹⁸ *Id.*

⁹⁹ *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

¹⁰⁰ Yen, *supra* note 1, at 288-298 (describing the pros and cons of using the ordinary observer test).

¹⁰¹ Tushnet, *supra* note 14, at 759 (2012) (“Copyright plaintiffs have not generally offered courts extrinsic evidence of how ordinary observers perceive the meaning of a particular work. The Ninth Circuit explicitly rejected reliance on a consumer survey to determine whether a particular accused work was a parody.”)

¹⁰² 3 PATRY ON COPYRIGHT § 9:69 (internal citation omitted) (“An effort by a district judge to ‘have a more Olympian viewpoint than the average playgoer’ was rebuffed on appeal.”)

¹⁰³ *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1022 (2d Cir. 1966).

In spite of the importance of the lay observer analysis to final outcomes in many copyright cases, there is little consistency in the methods judges use to conduct it. Regrettably, the term appears to have grown less clear as case law has evolved.¹⁰⁴ Quite frequently, it appears that the judge simply decides, as though by mere intuition. For example, in a case involving two fabric designs, one judge wrote:

While there are some differences in both the color and design of the two patterns, *we think that the average observer would probably find them substantially similar*. In our view the plaintiff is likely to succeed after trial. It seems clear to us that in its discretion, the district court should have granted a preliminary injunction. As we have before us the same record, and as no part of the decision below turned on credibility, we are in as good a position to determine the question as is the district court.¹⁰⁵

Judge Moore offers no explanation for his conclusion, and in fact, he hedges. Note his cautious language: “would probably find them substantially similar.” He states that he sees no reason he should not make such an assessment based on the record before him. Yet he does not explain what gives him sufficient basis to conclude what a lay observer would think.

Some judges have tried to elaborate the lay observer standard in greater detail, but their efforts have not always met with success. In *Carol Barnhart Inc. v. Econ. Cover Corp.*, for example, the question was how to determine conceptual separability so as to resolve whether a work's features were copyrightable independently of their function.¹⁰⁶ Judge Newman suggested, partially adopting the logic of *Kieselstein-Cord v. Accessories by Pearl*, that one test for conceptual separability could reside with the lay observer's reaction to the work in question.¹⁰⁷ Newman's test, known as the “temporal displacement” test, was ostensibly about a different doctrine, conceptual separability, yet it drew on a reception-based interpretive methodology that the majority had disavowed.¹⁰⁸ Putting flesh on the bones of the lay observer standard, Newman proposed in his lively dissent that if “the article ... stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function,” it ought to be deemed conceptually separable (and thus potentially copyrightable).¹⁰⁹ While commentators may have enjoyed the greater precision this version of the lay observer test offered, his own court was unswayed by the proposal, and referred to it derisively as “so

¹⁰⁴ Cohen, [Masking Copyright Decisionmaking] *supra* note 8, at 723.

¹⁰⁵ *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315, 1316-17 (2d Cir. 1969)(my emphasis).

¹⁰⁶ 773 F.2d 411, 414 (2d Cir. 1985).

¹⁰⁷ 632 F.2d 989 (2d Cir. 1980).

¹⁰⁸ *Carol Barnhart*, 773 F.2d at 418.

¹⁰⁹ *Id.* at 422.

ethereal as to amount to a nontest.”¹¹⁰ The *Carol Barnhart* majority might have scoffed at Judge Newman’s “nontest” because of the concern that such a standard would result in little more than outcome-driven judicial intuitionism. That is, in the judge’s trying to imagine what a work of art would stimulate in the mind of an observer, the judge was actually substituting a form of gestalt, or impression-based, analysis. Yet that standard is precisely what judges are routinely called on to do, to wit: “Under the ‘ordinary observer’ test ... two works are substantially similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal of the two works as the same.”¹¹¹ Until and unless copyright doctrine expects a more robust way to assess the ordinary observer standard, it will remain awash in intuitionism, difficult to predict, uncertain on appeal, and potentially off limits for assistance by experts, in most circuits. Intuitionism as an interpretive method, such as it is, presents a stark contrast from formalism and contextualism which are, at a minimum, on producing meaning through analysis of the texts in question, even when they disagree over the propriety of the method. By contrast, intuitionism locates authority in judicial intuition, and gives the judge large discretionary power.

In conclusion, nearly all copyright cases reflect interpretive choices that track the categories in this Part. Some cases display a marked reliance on one mode; still others feature a *mélange* of methods. Many cases make no mention of interpretive methods as such, yet the method—and their evidentiary and decisional implications—can be discerned in most copyright cases nonetheless. Part II will offer examples of this tendency.

PART II. JUDGES MAKE DIVERSE INTERPRETIVE CHOICES IN COPYRIGHT CASES

Judges in copyright cases choose between formalism, contextualism, and intuitionism. Applying these methods, judges offer diverse justifications—if any—for their interpretive reasoning.¹¹² Examples from the case law demonstrate that, at present, courts shift between these interpretive gears, without explaining their choices even when those may be influential upon the case’s disposition. This Part explores case law to demonstrate the operation of these interpretive methods.

These cases illustrate that judges make affirmative choices about their own interpretive authority, and these choices are not merely aesthetic, they are methodological choices that are legally relevant. Judges may choose to ground their interpretive authority in a single source of authority or they may discuss multiple authoritative grounds; sometimes they will offer no justifications for their finding (for example, in substantial similarity analysis), or they will offer reasons without explaining their relative weight (for instance, their reasons may track the fair use factors, but one factor may inexplicably trump the

¹¹⁰ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1144 (2d Cir. 1987).

¹¹¹ *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 139 (2d Cir.1998).

¹¹² Yen, *supra* note 1, at 268-269.

others). Loosely, one might say that judges most commonly rely on the text, or judicial intuition, but they sometimes rely on context.¹¹³ In rare cases, judges emphasize authorial intention. Expert testimony is also less common as a source of interpretive authority, and accordingly, both authorial intention and expert evidence are treated in this Article as outliers. There are good candidate reasons, both theoretical and practical, for which judges probably less commonly resort to these grounds of authority, explored below. Finally, judges, in their frequent reliance on the “total concept and feel” of a work, cast as an element of the work what is actually a method, intuitionism, or gestalt. It is well to distinguish between what is *in* the work from how to approach it, methodologically.

A. MANY CASES RELY PRINCIPALLY ON THE TEXT

In *Walker v. Time Life Films*, the author of the autobiographical police memoir, “Fort Apache,” sued the authors and producers of a screenplay entitled “Fort Apache: The Bronx.”¹¹⁴ The Court of Appeals for the Second Circuit affirmed the dismissal of plaintiff’s motion by the U.S. District Court for the Southern District of New York, holding that no reasonable observer could have found the two works in question to be substantially similar beyond unprotectable elements such as ideas.¹¹⁵ The Court also held that it had not been error for the lower court to base its judgment on the judge’s own assessment of the works after having read the book and watched the movie, even though it meant refusing to view some of the evidence plaintiff Walker had prepared and offered as proof of the works’ similarities.¹¹⁶

In the course of the lower court’s largely well-reasoned opinion, Judge Edelstein considers different grounds of interpretive authority. He begins—and ends—with the text, stating that “In determining copyright infringement, the works themselves supersede and control contrary allegations and conclusions, or descriptions of the works as contained in the pleadings.”¹¹⁷ He chooses to locate his interpretive authority in the text, and the court’s own formalist close reading of it, over “conclusions, or descriptions of the works.” This effectively prioritizes the text over critical readings of it or expert testimony about it. It also places the text over the author’s intentions and statements about it, since Judge Edelstein excludes plaintiff Walker’s own analysis of the works’ similarities. To be sure, the plaintiff is self-interested, and thus any statements offered up about the works may be presumed to be informed by litigation strategy as well as artistic intention. Nonetheless, Judge Edelstein’s emphasis on the text reflects a choice: the text, as a formalist object,

¹¹³ I qualify my assessments about the frequency of the use of particular approaches. These are not empirically tested claims. They simply reflect my opinion after reading, writing about, teaching, and rereading many copyright cases.

¹¹⁴ 784 F.2d 44, 46 (1986).

¹¹⁵ 784 F.2d at 46.

¹¹⁶ *Id.*

¹¹⁷ *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434 (S.D.N.Y. 1985) *aff’d*, 784 F.2d 44 (2d Cir. 1986).

transcends forces beyond or external to it in terms of its capacity to provide interpretive authority.

The opinion's formalist analysis is thorough and clear-sighted, attentively considering plot, structure, characters, subtopics, genre and so on.¹¹⁸ In its awareness of the importance of genre, the court gestures to something like an audience interest. This is because works that operate within the same genre will likely contain many similarities. Think of two cowboy westerns, two hardboiled detective stories, two movies about dinosaur theme parks, and so on. Yet the similarities common to a genre require audience "decoding."¹¹⁹ Audiences recognize certain genres as such because of the presence of particular and usually uncopyrightable elements.¹²⁰ Still, the opinion is unmistakably formalist, or text-based, in its orientation.¹²¹ When Walker raises actual audience confusion as a plausible way of determining similarity, Judge Edelstein rejects his argument. Walker points to three newspaper articles which purport to confuse his and defendant's works. These articles fail to persuade the court that the lay observer in general would have found the works substantially similar, because "a few opinions cannot enlarge the scope of statutory protection enjoyed by a copyrighted property."¹²² The court does not rule here that the audience could never provide interpretive authority for the finding that the works are substantially similar, it merely rules that, in this case, the audience does not rise to a significant enough factor to count in its analysis. The text transcends the audience, at least on this scant evidence.

In coming to his decision, Judge Edelstein cites *Davis v. United Artists*, a case involving a film and a novel both based on the Vietnam War.¹²³ In *Davis*, the court granted defendants' motion for summary judgment, and it excluded plaintiff's literary expert's opinion of the works' similarity, refusing even to consider it.¹²⁴ The rationale for this exclusion was strongly formalist: the court's own reading and viewing of the works gave it the clear ability to discern, on the basis of the works themselves, that there was no similarity.¹²⁵ The court cloaked its decisionmaking in the language of audience reception, yet the audience was simply a construct imagined to share the same intuitions and

¹¹⁸ 615 F. Supp. 430, 437-38 (S.D.N.Y. 1985).

¹¹⁹ STEPHEN NEALE, *GENRE* (1980).

¹²⁰ 615 F. Supp. at 436 ("In any account based on experiences in a poverty stricken, crime-ridden environment, depictions of bribery, prostitution, purse-snatching and neighborhood hostility to law enforcers are inevitable. Plaintiff contends that similar accounts in the film and book describe the disarming of threatening individuals, and the poor morale of disgruntled officers. ... These incidents are stock material for most police stories.")

¹²¹ Said, *supra* note 33, at 361.

¹²² 615 F. Supp. at 437 (internal citation omitted).

¹²³ 547 F.Supp. 722, 724 (S.D.N.Y.1982).

¹²⁴ 547 F.Supp. at 724.

¹²⁵ 547 F.Supp. at 725.

analysis as the court.¹²⁶ The import of the opinion rests on the notion that the works can be adjudicated on the basis of close reading, or a text-based approach, and this is *Davis*'s precedential value for *Walker v. Time Life*.

Subsequent courts have relied heavily on *Walker*'s dicta, namely, that "the works themselves supersede and control contrary allegations and conclusions, or descriptions of the works."¹²⁷ Indeed, the Second Circuit's affirmance of *Walker* emphasized this text-centered approach, downplaying similarities that might have otherwise become apparent from expert analysis.¹²⁸ In *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.* ("Gaito II"), a case involving architectural plans, the Second Circuit Court of Appeals affirmed a grant of defendant's motion to dismiss for failure to state a claim because substantial similarity can be determined at that early stage as a matter of law.¹²⁹ If no substantial similarity exists between the works, plaintiff's claim should be dismissed for failure to state a claim.¹³⁰ The standard for determining whether substantial similarity exists is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."¹³¹ On the basis of this language, one might expect the emphasis to be on the audience, or the court's understanding of it. It is audience perception of the similarity that appears to be the standard for infringement. Instead, however, to determine whether copyright infringement exists, the *Gaito* court quotes the *Walker* "works supersede and control" rule.¹³²

In *Gaito* the question was whether a copyright infringement claim could be decided on a Rule 12(b)(6) motion to dismiss, which was then an issue of first impression in the Second Circuit.¹³³ The case's posture understandably steered the court's discussion to the text as a source of interpretive authority since the crucial question was whether the texts, and the parties' pleadings, without more, could serve as a sufficient basis for a final

¹²⁶ *Id.* ("Indeed, if the Court had read plaintiff's book and seen defendants' motion picture, unaware of this infringement action, it never would have dawned upon it, as an average observer, that there was the slightest connection between the two works other than in the common title and the subject of the Vietnam War.")

¹²⁷ *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir.1986)("[I]n copyright infringement cases the works themselves supersede and control contrary descriptions of them.")

¹²⁸ *Id.* ("Appellant contends that similarities between a review of his book and the analysis of his book prepared by the defendants' expert witness raise questions concerning similarities in the works themselves. But comparison of secondary or descriptive materials cannot prove substantial similarity under the copyright laws... because the works themselves, not descriptions or impressions of them, are the real test for claims of infringement.")

¹²⁹ 602 F.3d 57, 59 (2d Cir. 2010).

¹³⁰ *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 2009 WL 5865686, 5 (S.D.N.Y. 2009)("Gaito I").

¹³¹ *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999)(internal citation omitted).

¹³² *Gaito I*, 2009 WL 5865686 at 5 (S.D.N.Y. 2009).

¹³³ *Gaito II*, 602 F.3d at 59, 63 (2010).

disposition. Still, the case is noteworthy for doubling down on the autonomy of the text in resolving copyright disputes. Substantial similarity is typically considered an “extremely close question of fact,”¹³⁴ requiring resolution by the trier of fact,¹³⁵ and not usually recommended for resolution as a matter of law.¹³⁶ However, substantial similarity can sometimes be determined as a matter of law, either because no reasonable jury could find that the two works are substantially similar, or because the similarity concerns only noncopyrightable elements.¹³⁷

Gaito held that when a court considers substantial similarity, “no discovery or fact finding is typically necessary, because ‘what is required is only a visual comparison of the works.’”¹³⁸ Drawing on *Walker*, *Gaito* ruled that the text trumps other sources of interpretive authority—or at least, it can. The court’s language emphasizes formalism:

It is well settled that in ruling on [a motion to dismiss], a district court may consider ‘the facts as asserted within the four corners of the complaint’ together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.”¹³⁹

Because the works have been attached to the pleadings as documents for the court to review, the court is deemed to have all it needs for its ruling.¹⁴⁰ Katzmann concludes that “where, as here, the district court has before it all that is necessary to make a comparison of the works in question,” it is entirely proper for a court to decide a motion to dismiss on the basis of substantial similarity (or the lack thereof).¹⁴¹ According to this view, which subsequent case law has continued to adopt, the text possesses all the interpretive tools needed to unlock it, for the purposes of answering the questions copyright would ask of it.¹⁴²

In *Gaito*, following *Walker*, Judge Katzmann effectively located the court’s interpretive authority in the text, but clarified that in some cases it might not be proper to decide the question of non-infringement without discovery. Implicit in his decision is the idea that some cases are too complex to be determined without assistance, and this is not such a

¹³⁴ *Id.* at 63.

¹³⁵ *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980).

¹³⁶ *Gaito II*, 692 F.3d at 63 (internal citations omitted).

¹³⁷ *Id.*

¹³⁸ *Id.* at 64.

¹³⁹ *Id.* (internal citation omitted).

¹⁴⁰ *Id.* at 64-65 (“Although substantial similarity analysis often presents questions of fact, where the court has before it ‘all that is necessary to make a comparison of the works in question,’ it may rule on ‘substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss.’”)

¹⁴¹ *Id.* at 65.

¹⁴² *Klauber Bros., Inc. v. Bon-Ton Stores, Inc.*, 2014 WL 657953, No. 13–1672 (2d Cir. 2014).

case. He cites to *Computer Associates v. Altai* for an example of when expert testimony might be necessary, because the “strictures of [the court’s] own lay perspective” might be too limiting to understand the issues at bar.¹⁴³ There may be excellent legal reasons to adopt a formalist approach like that of *Gaito*, such as ease of administration, clarity, efficiency, institutional competence, and so on. Still, it is important to see formalism as one choice among many possible approaches to selecting interpretive authority in copyright cases. To cast the text as autonomous or self-interpreting effaces the interpretive method, or, at a minimum, naturalizes it: it becomes as though there is no alternative way to approach the text. A central goal of this Article is to denaturalize such reading strategies, to cast these moves as choices among interpretive methods. Relying on the text alone is not a bad choice, but it is clearly an affirmative choice.

B. SOME CASES PRIORITIZE CONTEXT OVER TEXT

Some cases place greater emphasis on the context of the work than on the text itself. By context, one could mean two things: the historical context in which the work was produced, or the one that may be depicted in the work. My focus here is on the latter case, in which the context in the work may be an epoch (as in period drama); a setting (as in films set in Beverly Hills); or a genre (as in detective fiction, or medical dramas). In cases that discuss genre, courts may focus on it as a way to identifying classes of works that will, by design, possess numerous similarities.¹⁴⁴

A recent example illustrates what it looks like when a court deliberately situates its interpretive authority in a work’s context, discussing both genre and historical context. Because the same plaintiff came before the court multiple times with versions of the same work (albeit naming different defendants), the court’s various interpretive approaches can be discerned and meaningfully compared. In two different actions based on the same screenplay, before two different judges, the court made different methodological choices, first grounding its authority in the text, and then subsequently grounding it in context.

In *Effie Film, LLC v. Pomerance*,¹⁴⁵ the actress and author, Emma Thompson, sought a declaratory judgment of non-infringement for her screenplay about the unhappy marriage of Euphemia (“Effie”) Gray and John Ruskin, and the subsequent marriage between Effie and the pre-Raphaelite painter, John Everett Millais.¹⁴⁶ Ruskin and Millais were important figures from the arts and letters of the Victorian era. Eve Pomerance had previously published two screenplays about these same figures, and when she threatened suit, Effie Film sued for declaratory relief on behalf of Thompson. In the course of granting Effie Film’s 12(c) motion, Judge Oetken of the Southern District of New York

¹⁴³ *Gaito II*, 692 F.3d at 65; *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir.1991).

¹⁴⁴ See, generally, STEPHEN NEALE, *GENRE* (1980).

¹⁴⁵ *Effie Film, LLC v. Pomerance*, 09 F. Supp. 2d 273 (S.D.N.Y. 2012).

¹⁴⁶ 932 F. Supp.2d 538 (2013)(hereinafter, “*Pomerance*”).

carefully summarized all three of the works at issue. In so doing, he grounded his authority in the texts at issue, adopting a formalist approach.

In *Effie Film LLC, v. Murphy*, decided by a different judge on the same court the following year, Judge Griesa cited to Judge Oetken's opinion in *Pomerance* approvingly.¹⁴⁷ Gregory Murphy, an author of numerous plays and other literary works, had produced a play for the stage, and a screenplay, both entitled "The Countess," that likewise focused on the Gray-Ruskin marriage, the Gray-Millais romance, and related historical events.¹⁴⁸ In the stage of litigation that concerns us here, the court had before it Thompson's complete, allegedly infringing screenplay, and it could have proceeded directly to analyzing the two works. In so doing, it would have been using a formalist approach to copyright's substantial similarity analysis, which is the means of determining whether prima facie infringement has occurred.¹⁴⁹ A great deal of prior case law suggests that courts may grant motions even at early stages on the basis of nothing more than textual analysis of the works themselves, with no consideration of context, discovery, or expert testimony.¹⁵⁰ Thus nothing, in theory, prevented the court from adopting a formalist approach, simply doing a close reading of the two works, and rendering judgment. Perhaps most importantly, this would have followed the interpretive approach the Court itself had taken in the *Pomerance* litigation the year before.

The *Effie* court did not do so. It made an interpretive choice to ground its analysis in what might be called a contextualist or historicist reading of the works. Even more precisely, we might call it a hermeneutically historicist approach.¹⁵¹ Put in less florid terms, the court was simply contextualizing the works by trying to evoke the Victorian era, helpfully cataloguing characteristics likely to appear in any work about that epoch. Still,

¹⁴⁷ *Effie Film, LLC v. Murphy*, 932 F. Supp. 2d 538, 553 (S.D.N.Y. 2013) (hereinafter, "*Effie*") ("Judge Oetken has recently provided an excellent analysis of copyright law as it applies to works of historical fiction, and even the 'Effie' screenplay itself, in granting an analogous motion in another action brought by Effie Film against another author of a screenplay based on the same historical events.")

¹⁴⁸ 932 F. Supp.2d at 542.

¹⁴⁹ *Gaito II*, 602 F.3d at 65 (2d Cir.2010)("Where the court has before it 'all that is necessary to make a comparison of the works in question,' it may rule on substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss.")

¹⁵⁰ *Id.* at 65-66. See also *Christianson v. W. Publ'g Co.*, 149 F.2d 202, 203 (9th Cir. 1945); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941-42 (10th Cir. 2002).

¹⁵¹ I qualify my use of the term "historicist" because typically, historicism refers to investigation into the era of a work's production. The animating idea of historicism, or at least the new historicism, is that works cannot be understood except as artifacts reflecting the social ideas and environment, the "network of material practices," of the time of their creation. ARAM VEESER, ED. *THE NEW HISTORICISM*, (ROUTLEDGE, CHAPMAN AND HALL) 1989 at xi. Here, instead, the approach is informed by historical research, which allows the court to engage in clear-sighted analysis of copyright doctrines, such as *scènes à faire* and the idea/expression dichotomy. The court's focus nonetheless draws on an approach Paul Hamilton has identified as hermeneutic historicism, in which "[t]he past is to be understood on the model of interpreting a text; and texts, literary or otherwise, only have meaning within an economy of other texts." PAUL HAMILTON, *HISTORICISM*, 2D ED, ROUTLEDGE (1996) AT 3.

it is striking that the first things the court says about the work are not directly about the work at all, but about the era in which the stories are set:

Both “Effie” and “The Countess” present fictionalized accounts of the same historical events. Therefore it is necessary to review the historical episode that both works draw from... [I]t will be impossible to gauge the creative similarities of the works without some grasp of the historical narrative.¹⁵²

The court suggests that the task of comparing the works—the central task in any finding of copyright infringement—requires a historically informed interpretation. It states that substantial similarity analysis is “impossible” without reference to a contextual framework.

Put another way: to read the text, the courts says, one must look first *outside* the text. The court dedicates a remarkable twelve paragraphs of its opinion to a summary of the historical moment and to biographical events that help set the stage for both “Effie” and “The Countess.” Yet in the earlier adjudication of this same plaintiff’s work, the other district court had adopted a different approach. While the earlier case, *Pomerance*, acknowledged that the issue of historical fiction presented particular issues, and mentioned the Victorian era in passing, it devoted the bulk and the emphasis of its opinion to formalism, offering summary and exegetic analysis of the works. *Pomerance* dedicated 13 paragraphs to the “Effie” script, and 15 and 11 respectively to each of defendant *Pomerance*’s scripts.¹⁵³ In its approach, *Pomerance* appears to have followed the classic Learned Hand opinion, *Sheldon v. Metro Goldwyn-Mayer*, providing what looks like a close reading, and doing no more than acknowledging the historical era with a quick textual nod.¹⁵⁴

Consider by way of further contrast with *Effie*, *Hoehling v. Universal City Studios, Inc.*, a landmark, if oft-criticized, case in the copyrightability of nonfiction historical

¹⁵² *Id.* at 543.

¹⁵³ *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 278 (S.D.N.Y. 2012)(“Victorian England, famed for its cultural achievements, high political drama, and sexual mores, remains a rich source of inspiration for historians and artists. For generations, authors, composers, dramatists, and scholars have been drawn to the story at the heart of this case—a story that involves two major figures of the Victorian art world, John Ruskin and John Everett Millais, and a woman, Euphemia Gray, who married Millais after annulling her notoriously unhappy marriage to Ruskin on the scandalous ground of non-consummation.”)

¹⁵⁴ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)(“An understanding of the issue involves some description of what was in the public demesne [*sic*], as well as of the play and the picture. In 1857 a Scotch girl, named Madeleine Smith, living in Glasgow, was brought to trial upon an indictment in three counts; two for attempts to poison her lover, a third for poisoning him. The jury acquitted her on the first count, and brought in a verdict of ‘Not Proven’ on the second and third. The circumstances of the prosecution aroused much interest at the time not only in Scotland but in England; so much indeed that it became a cause celebre [*sic*], and that as late as 1927 the whole proceedings were published in book form.”)

accounts.¹⁵⁵ There, the works at issue both took place in Nazi Germany, no less complex and important an era than the one discussed in the *Effie* litigation. Yet *Hoehling* is hardly a model of historicist emphasis, even though discussion of the historical era depicted in both works was a doctrinally important part of its analysis.¹⁵⁶ Instead, *Hoehling* focuses on copyright's subject matter limitations as a matter of sound public policy, sidestepping close analysis of the works after simply offering peremptory summaries.¹⁵⁷ *Hoehling* thereby displays its own interpretive methodology, rooted in copyright instrumentalism.¹⁵⁸

The *Effie* court made a different choice, and I would argue that the choice reflects (or determined) the court's disposition in finding no infringement. Those twelve paragraphs of historical background both precede and, in some sense, preempt, formalist analysis. The court could have selected other interpretive methods, such as a gestalt approach, following *Roth Greeting Cards v. United Card Co.*¹⁵⁹ *Roth* calls for judges to consider the combined effects of the work's elements and impressions, in a test known as the "total concept and feel" of the works. It relies on judicial intuition, or impressions, of the works. Generally, this gestalt, or impression-based judgment leads more easily to the conclusion of infringement when two works possess many similarities, even if the

¹⁵⁵ 618 F.2d 972 (2d Cir. 1980); see also *CBS v. Nash*, 899 F.2d 1537, 1540-1542 (7th Cir.1990)(Easterbrook, J.)(criticizing *Hoehling* for failing to generate incentives efficiently); 2 *Patry on Copyright* §3:63 ("Difficulties ... have arisen in the area of history as the result of a poor first analysis ... Judge Hand's comments reflect a naïve and blinkered understanding of how history is written ... no narrative can be, as Hand suggested, a self-defining, self-selecting, self-ordering aggregation of facts." (citations omitted)); Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v. Universal City Studios*, 29 57 J. COPYRIGHT SOC'Y U.S.A. 647 (1982) ("The *Hoehling* court's approach is fundamentally flawed for at least five reasons.")

¹⁵⁶ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)(internal citations omitted)("The remainder of *Hoehling*'s claimed similarities relate to random duplications of phrases and sequences of events. For example, all three works contain a scene in a German beer hall, in which the airship's crew engages in revelry prior to the voyage. Other claimed similarities concern common German greetings of the period, such as "Heil Hitler," or songs, such as the German National anthem. These elements, however, are merely scènes à faire, "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." ... Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain "stock" or standard literary devices, we have held that scenes a faire [sic] are not copyrightable as a matter of law.")

¹⁵⁷ *Id.* at 978 ("To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.")

¹⁵⁸ *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 295 (S.D.N.Y. 2012)("To achieve that end, *Hoehling* prioritizes an instrumental conception of copyright law and concludes that weak copyright protections will best facilitate the creation and dissemination of new historical knowledge.")

¹⁵⁹ The test derives from *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), which is discussed *infra* Part I.C.

particular similarities are historical facts and thus unprotectable in their own right. Scholars have noted as much.¹⁶⁰

The decision of the *Effie* court to ground its interpretive authority in a historicist reading, thus emphasizing or inflating historical *context* and downplaying *text*, reflects an important interpretive choice. To be sure, with historical or biographical genres, where the copyright protection is already thin, and common historical elements likelier to be present, a historicist or contextualist approach may seem more self-evident. After all, both works strive for fidelity to the same historical era, even if differently conceived. Judges can and do apply contextualist approaches to fiction, too, however. In particular, when judges look at the question of genre, they are, in some sense, analyzing the context in which the work may be understood. A hard-boiled detective novel, for instance, looks extremely similar to another in its genre, until one understands that certain common tropes, plots, characters, and settings are likely to exist in both. Part of the work of decoding a text is thus situating it in terms of its semiotic context, including its genre.¹⁶¹ Courts have recognized that at times, genre makes demands on a work and limits authorial choices. Where that is true, similarity analysis must filter out the “elements dictated by efficiency, necessity, or external factors.”¹⁶² Yet there has been no programmatic system for how to weight the demands of genre in copyright infringement analysis.

C. MANY CASES CHOOSE JUDICIAL INTUITION OVER OTHER SOURCES

In a fundamental sense, judicial intuition is always at work in legal analysis in the common law system. Usually, though, it does not substitute for other methods in instances in which formal methods are typically deployed, as in the case of statutory interpretation. A judge would be hard pressed to defend an intuitive reading of a statute against a plain-meaning (or textualist) one, or a structuralist, purposivist, originalist, or pluralist reading. Judges do not simply say: “this is what the statute seems to me to mean,” or “my gut tells me the Constitutional meaning of liberty is...” Doing so would be replacing canons of construction and other interpretive tools with hunches. Yet this sort of intuitionism operates with frequency in copyright law. It does so both by design and by accident. It does so by design through legal standards that empower judges to speak in the guise of the ordinary observer, and to make legal rulings based on the “total concept and

¹⁶⁰ Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel,'* 38 EMORY L.J. 393, 411 (1989) (“If copyright claims can in fact be maintained at such a high level of abstraction [as Roth implies], practically any similarity could conceivably support a finding of infringement.”) Lemley, *supra* note 13, at 739.

¹⁶¹ Said, *supra* note 33, at 365 (“Typically, what texts demand of us, whether they are visual or verbal texts, is at least in part a function of genre. Texts, whether verbal or visual, are often virtually incomprehensible without reference to the generic tradition to which they belong, however uneasily.”)

¹⁶² See, e.g., *Kohus v. Mariol*, 328 F.3d 848, 856 (6th Cir. 2003); *Matthew Bender & Co. v. West Publ'n Co.*, 158 F.3d 674, 682 (2d Cir.1998) (holding that, if external factors constrain creative options, there may be no creative spark, and thus, no copyright protection; *Altai*, 982 F.2d at 707–08).

feel” of the works at issue. The first of these is formalized as the “lay observer standard,” under which the judge (really, the trier of fact, but very often the judge) must determine whether the works in question would be found substantially similar by a “hypothetical” ordinary observer whose “reasonably expected impressions” are supposed to guide the judge.¹⁶³ The second of these is the judicially created “total look and feel” test first announced in *Roth Greeting Cards*.¹⁶⁴ Intuitionism also operates in copyright as though by accident, through the considerable latitude judges have to employ intuition in place of formal interpretation in their determinations of a number of important doctrinal questions, such as, inter alia, originality, substantial similarity, and whether a use is fair.

In *Roth*, the Ninth Circuit found copyrightable cards that consisted of “common and ordinary English words and phrases which are not original with Roth and were in the public domain prior to the first use by plaintiff.”¹⁶⁵ In so finding, it reversed the lower court’s decision, and held that the combination of uncopyrightable factors nonetheless created something copyrightable:

It appears to us that in total concept and feel the cards of United are the same as the copyrighted cards of Roth. [T]he characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially similar as in Roth’s cards.¹⁶⁶

Roth’s analysis consists of an approach to the work’s elements, but it is separable from the elements themselves; the elements can be enumerated, and it is but one way of looking at them, to try to capture what their “total feel” conveys. It is an approach that downplays granular analysis, and dissection into component parts, in favor of a holistic, or gestalt approach.

Since *Roth*, the total concept test has become the most prominent approach to comparing works at issue.¹⁶⁷ However, it raises numerous questions, and arguably was not intended to become a generalizable test, beyond the facts of the specific case.¹⁶⁸ Which elements should be included in the enumeration of things to consider as part of the “feel”? Should unprotectable aspects (such as ideas, stock characters, or fonts) be filtered out before the

¹⁶³ *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985) (“Of course the ordinary observer does not actually decide the issue; the trier of fact determines the issue in light of the impressions reasonably expected to be made upon the hypothetical ordinary observer”).

¹⁶⁴ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1110.

¹⁶⁷ Mitchell J. Rotbert, *Total Concept and Feel: A Doctrine Running Amok*, 45 OCT. MDBJ 20, 24 (2012).

¹⁶⁸ Samuelson, *supra* note 13, at ____.

impressionistic assessment begins?¹⁶⁹ How can such an approach—which Tushnet refers to wryly as “a sort of magic by which unprotectable parts together become protected”—overcome the fact that unprotectable aspects do not, by themselves merit protection?¹⁷⁰ Is the total concept and feel equivalent to what Feist called the creative selection and arrangement of facts?¹⁷¹ How does this gestalt assessment avoid being “highly subjective,”¹⁷² an outright “abdication of analysis,” given that the standard seems to target a “wholly amorphous referent”?¹⁷³ In *Tufkenian Import*, a case about competing Oriental rug designers, the court emphasized that the *Roth* test should only be applied after a court’s dissection into original and unprotectable parts.¹⁷⁴ Tufkenian’s approach to Roth suggests that it is but one of many possible interpretive approaches. Unfortunately, though, many courts apply it less carefully.

Frequently, the total concept and feel is treated as an element of the work itself instead of being treated as an interpretive approach. Opinions may divide their analysis into discussion of similarities between the works, and subheadings will indicate that the analysis treats plot, characters, settings, and total concept and feel all as equally situated and inevitable aspects of the works themselves. For example, courts may cite to their analysis as follows: “When examining two works of fiction, courts in the Second Circuit will generally compare such elements as plot, theme, and total concept and feel.”¹⁷⁵ In other words, one possible (external) perspective, one interpretive method, gets internalized as a necessary (internal) element. This naturalizes the approach and makes it difficult for subsequent courts to adopt alternative approaches. Further, it makes the interpretive logic effectively unassailable. As Tushnet has shown, under this test, “the factfinder is directed to the gestalt, but a gestalt can’t be broken down.”¹⁷⁶ Oddly, though, the gestalt approach often trumps other interpretive methods and sources, as it did in the lower court in *Shaw*, and as it did in *Roth*, when plaintiffs’ claim would otherwise have failed to clear the copyrightability hurdle. The hierarchy of interpretive authorities is by no means clear. It would appear however, authors and experts lie at the bottom of this hierarchy of interpretive authority.

D. FEW CASES PRIORITIZE AUTHORS OR EXPERTS

¹⁶⁹ *Tufkenian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d. Cir. 2003).

¹⁷⁰ Tushnet, *supra* note 14, at 718.

¹⁷¹ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348, (1991)

¹⁷² Rotbert, *supra* note 160, at 25.

¹⁷³ *Tufkenian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d. Cir. 2003).

¹⁷⁴ *Id.*

¹⁷⁵ *Williams v. Crichton*, 84 F.3d at 588–91; *Crane v. Poetic Products Ltd.*, 593 F. Supp. 2d 585, 596 (S.D.N.Y. 2009) *aff’d*, 351 F. App’x 516 (2d Cir. 2009)

¹⁷⁶ Tushnet, *supra* note 14, at 719.

Characterizing copyrightable works as non-complex helps explain judicial underreliance on expert testimony about works: if works are not complex, no need for informed assistance arises. But it is less clear why authorial intention plays so insubstantial a role in copyright's interpretive regime. When authorial choices arise, they might seem to gesture to reliance on the author as a source of interpretive authority.¹⁷⁷ Instead, however, these "demonstrable authorial choices" are often couched in formalist analysis, as decisions discernable to anyone experiencing the work, because of its textual features.¹⁷⁸ In other words, this analysis is still rooted in the work itself, rather than in authorial statements about it.

For example, in *Mannion v. Coors Brewing Co.*, Judge Kaplan of the Southern District of New York was called on to determine the nature of copyright protection of photographs, which in turn required his assessment of the amount of originality in plaintiff's photograph.¹⁷⁹ In an action between a photographer, Jonathan Mannion, and an advertising agency representing Coors Brewing Co., Kaplan held that Mannion's photograph was sufficiently original to warrant protection. Mannion had created a three-quarter-length portrait of Kevin Garnett, a basketball star, in the foreground, and a cloudy sky in the background. Garnett wore a white t-shirt, white athletic pants, and bright jewelry. Defendants' photo featured a similarly posed young man, also muscular and African-American, and also wearing white clothing. Both posed in front of a cloudy backdrop. Kaplan's opinion offers a sophisticated and granular discussion of types of originality: originality in rendition [how a work is created],¹⁸⁰ originality in timing,¹⁸¹ and originality in creation of the subject.¹⁸² While Kaplan ultimately turned to judicial intuition to analyze the photos in question, his interpretive methodology started with the author's intention as a function of choices the *works* make manifest, that is, with formalism:

Decisions about film, camera, and lens, for example, often bear on whether an image is original. But the fact that a photographer made such choices does not alone make the image original. "Sweat of the brow" is not the touchstone of copyright. Protection derives from the features of the work itself, not the effort that goes into it.¹⁸³

¹⁷⁷ Eva Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOKLYN L. REV. 1487, 1517-1518 (2011) ("Use of authorial narrative is a species of analysis, advocated by some and questioned by others, that assesses a work by resorting to authorial intent") (citations omitted).

¹⁷⁸ *Mannion*, 377 F.Supp.2d at 451.

¹⁷⁹ 377 F.Supp.2d 444, 447 (2005).

¹⁸⁰ *Id.* at 452 ("copyright protects not *what* was depicted but rather *how* it was depicted").

¹⁸¹ This refers to when a photographer is in the right place at the right time. *Id.* at 452-453.

¹⁸² *Id.* at 453-454.

¹⁸³ *Id.* at 451.

Merely working hard, no matter how intense the effort, does not give rise to copyright in the final product.¹⁸⁴ This is, at least, true in theory, if not always in application. Judges are often at pains to distinguish choices that reflect so-called “sweat of the brow,” which copyright does not protect per se, from choices that are in fact creative decisions.¹⁸⁵ Put another way, no matter how much an author *intends* a work to be original, or works hard to make it so, the proof lies in the text, not in either the intention or the effort. While Kaplan states the quite clearly the principle that sweat of the brow is not enough, he does not deal with some of the issues of greater difficulty.

He writes that “an artist who arranges and then photographs” a scene, or who “orchestrat[es]” it, may have the right to prevent others from duplicating that created subject. But he does not offer clues as to what would count in future cases, for parties curious as to whether they had created their subject or not.¹⁸⁶ That the photographer instructed his subject “to wear simple and plain clothing and as much jewelry as possible, and “to look ‘chilled out’” seems to have counted for Kaplan.¹⁸⁷ An analysis focused on context would have inquired into whether Mannion was working within a particular genre (hip hop-related photography, for instance), which dictated that such aesthetic choices were necessary elements in conveying a particular style, or in conforming to the genre. Had Kaplan chosen a contextualist approach, the results of his analysis might have been different.

Consider another example demonstrating the less favored status of authorial intention as an interpretive ground. In *Cariou v. Prince*, the Second Circuit Court of Appeals held 25 of 30 paintings by the defendant, an appropriation artist, to be making fair uses of the photographer Patrick Cariou’s work.¹⁸⁸ It reversed and remanded as to the remaining paintings, on which Judge Deborah Batts of the Southern District of New York had previously granted plaintiff injunctive relief. The parties settled as to the last five paintings.¹⁸⁹ In my reading of the case, the grounds for the Second Circuit’s reversal lie in the exercise of Judge Batts’s interpretive choices.

Patrick Cariou is a photographer who produced a book of portraits of Jamaican Rastafarians and the Jamaican landscape for a book called “Yes, Rasta.”¹⁹⁰ Richard Prince is a well-known appropriation artist who purchased a copy of *Yes, Rasta* and then

¹⁸⁴ *Bridgeman Art Library, Ltd, v. Corel Corp.*, 36 F.Supp.2d 191 (S.D.N.Y. 1999).

¹⁸⁵ *Feist*, 499 U.S. at 359-60.

¹⁸⁶ *Id.* at 454-455.

¹⁸⁷ *Id.*

¹⁸⁸ *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

¹⁸⁹ Randy Kennedy, *Richard Prince Settles Copyright Suit with Patrick Cariou over Photographs*, NYT (Mar. 18, 2014) http://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/?_php=true&_type=blogs&_r=0

¹⁹⁰ 784 F.Supp.2d 337, 343 (S.D.N.Y. 2011).

removed and reused the photos as the basis for an exhibition of his own, entitled "Canal Zone." In 2009, Cariou sued Prince, as well as Larry Gagosian, the gallery owner who was to exhibit Canal Zone in Manhattan.¹⁹¹ Prince readily admitted to unauthorized use of Cariou's photographs, which could normally constitute copyright infringement.¹⁹² In Prince's case, however, his lawyers argued that he had transformed the works and therefore could claim fair use. Prince's legal strategy emphasized the argument that he had transformed the message of Cariou's art. Judge Batts rejected defendants' theory, finding it difficult to square a claim of semiotic transformativeness with Prince's deposition, in which he admitted that he had not intended any particular message to comment on Cariou's artwork. Grounding her interpretive authority in Prince's authorial intentions, she granted Cariou injunctive relief, which would have permitted plaintiff to seize and destroy the several dozen paintings in the Canal Zone exhibit.

Judge Batts's reasoning was facially appropriate, if the remedy she selected seems somewhat draconian. First, she applied precedent set in another appropriation case, *Rogers v. Koons* (which had stressed the need for a fair user to comment on the work being used).¹⁹³ When she analyzed the fair use factors, she defined transformativeness narrowly, following *Rogers*: "Prince's paintings are transformative only to the extent that they comment on [Cariou's] photos."¹⁹⁴ Second, she inquired into the nature of the use by the defendant, as one of the four fair use factors set out under 17 U.S.C. Sec. 107.¹⁹⁵ Ultimately, however, Batts overemphasized the role Prince's intentions should play. When she applied the *Rogers* comment-on-the-works standard to the works at issue, she found that the works could not possibly be transformative because Prince had had, by his own admission, no intention of commenting on the underlying works.¹⁹⁶ Instead, he had testified that he wished to use the photos as facts, for their truth value.

The Second Circuit reversed and remanded in terms that delivered something of a rebuke.¹⁹⁷ The Second Circuit held that all but five of the paintings were fair use, and the remaining ones were to be considered anew by the district court. The key holding of the decision on appeal was arguably that Judge Batts had applied an incorrect legal standard

¹⁹¹ *Id.* at 337.

¹⁹² *Id.*

¹⁹³ *Rogers v. Koons*, 960 F.2d 301, _ (2d Cir.1992).

¹⁹⁴ *Id.* at 349.

¹⁹⁵ 17 U.S.C. 107.

¹⁹⁶ *Id.* ("On the facts before the Court, it is apparent that Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos, and Prince's own testimony-shows that his intent was not transformative within the meaning of Section 107, though Prince intended his overall work to be creative and new.")

¹⁹⁷ *Id.* at 706 ("As even Cariou concedes, however, the district court's legal premise was not correct. The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.")

for determining transformativeness by rigidly applying the comment-on-the-work standard. Batts did not discuss the possibility that Prince might produce a transformative work even without purposely intending to comment on the underlying works. In other words, Batts prioritized intention over other sources of interpretive authority, such as text, context, audience reception, or expert testimony. Yet the work's transformativeness could have been discerned on the basis of formalist analysis, or expert testimony drawing on familiarity with the field of appropriation art, or audience perceptions of the extent of transformation. Choosing authorial intention reflects a particular, intentionalist methodology that Batts selected without discussion, and that arguably provided the grounds for *Cariou's* reversal, when the Second Circuit disavowed Batts's legal analysis.¹⁹⁸

The choices over interpretive methods in the *Cariou* litigation are neither unique, nor simple. Judges must—and routinely do—make choices methodological choices with regard to where to locate their interpretive authority. Depending on where a judge focuses interpretive authority, a case could result in a different outcome. The problem is, at present, there is little consensus that sophisticated interpretation is necessary, let alone guidance on how interpretation can and should be done. Yet interpretive grounds compete for authority. Choosing one interpretive method over another, as Judge Batts did in the *Cariou* litigation, does not occur in a vacuum of critical and legal theory, or at least, it should not.¹⁹⁹

Indeed, a robust literature exists outside of copyright law that puts copyright's interpretive regime into helpful perspective. The “dimensions of inquiry” in textual interpretation draw attention to questions other areas of law have long considered, because of their importance for doctrine and outcomes alike. For example, Professor Kent Greenawalt has enumerated dimensions of inquiry arising in interpreting wills and contracts. He includes seven key areas framed as a list of binarisms to help determine how meaning should be derived from the text: Writer or Reader? Subjective or Objective? Abstract or Contextual? Specific Aim or General Objective? Document or External Evidence? Time of Writing or Time of Interpretation?²⁰⁰ Those questions

¹⁹⁸ It is worth noting that Batts's choice was not unreasonable in its methodology, even if it was ultimately overruled. Intentionalism remained sufficiently viable that it animated the dissent of the Second Circuit's Judge Wallace. *Id.* at 712 (“Unlike the majority, I would allow the district court to consider Prince's statements in reviewing fair use. While not the sine qua non of fair use... I see no reason to discount Prince's statements as the majority does... I view Prince's statements—which, as Prince acknowledges, consist of ‘his view of the purpose and effect of each of the individual [p]aintings’—as relevant to the transformativeness analysis.”)

¹⁹⁹ Farley, *supra* note 30, at 839. (“These encounters with art show that law can often operate in a vacuum. The difficult questions about the nature and definition of art that courts encounter here have been addressed in philosophy, art history, and art criticism. But courts never acknowledge that these questions have already been theorized and that there are bodies of scholarship that are relevant and could be helpful.”)

²⁰⁰ Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 541-543 (2005).

already arise in copyright cases, and judges are often pressed to answer them in some form, with little guidance. Judges in copyright cases make interpretive selections with little to no discussion of their choices being embedded in a larger critical conversation on interpretive theory, in both law and aesthetics. Partly because the interpretive decision-making process lies below the surface, it remains malleable and produces often inconsistent results. At present, judges may rely on whatever sources of authority seem to them to be warranted, without explaining why. Even within the focus on one of these sources of authority, the analysis is not consistent or coherent across courts. With respect to the focus on audience, for instance, the judicial analysis appears circuit-dependent and seems to consist of a hybrid of standards.²⁰¹ Demonstrably, though, judges choose to prioritize one source of interpretive authority over another, without saying that—or why—they are doing so, and in so doing, they create a confused and confusing body of law.²⁰²

These interpretive tensions exist in law and aesthetics both. Rita Felski, a contemporary literary critic, has written: “We inflate context, in short, in order to deflate text; while newly magnified social conditions dispose and determine, the artwork flickers and grows dim.”²⁰³ Felski’s almost plaintive tone is in some sense trying to capture the difficult analytic balance between a text’s clearly internal factors and its external ones.²⁰⁴ Her comment evokes a longstanding set of debates over grounds of interpretive authority in schools of aesthetic and critical thought. These debates suggest that in the competition for interpretive authority, internal and external sources compete. When the so-called “death of the author” occurs, thus lifting the reader to semiotic prominence, Roland Barthes

²⁰¹ Jeanne C. Fromer and Mark Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. ____ (forthcoming 2014) (“Copyright law’s use of varied infringement audiences—sometimes depending on the circuit—is confused and circuit-dependent. As a general matter, however, copyright uses a hybrid test, drawing on the perspective of the expert and of some non-expert observer (either the consumer or the ordinary person).”)

²⁰² Yen, *supra* note __, at 250 (“Copyright law develops as judges change the premises governing interpretation of the law. . . . the precedent which governs new cases may be inconsistent, and . . . the outcome of a case could depend on the precedent a judge chooses to apply. To the extent that these inconsistencies parallel differences in aesthetic theories, the judicial selection of controlling precedent in a given case effectively becomes a choice among competing aesthetic theories. . . . Analytically inconsistent cases therefore exist simultaneously as ‘good law.’”)

²⁰³ Rita Felski, *Context Stinks!* 42 NEW LIT. HIST. 573 (2011)

²⁰⁴ I acknowledge that the distinction between internal and external is reductionist, even problematic. The point of new historicism, after all, is to suggest that what I am calling external factors cannot be divorced from the way the text comes together; its social moment *produces* the text, suggesting that any internal/external binarism is destined to fail. What is outside the text (history) is necessarily contained within it under a theory that says that historical forces have contributed to shaping all texts. For the moment, I set aside these admittedly difficult textual metaphysics. Here, I mean simply to refer to internal in its formalist or four-corners meaning and external to mean extrinsic or metatextual, that is, non-formalist approaches to the text. Said [*Only Part of the Picture*], *supra* note __, at 361.

writes, “[t]he birth of the reader must be ransomed by the death of the author.”²⁰⁵ The different approaches taken in the two courts in *Cariou* reflect this potentially deep methodological divide, one to which scholars of aesthetics and humanities are highly sensitized, since the politics of interpretation occupy center stage in those fields of inquiry. Of course, interpretive choices about method also matter a great deal to legal outcomes. Because these choices matter, it is worth underscoring that they are difficult to make, full of semiotic, legal, and factual complexity. The next part argues that interpretive issues in copyright cases are complex, even when non-technical works, such as works of art, music, and literature, are at issue.

PART III. COPYRIGHT’S INTERPRETIVE CHOICE REGIME IS COMPLEX

The previous Parts have argued that interpretive issues are embedded in the doctrinal analysis judges must routinely undertake as they must determine whether works are protected, whether works have been infringed, and whether various defenses apply. This Part argues that these interpretive issues are difficult, and militate in favor of a doctrine that guides judges rather than assuming they already possess all the tools they might need for the task. Part III.A argues that copyrightable works are complex and III.B argues that the work of interpreting them equally so. Part III.C shows that scholars acknowledge copyright’s interpretive complexity, and Part III.D. demonstrates that despite the difficulty, judges have a wide berth, and little in the way of guidance to assist them in navigating it. Part III concludes that copyright law should abandon its presumption of non-complexity for expressive works and their analysis. It should recognize that analysis of copyrightable works is methodologically embedded in an intellectual history, both deep and wide, of sophisticated methods of interpretation in which judges already participate.

A. COPYRIGHTABLE WORKS ARE COMPLEX

This Part argues that judges in copyright cases sometimes appear to assume that disputed works in copyright cases are not complex, and thus do not require methodologically explicit interpretation. Copyright case law erroneously presumes that the work of textual analysis required in copyright infringement cases is not complex. I disagree: both the analysis and the works analyzed are complex, dynamic things and should be acknowledged as such. Judges have to make difficult methodological decisions no less complex than those required of them when confronted with technical (software) cases. In the former, courts and scholars have not generally acknowledged the inevitable complexity; in the latter, the reverse is true.

Elsewhere in the law, when judges face complex or “polycentric” issues, or issues that explicitly require interpretation, judges typically offer reasons and otherwise explain their work. Typically in such cases, judges will receive expert evidence to guide their analysis. By contrast, in copyright law, when questions of interpretation grow very complex,

²⁰⁵ ROLAND BARTHES, THE DEATH OF THE AUTHOR, IN THE RUSTLE OF LANGUAGE 49, 50 (Richard Howard trans., 1986) at 11.

judges sometimes offer conclusions with little to no support or explanation.²⁰⁶ Judges sometimes proceed as though expressive works were effectively self-interpreting, facially clear, and thus semiotically accessible.²⁰⁷ Tushnet has referred to this as a judicial tendency to treat certain works as though they were “transparent,” that is, clear on their surfaces and thus requiring no interpretive apparatus.²⁰⁸ Displaying what Tushnet has aptly called, in the context of visual works, “the epistemic hubris” of copyright law, judges see fit to make rulings on artistic works as though these objects of study required no special methodology.²⁰⁹ That is, they can be said to treat expressive works as though those were transparent (Tushnet’s language) or autonomous (my language).

To be sure, this judicial tendency toward textual autonomy—the view that allows the work to speak for itself—is efficient, since it collapses the possibilities of the multiple into the certitude of the singular.²¹⁰ Yet this interpretive hubris also at times betrays an interpretive provincialism. Some judges seem to think that certain objects of their analysis are hard, and some are easier. *Computer Associates v. Altai*, a case that has become a lynchpin in copyright’s infringement analysis, held that it was simply “the reality that computer programs are likely to be somewhat impenetrable by lay observers—whether they be judges or juries,” and it argued that it could not “disregard the highly complicated and technical subject matter at the heart of these claims.”²¹¹ Likewise, this language, from a piece of scholarship published in a highly respected law review, captures the idea:

Unfortunately, while judges are commonly familiar with literature, they are not necessarily familiar with the intricacies of computer technology. Judges have well-developed intuitions about what is and is not important in comparing two works of literature. One cannot hope for a similar understanding of computer programming, due to its more technical nature.²¹²

²⁰⁶ Farley, *supra* note 30, at 838-39 (2005) (“Probably the most prevalent way that courts deal with the tension between needing to decide an object’s art status, while at the same time being admonished not to do so, is simply to reach a conclusion on that question without including any supporting analysis. Perhaps these courts believe that if they state bald conclusions, they will not be accused of engaging in aesthetic judgments. [the] conclusion [a]re stated flatly, as if self-evident.”¹³⁷ The courts must have relied on certain ideas about the nature of art, but no reasoning was articulated.” [citations and examples omitted])

²⁰⁷ The view of texts as self-explicating or semiotically autonomous is discernible in judicial language stressing that artistic works themselves supersede any statements of them, as discussed *supra* with respect to dicta in *Gaito* and *Walker*. See Part I.A, p. ____.

²⁰⁸ Tushnet, *supra* note 14, at 688.

²⁰⁹ *Folio Impressions Inc. v. Byers California*, 937 F.2d 759 (2d Cir. 1991)(all that is required is a visual comparison of the works).

²¹⁰ Tushnet, *supra* note 14, at 688.

²¹¹ *Id.*

²¹² David W.T. Daniels, *Learned Hand Never Played Nintendo: A Better Way to Think About the Non-Literal, Non-Visual Software Copyright Cases*, 61 U. CHI. L. REV. 613, 635 (1994).

The patronizing tone here reflects the idea that non-“technical,” expressive works are accessible to judges because of their training in (what in our era, in our country happens to be considered by many) the humanistic discipline of law.²¹³ By contrast, judges are thought to lack the expertise to weigh in on complex software matters since legal training does not equip judges with familiarity in computer code languages.²¹⁴ This presumption is not just a philistine nuisance; it has unfortunate ramifications for copyright law, as the next two subparts argue.

B. ANALYSIS OF COPYRIGHTABLE WORKS IS INTERPRETIVELY COMPLEX

At present, a consensus seems to exist that copyright adjudication does not require complex interpretive work of judges when they adjudicate expressive and artistic, or “non-technical” works.²¹⁵ Copyright law contrasts expressive works with technical works such as software; the former are thought not to require particular training or sophistication for their adjudication. Both the works, and the analysis necessary to adjudicate them, are cast as nontechnical and thus accessible. Judges are thought to be able to decode the works at issue simply by having them in front of them; dicta refer to the way that texts offer a kind of testimony that judicial common sense can simply discern: “the ‘mute testimony’ of the forms put him in as good a position as the Copyright Office to decide the issue,”²¹⁶ and “[g]ood eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts.”²¹⁷ Some courts only allude to the purported simplicity of the work before them, but some say so outright: “[T]he Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training.”²¹⁸

In fact, however, the analysis of these works is methodologically complex. One court has bemoaned the “turbid water of the ‘extrinsic test’” and referred to its application in one context as a “somewhat unnatural task, guided by relatively little precedent.”²¹⁹ When judges interpret an artistic text, they are necessarily making a set of unacknowledged

²¹³ GRAEME B. DINWOODIE, *REFINING NOTIONS OF IDEA AND EXPRESSION THROUGH LINGUISTIC ANALYSIS*, IN *COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE* 194, 204 (Lionel Bently et al. eds., 2010) (“[C]ourts, who work daily with words, perhaps instinctively believe they understand the nature of literary works.”)

²¹⁴ *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992); Lee; *supra* note 24.

²¹⁵ *Altai*, 982 F.2d at 713. Lemley *supra* note 13 (describing the state of the law).

²¹⁶ *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 414 (2d Cir. 1985)(referring approvingly to Judge Wexler’s reasoning in the lower court’s decision).

²¹⁷ *Klauber Bros., Inc. v. Russell-Newman, Inc.*, 2013 WL 1245456 (S.D.N.Y.)(referring to the lower court’s decision).

²¹⁸ *Gable v. Nat’l Broad. Co.*, 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010) *aff’d sub nom. Gable v. Nat’l Broad. Co., Inc.*, 438 F. App’x 587 (9th Cir. 2011).

²¹⁹ *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004)

methodological choices that presuppose anterior interpretive and theoretical judgments.²²⁰ Experience or expertise surely increases the ability to make those judgments. Judge Richard Posner, also the author of a widely disseminated book on law and literature acknowledges that, at least in one context of copyright law, judges must make judgments based on their interpretation of the works at issue.²²¹ He argues that judges often must be able to grasp the point of a parody in order to find it un infringing. To that end, he thinks literariness a virtue, suggesting that expertise helps what is otherwise a complex task.²²²

The complex task of adjudicating expressive works in copyright cases always requires some methodological choice. This is true even when judges speak from an analytical stance that is clothed in intuition, that is, a stance that appears to consist merely of common-law style legal reasoning. Professor Adrian Vermeule writes

The idea that judges should take each case as it comes, interpreting statutes sensibly in light of the materials at hand, itself constitutes an implicit choice of interpretive method and an implicit allocation of interpretive authority.²²³

Intuitionism is a choice, as is the refusal to apply a particular method, or to give reasons. They differ from conventional interpretive methods, but they should be viewed as methods judges sometimes choose.

The interpretive choices attaching to expressive works are necessarily complex, and how to negotiate these choices is by no means clear. The works themselves are semiotically complex, too. Still, many courts proceed as though interpretive choices with respect to expressive works are unnecessary, and their adjudication easier than resolving questions raised by cases concerning technology and science. Finally, because adjudication of expressive works is not thought to be complex, no robust methodology for how to analyze these works has emerged. Judges lack clear guidance on what to do when confronted with expressive or artistic works, because at present, there is little awareness of the interpretive complexity inherent in copyright law.

C. SCHOLARS HAVE NOTED THE INTERPRETIVE COMPLEXITY OF COPYRIGHT LAW

Despite the prevailing view, in case law, that complexity tracks technicality, thus making non-technical works presumptively non-complex, recent scholarship has begun to explore copyright's interpretive complexity. Though this emerging body of scholarship has not emphasized interpretive method selection, in its attempts to locate heuristics to clarify

²²⁰ Zahr Said Stauffer, 'Po-Mo Karaoke' or Postcolonial Pastiche? What Fair Use Analysis Could Draw from Literary Criticism, 31 COLUM. J.L. & ARTS 43, 49-50 (2007).

²²¹ RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION, 3D ED (2010), 544.

²²² *Id.* ("[T]he more literary the judges, the greater the probability of finding [the] point" of the parody.)

²²³ Vermeule, *supra*, note 4, at 97 (2000).

copyright analysis, it folds in assumptions about copyright's inherent complexity. This Part discusses some recent scholarship in two areas, copyrightability, and fixation, to demonstrate that copyright law possess inherent complexity belied by rules that differentiate between so-called technical and non-technical works.

For copyrightability, the complex nature of the question is coupled with broad judicial discretion to decide the issue as a matter of law. Within copyrightability, the question of "originality as a legal construct" offers certain challenges in the contemporary creation landscape.²²⁴ Professor Ed Lee has argued that originality, though historically a simple determination, may have grown more difficult in the digital era.²²⁵ Nonetheless, judges at present do have what Lee characterizes as "considerable discretion to decide the issue" of originality and he laments that "the precise contours of [its] requirements remain obscure."²²⁶ Professor Eva E. Subotnik has suggested that maintaining a low threshold for copyright makes sense. This would seem to allow judges to do as little normative analysis as possible in an area fraught with aesthetic complexity. Both Lee and Subotnik propose certain heuristics to try to reduce uncertainty, the former as a three-part test, the latter as a set of proxies. Subotnik writes:

Caught between the impermissibility of relying upon aesthetic virtues, on the one hand, and the degree of effort expended by an author, on the other, the closest courts can come to identifying originality, at least under the current copyright framework, is through proxies for the legal concept. ... [T]his article identifies three that serve this function: the proxy of ontology, the proxy of narrative, and the proxy of comparison.²²⁷

Subotnik's suggested use of proxies underscores the complex work that judges do, and the difficulty they have had in articulating, let alone employing, interpretive methodology consistently. Likewise, Lee has proposed a heuristic designed to resolve problems arising from uncertainty around what authorship and originality mean in the digital era.²²⁸ Lee's model would introduce intentionalism, or at least authorial output, in combination with other factors, rather than insisting on only formalism, or the text.²²⁹ In his emphasis on authorial efforts and skill, Lee acknowledges that independent creation will feature "a wide degree of subjective choices by the artist."²³⁰ These choices seem likely to introduce issues of subtlety and complexity sufficient to make administering related tests very difficult, absent clear methodological choices with respect to interpretation. It is striking

²²⁴ Subotnik, *supra* note __, at 1490.

²²⁵ Edward Lee, *Digital Originality*, 14 VAND. J. ENT. & TECH. L. 919, 920 (2012).

²²⁶ *Id.* at 919.

²²⁷ Subotnik, *supra* note __, at 1494.

²²⁸ Lee [Digital Originality], *supra* note __, at 919, 936.

²²⁹ *Id.* at 937.

²³⁰ *Id.* at 940.

though, that both Subotnik and Lee seek to introduce heuristics or simplifying measures, legal strategies to guide judges or reduce the challenges judges face, due to copyright's inherent complexity.

Relatedly, in the fixation context, scholars have noted the intricate theoretical questions judges must decide; I would argue that the difficulty is augmented by lack of clarity as a matter of interpretive method. For instance, discussion of whether a work is "fixed" for the purposes of copyright's fixation requirement requires selection of an interpretive method with which to proceed. Interpretive methods could vary in how to define the work, including how to conceptualize what counts as its "text" versus its context. For example, if the context around a work affects the work, does it erode the boundaries of the work? Put another way, once the text and context have been defined, what effect should context have on text, in a court's definition of a work's fixation? A court asked an intriguing version of this question recently: if a horticultural sculpture is eroded by wind and rain, does it change so much that it can no longer be considered fixed?²³¹ Or perhaps a garden lies at the other end of the spectrum: it changes too much by its very nature, to be considered properly fixed in the first place: "gardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed."²³² *Kelley's* fixation question tees up the difficulty of defining a work for the purposes of copyright law.

How one frames what counts as "the work" in the first place is largely a function of interpretive method selection.²³³ Robert H. Rotstein has shown how bringing aesthetic theories to copyright law reveals a disconnect between the legal notion of a work as fixed and immutable, and the literary notion of a text as inherently mutable.²³⁴

Unlike the stable and autonomous "work," which the law treats as akin to an object, the text is a process—an act of speech that occurs when a member of an audience (a reader, viewer, listener, computer operator) interacts with the textual artifact (that is, the book, motion picture, song, or computer program). Thus, for example, the song *The Boxer* in 1969 was a different "text" from *The Boxer* in 1981, because the listeners in each case "created" different texts.²³⁵

Rotstein's view may overstate the critical influence of reception theory, but whether or not its view of the text as functionally dependent on its reader is taken as completely accurate, it highlights the normative nature of defining the boundaries and function of a work of authorship for the purposes of copyright law.

²³¹ *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011).

²³² *Id.* at 304.

²³³ Rotstein, *supra* note 60, at 727 ("Contemporary literary theory has vigorously debated the significance of the mutability of 'works of authorship'").

²³⁴ *Id.*

²³⁵ *Id.*

Similarly, Professor Michael Madison has examined the constructedness of the notion of the work, and urged scholars to treat the boundaries of a work with greater fluidity.²³⁶ Professor Laura Heymann has likewise drawn attention to the way that fixation delineates a legally constructed line around a work, and she stresses the fact that its boundaries are not otherwise aesthetically fixed or inevitable. For Heymann, fixation is what “creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs.”²³⁷ Her analysis sheds nuanced light on the complex boundary that fixation creates:

It transforms the creative process (and its subject) from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation. Even in contexts in which there is no competing claim as to control, fixation still works to bound the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights. Once an “author” has fixed a certain version of her work, she has propertized its subject, subordinating the work to the various laws and tropes that come with a property-based regime such as copyright law: ownership, transformation, borrowing, and theft. Fixation is what allows the subject to be commercialized and analyzed; it is what marks the transformation to subject in the first place.²³⁸

In Heymann's vision, the dynamism of interpretive fluidity yields to static lines the law draws in order to demarcate—and contain—property. Heymann's account of the “work” hints at the semiotic play between the various interpretive grounds in which authority can lie. If a judge grounds interpretive authority in the text (in *Kelley*, it was the horticultural sculpture), then changes like those made by the wind, the rain, and the fauna in *Kelley* would dictate a finding of non-fixation, and thus noncopyrightability. If a judge focuses on the work as something that exists in perpetual dialogue with its audience, thus embracing a reader-response theory, or a contextualist approach, a work's contours will seem less defined. Viewed with such a lens, the work will evolve as perceptions of it evolve. Consequently, it would likely be held to be unfixed by its nature, like the garden in *Kelley*, unless an argument could be made that the work required flux and growth as part of its reception, without losing copyright protection altogether. Interestingly, Sir Conan Doyle's estate attempted to make a version of this argument in order to extend copyright in Sherlock Holmes, but the court rejected this line of reasoning as an end-run

²³⁶ See, e.g. Madison, Michael J., *IP Things as Boundary Objects: The Case of the Copyright Work* (March 31, 2013). U. of Pittsburgh Legal Studies Research Paper No. 2013-12. Available at SSRN: <http://ssrn.com/abstract=2256255> or <http://dx.doi.org/10.2139/ssrn.2256255>.

²³⁷ Laura A. Heymann, *How to Write A Life: Some Thoughts on Fixation and the Copyright/privacy Divide*, 51 WM. & MARY L. REV. 825, 829-30 (2009).

²³⁸ *Id.*

around the limited duration requirement.²³⁹ This brief discussion of the “work” as a legal construct shows yet another way in which interpretive aesthetics can make the legally relevant difference by invalidating for lack of fixation a copyright that otherwise appeared valid.

This Part has provided a handful of examples of recent scholarship that attest to the understanding, at least among scholars, that copyright possesses inherent interpretive complexity. Scholars have responded by trying to propose heuristics, and by trying to diagnose more accurately when and where these difficulties arise, and may even be predicted. Scholars' view of copyright law, however, does not align with the judicial presumption, alive and well in most circuits, that copyright law in non-technical works is not interpretively complex, and does not require special treatment or judicial guidance.

D. JUDGES RECEIVE LITTLE GUIDANCE AND MUCH DISCRETION

Conceiving of expressive works—and the analysis they require—as non-complex has two further consequences for copyright law. First, expert testimony tends to be disallowed on questions that are nonetheless difficult and could benefit from illumination by experts. Second, copyright imposes no requirement that judges be transparent about how they decide where to ground their interpretive authority, and how much weight to accord any one source. Because the question is not considered difficult at present, its resolution requires no scrutiny and imposes no constraints. We might shrug and conclude that this flexibility is a characteristic aspect, and one of the chief benefits, of the common law system. Yet elsewhere in copyright's analysis, judges do face some procedural constraints, and it is unclear that the scope of interpretive latitude exists by design, rather than because judicial interpretation has escaped our collective focus. Indeed, the proper scope of judicial discretion in choosing how, when, and even whether to interpret the works in copyright cases can only be evaluated once it is clear that copyright law routinely requires that judges face these choices, and that these choices are complex.

As it now stands, most circuits do not allow judges to receive a great deal of assistance from experts, on what I would argue are the hardest interpretive questions.²⁴⁰ This may be a consequence of the enduring fallacy that artistic works are not deserving of, or rather do not *require* technical interpretation in the way that technical works such as computer

²³⁹ “From the outset of the series of Arthur Conan Doyle stories and novels that began in 1887 Holmes and Watson were distinctive characters and therefore copyrightable. They were “incomplete” only in the sense that Doyle might want to (and later did) add additional features to their portrayals. The resulting somewhat altered characters were derivative works, the additional features of which that were added in the ten late stories being protected by the copyrights on those stories. The alterations do not revive the expired copyrights on the original characters.” *Klinger v. Conan Doyle Estate, Ltd.*, 14-1128, 2014 WL 2726187 (7th Cir. June 16, 2014).

²⁴⁰ Lemley, *supra* note 13, at 726.

software programs do.²⁴¹ Even when it is allowed, expert evidence plays a much more minor role in copyright law than it might play. Indeed, judges routinely deny or seem to ignore interpretive assistance when it is proffered.²⁴² Recognizing the genuine challenges of copyright's interpretive complexity could affect when and whether to admit expert testimony to assist factfinders.

At common law, the standard for infringement was whether an ordinary observer would recognize a work as having been impermissibly copied by another. Expert testimony was typically inadmissible on that question. *Altai* held that expert testimony could be admitted in the narrow cases of complex works that might be too difficult for lay observers to understand. *Altai* thus reaffirmed “the traditional role of lay observers in judging substantial similarity in copyright cases that involve the aesthetic arts, such as music, visual works or literature.”²⁴³ Technical subject matter may merit expert testimony, but the aesthetic arts should continue to need no expertise other than that of the lay observer, which is a standard applied by the factfinder (very often, the judge).²⁴⁴ The admissibility of expert testimony is subject to court discretion under Federal Rule of Evidence 702, guided by the premise that the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.”²⁴⁵ *Altai* clarified that when “the subject matter is not complex or technical, such as a computer program or a functional object... but instead involves a literary work aimed at a general audience, expert testimony will seldom be necessary to determine substantial similarity.”²⁴⁶

Much subsequent case law has reaffirmed this distinction between technical and accessible, unfamiliar and familiar, scientific and artistic, hard and easy, subject matter. Important legal consequences flow from this simplistic set of distinctions, which are, perhaps, reflected in the entrenchment of the terms “soft IP” (referring to copyright, trademark, trade secret and trade dress law) and “hard IP” (referring to patent law).²⁴⁷ In

²⁴¹ We see this in *Apple v. Microsoft*, 35 F.3d 1435, 1443 (9th Cir. 1994), among other places.] Cf. Lemley, *supra* note 13, at 740 (suggesting broader adoption by the standard used in software cases, which permits expert evidence on the question of improper appropriation).

²⁴² *Salinger v. Colting*, 607 F. 3d 68 (2d Cir. 2010)(ignoring expert evidence from all five experts presenting arguments in favor of finding a fair use).

²⁴³ *Id.* at 714-715.

²⁴⁴ *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 834 (C.D. Cal. 2010) aff'd sub nom. *Gable v. Nat'l Broad. Co., Inc.*, 438 F. App'x 587 (9th Cir. 2011)(“the Court recognizes that the task of comparing two fiction works is not highly technical, and indeed requires no specific training”).

²⁴⁵ Fed. R. Evid. 702.

²⁴⁶ *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992).

²⁴⁷ See e.g. Marc E. Hankin, *Comment: Now That We Know “The Way Forward,” Let Us Stay the Course*, 77 CHI.-KENT L. REV. 1295, 1298-99 (2002)(“Intellectual Property” (“IP”) is an umbrella term designed to include a bundle of rights, often considered to be intangible, that typically deal with technical inventions and works of creative authorship. This bundle includes patents, trademarks, copyrights, mask works, trade

a majority of circuits, judges are permitted to consider expert testimony in cases with technical issues, which typically arise in software cases, even when, in cases with nontechnical issues, such testimony would be excluded.²⁴⁸

Most circuits do not allow expert analysis on the question of whether copying was improper. Not all copying is unlawful, yet discerning whether what has been copied—and why—can be an extraordinarily difficult exercise in line-drawing. It may seem counterintuitive, then, that the majority of courts exclude expert testimony during the stage of the analysis when analysis seems to grow most complex.²⁴⁹ Even when, in theory, courts *could* admit expert testimony, judges frequently view such evidence with diffidence. An early example comes from Judge Learned Hand, who refused to consider expert testimony as to substantial similarity in the classic case of *Nichols v. Universal*. Judge Hand not only excluded expert evidence, he remonstrated with the plaintiff for seeking to include it in the record. As a methodological manifesto-in-the-making, it is worth quoting in full:

We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. *It ought not to be allowed at all*; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the *less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal*. We hope that in this class of cases such evidence may in the future be entirely excluded, and *the case confined to the actual issues*; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical.²⁵⁰

secrets, and additional rights that are spelled out in various ways by different countries throughout the world.¹⁶ All of these rights, however, can be broken down into what most attorneys think of as “hard IP” or “soft IP”); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 471 (2011); Andrew A. Schwartz, *The Corporate Preference for Trade Secret*, 74 OHIO ST. L.J. 623, 668 (2013). *But cf.* Eric Goldman, 18 NO. 2 CYBERSPACE LAW. 11 (2013) (“[T]he hard/soft [IP] distinction might imply some difference in the degree of the practice’s difficulty, i.e., the perception that patent law, and any associated technology, are complicated and “hard,” while other IPs are relatively easy and “soft” by comparison. People rarely articulate this relative value judgment explicitly, ...Still, there is a certain implicit arrogance in this line of thinking.”)

²⁴⁸ Computer Associates Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992).

²⁴⁹ Shyam Balganes, Irina Manta, and Tess-Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. ____ (forthcoming 2014).

²⁵⁰ Nichols v. Universal Pictures Corporation, 45 F.2d 119, 122-123 (2d Cir. 1930).

Many subsequent cases have similarly evinced this same bristling attitude towards expert evidence, and even those judges who seem not to object to expert opinions scarcely welcome them. In *Tisi v. Patrick*, for instance, the court viewed the expert opinion as little more than window dressing to judicial intuition: “This action requires an analysis of the common and unique aspects of the two rock music compositions at issue *Thanks to the skill of counsel and the clarity of the Defendants’ expert witness, the unfamiliarity of the court with the genre has been overcome. A combination of common sense and a hastily trained ear* dictate the forthcoming result.”²⁵¹ To be sure, the expert witness assisted, but the outcome relied on judicial “common sense” as much as anything else.

In sum, because judges do not acknowledge that they are making choices about their interpretive methodologies, their opinions can—and often do—reflect interpretive judgments that appear to be driven more by outcome than consistency, coherence, or expert guidance. That is, on a crucial underlying aspect of copyright adjudication, judges frequently “move the goalposts” in ways that frustrate the goals of, predictability, fairness, and accountability in litigation. Judges attend to the facts of a given case as the basis for selecting an interpretive methodology, rather than choosing one based on clear norms or rules that parties can understand and subsequent courts can follow, or at least debate openly. Instead, these choices often appear to be fact-driven, without explicit admission they are so. These choices tend to be inconsistent across similar cases, thus contravening the principle of stare decisis. Sometimes these choices are inconsistent even within a given opinion, suggesting the consequentialist and incoherent nature of the interpretive analysis and the difficulty created for subsequent parties trying to predict their own outcomes. Leaving copyright’s complexity unacknowledged means judges do not receive the benefits of expert testimony, and a widely held view that none is necessary remains the rule. However, judges consistently face complex interpretive questions that could be better addressed if copyright’s cognitive burdens were more accurately assessed, and taken into consideration.

Copyright law should abandon its non-complexity premise, with respect to the work it requires of judges, and the interpretively complex nature of expressive works. The consequences of this premise are that expert guidance is disallowed right when it is most needed, and judges are not attentive to their interpretive methodology with expressive works because none appears necessary. Acknowledging the interpretive complexity inherent in copyrightable works supports the conclusion that copyright adjudication would benefit from greater transparency and more judicial guidance with respect to choice of interpretive methods.

PART IV. DOCTRINE SHOULD STRUCTURE JUDGES’ INTERPRETIVE CHOICES

Copyright’s interpretive choice regime controls questions of major importance for the parties, such as whether an issue may be decided at summary judgment, whether expert testimony is allowed or required, and whether a use is fair or not (among multiple other

²⁵¹ *Tisi v. Patrick*, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000).

doctrinal issues). Characterizing what copyright demands of judges helps clarify the proper scope of their authority, and the proper tools for them to use in exercising it. Currently, the lack of transparency that characterizes copyright's interpretive practices creates unpredictability and unfairness for the parties. This Part offers a set of prescriptions about which interpretive methods might be best adopted, by whom, when, and for what purpose. It argues in favor of continuing to allow judges to decide many copyright infringement cases as a matter of law, especially on pre-trial motions. Moreover, it argues that one interpretive method—formalism—is best suited to dispose of questions of law, especially pre-trial. Yet formalism does not work as a one-size-fits-all interpretive panacea. Other, more fact-intensive interpretive methods—namely, contextualism and intentionalism—will more fairly and capably address particular doctrinal questions. Thus, a case decided on a full trial may witness an array of interpretive methods; it is up to the court to make transparent when and why it has selected a particular method. Ultimately, the approach likely to produce the greatest predictability and fairness is one that constrains judicial discretion over interpretive choice and relies on doctrine to structure judicial choices more consistently.

A. INTERPRETIVE CHOICE BELONGS WITH THE JUDGE

One of the chief benefits of recharacterizing judicial practices in copyright as interpretively complex, as Part III has done, is being able to address the allocation of decisional authority more precisely. Judges in copyright cases are called on to make complex interpretive choices about how to read a given work. By analogy with patent law, it becomes clear that the interpretive choices made by judges in copyright cases belong, largely, with the court, not with the jury.

In *Markman v. Westview* (“Markman I”), the Federal Circuit Court of Appeals held that claim construction—patent’s most heavily interpretive area—was a matter of law.²⁵² That has left courts struggling to determine the proper interpretive method, but it clarified, at least, the proper person to conduct the interpretive analysis.²⁵³ Critics still charge the interpretive regime with unpredictability, and excessive complexity; lively debates continue about the proper use of extrinsic versus solely intrinsic evidence in claim construction, and those debates may well have larger implications for copyright that future scholarship could address.²⁵⁴ Yet these debates can happen precisely because of the transparent and process-oriented nature of interpretation in patent law. Importantly, *Markman* made clear that the interpretive work required in patent law was of a particular kind, well-suited to allocation to the judge, and thus, a matter of law.²⁵⁵ It established a

²⁵² *Markman v. Westview Instruments, Inc.* 52 F.3d 967, 989 (Fed. Cir. 1995)(en banc).

²⁵³ Holbrook, *supra* note 26, at 146.

²⁵⁴ Mark D. Janis and Timothy R. Holbrook, *Patent Law’s Audience*, 97 MINN. L. REV. 72, 93-94 (2012).

²⁵⁵ Ned Snow, *Judge Playing Jury*, 44 U.C. DAVIS 483 (2010); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (“[W]hen an issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound

set of procedures—known as *Markman* hearings—in which this interpretive work by judges takes center stage.²⁵⁶ *Markman*—and patent law more generally—concerns interpretation of complex documents that may be semiotically, linguistically, and scientifically complex, as well as legally meaningful. Thus these extra procedures may be necessary, to provide judges with additional information on which to base their decisions.

Yet copyright law is not so different. Copyrightable works usually lack the scientific complexity of (at least some) patent claims, but they are no less semiotically complex despite judicial tendencies to decide copyright infringement issues based on gestalt. While judges may not need a hearing simply on the interpretive issues in a copyright case, it is not unreasonable to think they might, in some cases, benefit from expert testimony, or from extrinsic evidence that goes beyond the four corners of the work. The discretion to decide should be, however, not a doctrinal rule—as it is in copyright now, existing in an incoherent patchwork of different Circuits' rules—but a matter for judicial decision-making. Following *Markman*'s logic, copyright judges should continue to exercise their authority to make interpretive choices about the works they adjudicate, and they should do so largely as a matter of law, with exceptions discussed below.

Treating copyright cases in this way would have the salutary effect of minimizing the need for jury trials and, perhaps, shortening litigation generally. Indeed, I would argue that the kinds of questions that involve facts are largely absent from much, though not most, interpretive choice issues in copyright, which may be borne out by the sheer number of cases resolved on early motions, on the legal question of substantial similarity. Yet for matters of law, judges exercise a great deal of discretion—indeed, they have nearly unfettered access to a range of interpretive choices—and they usually decide, without external constraints, what interpretive authorities they will select.

B. JUDGES SHOULD ADOPT FORMALISM AS A DEFAULT

Our current regime provides judicial discretion over interpretive choice with no mandate for transparency about the methodological choices that exist and that judges select. In my view, greater constraints on this discretionary power make a good deal of sense. This Part argues that judges deciding issues as a matter of law should adopt formalism as a methodological default. Adopting formalism within a two-tiered structure that allows judges to default to it, and then proceed to other interpretive methods if such a departure is warranted, would create greater predictability in outcomes, and could minimize litigation time and expense.

Formalism is well-suited to analysis by a single individual with the ability to “read” evidence like the patterns created through dissection or other “objective” analysis. While not every reader will draw the same conclusions from a set of patterns, the patterns

administration of justice, one judicial actor is better positioned than another to decide the issue in question”).

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themselves are often inarguably present or absent.²⁵⁷ That is, parties can point to a list of similarities that is either more or less convincing, but that amounts to external, objective evidence. When parties offer a battle of the lists of similar features, judges can evaluate the strength of these lists against a baseline of their own extrinsic analysis of the works. Apples can be compared to apples, and oranges discerned more readily as a different fruit. This extrinsic or objective analysis takes as its starting point the figurative “four corners” of the work, or what we might call the bounds of the work when it is not textual or paginated. The work serves as the source of interpretive authority, thus minimizing the amount of evidence required at that stage, and narrowing the grounds available for dispute.

Formalism has many virtues in this context. Formalism is rule-based, rather than standards-based, as an interpretive method.²⁵⁸ It seeks to minimize flexibility, and maximize predictability.²⁵⁹ No interpretive method guarantees perfect predictability, of course. However, a method that emphasizes the same starting point each time—the work, or text, at issue—and the same modes of procedure within that work, will create greater consistency across cases. Judges can use formalism to weed out non-meritorious cases, or cases that are perhaps easy ones, lacking questions of fact about context, intention, and other complicating factors. Simply producing a “close reading” of both texts will often suffice to resolve the question. Explicitly acknowledging that they are applying a formalist or four-corners type of lens will curtail the fallacy that the work “speaks for itself,” which has in the past operated as a trump card to exclude other interpretive approaches, and extrinsic evidence.²⁶⁰ Texts are not self-interpreting, but require interpretive engagement of judges. Formalism brings judicial analysis to the surface, forcing judges to produce a record of analysis that is more objective than a hunch, or gestalt, about the works in question.

The formalism that would serve copyright best by producing the greatest predictability is process-based formalism that emphasizes procedure, consistent reason-giving, and process- rather than outcome-driven reasoning. To the extent that this process-based

²⁵⁷ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). *But see* *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001) vacated, 252 F.3d 1165 (11th Cir. 2001) and rev'd, 268 F.3d 1257 (11th Cir. 2001)(internal citations omitted): “Such lists, however, are “ ‘inherently subjective and unreliable,’ particularly where the list contains random similarities, and many such similarities could be found in very dissimilar works.”

²⁵⁸ Malkan, *supra* note ___, at 1, 4.

²⁵⁹ Fredrick Schauer, *On Formalism*, 97 YALE L.J. 509, 539 (1988).

²⁶⁰ *See supra* Part II.A.

formalism creates a mandate that judges “give reasons,” it creates commitments for the future, thus imposing a new set of constraints. If predictability and consistency are two of the key goals to keep in mind for improving copyright's infringement analysis, a shift to process-based formalism will work best.

Formalism is not, however, without drawbacks. The cost of using rules rather than standards is often loss of tailoring, and it can sometimes create unfairness. If judges explicitly adopt formalism in their resolution of questions of law, they will need some fallback or next-level mechanism for what happens when formalism does not sufficiently resolve the questions at bar. However, the need to move past formalism can be anticipated based on the types of work at issue, and the specific facts in play. If parties believe a formalist approach will miss crucial elements of the litigation, they can brief the court accordingly, and signal to the judge that perhaps this case is one that should not be resolved as a matter of law, nor on a solely formalist basis. For instance, they may point to expert depositions or even prior scholarship to indicate that expert opinions should be central to disposition of a case, or they may flag complex questions of fact that make pre-trial disposition improper. Where formalism appears inadequate, say, in cases requiring additional context, deep doctrinal analysis, or resolution of factual disputes, a fuller trial is, in any event, appropriate, as the rules around summary judgment already reflect.²⁶¹

Formalism's virtues, if deployed in the way I envision, include offering defendants a more predictable and streamlined way to cut off litigation pre-trial, because of a rebuttable presumption that judges, as a matter of law, could properly resolve a matter on the basis of objective or extrinsic analysis alone. Resolving disputes earlier on will help minimize costs to the parties, and take pressure off the judicial docket by obviating the need for trial or for additional evidence on summary judgment motions. Additionally, explicitly relying on formalism will improve predictability and transparency: parties can anticipate that judicial focus will be on the works themselves and on analysis of their structures, themes, and concrete elements, rather than on a malleable, unpredictable impression of the works. The shift to a more objective standard of analysis makes sense in light of the increased reliance on summary judgment as a dispute resolution mechanism. Historically, courts withheld summary judgment in copyright cases because of the concern that judges would have to wade into subjective analysis of similarity.²⁶² Though it is well-settled, now, that courts may find non-infringement as a matter of law on a motion of summary judgment, such determinations are limited to cases in which only non-copyrightable elements have been copied, or because the two works at issue are objectively *not* substantially similar: no reasonable juror could find otherwise.²⁶³ For all the foregoing reasons, judges should default to formalism when interpreting works at stages in which issues exist as questions of law. Thus, when looking at doctrinal

²⁶¹ Fed. R. Civ. P. 56.

²⁶² *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.) (citing *Arnstein v. Porter*, 154 F.2d 464, 474 (2d Cir.1946)), *cert. denied*, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980).

²⁶³ *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999).

questions like copyrightability, a matter of law, or when deciding issues on early motions, judges should default into formalism as a clear, predictable, rule-based interpretive method, whose analysis has the greatest capacity to be objective, efficient, and transparent.

C. FORMALISM BY ITSELF MAY NOT SUFFICE

In certain cases, however, formalism will not be the interpretive method best suited to achieve predictability, transparency, and fairness. Specifically, when questions of fact arise, formalism ceases to be the ideal default interpretive method. This is because some doctrines will require fact-finding (on questions of access, and copying, for instance) or call for extensive inquiry into sometimes subjective questions (such as an author's intent, the meaning of an unclear scope of assignment of copyright, or an audience's reception of a work). Certain doctrines may, in fact, require particular lenses, and contextualism may be more procedurally burdensome, but fairer, in those cases, than formalism. Thus there are many doctrines in which formalism, alone, may not render a fair or thoroughly reasoned decision.

For instance, when judges consider issues of joint authorship, works made for hire, and transfers and assignments of copyright, they are very likely to encounter uncertainties that go beyond the four corners of the given works. Disputes may touch on the works' similarities, to be sure, and to that extent, an explicitly formalist lens still makes sense on those issues. But the broader range of issues implicated will include authorial intention, employment conditions, contracts, targeted audience, and so on. Judges adjudicating questions not amenable to formalist approaches will consider intentionalism, institutionalism, contextualism, or some mix of those.

An interesting test case lies in interpretive methods used to determine fair use. The range of possible fair uses cases is great, and some uses are much more clearly fair than others. In some cases, the strong speech interests involved in fair use litigation would support a robust formalist approach to allow a judge to determine whether a use was fair on the basis of his objective analysis of the works alone. Such a clear, rule-based approach to the doctrine would help defendants whose constitutional interests we may have reason to believe are stronger than those of the average copyright defendant. Yet the backdrop of fair use cases show that in many of them, formalism could prove to be a poor fit. First, the transformativeness doctrine that drives the analysis under Section 107's first prong, the nature and purpose of the use, is sometimes not readily visible under formalist analysis. Sometimes it reveals itself under contextualist analysis (looking at genre, or audience reception by a particular interpretive community to which the judge is not privy); sometimes it can be informed by statements of authorial intention, expert opinions, or greater information, generally, all of which lie outside the text. Indeed, fair use is often considered a question of mixed fact and law, and historically, tended to be almost exclusively the province of the factfinder.²⁶⁴ Quite plainly, the statute itself

²⁶⁴ Ned Snow, *Fair Use as a Matter of Law*, 89 DENVER U. L. REV. 46 (2012).

incorporates a formalist analysis in its asking about the amount of work borrowed, but it just as plainly calls for moving beyond the text to the author's purpose, and to the effect of the work's publication on the relevant market.²⁶⁵ Because of its sensitivity to findings of fact, fair use may be a poor candidate for a formalist approach designed to cull cases at early stages, using rules and narrowing the scope of judicial inquiry.²⁶⁶ Finally, an undeniable part of fair use's power lies in its ability to bless what might have looked like infringing cutting-edge technologies and forms of avant-garde expression. When the boundaries between new and old are evolving and uncertain, a rules-based approach, with its lack of flexibility, may not be capable of adhering to copyright's larger mandate to promote progress. It may trade clarity for adaptability and fairness. Thus judges in fair use cases would do well to rely less heavily on formalism, and litigants to expect that many fair use cases will require broadening beyond the narrow scope of the work alone.

Under a process-based formalism, judges would begin with formalism in the first tier of analysis, and only if necessary, proceed to a second tier of more fact-intensive analysis. Judges would select from contextualist, intentionalist, and other approaches to interpreting the works. Such an approach would make clear what approaches were being used, and in this transparency, shine light on methodological abdication when it occurs. For judges, at times, simply conclude an issue, offering little other than an announcement, with no method apparent and no reasoning offered.²⁶⁷ This is sometimes the case when judges rely on "total concept and feel" analysis. It also happens under the guise of the lay observer standard.

Perhaps, as a policy matter, the lay observer standard is a province that is appropriate for judicial intuitionism. It could be that this is "a decision-making environment" like those in which, as Professor Schauer has written, it may be normatively a good thing for decision makers not to have to give reasons.²⁶⁸ If giving reasons means giving commitments, then perhaps it would overly constrain future judges to be bound to particular methods in arriving at a conclusion purporting to capture the lay observer's perspective. Yet the problem with the current thinking is that intuitionism does effectively already make a choice. By assuming that they can discern the lay observer's view of the works based on their own, intuitive responses to the works before them, judges, like Judge Moore in *Ideal Toys*, make a methodological choice. Moore may not have given a reason, but at some level of generality, he has made a kind of commitment.

²⁶⁵ 17 U.S.C. §107.

²⁶⁶ "In applying the fair use doctrine "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis" and "all [of the four factors] are to be explored, and the results weighed together in light of the purposes of copyright." *Salinger v. Colting*, 641 F. Supp. 2d 250, 255 (S.D.N.Y. 2009) vacated, 607 F.3d 68 (2d Cir. 2010) (citing *Campbell*, 510 U.S. at 577–78, 114 S.Ct. 1164).

²⁶⁷ *Tufkenian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003).

²⁶⁸ Schauer, *supra* note 3, at 634 ("[M]any decisionmaking environments eschew the very feature that the conventional picture of legal decisionmaking takes as an essential component of rationality.")

That commitment is to a standard that broadly accords judges the discretion to fill it through intuitive analysis. When one chooses an intuitive methodological approach, one is necessarily choosing it over other approaches.²⁶⁹

Because intuitionism is a method (of sorts), but an extremely manipulable one that is difficult to evaluate on appeal, it ought to arise only in cases in which there is a strong argument that other methods are inadequate, from a process-based formalism perspective. A shift to an intuitionist method should not, in other words, arise out of an outcome-determinative analysis that finds that, for example, a holistic approach is the sole way to arrive at a finding of infringement (as it was in *Roth*, the case that has come to stand for the total concept and feel test).²⁷⁰ If intuitionism adds depth or nuance to an already robust analysis, it may, perhaps, have some value for judicial reasoning.

In sum, judges are the proper authority to make decisions of interpretive choice in copyright law. When they confront matters of law, judges should adopt formalism unless the parties can rebut the presumption that formalism should operate, either by showing that a question of fact exists that would trigger a shift in method, or by showing that formalism will fail to capture some crucial aspect of the case. Nonetheless, judges should acknowledge the limits of formalism; sometimes other methods will be required, as when matters of fact arise, or when doctrines arise that inherently require inquiry beyond the text, thus minimizing the utility of formalism. Judges should still be empowered to decide, as a matter of law, that a different interpretive method is required, and to acknowledge an occasionally inevitable broadening of scope. This Part has argued for greater reliance on a process-based formalism, or “dissective analysis,” anchored within a larger procedural two-tiered structure. Formalist analysis, as a default, best structures judicial decisionmaking and serves the copyright regime most efficiently and fairly. Other interpretive methods can be thought of as second-tier, less frequently arising complements rather than equivalent alternatives. There is a place for contextualism, and other non-formalist interpretive methods, so long as they are properly methods, and not purely hunches. Relatedly, gestalt, impressionistic analysis should be used only sparingly, if at all. With greater guidance of interpretive choice in copyright law, steering judicial analysis increasingly toward process-based formalism, outcomes can be more predictable, consistent, logical, and fair.

PART V. CONCLUSION

The Article has demonstrated that judges in copyright adjudication face numerous, inevitable, and difficult interpretive questions. Specifically, at recurring methodological forks in their analysis, judges must decide what interpretive methods to use, just as they would if they were adjudicating legally determinative textual objects such as contracts. I

²⁶⁹ Said, *supra* note 33, at 365 (“If one can be said to grasp an image’s meaning immediately upon receipt, one necessarily implies that the work’s critical reception, its genre, and its author’s intention matter less, if at all.”)

²⁷⁰ Samuelson, *supra* note 13, at ____.

have shown how these choices implicate larger theoretical questions with real legal significance for outcomes. Far from having answered these questions, copyright scholarship has not yet really asked them in any systematic way. Moreover, these interpretive questions are not issues that arise in only a narrow stratum of difficult cases. They arise in all copyright cases, just as interpretive questions can exist in all cases concerning contracts, wills, statutes, and the Constitution; indeed, just as in those other areas, questions of interpretive method are often the hardest issues to decide. In that sense, copyright law is not meaningfully different from those other areas of law.

Copyright law requires judges to act with interpretive precision, but it denies them meaningful, consistent guidance. It also empowers them to act with considerable discretion with regards to the interpretive methods they use. Their decisions as to their interpretive authority are not made on the surface, and thus they are not explicitly reviewed on appeal.

Streamlining and clarifying copyright adjudication through adoption of process-based formalism by insisting on different interpretive strategies and actions could serve the values of transparency, predictability, fairness, and efficiency. This would effectively reflect a shift from interpretive standards to interpretive rules. Additional changes could be contemplated in the rules around expert evidence. Many possible solutions exist. At a higher level of abstraction, any systematic change will require a jurisprudentially informed discussion of the desirable scope of judicial authority as well as the tradeoffs of rules versus standards. At a much more immediate level, it requires awareness that what judges *do* with the works they adjudicate in copyright cases is, like the works themselves, interpretively complex. Accordingly, the Article concludes that interpretive choice should be understood to be a key part of the judicial work in copyright cases, thus meriting sustained scholarly attention and greater judicial awareness. Once it is acknowledged that methodological forks are built into copyright law, the question of how judges do—and perhaps how they should—decide among interpretive approaches can rise to the surface. All that said, judges possess great discretion over their interpretive method selection, and their lack of any constraints mandating transparency or guiding their decision-making creates inconsistency and unpredictability. Accordingly, I have argued for the benefits of a turn to process-based formalism in the form of two-tiered analysis, beginning with formalism to review issues arising as a matter of law, and then only moving beyond formalism in cases where such an expansion is warranted and can be argued by the parties, or decided and justified by a judge.