Copyright is literal. It understands how to deal with the written word, but struggles with everything else. Words are the prototype and the central theoretical concern of copyright law, despite our increasingly audiovisual economy. Legal protection for visual, musical, and other modes of expression was added to the U.S. code slowly and haphazardly, following economic rather than aesthetic demands. This theoretical absence has continuing consequences for copyright law, which often misconceives its object, resulting in confusion and incoherence.

An introductory example comes from perhaps the most significant copyright development of our time, Google Book Search. Book Search involves the scanning and digitization of millions of volumes of books in library collections, with the goal of making the books available to anyone in the US. Under the pending settlement, users will be able to get free access to portions of the scanned works, and to pay for greater access.

But the settlement excludes many of the images in those books. Owners of copyright in images are not as such members of the settlement class. Images will be scanned, but not present in the versions available to institutions and individuals, unless the book is a children’s book or the copyright owner of the book in which the image appears also owns the copyright in the image. Google and the plaintiffs figured out how to manage rights in books and in articles or other written contributions to books, including how to look for the rightsholders of those works where they had not opted into the settlement. Images, by contrast, were literally (pun intended) too hard to deal with. By eliminating them, Google and the book authors and publishers preserved the possibility of a compromise with respect to text.

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1 Professor, Georgetown University Law Center. Thanks to Mark Tushnet, Amy Adler, Laura Heymann, Mark Lemley, Liam Murphy, Burt Neuborne, Diane Zimmerman, and other members of the NYU faculty.

2 Cf. Anne Barron, Copyright Law and the Claims of Art, 4 INTELL. PROP. Q. 368, 372-73 (2002) (“One of the most remarkable features of copyright’s historical development has been the piecemeal and particularistic manner in which its reach has extended over time to accommodate new kinds of intellectual entity. This is especially evident in relation to the visual arts. . . . These legal developments have evidently not been motivated by systematic thinking about the arts in general, or the visual arts in particular: new categories of protected subject matter have not been derived by deduction from a broad concept of ‘Art’, or even ‘Visual Art’, but have been added incrementally by way of analogy with what had already received the protection of the law.”).

3 Google Book Settlement, FAQs, http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704#q7# (“Photographs, illustrations, maps, paintings and other pictorial works in Books are covered by the Settlement ONLY when either (a) the U.S. copyright interest in the pictorial work is owned by a person who is also a copyright owner of the Book containing the pictorial work or (b) the pictorial work is an illustration in a children’s Book . . . ”).

Not only does the proposed settlement enact the prominence of text over other methods of communication—despite copyright’s formal medium neutrality—almost all public discussions of the settlement also concern only text, not images. The debate proceeds as if, scanning errors aside, the Google database will give users access to the “books.” But what they will really get in many cases is access to the words in the books. Google and the plaintiffs solved their problems by fiat: non-children’s books are now just their words, even if in the actual work itself images were integral to the expression or discussed in the text as if they were present. Images will be replaced by blanks, a perfect if unintentional demonstration of how copyright, like much of law, thinks about images, which is to say it doesn’t think much about them at all. Even in a culture saturated with images, video and music, our default when we talk about knowledge, and thus about the benefits and dangers of copyright, is text.

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6 See Rebecca Tushnet, *Google Books and Visual Culture,* REBECCA TUSHNET’S 43(B)LOG (May 11, 2009), http://tushnet.blogspot.com/2009/05/google-books-and-visual-culture.html. The particular omission depicted has since been corrected, as Google corrects specific errors brought to its attention. Here, the error was that the images in the book were so old that they were in the public domain. The settlement, however, contemplates omitting images in this fashion whenever they are not claimed by the owner of the copyright in the book in which they appear.
The blank space, image replaced by the words “copyrighted image,” says at least as much about the overall law of copyright as it does about the Google settlement. Copyright oscillates between two positions on non-textual creative works such as images—they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that the meaning of an image is so obvious as to admit of no serious debate. When they treat images as opaque, they deny that interpretation is possible, pretending that images are so far from being able to be discussed and analyzed using words that there is no point in trying. Courts have the same problems with music, though the tendency is to assume opacity and ask experts to do the heavy lifting. Performance, which is a category of rights in copyright rather than a distinct category of protected works, has similar difficulties. The law treats nontextual works as either meaningless in themselves—mere representations of reality or implementations of someone else’s work—or so full of untranslatable meaning that no considered analysis or dissection is possible. This oscillation between opacity and transparency has been the source of much bad law.

This paper explores the ungovernability of nontexual materials, beginning with an overview of the power of images and some comparisons to non-copyright fields in which similar dynamics are apparent. Courts have difficulty with the visual, which leads to persistent difficulties analyzing copyrightability, infringement, and fair use. In assessing copyrightability, courts draw lines between artistic choice and mere reproduction of reality, but also treat the artist as a person with a special connection to reality, a way of seeing that ordinary mortals lack. Infringement analysis repeats this doubling, using the representation/reality divide to separate protected elements of a specific work from unprotected ones while simultaneously insisting that works are indivisible gestalts.

The trouble is compounded when text and nontext come together to form a work or a performance and courts automatically privilege the text. I devote special attention to multimedia works—focusing on comic art and performance—because of courts’ tendencies to collapse the multi into something singular, highlighting the instabilities in their approaches to nontextual works. The baseline expectation that text will be the unit of analysis, and that text is the only thing that can be fruitfully analyzed, confounds our ability to work with other creations. By confronting our preconceptions about the relationship of images to reality, we may be able to proceed more predictably—to do what law promises in terms of giving reasons for its rules and reasons for its results in specific cases. The fundamental difficulty, however, is not legal, but cultural: we cannot expect the law to do better at understanding forms of art than society at large does.

The Difference That Images Make

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7 Not surprisingly, the technology by which Google makes its billions also treats text and images differently. Computer screening for text is much more advanced than for images. Programs categorizing images generally look at the words surrounding the images to figure out what they depict and whether to mark them as explicit. I thank Ann Bartow for this point.

8 Though sound recordings, a type of performance, are listed in 17 U.S.C. §102 (2006), which sets out the subject matter of copyright, as a protectable type of work.

9 I will focus throughout this article on representational images, because those are what the relevant intellectual property cases are about and because this allows fruitful comparisons between the treatment of words and images, both of which are generally taken to stand for (represent) some idea, entity, or the like. In the case of trademark in
The law’s default text is the word. Law students learn in a context focused on words, and full-fledged lawyers have few tools to deal with images.10 As Neil Feigenson and Christina Spiesel summarize, “Law, like most other disciplines or practices that aspire to rationality, has tended to identify that rationality (and hence its virtue) with texts rather than pictures, with reading words rather than ‘reading’ pictures, to the point that it is often thought that thinking in words is the only kind of thinking there is.”11 Judges and scholars are powerfully motivated to disavow “judging” art because the artistic enterprise seems so opposed to the legal enterprise: irrationality versus rationality, subjectivity versus objectivity, fantasy (or Truth) versus facts, and so on.12 Images seem especially dangerous because of their irrational power, their appeal to passion rather than reason. The seductive quality of artistic images, their appeal to the senses and the emotions, has been a recurring justification in the complex and centuries-old history of iconoclasm, censorship, and suppression of art. The voluptuousness of art, its power beyond words, the possibility that it could be worshipped, fetishized, or misinterpreted, paved the way for both adulation and censorship. … [B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.13

Legal focus on words is both understandable and often justified. The problem comes with failing to deal with other means of communication, because they are also implicated and regulated by the law. When nonverbal artifacts end up involved in litigation, courts have to interpret them.14 The problem worsens because courts often translate nontextual works into words while not recognizing the ways in which the translation is flattening and distorting. As Sheldon Nahmod observes, “[v]ery often, artistic communication is not capable of ‘relatively particular, only when an image is or becomes representational—acquires secondary meaning, in the language of trademark—can it be protected as a mark; by definition, a trademark is an indicator of source. Nonrepresentational art presents significant puzzles of its own, particularly as to why it might be protected by the First Amendment, but that question is beyond the scope of this article. See Mark Tushnet [in progress].


11 FEIGENSON & SPIESEL, supra note 9, at 4; see also, e.g., Costas Douzinas & Lynda Nead, Introduction to LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW, 1, 3 (Costas Douzinas & Lynda Nead eds., 1999) (“Art is assigned to imagination, creativity, and playfulness, law to control, discipline, and sobriety. There can be no greater contrast than that between the open texts and abstract paintings of the modernist tradition and the text of the Obscene Publications Act, the Official Secrets Act, or indeed any other statute.”).

12 See, e.g., Christine Haight Farley, Judging Art, 79 Tul. L. Rev. 805, 807 (2005) (“Other jurists and commentators have similarly expressed the view that legal and artistic determinations should not be merged and that judges should refrain from indulging in subjective aesthetic determinations. Although never fully unpacked, these views are usually premised on the following conventional understanding. First, art and law belong in separate cognitive and intellectual spheres. Second, art and law exist in polarity where law is objective and art is subjective. Third, law is about precedent whereas art is about the evolution of ideas.”).

13 Amy Adler, The Art of Censorship, 103 W. Va. L. Rev. 205, 213 (2000); cf. Barron, supra note 1, at 400 (noting that Kant argued for the primacy of words over visual artworks; only the former deserved treatment as expression of the author’s self, and thus were the proper subject of moral rights to control dissemination).

14 See Farley, Judging Art, supra note 11, at 807-08.
precise, detached explication.’ Indeed, if such an explication could be given, one might
legitimately wonder why the painting had to be painted ….” 15

The argument of this article takes as a given that there are certain features of human
perception that work in predictable ways depending on the perceptual input. I do not wish to
argue that what follows from those features is fixed or universal. To the contrary, cultural factors
are vital in determining what, if anything, those perceptual differences will mean, both generally
and as a matter of law. The intuitive lines judges and lawyers often draw between images and
words are not mistaken in positing distinctions. The problem with the unexamined intuitions is
that they then take for granted the social and legal consequences of those differences, often in
conflicting ways.

With that background, it is uncontroversial that images work differently on the human
brain than words, even when they are communicating similar ideas. Among other things, images
are perceived more as a gestalt that can then be broken down into its details, while texts appear
to the reader in a set sequence, most or all of which needs to be processed for the whole to be
understood. 16 The difference between the lightning and the lightning bug, to use Mark Twain’s
element of the difference between the right word and the nearly right word, would be very far
apart as images. In addition, pictures can trigger emotions more reliably than words. 17 Pictures
are generally processed more quickly in the brain, contributing to their emotional power. 18
Pictures are also easier to remember than (roughly equivalent denotational) words. 19

Vision is encoded in American legal culture, and more broadly, as equivalent to truth in
so many ways that ferreting them all out would be impossible. 20 An easy example is all the dead-
metaphor, unnoticeable terms we use to equate vision with reality: we see (meaning

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15 Sheldon H. Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First
Amendment, 1987 WIS. L. REV. 221, 245; see also id. at 246 (“[V]isual artistic expression may be comparable to
musical expression which by its very nature is even less capable of ‘relatively precise, detached explication.’ This is
another way of saying that ‘the medium is the message,’ and that one cannot really separate the ‘what’ from the
‘how,’ or the content from the vehicle of expression.”) (footnotes omitted).
16 FEIGENSON & SPIESEL, supra note 9, at 7 (“As with reading words, we are primed when we look at pictures by
what we have already seen . . . . But we can enter a picture anywhere we want to, drawn to any feature of it that
catches our eye, whether the attraction is based on our own interests and predilections, formal qualities of the picture
itself, or some combination thereof. With words, we can’t get the idea without getting to the end of the spoken or
written thought. With pictures, by contrast, we can stop ‘reading’ when we think we recognize the subject matter,
although we may then fail to decode other meanings that the picture may be intended to convey or be capable of
conveying.”) (footnotes omitted).
17 FEIGENSON & SPIESEL, supra note 9, at 7-8.
18 FEIGENSON & SPIESEL, supra note 9, at 7.
19 See, e.g., Julie A. Edell, Nonverbal Effects in Ads: A Review and Synthesis, in NONVERBAL COMMUNICATION IN
ADVERTISING, 11, 13 (Sidney Hecker & David W. Stewart eds., 1988) (research shows that “pictorial stimuli
frequently were remembered better than were their verbal equivalents”).
20 As Diane Zimmerman has pointed out, when vision and other senses conflict, we regularly prioritize vision. See
Diane Zimmerman, False Light Invasion of Privacy: The Light that Failed, 64 N.Y.U. L. REV. 364, 411-12 n. 268
(1989); see also Irvin Rock & Jack Victor, Vision and Touch: An Experimentally Created Conflict Between the Two
Senses, 143 SCI. 594, 595-96 (1964) (finding that subjects shown a square in a distorted way so that it looked like a
rectangle still believed the shape was a rectangle even when they were allowed to hold it); James J. Gibson,
Adaption, After-Effect and Contrast in Perception of Curved Lines, 16 J. EXP. PSYCHOL. 1, 5 (1933) (finding a
similar result for straight lines distorted to look curved).
understand”), demonstrate (from a root meaning “show”), clarify the obscure, and many other words employed in this article. I won’t stop and identify those terms, but it’s worth noting that they structure our thinking because they are so deep-seated and naturalized.

A. Emotions, Images, and the Law

There has been substantial scholarly attention recently to the role of emotion in law. Emotion is often mediated and enhanced by going beyond words; thus, for example, victim impact statements used at criminal sentencing now may incorporate video, sometimes set to haunting music, with resulting controversy over whether such presentations irrationally influence sentencing juries. The association between images and emotions means that images’ immediacy, combined with Western law’s general emotion/reason opposition, can switch valence quickly, from truth (represented by pure reason and logic) to falsity. Consider the famous visual pun, Magritte’s The Treachery of Images, which consists of the words Ceci n’est pas une pipe below a picture of a pipe. The caption is both true and false: this is not a pipe (it is a picture of a pipe), and yet if we asked someone “what is this?” while pointing to the picture we would readily accept the answer “it’s a pipe.” The truth of the image is its falsity. The Treachery of Images is the inverse of Google’s “copyrighted image,” which is not an image at all, although we are to understand that it takes the place of an image.

Complicating matters, we tend to read images using naïve theories of realism and representation. Images are easier to believe than words. Pictures appear to us to resemble “unmediated reality” more than words do—they seem to be caused by the external world without “human mediation or authorial interpretation,” and are thus easily accepted as “highly credible evidence.” Images are more vivid and engaging, decreasing the mental resources we have
available to assess them critically. And, because we process them so quickly and generally, we may stop looking before we realize that critical thought should be applied to them.\(^{25}\) One reason that pictures are so powerful is that they are hard to see as arguments.\(^{26}\)

Justice Jackson, writing to strike down a requirement that schoolchildren salute the flag, referred to images as working “a short cut from mind to mind.” As Amy Adler elucidates, this is both a positive and a negative characterization: in this view, images are “forceful, but crude. They’re a cheat, a short cut.”\(^{27}\) In Virginia v. Black,\(^{28}\) likewise, the power of the burning cross—

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\(^{26}\) What Alan Sekula writes of photographs can be generalized to other types of images and to video:

A photographic discourse is a system within which the culture harnesses photographs to various representational tasks. Photographs are used to sell cars, commemorate family outings, to impress images of dangerous faces on the memories of post-office patrons, to convince citizens that their taxes did in fact collide gloriously with the moon, to remind us of what we used to look like, to move our passions, to investigate a countryside for traces of an enemy, to advance the careers of photographers, etc. Every photographic image is a sign, above all, of someone’s investment in the sending of a message. Every photographic message is characterized by a tendentious rhetoric. At the same time, the most generalized terms of the photographic discourse constitute a denial of the rhetorical function and a validation of the “truth value” of the myriad propositions made within the system. . . . [T]he most general claims of the discourse are a kind of disclaimer, an assertion of neutrality; in short, the overall function of photographic discourse is to render itself transparent.

\(^{27}\) Adler, Art of Censorship, supra note 12, at 214; see also id. at 214-15 (“Furthermore, there is a certain treachery to images. The Court’s opinion reveals a nagging uncertainty about how to account for the flag’s meaning. Consider what Justice Jackson says next: ‘A person gets from a symbol the meaning he puts into it, and what is one man’s
a symbol—was understood to constitute essentially an explicit threat, allowing the state to ban crossburning carried out for the purposes of intimidation. The message was clear, despite the lack of words. The crossburners didn’t use words because words, however vicious, wouldn’t have carried the same threatening power as the flaming cross.29

Because images and other nonverbal media don’t work like words, courts have often been cautious in recognizing them as “speech,” that is, as communication protected by the First Amendment. Each new mass medium has recapitulated the struggle for First Amendment recognition. Given that the post-Founding Era new mass media have been predominantly nontextual, the fear that a new form of communication was too emotional or irrational has been a major driver of courts’ initial hesitance to extend the First Amendment.30 And yet their very power eventually provides reason to bring them within the First Amendment’s scope.

B. Images as Legal Tools

The communicative power of images can, when recognized, be leveraged by law. Requirements that tobacco manufacturers refrain from using images and rely only on words to sell their products, for example, rest on the idea that anyone forced to think about smoking would see what a stupid idea it is.31 Using the same logic in the opposite direction, antiabortion legislators are forcing women seeking abortions to view ultrasound images, on the theory that seeing the ultrasound will deter women because of the unique effects vision has on decisionmaking, effects that can’t be produced with informational pamphlets.32

comfort and inspiration is another’s jest and scorn.’ This passage portrays visual symbols as a potentially hazardous form of communication. If the meaning of a visual symbol rests in the mind of the person who sees it, then a speaker who uses a symbol to convey a message runs a risk that the symbol will mean something other than what he intended. . . . The visual symbol is so powerful that it may overpower the speaker.”). 28 538 U.S. 343 (2003).

29 Randall Bezanson argues that Black is about the burning cross as a type of art that “communicates at a sensual, non- or pre-rational level, appealing to emotion and noncognitive understanding or interpretation.” BEZANSON, supra note 24, at 239.

30 BEZANSON, supra note 24, at 1 (“From the earliest stages of First Amendment jurisprudence, artistic expression has often been excluded from constitutional protection. And with newly emerging aural and visual technologies, the U.S. Supreme Court has most often declined to apply the full force of constitutional protection, at least for a time, proceeding cautiously and in small steps with the mediums of radio, television, and film, and, most recently, electronic forms of communication. The Court’s caution has been particularly evident with the more artistic and emotionally powerful genres of expression such as dance, film, or video. Ideas about freedom of speech have been shaped by the cool, detached, and reasoned medium of print. They are poor fits for the emotional, involved, sensory mediums spawned by twentieth-century technologies.”); Randall P. Bezanson, The Quality of First Amendment Speech, 20 HASTINGS COMM. & ENT. L.J. 275, 311 (1998) (arguing that the real basis for allowing greater regulation of broadcasting and cable than traditional print media is concern over audiovisual media’s ability to “shap[e] personal and cultural values, the persuasiveness of its multisensory and real-time character, and the added dimensions of force and immediacy that unrestricted access to multisensory stimuli provide”).


32 Carol Sanger, Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice, 56 UCLA L. REV. 351, 361 (2008) (noting the connection between the general importance of visuality and the new requirements).
Relatedly, it is probably not accidental that, dissenting from a ruling upholding limits on antiabortion protests near clinics, Justices Scalia and Kennedy repeatedly invoked scenarios involving the use of words—cool, rational, traditionally persuasive words—rather than the bloody images that are the dominant feature of most actual antiabortion protest. “Excuse me, my dear”\(^{33}\) is an invitation to dialogue; a picture of a dismembered fetus is not. Imagined scenarios involving words made it much easier for the dissenters to explain, in terms consistent with the First Amendment’s preference for reasoned debate, why the protesters had First Amendment rights to approach women seeking medical care at clinics. Activists, by contrast, are well aware that images are their best forms of argument because they appeal so effectively to emotion.

Even outside the First Amendment context, law has often struggled with this mixture of danger and power, sense and meaninglessness. Jennifer Mnookin has investigated the ways in which the development of photography was both the apotheosis of evidence and a threat to the legal system: The photograph’s apparent power to replicate, rather than simply represent, reality made it persuasive. But photography also threatened law because there wouldn’t seem to be a need for legal judgment if photography made a universal truth apparent to everyone.\(^{34}\) In response, courts treated photographs as support for testimony, like other objects, but refused to acknowledge what happened in fact—that photos served as independent confirmation of testimony (evidence in themselves) because they seemed veridical in ways that sketches didn’t.\(^{35}\)

Mnookin posits that courts formally devalued photographs, while actually relying on them, because judges valued words more than images, and because the power of the image was a threat to the judicial system’s prioritizing of the word.\(^{36}\)

Photographs, unlike murder weapons, are themselves representations, and potent ones. They tell a story about the world, making a difficult-to-refute claim about how a particular location looked at one instant. The claim may be indeterminate; it may be capable of multiple interpretations, but to whatever extent this visual depiction is not tied to testimony, a competing, nonverbal account enters a space where the words of witnesses—and lawyers—are supposed to reign…. A document cannot prove the truth of its own contents in the way that a photograph might. No one would ever call a document ‘a witness on whose testimony the most certain conclusions may be confidently founded.’ … Perhaps as representations that suggested the possibility of substantiating their own contents, photographs threatened the hegemony of testimony. If photographs had probative force, they could evade the web of words.\(^{37}\)

Mnookin is forced to speculate about the underlying rationales for judicial behavior because the law has not systematically acknowledged these differences between images and words, though the concept of images as having peculiar and unmediated access to reality or truth pops up again and again in undertheorized ways.\(^{38}\) Even though there is both historical and

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\(^{34}\) *See* Mnookin, *supra* note 23, at 18-20.

\(^{35}\) *See* id. at 43-54.

\(^{36}\) *See* id. at 54-55.

\(^{37}\) *Id.* at 56 (footnotes omitted).

\(^{38}\) *Cf.* ALISON YOUNG, JUDGING THE IMAGE 12 (2005) (“The co-implication of law and the image, of jurisprudence and aesthetics, engenders discomfort in its juxtaposition of such different terrains, entities and experiences: this is
cross-cultural evidence that perceptions of the correspondence of images with reality vary depending on the viewer’s background and knowledge, the default is to treat images as real, with corresponding difficulty analyzing them as images, distinct from that which they (purport to) represent. The apparent reality of images obscures the fact that meaning always comes from interpretation. (To take one recent example, research has shown that perceptions of how close a person is to the observer politically can affect whether that observer perceives a darker-skinned photo is a more accurate depiction of reality than a lighter-skinned photo.

The same phenomenon occurs with moving pictures. As Jessica Silbey has shown, in judging filmed confessions, and elsewhere, courts perceive film as transparent and thus proceed

the discomfort of abjection, when one encounters something that has been hidden, evacuated, repressed. The abject locates that which we would rather not see, or reveal, or touch. In the abject discomfort of a co-implicated relation between jurisprudence and aesthetics, we find that which the legal tradition would prefer not to be revealed – uncertainty, affectivity, contingency, difference, the peripatetic and nomadic, the marginal, the image.” (footnote omitted).

39 See, e.g., Linda M. Scott, Images in Advertising: The Need for a Theory of Visual Rhetoric, 21 J. CONSUMER RES. 252, 261 (1994) (“Although newly devised styles of representation are often seen as arbitrary, awkward, cryptic, and even frightening, the conventions are learned until, in time, they look self-evident . . . . The style of impressionism was at first jarring and unintelligible to viewers of the late nineteenth century. Now, few of us have trouble seeing dancers, children, or gardens in the works of Degas, Renoir, or Monet. Contrariwise, it is well documented that judgments of what looks lifelike varies a great deal over time and across cultures.”) (citations omitted).

40 See, e.g., Christine Haight Farley, The Lingering Effects of Copyright’s Response to the Invention of Photography, 65 U. PITT. L. REV. 385, 393 (2004) (“It is precisely this seeming transparency of the photograph that is its most powerful rhetorical device.”) (footnote omitted); LINDA HAVERTY RUGG, PICTURING OURSELVES: PHOTOGRAPHY AND AUTOBIOGRAPHY 5 (1997) (“While we know on one level that photographs are the products of human consciousness, they also can (have been, are, will) be taken as ‘natural’ signs, the result of a wholly mechanical and objective process, in which the human holding the camera plays an incidental role in recording ‘truth.’”); W.J.T. MITCHELL, ICONOLOGY 37 (1986) (“The effect of [the invention of artificial perspective] was nothing less than to convince an entire civilization that it possessed an infallible method of representation, a system for the automatic and mechanical production of truths about the material and the mental worlds. . . . And the invention of a machine (the camera) built to produce this image has, ironically, only reinforced the conviction that this is the natural mode of representation. What is natural is, evidently, what we can build a machine to do for us.”).

41 See Rudolf Arnheim, The Images of Pictures and Words, 2 WORD & IMAGE 306, 309-10 (1986) (“The statement of the painter . . . is limited to the behaviour of visual forces, which it applies to the appearance and action of physical things . . . . This lack [creates] problems for pictures intended to convey information, such as the photographs in newspapers or the short film-clips on television. Such glimpses of events show with immense authenticity what actually happened and what significant personages actually look like, but they remain neutral as far as true meaning is concerned. Even the most dramatic images of violence and suffering, of utmost happiness or victory evoke only our direct compassion. The interpretation of their significance has to be added from elsewhere.”); John Fiske, Introduction to COMMUNICATION STUDIES 16 (2d ed. 2002) (“Photographs are never as easy to decode as they may appear, and they are usually open to a number of readings.”).


43 See Bezanson, Quality, supra note 29, at 313 (“Video conveys multisensory stimuli; it does so not just by the rational and domesticated medium of spoken or printed words, but by images that lend meaning and force to those words, by more direct appeal to emotional or non-reasoned ways of perceiving, and it does so without the constraints of distance and time. With video, a viewer can participate, rather than merely ‘view,’ and can be called to action by the combined force of reason and emotion. Video, therefore, presents problems more akin to the mob or the inciter than to the reader or the book.”).
with absolute self-confidence in interpreting a particular piece of film. They would be much more savvy about the possible meanings of what’s shown, the relevance of framing decisions, the camera’s point of view, and the significance of what didn’t get shown on the tape if they were dealing with text. Film disarms lawyers, leading them to ignore the special features of images while simultaneously relying on those features to assume that images must give direct access to truth. Right when interpretation is most needed, courts abandon interpretation, or at least think they have no need to engage in it.

The magic of the visible also shows up in judicial treatment of cameras in the courtroom itself. Transcripts are unremarkable and indeed considered necessary to the cause of justice, so as to produce a reviewable record. But cameras are intrusive, potentially hostile to witnesses; we take it for granted that they will change the behavior of all but the hardiest of participants in the judicial process. The image is widely supposed to have a different effect both on the audience and on the portrayed.

[design patent: per Barton Beebe, design patents privilege the graphic representation of the design over textual description—need some cases/articles on this. Compare to the European treatment of trademarks: while anything can be a trademark, the EU has begun to take the position that it must be reducible to two-dimensional description, which means words, images, or sheet music; smells and other forms of communication are out. Only the visual field is trustworthy when it comes to defining what is open to competitors and what is owned as a communicative symbol. Not sure where this part is going—maybe just to point out that each field seems to reach its own set of compromises, picking and choosing from attitudes towards visual representation without coherence.]

II. Persistence of Vision: Images in Other Legal Fields

Given the features of images discussed in the previous part, it would be surprising if any field of law involving images escaped difficulty. This part briefly surveys several notable areas in which images are bound up in legal regulation: pornography and obscenity; trademark and advertising law; and tort law, in which visuals play the role of evidence. In each instance, the way that images appear to have a closer relation to the real than words do affects legal analysis, often for the worse. The patterns identified in this part will recur in copyright.

A. Pornography/Obscenity

“I know it when I see it.”

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45 See, e.g., Silbey, Criminal Performances, supra note 43, at 194 (“Film, it is advised in legal opinions and legislative enactments, gives us the most direct access to the person . . . . Film’s illusion of immediacy and its manifestation of the experience of bearing witness often overpower our analytical resources.”) (footnote omitted).
47 [cite]; some discussion of the recent ban on cameras in California’s Prop. 8 trial.
Initially, it is important to note that the modern theory of pornography is fundamentally a theory of images, not words. Modern obscenity law, too, is all but exclusively targeted at images, such that prosecutions based on words are in practice limited to what would be described by nonlawyers as “child pornography” but, being written, does not involve the exploitation of actual children in its production and thus cannot be prosecuted as child pornography. The residual prosecution of the occasional written text is, therefore, a side effect of the fact that only images can be child pornography. Outside that context, obscenity is images, or, more commonly these days, video. As a result, the legal system’s general difficulty with images is readily apparent in obscenity cases.

Lacking a coherent theory of images, law both denigrates and elevates them as compared to words. Denigration may take the form of treating images as meaningless. In one recent privacy case, for example, the Eleventh Circuit treated nude pictures of a former wrestler as distinct from the story accompanying them, devoid of content: “the nude photographs ‘impart[] no information to the reading public.’” And yet this is so blatantly false that it has to mean

49 E.g., ANDREA DWORKIN & CATHERINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY app. d, at x (1988). It’s notable that one of MacKinnon’s books about the topic of pornography and sexual subordination is called Only Words, because discussions about free speech always default to words. As MacKinnon recognizes, the word-centric model is a great part of the power of assimilating pornography to prototypical “speech.”

50 See Adler, Art of Censorship, supra note 12, at 210 (“[T]he difference between text and image within the First Amendment has significant real world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material. . . .”)) (footnotes omitted); Charlotte Taylor, Free Expression and Expressness, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 404 n.126 (2009); see also Clay Calvert & Robert D. Richards, A War over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law, 16 J.L. & POL’Y 177 (2007) (arguing that the prosecution of a writer of stories about children for obscenity was misguided).


52 The formal doctrine allows for the possibility of prosecuting words that aren’t about children, see Kaplan v. California, 413 U.S. 115 (1973); it just doesn’t happen. The primacy of images is amusingly apparent in the scrambling technology used to keep nonsubscribers from seeing sexually explicit cable channels such as Playboy’s. LUCAS HILDERBRAND, INHERENT VICE: BOOTLEG HISTORIES OF VIDEOTAPE AND COPYRIGHT 106 (2009) (“[S]crambled cable channels really did screw up the image into purple and black squiggles that were truly indecipherable, though the sound remained likewise unaltered; I vividly recall hearing the flirty come-ons and moans behind the teasing streaks when channel surfing past the Playboy channel during late-night babysitting gigs.”).

53 See Douzinas & Nead, supra note 10, at 4 (“The programmatic separation of law and art can lead to deep suspicion and contempt of one side toward the other but also, although more rarely, to a feeling of inferiority and envy for the abilities exclusively attributed to the other.”).

54 Toffloni v. LFP Publ’g Grp., 572 F.3d 1201, 1209 (11th Cir. 2009); cf. Diane Zimmerman, I Spy: The News-Gatherer Under Cover, Allen Chair Symposium Issue, 33 U. RICH. L. REV. 1185, 1208 (2000) (noting the higher First Amendment protection given to text than to pictures in cases involving privacy and newsgathering torts). Eric Johnson, arguing from a disability perspective, has shown that similar dynamics are at work when courts confront three-dimensional models and replicas. Compared to books or even to two-dimensional art, courts are even less likely to recognize the informational benefits such works offer:

Two-dimensional works are seen as more communicative, more expressive, and closer to fundamental concepts of constitutionally protected free expression. Three-dimensional works, on the other hand, tend to be viewed as more frivolous, less essential, less communicative, and further away from core First
something else, something like “no worthwhile information,” except that to put it in those terms would be to foreground the First Amendment problem with regulating the images, and not descriptions of those images. It’s only by declaring the image worthless—and “worthless” for First Amendment purposes means “meaningless”—that the court can distinguish between words and images.56

The very excessive, worth-a-thousand-words quality of pictures may make them too unstable for courts used to looking for meaning in words. With texts, by contrast, courts feel expert and in control: courts have many tools to interpret text.57 When it comes to free speech claims, courts are reluctant to condemn texts because, having a sense of how words operate, courts believe that words alone rarely do harm.

Thus, in United States v. Whorley, a recent Fourth Circuit obscenity case involving both text and pictures depicting fantasized sexual encounters with children, the dissent accepted that pictures could constitute obscenity, but objected that text-only emails shouldn’t be prosecutable as obscene because of First Amendment principles. The dissent defended its conclusion on the ground that “[t]he ability to consider and transmit thoughts and ideas through the medium of the written word is an attribute unique to humans.”58 (Representational drawing, by contrast, is of course widely practiced in the animal world.) The text of the emails contained protected ideas, the dissent maintained, without any recognition that the images might have done so as well. “Imagining” and “fantasy” were words the dissent used about the texts.59 Yet those terms are equally applicable to drawings. Giving the two media different levels of First Amendment protection needs some other justification. Once again, the images seemed to have a closer relationship to reality than words do, more than fantasy, relevantly akin to acts. This collapse

Amendment protection. Additionally, whereas two-dimensional works tend to be perceived as products of “the press,” three-dimensional works tend to be viewed as products of the merchandising industry. 

Eric E. Johnson, Intellectual Property’s Need for a Disability Perspective, 20 GEO. MASON U. C.R. L.J. 181, 196 (2010); see also id. at 199 (“[T]he bust [of Martin Luther King, Jr., which was enjoined as a violation of King’s right of publicity,] was highly suitable for serving as an expressive vehicle that provides information to a visually impaired person. . . . [T]he bust was an appropriate size for manual investigation and for storage on a bookshelf. . . . Despite the fact that unauthorized biographies clearly fulfill the prima facie requirements for a claim of infringement of the right of publicity, the informational and communicative value of books is not, of course, lost on anyone.”).

55 See Clay Calvert, Every Picture Tells a Story, Don’t It? Wrestling With the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling, 33 COLUM. J. L. & ARTS 349, 369 (2010) (“The nude photographs do convey information: a) they show what Nancy Benoit looked like around the time when, as the text of the article states, she was entering wet T-shirt and bikini contests; b) they show that Nancy Benoit once posed nude; c) they show that Nancy Benoit arguably exploited her sexuality to become a successful public figure in the world of professional wrestling; and d) they provide photographic information against which readers of Hustler can measure the veracity of the textual claims that Nancy Benoit was ‘hot’ and ‘sexy.’”) (footnotes omitted).

56 See Porat v. Lincoln Towers Cnty. Ass’n, 04 Civ. 3199, 2005 U.S. Dist. LEXIS 4333, at *13 (S.D.N.Y. Mar. 17, 2005) (“[T]he bust was well established that in order to be protected under the First Amendment, images must communicate some idea.”).

57 Cf. Graeme B. Dinwoodie, Refining Notions of Idea and Expression Through Linguistic Analysis, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE (Lionel Bently et al. eds., 2010) (manuscript at 9), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601234. (“[Increased resort to expert testimony in copyright cases] has occurred in areas where courts have felt less comfortable about making assessments about the nature of the works at issue; courts, who work daily with words, perhaps instinctively believe they understand the nature of literary works.”).


59 Id. at 350, 353.
between representation and reality also explains a number of reactions to shocking visual art, which is often described as obscene or pornographic.60

This theory of images translates into two sometimes conflicting reactions: first, courts often treat images as mystical in their direct operation on human minds, and thus subject to special constraints not applicable to words. In McEwen,61 an Australian case about Simpsons cartoon pornography, the judge concluded that “all persons depicted in written works are necessarily imaginary” because their images exist only in the reader’s mind, whereas an image can present an actual person or an imaginary one. This reasoning merges images of people (whether on paper or in the viewer’s mind) into the real people themselves,62 and the result is that images of unreal children can be prosecuted in the same way as images of real children.

Cases of this sort demonstrate how the merger of representation and reality operates, even when it is inarguable that there is no reality being represented: there is no Lisa Simpson whose person could be brought before the court. But the logic of imagery is so persuasive and automatic that her nonexistence, like the nonexistence of the anime characters depicted in Whorley, becomes the one thing the court doesn’t see. If you still doubt the power of the “magical relation between a picture and what it represents,” try this experiment: take a picture of your mother and cut out the eyes.63

And yet this visceral shudder also leads to the second reaction, which takes the power of images as a reason they shouldn’t be regulated. In obscenity law, the power of images has convinced many First Amendment scholars to offer spirited defenses of the First Amendment value of sexually explicit images: because they communicate so directly, nonrationally, and persuasively—creating the illusion of reality—they need to be protected, just as the First Amendment protects “Fuck the Draft!” and flagburning because of the emotional impact they have on audiences. Images, like shocking language, have power that can’t be replicated by alternate words or means of expression.64 The extra oomph of the visual seems to many theorists to be just an extra reason for protection.

60 See, e.g., Young, supra note 37, at 35-36 (describing the vigorous, extended, and destructive popular conflation of a portrait of Myra Hindley (notorious murderer of children) with Hindley herself; “the artwork could not be viewed except as an extension of the woman herself. The existence of Myra was taken as a reminder of the existence of Myra Hindley; it was as if the woman herself were standing in the Royal Academy, as young and vital and present as she was in 1966. This may serve to explain much of the pleasure taken in the imagination of Hindley’s annihilation.”) (footnote omitted); id. at 42 (noting that disgusting art feels like it’s touching the viewers, making them interact with the disgusting objects represented or displayed). Young argues that it is precisely our knowledge that “it’s just a picture” that increases the sense of threat—we react as if we are confronted with the real thing, and our simultaneous understanding that we are seeing a picture creates a kind of aesthetic vertigo. See id. at 43-44.


62 Cf. W.J.T. Mitchell, WHAT DO PICTURES WANT? THE LIVES AND LOVES OF IMAGES 2 (2005) (“[Images have a peculiar tendency] to absorb and be absorbed by human subjects in processes that look suspiciously like those of living things. We have an incorrigible tendency to lapse into vitalistic and animistic ways of speaking when we talk about images. It’s not just a question of their producing ‘imitations of life’ …, but that the imitations seem to take on ‘lives of their own.’”).

63 See Mitchell, supra note 61, at 9; cf. Susan Sontag, ON PHOTOGRAPHY 4 (1977) (“To photograph is to appropriate the thing photographed. It means putting oneself into a certain relation to the world that feels like knowledge—and, therefore, like power.”).

64 [cites; Koppelman etc.]; cf. Lipton, supra note 9, at 6 (arguing that the drafters of the European Union Data Protection Directive, like British judges in recent cases, perceived a greater potential for clash between privacy and
But it is crucial to recognize that the image’s power and directness also allows the opposite reaction: treating images as fundamentally less important than words, because their impact is gestalt-like, irreducible to words.\textsuperscript{65} Since it’s so easy to think of a picture of a pipe as a pipe, it’s easy to think of pictures of sex as sex. Arguments that pornography is essentially a sex toy, object-like rather than communication-like, follow from this attitude toward images (and movies; the discussion never concerns written pornography).\textsuperscript{66} When representation and reality merge, the special characteristics of representation are subsumed in the reality—which tends, in a post-	extit{Lochner} world, to be far easier to regulate than representation alone.\textsuperscript{67}

Images, then, are greater and lesser than words.\textsuperscript{68} Given these conflicting reactions, it is no surprise that the legal theory of obscenity struggles for coherence, just as it does more generally with the question of why art is (as almost everyone seems to agree) protected by the First Amendment.\textsuperscript{69}

\textbf{B. Trademark and Advertising Law}

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\textsuperscript{65} See Kaplan v. California, 413 U.S. 115, 119 (1973) (“A book seems to have have a different and preferred place in our hierarchy of values [than a picture], and so it should be.”); Adler, \textit{Art of Censorship}, supra note 12, at 210 (“One reason that art is particularly hard to fit within the marketplace [of ideas] model stems from art’s visual rather than verbal form. . . . [T]he First Amendment offers greater protection to speech that is verbal rather than visual. The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and rarely explained. I know of no scholarship that addresses it directly.”) (footnotes omitted).

\textsuperscript{66} See, e.g., Frederick Schauer, \textit{Speech and “Speech” — Obscenity and “Obscenity:” An Interpretation of Constitutional Language}, 67 GEO. L.J. 899, 923 (1978-79) (arguing that “hard-core” pornography is equivalent for purposes of regulation to “rubber, plastic or leather sex aids,” that “the mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same,” and that “the use of pornography may be treated conceptually as a purely physical rather than mental experience”); see also Steven G. Gey, \textit{The Apologetics of Suppression: The Regulation of Pornography as Act and Idea}, 86 Mich. L. Rev. 1564, 1594 (1988) (critiquing Schauer for collapsing the distinction between perceiving and doing); David A.J. Richards, \textit{A New Paradigm for Free Speech Scholarship}, 139 U. Pa. L. Rev. 271, 283 (1990) (“Of course, a hard-core pornographic depiction is a communicative symbol; it is neither a dildo, nor a prostitute. It is surely confused to equate the stimulation of erotic and sensual imagination by use of pornography with sexual devices or partners; that is the same kind of confusion, so transparently inimical to legitimate free speech interests, that led the Puritans to equate the imaginative pleasures of an evening at the theatre of Hamlet with actual fratricide, incest, and revengeful murder.”).


\textsuperscript{68} See MITCHELL, supra note 61, at 77 (“Images are all-powerful forces, to blame for everything from violence to moral decay—or they are denounced as mere ‘nothings,’ worthless, empty, and vain.”).

\textsuperscript{69} Cf. MITCHELL, supra note 61, at 128 (“[I]mages are one of the last bastions of magical thinking and therefore one of the most difficult things to regulate with laws and rationally constructed policies—so difficult, in fact, that the law seems to become infected by magical thinking as well, and behaves more like an irrational set of taboos than a set of well-reasoned regulations.”) (footnote omitted); Adler, \textit{Art of Censorship}, supra note 12, at 208 (“The recent political and legal attacks portray art in two strangely contradictory ways. On the one hand, critics denounce art for its pointlessness, its self-indulgent, even decadent irrelevance. . . . On the other hand, as . . . frequent controversies attest, there is something about art that belies this portrait. Art seems particularly relevant and threatening. . . . [Another vision is that art is] a powerful and dangerous force that calls some to battle. These two contradictory views, evident in political debate, also permeate our First Amendment jurisprudence of art.”).
Sex and free speech are both touchy topics. Maybe matters are easier in less fraught areas of the law. But trademark and advertising law, which tend not to be as obviously political, also have continuing difficulty dealing with non-textual forms of advertising and branding.

1. Trademark

Trademark doctrine occasionally equates words and images—the term “Blue Dog” will be considered highly similar to a drawing of a blue dog for purposes of assessing whether the two marks are likely to cause confusion. Justice Breyer, writing for a unanimous Supreme Court, held that trademark law does not make ontological distinctions. Anything can be a trademark, whether it’s a color, a sound, or even a smell, as long as it serves as an indicator of source.

Nonetheless, the traditional preference of the law for words will not be denied. Protection for trade dress—the overall packaging or configuration of a product—is one of trademark’s most active areas, as advertisers take advantage of the power of nonverbal communication to strengthen their brands. Trade dress litigation has boomed in the past few decades. Yet it is always vital to define the claimed trade dress, to know exactly what features the plaintiff is trying to protect. Courts have required descriptions of the claimed trade dress to be in words, even though pictures can be much more practical. In this instance, being able to know a design when you see it is insufficient. This gives potential defendants more room to maneuver, a procompetitive result that is a happy consequence of the law’s preference for words.

Trademark also recognizes some differences in types of marks depending on media, grounding its different treatment in social meaning. As for social meaning, the same Court that rejected ontological distinctions quickly followed that case with another unanimously holding that only some marks can be “inherently distinctive”—immediately recognizable as trademarks by ordinary consumers, and thus entitled to immediate protection against confusing uses. The Court ruled that product design trade dress can only be deemed to serve as a mark if the claimant shows “secondary meaning”—recognition by consumers that a particular configuration (for example, the shape of the Coke bottle) signifies source, even though most product configurations (for example, the shape of a standard cereal box) don’t do so. Inherent distinctiveness was a concept developed for certain categories of words, and the Court deemed it a bad fit for product design, as well as for color.

70 There are of course plenty of free speech claims to be made surrounding advertising and trademark law. See, e.g., Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech, 76 VA. L. REV. 627 (1990); Lisa P. Ramsey, Increasing First Amendment Scrutiny of Trademark Law, 61 SMU L. REV. 381 (2008). But conventional doctrine sees no First Amendment problems with core uses of trademark to protect against confusion over product source.


72 See, e.g., Heller Inc. v. Design Within Reach, Inc., 09 Civ. 1909 (JGK), 2009 WL 2486054 (S.D.N.Y. August 14, 2009) (“The plaintiff alleges that because ‘a picture is worth a thousand words,’ the images ‘without a doubt provide the most precise definition of the protected trade dress possible.’ However, images alone do not satisfy the plaintiff’s obligation to articulate the distinctive features of the trade dress.”); Nat’l Lighting Co. v. Bridge Metal Industries LLC, 601 F. Supp. 2d 556, 563 (S.D.N.Y. 2009) (holding that the court could not “be expected to distill from a set of images those elements that are common to a line of products and both distinctive and non-functional!”). [See also European requirements that marks be described in ways that can be textually represented, even if that means using Pantone color numbers or musical notation rather than a copy of the mark as it exists in the market.]

This conclusion depends both on concerns about protecting freedom to compete on product features and on the generalization that, while consumers often expect words to be trademarks, they are unlikely to expect that even an unusual product shape is a mark indicating source, as opposed to a striking product feature. Nonverbal marks such as sounds and smells are treated similarly to color and product configuration. The social meaning of many nonverbal forms of communication, that is, differs enough from the social meaning of words to justify separate treatment as a matter of trademark law.

Trademark law also considers differences in form when assessing whether a particular use is infringing or confusingly similar to another use. Though similarity is generally assessed in terms of “sight, sound, and meaning,” that test was developed for word marks. When there are no words or representational images involved, the Trademark Trial and Appeal Board applies instead an “eyeball” test. The leading treatise explains:

Because a picture is worth a thousand words, there is little in the way of guidelines to determine the visual similarity which will cause a likelihood of confusion of buyers. Obviously, for picture and design marks (as opposed to word marks), similarity of appearance is controlling. There is no point in launching into a long analysis of the judicial pros and cons regarding visual similarity of marks. Regarding visual similarity, all one can say is “I know it when I see it.”

The last line, of course, refers to Justice Stewart’s famous line about being unable to define obscenity, but able to recognize it. Whereof one cannot speak, thereof one must be silent. But one need not therefore disavow application of the law.

Outside the core of trademark’s protection against confusing uses on competing products, images have proved particularly troublesome. There has been much litigation about when “expressive” uses can proceed without trademark owners’ permission. In one notable case, the Ninth Circuit adapted a test it had used for word marks to cover images as well. An artist created Food Chain Barbie, a series of photographs of Barbie dolls interacting with kitchen appliances and food; Mattel sued. The governing test for allowing unauthorized “nominative” fair uses required that the defendant (1) need to use the mark (here, the overall shape of the Barbie doll) to identify the trademarked product; (2) use no more of the mark than necessary (a requirement that in the past had been interpreted to mean that block-letter replication of a mark was acceptable, but copying a distinctive font was not); and (3) do nothing else to indicate source or sponsorship.

75 [cites; find something about post-Wal-Mart sound marks; note also that the PTO has rejected a claimed trademark in the taste of medicine, on similar grounds]
76 Product packaging design can also be inherently distinctive, according to the Court, though such packaging generally includes words; at a minimum, nonverbal designs have to be fairly complex before they can be inherently distinctive, whereas a single word (including a made-up word) can be inherently distinctive.
The artist apparently had a problem with (2): it would be possible, indeed easy, to refer to Barbie without using her entire body. Siding with the artist, however, the court of appeals reinterpreted nominative fair use to allow replication of a visual image when the mark at issue was itself visual, despite the initially grounding of factor (2) in a word/presentation distinction. This move is sensible and eminently correct in the context of artistic uses of Barbie, but it also reveals a fundamental instability in the concept of what is “necessary” in terms of a reference to a mark. The idea that “Coca-Cola” will always mean the same thing as \emph{Coca-Cola} is reassuring, but wrong.\footnote{Cf. John R. Doyle & Paul A. Bottomley, The Massage in the Medium: Transfer of Connotative Meaning from Typeface to Names and Products, 23 APPLIED COGNITIVE PSYCHOL. 396 (2009) (finding that consumer perceptions of meaning are affected by typeface style). The connotations of the Coca-Cola font in particular, of course, have been built up by decades of targeted advertising. Logos also are important for nonliterate populations. See, e.g., Johnson, supra note 53, at 194 (“Judge Kozinski makes a favorable determination for the newspapers because ‘they do not use the New Kids’ distinctive logo or anything else that isn’t needed to make the announcements intelligible to readers.’ . . . Judge Kozinski—probably entirely unaware of what he was doing—removes many developmentally disabled members of society from the class of persons who could benefit from the nominative fair use doctrine.”) (footnote omitted).} The whole point of reserving that special font for Coca-Cola is that the mark in the font has extra meaning to which competitors are denied access, and there might well be an artistic or other legitimate reason to invoke that extra meaning. This is a particularly disturbing result given that there is now a trend for courts to find that an arguably nominative fair use that flunks the three-part test is infringing,\footnote{See, e.g., Autodesk, Inc. v. Dassault Systèmes SolidWorks Corp., 2009 WL 4756469 (N.D. Cal. Dec. 8, 2009).} without engaging in further analysis of whether confusion over source is actually likely.

After \textit{Mattel}, the nominative fair use test both acknowledges the power of the image in certain special cases—allowing artists to use Barbie’s face, not just her name—and hides it, using block-lettered words as the model of acceptable nominative fair uses, deviations from which need explanation. Recognizing the power of the image—the artist’s need to depict Barbie—the law nonetheless puts words at the center of the analysis, treating nontextual material as, in the ordinary case, unnecessary.
2. Advertising Generally

Advertising theorists are well aware that images can make the same claims as text, only better. Images are better both because they are more persuasive than words\(^\text{81}\) and because the law governing advertising has not recognized this difference. As a result, images can often make visual claims that would be unsubstantiated and thus unlawful if made in words.\(^\text{82}\) Though the law will uphold falsity claims against images in extreme circumstances,\(^\text{83}\) the mechanisms through which images communicate often make identification of falsehood difficult.

Commentators have long decried advertising that misleads, not with anything specific, but with the general idea that purchasing goods and services will produce love, contentment, and other desirable intangible results. Ralph Sharp Brown wrote the classic condemnation of such advertising from a trademark perspective, arguing that modern advertising sells image with no intrinsic value. Later work has recognized that “image” is in fact sold mainly with images, with assists from music and sometimes words reinforcing the visuals. As a result, proposals to regulate the noninformational content of ads, characterized as manipulating and distorting

\(^{81}\) This is particularly true in “low-involvement” situations, when consumers aren’t motivated to pay much attention to ads. When consumers are highly involved, images provide a starting point—still very important—but when involvement is low, pictures can be determinative of consumers’ beliefs about products. James Shanteau, Consumer Impression Formation: The Integration of Visual and Verbal Information, in Nonverbal Communication in Advertising, at 43, 55 (Sidney Hecker & David W. Stewart eds., 1988) (explaining that visuals have a primary role in initial impressions of ads; “if there is little or no subsequent processing, then visual information will dominate the final impression as well. If, on the other hand, there is subsequent processing, then visual material provides a starting point which is gradually eclipsed by later text information”); pictures are relatively more important in conditions of low involvement).

\(^{82}\) See, e.g., David M. Boush, Deception in the Marketplace: The Psychology of Deceptive Persuasion and Consumer Self-Protection 74 (2009) (“Pictorial metaphors may suppress counterarguing and deception-protection thinking by spreading consumers’ attention along multiple inferential pathways, and because people simply cannot counterargue pictures, thus causing inferences favorable to brand that could not be legally stated without substantiation.”) (citation omitted); David Vaver, ‘Brand Culture: Trade Marks, Marketing and Consumption’—Responding Legally to Professor Schroeder's Paper, in Trade Marks and Brands: An Interdisciplinary Critique 177, 186 (Lionel Bently et al. eds., 2008) (“[A]dvertisers use images rather than words to convey . . . messages [that would be inane if stated in words]: images do not actually ‘tell’ lies. The viewer discerns the message subconsciously. A picture here really is worth a thousand words, but what exactly those words are or mean cannot accurately be pinned down as if they were words in a contract or conveyance. In short, it is easier to lie through pictures than through words; it is also easier to get away with it legally.”); cf. Feigenson & Spiesel, supra note 9, at 13 (“Things can be ‘said’ in pictures that cannot, for a variety of reasons, be named with words, and people often exploit those interstices between saying and showing to talk about the world.”).

\(^{83}\) See, e.g., Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 516 (8th Cir. 1996) (finding images of two identical gas pumps or airline tickets with different prices literally false because the ad claimed through its visuals that, like the pumps or tickets, the drug being advertised was completely equivalent to the more expensive competing drug); Coca Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312 (2nd Cir. 1982) (finding image of an orange being squeezed directly into a carton literally false where the oranges were subjected to pasteurization and occasionally freezing before being packaged); Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 127 (S.D.N.Y. 1990) (use of deceptive “prop”); Warner-Lambert Co. v. Schering-Plough Corp., No. 91 Civ. 5079 (MGC), 1991 U.S. Dist. LEXIS 14620, at *3-4 (S.D.N.Y. Oct. 15, 1991) (images of people sleeping in situations where they would normally be awake overwhelmed spoken words in television ad to create misleading impression that competitor’s allergy drug put all or almost all of its users to sleep, and were likely to cause viewers to infer that advertiser’s allergy drug did not cause drowsiness).
consumers’ decisions by disabling them from responding rationally to the claims made, focus on visual elements specifically.84

As images replace words, the informational content of ads apparently drops—or, more precisely, is replaced by new kinds of “information” detached from any particular product function or benefit, so that the product’s supposed qualities (coolness, sexiness, etc.) wouldn’t exist if they weren’t advertised.85 Images, in this argument, are more likely to harm consumers’ autonomy because they aren’t received as truth claims, and thus slide under viewers’ defenses, even as they retain persuasive power.86 Images, that is, trick consumers into thinking that they aren’t being influenced. The logical (of course) conclusion is that truthful, legitimate ads should be almost exclusively words.87

Under our current system, however, images are ever-present, and some of them get challenged as conveying specific, actionable false messages. In such cases, courts often proceed with complete certainty, confident that (certain) images speak clearly. In one case, S.C. Johnson & Son, Inc. v. Clorox Co.,88 the defendant’s humorous ads showed two animated goldfish suspended in upside-down plastic storage bags, one safe and sound in its Glad-Lock bag and the other threatened by a leaky Ziploc.89 Plaintiff’s tests revealed that 37% of Ziploc bags tested

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84 See, e.g., Yoav Hammer, Expressions Which Preclude Rational Processing: The Case For Regulating Non-Informational Advertisements, 27 WHITTIER L. REV. 435, 437 (2005) (“[M]odern advertisements hardly convey information or clear arguments. Instead, they focus on an attempt to create a positive emotion within the viewers. The messages come in mostly visual and non verbal form, and viewers are hardly aware of the fact that messages have been conveyed. These characteristics of modern advertisements are the result of advertisers’ conclusion on the basis of many psychological studies, that emotional and experiential advertisements, rather than informational ones, are much more successful in causing viewers to internalize the advertising messages. The state of affairs where advertisers influence the decisions, values, and identity of viewers by means of a non cognitive process is problematic. It conflicts with our idea of man as an autonomous creature whose values, identity, and decisions reflect a conscious choice.”).

85 See Hammer, supra note 83, at 442-43 (referring to a decrease in the “quantity of information” provided by ads over time, though also arguing that the new ads contain powerful and significant messages).

86 See Hammer, supra note 83, at 457-59 (elaborating on the autonomy concern with a number of examples of ways in which visuals can persuade without being noticed as arguments, including subliminal messages, messages conveyed by the presence or absence of black people in ads, and messages about gender equality conveyed by pornography).

87 See Hammer, supra note 83, at 477 (“[L]aw should restrict advertisers to information-only advertisements. In addition, my suggestion is that advertisements might contain pictures of the product, but no other visual representations. Messages which set a non-rational process into motion are visual and should therefore be limited. For example, a recommendation of the product by a well liked and popular personality or even the mere exhibiting of the product together with such a personality without any words, constitute a dissemination of a covert message. On the other hand, a picture of the product is informational, which assists consumers in making rational decisions. However, only pictures of the product itself should be permitted. Pictures of the product against a certain background would allow for messages to be conveyed in a problematic manner and should not therefore be permitted.”); see also id. (“In addition, the law should limit the usage of auditory medium for the purpose of conveying messages and influencing people in non-cognitive ways. The suggested regulation should prohibit the use of pleasant music in advertisements. Furthermore, advertisers should be prohibited from using the voice of well known personalities to advertise their products.”).

88 241 F.3d 232 (2d Cir. 2001).

89 The court of appeals explained:

Both commercials show an animated, talking goldfish in water inside each of the bags. In the commercials, the bags are turned upside-down, and the Slide-Loc bag leaks rapidly while the Glad-Lock bag does not leak at all. In both the 15- and 30-second Goldfish I commercials, the Slide-Loc goldfish says, in clear
under similar conditions didn’t leak at all, and only 10% leaked at the rate depicted in the TV commercials (several drops over the course of a 15- or 30-second ad). The court thus found the ads false, including print ads that did not show any leakage rate because they only showed a drop of water forming from the Ziploc. Because the Ziploc bag in each ad was leaking, the court of appeals found a false representation that upside-down Ziploc bags filled with water always leak.  

This is a leap – the image itself, being a static image, could not make any representation about frequency of leaks, though clearly some comparative claim was being made.

A few years later, the same court upheld a finding that certain comparative ads for DirecTV’s HDTV service were false. Their snappy dialogue conveyed the false message that cable HDTV quality was worse. At the same time, the court held that images with an even more aggressive comparative message—showing an incredibly distorted image representing cable’s

distress, “My Ziploc Slider is dripping. Wait a minute!,” while the Slide-Loc bag is shown leaking at a rate of approximately one drop per one to two seconds. In the 30-second Goldfish I commercial only, the Slide-Loc bag is shown leaking while the Slide-Loc goldfish says, “Excuse me, a little help here,” and then, “Oh, dripping, dripping.” At the end of both commercials, the Slide-Loc goldfish exclaims, “Can I borrow a cup of water!!!”

Id. at 234-35.

90 See id. at 240.
91 See [cite].
92 Ad on file with author.
image quality—were merely puffery. The classic definition of puffery assumes a claim made in words, such as “the best ever!” Puffery is vague and exaggerated, or subjective and nonfalsifiable, and is nonactionable because no reasonable consumer would rely on it. In theory, puffery cannot distort consumer decisions as false advertising does.

The Second Circuit set aside prior definitions of puffery in order to create a new rule for images. Images, unlike words, “cannot be vague or broad,” are generally “specific and measurable,” and can therefore ‘be proven either true or false.’ Under the old definitions, then, images could not be puffery—but the court was convinced that some images, including the ones before it, needed to be defined as nonactionable puffery. A visual depiction of a product can be “so grossly exaggerated that no reasonable buyer would take it at face value.” Its unreality, its defiance of ordinary rules of representation, would simply be apparent. In the case at bar, no reasonable consumer could mistake the defendant’s heavily pixilated image for a real representation about cable’s image quality. The court, relying on its own assessment of the image, reversed the district court’s grant of injunctive relief as to the ads featuring these images.

The Second Circuit’s new rule ensured differential treatment of words and images, but provided little guidance for the next set of images to come along. This uncertainty is only tolerable because of the underlying assumption that all viewers will generally interpret a picture in the same way, allowing the court to recognize the category of the meaningless image (puffery) alongside the category of the exaggerated but especially persuasive image (falsity).

C. Tort Law: Scott v. Harris

Changing focus, I turn now to images as evidence rather than as direct objects of regulation. A recent Supreme Court case, Scott v. Harris, highlights the power of images to intervene in ordinary cases that, in prior decades, would likely have proceeded without such

93 Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144 (2d Cir. 2007).
94 See id. at 159 (recognizing definitions of puffery as “subjective claims about products, which cannot be proven either false or true” and “an exaggeration or overstatement expressed in broad, vague, and commendatory language”) (internal quotation marks and citations omitted).
95 Id. (internal citations omitted); see also Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 38 (1st Cir. 2000) (holding that there is “a fundamental difference between a slogan on a can label that communicates its meaning to consumers solely through the printed text, and a tag line shown on the screen at the end of a television commercial that communicates its message to consumers through a combination of audio-visual and textual media,” but not explaining what that fundamental difference was such that, as the court concluded, the former could not be false but the latter could be).
96 See Owen Weaver, Everything You Will Ever Want To Know About Puffery and How the Second Circuit Wrongly Applied It in Time Warner Cable, Inc. v. DIRECTV, Inc., 43 NEW ENG. L. REV. 357, 372 (2009) (“[I]t is hard to rationalize why the same false statement would have a higher propensity to deceive consumers when expressed through words rather than when expressed through images. In essence, DIRECTV used two different forms of advertising to convey the same message to consumers that its HD picture quality is superior to cable’s HD picture quality. The Second Circuit found DIRECTV’s claim to be literally false and deceptive when expressed through words in a television commercial, yet when the same message was expressed through an exaggerated image the Second Circuit determined that it was unlikely to deceive consumers. This decision in effect creates a dichotomy between statements expressed through words and statements expressed through images, with the latter avoiding liability under section 43(a). As a result, advertisers are now encouraged to produce outrageous visual advertisements because under that format they can avoid section 43(a) liability.”) (footnotes omitted).
evidence. The interpretive moves made—or not made—in dealing with images as evidence are echoed when courts analyze whether images themselves violate the law.

In Scott, eight members of the Court found that a videotape of a high-speed police chase so clearly displayed the truth of a police-citizen encounter that no jury should be allowed to assess whether the police behaved unreasonably, even though the chase ended with the target paralyzed. Notably, the majority posted the film of the chase on the Supreme Court’s website as part of its opinion, believing that the opportunity to see for oneself would make its decision more convincing. Because there was visual evidence, the majority seemed to believe that it could only be interpreted one way: the image provided unmediated access to reality. And yet the majority’s understanding was shaped by visual codes learned in other fora. Without noting the contradiction, Justice Scalia at oral argument referred to the tape as both equivalent to a Hollywood movie chase scene (that is, an entirely constructed encounter) and as unmediated reality.\footnote{See Feigenson & Spiesel, supra note 9, at 42.}

Subsequently, Dan Kahan et al. showed people the tape and found that demographic characteristics strongly affected whether viewers found the police’s actions unreasonably dangerous.\footnote{Dan M. Kahan et al., Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837 (2009).} What we see depends on where we stand. The Court’s assumption that the videotape communicated a single meaning to all perceivers was, simply, wrong.

III. Copyright

Copyright law, with its foundation in the law of print, is permeated by the dynamics identified in the previous part. The twist is that images’ presumed special access to truth has to somehow be held in abeyance in order to apply copyright law to an image, because copyright only protects expression. Reality is in the public domain. One might think that copyright would of necessity focus its attention on the ways in which images are not the same as the things they depict. Despite courts’ attention to the mechanics of photographers’ choices of subject matter and presentation, which they initially used to establish that photographers were creative artists entitled to copyright protection, copyright still relies on naïve theories of representation, sometimes elevating images and sometimes denigrating them.

Initially, conceptual maneuvers were required to allow copyright—whose constitutional basis is in a clause referring to “Writings” of “Authors”—to cover all media.\footnote{Sarony v. Burrow-Giles Lithographic Co., 111 U.S. 53, 54, 56 (1884) (interpreting “writings” loosely enough to cover visual images).} The official story is now one of media neutrality, except where specified otherwise. In the Copyright Act of 1976, Congress changed the definition of copyrightable works from “all the writings of an author” to “original works of authorship.”\footnote{17 U.S.C. § 102(a) (2006). The current statute lists categories of works, but does not purport to be exclusive. Id. (“Works of authorship include the following categories . . . .”); see also H.R. Rep. No. 94-1476, at 53 (1976) (“[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outdated concepts of the scope of particular categories.”); see also id. at 51 (“Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.”).} In practice, however, courts slot works into the enumerated
categories, distinguishing literary works from pictorial and audiovisual works, not least because
the type of work can determine which exclusive rights belong to the copyright owner.101

At the same time, the written text remains the prototypical copyrighted work.102 Judges,
whose output is written, may have a particularly easy time seeing the worth and creativity of
writing, and analogize other types of creation to words.

While copyright’s theories have remained textually focused, copyright’s practical effects
spread much farther as the balance of power in creative works has shifted. At this point, non-
software literary works are a small fraction of the economic value of the copyright industries.103
All sorts of disciplines have been slow to recognize the change; law is hardly alone. Mechanical
replication of text was standard for centuries—the printing press is often identified as the
technological innovation that ultimately led nations to create copyright law104—before Walter
Benjamin could announce “The Age of Mechanical Reproduction,”105 which was concerned with
the increasing salience of reproduction technologies for visual and audiovisual works. Printing
was the baseline assumption for text, worries about the effects of its wanton reproduction largely
forgotten,106 by the time that twentieth-century cultural critics started to consider how similar
prolific copying might affect visual culture. Just as old text-based theories sometimes do poorly
images and video, law’s textual focus is inconsistent with the real impetus for most copyright

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101 See Barron, supra note 1.
102 Statistical data are limited, but Barton Beebe’s survey of fair use cases indicates that textual works remain oft-
litigated, though he doesn’t break down how fair use defenses fare by type of work at issue. Barton Beebe, An
specifically, 36.6% of the opinions (and 31.3% of the district court opinions) [addressing fair use] addressed facts in
which both parties were engaged strictly in the medium of nonvirtual text. . . . Opinions addressing facts involving
video, broadly defined as moving images in television, motion picture, or other form, constituted 20.6% of the
opinions, while opinions involving music made up only 6.2% of those studied. Finally, 84.0% of the opinions
addressed facts in which both parties’ works appeared in the same medium. Where a shift in medium did occur, the
most common was from print to video or vice versa, which was reported in thirteen (or 4.2%) of the opinions.”)
(footnote omitted).
104 [cites]
105 WALTER BENJAMIN, The Work of Art in the Age of Mechanical Reproduction, in ILLUMINATIONS 217 (Hannah
larger overall phenomenon. Photography, for him, was “the first truly revolutionary means of reproduction,” and
reproduction had attained its greatest significance under modern capitalism with the development of film. His
examples and arguments were drawn from graphic arts and sculpture, the original copies of which had traditionally
had an “aura” of authenticity; the aura of the original manuscript was, by contrast, limited.
106 See, e.g., 1 ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE (1979) (discussing early
concerns about the spread of literacy giving knowledge to the wrong people); LEONARD W. LEVY, LEGACY OF
SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 21–22 (1960) (quoting Governor
Berkeley’s 1671 statement that “I thank God, there are no free schools nor printing . . . for learning has brought
disobedience, and heresy, and sects into the world, and printing has divulged them . . . . God keep us from both!”
(citation omitted); cf. MARYANNE WOLF, PROUST AND THE SQUID: THE STORY AND SCIENCE OF THE READING BRAIN
74 (2007) (“A more subtle concern for Socrates [who opposed written language and wanted oral culture] is that
written words can be mistaken for reality; their seeming impermeability masks their essentially illusory nature.
Because they ‘seem . . . as though they were intelligent’ and, therefore, closer to the reality of a thing, words can
delude people, Socrates feared, into a superficial, false sense that they understand something when they have only
just begun to understand it.”).
fights: audiovisual works now generate most copyright controversies, and even anticopying technology is mostly directed at protecting images and music rather than at printed works.107

The following sections address copyright’s treatment of images. First, I examine the basic area of factfinding, a predicate for any application of law to facts. Then I turn to issues of protectability, infringement via substantial similarity, and fair use.

A. Judging Images: Obviousness in Place of Theory

In the previous Part, I argued that the intensity of the images in Scott allowed the Court to substitute its judgment for everyone else’s, acting on the assumption that its judgment was equivalent to that of everyone else because the images so plainly had only one meaning.108 This pattern is apparent in copyright as well, where courts believe they can see the truth.

As a result, visual copyright cases can seem to involve not interpretation, but simple announcement of the obvious. Courts even feel free to disregard ordinary rules of factfinding, such as the standards of review governing facts found by a district court. In Boisson v. Banian, the Second Circuit reviewed the facts of an infringement case involving alphabet quilts de novo, because the court of appeals was just as well-positioned to see the truth as the district court sitting as finder of fact. The court of appeals therefore reversed a finding of noninfringement, holding that the similarities between two quilts were sufficient to constitute infringement, notwithstanding that many elements of the quilts were in the public domain.

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107 See, e.g., [cite some discussions of DRM aimed at music and film; DRM for texts certainly exists, but has generated far less controversy; scanning books from analog to digital is also easier and less distorting than filming a TV screen showing a DVD or taping a digital broadcast]; cf. HILDERBRAND, supra note 51, at 106 (“[Copy protection technology for videotape distorted the visuals,] mak[ing] the image pulse from light to dark while leaving the soundtrack unimpeded . . . . This method also indicates bias that the image track is more important than the sound track. . . .”).

108 See FEIGENSON & SPIESEL, supra note 9, at 43 (“The immediacy and intensity of seeing the video gave Justice Scalia the confidence to override the lower court’s findings of fact, communicated in mere written form.”).
Intriguingly, Judge Posner, one of the most influential judges of our era, performed the neat trick of using images to prove the correctness of his judgment while also impugning their reliability. His opinion in *Ty v. GMA*\(^{110}\) reproduced a picture of the stuffed pigs at issue in the case as evidence while disavowing them as inaccurate:

A glance at the first picture shows a striking similarity between the two bean-bag pigs as well. The photograph … actually understates the similarity (the animals themselves are part of the record). The “real” Preston is the same length as Squealer and has a virtually identical snout. The difference in the lengths of the two animals in the picture is a trick of the camera. The difference in snouts results from the fact that the pictured Preston was a manufacturing botch. And GMA put a ribbon around the neck of the Preston in the picture, but the Preston that it sells doesn't have a ribbon.\(^{111}\)

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\(^{109}\) Green quilts in *Boisson v. Banian*, the second found by the court of appeals to infringe the first, reversing the district court’s finding of noninfringement. On file with author.

\(^{110}\) *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

\(^{111}\) *Id.* at 1169.
His language is notable, among other things, for its reference to the “glance”—the image enables easy and immediate judgment. But the photographer’s choices also affect the meaning conveyed, though not enough here to sway the court.

If images are so treacherous, can theory help us navigate them? Alfred Yen and Christine Haight Farley have persuasively argued that courts make aesthetic judgments while disavowing any such intent, contributing to legal incoherence and unpredictability. Farley also documents how courts engage in various techniques to deny they’re making artistic judgments, displacing the issue to other questions such as the definition of parody, relying on the standard of proof or the weight of evidence, or simply stating a conclusion without any supporting analysis.\footnote{See Farley, Judging Art, supra note 11, at 836-38.}

As Yen points out, “[d]eciding copyright cases without knowledge of aesthetics seems as implausible as deciding antitrust cases without knowledge of economics.”\footnote{Alfred C. Yen, Copyright Opinions and Aesthetic Theory, 71 S. CAL. L. REV. 247, 247 (1998) (footnote omitted); see also Farley, Judging Art, supra note 11, at 809 (“Indeed, it is a curiosity that law has neglected [aesthetics] for the assistance it so obviously might lend. In numerous other areas of the law, outside disciplines are turned to for assistance in understanding the terrain that these disciplines have made their business to study. … If psychology can assist criminal law in deciding how to determine whether a defendant is insane, why should aesthetics not be used to assist a court in determining whether something is art?”) (footnote omitted).} Yen notes that judges are eager to fix the meaning of works, because the alternative to a single fixed meaning seems to be the postmodern nightmare in which nothing is certain and communication is impossible.\footnote{See id. at 260-61.} Courts in visual copyright cases have trouble with the excluded middle—the possibility that images might have multiple plausible meanings.\footnote{Courts in Lanham Act false advertising cases, by contrast, have particularized the inquiry into meaning: in some cases, they hold, statements have only one reasonable meaning, and can be evaluated for their truth or falsity on their faces. In other cases, courts find multiple reasonable meanings, and require plaintiffs to show with extrinsic evidence that a substantial portion of the consumer audience receives a false message from an ambiguous ad before enjoining it. Copyright plaintiffs have not generally offered courts extrinsic evidence of how audiences perceive the meaning of a particular work, though there are occasional battles of the experts, e.g., SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001), and the Ninth Circuit explicitly rejected reliance on a consumer survey to determine whether a particular accused work was a parody. My argument is certainly not that copyright laws need more surveys—that would just mean more words to fight about, since surveys can always be contested—but that copyright’s epistemology is sharply limited by courts’ attempts to fix meaning without interrogating their own assumptions about how images, music, and so on make that meaning.}

Yen’s work is extremely important in illuminating the role of aesthetic theory in copyright, but he considers all types of works together, from useful articles to television shows to written plays, without distinguishing the ways in which the type of medium affects the theory applied. Likewise, Farley is concerned mainly with works recognized by the art world as art objects, and does not distinguish in her analysis of courts’ use of aesthetic theories among words, images, and other forms. Indeed, because words are so unproblematically and prototypically the subject of copyright, courts have not been much concerned with whether a particular arrangement of words is beyond copyright’s boundaries, except when industrial policy is at issue (e.g., protection for databases or computer programs, where traditional words are often absent). Aesthetic theory as a boundary-defining tool is only required for nontextual works.

\textbf{B. Truth, Expression, and Protectability}
The Supreme Court’s classic statement about the low standard of copyrightability also addresses pictures specifically, but has been read to cover all forms of creativity. The Court was specifically dealing with circus posters featuring drawings of performers, and rejected the argument that commercial illustration didn’t deserve copyright protection. Justice Holmes wrote:

[The pictures] seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. … The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. …

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. ... It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.

Most readings of Holmes’s “dangerous undertaking” sentence take it to establish a broad nondiscrimination principle, such that copyright does not make judgments about artistic value. I don’t wish to argue that this is wrong. But I want to focus on Holmes’s unwillingness to judge the worth of pictures specifically, and his reference to other pictorial artists, as well as to handwriting—a means of visually presenting words rather than words themselves. This brings back the theme of the opacity of images, their irreducibility to anything else. Law must grant them copyright protection as externalized expressions of the artist’s individual consciousness; they are not unprotectable fact even if they are also representational.

The oscillation between high and low value of images—their easy readability versus their unique expression of a particular artistic imagination—comes out in other classic copyright cases as well. The Second Circuit famously held in Alfred Bell & Co. v. Catalda Fine Arts, Inc. that copyright’s standard for originality is so low that even accidental authorship caused by a hand jolted by “a clap of thunder” suffices. [Quote language about the painter throwing the sponge against the painting and producing the desired effect.] The minimalist author here is again a visual artist. A jolt of the hand is unlikely to produce a word, and even glossolalia will often be taken to represent some underlying psychological state of the author, not the mechanical derangement provoked by sudden noise that can nonetheless be claimed as the artist’s own work.

Unsurprisingly, the history of copyright and photography also contains similar conceptual maneuvers. In order to find that photographs are copyrightable, courts had to identify

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116 See Amy B. Cohen, Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments, 66 Indiana L.J. 175, 188 (1990), (generalizing Bleistein to “artistic merit”); [cite some cases employing Bleistein’s language to textual or other works—see what cases that quote “pictorial” do.]
photographers as authors, adding expression rather than just copying facts from the world. They did this by emphasizing particular choices made by the photographers, especially timing, angles, and similar decisions: selection of how to frame and present images. Christine Haight Farley notes that these were far from the only manipulations available to photographers, but focusing on those characteristics allowed courts to maintain that photographs were also pure representations of reality, which was important for other areas of the law in which photographs were increasingly used as evidence.\footnote{Farley, Lingering Effects, supra note 39, at 390 (“The Court [in Burrow-Giles, finding photographs to be copyrightable subject matter,] does not acknowledge ways in which a photographer can manipulate the image by intervening at other points in the process. For instance, surprisingly, there is no discussion of the possibilities for retouching, reworking, cropping, framing, redeveloping, coloring, etc. These activities, which the then-technology enabled, had definite analogies in the world of artistic production. . . . Moreover, the so-called ‘art photographers’ at the time were using these techniques for precisely these reasons. Instead, the Court focuses only on the pre-shutter actions and processes. . . . The significance of this privileging of the pre-shutter activity means, of course, that the other reading of photography—the one simultaneously being advanced in other courts of law—could easily be maintained.”).} It is extremely useful for us to be able to treat photographs as transparent windows on reality in certain circumstances, and expressions of the artistic soul in others, but that doesn’t make those characterizations consistent.\footnote{See Farley, Lingering Effects, supra note 39, at 393 (“[V]iewers may uncritically accept one meaning of a photograph when it hangs on a museum wall, and just as easily a very different meaning of the same photograph when it is used as evidence of a crime. In both cases, the viewer assumes that the meaning that they read into the photograph is in fact contained with it and not derived from external cues. Thus, photographs are at once able to be seen as the expression of the photographer who made [them], but also as a direct transcription of nature. In other words, photographs are accepted both as a window on the world and also as a mirror on the soul of the artist.”).}

C. The Effect of Naïve Theories of Representation on Infringement Analysis

Copyright infringement requires “substantial similarity” between the plaintiff’s work and the accused work. Amy Cohen has cataloged the ways in which courts have approached substantial similarity inquiries for different types of works. For visual works, she argues, courts draw the line between idea and expression by using subject matter and conventional representational techniques for that subject matter to identify ideas. What’s left over after convention is filtered out is denominated protectable expression.\footnote{Cohen, Copyright Law, supra note 115, at 211.} As a result, courts treat certain visual styles as more protectable than others.

In a case involving two highly similar pictures of birds and flowers created by the same artist, for example, each work produced by an artist was entitled to only very limited protection; near duplication was acceptable. The first picture below shows the work to which the plaintiff held copyright; the second shows the work to which the defendant held copyright; and the final picture shows a painting produced by the artist in court without direct reference to either of the previous paintings.
The court of appeals distinguished between less-protectable realism and more-protectable styles:

[I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist’s style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique. A copyright in that circumstance may be termed ‘weak,’ since the expression and the subject matter converge. In contrast, in the impressionist’s work the lay observer will be able to differentiate more readily between the reality of subject matter and subjective effect of the artist’s work.¹²²

Despite the court’s suggestion, photographers have in fact had a reasonable amount of success making infringement claims against others who copied their distinctive subject matter and presentation choices.¹²³ But more notable here is the concept of the reality (one is tempted to say the treachery) of images: once again, certain types of visual representation appear so connected to the represented objects—even though they might actually be imagined—that the pictures disappear into the objects, leaving very little for copyright to protect.

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¹²² Franklin Mint Corp. v. National Wildlife Art Exchange, 575 F.2d 65, 66 (3d Cir. 1978). Following the court’s lead, Seidel’s discussion of the case focuses on “realism” in the representation of the birds in the picture, casually dismissing the background and failing to discuss arrangement of picture elements. Seidel, supra note 120, at 46-47 (“Bird art is judged by the accuracy of the reproduction, which includes coloring, details of plumage, bodily attitude, bird positioning, and accuracy of background (if present). . . . An ornithologist or a bird lover can tell in an instant whether the attitude of a particular species of bird is accurately represented.”).

¹²³ E.g., Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005) (protecting photographer’s choice of subject matter and angle) [cite other cases]. Interestingly, Seidel also dismisses photography, as compared to painting, as a means of accurately representing birds, because photographs capture only a moment and might not reflect the typical position of the species. See Seidel, supra note 120, at 47. This equates truth with typicality and individuals with their species, as if there were a Platonic ideal of a bird whose representation was more accurate than an image of any actual bird.
This concept of special access to reality structures the court’s reasoning, even though several features of the paintings at issue argue strongly against any such concept. First, the paintings were in a style popularized for the depiction of birds by John J. Audubon, which among other things abstracts the birds and the fragments of plants on which they rest from any background, and configures the arrangement very carefully. By art world standards both at his time and now, Audubon was far from a realist. Audubon’s naturalist style is “realist” in the way that the Hollywood car chase scene is realist, which is to say not at all, even though the representational conventions are common enough in Western art that it is easy to perceive this style as realist. Thus, immediately after distinguishing strongly realist from less realist art and suggesting that the litigated paintings fell on the more realist side, the court noted that numerous conventions in ornithological art determined many features of those very paintings. As with the cartoon obscenity discussed in Part I, the ideology that collapses representation and reality made the court unable to appreciate that the very things it was saying about style and genre meant that the paintings were not pure copies of an underlying reality.

Second, the initial painting and the accused work were created by the same artist, working from his imagination and synthesis of birds and pictures he’d seen in the past, such that the image he was painting only existed in his head as a sort of Platonic ideal. The jury

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124 See, e.g., Linda Dugan Partridge, By the Book: Audubon and the Tradition of Ornithological Illustration, 59 HUNTINGTON LIBR. Q. 269 (1996) (arguing that Audubon’s claims to draw solely from nature are contradicted by the historical record and by his drawings themselves); Adam Gopnik, A Critic at Large: Audubon’s Passion, THE NEW YORKER, Feb. 25, 1991, at 96, 96 (noting “the uncanny intensity of his art—its haute-couture theatricality and ecstatic animation, its pure-white backgrounds and shadowless, cartoonish clarity—which still proves so unexpected that we are inclined either to explain it away as technique or write it off as naïveté”); id. at 100 (“It is impossible to imagine any rational point of view from which the birds might have been seen in nature . . . . Pure, isolated shapes set against a white background, they become symbols of themselves. . . . Audubon had invented an imaginary, unnaturally radiant light of a kind that was not seen again in descriptive art until the photographs of Avedon and Penn in the fifties . . . .”); Laurie S. Hurwitz, AMERICAN ARTIST, Feb. 1994, at 8 (“John James Audubon . . . has long defied art-historical classification . . . . Executed in the traditional manner of 18th-century naturalist, these images are also characterized by a graphic energy and flattened-out space that make them indisputable precursors of modern painting, from Picasso’s Cubist still lifes to Matisse’s cutouts.”). At the time Audubon created his style, it was not uncontroversially recognized as realist or even as naturalist: the preeminent publisher and engraver at the time “took one look at Audubon’s drawings and decided that the signature inclusion of flora and the depiction of the birds as lively, acrobatic creatures constituted embellishment and inaccuracy. ‘I will not engrave them . . . because ornithology requires truth in the forms and correctness in the lines. Here are neither,’ Lawson wrote. . . .” Nick Obourn, Call of the Wild, 32 ART & ANTIQUES 68 (2009); cf. Gopnik, supra, at 104 (“The constant animation that Audubon imposed on his creations, and that to his contemporaries could look so unnatural, has come to seem at the end of his two volumes as beautifully contrived as ballet . . . .”).

125 Cf. Michael J. Lewis, Rara Avis, NEW CRITERION, Jan. 2005, at 66, 67 (reviewing RICHARD RHODES, JOHN JAMES AUDUBON: THE MAKING OF AN AMERICAN (2004)) (describing Audubon’s style as “an unchallenging, easily digestible realism”). Audubon’s perceptions, like those of any artist, were formed by the art to which he’d been exposed, and how he saw shaped how he drew. Partridge, supra note 123, at 278 (“Any number of French and English illustrated waterbirds are comparable [to Audubon’s drawing]. The critical point here is that on the spot, in the Mississippi flatboat where he was examining his specimen, writing, and recording this quick sketch, Audubon was also working-and seeing-in the old illustrational format.”).

126 Franklin Mint, 575 F.2d at 66.

127 The painter used source materials to produce both paintings, including sketches, photos, and slides. See Seidel, supra note 120, at 48. Seidel, his lawyer, “decided that the best way to demonstrate both artistic variation and the absence of copying in ‘The Cardinal’ was to have Gilbert do another painting of a male and female cardinal on apple blossoms in open court within six feet of the bench and the witness stand during trial without referring to either of
returned a verdict of noninfringement, aided by the painter’s recreation of a third version of the same scene, produced in court without looking at either of the first two. However, copyright law recognizes “unconscious” copying as infringing. There is no rule that the infringed work needs to be before the copier as a reference before infringement can occur. In the ordinary case, the painter’s memory of the first painting would clearly be enough to find infringement. The court’s reasoning, like the jury verdict it upheld, most plausibly rests on an implicit theory that the painter was copying a purely intangible mental construct all three times, rather than copying the first painting when he returned to the subject matter. But all painting requires the involvement of the artist’s mind, not just her hand. All painting is mentally mediated, making its relationship to reality more complicated than pure reproduction.

Third, the artist in this case was not, despite his use of the Platonic image of cardinals in his head, working from a self-generated style. Even were such a style possible (as opposed to a style that is seen as fresh, shocking, or highly distinctive from the artist’s contemporaries), this wouldn’t have been one: the artist was using Audubon’s style, one that he’d learned—a word that here means copied, as is standard for painters. Rather than representing reality, the painter was representing Audubon’s style. But the idea that images have, or can have, a special veridical status was so powerful that it shaped how the court saw the paintings, and thus allowed the court to hold that the style here was so realist that the scope of copyright protection in the first painting was very narrow.129

Amy Cohen ultimately concludes that courts perform similar operations across media in sorting idea from expression, looking for what is familiar to them to determine what is unprotectable idea. Interestingly, Cohen equates accuracy in representation of reality—the

his earlier paintings.” Id. He did use his sketches, photos, and stuffed cardinal references. See id. This practice was in the tradition of the Audubon style. See Gopnik, supra note 123, at 99 (“[Audubon] eventually placed on his drawings and watercolors the notation ‘Drawn from nature,’ but that was shorthand for a long and contrived process. Audubon would shoot his birds—sometimes hundreds at a time—and then skin them and take them home to stuff and paint. . . . [H]e began to make flexible armatures of bent wire and wood, and he arranged bird skins and features—sometimes even whole, unevicerated birds—on them in animated poses.”).

128 See, e.g., Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), aff’d sub nom. ABKCO Music Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (D.N.Y. 1924). Actually, this rule is almost entirely limited to music cases and even there is an outlier, though courts haven’t noted any restriction on the doctrine. See Edwards & Deutsch Lithographing Co. v. Boorman, 15 F.2d 35, 37 (7th Cir. 1926) (suggesting unconscious copying as an explanation in a case finding infringement of a time teller, apparently a written compilation for use by bankers); Carissa L. Alden, A Proposal to Replace the Subconscious Copying Doctrine, 29 CARDOZO L. REV. 1729, 1736 (2008) (finding that, since Fred Fisher, only three cases have been decided under the subconscious copying doctrine): [check the cases since 2007 to account for publication delays] It may be that courts’ incomprehension of music makes them believe that musical similarities are more likely to come from copying, even good-faith, unconscious copying, than they are from the ordinary generic similarities judges recognize more easily in detective stories, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting), and resurrected-dinosaur-island stories, Williams v. Crichton, 84 F.3d 581 (2nd Cir. 1996), among others.

129 Cf. Cohen, Copyright Law, supra note 115, at 212 (“The determination that a particular work is life-like and, thus, less an original work of the artist than one that has a distinctive style, is a value judgment that reflects the judge’s view as to what is ‘life-like’ and as to what constitutes a distinctive, and therefore copyrightable, ‘style.’”).

130 See Cohen, Copyright Law, supra note 115, at 229 (“In the context of both types of work, the critical determinations for defining the line between protected and unprotected aspects of a given work are, first, the
hallmark of unprotectable idea in visual works—with tropes or scenarios that are “natural or necessary outgrowths of the same basic idea,” which is how courts identify unprotectable ideas in literary works. But these concepts are diametrically opposed. The term “scenes a faire,” used to identify unprotectable ideas (or sub-ideas), indicates that unprotectable ideas, being typical, are simply individual examples of an overall species, and the individual is not sufficiently distinguishable from the others of its species to receive a separate legal existence. By contrast, the concept of realism in visual representation contemplates that there is a specific external referent whose accurate depiction will sharply limit, if not defeat, copyright protection for a visual work. It is the individual referent, not the general idea, that makes the visual work insufficiently creative to get broad copyright protection. Applying a literary theory to a visual (or a musical) work produces predictably unsatisfactory results, as the work isn’t doing what the literary theory expects it to do.

The concept of unprotectable “idea” needs reconceptualization when it comes to nontextual works. As Julie Cohen has written, the focus on the “idea” as the basic thing that copyright doesn’t protect means that “disputes about copyright scope become disputes about identifying those expressions that should be treated ‘like’ ideas.” But music and images create “special difficulties for judges and juries unaccustomed to parsing nonverbal expression in these terms,” the current solution to which is that they proceed, like the Trademark Trial and Appeal Board, on an “I know it when I see it” basis—even though “seeing” is precisely the problem. It is unsurprising that courts therefore often manage their difficulties in assessing specific artistic characteristics of works by baldly stating their conclusions about protectability and infringement.

Images are short cuts from mind to mind, so substantial similarity in the visual field just is; there is no way to break it down or describe it. Learned Hand’s classic statement of the non-test for substantial similarity is forthright that, no matter how hard it is to tell when nonliteral copying infringes a literary work, matters are even more uncertain when it comes to pictures:

determination of what is the basic idea or subject matter and, then, a determination of what aspects of the work are necessary or common ways of developing that idea and are thus unprotected.”).

131 Id. at 228.
132 [Cite Meshwerks v. Toyota; the glass jellyfish case
133 See, e.g., Peter Decherney, Gag Orders: Comedy, Chaplin, and Copyright, in MODERNISM AND COPYRIGHT (Paul Saint-Amour ed., forthcoming Nov. 2010) (manuscript at 6) (“At times, the distinction between ideas and expression can seem meaningless or arbitrary. We can, for example, imagine paraphrasing another author’s words to express the same idea differently. But how can anyone decouple the underlying idea of an image or a musical phrase from its expression?”).
135 Id. at 1173.
136 See Farley, Judging Art, supra note 11, at 838 (“Parks v. LaFace Records [a right of publicity case about a song title and lyrics], Comedy III Productions, Inc. v. Saderup, Inc. [a right of publicity case about charcoal sketches, adapting copyright’s fair use test], and Gracen v. Bradford Exchange [a copyright case about a painting based on The Wizard of Oz] all fall into this category. In these cases, the courts either made conclusions about the artwork’s meaning or about whether the artists’ contributions were artistic. But these conclusions were stated flatly, as if self-evident.”) (footnotes omitted).
137 Similar things happen in music, but it seems that courts are much more willing to accept testimony about musical components than about visual components.
The test for infringement of a copyright is of necessity vague. In the case of verbal ‘works’ it is well settled that although the ‘proprietor’s’ monopoly extends beyond an exact reproduction of the words, there can be no copyright in the ‘ideas’ disclosed but only in their ‘expression.’ Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement.138

Despite Hand’s distinction between literary and visual works, this statement is often quoted to summarize the difficulty of making infringement judgments generally.139

[Look and feel – forest for the trees – cautions against dissection without appreciation of gestalt – magic by which unprotectable parts together become protected – Roth Greeting Cards – note mix of words and images which we’ll see again as too hard to deal with – conclusion: infringement analysis uses representation/ reality collapse to filter out unprotected elements, but also (and unpredictably) uses wholeness and irreducibility to stop analysis]

D. Fair Use

Finally, and related to the Google Book Search example with which this article began, copyright’s fair use doctrine is more likely to choke on nontextual works. Larry Lessig has eloquently written about how freedom to quote is the foundation of textual fair use; quotation is the foundation of scholarship, news reporting, and many other important endeavors.140 While courts have begun to recognize that copying an entire picture may be necessary to critique or analyze it, freedom to quote is far less likely to be recognized for music or video, creating a significant gap between good educational/scholarly practice and the law.141 As Lessig points out,

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139 [cites]
141 Respondents to a survey by the International Communication Association, for example, were quite clear about their pedagogical and scholarly needs for complete copies of certain nontextual works:

Some kinds of criticism require reproducing an entire work. Several respondents wrote that they view the reproduction of such visual works as photographs and visual advertisements to be particularly important. For instance:

• “It’s fairly impossible to critique an advertisement or a photograph without including the image in the critique.”
• “I needed to present a complete narrative, as portrayed in a video.”
• “Commentary on visual materials such as photographs and advertisements would be impossible without inclusion of the entire work. There is no logical way to excerpt just part of a magazine advertisement, for example.”

AD HOC COMM’N ON FAIR USE AND ACADEMIC FREEDOM, INT’L COMM’C’N ASSOC, CLIPPING OUR OWN WINGS: COPYRIGHT AND CREATIVITY IN COMMUNICATION RESEARCH 5 (March 2010).
it is bizarre that freedom to quote a Hemingway novel is the baseline, but not freedom to quote the filmed version.\textsuperscript{142}

As several cases finding fair use of images have noted, most of the time an image needs to be shown in its entirety, or nearly its entirety, for commentary on the image to make sense.\textsuperscript{143} This is a problem because standard fair use analysis, with its prototype of the text, favors partial and limited quotations. In order to protect critical, news-reporting, and similarly fair uses of images, courts have been required to discount the relevance of the amount of the work used, even though the amount used is an enumerated factor in the statutory definition of fair use. Were we to recognize copyright law’s text-based default, we could make similar moves more consistently; Congress is unlikely to change fair use, but courts can refine the doctrine to take into account that non-text works are different.

IV. A Case Study: Comic Art

Works mixing text and images, or words and music, have repeatedly posed challenges to legal regulation, especially in the area of intellectual property. Courts have been able to position themselves with respect to words alone or images alone using various theories about the power, or lack thereof, of particular forms of communication. But with harder-to-define works like modern comic art, those aesthetic theories seem to break down.

Comic art may be particularly troublesome for courts because it is in many ways uncanny, boundary-crossing, which is related to its culturally devalued status. Comics make for hard cases because they represent both images and words. They aren’t novels, so they don’t get understood as high-status and transparently meaningful. They aren’t pure visual art, so they don’t get the insulation of the transcendent power of nonverbal art. They are mixed, not purebred, and they get treated as such.

A. Identity Politics: Comics and the Right of Publicity

A good example comes from right of publicity law. \textit{Doe v. TCI}\textsuperscript{144} found that a comic book violated a hockey player’s right of publicity because a minor character, a mob enforcer, used the same name (Tony Twist), and the artist admitted that—as a hockey fan—he’d used Twist’s name, and had even promoted the comic, \textit{Spawn}, at hockey-related events. \textit{Spawn}, however, is not about hockey. It’s about an undead superhero who’s been released from Hell.

Most notably, in deciding that the comic artist had no free speech defense against liability, the Missouri Supreme Court stated that that, “[i]f a product is being sold that \textit{predominantly} exploits the commercial value of an individual’s identity, that product should be

\textsuperscript{142} See id. at 53.

\textsuperscript{143} \textit{Kelly v. Arriba Soft Corp.}, 336 F.3d 811, 821 (9th Cir. 2003) (holding that it was necessary for Arriba to copy an entire image in order to allow the users to recognize it; thus the usual fair use calculus weighing use of the entirety against the defendant was not highly significant); \textit{Perfect 10, Inc. v. Amazon.com, Inc.}, 508 F.3d 1146, 1167 (9th Cir. 2007); \textit{Nunez v. Caribbean Int’l News Corp.}, 235 F.3d 18, 24 (1st Cir. 2000); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006); cf. \textit{Ty, Inc. v. Publications Int’l Ltd.}, 292 F.3d 512 (7th Cir. 2002) (holding photos of copyrighted stuffed animals to be derivative works, but Rending that collectors’ guides with photos were likely to be noninfringing).

\textsuperscript{144} \textit{Doe v. TCI Cablevision}, 110 S.W.3d 363, 371-72 (Mo. 2003) (en banc).
held to violate the right of publicity and not be protected by the First Amendment.”145 Somehow, then, the court found that the comic book *Spawn* was *predominantly* an exploitation of Tony Twist, even though he was a minor character. The court was implicitly defining a subset of *Spawn* as the product, breaking down the comic into parts. The court referred neither to the plot of *Spawn* nor to its visuals, neither of which bear any relationship to Tony Twist the hockey player. The thing that was being exploited was abstracted from the works in which it appeared; the court ignored the comics themselves except as commercial products, as if they were full of cornflakes instead of art.

There is, as might be expected in the hotly contested field of the right of publicity, a directly contradictory comics case: *Winter v. DC*,147 decided under California law, holding that the characters of the Autumn brothers, a pair of evil albino twins, did not infringe the publicity rights of the Winter brothers, a pair of albino twins with a singing career and the same first names as the Autumn brothers. In that case, the court used a variant of the transformativeness test adapted from copyright’s fair use test, protecting creative works when their (market) value comes from the creativity added by the artist and not from the celebrity’s identity. The Supreme Court of California announced this test in *Comedy III Productions v. Saderup*148 as a way to protect artists’ First Amendment interests while allowing celebrities to control things like T-shirts and posters simply featuring their identities. Thus, in *Saderup*, an artist infringed the Three Stooges’ right of publicity by creating standard charcoal portraits and selling prints and T-shirts reproducing those portraits.

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145 *Id.* at 374 (emphasis added).
146 *Spawn* #46 (on file with author).
147 *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003)
148 *Comedy III Prods. v. Saderup*, 21 P.3d 797 (Cal. 2001)
Transformativeness, however, comes with its own problems, which can be illustrated by an example from renowned comics artist Brian Michael Bendis. Bendis created a portrait of Woody Allen, who has litigated and won some significant right of publicity cases. This is a standard portrait, done in charcoal, that seems therefore to fall right within the Saderup boundaries for what violates the right of publicity in California.

Bendis makes a particular artistic claim: drawing Allen helps him understand Allen’s art. Is this transformative? Or does it merely mean that Bendis can draw Allen, but he can’t

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150 BRIAN MICHAEL BENDIS, TOTAL SELL-OUT, at [] (“These portraits were something I did for myself; I do them when I am studying the artist’s work. Hard to explain how it helps me understand them, but it does.”).
make his picture public in any way that might commercially benefit him? If a court were to defer to this argument, it would only be because Bendis has used words to explain his visual art, and the court was willing to accept those words. The art does not speak for itself in the way that the transformativeness test requires.

More generally, transformativeness is structurally biased in favor of text. A novel or nonfiction work about Marilyn Monroe will inherently seem to involve more contribution by the writer than a picture of her, because the effort required for the visual artist to represent reality will be transparent—invisible as creative effort—both to courts and to audiences. This picks up on the problem discussed above with respect to copyright’s fair use doctrine, from which Saderup drew its transformativeness test: to depict an image, one must depict the image. There is no conventionally understood way to paraphrase an image, because to the extent that images are understood to share an external referent (such as a celebrity) they are the same.

B. Writer v. Illustrator: Authority in Comic Art

The mixed media problem posed by comics is revealed even more starkly when the contributor of words faces off against the contributor of images. Comics are a collaborative medium. Ownership disputes are, at least today, often avoided with work-for-hire agreements. When those agreements aren’t in place, it can become necessary to figure out who owns what, and the unitary work of art has to be dissected. The result may favor the user of words over the visual artist. In Gaiman v. McFarlane, also about the comic book Spawn, Judge Posner was explicit that copyright law should treat mixed media such as comics and motion pictures separately from ordinary works. The issue in the case was whether popular fantasy writer Neil Gaiman owned Cogliostro, Angela, and Medieval Spawn, characters he’d contributed to the Spawn universe—contributed in the sense of describing as characters, with their images and actual roles added by artists and scripters thereafter.

The problem Posner feared was that an “author/artist” figure—implicitly, in his view, the person who deserves to be treated as the author/owner—might simply tell an artist what to do in such an abstract way that his contribution wouldn’t be copyrightable alone, because copyright does not protect abstract ideas. Then the artist might comply in such a noncreative way that his contribution wouldn’t be copyrightable. Because one must contribute something copyrightable in

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151 Compare Blanch v. Koons, in which Jeff Koons’ testimony about the reasons he copied a fashion photograph explained transformativeness to the court in ways not obvious from the face of his painting. See Randy Kennedy, The Koons Collection, N.Y. TIMES, Feb. 28, 2010, at AR1, available at http://www.nytimes.com/2010/02/28/arts/design/28koons.html?pagewanted=all (citing Calvin Tomkins, The Turnaround Artist, THE NEW YORKER, April 23, 2007, at 60, []): Even by the standards of the art world, where language about art strays easily into deep and enigmatic waters, Mr. Koons’s way of explaining his own work is hard to take seriously, though he has always seemed to take it that way. With an ever-present warm smile and the comforting tones of a guidance counselor, he has spoken about how art “lets you kind of control physiology and the secretions that take place within the body,” how his art operates in “a morality theater trying to help the underdog,” how his balloon-based sculptures, at least sexually speaking, “really try to address whatever your interests are.” In a profile of Mr. Koons in The New Yorker in 2007 Calvin Tomkins observed that “it is possible to argue that no real connection exists between Koons’s work and what he says about it.”

As Peter Jaszi has observed [cite postmodern copyright article], Koons convinced a court that his use of a fashion photograph was transformative, after notable previous losses where the same explanations failed for him, suggests more about the current attitude of the courts towards appropriation art than it does about Koons. Cf. Rebecca Tushnet, My Fair Ladies: Sex Gender and Fair Use in Copyright, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 283-86 (2006?).
order to claim authorship, neither would qualify as authors for purposes of copyright law. And yet the resulting work, Posner was certain, would be copyrightable: a protected work without a protected author. That result would be silly, and so it could not be right. Instead, the writer gets special consideration. Apparently wordsmiths are to be protected even without a protectable contribution.

There are a number of problems with Posner’s reasoning, based as it was on the primacy of the word. In his nightmare scenario, Posner seems to have imagined a very odd motion picture or comic book, entirely composed of scenes a faire components that together were more than that. Even if such a work existed and needed an identifiable author, that would not logically mean that the writer should be that author. In *McFarlane* in particular, there was no contention by anyone that the *drawings* were stock or otherwise uncopyrightable. Indeed, if the artist had just done a painting of Cogliostro, it would have been copyrightable without any of Gaiman’s character-building behind it. Many writers produce full scripts for comic books, but that writers can make specific contributions doesn’t make Gaiman’s suggestions to the artist copyrightable.

Nonetheless, Posner clearly favored words over images. For example, he distinguished the classic Sam Spade case (which found that Sam Spade was not a copyrightable character, allowing Dashiell Hammett to write further adventures for the character despite having transferred the copyright in an earlier story) because “the description of a character in prose leaves much to the imagination, even when the description is detailed.” Visual images, he concluded, were different. Below are some images of Cogliostro and Angela in action. Query whether they leave so much less to the imagination than a vivid novel as to deserve categorical differentiation:
Here the consequence of considering images closer to reality than words is that images are easily dismissed as nothing more than images. This occurs even when the images are defiantly unreal: they depict a demon returned from Hell. Words, by contrast to images, have a connection to something more abstract, something that is somehow not quite contained in the words and thus grants an author of a text greater rights than those of someone who works in images. Posner says, “A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive. That is why kids lose a lot when they don’t read fiction, even when the movies and television that they watch are aesthetically superior.”

Images here are presented as so powerful as to not require any interpretation or elaboration (which is of course empirically false), with the perhaps surprising consequence that their power makes them less authorial, less qualified for the core of copyright protection. Among the phenomena Posner’s distinction can’t explain is why generations of supposedly passive fans of audiovisual material, from Star Trek to Lost, have been inspired to write, draw, and otherwise create works extending the initial stories, “completing” the works not just in their minds but on their pages and screens. Note here also Posner’s dismissal—his literal failure to see—the editing techniques that distinguish film from live performance. A viewer routinely “completes the work in his mind” because film cuts: a character gets in a car, and then is shown elsewhere, a sequence that is sensible only because of the mental operations performed by the audience. But this technique is so naturalized to a modern viewer that it is invisible.

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153 Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004).

154 See generally WALTER MURCH, IN THE BLINK OF AN EYE: A PERSPECTIVE ON FILM EDITING (2d ed. 2001); KAREN PEARLMAN, CUTTING RHYTHMS: SHAPING THE FILM EDIT 188, 217, 222-23 (2009) (pointing out that cutting
So, Posner concludes, the stock character description of Cogliostro provided by Gaiman became copyrightable by Gaiman when he was drawn and named and given speech by the visual artist. Gaiman’s contribution made Cogliostro a character and not a drawing. Gaiman’s contributions were “quite equal” to McFarlane’s, according to Posner, even though they were just ideas. When there’s a conflict between words and artwork, words get priority, even when they’re stereotypical, just because they’re words.

In fact, the Sam Spade case mentioned above has often been distinguished from the general run of cases asserting copyright in characters, many of which—including the key precedents—have come from comic and cartoon characters. Courts have been clear that it is easier to protect a visual character than a text-only character, because visually delineated characters are more recognizable.

This returns to the idea that images are more quickly comprehended, and once evoked harder to distinguish by new details or surroundings, than character traits only identified in words. The fact that character copyright is intimately bound up with incompletely articulated theories of the visual image may help explain why the nature of copyright in characters has puzzled courts and commentators for so long. The following explanation of why the character of Tarzan is copyrightable, separate from the book Tarzan of the Apes or any other specific work in which he had appeared, is nothing more than a judge throwing up his hands:

“allows us to surmise things that in fact are not part of the plot; it gets us to, in a sense, tell ourselves the story by giving us the opportunity to make a connection between two things”; editing creates story, emotions, and cause-effect relations that may not be present in initial footage. Final versions of films are often made up of selections from dozens of different takes. Beyond this, flashbacks, instant scene changes, slow motion, distorted lenses, competing points of view as in Rashômon, combinations of live-action and animation as in Who Framed Roger Rabbit?, acting against a green screen for later insertion of special effects, and numerous other film techniques have no real-world correspondence. Cf. Eric D. Barry, High-Fidelity Sound as Spectacle and Sublime, 1950-1961, in SOUND IN THE AGE OF MECHANICAL REPRODUCTION, 114, 118 (David Suisman & Susan Strasser eds., 2010) (“Benjamin also analyzes how new media are not only reproductive, but productive. He uses cinema as his example, highlighting how the careful crafting of films using editing techniques such as jump cuts and montage means that the sense of reality portrayed by film is actually ‘the height of artifice,’ a property of reproducible objects that have no single antecedent original.”).

155 Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231 (2d Cir. 1983) [there are earlier cases finding Superman to be a copyrightable character—Miraclem an I think; cite that instead?]; Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (citations omitted); see also Olson v. Nat’l Broad. Co., 855 F.2d 1446, 1452 (9th Cir. 1988) (“[M]any literary characters may embody little more than an unprotected idea [while] a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.” For similar reasons, copyright protection may be afforded to characters visually depicted in a television series or in a movie.”) (citations omitted).

156 Cite cases, such as the wrestling case.

157 Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (citations omitted); see also Olson v. Nat’l Broad. Co., 855 F.2d 1446, 1452 (9th Cir. 1988) (“[M]any literary characters may embody little more than an unprotected idea [while] a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.” For similar reasons, copyright protection may be afforded to characters visually depicted in a television series or in a movie.”) (citations omitted).

158 Leslie A. Kurtz, The Independent Legal Lives of Fictional Characters, 1986 WIS. L. REV. 429; Brief for Public Citizen, Inc. as Amici Curiae Supporting Appellant, Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (No. 09-2878-cv) (laying out the argument for why there is really no such thing as copyright in character, only substantial similarity).
It is beyond cavil that the character “Tarzan” is delineated in a sufficiently distinctive fashion to be copyrightable. . . . Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.159

“Character,” after all, is not a type of work listed in the Copyright Act, and so to have a copyright in a character seems both detached from and necessarily grounded in a copyright in some more conventional medium such as a literary work or an audiovisual work.160

Comic art is, in formal characteristics and in the market, connected to the general rise of transmedia entertainment, in which characters migrate from one form of media to another, creating further challenges for the definition of a work protected by copyright. The trouble law has with interpreting Simpsons characters presented as pornography, as well as the difficulty law has defining copyright in Medieval Spawn, suggests that the incoherent condition of the law surrounding comics will be replicated in new transmedia environments. This is likely to make our difficulties with integrating words and images even more salient.162

V. Performance

Performance, as understood in copyright law, is singing a song, acting out a play, screening a film, or other similar activity. It is grounded in bodies: the bodies of the performers,163 and after that the bodies of the audience, who can only experience a performance in real time; a book is a book wherever it is, but a performance is only a performance when it is occurring.164 Both in creation and in execution, performance is more fluid than copyright’s categories generally accept:

Theatre is inherently collaborative because it is an amalgam of the “static” word as it appears in the text and the “dynamic” act as it appears on the stage. There is an inseparability of the textual and the theatrical production. The process does not carefully

160 Puzzle: suppose one infringes the character of Batman. Statutory damages are calculated on the basis of the number of registered works infringed; there are thousands of registered works featuring Batman. So how many of them has the infringer infringed? The impulse is to answer “one,” but that is an impulse of equity, not of logic.
162 See Feigenson & Spiessel, supra note 9, at 20 (“One feature of our picture-laden digital visual environment is that we increasingly see composite pictures—not just words and pictures juxtaposed . . . but hybrids in which the conventional codes of various kinds of pictures may be combined or in which a picture from one kind of discourse winds up in another.”).
163 Cf. Amy M. Adler, Performance Anxiety: Medusa, Sex and the First Amendment, 21 YALE J.L. & HUM. 227 (2009) (arguing that First Amendment law makes distinctions between performance and film—recorded performance—that can’t be sustained by the formal justifications offered, and that the true explanation lies in fear of the body, particularly fear of the female body).
164 Brent Salter, Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship, 56 J. COPYRIGHT SOC’Y U.S.A. 789, 813 (2009) (“Theatre is widely acknowledged to be one of the most collaborative art forms. Oscar Hammerstein once wrote: ‘...[I]f any man could write and produce and direct and act and play the music, shift the scenery, design the costumes and, in short, do everything that could be done on one stage and come up with what was literally a one man show, he would still need one more thing: an audience. You cannot get away from collaboration.’”) (footnotes omitted).
insulate the writing of scripts from the acting or actual production of plays. It is not until this final step of “performance” is realised that the play can be said to be complete.\(^{165}\)

The fixed work only gradually and incompletely separated from the performance as technology and literacy changed the ability of audiences to relate to a fixed instance of a work. This separation was as much conceptual and ideological as it was physical: performances came to be understood and judged in relation to some fixed instance of a printed text.\(^{166}\) Fixity is now part of the concept of the work, even though such fixity was neither historically a characteristic of books in the age of print\(^{167}\) nor is it now a requirement in the digital age, where the same technology that allows exact fidelity also allows George Lucas to reconstruct *Star Wars* to erase the fact that, when the film was first shown, Han Solo shot first.\(^{168}\)

Performance is another case of the uncanny, where judges and other lawyers are used to texts and think of them as static (whatever the truth of that).\(^{169}\) Performance fixed into a single instance—a movie, recorded on film—becomes more static and comprehensible: an audiovisual *work*. But the real difference between the movie and the play seems to be the economic investment. We understand the producer of a movie to be interested in, motivated by, the right to circulate copies, and thus we generally treat movies as artifacts that exist only because of the incentives copyright provides, while the producer of a play seems to have different and lesser interests.\(^{170}\) Control is centralized in a film company as the owner of a work for hire, and for

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\(^{165}\) Salter, *supra* note 163, at 815. Salter’s interviews with directors repeatedly return to this theme:

Directors . . . suggest that there is a clear distinction between what is written on the page and what appears on the stage. As a consequence, some directors believe the notion of the “Romantic playwright” being the authorial voice of the work is incompatible with theatre creation. Theatre director Ben Winspear:

[Romantic authorship in theatre is] just not realistic. The theatrical text is only relevant when it’s spoken and spoken in the context of the stage. At any other point it’s like an architect’s plans. You know there wouldn’t be a single building in the world that accurately reflects the plans of an architect. You are always pulling out the jack hammer and shaving off a bit here, and knocking an extra doorway through there and filling that up with concrete . . . .

[T]heatre exists between the audience and the performers . . .

\(^{166}\) See, e.g., Joanna Demers, *Melody, Theft, and High Culture*, in MODERNISM AND COPYRIGHT, [], (Paul K. Saint-Amour ed. 2010) (“Lydia Goehr has shown that Western art music’s work-concept emerged around 1800, alongside a growing awareness of musical material as property. . . . Composers no longer wrote mere pieces but rather works that existed theoretically as a set of instructions or ‘scores.’ These theoretical works were realized through performances whose quality was judged on the basis of their fidelity to the originating score as well as to conventions governing music-making. The work-concept was groundbreaking because it distinguished performances (which could be riddled with mistakes) from works (which were supposedly independent, permanent, and capable of expressing the ineffable). The work-concept, in short, allowed music to escape its grounding in ephemeral sound and to aspire to what was seen as a superior quality of the plastic arts: permanence.”) (citations omitted).

\(^{167}\) ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING (1998)? (arguing that, because of the ways in which books were printed sheet by sheet and “pirated” by various printers who altered them in different ways, it was extremely common for different copies and unlikely that all copies of the “same” book would be identical; the fixity of print was an ideological effect, not a natural fact).


\(^{169}\) Barron, *supra* note 1, at 371 (arguing that the division of art into specific types, as in copyright, makes performance exceedingly difficult to conceptualize, in part because theater and related arts cross the boundaries of type and in part because theater needs an audience to be complete and thus refuses the self-contained status so vital to copyright’s (and modernism’s) definition of an artwork).

many of the same reasons, treating a film director as the unitary source of intent and meaning has been an irresistible temptation for many film critics, because it’s just so much simpler than looking at all the contributors.171

More generally, because performance is not a category of protected work, but rather a type of right granted copyright owners—in the U.S., limited to public performance—it confronts special difficulties in copyright theory oriented towards literary works. Compared to standard works of literature and art, performance appears marginal and non-creative, often founded on exploitation of others’ creativity, as when actors perform an existing play or singers perform an existing song. This lower status is most obvious in other nations, where performing rights are known as “neighboring rights,” not full copyrights, and the scope of such rights is generally more limited.172 Neighboring rights last for a shorter time and are more readily subject to compulsory licensing than copyrights under many such regimes.173 In the US, we call performance copyrights, but we have the same trouble valuing them, not just in formal terms—there is still no general sound recording public performance right, while writers of words and music have public performance rights in the very same songs174—but also in assessing performance as a contributor to the valuation of a work.175 Because of performance’s connections to the body, it is unsurprising that treatment of performance has had a profoundly disparate racial impact as well.176

that “[t]he producer of a play is denied copyright protection because of a belief that a dramatic work is just concerned with live performance” while “[t]he producer of a film receives copyright protection in order to facilitate the capital investment that is required to produce and market such a work to mass audience”).

171 See Salter, supra note 163, at 838.
172 [cite]
173 [cite]
174 [cite]
175 See, e.g., David Dante Troutt, I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons, 20 FORDHAM INT’L. PROP., MEDIA & ENT. L.J. 373, 396 (2010) (“[T]he secondary status given to performers and performance under copyright law has been a critical lever in determining the scope of economic benefit and artistic recognition under music copyright law.”); Sunny Noh, Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009, 6 BUFF. INT’L PROP. L.J. 83, 83-84 (2009). This attitude is far from outdated. In an otherwise intriguing article, for example, Bruce Boyden takes the position that games can be distinguished from sheet music and scripts for plays, though both are in some sense “rules” for producing an outcome, because the performers of music and plays is to execute their instructions without significant flexibility, whereas game rules have too much flexibility to actually “contain” any particular instance of a game. Bruce E. Boyden, Games and Other Uncopyrightable Systems, GEO. MASON L. REV. (forthcoming 2010) (manuscript at 36-37), available at http://ssrn.com/abstract=1580079. Boyden acknowledges that different performances of the same play or composition differ, yet asserts that “the aesthetic or intellectual experience in each instance is substantially similar; Bernstein’s ‘Lacrymosa’ is still ‘Lacrymosa.’ It is more than simply recognizable as being in the style of Mozart; the details are largely identical—the same notes in the same order.” Id. Aside from being overly optimistic about games (consider the flexibility of tic-tac-toe), Boyden’s claim is simply not credible to any fan of a particular performance genre. I readily accept that different games don’t feel substantially similar to their fans (whereas all soccer games are the same soccer game as far as I’m concerned), but then neither does Mel Gibson’s Hamlet feel substantially similar to Lawrence Olivier’s to me, any more than the sonnet form makes two sonnets substantially similar. Playwrights who refuse to allow cross-racial or cross-gender casting, among others, are pretty clear that performance can make all the difference in the meaning of the written instructions. See Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 YALE L.J. 535, 570 & nn. 162-63 (2004) (citing instances); cf. id. at 569-70 (discussing ways of performing music that change its meaning).
176 See, e.g., Troutt, supra note 174, at 404 (“[W]hether they were composers and performers or only performers, the majority of musicians then and now received most of their income as artists from performance. The fact that the
Performance offers the now-familiar problem that its nontextual values oscillate between the ineffable/invaluable and the meaningless/worthless. Failed attempts to protect Charlie Chaplin’s performance in early films, for example, included the argument that Chaplin’s performance was such a distinct entity that it could not be described or analyzed in words. The court, however, found nothing that copyright could protect in Chaplin’s movements or physical presentation.

In a very different context, in *Newton v. Diamond*, the Beastie Boys had a license to use a sample of the sound recording, but not the musical work from which the sound recording was made. The court of appeals had to separate the performance as fixed in the sound recording from the musical work. It ultimately concluded, over a dissent, that the expressive value of the sample came from the performance, not from the musical work, as if those two things could be separated. So far, the law has been unable to deal with performance as both unified with and distinct from the “underlying” written work, a creation that is more than the sum of its parts.

Another persistent difficulty with performance lies in identifying authorship. When we can’t be sure what the protected “work” is, we also have difficulty figuring out who to credit for it. Thus, controversies over whether plays are solely authored by the people designated “playwrights” or also should share legal authorship with dramaturgs, producers, performers, and others who make substantial contributions to the play as performed make up a disproportionate share of disputes over joint authorship in the U.S. system. Because joint authors share equally in the rights to a work, and each one can license it nonexclusively without the consent of the other authors, courts have preferred to award authorship to a single person, but this leaves significant inequalities in place and ignores the real creative contributions of others involved in bringing a play to its audience. Recently, claims of copyright in stage directions have complicated matters further; the law has difficulty conceptualizing stage directions because they are both dynamic—arising out of the interaction of many people—and dependent on the underlying play. Stage directions are not quite derivative works, but not quite anything else either.

Our difficulty with performance is especially troublesome when it comes to fair use. Justice Kennedy’s concurrence in *Campbell v. Acuff-Rose*, for example, cautioned that fair use for parody should not be read too broadly, taking it as obvious that a rap version of the country hit *Achy Breaky Heart* would be (1) hilarious and (2) not a fair use. The concurrence was unwilling to acknowledge that performance style alone could change the meaning of a musical work sufficiently to serve as commentary on that work, even though it is patently obvious that this occurs on a regular basis in our performance-oriented culture. Tori Amos, for example, has an entire album of cover songs by men about women; her renditions are often transformative.
most notably when she covers Eminem’s tale of a jealous husband murdering his wife and child. More recently, Tina Fey delivered Sarah Palin’s words verbatim, and, in the performance, made a profoundly effective parodic point. (Not incidentally, it is difficult to imagine anything other than performance that could have made this point: even playing footage of Palin’s own interview would not have been as revealing.)

Conclusion

It is extremely unlikely that courts will give up the illusion that images transparently represent reality. “[N]aïve realism [about images] cannot simply be transcended. It is a fundamental part of our psychological makeup and hence a default mode of response to our mediated world.” Only conscious attention to different modes of representation—which may involve, in some sense, turning judges into art critics—offers any hope for acknowledging, much less surmounting, the problems of nonverbal media. What we can do is move beyond two unproductive approaches: the one that uses the textual model against which to judge everything else, and the other that, recognizing that tools shaped for text work badly on images, video, and music, throws up its hands and declares nontextual materials beyond analysis.

[Is the first corner solution -- images simply aren't covered by copyright and trademark law, period -- available? One way of reading your paper is that everyone's assumed that copyright and trademark law adopts the other corner solution, and you're arguing that trying to do so -- that is, trying to treat images exactly as if they were words -- leads to anomalies, is descriptively inaccurate from the consumers' point of view, and has proven impossible for courts to hold to. Your proposal is to disaggregate the issues, at least to the extent of treating images that appear in different media differently (and maybe even further disaggregation would be a good idea). (BTW, this is a standard legal realist move.) I wonder whether you might want to discuss the "no coverage" corner solution as another possible policy implication.]

It’s often said that we don’t want our judges to be literary critics. But we do want them to be economists, engineers, risk managers, and so on. It’s no more unreasonable to ask them to learn some art theory to resolve a case in which that theory provides useful analytical tools than it is to ask them to learn some economics to resolve an antitrust case. The problem is the prevailing assumption that images are so transparent (or perhaps so meaningless) that judges don’t need any guidance from theory to evaluate them. And help must come from beyond literary theory, the conventional model for analyzing text. Film theory, music theory, performance theory, and other branches of aesthetic theory can contribute to our understanding of what copyrighted works do in the world and how they do it.

181 See/hear also Alanis Morissette delivering the Blackeyed Peas’ My Humps in her distinctive mournful style, creating a contrast that both emphasizes the banality of the original song and the bathos of Morissette’s own style. Alanis Morissette, My Humps, YOUTUBE (April 5, 2007), http://www.youtube.com/watch?v=pRmYfVCH2UA.

182 See FEIGENSON & SPIESEL, supra note 9, at102; see also MITCHELL, supra note 61, at 8 (“[D]ouble consciousness about images is a deep and abiding feature of human responses to representation. It is not something that we ‘get over’ when we grow up, become modern, or acquire critical consciousness. . . . [A]t the same time, the specific expressions of this paradoxical double consciousness of images are amazingly various.”).
The transparency of images is not inevitable, and can be challenged. It may be most effective to use images to argue back against images. In my experience teaching, for example, students’ initial reaction to the copyright infringement case Steinberg v. Columbia Pictures is to find two “New Yorker’s eye” views of the world similar enough that the second infringes the copyright in the first, as they have read that the trial court ruled. But when I present a variety of similar “myopic” worldview pictures, showing the ways in which the general idea can be executed, their opinions tend to change towards finding the pictures similar only in unprotectable style, not in protectable expression. People do not as readily or reflexively argue with themselves about the meaning of images as they do with texts, but focused attention to the specific characteristics of images can lead them to do so.

We can’t expect the law to treat images, music, or mixed media better than the culture at large does, so we can expect continued unease with art that produces nonrational responses or that crosses high/low cultural boundaries. Still, conscious attention to the features of nontextual media has to be the starting point for coherent legal doctrine. Images aren’t mystical, even though they are powerful. Going beyond our reflexive assumptions about the relationship between image and reality, we can see what the image itself has to offer.

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183 See FEIGENSON & SPIESEL, supra note 9, at 11. The Rodney King case is an oft-cited legal example of this tactic, in which slow-motion replay and constant repetition of the tape of police officers beating a motorist allowed the defense to reframe the officers’ actions from unlawful violence to justified use of force. See Mnookin, supra note 23, at 2 n.5 (citing a number of discussions of the tape and the effects of its repetition); Jennifer L. Mnookin & Nancy West, Theaters of Proof: Visual Evidence and the Law in Call Northside 777, 13 YALE J.L. & HUM. 329, 380 n. 157 (2001) (noting that frame-by-frame readings disrupted the apparently clear initial meaning of the tape); Christina O. Spiesel et al., Law in the Age of Images: The Challenge of Visual Literacy, in CONTEMPORARY ISSUES IN THE SEMIOTICS OF LAW 231, 237 (2005) (explaining how the prosecutors’ assumption that the tape’s meaning was transparent was defeated by the defense, which used repetition to reverse apparent causation).


186 Cf. Farley, Judging Art, supra note 11, at 808-09 (“[T]he law should acknowledge aesthetics (the field within philosophy that has concerned itself with the conceptual analysis of art) and its approaches for assistance in resolving cases in which the determination of an object’s art status is necessary.”) (footnotes omitted); Yen, supra note 112, at 251 (“Since no aesthetic perspective can be neutral and all-encompassing, aesthetic bias becomes inherent in copyright decisionmaking because an aesthetic perspective must necessarily be chosen. An allegedly different method of reasoning such as legal reasoning cannot eliminate the problem of aesthetic bias in copyright. The inevitable aesthetic bias of copyright decisionmaking can only be controlled if those who exercise bias are aware of it and take affirmative steps to counter it.”); id. at 301 (“A judge who is conscious of this problem can guard against it by being particularly open-minded to alternate aesthetic sensibilities. . . . [A] judge will gain perspective on works that she never would have realized by simply rejecting alternate interpretations as ‘mistaken’ or ‘wrong.’ . . . [C]ourts will wind up embracing a broader set of aesthetic conventions by openly thinking about aesthetics than they would by simply applying doctrine that embodies existing dogma.”).