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## Disparity in Copyright Protection: Focus on the Finished Image Ignores the Art in the Details

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# Disparity in Copyright Protection: Focus on the Finished Image Ignores the Art in the Details

## **Abstract**

Courts initial reactions play a major role in the assessment of copyright protection. A quick recognition of pictorial quality can result in an easy finding of originality. Based upon the extremely low threshold, such a quick summation is not surprising or necessarily refutable. However, the blanket assumption of a pictorial quality in photography creates a disparity in copyright protection for works of graphic design, like maps, which may not emit that immediate pictorial or aesthetic quality but may still employ creative choice. Those works that “scream” their pictorial nature get cursory review while the more subtle are being categorized as compilations and subjected to review more akin to the patent standard of novelty than the copyright standard of originality. Professor Christine Haight Farley has noted that “photographs are at once able to be seen as the expression of the photographer who made it, but also as a direct transcription of nature.” In order to streamline copyright protection for visual works, the dual nature of other visual works must also gain such recognition.

## **Keywords**

Copyright protection, Visual works, Front-end approach, End product approach

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**DISPARITY IN COPYRIGHT PROTECTION:  
FOCUS ON THE FINISHED IMAGE IGNORES  
THE ART IN THE DETAILS**

KAREN D. WILLIAMS\*

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## INTRODUCTION

Photography is a system of visual editing. At bottom, it is a matter of surrounding with a frame a portion of one's cone of vision, while standing in the right place at the right time. Like chess, or writing, it is a matter of choosing from among given possibilities, but in the case of photography the number of possibilities is not finite but infinite.

*John Szarkowski*<sup>1</sup>

The logic of Szarkowski's quotation is largely the logic employed by courts when they evaluate the creativity necessary to warrant copyright protection for a photograph. The word "graphic design"<sup>2</sup> could easily be substituted for "photography" in Szarkowski's quotation because both fields involve composition, perspective, and coloring. This interchangeability within the quotation might suggest that works of graphic design are protected in the same manner. Courts, however, are not employing the same logic for works of graphic design as for photography despite the similarities of the fields.

Under the Copyright Act of 1976 ("Copyright Act"), a copyrightable compilation is a work created by collecting and assembling preexisting materials or data so as to create an original work of authorship.<sup>3</sup> When reduced to elemental levels, the vast majority of, if not all, works are combinations of preexisting materials or based upon some prior expression.<sup>4</sup> In evaluating whether a work enjoys copyright protection, however, courts do not analyze various visual fields in the same manner. This creates a disparity of

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1. *Quoted in* SUSAN SONTAG, ON PHOTOGRAPHY 192 (1978).

2. Throughout this Comment, the term "graphic design" encompasses the art or profession of visual communication that blends words, ideas, and images to relay information to a given audience, see THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.), available at [http://dictionary.reference.com/browse/graphic design](http://dictionary.reference.com/browse/graphic%20design). This Comment focuses upon graphic works, such as maps and layouts that involve arrangement and depiction of several elements.

3. See 17 U.S.C. § 101 (2006) (noting selection, coordination, or arrangement as ways to distinguish the resulting work as a whole as original).

4. See, e.g., *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1078 (9th Cir. 2000) ("In a colloquial sense, of course, a photograph is derived from the object that is its subject matter."); *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, C.J., dissenting from order rejecting rehearing en banc) ("Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science grows by accretion, each new creator building on the works of those who came before."); cf. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003) (discussing the problem of requiring attribution to uncopyrighted materials because many works are built upon others, such as the film *Carmen Jones*, which is based upon the musical based upon an opera based upon a novel).

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protection such that works comprised of essentially the same subject are protected only when presented in certain formats.

Having different standards for different formats of visual works makes the originality determination, which is the basis for copyright protection, too convoluted in inappropriate and fuzzy distinctions. With advances in design and photography software, the lines between photography and graphic design are blurring. Software now allows a user to add content or alter existing content in a photograph so that some of the finished products cannot be clearly considered photography. Consider an artist taking a photograph of New York City's Times Square. If that same artist digitally removed the content of a billboard and replaced it with another ad that she designed, is the resulting image a photograph or graphic work? What if she simply removed some trash and vehicles from the photograph? Attempting to segregate works as graphic design versus photography could become too technical and lead to arbitrary results because the disciplines often meld together. Due to this melding, a single approach is necessary to keep the analysis from becoming unworkable and too focused on valuing aesthetic choices. Otherwise, as this Comment demonstrates, the label (of photograph or graphic work) given to a work may prove determinative of originality and ultimately of copyrightability.

Furthermore, such disparity allows for the inappropriate inference that one medium of expression is valued more than another despite the fact that courts generally shy away from assessments of artistic quality and value.<sup>5</sup> For example, suppose a photographer, using a red backdrop, takes a photograph of Leonardo da Vinci's Mona Lisa in a studio. The lighting of the photograph creates a long shadow, but overall the photograph is very basic. Now suppose a graphic designer, using computer software to produce a promotional poster, inserts an image of the Mona Lisa onto a red background and adds some effects to create the illusion of similar shading and dimension. Assuming, as this Comment argues, that such a composition is original in the realm of copyright law, both works should merit copyright protection. Simply granting protection to the photographer implies that the photographer's work is superior to the graphic designer's work.

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5. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (advising against judges evaluating the artistic merit of works); see also Christine Haight Farley, *Judging Art*, 70 TUL. L. REV. 805, 810-19 (2005) (recounting the various arguments against judges evaluating art while emphasizing protection of art, an undefined term, as valuable).

This Comment focuses upon works that are original despite utilizing subtle and conventional aesthetic techniques. These works still deserve scrutiny by the U.S. Copyright Office (“Copyright Office”) and the courts. With the growth of digital technology, the public at large can more easily acquire another person’s work and make changes to create a new work. The issue of ascertaining the copyright in such works, therefore, extends beyond the world of professional designers. If copyright is supposed to be a motivator for development and growth of ideas in the marketplace, authors need to know what aspects of their works are “theirs.” If courts do not take the time to acknowledge the details and artistic choices within works, the public will be deterred from creating original works and might resort to copying. Even when a work has minimal originality, copyright law protects that bit of originality such that overt copying is impermissible.<sup>6</sup>

This Comment argues that, despite common reliance upon the Supreme Court’s most recent guidance in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>7</sup> regarding originality, courts apply a different approach when evaluating the requisite creativity within works of graphic design.<sup>8</sup> These different approaches result in a disparity of protection for graphic works in comparison to photographic works with similar compositions.<sup>9</sup> Part I of this Comment discusses the basic framework of copyright, authorship and originality, and the historic jurisprudence on copyright protection of visual works. Part II identifies and explains the emergence of two approaches for analyzing originality in visual works: (1) a front-end, author-focused approach concentrated upon the pictorial aspects of the work, which is prevalent in photography cases; and (2) an end-product approach commonly applied to graphic works and seemingly consistent with language in *Feist*. This Comment focuses its analysis upon the errors of a map case, heard by the United States Court of Appeals for the Forth Circuit, to demonstrate how the end-product approach is a problematic method for ascertaining originality. Looking first at the maps as a compilation, Part III argues that the Fourth Circuit erroneously upheld the application of the end-product approach and that the Copyright Office overly scrutinized

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6. See *infra* note 120 (discussing “thin authorship”).

7. 499 U.S. 340 (1991).

8. See *infra* Part II (discussing the emergence of two approaches for analyzing the originality contained in visual works: the front-end, author-focused approach and the end-product approach).

9. See *infra* Part IV (highlighting the disparity in treatment between maps and other works).

the maps and web pages at issue when the Office denied copyright registration. Further, this part illustrates how the maps, in fact, satisfied the originality requirements of both a compilation and a pictorial work. Part IV then analyzes the maps as pictorial works rather than compilations so as to demonstrate the disparity in treatment of maps from other visual works, specifically photography. This Part analyzes the maps of a Fourth Circuit case in relation to a Ninth Circuit photography case involving the same compositional elements. Despite the comparable compositional elements, the two cases result in opposite holdings regarding the presence of originality. To illustrate this disparity in protection, this Comment examines how the maps would likely merit copyright protection under the front-end approach. Part V recommends the adoption of a streamlined front-end approach because that approach better comports with the goals of copyright law and moves away from the end-product approach which too closely resembles the tougher standard of novelty required in patent law.

## I. BACKGROUND

### A. *Subject Matter and Limitations on Copyright Protection*

The Constitution bestowed upon Congress the power to grant authors and inventors exclusive rights to their works for a limited period,<sup>10</sup> despite being at odds with the First Amendment right of freedom of expression.<sup>11</sup> Articulated objectives for copyright law vary from giving value to human authorship, to supplying new works for the greater benefit of society, to creating incentives for publishing.<sup>12</sup>

Generally, copyright protection extends to original works of authorship in a tangible form.<sup>13</sup> Originality is often the determinative factor of a copyright, and the “author” is the entity who created the expression.<sup>14</sup> Copyright protection, however, is limited to the

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10. U.S. CONST. art. I, § 8, cl. 8 (conditioning congressional power to grant limited monopolies upon the promotion of the sciences and arts).

11. *Compare Feist*, 499 U.S. at 349 (proclaiming benefits to society as the primary objective of intellectual property rights, not rewards for the labors of authors), *with* U.S. CONST. amend. I (declaring Congress shall not make a law abridging freedom of speech).

12. See Diane Leenheer Zimmerman, *It's an Original!(!): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 189–90 (2005) (discussing how asking six different people about the goals of copyright law would likely result in six different, yet logical responses and outlining some of those goals).

13. 17 U.S.C. § 102(a) (2006) (stating a work may qualify for copyright protection so long as it is in a tangible medium).

14. See *Feist*, 499 U.S. at 345–46 (defining “author” as the originator or maker).



expression in the work, not the underlying ideas or concepts.<sup>15</sup> This limitation is often described as the idea-expression dichotomy. For example, the facts in a news story are not copyrightable because the news agency is not the origin of the facts.<sup>16</sup> The substantive information in such a news story is not protectable, but the particular formation of words expressing those facts, which has a literary quality, is protectable.<sup>17</sup> Copyright case law has made a distinction between creation and discovery so that creations may warrant copyright protection while discoveries remain open for use as part of the public domain.<sup>18</sup> Therefore, anyone may write about a destructive fire of a historical building, but each author has a copyright in her original expression, i.e., diction and sentence structure.

As works and expressions begin to incorporate more elements and authors, the inquiry into copyright becomes more complicated. The Copyright Act explicitly states that compilations are within the subject matter of copyright.<sup>19</sup> The copyrights for these types of works, however, “extend[] only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work.”<sup>20</sup> Therefore, an author can take non-copyrightable elements and copyright the arrangement, but the scope of the

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15. See 17 U.S.C. § 102(b) (establishing that copyright protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries); see also *Baker v. Selden*, 101 U.S. 99, 103 (1879) (explaining that the objective of sharing useful knowledge would be frustrated by considering further use of the knowledge as piracy); *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (holding that a sculptor cannot prevent others from copying elements in sculptures based upon physiology or the use of a particular medium).

16. See, e.g., *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (emphasizing published information on current events is not the creation of the writer but “is a report of matters that ordinarily are *publici juris*”); cf. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 548 (1985) (stressing an author may not copyright ideas or facts he narrates but may copyright an autobiography as a whole).

17. See *Int’l News Serv.*, 248 U.S. at 234 (pointing out the dual nature of news as (1) substantive information and (2) “the particular form or collocation of words in which the writer has communicated it” because copyright protection only extends to the latter). For example, an Impressionist painter has a copyright in each of his original paintings but not for the Impressionist style of painting.

18. See *Feist*, 499 U.S. at 347 (distinguishing between creation and discovery because a person who finds and reports a fact has simply discovered its existence and has not made that fact come into existence); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (articulating that a person who discovers a fact does not constitute its “maker” or “originator”); cf. *Satava*, 323 F.3d at 807 (exploring the goal of benefiting public and limiting what an artist may protect).

19. See 17 U.S.C. § 103(a) (precluding protection for any part of the work used unlawfully).

20. *Id.* § 103(b).

copyright is limited to that arrangement because that is all that is original to that author.<sup>21</sup>

B. *Originality Is the Touchstone of Copyright Law*

1. *Originality is a very low threshold, requiring only a small indication of creativity*

Beyond being an expression in tangible form, a work must also be original to merit copyright protection.<sup>22</sup> *Nimmer on Copyright* states that “[a]ny ‘distinguishable variation’ of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author’s independent efforts, and is more than merely trivial.”<sup>23</sup>

The Supreme Court articulated the requirement of originality most recently in *Feist*.<sup>24</sup> There, the Court declared originality to be the touchstone of copyright protection.<sup>25</sup> A telephone utility brought a copyright infringement suit against an area-wide telephone directory because the publisher printed the names and addresses of the utility’s customers without permission.<sup>26</sup> *Feist* was a case in which two somewhat incongruent principles of copyright overlapped: “The first is that facts are not copyrightable; the other, that compilations of facts generally are.”<sup>27</sup> The Court discussed originality, in terms of creativity, as the key to resolving the tension between the two propositions.<sup>28</sup> Despite a requirement of creativity, the threshold is

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21. See, e.g., *Satava*, 323 F.3d at 810–11 (holding that the sculptor had copyright protection in the aspects of his jellyfish sculpture that went beyond the physiological nature of the species, such as the particular curl of a tentacle, but not in the accurate depiction of the species).

22. See 17 U.S.C. § 102 (“Copyright protection subsists . . . in original works of authorship . . .”) (emphasis added); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2d ed. 2000) (noting the word originality was left undefined in the Copyright Act because the phrase “original works of authorship” was intended to be a standard established by the courts).

23. 1 NIMMER, *supra* note 22, § 2.01[B].

24. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (requiring (1) a work independently created by the author and (2) a slight amount of creativity).

25. *Id.* at 345–46 (declaring originality to be the “*sine qua non* of copyright”); cf. Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC’Y U.S.A. 949, 974 (2002) (“*Feist* established, arguably for the first time with this level of clarity, that creative choices were what gives a work its originality.”).

26. See *Feist*, 499 U.S. at 342–44 (resolving a suit over use of listings of data for which Rural had refused to grant Feist a license).

27. *Id.* at 344.

28. See *id.* at 345 (pronouncing that originality “means only that the work was independently created by the author” and requires a minimal level of creativity that most works easily meet by showing some creative spark).

very low.<sup>29</sup> The Court explained that a compilation is not copyrightable *per se* but can be copyrightable based upon a tripartite structure: (1) the collection of pre-existing material, (2) the selection and arrangement of those materials, and (3) the creation of an *original* work from that selection and arrangement.<sup>30</sup> The originality is critical.<sup>31</sup> The Court explained that § 101 of the Copyright Act means that some fact-based works will not be original in the copyright sense.<sup>32</sup>

Before outlining the three elements of a copyrightable compilation, the *Feist* court rejected the “sweat of the brow” doctrine,<sup>33</sup> which regarded copyright protection as a benefit for the effort expended in compiling facts.<sup>34</sup> This doctrine rewarded copyright protection based upon the effort that went into a work rather than based upon its originality.<sup>35</sup> The Court stated that the doctrine’s most glaring shortcoming was that it granted copyright protection for the facts included in a compilation, as well as the selection and arrangement of those facts.<sup>36</sup> Furthermore, the Court emphasized that the objective of copyright is to promote the arts and sciences, not to reward the effort of authors.<sup>37</sup>

The Court found that the allegedly infringed white pages were not copyrightable because the alphabetical listing did not possess the tiny amount of creativity necessary.<sup>38</sup> Further, the *Feist* court questioned any “selection” and “arrangement” involved in the white pages because the company printed the information of its customers as

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29. See, e.g., *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004), *aff’d sub nom. Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005) (describing originality as requiring independent creation and “just a scintilla of creativity.”); see also text accompanying note 23 (characterizing a “distinguishable variation” as sufficient for finding originality in a work).

30. See *Feist*, 499 U.S. at 341 (citing 17 U.S.C. § 101).

31. See *id.* at 358 (accentuating that the statute stipulates a principal focus on “whether the selection, coordination, and arrangement are sufficiently original to merit protection”).

32. See *id.* (acknowledging that the language of the statute makes clear that “[n]ot every selection, coordination, or arrangement will pass muster”).

33. See *id.* at 355–56 (recounting the measures Congress took to eliminate the use of the sweat of the brow in copyright law, such as stating that copyright protected only those “copyrightable component parts” within a work).

34. *Id.* at 352.

35. See 1 NIMMER, *supra* note 22, § 3.04[B][1] (outlining the history and rationale of the sweat of the brow doctrine); see also *infra* Part I.B.2 (discussing the wide application of the sweat of the brow doctrine within the field of cartography).

36. *Feist*, 499 U.S. at 353.

37. *Id.* at 349.

38. See *id.* at 362–63 (charging that Rural’s white pages simply list information customers are required to provide in order to receive a phone number and exhibit no selection because publication is mandated by law).

required by law and merely alphabetized the entries by name.<sup>39</sup> The Court explicitly stated, however, that the requisite creativity is not novelty.<sup>40</sup> Somewhat contrary to that declaration, the Court described the white-page listings as “entirely typical,” “garden-variety,” “so commonplace . . . to be expected as a matter of course,” and “practically inevitable.”<sup>41</sup> Commentators have noted that the use of these terms suggests a novelty standard that the Court rejected elsewhere in its opinion.<sup>42</sup>

39. See *id.* at 362–63 (stating that Rural was required to publish names and telephone numbers of its subscribers so that “one could plausibly conclude that this selection was dictated by state law, not by Rural” and that alphabetizing the names was an “age-old practice, firmly rooted in tradition”).

40. See *id.* at 345–46 (elaborating on the principle that originality is not synonymous with novelty through the example that two poets unknowingly could compose identical poems which are both original and copyrightable). Courts have repeatedly stated that originality is not the same as novelty. See, e.g., *id.* at 345 (stating explicitly that originality is not novelty); *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 141 (5th Cir. 1992) (“Originality does not require ‘novelty, ingenuity, or aesthetic merit.’” (citing H.R. REP. NO. 1476, at 51 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664)). *Nimmer on Copyright* states that:

[I]t is now clearly established, both as a matter of congressional intent and judicial construction, that the originality necessary to support a copyright merely calls for independent creation, not novelty. Thus, a work will not be denied copyright protection simply because it is substantially similar to a work previously produced by others, and hence, is not novel.

1 NIMMER, *supra* note 22, § 2.01[A].

Under copyright law, two authors theoretically may create identical expressions and each author may copyright the expression. See *Feist*, 499 U.S. at 346 (explaining that a work may still be original even if it is very similar to another work so long as the similarity is not the result of copying); see also 1 NIMMER, *supra* note 22, § 2.01[A] (theorizing that a work is original and may command copyright protection even if it is completely identical to a prior work). But see Zimmerman, *supra* note 12, at 188 n.11 (stating that a court, however, would likely still find infringement in a case of striking similarity between a copyrighted work and an allegedly infringing work if there was any reasonable possibility that the defendant might have encountered the plaintiff’s work at some time and citing a case in which the defendant “unconsciously” infringed). Such duplication, however, is not permissible within patent law where the first creator alone generally may benefit from exclusive rights. See 35 U.S.C. § 102(a) (2006) (prohibiting patentability if “the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant”).

So long as an Author B does not copy Author A’s copyrighted expression, Author B’s expression should merit copyright protection irrespective of other similar work so long as it is original. Compare *id.* (establishing the more burdensome patent requirement of being first to arrive at the concept or method), with 17 U.S.C. § 102 (2006) (simply stating a work may qualify for copyright protection so long as it is an original expression in a tangible medium).

41. See *Feist*, 499 U.S. at 363; see also *id.* at 362–63 (discounting presence of any selection and finding alphabetization of listings lacking creativity because of the long-standing use in organizing information).

42. See Jane C. Ginsburg, *No Sweat? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 343–44 (1992) (arguing the terminology in *Feist* suggests the patent standard of protection but cautions that lower courts should not interpret a requirement of novelty or nonobviousness for finding a compilation to be original); Zimmerman, *supra* note 12, at 208 (postulating that “the Court went two ways” as to whether or not originality

Justice O'Connor, writing for the Court, did not clearly articulate whether a court should evaluate originality by looking at the work itself or by considering the author's choices<sup>43</sup> in making the resulting work.<sup>44</sup> This lack of clarity proves problematic as courts have applied the novelty-like language of *Feist* to works beyond alphabetized telephone directories.<sup>45</sup>

2. *Courts recognize that graphic works may warrant copyright protection*

Courts have long acknowledged that works of graphic design may be original and, therefore, warrant copyright protection. In 1903, the Supreme Court addressed the application of copyright protection to posters in *Bleistein v. Donaldson Lithographing Co.*,<sup>46</sup> which involved an alleged infringement of posters advertising a circus.<sup>47</sup> The Court explicitly held that the Copyright Act does not purport to classify ordinary posters at a level beneath copyright protection<sup>48</sup> and concluded that the commercial aspect of the poster did not bar copyright protection.<sup>49</sup>

Justice Holmes, writing for the Court in *Bleistein*, adopted a standard that if the expression is not copied, then that expression is original because "[i]t would be a dangerous undertaking for persons

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should be a measure of novelty because O'Connor first wrote that originality did not demand novelty but then explained the work's lack of originality as the result of an "entirely typical" methodology).

43. Throughout this Comment, "author choices" will be construed in accordance with Professor Gervais's definition of creative choices: "[A] creative choice is one made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards." Gervais, *supra* note 25, at 976-77.

44. See Zimmerman, *supra* note 12, at 209 (acknowledging that *Feist* does not expound upon how originality is to be found (citing Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 334-35 (1992))).

45. See, e.g., *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004) (part numbers to identify screw fasteners); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) (toner loading software); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998) (CD-ROM compilations of judicial opinions); *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) (video game).

46. 188 U.S. 239 (1903).

47. See *id.* (addressing whether reduction and reproductions of posters depicting ballet dancers and a family on bicycles could be copyrighted despite commercial nature).

48. See *id.* at 251 (finding appeal to public does not reduce value of posters so as to place such works outside the scope of the Copyright Act). But see Ginsburg, *supra* note 42, at 340-41 (advocating recognition of two kinds of copyright protection—one for high-authorship works such as novels and paintings and one for low-authorship works such as maps and similar information compilations—because copyright in low authorship works rests in the labor but should still merit some protection after *Feist* without "disguising low authorship works as high authorship endeavors").

49. See *Bleistein*, 188 U.S. at 251 (reasoning that works are not less connected with the fine arts just because they attract the public's attention and are intended to help make money).

trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.”<sup>50</sup> Holmes suggested that finding some of the author’s personality within the work is adequate for originality.<sup>51</sup> Holmes’s view of originality reaches expansively because he reasoned that even “a very modest grade of art has in it something irreducible, which is one man’s alone,” thereby meriting copyright protection.<sup>52</sup>

Courts continued to find copyright protection for works of graphic design involving the arrangement of pictures, illustrations, color, and type.<sup>53</sup> *Bleistein*’s limit upon a judge’s evaluation of the artistic merit in a work has remained prevalent.<sup>54</sup> One commentator contends that *Feist* was a response to the very broad granting of copyright embodied in Holmes’s approach.<sup>55</sup>

Because this Comment analyzes the copyrightability of a map,<sup>56</sup> it is important to discuss the distinctive history of maps in order to understand the complicated aspects of analyzing their copyrightability. Despite the early approval of copyright protection for graphic works as seen in *Bleistein*, maps have a checkered past in copyright case law that is not typical of other graphic works.<sup>57</sup> Early maps were of great value as the country expanded.<sup>58</sup> This value,

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50. *Id.*; see also 1 NIMMER, *supra* note 22, § 2.01[B] (discussing the *Bleistein* standard for the necessary quantum of originality as simply requiring the recognition of a distinguishable change from a prior work so long as the author made the change independently and the change is not trivial).

51. See *Bleistein*, 188 U.S. at 250 (reasoning that personality contains something unique and demonstrates singularity).

52. *Id.*

53. See, e.g., *Reader’s Digest Ass’n Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 805–06 (D.C. Cir. 1987) (finding a magazine cover copyrightable due to the arrangement and layout of lines, typefaces, and colors); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109–10 (9th Cir. 1970) (finding seven greeting cards, such as a card with a young child on the front and “i wuv you” on the inside, was copyrighted based upon the “text, arrangement of text, art work, and association between art work and text”).

54. See 1 NIMMER, *supra* note 22, § 2.01[B] (discussing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), in which the court stated copyright protection basically just prevents actual copying of another work).

55. See Zimmerman, *supra* note 12, at 202 (arguing that *Feist* was the first step in correcting the cost to “the law’s moral and intellectual authority” lost by the adoption of Holmes’s broad and predictable approach to originality).

56. See discussion *infra* Part III.

57. See generally John F. Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U. L. REV. 280 (1963) (tracing the jurisprudence of cartography in copyright law).

58. See David B. Wolf, *Is There Any Copyright Protection for Maps After Feist?*, 39 J. COPYRIGHT SOC’Y U.S.A. 224, 228 (1992) (highlighting the important role of cartography during the mid-nineteenth to mid-twentieth century as the United States grew in population and commerce led to a focus upon maps within a practical and scientific framework).

however, clouded courts' views of the originality of maps.<sup>59</sup> It is arguable that *Feist's* rejection of the sweat of the brow doctrine<sup>60</sup> significantly impacted cartography.<sup>61</sup> The rationale for the sweat of the brow doctrine was that "one should not freely reap the benefit of another's industry in reporting and researching facts or other public domain material."<sup>62</sup> Courts used this doctrine extensively in map cases in order to find originality.<sup>63</sup> This reliance on the sweat of the brow resulted from the traditional view that maps are compilations as defined in § 101 of the Copyright Act.<sup>64</sup> Despite the dual nature of maps as factual compilations with original elements of selection and organization and also as graphic works, one commentator noted that most courts have resolved this duality "by demeaning the selective, organizational, and pictorial originality of cartography and by protecting the utilitarian and fact-gathering aspects."<sup>65</sup> Looking at maps from the pictorial perspective has largely been unused.<sup>66</sup> As

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59. See, e.g., *id.* (stressing that variations in maps were viewed as a way of camouflaging the appropriation of another's factual material); cf. David B. Wolf, *New Landscape in the Copyright Protection for Maps: Mason v. Montgomery Data, Inc.*, 40 J. COPYRIGHT SOC'Y U.S.A. 401, 402 (1993) ("Each cartographer who does his job properly will reach the same result: 'certain common objects of information . . . must, if described correctly, be described in the same words.'" (internal citation omitted)).

60. See *supra* notes 33–37 and accompanying text (articulating the Court's reasoning for rejecting the use of the sweat of the brow doctrine as a means for copyright protection).

61. See Wolf, *supra* note 58, at 224 (postulating that *Feist* "dealt a death blow" to map case law and might mean maps have no copyright protection or greater protection for the pictorial elements). See generally Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1571–76 (1963) (outlining the early history of maps within copyright law).

62. 1 NIMMER, *supra* note 22, § 3.04[B]; see *supra* note 35 and accompanying text (describing the sweat of the brow doctrine).

63. Wolf, *supra* note 58, at 228. But see Gorman, *supra* note 61, at 1572–73 (arguing that *Amsterdam v. Triangle Publ'ns, Inc.*, 189 F.2d 104 (3d Cir. 1951), mistakenly transformed the sweat of the brow doctrine into a test of originality, instead of infringement).

64. See 17 U.S.C. § 101 (2006) (providing a list of definitions for terminology appearing in the statute); Wolf, *supra* note 58, at 226 (explaining that this distinction prevents protection of the utilitarian aspects and of pictorial features that are inseparable from the utilitarian aspects).

65. Wolf, *supra* note 58, at 227; accord Gorman, *supra* note 61, at 1575 (arguing that other utilitarian writings are copyrightable and that copyrights in such works do not prevent others from reaching the same results); 1 NIMMER, *supra* note 22, § 3.04[B][2] ("*Feist* does not stand for the proposition that factual compilations are beyond copyright protection or even require more than the standard *quantum* of originality.") (emphasis in original).

Wolf further argues that courts have looked at maps as directories because (1) the subject matter was determinable in a "unitary and stable fashion" and (2) the value in the map was the objective reality presented. Wolf, *supra* note 58, at 227. See generally *id.* at 227–31 (outlining early cases viewing maps as compilations).

66. See Wolf, *supra* note 58, at 240–41 (acknowledging *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978), in which the Ninth Circuit drew upon *Bleistein* and

discussed later in this Comment, the aversion to contemplating a map as a graphic work has led to greater scrutiny of the copyrightability of cartography.

3. *The issue of authorship in conjunction with the camera has led courts to a cursory review of originality in photography*

Like graphic works, photography has long been within the scope of copyright protection. The seminal case in copyright protection for photography is *Burrow-Giles Lithographic Co. v. Sarony*,<sup>67</sup> in which an alleged infringer claimed a portrait photograph of Oscar Wilde did not have copyright protection because the photograph did not have an author.<sup>68</sup> As a long-standing predecessor to *Feist*, much of the language in *Sarony* focused on creative choices and has been used to articulate the requisite creativity across mediums.<sup>69</sup> The tension in the case involved whether the camera *discovered* the captured image or the photographer *created* the image.<sup>70</sup> The photographer, Napoleon Sarony, emphasized his arrangement of the scene and subject.<sup>71</sup> The company argued the resulting work was simply an operation of the camera so that no one actually authored the work.<sup>72</sup> The Court distinguished the Wilde portrait from the ordinary production of photography, upon which the Court made no decision.<sup>73</sup> After recounting the steps and efforts Sarony took in

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*Sarony* to recognize maps like other creative works, as one of the few cases noting the pictorial aspects of maps).

67. 111 U.S. 53 (1884).

68. *See id.* at 54–56 (arguing that Sarony’s portrait simply reproduced the exact features of natural objects).

69. *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 547 (1985) (autobiography infringement case noting a nonfiction work can be original); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001) (quilt design infringement case highlighting that the photograph from *Sarony* was the result of mental conception); *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, 768 F.2d 145, 148 (7th Cir. 1985) (map infringement case noting significance of the work may be accidental); *see* Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 454–55 (2004) (recognizing that *Burrow-Giles* is commonly cited for the proposition that the author is the originator).

70. *See Sarony*, 111 U.S. at 56 (distinguishing the rights of authors as governed by copyright law from the rights of inventors governed by patent law); *supra* Part I.A (noting the distinction between creation and discovery within copyright law); *see also* Farley, *supra* note 69, at 395–402 (relating the shift from photography as serving solely as a record of nature into a form of artistic expression despite the heavy reliance upon the camera).

71. *See Sarony*, 111 U.S. at 55 (describing arrangement of the draperies and other accessories, selection of Wilde’s costume, direction in posing of Wilde, and lighting judgments).

72. *See id.* at 59 (emphasizing the work as a result of light, chemicals, and machinery).

73. *See id.* (allowing the possibility that some photographs might have no copyright protection but declining to address the issue further).



stylizing the composition, the Court found that Sarony “made” the Wilde portrait because the image was a “harmonious” and “graceful” picture of Sarony’s own mental conception.<sup>74</sup> Thus, the Court found originality in the pre-shutter activities of the photographer and bypassed the difficulty presented by the camera.<sup>75</sup> The *Sarony* decision has been extended with *Bleistein*’s concept of originality such that “no photograph, however simple, can be unaffected by the personal influence of the author.”<sup>76</sup>

Because the *Sarony* court did not establish a test for evaluating ordinary photographs, courts have struggled to evaluate less contrived works of photography that seek copyright protection.<sup>77</sup> Despite other potential methods of locating authorship in photography, courts continue to focus on the directorial role of the photographer in the resulting composition.<sup>78</sup> A recent controversial case, *Bridgeman Art Library, Ltd. v. Corel Corp.*,<sup>79</sup> has suggested that the directorial role of the photographer may not always be enough to merit copyright protection when a photographer is attempting to replicate the original subject matter as accurately as possible.<sup>80</sup> The court in *Bridgeman* found no copyrightability in photographic transparencies of well-known museum artwork because the later transparencies portrayed “underlying works without any avoidable

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74. *Id.* at 60.

75. *See id.* (repeating Sarony’s directorial role in posing Oscar Wilde in front of contrived backdrop); *see also* Farley, *supra* note 69, at 413 (identifying Sarony’s own account as weighty and dispositive in Court finding an authorial presence within the portrait photograph); JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 58 (1991) (discussing *Sarony* and the development of a “doubleness” in originality that included connotations of artistic creativity and “[of] the work’s point of origination, not the unique, soul-invested nature of the work itself”).

76. Wolf, *supra* note 58, at 233; *see also id.* (extrapolating the combination of *Sarony* and *Bleistein* in Learned Hand’s district court decision in *Jewelers’ Circular Publ’g Co. v. Keystone Publ’g Co.*, 274 F. 932 (S.D.N.Y. 1921)). *Jewelers’* was a compilation case but characterized maps as comparable to the compilation at issue. *Id.* at 228 n.8.

77. *See* Farley, *supra* note 69, at 438–40 (asserting that courts after *Sarony* “accepted unthinkingly” the presence of authorship in photography).

78. *See, e.g., id.* at 433–37 (suggesting authorship in photography can be found in the tasks of the cameraman, the post-shutter production, and the selection of a single frame from the multiple takes of a photo shoot).

79. 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *aff’d on reh’g*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

80. *See id.* at 426 (finding that “Bridgeman’s images are substantially exact reproductions of public domain works, albeit in a different medium”); *see also* Farley, *supra* note 69, at 450 n.251 (quoting court transcripts in which Bridgeman’s attorney argued a “mind operation” as the basis for originality, while the court equated the photographs at issue as analogous to the output of a Xerox machine and further distinguished between a finding of originality in art photography and family snapshots).

addition, alteration or transformation.”<sup>81</sup> Under this reasoning, some technical choices within photography do not result in an original work.<sup>82</sup>

## II. COURTS TAKE TWO APPROACHES IN ANALYZING THE ORIGINALITY OF VISUAL WORKS

Having established the low threshold of originality, as well as the applicability of copyright protection in the fields of graphic works and photography, this Comment now argues that the assessment of originality in the two fields is inconsistent. Two approaches within visual works may have developed because the *Feist* court did not offer guidance as to how to determine minimal creativity within a work<sup>83</sup> and because some works can naturally be characterized as pictorial. With the Supreme Court speaking in generalities in *Feist*<sup>84</sup> and *Bleistein*,<sup>85</sup> the lower courts have been left with little guidance, so the divergent approaches are not surprising. As discussed below, this Comment identifies, names, and defines two approaches regarding originality assessments. Some courts rely on the approach of *Sarony*, where the Court gave great weight to the artistic choices that the author made in arriving at his finished product<sup>86</sup> (the “front-end approach”) while other courts adopted the approach used in *Feist*, where the court relies almost wholly upon the end-product for evidence of creativity<sup>87</sup> (the “end-product approach”).

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81. *Bridgeman*, 25 F. Supp. 2d at 426–27. The district court reached this conclusion based upon the copyright laws of the United Kingdom, not the Copyright Act. *See id.* at 426 (applying the Copyright, Designs and Patents Act 1988’s standard of “original literary, dramatic, musical or artistic works”). The UK originality standard, however, closely mirrors the U.S. standard such that the reasoning remains applicable within the context of this Comment. *Compare id.* (describing the UK requirements as: (1) origination from an author; and (2) a lack of copying), *with supra* note 24 (recounting the *Feist* court’s statement of copyrightability as authorship and originality).

82. *See Farley, supra* note 69, at 451 (noting the court making a distinction between technical choices involving the operation of the camera and pre- or post-shutter activity).

83. *See supra* note 44 and accompanying text (noting the open question of whether to find originality in the work itself or the mental choices involved in the production of the work).

84. *See* 499 U.S. 340, 362–64 (1991) (denying that alphabetization is original for an arrangement or selection without any guidance upon what kind of arrangement or selection is atypical enough to warrant a classification as original).

85. *See GAINES, supra* note 75, at 65 (pointing out that finding “something” in the work to be creative “doesn’t tell us what is to be found,” thereby providing “nothing specific to look for in the authorial product”); *supra* notes 46–52 and accompanying text (describing Holmes’s opinion as indicative of originality but lacking elaboration on what elements in the work suggested “personality”).

86. *See discussion supra* Part II.A.

87. *See discussion supra* Part II.B.

A. *The Front-end Approach Predominates in Photography Cases*

Following the precedent in *Sarony*, courts continued to analyze photography based upon the pre-shutter choices of the photographer, as well as based upon the instant in which the photographer chose to click the camera's shutter and create the exposure.<sup>88</sup> In *Pagano v. Charles Beseler Co.*,<sup>89</sup> the court analogized the composition choices of *Sarony* to the timing choices of the challenged cityscape photograph.<sup>90</sup> The court reasoned that deciding when to take the photograph undoubtedly required originality.<sup>91</sup>

In *Leibovitz v. Paramount Pictures*,<sup>92</sup> famed photographer Annie Leibovitz sued for copyright infringement of her photograph of a nude, pregnant Demi Moore based upon a movie poster for *Naked Gun 33 1/3: The Final Insult*.<sup>93</sup> To assess infringement, the Second Circuit had to determine what in Leibovitz's photograph was original and therefore protectable under copyright law.<sup>94</sup> The Circuit concluded that Leibovitz was "entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected."<sup>95</sup> These elements are the manifestation of the artist's choices in composition just as those identified in *Sarony*.<sup>96</sup>

A court's attempt at locating creativity is basically a self-fulfilling prophecy because an author makes multitudes of choices, including choices of what not to include.<sup>97</sup> Even when a photograph is very simplistic in its composition, courts often credit this simplicity as a deliberate choice and not as an absence of creativity.<sup>98</sup>

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88. See generally *Leibovitz v. Paramount Pictures*, 137 F.3d 109 (2d Cir. 1998); *Pagano v. Charles Beseler Co.*, 234 F. 963 (S.D.N.Y. 1916).

89. 234 F. 963 (S.D.N.Y. 1916).

90. See *id.* at 964 (crediting timing of exposure as capturing human figures in artistic, not simply lifelike, positions).

91. See *id.* (concluding that timing is critical in resulting light and shading within the pleasing background of buildings and trees).

92. 137 F.3d 109 (2d Cir. 1998).

93. *Id.* at 115.

94. *Id.*

95. *Id.* at 116.

96. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (stating the following as indicators of originality: the posing of Wilde; the selection and arrangement of costumes, draperies and other items; the presentment of "graceful outlines;" the lighting; and the inducement of the "desired expression"). But see GAINES, *supra* note 75, at 82 (criticizing *Sarony* as giving Oscar Wilde's originality in himself to the photographer because Wilde was the subject of the photograph).

97. See Farley, *supra* note 69, at 434 (observing that the person operating the camera always makes choices when taking a photograph).

98. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) ("The least pretentious picture has more originality in it than directories and the like, which may be copyrighted."); *Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co.*,

Acknowledging the choice of simplicity in photography results in a more holistic evaluation of the creator's choices—choices of what to include and of what to omit. The presence of what the creator chooses to include is observable in the finished product, but the creator's choices of what to omit may only be appreciated in the creator's account of how she reached the finished product.

The recent case of *Ets-Hokin v. Skyy Spirits, Inc.*<sup>99</sup> illustrates the retention of this approach among modern courts. A photographer, Joshua Ets-Hokin, challenged the production of photographs by others that mimicked his studio work.<sup>100</sup> Ets-Hokin produced three photographs for Skyy, a vodka producer, in which the signature blue bottle appeared slightly shadowed but the angling was a “straight on” perspective.<sup>101</sup>

The Ninth Circuit concluded that the subject matter of the photographs (the blue vodka bottle) was not copyrightable.<sup>102</sup> Proceeding from this conclusion, the court held Ets-Hokin's photographs met the minimum requirement of creativity, referencing the volume of case law holding that photographs generally satisfy this requirement.<sup>103</sup>

#### B. *The End-product Approach Predominates in Graphic Works Cases*

In cases involving graphic compilation works, however, courts tend to look at the end-product and search for indications of creativity therein, as done in *Feist*.<sup>104</sup> Little, if any, mention is made of the choices of the author. This shift toward emphasis upon the work instead of the author traces back to *Bleistein* where the Court discussed aspects of the circus posters but not the author.<sup>105</sup> In a pre-

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274 F. 932, 934 (S.D.N.Y. 1921), *aff'd*, 281 F.3d 83 (2d Cir. 1922) (“[N]o photograph, however simple, can be unaffected by the personal influence of the author . . .”).

99. 225 F.3d 1068 (9th Cir. 2000).

100. *Id.* at 1071–72.

101. *Id.* at 1071.

102. *Id.* at 1078, 1080–81 (reasoning that to constitute a “preexisting work” within the meaning of “derivative work” the underlying work must be copyrightable, which the bottle is not because its design is useful rather than aesthetic); *accord* I NIMMER, *supra* note 22, § 3.01 n.10 (arguing “preexisting works” in the definition of derivative works requires copyrightability whereas “preexisting materials” in the definition of compilations does not).

103. *See Ets-Hokin*, 225 F.3d at 1073–76 (recounting photography as an artistic expression and highlighting landmark cases such as *Savony*).

104. *E.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 362–63 (1991) (referencing only the alphabetical order when discussing Rural's claim of originality in its coordination and arrangement of facts and pointing to the “creator” of the directory, Rural, as making no choices in the selection of information because of a government requirement).

105. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–50 (1903) (reasoning that the depiction of life does not deprive a work of copyright protection

*Feist* case, the D.C. Circuit looked solely at the arrangement and layout of elements—which did not qualify for copyright protection themselves—within the cover of *Reader's Digest* in order to determine that the arrangement created “a unique graphic design and layout” meriting copyright protection.<sup>106</sup>

In a graphic design case shortly after *Feist*, the plaintiff sued for infringement of his heart-shaped picture of the earth.<sup>107</sup> The Court of Federal Claims found that the design was not copyrightable because it was an idea and that, even if the picture was an expression, it was still not copyrightable because the expression existed in the public domain.<sup>108</sup> The court seemed to rely upon the *Feist* language indicative of novelty because it reasoned that the perspective used in both works has been used for so long that use of such a perspective exists in the public domain.<sup>109</sup> Furthermore, the court offered no account of the plaintiff's mental process in arriving at his copyrighted design and looked for originality only from the finished work within the context of other similar works, including the defendant's.<sup>110</sup>

The recent case of *Darden v. Peters*<sup>111</sup> illustrates the retention of this approach. The Fourth Circuit upheld the Copyright Office's determination that a graphic designer's work did not contain the necessary modicum of creativity to warrant copyright registration.<sup>112</sup> Darden created a website and commissioned “a stylized map of the United States that serves as a link to a separate page displaying a detailed map of any state selected by the user.”<sup>113</sup> *Darden* involved two works: (1) a collection of maps and (2) web pages that included the maps and other elements.<sup>114</sup> The designer started the work with a

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and comparing the posters to Velasquez and Whistler); accord Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 482 (contrasting *Sarony*, in which the author received great emphasis while the work received only slight mention, with *Bleistein*, which “adopted the opposite tactic by focusing primarily on the characteristics of the posters themselves” and referencing art of stature).

106. *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987).

107. *Meade v. United States*, 27 Fed. Cl. 367, 368 (1992).

108. *Id.* at 372.

109. *Id.*

110. *See id.* (finding that the perspective used by the plaintiff was similar to that of others and concluding that there was a lack of similarity in the remaining copyrighted elements of the design with the alleged infringer, thus ending the infringement evaluation).

111. 488 F.3d 277 (4th Cir. 2007).

112. *See id.* at 287–88 (rejecting registration of Darden's maps and website as compilation works).

113. *Id.* at 280.

114. *See id.* (specifying that Darden's copyright application, filed in May 2002, involved registration of his website “APPRAISERSdotCOM” and a separate application for “Maps for APPRAISERSdotCOM”).

Census map, which is in the public domain and therefore not copyrighted, colored the map, and added shading to create a three-dimensional effect.<sup>115</sup> The Copyright Office and courts did not find the requisite creativity in Darden's claim of "the special combination of font and color selection; visual effects such as relief, shadowing, and shading; labeling; and call-outs."<sup>116</sup> Further, the formatting and design of the website was not copyrightable as a compilation.<sup>117</sup>

The Fourth Circuit pointed to the Office's established regulations to evaluate if Darden's map and website design fell outside of works meeting the minimal level of creativity for copyright protection.<sup>118</sup> The regulation proscribes copyright registration of "familiar symbols or designs [and] mere variations of typographic ornamentation, lettering or coloring" as well as "[w]orks consisting entirely of information that is common property containing no original authorship."<sup>119</sup>

### III. THE FOURTH CIRCUIT APPLIED THE END-PRODUCT APPROACH AND OVERLY SCRUTINIZED THE ORIGINALITY REQUIRED FOR A COMPILATION AS DESCRIBED IN *FEIST*

Before addressing the disparity created by the two approaches in Part IV, this Comment highlights the oversights created by the end-product approach in *Darden* to demonstrate the weaknesses of the approach. The maps in *Darden* are concededly simplistic, but this simplicity means the maps should receive a "thin" copyright that would basically prevent direct copying of the maps.<sup>120</sup> First, this

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115. *Id.*

116. *Id.* at 281.

117. *See id.* at 281–82 (recounting the Copyright Office's denial when Darden sought reconsideration as a compilation after examiner suggested this characterization might warrant protection).

118. *Id.* at 287; *see* 37 C.F.R. § 202.1(a) (1992); *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359 (1991) (professing the existence of a small group of works that lack creative spark or contain such trivial creativity that it is not worthy of acknowledgment).

119. 37 C.F.R. § 202.1. These regulations embody the idea/expression dichotomy codified in the Copyright Act and prevent trivial changes to a work product from barring use of information that exists within the public domain. *See Feist*, 499 U.S. at 349 (emphasizing that the principle of idea/expression or fact/expression dichotomy applies to all works of authorship); *see also* *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 547 (1985) (explaining that a copyright does not prevent subsequent users from copying the elements that are not original from a prior author's work, such as those in the public domain); *Satava v. Lowry*, 323 F.3d 805, 812 n.5 (9th Cir. 2003) ("Congress did not intend for artists to fence off private preserves from within the public domain . . .").

120. *See* Dennis S. Karjala, *Copyright in Electronic Maps*, 35 *JURIMETRICS J.* 395, 397 (1995) (identifying works of low authorship as particularly vulnerable to misappropriation in the digital age because of the ease of straightforward, cheap copying). *See generally* Jane C. Ginsburg, *Creation and Commercial Value: Copyright*

section argues that the *Darden* maps could have satisfied the requirements for protection as a compilation. Then, this section concludes that, even if protection as a compilation is too forced, protection as a pictorial work clearly applies and, in fact, involves simpler analysis.

*A. The Colorized, Shaded Maps Involve Aesthetic Choices Sufficient to Satisfy the Minimal Level of Creativity Required for a Compilation*

Following the *Feist* analysis for originality in compilations, the works for which Darden sought copyright protection must satisfy the definition of compilation within the Copyright Act.<sup>121</sup> First, Darden's maps<sup>122</sup> easily satisfy the most basic and straightforward requirement—that of collecting and assembling pre-existing materials—because the graphic artist started with a “base” of existing digital and non-copyrightable U.S. Census maps<sup>123</sup> depicting the country, individual states, and counties.<sup>124</sup> The artist collected a map of the United States, maps of individual states, and maps of counties within states to make his larger work.<sup>125</sup> The artist also assembled the maps, though concededly on a very basic level, when he adjusted the Census map boundaries so that the maps could be reproduced.<sup>126</sup> Furthermore, the artist also assembled the map of the United States

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*Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1866 (1990) (presenting the idea of low authorship works); David E. Shipley, *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91 (2007) (analyzing courts' application of *Feist* to fact-based works).

121. See *Feist*, 499 U.S. at 357 (observing that copyrightable compilations must include “(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an ‘original’ work of authorship”); see also 17 U.S.C. § 101 (2006) (defining terms within the Copyright Act).

122. The website and maps are viewable at <http://www.appraisers.com>.

123. The Census maps are non-copyrightable materials because U.S. government products cannot be copyrighted. See 17 U.S.C. § 105 (denying copyright protection to U.S. government works).

124. *Darden v. Peters*, 488 F.3d 277, 280 (4th Cir. 2007) (describing the web designer's process of starting with a digital version of the map and then adding coloring and labeling); accord Wolf, *supra* note 58, at 228 (acknowledging that most commercially produced maps begin with a basic foundation in a noncopyrightable government map).

125. See *Darden*, 488 F.3d at 280 (describing how the web designer stylized maps to three levels of specificity and labeled the areas, including adding “callout labels”).

126. See *id.* at 281 (noting the submission upon reconsideration of the artist's account of his work on the maps, in which he states “each map was altered to such a degree that each line on each map is measurably changed from the digital originals”). The artist also said that he resized and redrew many lines to prevent a “chunky” look. *Id.* Darden's reply brief characterized these changes as “soften[ing] the maps' appearance.” Reply Brief of Appellant at 14, *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007) (No. 06-1177).

by placing Alaska and Hawaii in their non-geographically representative locations to better utilize space.<sup>127</sup>

The Darden maps also satisfy the second prong through the selection of the materials.<sup>128</sup> The *Darden* graphic artist “selected” the maps for the functional purpose of organizing listings for appraisers across the nation, but he also made some artistic and aesthetic alterations.<sup>129</sup> It is true that, because the task was to create clickable icons of the U.S. states, the overarching subject matter of the work was selected *for* the designer, not *by* the designer,<sup>130</sup> much as the content of the white pages in *Feist* was selected by state law.<sup>131</sup> Selection, however, is a term that extends more broadly than the selection of the subject matter, i.e. the facts one includes in the compilation. In *Darden*, the designer may not have selected the subject matter, but he did select the particular map for his starting point from a plethora of government maps.<sup>132</sup> The *Darden* graphic artist also had a wide array of colors available to him, and he used a particular blue color.<sup>133</sup>

Additionally, the second prong could also be satisfied by “arrangement” or “coordination,” in addition to “selection.” To arrange is “to put in the correct, proper, or suitable order.”<sup>134</sup> Again, the work is concededly simplistic, but this fact alone is not a bar to copyright protection as the designer arranged the states in their

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127. See *supra* note 122 (displaying Darden’s maps). In his filings to the Fourth Circuit, Darden emphasized that “[t]he map of Alaska shows creative use of the numerous elements in combination with nothing dictating placement other than creating balance and symmetry within the image.” Reply Brief of Appellant at 14, *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007) (No. 06-1177).

128. See *supra* note 121 (outlining the three requirements for protection of a compilation).

129. See *Darden*, 488 F.3d at 280 (describing the website as allowing a user to click on the appropriate map and obtain a map with greater detail and listings for appraisers in a given county).

130. See *id.* (explaining that Darden commissioned the creation of the maps at issue for his online referral service to real estate appraisers throughout the United States).

131. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (discounting any selection in the company’s publishing of names and corresponding telephone numbers in the directory because Rural was mandated to do this by the Kansas Corporation Commission).

132. To see the diversity of government maps available for use by the public, go to <http://www.usa.gov>. Then click “Reference and General Government” and then “Maps.”

133. See BOB GORDON & MAGGIE GORDON, *THE COMPLETE GUIDE TO DIGITAL GRAPHIC DESIGN* 188 (2002) (explaining that when designing in the digital setting, a designer has 6.7 million colors at her disposal, based upon the use of the three primary colors and 256 intensity levels).

134. WEBSTER’S NEW WORLD COLLEGE DICTIONARY 76 (Victoria Neufeldt ed., MacMillan 3d ed. 1997).



geographic order.<sup>135</sup> The designer's arrangement is most evident in the country map because he positioned the outline of Alaska below Arizona and New Mexico and that of Hawaii in the nook between Texas and Florida.<sup>136</sup> Also, based upon statutory construction, the term "coordination"<sup>137</sup> has a meaning distinct from "arrangement." Based upon the attention the designer paid to the outline of certain states when adding shading, one could argue some pairing or coordination of the elements occurred.<sup>138</sup>

Having established the first two prongs, which are essentially definitional of a compilation, the critical factor determining copyright protection remains. To satisfy the final prong, the particular selection or arrangement must be original.<sup>139</sup> Adding color and shading are far from novel concepts, but they still involve deliberate, aesthetic choices by the creator.<sup>140</sup> The record in *Darden* indicates a deliberate choice because the graphic designer shadowed each map differently so as "to highlight the unique shape and attribute of each particular state or set of counties."<sup>141</sup>

In its denial of copyright protection for the maps, the Copyright Office implicitly seemed to equate originality with novelty, despite courts' traditional rejection of novelty as a requirement for copyright protection.<sup>142</sup> Some of the descriptions of the telephone listings used by the Court in *Feist* seem applicable, but lead to a misguided

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135. See, e.g., *Feist*, 499 U.S. at 359 (theorizing instances in which the creative spark is "so trivial as to be virtually nonexistent" and therefore does not warrant copyright protection).

136. See *supra* note 122 (listing the online website where the maps are viewable).

137. To coordinate is to "to bring into proper order or relation" or "adjust (various parts) so as to have harmonious action." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 306 (Victoria Neufeldt ed., MacMillan 3d ed. 1997).

138. See, e.g., Brief of Appellant at 24, *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007) (No. 06-1177) (specifying that the designer outlined the southern and western portions of Alaska to enhance the peninsulas and Aleutian Islands but highlighted the northwest and southwest corners of California).

139. See *supra* note 121 (describing the elements of a copyrightable compilation and emphasizing originality).

140. See RONNIE LIPTON, THE PRACTICAL GUIDE TO INFORMATION DESIGN 158-59 (2007) (advising designers to plan a project in black and white and then add color only as needed to convey the message, thereby using color clearly while abiding by the "don't decorate" rule); cf. *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 748 (2d Cir. 1998) (declining to examine the maps feature-by-feature with the individual color choices as protected elements, and instead focusing on the overall manner of selection, coordination, and arrangement).

141. Brief of Appellant at 24, *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007) (No. 06-1177); see also *supra* note 138 (discussing the outlining and shading used to highlight portions of Alaska and California).

142. See *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007) (reasoning that additions to preexisting maps such as color and shading lack the minimum creativity necessary for copyright protection, and not discussing the graphic artist's choices of arrangement and shading).

evaluation of the required level of creativity.<sup>143</sup> The Fourth Circuit would be incorrect to go so far as to conclude as the Supreme Court did in *Feist* that the arrangement was “so mechanical or routine as to require no creativity whatsoever.”<sup>144</sup> *Feist*’s “routine” organization of the material consisted of alphabetization, whereas in *Darden* the arrangement of the maps—specifically their colorization and shading—did not have the functional role of organizing the material.<sup>145</sup> The *Darden* graphic artist had a wide array of colors available to him, and he made an aesthetic choice of a particular shade of blue.<sup>146</sup> Though adding color is a basic alteration often used to make elements more visually inviting, the use of blue is not “inevitable.”<sup>147</sup> A work can replicate an expression and still be original; thus, evaluating the creativity of a work in terms of predictability would be misguided.<sup>148</sup>

Beyond color choice, the additions of shading and relief effects are typical techniques within the fine and commercial arts for adding dimension to an element in a two-dimensional work.<sup>149</sup> The addition of dimension is prevalent within art and design, but creativity within copyright law is not about *what* concepts are present, but *how* they are presented.<sup>150</sup> The “how” is the expression that is protected, and, here, the graphic artist had a number of techniques available for

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143. See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362–63 (1991) (characterizing the alphabetization of names as commonplace and typical).

144. *Id.* at 362.

145. Compare *id.* at 362–63 (finding that the phonebook’s arrangement was designed to help users navigate easily through many pages of names, but that the company displayed too little creativity in selecting the content), with *Darden*, 488 F.3d at 287 (ignoring the creator’s overall arrangement and perspective as well as discounting any aesthetic role played by the color change and the addition of shading performed by the creator).

146. See KAREN TRIEDMAN & CHERYL DANGEL CULLEN, *COLOR GRAPHICS: THE POWER OF COLOR IN GRAPHIC DESIGN* 11 (2002) (suggesting that a consumer might feel trust toward a bank that uses blue in its logo and promotional materials because “sound financial institutions often rely on blue to communicate stability and trust”). Color selections are often made because of the subject matter of the work and because of the audience. See *id.* at 55 (listing twenty-one dominant colors with responses they generally elicit, such as gold evoking warmth and opulence).

147. See *Feist*, 499 U.S. at 345 (observing that simply because two works are similar, such as having similar color schemes, does not eliminate each work’s originality nor prevent copyright protection). See generally MARIO GARCIA, *PURE DESIGN* 138 (2002) (indicating that the purpose of color use in publications is “to energize the canvas, to attract the eye, . . . and ultimately, to leave an impression”).

148. See *supra* note 28 (articulating the *Feist* requirements for originality).

149. In painting and design, a relief effect is the “apparent solidity or projection of objects, obtained by modeling and gradation of color.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1133 (Victoria Neufeldt ed., MacMillan 3d ed. 1997).

150. See, e.g., *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (emphasizing that the arrangement of certain colors and the styling of particular elements of a sculpture are copyrightable, but noting that the simple presence of such colors and elements is not).

adding a three-dimensional effect but chose one particular technique.<sup>151</sup> The shading in *Darden* and alphabetization in *Feist* are similar as both arrangement techniques are conventional. Shading, however, involves creativity because the technique includes additional, particular choices, such as the depth of the shading, the degree of shading gradient applied, and angling of the shadow, that extend beyond the mechanical nature of alphabetization. The various choices regarding shading can lead to different outcomes whereas alphabetization produces one result.<sup>152</sup>

The maps likely constitute a thin copyright because the work's originality is quite limited, but that originality does merit a copyright. Such a copyright would, and should, essentially prevent exact appropriation of Darden's maps.<sup>153</sup>

*B. Regardless of Their Classification as a Compilation, the Maps Contain Pictorial Qualities That Display the Requisite Originality*

Even if protecting Darden's maps as a compilation is a bit contrived, the *Bleistein* analysis of the pictorial nature of a work is still relevant to *Feist's* strong focus on creativity.<sup>154</sup> The maps Darden sought to protect had economic value because they enhanced the appearance and accessibility of his website, and they also elicited the interest of others in licensing the use of the maps.<sup>155</sup> *Darden* made a

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151. See *id.* at 811–12 (suggesting that the curling of the jellyfish tentacles exemplified some level of artistic expression because the curling had aesthetic aspects not governed by the physiological nature of the jellyfish or the glass-in-glass medium).

152. See *supra* note 138 and accompanying text (recounting the use of shading to highlight certain aspects of the maps); *supra* note 141 (demonstrating the choice of angling within the technique of shading).

153. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (explaining that, based upon the limited scope of the copyright in a factual compilation, a later compiler may use the facts from another author's publication in preparing a latter work as long as latter work does not contain the same selection and arrangement).

154. Compare *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (describing depiction as the creator's reaction to the subject matter and as encompassing the creator's personality through particular collections, designs, and internal combinations), with *Feist*, 499 U.S. at 345 (articulating a more clinical approach to authorship as derived from independent creation and the slightest amount of creativity).

155. See *Darden v. Peters*, 488 F.3d 277, 280 (4th Cir. 2007) (describing the ability of users to click on maps and find listings of appraisers in a given area).

The underlying economic motive—subconsciously or not—often diminishes the artistic aspects, clouding the interpretation of the creator's decision-making. See *Bleistein*, 188 U.S. at 251 (pronouncing that the use of a work to increase trade or make money does not weaken the work's connection to the fine arts). *Bleistein* itself evidences an unsuccessful attempt to deny copyright protection based on an undervaluation of commercially successful works. See *id.* at 252 (denying that the commercial value or popular appeal of a work diminishes its aesthetic and

misguided attempt of using commercial viability as evidence of creativity despite *Bleistein's* explicit finding that consumer and popular appeal do not factor into the determination of a work's creativity.<sup>156</sup>

Ignoring the confusion of the commercial viability argument, Darden's maps would likely warrant copyright protection had the Copyright Office and Fourth Circuit analyzed them as pictorial works within the *Bleistein* framework.<sup>157</sup> Maps are modified illustrations of the political boundaries of states and counties.<sup>158</sup> Despite the Fourth Circuit's classification of them as trivial, the color choices and shading in Darden's maps are evidence of artistic choices.<sup>159</sup>

Much like photography in the analysis discussed below,<sup>160</sup> the *Darden* maps warrant copyright protection under the *Bleistein's* circular argument. In *Bleistein*, the Court made an initial determination that the overall work was pictorial or aesthetic, thereby indicating the presence of some creative choice or imprint of the author, because the Court generalized that pictorial works contain creativity.<sup>161</sup> The maps, using the language of *Bleistein*, are an "ensemble," including all the details and "*particular* combinations of figures, lines, and colors" in which the choices of the artist bear greater attention and emphasis.<sup>162</sup> Describing the elements of the work as "particular" acknowledges the deliberation and mental

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educational value). Courts are rightly leery of defining what art is and what constitutes good art because such determinations delve into purely subjective discussions of aesthetics. *See id.* at 251–52 (hypothesizing that permitting judges trained only in the law to assess the worth of pictorial illustrations would leave certain works outside the scope of protection); *cf.* Farley, *supra* note 5, at 809 (advocating that courts ought not adopt a single aesthetic theory of art but that they acknowledge various, and even conflicting, theories so that observers are clear on the approach taken by a given court).

156. *See Darden*, 488 F.3d at 287 (remarking that other real estate companies associated the maps with Darden and made offers to license their use).

157. *See Bleistein*, 188 U.S. at 250 (setting out the broad standard for originality in that a work with "[p]ersonality always contains something unique").

158. *See id.* at 251 (defining pictorial illustrations as "prints or labels designed to be used for any other articles of manufacture").

159. *See id.* at 250 (suggesting that handwriting is a "very modest grade of art," yet it still bears the personality of the writer).

160. *See* discussion *infra* Part IV (considering the copyrightability of the Darden maps in the context of a comparable photograph).

161. *See Bleistein*, 188 U.S. at 250–51 (providing no direct indicators of originality in the work but speaking only in generalizations); *see also* GAINES, *supra* note 75, at 69 (contending that, because a photographer must express herself through a mechanical apparatus, the expression of personality must overcome the impersonal machine of the camera through the photographer's choices, techniques and artistic practices).

162. *Bleistein*, 188 U.S. at 250 (emphasis added). *But see* 37 C.F.R. § 202.1(a) (2007) (classifying "mere variations" in color and labeling as not subject to copyright protection).

choice of an artist that almost always illuminates the slightest glimmer of a creative spark.<sup>163</sup> This approach focuses upon what is copyrightable rather than what is not.<sup>164</sup>

#### IV. COURTS HAVE CREATED A DISPARITY OF PROTECTION BETWEEN PHOTOGRAPHY AND OTHER GRAPHIC WORKS

In *Darden*, the maps likely merited copyright protection as either compilation works or pictorial works. The shortcomings of the Copyright Office's and courts' analysis of *Darden*'s maps discussed above are further exacerbated because similar deficiencies are not present in the front-end approach. By contrasting the two approaches, this section illustrates the disparity they create when applied to different fields of visual works.

##### A. *Applying the Front-end Approach as Seen in Ets-Hokin, the Maps in Darden Would Qualify for Protection*

This section utilizes the facts of *Darden*<sup>165</sup> and of *Ets-Hokin*<sup>166</sup> to analyze the copyright treatment of photography and graphic design. It illustrates how the earlier example of a photograph and a promotional poster depicting the Mona Lisa<sup>167</sup> do not earn the copyright protection that logic would suggest. This Comment argues that copyright law should treat the Mona Lisa works the same, but the following analysis of *Darden* and *Ets-Hokin* reveals no such consistency.<sup>168</sup>

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163. See *Bleistein*, 188 U.S. at 250 (proclaiming no doubt as to the original nature of work made by plaintiff's designer).

164. Compare *id.* (looking at the choices made as indications of artistic personality), with 37 C.F.R. § 202.1(a) (highlighting five categories of contributions that do not satisfy creativity requirement).

165. See *supra* notes 111–119 and accompanying text (outlining the facts and issues of *Darden*).

166. See *supra* notes 99–103 and accompanying text (introducing the subject matter of the photograph in *Ets-Hokin*).

167. See discussion *supra* Introduction (introducing a hypothetical photograph and promotional poster portraying the Mona Lisa).

168. Both *Darden* and *Ets-Hokin* addressed the copyrightability of works, but they did so in different contexts. The Fourth Circuit reviewed the copyrightability of the maps based upon a challenge to the Copyright Office's denial of copyright registration under the abuse of discretion standard. *Darden v. Peters*, 488 F.3d 277, 280 (4th Cir. 2007). The Ninth Circuit, however, approached the copyrightability of studio photography in the context of an infringement claim. *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1071 (9th Cir. 2000). In this context, “[w]hether a particular photograph is protected by copyright law is . . . subject to *de novo* review.” *Id.* at 1073. Although the *Darden* standard defers to the Copyright Office's determination, this Comment will argue that the Fourth Circuit's analysis and conclusion were lacking. An analysis of the appropriateness of the differing standards of review is outside the scope of this Comment.

The compositional nature of the maps and website in *Darden* is analogous to the studio photography in *Ets-Hokin* where the photographer positioned and manipulated the elements and lighting in a controlled setting.<sup>169</sup> Ets-Hokin's photographs were basically compositions of (1) noncopyrighted elements (the bottle and an additional glass in one frame), (2) color (the backdrop), and (3) some shading (lighting).<sup>170</sup> The components in the *Darden* maps are the same: (1) noncopyrighted elements (Census maps), (2) color (blue added to the maps), and (3) shading (relief and shading effects).<sup>171</sup> Thus, the maps in *Darden* are equally deserving of copyright protection as the photograph in *Ets-Hokin*.

1. *A basic presumption of authorship and creativity strongly favors copyright protection*

The discrepancy in outcomes seems to lie largely in the basic rubber-stamping of photographs as copyrightable subject matter.<sup>172</sup> *Ets-Hokin* references the volume of case law holding that photographs generally satisfy this requirement.<sup>173</sup> The blanket assumption that a photograph warrants copyright protection derives from the idea of the photographer working as the "composer" of the produced image, separate from the mechanization of the camera.<sup>174</sup> The graphic artist also "composes" through angles, lighting, and content in a given space. Such considerations are typical of those working within the visual arts because they embody basic principles of composition,

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169. Compare *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 54–55 (1884) (observing that the photograph in question not only depicts its subject, but also creates a visible form by portraying draperies and accessories), and *Ets-Hokin*, 225 F.3d at 1077 (enumerating the factors over which a photographer has control, including lighting, shading, angle, and background), with *Darden*, 488 F.3d at 280 (constructing the background and positioning of the various map series within the website platform).

170. See *Ets-Hokin*, 225 F.3d at 1071 (describing the photographs containing a bottle positioned in front of a plain white or yellow backdrop with back lighting).

171. See *Darden*, 488 F.3d at 281 (combining basic non-copyrightable elements into a compilation).

172. See *Ets-Hokin*, 225 F.3d at 1076–77 (reciting Judge Learned Hand's comment that "no photograph, however simple, can be unaffected by the personal influence of the author[.]" which is the view adopted by the Ninth Circuit (quoting *Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921))).

173. See *Ets-Hokin*, 225 F.3d at 1073–76 (touting photography as an artistic expression and surveying the historical photography cases such as *Saroni*).

174. See, e.g., *Saroni*, 111 U.S. at 60 (expounding upon the photographer's contributions to the work by "selecting and arranging the costume, draperies, and other various accessories," and by arranging the subject (Wilde) and lighting). See generally Farley, *supra* note 69, at 412–19 (analyzing courts' interpretation of the role of the photographer in creating original works before and after the camera's shutter exposure).

proportion, and color.<sup>175</sup> For example, basic compositional principles, such as the rule of thirds,<sup>176</sup> strongly influence the ultimate composition in both photography and design.<sup>177</sup> As discussed later, this presumption often creates pitfalls in copyright protection and is likely inappropriate.<sup>178</sup> The presumption, however, does exist within photography<sup>179</sup> and contributes to the disparity in protection as compared to graphic works.

2. *The cases do not consider the role of the author in the same manner, so the evidence and discussion of creative choice are dissimilar*

*Ets-Hokin* and other photography case law often focus upon the actions of the creator, perpetuating an easier assessment and discovery of authorial input.<sup>180</sup> The reliance upon the actions of the graphic artist before clicking the proverbial “publish” button would make originality as commonplace in graphic design as in photography.<sup>181</sup> A graphic artist’s narrative of creation would verbalize the subtle and overlooked choices that a graphic artist often makes.<sup>182</sup> Rarely would the first color choice of an artist remain unchanged or unaltered through the completion of the project. Just

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175. See ALFRED A. BLAKER, PHOTOGRAPHY: ART AND TECHNIQUE 393–411 (1980) (reinforcing the importance of considering composition, including the golden mean, rule of strategic placement, and lines of movement, before taking a photograph); LIPTON, *supra* note 140, at 15–35 (describing the Gestalt principles, contrast, and golden mean).

176. According to early architects, the most pleasing form follows a ratio of roughly 2:3 known as the golden mean or golden proportion. LIPTON, *supra* note 140, at 22. The rule of thirds, based upon the 2:3 proportion, divides a space into nine equal rectangles such that the intersections of the lines are the aesthetically pleasing positions for the focal point. *Id.* at 23.

177. See GARCIA, *supra* note 147, at 138 (summarizing the three important characteristics of color: (1) movement, (2) temperature, and (3) symbolism); LIPTON, *supra* note 140, at 22–23 (providing an overview of proportion and balance).

178. See discussion *infra* Part V.B (recommending courts abandon a presumption of originality within photography and not extend a similar presumption within graphic works).

179. See *supra* note 77.

180. See, e.g., *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 60 (1884) (focusing on the photographer’s pre-shutter exposure activities in posing the subject); *Leibovitz v. Paramount Pictures*, 137 F.3d 109, 111 (2d Cir. 1998) (elaborating on the detail that a photographer paid to evoking Botticelli’s *Birth of Venus* through the subject’s posture and hands); *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992) (articulating a photographer’s deliberate choice to include the owners in a puppy photo and the selection of the location for the shoot); *Pagano v. Charles Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916) (emphasizing a photographer’s choice of timing and its role in creating the subsequent photograph).

181. See Farley, *supra* note 69, at 390–91 (rationalizing the focus on the pre-shutter activities of the photographer as a way to distinguish expressive works from documentary or evidentiary works within the same medium).

182. See, e.g., LIPTON, *supra* note 140, at 25 (elucidating how a matching menu bar and logo in the same location on every page of a website creates an implied connection that embodies the Gestalt principle of closure and good continuation).

as a photographer may choose to change the angle of the camera so as to shift the focal point of the image from the perfect center of the photo, a graphic designer may choose to position the dominant element off-center.<sup>183</sup> Presenting the creator's narrative of the aesthetic evaluations allows courts to easily hone in upon these types of choices and thereby recognize elements that are original.<sup>184</sup>

Even in the posed, studio setting, the coloring changes and perspective suggest deliberate mood considerations of the creator, thereby favoring an authorial presence.<sup>185</sup> For example, in *Ets-Hokin* the lighting of the photograph sets the tone or mood of the photograph because it impacts the brightness and shading of the colors within the frame. Similarly, in *Darden*, the use of blue creates an overall feel for the work, such as a calming tone, that interacts with the type and other elements. Though not normally articulated by courts, the graphic artist has great leeway to decide from what direction he wishes to add the shading and subsequent hints of three-dimensional perspective.

Some commentators, including Professor Dennis S. Karjala, argue that following an approach with heavy emphasis upon the mental process of the author will lead to overprotection.<sup>186</sup> Karjala's "sweat of the brain" theory overlaps with this Comment's front-end approach.<sup>187</sup> Karjala argues that this approach is contrary to the requirement that "expressive creativity in the end product independent of the manner or methodology by which the product was created" moves into the realm of protecting ideas.<sup>188</sup> This view proves problematic in visual compilations. Some expressions are the

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183. See *supra* note 176 (describing the rule of thirds which would place the focal point away from the true center of the work).

184. See, e.g., *Sarony*, 111 U.S. at 60 (quoting from the photographer's account of creating challenged photograph during explanation of authorial presence); *Rogers*, 960 F.2d at 307 (listing the following as factors for assessing originality in photography: posing, lighting, angle, and selection of film and camera selection, as well as "almost any other variant").

185. See, e.g., *Rogers*, 960 F.2d at 304 (referencing photographer's choice of lighting and manipulation of natural light in account of production of contested photograph); *Pagano*, 234 F. at 964 (making note of the pleasant feel created by the lighting and shading in the background of the photograph).

186. See Karjala, *supra* note 120, at 402 (arguing if intellectual judgment involving in determining information makes it "non-factual," then very little will not receive copyright protection).

187. See generally *id.* at 400-04 (classifying "a finding of intellectual creative activity in the process of creating the work to conclude that the work was protected, even where there was no evidence of creativity in the final product except in the accuracy of its avowedly factual content" as the sweat of the brain theory).

188. *Id.* at 402.



result of choices *not* to include certain elements or aspects.<sup>189</sup> These negative choices may not manifest themselves to a viewer without some narrative from the creator. In evaluating a compilation work under *Feist's* tripartite structure, selection is a key component.<sup>190</sup> It seems illogical to argue that a court can fully assess selection within the four corners of a work when the work only represents the affirmative choices of the creator.<sup>191</sup> Selection involves discerning among options, but the end-product does not always reflect the sphere the creator was working within to create that result.

3. *Courts equate simplicity with authorial restraint in photography, but with adoption of the conventional (and unoriginal) in graphic works*

The commonplace, straight-on perspective does not deter copyright protection within photography because simplicity and predictability are praised in photography rather than scolded as “mere variations.”<sup>192</sup> The simplicity of the maps and website in *Darden* might convey creative choice and restraint under the front-end approach, whereas it negates originality under the end-product approach.<sup>193</sup> Simplicity in graphic works allows for the “message” to be louder and clearer,<sup>194</sup> but this concept has been embraced for photographic works and not graphic works.<sup>195</sup>

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189. See LIPTON, *supra* note 140, at 218 (cautioning against including too much information in a design and advocating selectivity when creating an informational design).

190. See *supra* notes 30–31 and accompanying text (including selection, arrangement, and coordination in two of the three elements for a copyrightable compilation).

191. See GAINES, *supra* note 75, at 69 (highlighting that finding personality within a photograph requires more than looking at the actual work and should include acknowledgement of choice, technique, and artistic practice).

192. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (remarking the least pretentious picture has more originality than works like directories, which can be copyrighted); *accord Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1077 (9th Cir. 2000) (acknowledging straight-on, centered perspective of product shot likely resembled other shots of bottles, but arguing such similarity does not diminish the originality of the photographer’s work).

193. Compare *Bleistein*, 188 U.S. at 250 (concluding the “least pretentious picture” involves more creativity than directories, which can have copyright protection), with *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363 (1991) (classifying alphabetical white pages as “an age-old practice, firmly rooted in tradition”).

194. See *supra* note 189 (instructing a designer to use selectivity in order to generate an effective product for the end user).

195. See *supra* note 75 and accompanying text (describing the acceptance of the front-end approach for photography).

B. *As Seen in Other Graphic Works Cases, the Front-end Approach  
Highlights the Selection Process, Which Is Otherwise Neglected  
in the End-product Approach*

The end-product approach is not a new method of accessing creativity that began after *Feist*. Rather, the technical end-product approach has been used in cases involving graphic works other than maps. Without judicial or statutory guidance on evaluating originality, the approach will likely continue within the field due to this case law. Looking at pre-*Feist* cases that describe the creativity based upon the end-product, many potential indicators of originality are not presented in the opinions, thereby perpetuating the technical approach of the end-product evaluation.

In *Reader's Digest Ass'n v. Conservative Digest Ass'n*,<sup>196</sup> the D.C. Circuit held that the district court was correct in concluding that the design of the Reader's Digest magazine cover qualified for copyright protection.<sup>197</sup> Despite acknowledging that the independent elements of the cover did not qualify for protection, the court found the "distinctive arrangement and layout of those elements [to be] entitled to protection as a graphic work."<sup>198</sup> The graphic design in this case warranted copyright protection under the end-product approach but indicates some of the shortcomings of the approach that cause other graphic works, like maps as discussed above, to be denied copyright protection.

The vague language of *Reader's Digest* hints at creativity in the arrangement but neglects aspects that might be noted in the front-end approach. The cover at issue in *Reader's Digest* was primarily text. Typefaces themselves are generally regarded as not copyrightable.<sup>199</sup> The selection of the particular typeface, however, might be an indicator of creativity.<sup>200</sup> Also, the repetition of text may create a graphic, cohesive effect that could indicate creativity because the use of type extends beyond its traditional purpose of forming words.

In *Meade v. United States*,<sup>201</sup> discussed earlier as an example of the end-product approach,<sup>202</sup> the Court of Federal Claims court

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196. 821 F.2d 800 (D.C. Cir. 1987).

197. *Id.* at 806.

198. *Id.*

199. See 1 NIMMER, *supra* note 22, § 2.15 (explaining that a House Committee statement seems to foreclose copyright protection for typeface but highlighting arguments that there in fact is not an absolute exclusion).

200. See LIPTON, *supra* note 140, at 100 ("Designers who love typefaces and appreciate their subtle differences, or 'personalities,' tend to spend a lot of effort on choosing typefaces."). Just like lighting and perspective (the angle of viewing the content), the typeface contributes to setting the tone of the work. *Id.*

201. 27 Fed. Cl. 367 (1992).

concluded that the common aspects of the two works were unprotectable subject matter and, therefore, found no infringement.<sup>203</sup> The court correctly concluded that a heart-shaped picture of the earth is an idea and therefore not copyrightable.<sup>204</sup> However, the court incorrectly characterized the plaintiff's work as an idea, not an expression, and further concluded that even if the work was an expression, the expression is in the public domain.<sup>205</sup> The concept employed by the plaintiff there may have been simplistic such that it warranted a "thin" copyright in which the defendant's variation would not infringe, but the court focused upon the particular expression without entertaining how the author's role should impact the ultimate determination of copyrightability. This type of tunnel vision illustrates the need to reorient copyright law toward the front-end, author-focused approach.

V. THE FRONT-END APPROACH SHOULD BE THE STANDARD FOLLOWED BY THE COPYRIGHT OFFICE AND COURTS AS THE METHOD OF EVALUATING ORIGINALITY IN VISUAL WORKS

Having established that certain elements are overlooked in the end-product approach and that these oversights lead to disparate treatment between photography and graphic works, a stream-lined application better analyzes visual works for the minimal level of originality needed for a copyright. This section first highlights why the front-end approach is more appropriate and not an overextension of copyright protection. Furthermore, this Comment recommends an abandonment of the originality presumptions within photography that have detracted from the front-end approach because a true application of the front-end approach better informs copyright owners and others who wish to use similar content as to the actual scope of copyright protection in a given work.

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202. See discussion *supra* notes 107–110 and accompanying text (recounting the allegation that the Postal Service infringed a heart-shaped picture of the Earth by its design of the stamp in which the court ultimately concluded the plaintiff's work was not copyrightable).

203. *Meade*, 27 Fed. Cl. at 370–72.

204. *Id.* at 372; see *supra* notes 11–15 and accompanying text (elaborating on the idea-expression dichotomy).

205. See *Meade*, 27 Fed. Cl. at 372 (declaring the existence of heart-shaped maps and pictures of the Earth for centuries).

A. *The Front-end Approach Is Appropriate for Visual Works Because Hindsight Plays a Lesser Role and the Scope of Protection Is Still Dictated by Originality*

Although both approaches are methods of evaluating the creativity mandated by *Feist*, the front-end approach is the better method of evaluation. First, the front-end approach comports with the judiciary's longstanding desire to refrain from evaluating art and aesthetic qualities.<sup>206</sup> Due to the subjective nature of art, especially fine art, courts would be treading on shaky footing to define what art is and what is "good" art worthy of legal protection.<sup>207</sup> The assessment of art rightly should be left to society at large, not legally-focused judges.

Furthermore, the front-end approach eliminates the natural inclination for hindsight to cloud the evaluation of creativity. Some patent cases have recognized the problem of hindsight.<sup>208</sup> Once a person sees the finished product, that result often seems typical or obvious. Therefore, grasping too strongly upon the adjectives in *Feist* that explained why the directory was not original<sup>209</sup> will lead copyright into the same pitfall of failing to identify creativity in a work that seems minimally creative when posed before you.

Although the front-end approach will likely result in protection of works that the end-product approach would exclude, the protection granted to compilations is so limited in scope that others' abilities to create similar works will not be impinged.<sup>210</sup> Granting copyright protection to a work does not give the author exclusive rights over the choices the author made in arriving at the finished work. The copyright protection lies only in the tangible form.<sup>211</sup> Considering the mental processes of the author simply enables a more holistic evaluation of the creativity involved. The front-end approach does

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206. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (describing the situation of a person trained in the law acting as final judge on the worth of pictorial works as dangerous). See generally Farley, *supra* note 5.

207. See *Mazer v. Stein*, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art").

208. See, e.g., *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999) (noting the ease of understanding an invention might lead a person "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher" (quoting *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983))).

209. E.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361-63 (1991) (allowing for a misconstruing of the necessary quantum of creativity with wording like "entirely typical," "garden-variety," and "practically inevitable").

210. See generally Shipley, *supra* note 120 (articulating that protection of works of thin authorship is limited but still useful and worthwhile for owners of such copyrights).

211. 17 U.S.C. § 102 (2006).

not have to resume the principles of the “sweat of the brow” doctrine as Karjala’s terminology “sweat of the brain” implies.<sup>212</sup> Consideration of the mental processes of the author simply addresses creative choice; the originality would not extend to the unprotectable elements of the larger work.<sup>213</sup>

*B. Courts and the Copyright Office Should Abandon Presumptions of Originality Because These Presumptions Ignore the Small Class of Works that May Lack Originality and Do Not Provide Adequate Notice of What Elements of a Work Are Copyrighted*

The front-end approach, however, should not digress into a basic presumption as seen in many photography cases.<sup>214</sup> In fact, photography needs more scrutiny. Why should copyright law not involve a basic presumption that a work has the required amount of creativity? First, the language of the statute clearly indicates some works will not meet the creativity requirement.<sup>215</sup> Second, copyright protection exists when two elements are present: an author and originality.<sup>216</sup> The end-product approach divorces consideration of these two elements and their interplay, resulting in an overly mechanical view of originality. Finally, focusing upon the author’s choices allows for a fuller consideration of creativity by the inclusion of the selections made by the creator and includes scrutiny not present in some photography cases.<sup>217</sup> The lack of scrutiny results in overprotection in some photographs because, based upon a presumption of originality, courts do not distinguish the copyrightable elements in a photograph from the non-copyrightable

212. *Supra* notes 186–188 and accompanying text.

213. *See supra* notes 15–21 and accompanying text (pointing out the limitation upon copyright protection in a work to expressions, not ideas, and only the original aspects within the work, not necessarily the whole work).

214. *See* Zimmerman, *supra* note 12, at 204 (postulating that *Bleistein* effectuated the demise of a meaningful threshold for the originality requirement); Farley, *supra* note 69, at 447–50 (arguing that the Romantic view of an aesthetic author producing a photograph continues to pervade photography jurisprudence).

215. *See* 17 U.S.C. § 101 (2006) (defining a compilation as materials or data “selected, coordinated, or arranged *in such a way* . . . [as to result in] an original work of authorship[.]” thereby allowing for the possibility that a work might be arranged *in such a way* so that it would not warrant copyright protection) (emphasis added); *supra* note 32 (highlighting *Feist*’s specific reference to the statute’s allowance for a class of works to lack adequate originality for copyright protection).

216. *Supra* notes 13–14 and accompanying text.

217. *See, e.g.,* *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1076–77 (9th Cir. 2000) (adopting the prevailing view that almost any photograph has the necessary originality because of the photographer’s personal choices); *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916) (reasoning that anyone may take a photograph of a public building and that the act of taking a photograph “undoubtedly requires originality” which allows one to conclude that any photograph of a building would be original).

elements. To avoid overprotection and underprotection, graphic works and photography need more than a passing statement in Copyright Office determinations and judicial opinions regarding originality.<sup>218</sup> As seen in *Bridgeman*, some courts are already embracing this greater, and more appropriate, scrutiny of photography by acknowledging some photographs lack the requisite creativity.<sup>219</sup> These decisions demonstrate that the door is still open for some works to fall below the copyright standard as *Feist* and *Sarony* emphasized.<sup>220</sup>

Removing a presumption or perfunctory announcement of originality in visual works will lead to greater clarity as to the scope of particular copyrights for the owners, as well as others who would like to use of that work or some of its elements. Applying the front-end approach, judges can more deliberately articulate the finding, or lack thereof, of originality within a work.<sup>221</sup> Based upon the exceedingly low threshold for sufficient originality, identifying some of the indicators of originality within a work will not be burdensome for courts and will further direct courts into a more stream-lined approach to finding originality.<sup>222</sup> Returning to the Mona Lisa

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218. See Thomas G. Field, Jr., *When the Copyright Office Hides the Ball*, IPFRONTLINE, July 2, 2008, <http://www.ipfrontline.com/depts/article.asp?id=19701&depid=4> (hypothesizing that the concern in *Darden* was actually utility but pointing out that was not discussed); *cf. id.* (stating that sometimes the Copyright Office cites a lack of originality for rejecting copyright registration and then the courts go along even though the courts' "concern seems to lie elsewhere").

219. See *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998), *aff'd on reh'g*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (qualifying that, although there is an inherent creativity in the art of photography, a photograph which is simply a copy of another's work that is "as exact as science and technology permit[s] lacks originality"); see also *Caratzas v. Time Life, Inc.*, No. 92 Cir. 6346 (PKL), 1992 WL 322033, at \*4. (S.D.N.Y. Oct. 23, 1992) (asserting that a photographer cannot acquire a copyright in images of public objects).

220. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 341 (1991) (surmising that the § 101 definition of a compilation, based upon the phrase "in such a way" envisions that some fact-based works will merit protection while others will not); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (theorizing the possibility of an "ordinary production of a photograph" not warranting copyright protection but explicitly declining to decide on the matter).

221. See Farley, *supra* note 5, at 846 (arguing that judges intuitively apply aesthetic theories without acknowledgement and generally with suppression of the approach taken).

222. Although judicial explanation of what is original may require more words and attention than the opinions discussed in this Comment, this level of analysis is not highly technical nor does it require more scrutiny than other legal issues. In fact, some courts are already providing the level of specificity recommended in other copyright cases. See *infra* note 224 (pointing to a sculpture case as an appropriate example of the level of analysis needed to inform owners and the public as to the limits of a copyright).

problem,<sup>223</sup> courts should more clearly articulate that a copyright holder in either the photograph or promotional poster does not have exclusive rights to the expression of the Mona Lisa but only to the particular aspects, such as particular shading, positioning, or embellishment.<sup>224</sup> If copyright law adopts the reasoning of *Bridgeman*<sup>225</sup> and finds the photograph of the Mona Lisa uncopyrightable, then the promotional poster should also be uncopyrightable.

In conclusion, the Copyright Office and courts need to refocus their determinations of originality upon actual analysis of the creativity within the visual work. Photography, therefore, needs greater scrutiny than it currently receives while graphic works need less. These changes will place the fields of photography and graphic works under the same front-end standard.

#### CONCLUSION

Courts seem to perpetuate an antiquated view of photography as a magical capturing of something ephemeral and non-existent. Graphic design is as equally planned and considered as photography, but the case law within graphic design, especially in maps and layout, has less sweeping language embracing the artistic nature of the medium. Despite Feist's emphasis upon creativity as the basis for copyright protection, two approaches exist for the assessment of the

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223. See discussion *supra* Introduction (hypothesizing a composition of the Mona Lisa painting on a red background in both the photographic and graphic print mediums).

224. Courts may look to the field of sculpture for a good model of this type of detailed analysis. In *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), the court clearly delineates the aspects of the lifelike glass-in-glass sculptures of jellyfish. First the court articulated what elements of the allegedly infringed work were factual and thereby uncopyrightable. See *id.* at 810–11 (removing the physiology of the jellyfish and the glass-in-glass medium from potential copyright protection, as well as the depiction of the jellyfish swimming vertically). The court then found the only copyrightable aspects to be “the distinctive curls of particular tendrils; the arrangement of certain hues; [and] the unique shape of jellyfishes’ bells” to the extent they are not controlled by the species itself or the medium. *Id.* at 812. The court concluded that the copyright is “thin” and would likely prevent only identical copying. *Id.* If the court did not provide the analysis of the sculpture and simply declared a thin copyright, however, the public at large would be losing the much needed perspective to know what a copyright notice attached to a work actually indicates. Suppose the sculptor includes a copyright notice with his subsequent sculptures based upon his thin copyright. Without adequate case law explicating what a copyright in such a work actually entails, another sculptor intending to move into that genre may infer greater restrictions upon what elements of the first work she may include within her own.

225. See *supra* notes 79–82 and accompanying text (describing how *Bridgeman* found straight-on photographs of artwork as lacking the requisite originality because the photographs did nothing more than a copier machine).

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requisite creativity. The front-end approach has predominated in photography whereas the end-product approach prevails in graphic design cases. Unfortunately, the two approaches can result in contrary conclusions. Because the end-product approach is more restrictive in finding originality, a disparity has resulted that means the copyrightability of works comprised of essentially the same components depends upon the medium used.

Courts' initial reactions play a major role in the assessment of copyright protection. A quick recognition of pictorial quality can result in an easy finding of originality. Based upon the extremely low threshold, such a quick summation is not surprising or necessarily refutable. However, the blanket assumption of a pictorial quality in photography creates a disparity in copyright protection for works of graphic design, like maps, which may not emit that immediate pictorial or aesthetic quality but may still employ creative choice. Those works that "scream" their pictorial nature get cursory review while the more subtle are being categorized as compilations and subjected to review more akin to the patent standard of novelty than the copyright standard of originality. Professor Christine Haight Farley has noted that "photographs are at once able to be seen as the expression of the photographer who made it, but also as a direct transcription of nature."<sup>226</sup> In order to streamline copyright protection for visual works, the dual nature of other visual works must also gain such recognition.

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226. Farley, *supra* note 69, at 393.