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AESTHETIC NONDISCRIMINATION & FAIR USE

BRIAN L. FRYE*

ABSTRACT

While courts do not consider the aesthetic value of an element of a work in determining whether it is protected by copyright, they do consider the aesthetic value of the use of a copyrighted element of a work in determining whether that use is a fair use. This asymmetry improperly and inefficiently discriminates in favor of copyright protection and against fair use. Moreover, the fair use transformativeness inquiry discriminates against marginalized authors, because courts are less likely to appreciate the aesthetic value of their uses of copyrighted works.

Courts should apply the aesthetic nondiscrimination principle to both copyright and fair use. In other words, “transformative” should just mean “different,” and courts evaluating a fair use claim should simply ask whether the use changes the copyrighted work in any way, including context, and should not ask whether that change is substantial or valuable. While this would substantially narrow the scope of the derivative works right, it would almost certainly increase social welfare by encouraging the production of derivative works without materially affecting the incentives to create works of authorship.

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INTRODUCTION

A well-worn Latin adage observes, “De gustibus non est disputandum,” or, roughly translated, “There’s no accounting for taste.”¹ Economists typically use the adage to express the principle that social welfare depends on individual preferences, so government should help people maximize their individual preferences.² In other words, the *de gustibus* principle of economics holds that government should be agnostic about the relative merit of individual preferences. As some might say, “Different strokes for different folks.”³

More than 100 years ago, United States copyright law incorporated a version of the *de gustibus* principle when the Supreme Court held that copyright can protect any original work of authorship, irrespective of its aesthetic value.⁴ This principle eventually became known as the aesthetic nondiscrimination doctrine, which provides that the aesthetic value of a work of authorship is irrelevant to whether it is original and protected by copyright.⁵

But that does not mean that aesthetic value is irrelevant to copyright law. The most important defense to copyright infringement is the fair use doctrine, which provides that certain uses of copyrighted works are non-infringing fair uses.⁶ Specifically, “transformative” uses of a work of authorship are typically non-infringing fair uses, and courts determine whether a particular use of a copyrighted work is transformative by asking whether it “adds something new” to the original work and thereby provides a “social benefit.”⁷ So, in practice, the transformativeness inquiry requires courts to evaluate the aesthetic value of the allegedly infringing use.

This article argues that the aesthetic nondiscrimination doctrine should apply to both copyright protection and fair use. If originality does

1. The literal translation of the adage is “about tastes, it should not be disputed.”

2. *But see* George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977) (arguing that most people have similar preferences).

3. *Cf. Different Strokes* (NBC television broadcast Nov. 3, 1978).

4. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

5. *See* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 813 (2005) (describing the effect of aesthetic discrimination).

6. 17 U.S.C. § 107 (2012).

7. *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

not depend on aesthetic value, neither should transformativeness. Of course, applying the aesthetic nondiscrimination doctrine to fair use would significantly reduce the scope of the derivative works right. However, it would almost certainly increase public welfare because the derivative works right is inefficiently broad, dramatically limiting the production of derivative works without materially increasing the incentive to create works of authorship.

The effects of the compulsory license for making sound recordings of musical works suggest that narrowing the scope of the derivative works right in this way would increase public welfare. The compulsory license enables anyone to create and distribute a sound recording of a copyrighted musical work without permission in exchange for a statutory royalty, but it does not permit the creation of derivative musical works without permission.⁸ As a consequence, musicians create many *cover* versions of musical works but avoid creating *derivative* musical works. In other words, the compulsory license encourages the creation of one kind of derivative work—cover songs—and discourages the creation of another kind of derivative work: homages.

Cover songs clearly increase social welfare. The public demands cover songs, and the consumption of one version of a musical work does not decrease demand for alternative versions of that musical work. On the contrary, popular covers tend to increase demand for both the musical work and other versions of the musical work.⁹ Presumably, an increase in the number of homages would increase public welfare in a similar fashion. The public's demand for cover songs reflects its preference for familiar works of authorship, which the derivative works right discourages.

Moreover, reducing the scope of the derivative works right would not materially affect the incentive to create works of authorship, because the right does not provide a salient incentive to marginal authors. The derivative works right is valuable only if the copyrighted work is valuable. But authors cannot predict the value of a work of authorship before creating it and distributing it to the public. In other words, the value of the derivative works right is indeterminate until after the underlying work of authorship is already created, and a right of indeterminate value cannot provide a salient incentive. This suggests that limiting the scope of the derivative works right would increase public welfare without materially decreasing the incentive to create works of authorship.

8. 17 U.S.C. § 115 (2012).

9. Douglas Campbell Rennie, *This Book Is A Movie: The Faithful Adaptation as a Benchmark for Analyzing the Substantial Similarity of Works in Different Media*, 93 OR. L. REV. 49, 63–64 (2014).

I. THE ORIGIN OF THE AESTHETIC NONDISCRIMINATION DOCTRINE

The so-called aesthetic nondiscrimination principle provides that courts cannot consider the aesthetic value of a work of authorship in determining whether it is protected by copyright.¹⁰ It is based on *Bleistein v. Donaldson Lithographing Company*, in which the U.S. Supreme Court held that copyright can and should protect any original work of authorship, regardless of its aesthetic value.¹¹

In 1898, Benjamin Wallace, the owner of a travelling circus called the “Great Wallace Shows,” hired the Courier Lithographing Company of Buffalo, New York to design and print chromolithograph posters for the circus.¹² Courier filed copyright registrations on three posters with the Librarian of Congress:

- “Spectacular Ballet Design,” which depicted “a line of a dozen or more figures of females in ballet costumes of the most flashy style”¹³ with the legend, “Great Wallace Shows grand spectacular ballet costumed & presented exactly as in grand opera. Led by the celebrated Sisters Maccari, Hulda, Adele & Amelia premiere danseuses. A tremendous sensation costing a fortune to produce”;¹⁴

10. Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 461–62 & n.56 (2009) (“Professor Gorman called Holmes’ aesthetic nondiscrimination principle in *Bleistein* “[o]ne of the more enduring observations in all of copyright.”) (quoting Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS, 1, 1 (2001)).

11. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903). *See generally* Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in INTELLECTUAL PROPERTY STORIES 77, 96 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005); Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC’Y U.S.A. 347 (2012).

12. *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 993 (6th Cir. 1900) *rev’d sub nom. Bleistein*, 188 U.S. 239. Lithography is a method of printing that uses water-retaining or “hydrophilic” and water-repelling or “hydrophobic” media applied to a flat plate in order to produce a monochrome image. *See Lithography*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/lithography> [<https://perma.cc/S28Q-47UD>]. Chromolithography is a method of printing that uses multiple lithographic plates to produce a multi-colored image. *See id.*

13. *Bleistein v. Donaldson Lithographing Co.*, 98 F. 608, 609 (C.C.D. Ky. 1899) *aff’d sub nom. Courier Lithographing Co.*, 104 F. 993 *rev’d sub nom. Bleistein*, 188 U.S. 239.

14. *Courier Lithographing Company, Spectacular Ballet Design* (1918), available at <http://www.loc.gov/pictures/item/2007684718/> [<https://perma.cc/G227-J4WJ>].

- “Stirk Family Design,” which depicted “a series of representations of fancy or trick bicycle riding”¹⁵ with the legend, “The renowned Stirk Family, whose ‘fame folds in the orb ‘o this Earth.’ The glass of fashion and the mold of form. The highest of high class acts. Marvelous and original evolutions by adult and juvenile experts. An enormously expensive feature of the world’s best show.”;¹⁶ and
- “Statuary Act Design,” which depicted “pictures of certain statuary”¹⁷ with the legend, “The classic, chaste, and culminating living triumphs of imitative art. 8 lovely ladies of faultless form posing upon a great revolving pedestal in bewitching, perfect, breathing reproductions of famous historical incidents & the crowning features of the world’s most noted studios and galleries.”¹⁸

On April 11, 1898, Courier shipped a “large number of prints” of each poster to Wallace in Peru, Indiana.¹⁹ When Wallace ran out of posters, he hired the Donaldson Lithographing Company of Newport, Kentucky to create less expensive monochrome electrotype reproductions of the posters.²⁰ Courier and six of its employees, including George Bleistein, filed a copyright infringement action against Donaldson, claiming \$12,000 in damages.²¹

The trial court granted the defendant’s motion for a directed verdict on the ground that the posters were “neither ‘pictorial illustrations’ nor ‘works connected with the fine arts,’ within the meaning of [the Copyright Act].”²² The appeals court affirmed, holding that copyright does not and should not protect advertisements:

15. *Bleistein* 98 F. at 609.

16. Courier Lithographing Company, *Stirk Family Design* (1918), available at <http://www.loc.gov/pictures/item/2007684720/> [<https://perma.cc/E9WK-N87Z>].

17. *Bleistein* 98 F. at 609. “Spectacular Ballet Design” and “Stirk Family Design” were registered on April 11, 1898, and “Statuary Act Design” was registered on April 18, 1898. *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 993 (6th Cir. 1900), *rev’d sub nom. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

18. Courier Lithographing Company, *Statuary Act Design* (1918), available at <http://www.loc.gov/pictures/item/2007684719/> [<https://perma.cc/DJA5-H856>].

19. *Courier Lithographing Co.*, 104 F. at 993.

20. See generally Zimmerman, *supra* note 11.

21. *Bleistein*, 98 F. at 608. The plaintiffs were George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing, and Edwin Fleming, doing business as the Courier Lithographing Company. See *Bleistein*, 188 U.S. at 239.

22. *Bleistein*, 98 F. at 608.

What we hold is this: that if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the “author” in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible.²³

But the Supreme Court reversed, holding that the Copyright Act can and should protect all “pictorial illustrations,” including advertisements.²⁴ As Justice Holmes’s majority opinion observed:

A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.²⁵

Holmes explained that copyright protection should not depend on the aesthetic value of a work because courts cannot reliably or objectively determine aesthetic value:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the

23. *Courier Lithographing Co.*, 104 F. at 996.

24. *Bleistein*, 188 U.S. at 250–51.

25. *Id.* at 251. A majority of the works of French Impressionist painter Edgar Degas (1834–1917) depict dancers, especially ballet dancers, like those depicted in the poster “Spectacular Ballet Design.” See, e.g., Paul Trachtman, *Degas and His Dancers*, SMITHSONIAN MAGAZINE (Apr. 2003), <http://www.smithsonianmag.com/arts-culture/degas-and-his-dancers-79455990/?no-ist> [<https://perma.cc/8BK6-GE5B>].

other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.²⁶

Essentially, *Bleistein* adopted a version of the *de gustibus* principle, holding that copyright should protect any original work of authorship, irrespective of its aesthetic value, because aesthetic value is inescapably subjective. If judges were to consider the aesthetic value of a work in determining whether it is protected by copyright, their own subjective preferences could prevent them from recognizing both the objective aesthetic value of the work and its subjective aesthetic value to others.

Of course, the Court tried to hedge by holding that judges should not consider the aesthetic value of a work “outside of the narrowest and most obvious limits.”²⁷ And what were those narrow and obvious limits? The Court did not explain. Unsurprisingly, they soon proved non-obvious and, as a consequence, became quite narrow indeed. In practice, *Bleistein* made aesthetic value irrelevant to copyright.

Justice Harlan dissented, adopting the appellate court's reasoning as his own and adding:

The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.²⁸

While Harlan argued that copyright does not and should not protect advertisements, he did not explain why. That is unfortunate because there are multiple reasons for taking that position. Presumably, Harlan believed that copyright requires aesthetic value. But one could also argue that

26. *Id.* at 251–52 (internal citations omitted).

27. *Id.* at 251.

28. *Id.* at 253 (Harlan, J., dissenting) (Justice McKenna joined Harlan's dissent).

copyright in advertisements is unnecessary because businesses do not need a copyright incentive to advertise their products.²⁹

Copyright scholars eventually dubbed the version of the *de gustibus* principle adopted in *Bleistein* the aesthetic nondiscrimination principle.³⁰ Notably, while the federal courts have never used the term “aesthetic nondiscrimination,” they immediately and uniformly adopted the aesthetic nondiscrimination principle.³¹ For example, in *Mazer v. Stein*, the Supreme Court held that copyright protected porcelain statuettes of male and female dancers intended for use as lamp bases, without considering the aesthetic value of the statuettes.³² But in his rather plaintive concurrence, Justice Douglas observed that the majority’s application of the aesthetic nondiscrimination doctrine made the effective scope of copyright protection quite broad:

The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all “writings” in the constitutional sense. But to me, at least, they are not obviously so.³³

In retrospect, Justice Douglas’s concerns were quite prescient. The prevailing theory of copyright law is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship by providing an incentive for marginal authors to create works of authorship. As the Supreme Court has explicitly and repeatedly held, the Intellectual Property Clause adopted the economic theory of copyright:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is

29. See also Rosen, *supra* note 11, at 374 (arguing that Holmes misinterpreted the purpose of the Copyright Act of 1874, which was intended to protect works “connected to the fine arts,” but not “pictorial illustrations”).

30. See Miller, *supra* note 10, at 477 n.123 (stating that Holmes’s refusal to consider aesthetic merit “is known as the aesthetic nondiscrimination principle”).

31. See Robert A. Gorman, *supra* note 10, at 1 (characterizing the aesthetic nondiscrimination principle as “[o]ne of the more enduring observations in all of copyright.”).

32. *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

33. *Id.* at 220–21 (Douglas, J., concurring) (Justice Black joined Douglas’s concurrence).

the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.”³⁴

In other words, copyright protection provides an economic incentive for authors to produce works of authorship and are justified because the social cost of giving authors certain exclusive rights in their works of authorship is less than the social benefit of the additional works of authorship they produce. The aesthetic nondiscrimination doctrine is consistent with the economic theory of copyright insofar as it ensures that the value of copyright protection depends on demand, rather than ideology.

The problem with the economic theory is that it encourages policymakers to assume that more copyright necessarily means more works of authorship. In fact, the salience of copyright protection to marginal authors is obviously contextual. If the costs associated with the production and distribution of a work of authorship are high, then copyright is typically quite salient because rational marginal authors will not invest in the production of those works unless they believe they can recover their costs. But if the costs associated with the production and distribution of a work of authorship are low, then copyright is typically not salient to rational marginal authors because there are no costs to recover.

Historically, the costs associated with the production and distribution of works of authorship were high, especially the cost of distributing physical copies.³⁵ But those costs have dramatically decreased, especially because the marginal cost of distributing a digital copy of a work of authorship is effectively zero.³⁶ As a consequence, copyright has become a much less salient incentive to many authors.³⁷

However, the scope of copyright protection has not changed. As Brad Greenberg has observed, copyright under the 1976 Act is like an Oprah giveaway: everybody gets one.³⁸ Every blog post, email, tweet, status update, and selfie is protected by copyright, whether or not copyright protection provided a salient incentive to its author.

34. *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

35. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–28 (1989).

36. See Alina Ng, *When Users Are Authors: Authorship in the Age of Digital Media*, 12 VAND. J. ENT. & TECH. L. 853, 865 (2010).

37. *Id.* at 866.

38. See Brian L. Frye, *Copyright as Charity*, 39 NOVA L. REV. 343, 351–52 (2015).

II. COPYRIGHTABLE SUBJECT MATTER

When the Supreme Court adopted the aesthetic nondiscrimination principle in *Bleistein*, it implicitly assumed that copyright protected works of authorship as a whole.³⁹ But the scope of copyright protection gradually expanded to include certain discrete elements of a work of authorship as well. For example, in 1930 the Second Circuit held that the copyright in a dramatic work could protect not only the work as a whole, but also “a separate scene,” “part of the dialogue,” or “an abstract of the whole.”⁴⁰ Courts implicitly assumed that the aesthetic nondiscrimination principle also applied to any element of a work that was protected by copyright.⁴¹ As a consequence, copyright effectively protected any original element of a work that could be characterized as an “expression” rather than an “idea.”⁴²

The Copyright Act of 1976 amended the exclusive rights of copyright owners to include the exclusive right “to prepare derivative works based upon the copyrighted work.”⁴³ In *Harper & Row v. Nation*, the Supreme Court assumed that the derivative works right extended copyright protection to each original element of a work as an independent work of authorship.⁴⁴ But it expressly declined to define “originality” for the purpose of the Copyright Act.⁴⁵ Six years later, in *Feist v. Rural*, the Supreme Court defined an “original” element of a work of authorship as an element that was “independently created by the author” and “possesses at least some minimal degree of creativity.”⁴⁶ It also implicitly (and perhaps unintentionally) held that every work of authorship is effectively a compilation of theoretically discrete elements, some of which may be original and protected by copyright, and others of which may not.⁴⁷

39. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

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

41. *Id.*

42. *Id.*

43. 17 U.S.C. § 106(2).

44. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)

(holding that copyright does not prevent subsequent users from copying from a prior author’s work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain—as long as such use does not unfairly appropriate the author’s original contributions.”).

45. *Id.* (“Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author’s original contributions to form protected expression We need not reach these issues, however, as The Nation has admitted to lifting verbatim quotes of the author’s original language totaling between 300 and 400 words and constituting some 13% of The Nation article.”) (internal citations omitted).

46. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

47. *Id.*

A. *Feist v. Rural*

Rural Telephone Service Company, Inc. provided telephone service to subscribers in parts of northwest Kansas.⁴⁸ Among other things, Rural published and distributed a telephone directory that consisted of white pages, which listed all of Rural's subscribers in alphabetical order, and yellow pages, which listed Rural's commercial subscribers in alphabetical order, along with advertisements purchased by certain subscribers.⁴⁹

Feist Publications, Inc. published regional telephone directories that also consisted of white pages and yellow pages.⁵⁰ Feist decided to publish a telephone directory covering a region that included many of Rural's subscribers and offered to license Rural's white pages listings.⁵¹ Rural refused to license its listings, so Feist copied them without permission.⁵²

Rural filed a copyright infringement claim against Feist.⁵³ The district court granted summary judgment to Rural, holding that copyright protects telephone directories, and the circuit court affirmed.⁵⁴ But the Supreme Court reversed, holding that copyright could not protect Rural's white pages listings because they lacked any original elements.⁵⁵

B. Originality

The Supreme Court began by observing that copyright can only protect original works of authorship. “The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.”⁵⁶ The Court explained that “originality requires independent creation plus a modicum of creativity.”⁵⁷ Accordingly, copyright cannot protect facts—including names, telephone numbers, and addresses—because they are discovered, not created, by an author.⁵⁸

48. *Id.* at 340.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural's subscribers.”). Rural proved that Feist copied its listings by showing that Feist's directory included four fictitious listings created by Rural for the purpose of proving copying. *Id.* at 344.

53. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc.*, 663 F. Supp. 214, 216 (D. Kan. 1987).

54. *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc.*, 916 F.2d 718, 718 (10th Cir. 1990); *Rural Tel. Serv. Co.* 663 F. Supp. at 220.

55. *Feist*, 499 U.S. at 363–64.

56. *Id.* at 345 (emphasis in original).

57. *Id.* at 346.

58. *Id.*

However, copyright can protect a compilation of facts if the ordering, selection, or arrangement of facts is original: “These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”⁵⁹ But the Supreme Court held that copyright could not protect Rural’s white pages listings as a compilation of facts because the selection, ordering, and arrangement of the listings required “no creativity whatsoever.”⁶⁰

The practical effect of the creativity requirement was, and remains, unclear. *Feist* repeatedly emphasized how little creativity is required for copyright protection. But it neither defined creativity nor explained how to determine whether an element of a work has enough creativity to qualify for copyright protection. As a consequence, while *Feist* purported to increase the requirements for copyright protection by requiring some degree of creativity, it arguably decreased the requirements for copyright protection by setting the creativity bar so low that almost anything qualifies, no matter how trivial or banal.

After *Feist*, copyright cannot protect the decision to put white pages listings in alphabetical order, but it can protect almost anything else. The *Feist* Court itself suggested that copyright could protect Rural’s yellow pages listings and even some elements of Rural’s white pages listings that *Feist* did not copy.⁶¹ Circuit courts subsequently held that copyright also protected an ethnic telephone directory and an automobile price guide.⁶²

In addition to adopting the largely toothless creativity requirement for originality, *Feist* also implied that copyright independently protects all of the original elements of a work, rather than protecting the work as a whole. As the Court observed:

The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright;

59. *Id.* at 348.

60. *Id.* at 362 (“The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.”).

61. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (“*Feist* appears to concede that Rural’s directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements.”).

62. *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994); *Key Publ’ns, Inc. v. Chinatown Today Publ’g Ent., Inc.*, 945 F.2d 509, 511 (2d Cir. 1991).

accordingly, copyright protection may extend only to those components of a work that are original to the author.⁶³

The Court went on to explain, “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶⁴ In other words, copyright protects the original elements of a work, rather than the work as a whole. Or rather, after *Feist*, every work of authorship is implicitly a compilation of discrete elements, some of which may be original and protected by copyright, and some of which may not.⁶⁵

III. FAIR USE

One of the most important defenses to copyright infringement is the fair use doctrine, which provides that certain *prima facie* infringing uses of copyrighted works are non-infringing uses.⁶⁶ Copyright and fair use have always existed in tandem. Initially, fair use was a common law defense to copyright infringement.⁶⁷ When England created modern copyright by passing the Statute of Anne, English courts eventually adopted a fair use doctrine, which provided that copyright could not prevent certain productive uses.⁶⁸ And when Congress created United States copyright law by passing the Copyright Act of 1790, United States courts also adopted a fair use doctrine, which provided that fair use permits the use of a copyrighted work without permission for the purpose of commentary or criticism, unless the use supersedes the market for the original work.⁶⁹

The purpose of the fair use doctrine is to balance the exclusive rights of copyright owners against the right to make productive uses of copyrighted works.⁷⁰ In particular, the doctrine is intended to ensure that copyright does not conflict with the First Amendment right to free speech.⁷¹ In theory, the fair use doctrine ensures that copyright owners can internalize the positive externalities generated by the creation of a work of authorship but cannot prevent others from using that work of authorship to generate

63. *Feist*, 499 U.S. at 348.

64. *Id.* at 361.

65. *See, e.g.*, *Computer Associates Int’l., Inc. v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992).

66. 17 U.S.C. § 107 (2012).

67. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

68. *Gyles v. Wilcox*, 26 Eng.Rep. 489, 2Atk. 141 (1970) (No. 130).

69. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

70. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

71. *Eldred v. Ashcroft*, 537 U.S. 186, 218–20 (2003).

additional positive externalities. But in practice, many courts found the fair use doctrine difficult to apply.⁷²

The Copyright Act of 1976 codified the fair use doctrine for the first time, providing:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷³

As Congress explained, the purpose of codification was “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”⁷⁴ Of course, it is impossible to codify a common law doctrine without changing it. Codification alone is a change, and it inevitably affects the interpretation of the doctrine if only by obligating courts to consider the specific language of the statute.

A. Toward a Fair Use Standard

In any case, codification alone did not clarify the application of the fair use doctrine. Courts remained unsure how to determine whether particular uses of copyrighted works were fair uses. In his seminal article, *Toward a Fair Use Standard*, Judge Leval argued that the first fair use factor—the “purpose and character of the use”—is the most important.⁷⁵ According to Leval, the fair use doctrine is intended to encourage productive uses of copyrighted works, so the fair use analysis should focus

72. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001).

73. 17 U.S.C. § 107 (2012).

74. H.R. REP. NO. 94-1476, at 66 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

75. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

on whether the allegedly infringing use is transformative or different from the original use:

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.⁷⁶

Leval also argued that mere difference is not enough and that a use of a work is a transformative fair use only if it adds something new and substantial to the original use:

A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.⁷⁷

In other words, according to Leval, a use of a copyrighted work is a transformative fair use only if it adds something new and valuable to the original use. Or rather, courts must consider the aesthetic value of a secondary use in order to determine whether it is a fair use.

B. *Campbell v. Acuff–Rose*

The Supreme Court soon adopted Leval's interpretation of the fair use doctrine.⁷⁸ In 1964, Roy Orbison and William Dees wrote the iconic song "Oh, Pretty Woman" and assigned their rights to Acuff–Rose Music, Inc. In 1989, Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs of the rap group 2 Live Crew offered to license "Oh, Pretty Woman" in order to create a rap parody, but Acuff–Rose refused.⁷⁹ Nevertheless, 2 Live Crew recorded and distributed a parody titled "Pretty

76. *Id.* at 1111 (emphasis in the original).

77. *Id.*

78. *See* *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

79. *Id.* at 572–73.

Woman.”⁸⁰ Acuff–Rose filed a copyright infringement action.⁸¹ The district court granted summary judgment to 2 Live Crew, holding that their parody was a fair use because it did not affect the market for the original, but the Sixth Circuit reversed, holding that the parody was not a fair use because it was commercial.⁸²

The Supreme Court reversed the Sixth Circuit and held that 2 Live Crew’s parody was a fair use because it was a transformative use of the original work:

Suffice it to say now that parody has an obvious claim to transformative value, as Acuff–Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.⁸³

The Supreme Court explicitly adopted Leval’s interpretation of the fair use doctrine, including his conclusion that the first fair use factor is the most important and that the doctrine requires transformativeness.⁸⁴ Specifically, it held that parody could be transformative because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁸⁵ The Court observed, “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”⁸⁶ So, copying in order to create a parody is a fair use because parody requires copying. Or rather, copying is fair use only if it is justified.

And when is copying justified? Apparently, when the new work is sufficiently valuable:

If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes

80. *Id.* at 573.

81. *Id.*

82. *Id.*; *Acuff–Rose Music, Inc. v. Campbell*, 972 F. 2d 1429, 1439 (6th Cir. 1992).

83. *Acuff–Rose*, 510 U.S. at 579.

84. *Id.* at 578–79.

85. *Id.* at 579.

86. *Id.* at 580–81.

accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.⁸⁷

In other words, copying is a fair use only if it adds something valuable to the original. And that does not include something of commercial value, which implies that fair use requires adding something of aesthetic value.

Of course, the Supreme Court explicitly disclaimed any aesthetic element to the fair use analysis, citing *Bleistein*, “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.”⁸⁸ But in the very next paragraph, it provided a remarkably patronizing description of the transformative aspects of 2 Live Crew’s work of authorship:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.⁸⁹

So, 2 Live Crew’s parody of “Oh, Pretty Woman” was sufficiently transformative to qualify as a fair use but not to escape the Supreme Court’s ridicule. Apparently, courts should not consider the aesthetic value of allegedly transformative uses, except to poke fun at them. Of course, 2 Live Crew sold nearly 250,000 copies of “Pretty Woman” before Acuff–Rose even filed its infringement action and sold many more copies afterward, so many consumers plainly found it aesthetically valuable.⁹⁰ In any case, *Campbell* leaves the distinct impression that 2 Live Crew’s parody is a protected fair use only on the Supreme Court’s sufferance. One wonders

87. *Id.* at 580.

88. *Id.* at 582.

89. *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

90. *Id.* at 573.

whether the Supreme Court would have even recognized the transformative aspects of a subtler parody.

The Court's dismissive assessment of 2 Live Crew's work illustrates a troubling consequence of reliance on transformativeness. As Andrew Gilden has observed, the open-ended nature of the transformativeness test tends to disadvantage marginalized authors, because courts are less likely to recognize the aesthetic value of their contribution.⁹¹ The transformativeness analysis increasingly relies on a raw material metaphor that favors artists seen by courts as cooking or recontextualizing the material they incorporate into their work, rather than using it in its raw form.⁹² This raw versus cooked dichotomy subtly encourages courts to privilege certain kinds of uses over others. While courts are increasingly willing to find that rich and fabulous appropriation artists have transformed the works that they copy by cooking the raw materials of culture, they are less willing to pardon lesser-known artists.⁹³ In other words, courts unconsciously respond to social cues. While blue-chip artists like Prince and Koons have mounted successful fair use defenses based on recontextualization, socially marginalized authors are typically less successful.⁹⁴

As a consequence, Amy Adler has argued that courts should abandon the transformativeness test entirely, at least in relation to works created by visual artists, who routinely use original elements of existing works of authorship without transforming them in any of the ways contemplated by the fair use doctrine.⁹⁵ While such uses create new meanings, they do so by changing the context in which those works are presented rather than changing the works themselves. Adler suggests that the fair use inquiry should turn on whether the allegedly infringing work negatively affects the market for the original work.

By contrast, Laura Heymann has argued that transformativeness should depend on consumer perceptions rather than authorial intent.⁹⁶ In other words, courts should find that an allegedly infringing work is transformative if consumers perceive it as different from the copied work, irrespective of the intentions of the author of the work.⁹⁷ Of course, as Heymann recognizes, this reformulation of the transformativeness test

91. Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016).

92. See, e.g., *Acuff-Rose*, 510 U.S. at 579 (citing Leval, *supra* note 75, at 1111).

93. Gilden, *supra* note 91, at 370.

94. *Id.*

95. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U.L. REV. 559, 564 (2016).

96. Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 455 (2008).

97. *Id.*

approaches a market-based approach to fair use, but differs insofar as it asks whether a work has created a new “discursive community” based on the alleged infringer’s unique contributions.⁹⁸

IV. OBJECTIVE TRANSFORMATION

I believe that courts may be able to avoid many of the problems associated with the fair use doctrine by explicitly applying the aesthetic nondiscrimination doctrine to the transformativeness test. In other words, transformativeness should be an objective inquiry. When courts ask whether an allegedly infringing work transforms the work it copies, they should only ask whether the two works are different, not whether the defendant has added anything valuable. As the Supreme Court recognized in *Bleistein*, courts are ill suited to determine whether an original element of a work of authorship has any aesthetic value.⁹⁹ They are equally ill suited to determine whether the use of an element of a work of authorship has any aesthetic value. As currently formulated, the transformativeness test implicitly requires courts to evaluate the aesthetic value of allegedly transformative uses, a task they cannot accomplish without discriminating against marginalized authors and uses of works of authorship that judges do not understand or value.

Of course, applying the aesthetic nondiscrimination doctrine to the transformativeness test would dramatically reduce the scope of the derivative works right.¹⁰⁰ If transformativeness only requires difference, then the overwhelming majority of uses are transformative and the derivative works right becomes almost meaningless. But this is probably for the best.

Under the economic theory, copyright protection is justified only if it provides a salient incentive to marginal authors. The derivative works right provides a salient incentive to the extent that it provides an exclusive right to create adaptations of the original work, like sequels and versions in different media. But trademark and unfair competition law can also provide these salient incentives. By contrast, the derivative works right rarely if ever provides a salient incentive to the extent that it provides an exclusive right to use elements of the original work to create different works because authors typically cannot anticipate such uses. Effectively, the derivative works right limits or prevents the creation and distribution of works of authorship that the public values. As a consequence, the derivative works right is largely unjustified and should be eliminated.

98. *Id.* at 465.

99. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

100. *See* 17 U.S.C. § 106 (2012).

V. MUSICAL WORKS AND COMPULSORY LICENSES

The music industry provides an excellent illustration of how the derivative works right has limited or prevented the creation of valuable works of authorship in other media. Recorded music typically consists of two copyrightable works: the sound recording and the underlying musical work.¹⁰¹ The sound recording is a derivative work of the musical work, because it copies some or all of the original elements of the musical work and adds new original elements.

Typically, the derivative works right provides that an author cannot create and distribute a derivative work based on a copyrighted work without the permission of the copyright owner.¹⁰² But the compulsory licensing system for musical works provides that an author may create and distribute a sound recording of a copyrighted musical work without the permission of the copyright owner for a nominal fee after the copyright owner has authorized the creation and distribution of the first sound recording.¹⁰³

As a consequence, many musicians record and distribute covers, which are sound recordings of copyrighted musical works. The most frequently recorded popular song may be George Gershwin's "Summertime," as a group of collectors have identified more than 30,000 recordings of the song.¹⁰⁴ More than 7,000 musicians have recorded versions of the song "Amazing Grace."¹⁰⁵ And more than 1,000 musicians have recorded versions of Joni Mitchell's song "Both Sides Now."¹⁰⁶

The demand for covers of musical works shows that they have social value and that the public does not perceive covers as substitutes for the musical work. On the contrary, covers of musical works typically increase the value of the underlying musical work and complement the value of each other, even if they are very similar. For example, Dan Penn and Chips Moman co-wrote the song "The Dark End of the Street" in

101. 17 U.S.C. § 102(a)(2) & (7) (2012).

102. *Id.* See also H.R. REP. NO. 94-1476, at 57 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

103. 17 U.S.C. § 115.

104. THE SUMMERTIME CONNECTION, <http://summertime-connection.nl/> [<https://perma.cc/MWK3-DLHC>] (last visited July 15, 2016).

105. Noah Berlatsky, *From "Sweet Home Chicago" to "Yesterday," the Most-Covered Songs in History*, SALON.COM (July 26, 2014, 10:00 AM), http://www.salon.com/2014/07/26/from_sweet_home_chicago_to_yesterday_the_most_covered_songs_in_history/ [<https://perma.cc/FZD6-VQ7Y>].

106. *Known Recordings of 'Both Sides Now'*, JONI MITCHELL, <http://jonimitchell.com/music/covers-song.cfm?id=Both%20Sides%20Now> [<http://perma.cc/3MP7-HV7C>] (last visited July 15, 2016).

1966.¹⁰⁷ James Carr recorded the first version of the song, which was released in 1967.¹⁰⁸ Soon afterward, Percy Sledge recorded a version of the song, which was also released in 1967.¹⁰⁹ Even though the Carr and Sledge versions of the song are similar in many respects, both were popular and successful.¹¹⁰ The arrangements are slightly different, and the performances reflect the distinctive personalities of their respective singers. In 1969, Clarence Carter recorded a rather salty version of the song with an extensive spoken introduction, and the Flying Burrito Brothers recorded a version in a country rock style.¹¹¹ In 1972, Ry Cooder recorded a soul-influenced version of the song, performed at a slower tempo.¹¹² And many other musicians have also recorded versions of the song, each of which have appealed to different audiences in different ways.¹¹³ In other words, the evidence shows that the public benefits from the creation of covers and does not perceive covers as substitutes for the original musical work.

In the absence of the compulsory licensing system, the owner of the copyright in a musical work could limit or prohibit the creation of covers. While that would benefit the authors of popular musical works, it would certainly reduce the production of covers. Indeed, some authors have indicated that they would prohibit covers of their musical works.¹¹⁴ The mechanical license benefits the public by preventing the authors of musical works from inefficiently exercising derivative works rights.

Of course, the compulsory licensing system itself is flawed because it does not apply to derivative works that substantially alter the underlying work:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the

107. See Barney Hoskyns, *Lives of the great songs / Cheatin' meeting of minds: The Dark End of the Street*, THE INDEPENDENT (Jan. 8, 1994), <http://www.independent.co.uk/arts-entertainment/lives-of-the-great-songs-cheatin-meeting-of-minds-the-dark-end-of-the-street-1398917.html> [<https://perma.cc/3U2B-75LL>].

108. *Id.*

109. *Id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *Id.*

114. E.g., Prince. Eriq Gardner, *Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too*, BILLBOARD.COM (Feb. 6, 2015), <http://www.billboard.com/articles/business/6465293/why-taylor-swift-may-soon-be-able-to-stop-cover-songs-on-spotify-too> [<https://perma.cc/BJJ2-9U2X>].

work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.¹¹⁵

As a consequence, while the compulsory licensing system reduces the inefficiency of the derivative works right, it still prevents the creation of many derivative works without permission. Ironically, it actually facilitates the creation of derivative works that are similar to the original work and more likely to function as market substitutes, but discourages the creation of derivative works that are different from the original and less likely to function as market substitutes.

In any case, the popularity of covers facilitated by the compulsory licensing system suggests the extent to which the derivative works right has negatively impacted the ability of authors to create derivative and non-substituting works with substantial social value. Indeed, consumers typically prefer generic and familiar works of authorship, suggesting that the derivative works right may impose substantial social costs.¹¹⁶ The application of the aesthetic nondiscrimination doctrine to the transformativeness test would drastically reduce the scope of the derivative works right and promote the creation of many socially valuable works, without affecting any of the salient incentives that copyright provides to marginal authors.

CONCLUSION

The aesthetic nondiscrimination doctrine should apply to both the subject matter of copyright and the subject matter of fair use. If courts should ignore the aesthetic value of a work of authorship when determining whether it is protected by copyright, they should also ignore the aesthetic value of transformative uses of that work of authorship. What's sauce for the goose is sauce for the gander. The purpose of copyright is to promote the creation of works of authorship with social value, but the current iteration of the fair use doctrine permits inefficient assertions of the derivative works right. An objective version of the transformativeness test would reduce the scope of the derivative works right and increase the efficiency of copyright doctrine.

115. 17 U.S.C. § 115(a)(2).

116. See Heymann, *supra* note 96, at 465.