Bleistein, American Copyright Law, and the Problem of Aesthetic Progress

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Abstract

From the very origins of American copyright law in the Intellectual Property Clause, whose preamble "To Promote the Progress of Science and useful Arts" excludes any reference to the "fine arts," our copyright law has struggled to reconcile its fundamental purpose, the promotion of progress, with the aesthetic. In the 1903 case of *Bleistein v. Donaldson Lithographic Co.*, the Supreme Court was finally forced to attempt such a reconciliation and to explain how progress in the aesthetic, rather than in the scientific or technological, might be assessed. In an opinion that for all of our attention to it still remains underappreciated and fundamentally misinterpreted by courts and commentators alike, the new Justice Oliver Wendell Holmes, Jr. established that "personality" was the basis of copyright protection, but that the purpose of copyright protection, even of aesthetic works, was progress in the form of "commercial value." This Article argues that Justice Holmes's market-value theory of aesthetic progress and the cavalier, peremptory manner in which he formulated it had a profoundly damaging influence on American copyright law and on our pursuit through it of aesthetic progress. After *Bleistein*, the law coalesced around the "commercial value" of authorial works, creative products, aesthetic objects—and away from the "personality" of authorial work, creative practice, aesthetic subjects. Focusing on aesthetic ends rather than aesthetic means, the law adopted for the aesthetic, as it had for the scientific and technological, an "accumulationist" model of progress, one which defined aesthetic progress as simply the accumulation over time of more and more aesthetic works. Since *Bleistein*'s fateful commitment to accumulation, it has not been the "Romantic author" but rather the fetishized intellectual commodity that has been the cynosure of the law and driven the law's expansion.

Urging a rejection of *Bleistein*'s approach as obsolete in a new culture of massively-distributed authorship, this Article proposes that our copyright law embrace and implement an alternative vision of aesthetic progress based in part on American pragmatist aesthetics. Pragmatist aesthetics recognizes that aesthetic labor has value—as a source of pleasure, of aesthetic and moral cultivation, of imaginative freedom, self-actualization, and solidarity—even when it does not ultimately result in the production of an aesthetic work. The pragmatist vision of aesthetic progress pursues not more accumulation, but more personal engagement and popular participation in the aesthetic practices of our increasingly "poeticized culture." It urges various reforms of our copyright law.

Introduction

The Intellectual Property Clause of the U.S. Constitution states that Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] To the enduring credit of the Committee of Eleven,[2] the clause displays an elegantly interwoven parallel construction much favored in eighteenth-century prose and poetry:[3] at once, the clause empowers Congress, through copyright law, "to promote the Progress of

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[1] U.S. CONST. art. I, § 8, cl. 8.

[2] For the drafting history of the clause, see *infra* notes 95–98 and accompanying text.

[3] CHESTER NOYES GREENOUGH & FRANK WILSON CHENEY HERSEY, ENGLISH COMPOSITION 246 (1917) (characterizing the eighteenth century as the "golden age of parallel construction"). The clause also arguably exhibits a "balanced construction" typical of eighteenth century rhetoric. *See* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 116 (2002) (discussing the "balanced style of composition" found in the Intellectual Property Clause); H.R. Rep. No. 1923, 82nd Congress, 2nd Session (1952) ("The background, the balanced construction, and the usage current then and later, indicate that the constitutional provision is really two provisions merged into one.").

Science…, by securing for limited Times to *Authors*…the exclusive Right to their…*Writings*" and, through patent law, "to promote the Progress of…*useful Arts*, by securing for limited Times to…*Inventors* the exclusive Right to their…*Discoveries*."[4] But for all of its apparent balance, the clause suffers from two fundamental asymmetries, one that courts and commentators have pondered over for more than two centuries,[5] and another that in that same length of time appears to have attracted only passing attention in one federal court case, the turn-of-the-twentieth-century case of *Bleistein v. Donaldson Lithographic Co*.[6]

The first problem goes to the unresolved relation between the Intellectual Property Clause's two sub-clauses, which pivot awkwardly about the comma. Does the Progress Clause ("To promote the Progress of Science and useful Arts") establish a purpose that limits the means specified in the Exclusive Rights Clause ("by securing for limited times…"), so that Congress may secure monopoly rights in intellectual works only when doing so will promote progress?[7] Or does the Exclusive Rights Clause limit the means by which Congress may promote progress, so that Congress may seek "to promote the Progress of Science and useful Arts" only by securing intellectual property rights?[8] In the late-eighteenth and early-nineteenth centuries, the prevailing

[4] The parallel construction supports the dominant view that, as the Nimmer treatise puts it, "'science' refers to copyright, whereas the 'useful arts' connote patents." 1 NIMMER ON COPYRIGHT § 2.01 n 11.4 (2010). *See also* Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 35 (2001).

[5] *See generally* WALTERSCHIED, *supra* note 3; Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

[6] 98 F. 608 (C.C.D.Ky. 1899). One other district court opinion of the time may also have addressed the issue, though obliquely. *See* Henderson v. Tompkins, 60 F. 758, 762-63 (C.C.D. Mass. 1894).

[7] *See* Lee v. Runge, 404 U.S. 887, 888-889 (1971) (Douglas, J., dissenting from denial of certiorari) (arguing that the Progress Clause "acts as a limit on Congress' power to grant monopolies through patents."); *id*. at 890 (same). *See also* In re Shao Wen Yuan, 188 F.2d 377, 380 (C.C.P.A. 1951) (discussing framers' familiarity with the "struggle over monopolies" in England and concluding that framers intended the Progress Clause to limit the Exclusive Rights Clause); Clayton v. Stone, 5 F. Cas. 999, 1003 (C.C.N.Y. 1829) (holding that the Progress Clause limits the subject matter of copyright protection); AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 112 (2005) (discussing framers' efforts to limit congressional powers and citing their use of the Progress Clause to ensure that "[p]atents and copyrights could not be given merely to reward political allies").

[8] *See, e.g.*, American State Papers, Miscellaneous, Doc. No. 74, 4th Cong., 1st Sess. (1796) (recording the opinion of a congressional committee that Congress cannot give "pecuniary encouragement" to incentivize scientific and technological advance because the Constitution limits congressional powers only to the grant of patents for this purpose). In early debates over the establishment of a national university, the Intellectual Property Clause was also understood to form a barrier to the enterprise. *See* II THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1604 (Joseph Gales ed., 1834). *See also* WALTERSCHEID, *supra* note 3, at 169 (arguing that

view answered yes to both questions: Congress could only promote progress through intellectual property rights and could only provide intellectual property rights when doing so would promote progress.[9] In the present-day, the prevailing view answers no to both. Neither phrase, it is now generally thought, significantly limits the other. Little more than a "preamble,"[10] mere "introductory language,"[11] the Progress Clause proposes but does not require that Congress promote progress;[12] the Exclusive Rights Clause simply volunteers an example of one possible means of doing so.[13]

The second, less remarked asymmetry is more profound. It goes to a peculiar vacancy in the Progress Clause, one that apparently only the courts in the *Bleistein* case ever took the time to notice. While several state copyright statutes in the 1780s spoke broadly of their intent to encourage the "various arts and sciences,"[14] with one such statute entitled simply "An act for the encouragement of arts and sciences,"[15] the Progress Clause conspicuously avoids the phrase "arts and sciences," otherwise so pervasive in the eighteenth century.[16] Instead, in the phrase "to promote the Progress of Science and useful Arts," the clause takes pains to exclude any reference to a rather significant category of intellectual achievement: the fine arts. To be sure, the eighteenth century had not definitively settled the meanings of the terms "science" and "useful arts,"[17] but the former was generally understood to refer to systematic theoretical and empirical knowledge (i.e., *Wissenschaft*), the latter to technology or commercial practices. More significantly for our purposes, neither "science" nor the "useful Arts" encompassed the fine arts.[18] Even as late

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the view of the Exclusive Rights Clause as limitative of the Progress Clause "would prevail during much of the first half of the nineteenth century").

[9] *See supra* notes 7 & 8.

[10] 1 Nimmer on Copyright, § 1.03[A].

[11] Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981).

[12] *See, e.g.*, *id*. (rejecting argument that Progress Clause limits Exclusive Rights Clause).

[13] *See, e.g.*, Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1565 (Fed. Cir. 1988) (citing other constitutional provisions that authorize Congress to support scientific and technological advance).

[14] U.S. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS, 1783-1900, at 12, 16, 17 (1900) (preamble to Massachusetts copyright statute, copied by the New Hampshire and Rhode Island statutes). *See also id*. at 23 (North Carolina copyright statute preamble's reference to "the general extension of arts and commerce").

[15] *Id*. at 19 (South Carolina copyright statute).

[16] *See* DAVID SPADAFORA, THE IDEA OF PROGRESS IN EIGHTEENTH-CENTURY BRITAIN 29-34 (1990) (discussing eighteenth-century usages of the phrase).

[17] *See id*.

[18] *See, e.g.*, 2 ENCYCLOPEDIA BRITANNICA; OR A DICTIONARY OF ARTS, SCIENCES, AND MISCELLANEOUS LITERATURE 360 (1797) (discussing the distinction between useful arts and fine arts next to the margin heading "Progress of the fine arts"). *See generally* LARRY SHINER, THE INVENTION OF ART 5-10, 79-94 (2001); SPADAFORA, *supra* note 16, at 29-34; Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics (I)*, 12 J. HISTORY IDEAS 496, 497 (1951); Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics (II)*, 13

as 1899, in his *Bleistein* district court opinion, Judge Walker Evans believed the standard dichotomy between the fine and the useful arts to be so obvious—"as a matter of common knowledge"[19]—that he made judicial notice of it to ask whether the circus advertisements at issue in the case before him fell within the subject matter of the Intellectual Property Clause.[20] The failure of the Progress Clause to reference the fine arts is all the more mysterious given that the framers elsewhere clearly subscribed to the general belief of the time that both the "arts and sciences" were progressing[21] and that "a flourishing state of the Arts and Sciences contributes to National Prosperity and reputation."[22] Yet as Judge Evans noted, the Progress Clause excluded the fine arts, and we have no records from the time or commentary since to explain this aporia, this banished category. [23]

The exclusion of the fine arts may momentarily raise a rather awkward question, as it did for Judge Evans:[24] to the extent that our present-day intellectual property laws provide exclusive rights to works outside of the categories of copyrightable "Science" and patentable "useful arts," are such laws unconstitutional? The answer, of course, must be that the Constitution somehow permits the provision of exclusive rights in such works, perhaps through the increasingly flexible term "Writings," which is now understood to encompass sculpture, photographs, motion pictures, and sound recordings, among much else,[25] or perhaps through the Commerce Clause.[26] If the actual

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J. HISTORY IDEAS 17, 21 (1952). Kristeller's enormously influential history of the "modern system of the arts" set out in these articles has recently been strongly criticized. *See* James I. Porter, *Is Art Modern? Kristeller's "Modern System of the Arts" Reconsidered*, 49 BRITISH J. AESTHETICS 1 (2009). On the distinction between useful and fine arts, see also GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 548 (2009); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET 13-18 (1994).

[19] Bleistein v. Donaldson Lithographing Co., 98 F. 608, 611 (C.C.D.Ky. 1899).

[20] *Id*.

[21] *See, e.g.*, JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, at i (1794) ("The arts and sciences, in general, during the three or four last centuries, have had a regular course of progressive movement.").

[22] George Washington, *Eighth Annual Message to Congress*, December 7, 1796, *in* GEORGE WASHINGTON WRITINGS at 982 (John Rhodehamel ed., 1997). *See generally* WOOD, *supra* note 18, 543-575 (discussing American cultural nationalism in the early-republic period).

[23] In his exhaustive 500-page study of the Intellectual Property Clause, Walterscheid never addresses the issue. He does, however, suggest that since copyright fits under "Science," and since the fine arts are traditionally part of copyright, the Intellectual Property Clause encompasses the fine arts. *See* WALTERSCHEID, *supra* note 3, at 151.

[24] *See* Bleistein v. Donaldson Lithographic Co., 98 F. 608, 611 (C.C.D.Ky. 1899) (questioning whether Congress has the power to legislate regarding the fine arts unless they are also useful arts).

[25] *See, e.g.*, Burrow-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 56-57 (1884) (holding that photographs qualify as "Writings" under the Exclusive Rights Clause). Justice Douglas was never satisfied with *Burrow-Giles*' reasoning. In his dissent in *Mazer v. Stein*, 347 U.S. 201, 219 (1954), Justice Douglas, joined by Justice Black,

language establishing Congress's progress power does not allow us to reach this result, then it probably makes good sense to ignore it—as the Supreme Court has done repeatedly, most notably in *Goldstein v. California*,[27] when it quoted the Intellectual Property Clause in full and then explained without further comment that the clause's "objective is to promote the progress of science and the arts."[28] If the framers sought to write the fine arts out of the Intellectual Property Clause, we have since succeeded, when expedient, in reading the word "useful" out of the clause. This Article does not wish to suggest a different course, nor did the then newly-appointed Judge Evans, who found a way to deny copyright protection to the posters at issue on other grounds.[29]

I refer to the curious absence of the fine arts from the language of the Progress Clause to emphasize something else: that from its very origins in the Intellectual Property Clause, our intellectual property law has struggled to reconcile its fundamental purpose, the promotion of progress, with the aesthetic. If the current incoherence of intellectual property law's treatment of aesthetic issues is any indication, this struggle continues still. Though the framers apparently sought to quarantine the aesthetic and the Intellectual Property Clause from each other, we have ignored their efforts and treated the clause as if it addresses "science and the arts." And yet, like the framers, though we routinely speak of technological progress, we cannot seem to bring ourselves to speak of *aesthetic progress*. Admittedly, one finds in the intellectual property case law occasional references to the impact of copyright law on "artistic progress"[30] or, more grudgingly, on "intellectual (and artistic)

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urged that the case be reargued in order to consider the question of whether the statuette at issue in the case came within the meaning of "Writings." *Id*. at 220-21. The Supreme Court has not taken up the issue since *Burrow-Giles*.

[26] *See generally* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004). *But see* Jeanne Frommer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L.J. 1329 (2012).

[27] 412 U.S. 546 (1973).

[28] *Id*. at 555. *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (referring to "the goal of copyright" as being "to promote science and the arts"); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 94 (1996) (Stevens, J., dissenting) (describing the Intellectual Property Clause as providing "the power to promote the progress of science and the arts by granting exclusive rights to authors and inventors"); Janky v. Lake County Convention & Visitors Bureau, 576 F.3d 356, 363 (7th Cir. 2009) ("[T]he very purpose of copyright law is to promote the progress of the arts and sciences, U.S. CONST. art. I, § 8, cl. 8.").

[29] Bleistein v. Donaldson Lithographic Co., 98 F. 608, 611 (C.C.D.Ky. 1899) (denying protection on statutory grounds)

[30] Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 222 (S.D.N.Y. 2000). *See also* Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L.REV. 1105, 1107 (1990), that "[copyright] is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public."); Bobrecker v. Denebeim 28 F.Supp. 383, 385 (D. Mo. 1939) ("There was a mere difference in the ensemble, but in neither case was there originality or an improvement which denotes progress in art.").

progress,"[31] or to "the purpose of copyright" as being "to promote literary progress."[32] Courts also sometimes interject that the purpose of design patent protection is "to promote the progress in the 'art' of industrial design."[33] More recently, advocates seeking a new fashion design protection law have declared as the law's constitutionally-sanctioned goal the "progress"[34] of fashion—though one Congressman in favor of reform struggled mightily to explain where exactly fashion fits among "Science and useful Arts."[35] But as the fashion design protection debate makes especially clear, with its unexamined assumption that the latest fashion trend (or cycle) represents "Progress" over what came before it, we have no well-developed theory of what aesthetic progress—in contrast to technological, economic, or even political progress—might entail. The result is that our intellectual property courts lack even basic guidance as to what we hope to accomplish by providing property rights in aesthetic expression, a condition which may go far towards explaining why the doctrine in this area remains so troubled.[36]

There may be many reasons for our failure to come to terms with aesthetic progress, not least that the concepts of the aesthetic and progress are both seriously perplexing, but there is a pivotal historical event that goes far toward

[31] Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990). *See also id.* at 1540 ("Once a work has been written and published, any rule requiring people to compensate the authors slows progress in literature and art, making useful expressions 'too expensive,' forcing authors to re-invent the wheel, and so on.").

[32] Becker v. Loew's, Inc., 133 F.2d 889, 891 (7th Cir. 1943). *See also* Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) (Easterbrook, J.).

[33] In re Laverne, 356 F.2d 1003, 1006 (CCPA 1966). See also In re Koehring, 37 F.2d 421, 781 (CCPA 1930) (Graham, J., and Garrett, J. dissenting) (stating that in establishing design patent protection it was "the intent of Congress to patronize the arts and develop the aesthetic sense of the citizenship."

[34] *See* Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 82 (2006) [hereinafter Hearing on H.R. 5055] (statement of Susan Scafidi, Visiting Prof. of Law, Fordham Law School) (quoting the Progress Clause and stating "It is this 'progress' over time that is hindered by the lack of legal protection for fashion design.").

[35] *Hearing on H.R. 5055*, *supra* note 34, at 187 (statement of Rep. Darrell Issa, Member, H. Subcomm. on Courts, Internet, & Intellectual Property) ("From a constitutional law standpoint, and I keep it as simple as can be and so did the founding fathers, it said to promote the progress of science, well, scratch that out, and useful arts, we will assume that applies, by securing for limited times to, and we will scratch out 'authors,' and say 'inventors.' Now, a dress designer is an inventor by anyone's standard…").

[36] This is particularly the case with respect to design patent law. *See* Mark McKenna & Katherine Strandberg, *Progress and Competition in Design*, 17 STAN. TECH. L. REV. 1 (2013); Peter Lee & Madhavi Sunder, Design Patents: Law Without Design, 17 Stan. Tech. L. Rev. 277 (2013). *See also* Sean M. O'Connor, *The Lost "Art" of the Patent System*, 2015 U. ILL. L. REV. 1397. For a study of intellectual property law's difficulties with architectural works, see Xiyin Tang, *Narrativizing the Architectural Copyright Act: Another View of the Cathedral*, 21 TEX. INTELL. PROP. L.J. 1 (2012)

explaining our present predicament: the 1903 Supreme Court opinion in the case we have already encountered, *Bleistein v. Donaldson Lithographic Co.*[37] Underappreciated and still misunderstood by courts and commentators, *Bleistein* is arguably the single most important copyright opinion the Court has ever produced.[38] In it, the Court held that Bleistein's three posters advertising a circus were copyrightable as "pictorial illustrations or works connected with the fine arts"[39] under the terms of the 1870 Patent and Copyright Act as amended. To reach this result, the Court was required to address two underlying questions: may Congress provide copyright protection to works of the fine arts under its Intellectual Property Clause power, and if it may, does the Progress Clause limit Congress to offering protection only to those works of the fine arts that promote "Progress"? The Court quickly disposed of the first question, the "Science and useful Arts" issue identified by the district court, by finding, quite improbably, that the fine arts qualified as "useful Arts."[40] This opened the door to the more difficult second question, which asked the Court to deny copyright protection to the works at issue because they lacked sufficient merit to promote progress. This the Court might very well have been willing to do—as lower courts had done in the past[41]—had the works at issue failed in some way to advance "Science." But *Bleistein*'s circus posters were *aesthetic* works, and the question was essentially whether these works promoted *aesthetic* progress. In *Bleistein*, in short, the framer's quarantine failed; the constitutionally-sanctified concept of "Progress" was finally forced to come to terms with the aesthetic. The result, for better but mostly for worse, was our present-day copyright law. Among the many ironies that *Bleistein* would produce, perhaps the strangest is that the aesthetic, which the framers had apparently sought to exclude from the Intellectual Property Clause, would ultimately serve as the crucible for many of the core principles of our copyright law. The stone that the framers rejected became the chief cornerstone of the law.

It did not help that in the author of the *Bleistein* majority opinion, the concept of aesthetic progress found its perfect nemesis: the recently-appointed Justice Oliver Wendell Holmes, Jr., a man who in a letter decades later to Harold Laski compared the aesthetic judgment of art and "aesthetic ultimates" to the moral judgment of Germany's use of mustard gas in World War I, and

[37] 188 U.S. 239 (1903).

[38] This is not to say that *Bleistein* has been ignored. For important work on *Bleistein*, see Oren Bracha, *Commentary on* Bleistein v. Donaldson Lithographic Co. (1903), *in* PRIMARY SOURCE ON COPYRIGHT (1450-1900) (Lionel Bently & Martin Kretschmer eds. 2008), available at http://www.copyrighthistory.org/; Zvi Rosen, *Reimagining Bleistein: Copyright Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC'Y U.S.A. 347 (2012); Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographic Company: Originality as a Vehicle for Copyright Inclusivity*, *in* INTELLECTUAL PROPERTY STORIES 77 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds. 2006); and Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 199 (2005).

[39] Act of June 18, 1874, § 1, 43rd Cong., 1st Session, 18 Stat. 78.

[40] *See infra* Part II.B.2.

[41] *See infra* Part II.A.2.

concluded that there was no foundation for either form of judgment because there was no "superior tribunal to decide."[42] With *Bleistein*, the new Justice—it was his second opinion on the Court—must have felt altogether in his element, and not just because it gave him a chance to allude to Velasquez, Whistler, Müller, Degas, Goya, Manet, and Rembrandt and to quote from Ruskin in his three-page opinion. More significantly, the aesthetic was a realm that boasted a long and very respectable tradition of radical disinterestedness—*de gustibus non est disputandum* ("there can be no disputing matters of taste").[43] Aesthetic judgment arguably epitomized Holmes's view of "ultimate" judgment in general: "truth" consists of "the majority vote of that nation that could lick all the others."[44]

On the question of aesthetic progress, Holmes would defer in *Bleistein* to a somewhat different voting mechanism: market demand. Forcefully adopting a stance of "aesthetic neutrality,"[45] Holmes held that aesthetic progress was shown simply in the posters' "commercial value,"[46] or even more simply, in the mere fact that someone wanted to reproduce them: "That these pictures had their worth and their success is sufficiently shown by the desire to reproduce

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[42] Holmes wrote to Laski:

> A wonderfully interesting account of your jaw with the mussoos about classicism and romanticism. etc. Of course they seem to me as to you ridiculous. But that we must discount, for it means that you and I tacitly assume *our* aesthetic ultimates to be valid against theirs. I think they are because I think them founded on a wider view—but if the Frenchmen think not, we can't patronize them before a dispassionate tribunal, although of course we do between ourselves. I often think of the way our side shrieked during the last war at various things done by the Germans such as the use of gas. We said gentlemen don't do such things—to which the Germans: "Who the hell are you? *We* do them." There was no superior tribunal to decide—so logically the Germans stood as well as we did.

2 HOLMES-LASKI LETTERS 1238 (Mark DeWolfe Howe ed. 1953) (emphasis in original).

[43] On Justice Holmes' stance of disinterestedness, see generally Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964). *See also* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2002); Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 929 (1940). For an example of an extreme criticism of Holmes' stance, see Ben Palmer, *Holmes, Hobbes, and Hitler*, 31 A.B.A.J. 569 (1945). For a defense of Justice Holmes, see Richard A. Posner, *Introduction*, *in* OLIVER WENDELL HOLMES, THE ESSENTIAL HOLMES at ix (Richard A. Posner ed. 1992).

[44] Oliver Wendell Holmes, *Natural Law*, 32 HARVARD L. REV. 40, 40 (1918) (*quoted in* THOMAS HEALY, THE GREAT DISSENT 157 (2013).

[45] *See* Alfred Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 300 (1998) (characterizing Holmes's stance in *Bleistein* as one of "aesthetic neutrality"). *See also* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 812-818 (2005) (discussing *Bleistein*'s call for judicial restraint with respect to aesthetic judgment).

[46] *Bleistein v. Donaldson Lithographic Co*., 188 U.S. 239, 252 (1903).

them without regard to the plaintiffs' rights."[47] Holmes's constitutional and statutory interpretation in *Bleistein* was a shambles, but the opinion was a rhetorical, indeed, an aesthetic, tour de force—or, in its freewheeling, undisciplined rhetoric, what passed for one at the time. With the rise of artistic modernism, the aesthetic education movement, and American pragmatism, the early-twentieth century would prove to be an especially appropriate time for intellectual property law to consider the relation between the aesthetic and progress, but *Bleistein*'s market-value theory of aesthetic progress was a conversation-stopper. In a sense, through Holmes in *Bleistein*, the aesthetic worked its own undoing.

This Article seeks to restart the conversation about aesthetic progress that *Bleistein* so abruptly ended, and by drawing upon the twentieth-century tradition of American pragmatist aesthetics, it seeks to restart this conversation at roughly the time that *Bleistein* ended it. To do so, the Article makes a descriptive and a prescriptive argument.

Descriptively, the Article argues that Holmes's market-value theory of aesthetic progress and the cavalier, peremptory manner in which he formulated it had a profoundly damaging influence on American copyright law and on our pursuit through it of aesthetic progress, an influence so profound that it is not clear we even notice it anymore. *Bleistein* came at a time of fundamental, even epochal change in the law. Though the trends of industrial capitalism came later to copyright law, come they did. As Oren Bracha has shown in his important history of nineteenth-century American copyright law,[48] the status of the author and authorial labor was already in decline at the end of the nineteenth century[49] and the status of the copyrighted work, the intangible intellectual commodity, was in the ascendancy.[50] In its market-value theory of aesthetic progress, *Bleistein* both expressed this shift and also very substantially quickened it. To make matters worse, soon after *Bleistein* was handed down, courts and commentators began fundamentally to misinterpret the epigrammatic opinion, just as courts and commentators still do. They conflated Holmes's discussion of the basis of copyright protection, in human "personality,"[51] with his discussion of the purpose of copyright protection, the pursuit of "commercial value." This misreading led to the decline and eventual erasure of personality and authorial labor as a significant factor in our copyright law. Instead of a personality-oriented regime, the law became a commodity-oriented regime. The law adopted for the aesthetic, as it had for the scientific and technological, an "accumulationist" model of progress, one which defined aesthetic progress as simply the accumulation over time of more and more aesthetic works.

This revisionist account of *Bleistein* has important implications for our understanding of the basic history of American copyright law. Under the rubric of "Romantic authorship," copyright commentary has long argued that the

[47] *Id*.
[48] *See* Oren Bracha, *The Ideology of Authorship Revisited*, 118 YALE L.J. 186 (2008).
[49] *Id*. at 248-263.
[50] *Id*. at 224-247.
[51] *Bleistein*, 188 U.S. at 250.

law's "exaltation of authorship"[52] has driven the expansion of the law. But the story of Romantic authorship was little more than an occasional sideshow after *Bleistein*. Instead, it has been the exaltation—indeed, the "fetishization"[53]—of the work, of the intellectual commodity, that has driven the expansion of copyright law. After *Bleistein*, the law finally coalesced around the "commercial value" of works, creative products, aesthetic objects—and away from the "personality" of work, creative practice, aesthetic subjects. It is this shift, rather than any supposed concern with the Romantic author, that has produced the obtuse sensibility of contemporary copyright law, a sensibility captured most effectively by Jessica Litman when she observed that "we have seemed to think that the Progress of Science is nothing more than a giant warehouse filled with works of authorship."[54]

Prescriptively, the Article draws upon pragmatist aesthetics—which was ostracized by the analytic turn in the mid-century, but which has since gained increasing influence, particularly in recent decades—to formulate an alternative vision of aesthetic progress. Pragmatist aesthetics envisions aesthetic progress as fundamentally different from technological progress, which typically focuses on the ends, the accomplishments, the "commercial value," of technological advance rather than on any intrinsic value in the means, the labor, by which those ends are achieved. But as many philosophical traditions have recognized, aesthetic work is different from technological work. Aesthetic "play"[55] is autotelic, an end in itself; it is not mere "drudgery," but is rather "agreeable on its own account."[56] Aesthetic labor has value—as a source of pleasure, of

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[52] Ralph Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 589 (1985).

[53] MICHAEL TAUSSIG, THE DEVIL AND COMMODITY FETISHISM IN SOUTH AMERICA 37 (1980) (describing fetishism as, among other things, "the subordination of men to the things they produce, which appear to be independent and self-empowered."). *See also* DANIEL MILLER, MATERIAL CULTURE AND MASS CONSUMPTION 42-45 (1987) (discussing fetishism's role in market societies in disguising the labor origins of products); Robert Pool, *Fetishism Deconstructed*, 3 ETNOFOOR 114 (1990) (describing fetishism as "the masking of social relations through concern with objects per se"). *See generally* Roy Ellen, *Fetishism*, 23 MAN 213 (1988).

[54] Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879-82 (2007). *See also* Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325, 326 (2011) ("If such a system [of copyright protection] encourages them to create many new works, and store them all in a safe place, will it have accomplished what we want it to?"). *Cf.* Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 421, 423 (2000) (discussing the view of Martin Heidegger that, as part of the "darkening of the world," "the world is coming to resemble a huge warehouse of goods, a 'standing reserve' or 'stock[room].'").

[55] *See* JULIE COHEN, CONFIGURING THE NETWORKED SELF 37-45 (2012) (discussing the "play of everyday practice"); Christopher S. Yoo, Copyright and Personhood Revisited (working paper) (using Self-Determination Theory to show the importance of active creative conduct).

[56] The phrase is taken from Immanuel Kant's *Critique of Judgment*:

> Art is further distinguished from handicraft. The first is called free, the other may be called industrial art. We look on the former as

aesthetic and moral cultivation, of imaginative freedom and self-actualization—even when it does not ultimately result in the production of an aesthetic work. Pragmatist aesthetics extends this insight to advocate for a notion of aesthetic progress that focuses not on the accumulation over time of more artistic accomplishments, more great works, more aesthetic ends, but rather on the extent of personal engagement and popular participation in aesthetic practice, in aesthetic means, in the cultural processes of what Richard Rorty imagined to be our increasingly "poeticized culture."[57] *Bleistein*'s accumulationist notion of aesthetic progress, obsessed as it has since become with the growth rate of the gross aesthetic product of the nation, might have made some sense for the twentieth-century consumer society in which it was born, but the pragmatist vision of aesthetic progress befits the "Web 2.0" age of massively-distributed authorship and user-generated content. It urges certain reforms of copyright doctrine.

Part I reviews the emergence of the concept of aesthetic progress in the Atlantic World in the early-modern period, considers why the framers excluded the fine arts from the Intellectual Property Clause, and draws upon the work of John Dewey and Richard Rorty to outline a pragmatist aesthetic approach to aesthetic progress. Part II closely reads *Bleistein* and situates the opinion within the American Romantic tradition's celebration of human "personality." Part III details courts' and commentators' century-long misreading of *Bleistein* and the impact of this misreading on the law. Part IV briefly considers how copyright law could be modified better to pursue a pragmatist notion of aesthetic progress.

I. The Problem of Aesthetic Progress

The idea of aesthetic progress may strike the present-day reader as exceedingly strange, so let us begin with its converse, the idea of aesthetic regress. Since roughly 1910, this latter idea perhaps comes more naturally to us.[58] Indeed, in *Bleistein*, Justice Holmes appeared to take the familiarity of this latter concept for granted when he quickly passed over one of the defendant's weaker arguments, that the *Bleistein* posters cannot qualify for copyright protection as "illustrations" under the terms of the 1870 Act because they do not appear in a book. Holmes responded: "The word 'illustrations' does not

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> something which could only prove final (be a success) as play, i.e., an occupation which is agreeable on its own account; but on the second as labour, i.e., a business, which on its own account is disagreeable (drudgery), and is only attractive by means of what it results in (e.g., the pay.)

See IMMANUEL KANT, CRITIQUE OF JUDGMENT 231 (J.H. Bernard trans., 2005).

[57] RICHARD RORTY, CONTINGENCY, IRONY, SOLIDARITY 53 (1989). *See generally* Ulf SCHULENBERG, ROMANTICISM AND PRAGMATISM: RICHARD RORTY AND THE IDEA OF A POETICIZED CULTURE (2015).

[58] *Cf.* Virginia Wolf, *Mr. Bennett and Mrs. Brown*, *in* I COLLECTED ESSAYS 320 (1966) ("On or about December 1910, human character changed.").

mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Müller's engraving of the Madonna di San Sisto could not be protected today if any man were able to produce them."[59] This final aside—"if any man were able to produce them"—is characteristically Holmesian, as is the example of Johann Friedrich Wilhelm Müller's 1816 engraving. There can be little doubt that Holmes, a sophisticated life-long connoisseur of prints,[60] was aware that Müller spent the final decades of his life working solely on his engraving of Raphael's *Sistine Madonna*, and that he was said to have been so physically and mentally exhausted by the undertaking that it killed him before he ever saw a finished print of his work.[61] The legend of Müller's *Madonna di San Sisto* speaks of the struggle of latter generations to produce even an adequate copy, let alone an original work of comparable significance. More generally, Holmes's aside draws upon the still-commonplace belief that the aesthetic capacities of one era may simply be inferior to those of another era.[62]

This belief implicates a profound and persistent set of questions in the arts: has artistic expression progressed or regressed over time, or is it improper to speak of the aesthetic value of artistic expression in any but synchronic terms?[63] Has it all been downhill since Shakespeare or Beethoven or Rembrandt, or are Stoppard and Schoenberg and Van Gogh as valuable in their own incommensurable ways, each enriching a timeless tradition, an "eternal present"?[64] Underlying these questions are a host of more fundamental questions. Is the mere accumulation of artistic expression over time a form of progress, or, as in science, must progress involve the supersession or at least the refinement of previous achievements? More fundamental still is the "axiological" question: how can a standard be established to evaluate aesthetic works in the context of their own time and place, let alone across time and

[59] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 240 (1903).

[60] *See* SUSAN-MARY GRANT, OLIVER WENDELL HOLMES, JR.: CIVIL WAR SOLIDER, SUPREME COURT JUSTICE 31 (discussing Holmes's student essay on Dürer and his lifelong interest in reading about etchings and engravings). See also Richard Posner, *Introduction*, in THE ESSENTIAL HOLMES at xiv (Richard A. Posner ed. 1992) (characterizing Holmes as "a loving collector of prints").

[61] Michael Bryan's then-authoritative *Dictionary of Painters and Engravers* (1889) recounts the heroic tale. *See* 2 MICHAEL BRYAN, DICTIONARY OF PAINTERS AND ENGRAVERS 184-85 (Walter Armstrong & Robert Edmund Graves eds., 1889).

[62] *See generally* OLGA HAZAN, LE MYTHE DU PROGRÈS ARTISTIQUE (1999).

[63] *See generally* RAYMOND DUNCAN GASTIL, PROGRESS: CRITICAL THINKING ABOUT HISTORICAL CHANGE (1993); Murray Krieger, *The Arts and the Idea of Progress*, *in* PROGRESS AND ITS DISCONTENTS 449 (Gabriel A. Almond et al. eds. 1977). *See also* HAZAN, *supra* note 62 (noting prevalence of these questions in art history).

[64] LAURA HOPTMAN, THE FOREVER NOW: CONTEMPORARY PAINTING IN AN ATEMPORAL WORLD 15-16 (2014) (rejecting the utility of "[t]ime-based terms like *progressive*—and its opposite, *reactionary*, *avant-* and *arrière-garde*" to describe "atemporal works of art" and proposing instead that they be understood as "existing in *the eternal present*" (emphasis in original)).

place?[65] What true foundation is there for aesthetic judgment—if not, by implication, for any form of judgment?

Since *Bleistein*, the intellectual property case law has refused explicitly to engage any of these questions, while intellectual property law commentary has largely sought to avoid them as well.[66] Confronted with an aesthetic issue, even the strongest copyright judges invariably cite *Bleistein* and wash their hands of the problem of aesthetic judgment.[67] "We recognize that in aesthetics there are no standards,"[68] asserted Judge Hand, while Judge Posner has demurred on the basis that "judges can make fools of themselves pronouncing upon aesthetic matters."[69] This is remarkable for at least two reasons. First, we have long claimed and still claim that intellectual property law's guiding purpose is to promote progress. As the Supreme Court asserted in *Mazer v. Stein*,[70] copyright law in particular grants economic incentives to authors in the form of intellectual property rights "to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world."[71] In thus justifying copyright protection, we make no distinction between aesthetic and non-aesthetic works; we do not say that we grant intellectual property rights in non-aesthetic works to promote progress, and in aesthetic works to do something else. Rather, despite the precise wording of the Intellectual Property Clause, our purpose in both cases is professedly the same. This would seem to call for some minimal inquiry into the nature of aesthetic progress. Second, much of intellectual property law commentary, particularly from the copyleft, seeks some form of qualitative progress in the production or consumption of aesthetic expression. Oftentimes, the same commentators (and I am one of them) who accept the orthodoxy that judges should not engage in aesthetic judgment nevertheless argue elsewhere that the law must be reformed in one way or another to promote "better" aesthetic expression, be that expression non-commercial, or appropriationist, or simply more diverse.[72] Such commentary is ultimately anything but aesthetically neutral, nor should it be.

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[65] *See generally* BARBARA HERRNSTEIN SMITH, CONTINGENCIES OF VALUE (1988).

[66] *But see* COHEN, *supra* note 55 (discussing "cultural progress"); Yen, *supra* note 45; Farley, *supra* note 45.

[67] *See* Farley, *supra* note 45, at 811-815 (evidencing courts' perception of art as the "law's other").

[68] H.C. White Co. v. Morton E. Converse & Son Co., 20 F.2d 311, 312 (2d Cir. 1927) (Hand, J.).

[69] Gracen v. Bradford Exchange, 698 F.2d 300, 304 (7th Cir. 1983).

[70] 347 U.S. 201 (1954).

[71] *Id*. at 219 (citation omitted).

[72] *See, e.g*., William W. Fisher III, *Reconstructing Fair Use*, 101 HARV. L. REV. 1659 (1988). Fisher accepts *Bleistein*'s aesthetic neutrality principle on the reasonable ground that even "some degree of governmental control over the definition of good and bad art" may result, at best, in bad judgments, and at worst, in censorship. *Id*. at 1740. Yet what motivates Fisher's "modest proposal" for the reform of fair use doctrine is arguably a partially ethical, partially aesthetic vision of the "good life" and a "good society." *Id*. at 1746, 1751. *See also* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

The "problem" of aesthetic progress in intellectual property law as elsewhere is that we appear to lack any foundation for establishing what constitutes progress in the aesthetic—because, as is conventionally thought, "there are no standards."[73] This Part first discusses the origins of the concept of aesthetic progress in the early-modern period. It then speculates that the framers declined to reference the fine arts in the Progress Clause in an effort to shield intellectual property law from the problem of aesthetic progress—and, furthermore, to shield the pursuit of aesthetic progress from intellectual property law. The Part concludes by turning from the past to the present. It focuses on an American pragmatist vision of aesthetic progress that emerged, too late, in the decades following *Bleistein* in the works of John Dewey. As we will see in later Parts, it was a distinctively pragmatic reconciliation with the problem of aesthetic progress that Holmes came close to establishing in *Bleistein* and in American copyright law, but then decisively rejected.

A. The Origins of the Concept of Aesthetic Progress

The story of the concept of aesthetic progress begins with a curious controversy of the seventeenth century that raged on and off into the eighteenth: the so-called *Querelle* or "Battle between the Ancients and the Moderns."[74] Proponents of the Ancients asserted that classical Greek and Roman arts and sciences remained superior to those of contemporary Europe; proponents of the Moderns—and of early-modernity—asserted the opposite. As the fighting words of the seventeenth-century French *Querelle* gave way to the more moderate arguments of eighteenth-century Britain, it became clear to nearly all involved that the Moderns had indisputably progressed beyond the Ancients in some areas of achievement, but that in other areas, it was more difficult to judge. In his highly-influential *Lectures on Rhetoric and Belles Lettres* (1783), widely reprinted in the American colonies,[75] Hugh Blair exemplified this view: "[I]n natural philosophy, astronomy, chemistry, and other sciences that depend on an extensive knowledge and observation of facts, modern philosophers have an unquestionable superiority over the ancient,"[76] but "nothing of this kind

[73] *See also* COHEN, *supra* note 55, at 56 (characterizing Holmes's statement of judicial aesthetic neutrality in Bleistein as "canonical statement of the copyright lawyer's anxiety about the twin dangers of judgment and relativism").

[74] *See generally* JOAN DEJEAN, ANCIENTS AGAINST MODERNS: CULTURE WARS AND THE MAKING OF A FIN DE SIÈCLE (1997); JOSEPH N. LEVINE, THE BATTLE OF THE BOOKS: HISTORY AND LITERATURE IN THE AUGUSTAN AGE (1991); SPADAFORA, *supra* note 16. *See also* Birnhack, *supra* note 4, at 44-45 (discussing the Battle); O'Connor, supra note 94 (same). *Cf.* Jonathan Swift, *The Battle of the Books*, *in* A TALE OF A TUB AND OTHER WORKS 104 (Angus Ross & David Woolley eds., 2008) (satirizing the Battle).

[75] Blair's *Lectures* were well-known in eighteenth- and nineteenth-century America. *See* ERIC SLAUTER THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION 104, 106 (2009).

[76] HUGH BLAIR, 2 LECTURES ON RHETORIC AND BELLES LETTRES 154 (1807) (1783).

holds as to matters of Taste; which depend not on the progress of knowledge and science, but upon sentiment and feeling."[77]

The battle lines of the *Querelle* were largely responsible for breaking the "unity of the arts" and generating the distinctions between the categories of "science" and the "useful arts," in which contemporary Europe was unarguably superior, and the category of the "fine arts," in which Europe was at best only arguably superior.[78] As a measure of the fitness of the category it identified, the term "fine arts" spread rapidly through European thought in the mid-eighteenth century.[79] The formation of the special category of the fine arts, which were unconstrained by the imperatives of utility and subject only to the judgment of the imagination rather than reason,[80] is largely responsible for the formation of the category of the aesthetic. The very concept of the aesthetic was formed within the question of progress, as an exceptional category principally defined by its resistance to the entire concept of progress as then generally understood.

Yet notwithstanding this resistance, many at the time, including Blair,[81] ultimately professed a belief in the superiority of the modern fine arts and in the importance of their continuing progression. This was more than merely a matter of bragging rights in that increasingly self-confident and optimistic—and perhaps naive—time. Linking aesthetics with politics, commentators believed that the progress of the "polite arts"[82] promised to promote the overall progress of civic virtue and good government.[83] An open question was how the "the refinements of Government" might promote in turn the "refinements of Art," so that the two might go forward "hand in hand."[84] Leading figures of the Scottish—and American—Enlightenment took up this theme. In the royal dedication that begins his *Elements of Criticism* (1762), for example, Lord Kames explained: "Considering how early in life taste is susceptible of culture, and how difficult to reform it if unhappily perverted, …[t]o promote the Fine Arts in Britain, has become of greater importance than is generally imagined….

[77] *Id*.

[78] See SHINER, *supra* note 18, at 80-88.

[79] *See id*. at 84.

[80] *See id*. at 82.

[81] BLAIR, *supra* note 76, at 156 (discussing the superiority of Shakespeare and Milton to ancient authors).

[82] *See generally* Lawrence Klein, *The Third Earl of Shaftesbury and the Progress of Politeness*, 18 EIGHTEENTH CENT. STUD. 186 (1984).

[83] *See* WOOD, *supra* note 18, at 543-75. *See also* ERIC SLAUTER THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION 87-122 (2009) (discussing eighteenth-century views concerning the relation between aesthetic and political judgment). *Cf.* 1 ANTHONY A.C. EARL OF SHAFTESBURY, CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES 217 (1711) ("Thus are the Arts and Virtues mutually friends; and thus the science of virtuosi and that of virtue itself become, in a manner, one and the same."). On the framers' emphasis on political progress, see generally Birnhack, *supra* note 4.

[84] AUGUSTUS CHATTERTON (pseud.), THE BUDS OF BEAUTY at v (1787).

[F]or depravity of manners will render ineffectual the most salutary laws."[85] Citing the example of "ancient Greece," Kames asserted that the diversion of luxurious expenditure towards the fine arts, "instead of encouraging vice, will excite both public and private virtue."[86] For his part, Adam Ferguson went so far as to criticize the Spartans for placing politics before the fine arts (rather than at a roughly equal level) and attributed the degeneration of their polity largely to this error.[87] In Ferguson's view, furthermore, the progress of the fine arts was both cumulative and ameliorative in nature: "The monuments of art produced in one age remain with the ages that follow; and serve as a kind of ladder, by which the human faculties, mounting upon steps which ages successively place," arrive at ever more excellent works of art.[88] For George Turnbull, this progress would continue, provided that society encouraged it, since "the Progress of the Arts and Sciences," Turnbull wrote in his well-known *Treatise on Ancient Painting* (1740), "depend[s] greatly on the Care of Society to encourage, assist, and promote them."[89] Other leading thinkers such as Archibald Alison and David Hume still held to the belief that the fine arts were prone, with the societies that produced them, to cyclical perfection and degeneration.[90] But at least in America, the more optimistic view appears to have prevailed, with the works of Kames, Ferguson, Turnbull and others teaching that a "pure and refined taste could uplift democracy, and redeem it from vulgarity and greed."[91]

The belief that the fine arts, civic virtue, and good government could all mutually progress together, each promoting the others, was especially appealing to many early-republic Americans because it harmonized so thoroughly with their emerging cultural nationalism. The then-influential principle of *translatio studii*—that the center of learning moves ever westward—compelled in many the conviction that America would eventually emerge as the country "where the best of all the arts and sciences would

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[85] HENRY HOME, LORD KAMES, ELEMENTS OF CRITICISM (1762) (royal dedication). *See also* WILLIAM CHRISTIAN LEHMANN, HENRY HOME, LORD KAMES, AND THE SCOTTISH ENLIGHTENMENT (1971).

[86] *Id.*

[87] *See* Christopher J. Berry, *'But Art Itself is Natural to Man': Ferguson and the Principle of Simultaneity*, *in* ADAM FERGUSON: PHILOSOPHY, POLITICS AND SOCIETY 143 (Eugene Heath & Vincenzo Merolle eds. 2009).

[88] 1 ADAM FERGUSON, PRINCIPLES OF MORAL AND POLITICAL SCIENCE 299 (1792). *See also* ANONYMOUS, AN ESSAY ON PERFECTING THE FINE ARTS IN GREAT BRITAIN AND IRELAND 4 (1767) ("If the moderns have improved on those who went before them, those who come after will improve upon us.").

[89] GEORG TURNBULL, TREATISE ON ANCIENT PAINTING 109 (1740).

[90] *See, e.g.*, ARCHIBALD ALISON, ESSAYS ON THE NATURE AND PRINCIPLES OF TASTE 337 (1790) (discussing degeneration of taste); David Hume, *On the Rise and Progress of the Arts and Sciences*, *in* ESSAYS, MORAL, POLITICAL, AND LITERARY (1742) ("When the arts and sciences come to perfection in any state, from that moment they naturally, or rather necessarily decline, and seldom or never revive in that nation, where they formerly flourished.").

[91] HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 355 (1976).

flourish."[92] In his *Election Sermon* (1783), Ezra Stiles, the president of Yale, spoke as well of how the "fermentation and communion of nations" that characterized the new nation's immigrant culture would propagate arts superior to foreign achievements: "[A]ll the arts may be transported from Europe and Asia and flourish in America with an augmented lustre."[93] In this way, the progress of the fine arts in America would help to vindicate the revolution and American form of government and unify the new nation.

B. The Mystery of the Progress Clause

Given the eighteenth-century belief that government could promote aesthetic cultivation and aesthetic progress, and that this progress could both improve the civic conditions of a society and bring renown to a nation, it should not be surprising that both James Madison and Charles Pinckney proposed language for the Intellectual Property Clause that would have encompassed the fine arts.[94] Madison proposed the power "To secure to literary authors their copy rights for a limited time" as well as the powers "To establish a University," "To secure to the inventors of useful machines and implements the benefits thereof for a limited time," and "To encourage by premiums & provisions, the advancement of useful knowledge and discoveries."[95] Pinckney went farther. In addition to proposing the powers "To secure to authors exclusive rights for a certain time" and "To grant patents for useful inventions," he proposed the power "To establish seminaries for the promotion of literature and the arts and sciences."[96] Yet nothing from the time indicates who was responsible for the phrasing that ultimately established Congress's power "To

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[92] WOOD, *supra* note 18, at 545.

[93] EZRA STILES, THE UNITED STATES ELEVATED TO GLORY AND HONOR 50-51 (1783). Stiles continues somewhat improbably: "Not to mention the augment of the sciences, from American inventions and discoveries—of which there have been as capital ones here, the last half century, as in all Europe." *Id*.

[94] In an important article, Sean O'Connor has argued that the framers were influenced by the French *Encyclopédistes* in their formulation of the Intellectual Property Clause. *See* Sean O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHIC. L. REV. 733 (2015). Despite O'Connor's arguments, I continue to share the traditional view that the *Encyclopédie* was not widely disseminated in the Colonies and, though it may have made a prestigious addition to some personal libraries, it was not widely read. *See, e.g.*, HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 114 (1976) (expressing skepiticism about the influence of the *Encyclopédie* on American thought of the time) (cited in O'Connor, at 803 n. 393). But see O'Connor, at 803-808.

[95] III RECORDS OF THE FEDERAL CONVENTION OF 1787, 321-22 (Max Farrand ed., 1937) (Madison's Notes for Saturday, August 18). *See also* WALTERSCHEID, *supra* note 3, at 101-102.

[96] *Id*. at 477-48. Pinckney also proposed the power "To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures." *Id*. *See also* WALTERSCHEID, *supra* note 3, at 101-102.

promote the Progress of Science and useful Arts….",[97] which was adopted without debate on September 5, 1787 in the waning days of the Federal Convention.[98] The mystery is all the more compelling because if the status of the fine arts simply was not a concern of the framers at the time (i.e., if, distracted by weightier issues, they simply did not care one way or the other), then they would very likely have used the conventional phrase "arts and sciences," as the state copyright statutes had. Their exclusion of the fine arts from the Progress Clause was a deliberate act.

Several factors may have contributed to, but do not fully explain, the framers' decision. The first emerges from English practice of the time, which provided only common law protection for certain works of the fine arts, such as sculpture and painting.[99] The Statute of Anne of 1709, England's first copyright act, carried the title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned,"[100] and as the title suggests, it initially applied only to "Books." The Engravers' Copyright Act of 1735, "An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints,"[101] then extended statutory copyright protection to "any historical or other print or prints."[102] In 1777, Lord Mansfield held that the Statute of Anne applied to musical compositions.[103] With the Models and Busts Act of 1798,[104] "An Act of the Encouraging of Making New Models and Casts of Busts,"[105] statutory protection finally extended to sculptural works. Remarkably, not until the Fine Art Copyright Act of 1862[106] did England provide copyright protection to paintings.[107] The treatise-writer Edward

[97] As Birnhack notes, *supra* note 4, at 23, neither Madison nor Pinckney's proposed language included any reference to "progress."

[98] Madison and Pinckney made their proposals on August 18, 1787. These were then referred to the Committee of Detail, which did not reference them in its August 22 report. On August 31, the proposals were referred on to the Committee of Eleven, which reported on September 5 a synthesis of the proposals very nearly in the form of the current Intellectual Property Clause. According to the Journal, the Committee of Eleven reported the clause without any commas, *see* II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 505 (Max Farrand ed. 1937), while according to Madison's notes, the committee reported the clause with a comma after "inventors," *see id*. at 509. The comma after "progress" appears to have been added by the Committee of Style and Arrangement. *See id*. at 595.

[99] *See generally* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911 (1999).

[100] 8 Ann., c. 19 (Eng.).

[101] 8 Geo. 2, c. 13 (1735).

[102] *Id*.

[103] Bach v. Longman (1777) 2 Cowper 623.

[104] 38 Geo. III, c.71.

[105] *Id*.

[106] 25 & 26 Vict., c.68.

[107] *See* Ronan Deazley, *Breaking the Mould?: The Radical Nature of the Fine Arts Copyright Bill 1862*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 289 (Ronan Deazley et al. eds., 2010). *Cf*. Christine Haight Farley, *The*

Scrutton proposed one explanation for English practice when he wrote in 1890 that "paintings and drawings are naturally classed with sculptures, as works of which the original has the most value, while copies are either rare, or inadequately represent the original."[108] Perhaps, then, the framers declined to address the fine arts on the assumption that the copying technology of the time did not endanger incentives to create paintings and sculpture.

Yet this explanation is not fully satisfactory. First, as of 1787, the English had extended statutory protection to certain other major genres of the fine arts, such as poetry, novels, and music, and it is hard to imagine that the framers were concerned about the special case of paintings and sculpture. Second, the English story was essentially one of inertia; they began from a default position of no protection outside of the common law and slowly added statutory protection over time. The Americans, by contrast, were writing on a clean slate, and their default was, if anything, the general category of "arts and sciences." They were meanwhile exposed to numerous English acts promulgated for the "encouragement" of various genres of fine art. For the framers affirmatively to exclude any reference to the fine arts seems to require something more.

Perhaps this added motivation came from a competing view of the fine arts in early-republic America, the view that at best they were useless and at worst corrupting of virtue and religious faith. One commentator of the time, Benjamin Henry Latrobe, captured this alternative view succinctly when he observed that "our national prejudices are unfavorable to the fine arts."[109] As John Adams conceded in a letter to Abigail, the fine arts were mere "bagatelles introduced by time and luxury in change for the great qualities and hardy, manly virtues of the human heart"; they could "inform the Understanding or refine the Taste," but they could also "seduce, betray, deceive, deprave, corrupt, and debauch."[110] Many of the founding generation were particularly suspicious of sentimental novels,[111] whose deleterious effects were understood to be especially harmful to their main readership, American women.[112] Indeed, as much of the above suggests, the fine arts, like the aesthetic more generally, comprised a gendered domain.[113] Notwithstanding the common view that taste fostered virtue, the framers may have had little desire that a constitutional provision be seen to declare among its purposes the promotion of the progress

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Lingering Effects of Copyright's Response to the Invention of Photography, 65 U. PITT. L. REV. 385 (2004).

[108] THOMAS EDWARD SCRUTTON, THE LAW OF COPYRIGHT 161 (1890).

[109] Quoted in WOOD, *supra* note 18, at 560.

[110] Quoted in WOOD, supra note 18, at 549.

[111] *See generally* CATHY N. DAVIDSON, REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA (1988); SERGIO PEROSA, AMERICAN THEORIES OF THE NOVEL: 1793-1903 (1983).

[112] *See* EVE KORNFELD, CREATING AN AMERICAN CULTURE, 1775-1800, at 54-65 (2001).

[113] *Cf.* Susan Sage Hienzelman, *"Termes Queinte of Law" and Quaint Fantasies of Literature*, *in* LAW IN THE LIBERAL ARTS 166, 168 (Austin Sarat ed. 2005) (discussing "[t]he repression of the aesthetic and the emotional in the law").

of "books of mere amusement."[114] It may not be surprising, then, that the framers appear to have inscribed into the founding provision of American intellectual property law a dichotomy between the masculine "Science and useful Arts", privileged and worthy of constitutional mention, and the feminine fine arts, supplementary and unworthy[115]—a dichotomy which survives, incidentally, in the current colloquial distinction between "hard IP" and "soft IP."

A third, and to my mind the most compelling (and perhaps obvious), explanation for the framers' exclusion of the fine arts from the Progress Clause stems from what I have been calling the problem of aesthetic progress. The framers undoubtedly recognized that the deliberate pursuit of progress requires judgment about what constitutes progress and a foundation for that judgment. By the late-eighteenth century, the realms of "Science and useful Arts" had developed well-accepted, positive, and seemingly objective standards of judgment, standards that Congress and courts could rely on to limit the reach of monopoly rights to those "Writings" and "Discoveries" the creation of which did indeed promote scientific and technological progress. But the realm of the aesthetic was different. Even those, like Hume, who posited a "universal" or objective standard of taste nevertheless typically believed that few were expert enough to judge the merit of aesthetic expression.[116] Other commentators rejected an objective standard of aesthetic judgment and, in the *de gustibus* tradition, reasoned that one simply could not reason about the aesthetic.[117]

The framers likely included the Progress Clause both to justify and to limit the extraordinary grant of monopoly rights provided for by the Exclusive Rights Clause. As a justification for monopoly rights in works of the fine arts, the invocation of aesthetic progress would have been non-controversial. But as a limitation on those rights, so that only aesthetically progressive works would qualify, the invocation of aesthetic progress would have been highly

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[114] ROYALL TYLER, THE ALGERINE CAPTIVE, at v (1816).

[115] There is, however, a significant, perhaps obvious, problem with this interpretation of the Intellectual Property Clause: in offering copyright protection to "books," the Copyright Act of 1790 covered sentimental fiction. This raises a further problem with respect to the relation between the Intellectual Property Clause's two sub-clauses. Consider that while works of sentimental fiction would not have qualified as either "Science" or "useful Arts" under the Progress Clause, they clearly qualified as "Writings" under the Exclusive Rights Clause. The 1790 Act's protection of all books, including sentimental fiction, would suggest that in the view of the framers who sat in the first Congress, the Progress Clause did not limit the Exclusive Rights Clause—or perhaps that in 1790, they gave little thought to any of this and, at least with respect to statutory law, simply followed the English example.

We have no case law from the time to clarify this problem, but in the 1834 case of *Wheaton v. Peters*, 33 U.S. 591 (1834), one of the earliest significant copyright cases in the country, the Supreme Court spoke without qualification of the value of books of "entertainment." *See id*. at 657 ("A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords.").

[116] See David Hume, *Of the Standard of Taste*, FOUR DISSERTATIONS (1757).

[117] *See* SLAUTER, *supra* note 83, at 119.

problematic. Despite their faith in the progress of the fine arts in general and in the importance of this progress to the cultivation of civic virtue, the framers may have concluded that given the vagaries of taste, there were no acceptable standards of judgment that the law could employ to pursue aesthetic progress, and in any case, the state might abuse those standards to the detriment of the progress of the fine arts and of civil society. To be sure, the framers could have called for short-term monopoly rights in all newly-created aesthetic works regardless of their aesthetic merit, but this the framers were apparently not willing to do, at least not in the Constitution. The overriding imperative of the Intellectual Property Clause—and the explicit defense of its special grant of monopoly rights—was the promotion of progress. As between promoting progress and protecting all aesthetic works regardless of progress, the framers chose the former and excluded the fine arts.

In essence, then, the framers likely sought in the strange wording of the Intellectual Property Clause to evade the problem of aesthetic progress. Yet the framers quite clearly did so in vain. The fact is that since *Bleistein* we have largely ignored the precise wording of the Progress Clause and assumed that it applies to the fine arts, sometimes through the term "Science,"[118] sometimes through the term "useful Arts,"[119] usually without explaining how.[120] We are thus stuck with the aesthetic and a commitment to aesthetic progress and should seek to make the best of it, but instead, we have so far made the worst of it. Before turning to *Bleistein*, however, I consider a contemporary approach to aesthetic progress, which may offer some hint of how copyright law could have done—and almost did—better.

C. A Pragmatist Vision of Aesthetic Progress

The emergence of artistic Modernism in the late-nineteenth century and its artistic aftermath in the twentieth may go far towards explaining why the present-day reader may find the Battle between the Ancients and the Moderns to be more or less comical and the more general idea of aesthetic progress to be more or less bizarre. We are accustomed now not to the idea of the progress of the "fine arts" but to the possibility of their exhaustion and to art about the insignificance or death of art or about the incoherence of the category of art (or about nothing),[121] which is why the concept of aesthetic regress, or cyclical "degeneration," may come more naturally to us. The overriding eclecticism of twentieth- and twenty-first-century art, with its cacophony of radical breaks, irreverent appropriations, and ever finer differences that quickly dissolve into

[118] *See, e.g.*, David Silverstein, *Patents, Science and Innovation: Historical Linkages and Implications for Global Technological Competitiveness*, 17 RUTGERS COMPUTER & TECH. L.J. 261, 291 (1991).

[119] *See, e.g.*, Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 249 (1903).

[120] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[121] *See, e.g.*, GIANNI VATTIMO, THE END OF MODERNITY 59 (1988) (discussing the "death or decline of art").

indifference,[122] has arguably resulted, as a historical matter, in an extreme "contemporaneity of the non-contemporaneous,"[123] "in which all stylistic means [are made] equally accessible."[124] The result, as Peter Bürger has asserted, is that "no movement in the arts today can legitimately claim to be historically more advanced *as art* than any other."[125] Arthur Danto has otherwise formulated the controversial thesis that the progressive conceptualization and self-reflexiveness of twentieth-century artistic expression brought on the "end of art:" "The artists have made the way open for philosophy, and the moment has arrived at which the task must be transferred finally into the hands of the philosophers."[126] It is well-recognized that Danto's thesis cannot account for all of the visual arts, let alone the totality of the fine arts, and yet what probably powers the continuing appeal of his "end of art" thesis is the degree to which the thesis—or at least the "end of art" slogan[127]—is consistent with everyday views of the apparent meretriciousness of much of the contemporary fine arts after Modernism.

But it is nevertheless crucial to recognize that a rejection of the idea of *artistic* progress, i.e., of progress in the fine arts, does not necessarily entail a rejection of the idea of *aesthetic* progress.[128] Indeed, the rejection of the former may very well open up conceptual space for the acceptance and promotion of the latter. This is because the artistic and the aesthetic need not and should not be understood as equivalent categories; they are related, rather, as part and whole. This is one of the primary lessons of pragmatist aesthetics, an increasingly influential school of aesthetic thought based largely on the works of John Dewey that focuses on the aesthetic experience not of "mummified museum art,"[129] but of "non-art"[130] objects, practices, and phenomena.[131] This is

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[122] *See* MAARTEN DOORMAN, ART IN PROGRESS: A PHILOSOPHICAL RESPONSE TO THE END OF THE AVANT-GARDE 117-120 (Sherry Max trans., 2003). *See also* Jürgen Habermas, *Extract from 'Questions and Counterquestions,' in* THE CONTINENTAL AESTHETICS READER 278, at 280 (2000) (Clive Cazeaux ed., trans. James Bohman) (discussing the "[f]orced novelty, dependence on the latest trends, and the accelerated pace of fads" that characterize avant-garde art).

[123] REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME 90 (Keith Tribe trans., 2004).

[124] JURGEN HABERMAS, ON THE PRAGMATICS OF COMMUNICATION 413 (Maeve Cooke ed. 2014).

[125] PETER BÜRGER, THEORY OF THE AVANT-GARDE 63 (1984). *See also* HOPTMAN, *supra* note 64 (discussing the atemporality of contemporary art). *But see* HAL FOSTER, THE RETURN OF THE REAL: THE AVANT-GARDE AT THE END OF THE CENTURY (1996).

[126] ARTHUR C. DANTO, THE PHILOSOPHICAL DISENFRANCHISEMENT OF ART 111 (2005).

[127] Danto has tried to distance himself from this phrase. *See, e.g.*, ARTHUR DANTO, AFTER THE END OF ART 4 (1997) (discussing the circumstances of his use of the phrase).

[128] Dewey drew a different distinction between the "artistic" and the "aesthetic." *See* JOHN DEWEY, ART AS EXPERIENCE 46 (1934).

[129] Doris Summer, *Maestros: Double Dealing And Risky Artists*, *in* PAULA TROPE: EMANCIPATORY ACTION 48 (Gabriela Rangel ed. 2011).

[130] YURIKO SAITO, EVERYDAY AESTHETICS 20 (2007).

not the place to review the full scope of pragmatist aesthetics and the closely-related "aesthetics of the everyday,"[132] but it will be useful here briefly to consider certain prominent themes of pragmatist aesthetics that may inform a better vision of aesthetic progress than whatever has been left to us by artistic Modernism—and by *Bleistein*.

First, pragmatist aesthetics urges a rejection of the standard view that aesthetic judgment is ultimately foundationless and insusceptible to deliberation and persuasion, a view most commonly expressed in the plainly-incorrect cliché *de gustibus non est disputandum*. Pragmatist aesthetics draws upon the pragmatist philosophical tradition to hold that, as in ethics or any other area of judgment, a foundation for aesthetic judgment is possible, but it cannot be discovered in some pre-existing god-given or essential standard that is external to human agency, "that transcends the merely human,"[133] nor should it simply be relegated to the economist's mystical realm of the exogenous. The foundation for aesthetic judgment is consensus subject to the claims of reason, imagination, and utility, and where consensus is impossible, tolerant, deliberative, continuing dissensus. To be sure, it may be more difficult to achieve consensus with respect to aesthetic judgment, but this does not justify the passive, even fatalistic shrug with which the *de gustibus* tradition so often seems to meet aesthetic questions.

Second, in line with Dewey's view that "a good definition of art should effectively direct us toward more and better aesthetic experience,"[134] pragmatist aesthetics urges a restoration of the "unity of the arts" that had been sundered in the eighteenth century. Fundamentally opposed to the Kantian and analytic traditions of aesthetic inquiry, pragmatist aesthetics emphatically rejects, in Dewey's words, the "compartmental conception of fine art"[135] that divides the "official arts"[136] from the "popular arts" and the useful arts. Instead, it seeks to join these along a single continuum, all to "recover the continuity of aesthetic experience with normal processes of living."[137] Pragmatist aesthetics recognizes that for many today, aesthetic experience consists very little, if at all, of the

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[131] *See generally* RICHARD SHUSTERMAN, PRAGMATIST AESTHETICS (2000). *See also* THOMAS LEDDY, THE EXTRAORDINARY IN THE ORDINARY: THE AESTHETICS OF EVERYDAY LIFE (2012); KATYA MANDOKI, EVERYDAY AESTHETICS: PROSAICS, THE PLAY OF CULTURE AND SOCIAL IDENTITIES (2007); SAITO, *supra* note 130; Richard Shusterman, *Aesthetics*, *in* A COMPANION TO PRAGMATISM 352 (John R. Shook & Joseph Margolis eds. 2006). For criticisms of everyday aesthetics, see GLENN PARSONS & ALLEN CARLSON, FUNCTIONAL BEAUTY (2012); Christopher Dowling, *The Aesthetics of Daily Life*, 50 BRIT. J. AESTHETICS 225 (2010); Brian Soucek, *Resisting the Itch to Redefine Aesthetics: A Response to Sherri Irvin*, 67 J. AESTHETICS & ART CRIT. 223 (2009).

[132] *See* Crispin Sartwell, *Aesthetics of the Everyday*, *in* THE OXFORD HANDBOOK OF AESTHETICS 760 (Jerrold Levinson ed., 2005).

[133] SCHULENBERG, *supra* note 57, at 231.

[134] SHUSTERMAN, *supra* note 131, at 57.

[135] DEWEY, *supra* note 128, at 8.

[136] *Id.* at 191.

[137] *Id*. at 10.

experience of museum art.[138] It consists instead of the experience of popular material culture (e.g., consumer goods) and popular expressive culture (e.g., video games, movies, music, blogs, Facebook pages, YouTube videos, fashion, perhaps even circus posters).[139] Pragmatist aesthetics further recognizes that for many the experience of the useful arts in the form of paid labor is completely empty of aesthetic meaning, which is found only in consumption: "so much of production has become a form of postponed living and so much of consumption a superimposed enjoyment of the fruits of the labor of others."[140] The result, declared Dewey, is that "the conditions that create the gulf which exists generally between producer and consumer in modern society operate to create also a chasm between ordinary and aesthetic experience."[141]

A third theme of pragmatist aesthetics, and the most important for our purposes, follows from its rejection of the Kantian tradition and of the distinction between "museum art" and the useful arts. Pragmatist aesthetics asserts that the overriding value of the aesthetic is found not in objects, but in practice, in human action and interaction. It is found not in inert "art products,"[142] mere "artifacts"[143] which "exist externally and physically…apart from human experience,"[144] but in the dynamic experiential process of creating and perceiving aesthetic phenomena.[145] For Dewey, the perception of an aesthetic work required an appreciation of the individual, human choices that led to its production; indeed, the perceiver must actively re-create these choices:

> For to perceive, a beholder must *create* his own experience. And his creation must include relations comparable to those which the original producer underwent…. Without an act of recreation the object is not perceived as a work of art. The artist selected, simplified, clarified, abridged and condensed according to his interest. The beholder must go through these operations according to his point of view and interest.[146]

Dewey regretted the degree to which market relations obscured the human practices that led to the creation of aesthetic works, reducing the works to little more than reified commodities.[147] Because "works of art are now produced, like

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[138] *See* Sherri Irvin, *The Pervasiveness of the Aesthetic in Ordinary Experience*, 48 BRIT. J. AESTHETICS 29, 29-30 (2008).

[139] Dewey spoke of "the sights that hold the crowd—the fire-engine rushing by; the machines excavating enormous holes in the earth; the human-fly climbing the steeple-side; the men perched high in air on girders, throwing and catching red-hot bolts." See Dewey, *supra* note 128, at 5.

[140] *Id*. at 26.

[141] *Id*. at 10.

[142] *Id*. at 110.

[143] *Id*. at 54.

[144] *Id*. at 3

[145] *See* Shusterman, *supra* note 131, at 354.

[146] DEWEY, *supra* note 128, at 54.

[147] *See* SHUSTERMAN, *supra* note 131, at 20-21.

other articles, for sale in the market,"[148] "[o]bjects that were in the past valid and significant because of their place in the life of a community now function in isolation from the conditions of their origin."[149]

These three themes underlie a distinctively pragmatist vision of aesthetic progress distinct from what we might call the standard accumulationist account. This standard account distinguishes among scientific, technological and aesthetic progress, but applies to all of them the same basic accumulationist framework. It holds that scientific progress consists of the accumulation over time of positive knowledge that supersedes, refines, or supplements previous knowledge. Technological progress relatedly consists of the development over time of ever more efficient technical means to given ends. Both scientific and technological progress are unidirectional or ratchet-like in nature and may be measured objectively. The standard account recognizes that aesthetic progress, by contrast, does not necessarily consist of the supersession or refinement of what has come before—the works of Picasso, for example, do not somehow represent a replacement for or improvement upon the cave paintings of Chauvet-Pont-d'Arc Cave. Nevertheless, aesthetic progress consists of the accumulation over time of ever more artistic achievements or great works, though, *de gustibus*, their relative merit cannot be objectively assessed. Thus, while we standardly apply a strong accumulationist model to scientific-technological progress, in which our goal is to accumulate ever better scientific and technological achievements, we apply a weak accumulationist model to aesthetic progress. We insist not on better works, but simply on more works; we retreat to the quantitative in an effort to disengage from the qualitative.

Very much in contrast to these accumulationist accounts, pragmatist aesthetics recommends a vision of aesthetic progress that focuses not on the stockpiling over time of fixed, archivable works, but rather on the quality of ephemeral aesthetic experience in the present. In this sense, like the turn-of-the-century aesthetic education movement from which it drew inspiration,[150] pragmatist aesthetics measures aesthetic progress (or regress) largely by the extent of popular, democratic participation in aesthetic practice. Aesthetic progress is thus crucially different from scientific-technological progress. We would not typically say that enhanced popular participation in scientific and technological research itself constitutes progress in those fields, unless we assume that this participation would itself help to produce even greater discoveries and inventions. Instead, our view is that the production of scientific and technological advances proceeds most efficiently when there is no redundancy of research and development.[151] By contrast, it is conventional to observe across the various approaches to aesthetics that the process of aesthetic

[148] DEWEY, *supra* note 128, at 9.

[149] *Id.*

[150] *See, e.g.*, CHARLES DEGARMO, AESTHETIC EDUCATION (1913).

[151] To the extent that we do focus on the means of scientific or technological progress as intrinsically pleasurable in themselves, these means and our focus qualify as aesthetic in nature. See DEWEY, *supra* note 128, at 5; SHUSTERMAN, *supra* note 131, at 12.

creation is more than merely an instrumental means to some separate end that is the sole object of value. Aesthetic play has intrinsic value. Indeed, it may generate as much social welfare, if not more, than any objects eventually produced. In its emphasis on the popular, the experiential, and the intrinsic value of aesthetic labor, pragmatist aesthetics thus envisions a notion of aesthetic progress that privileges aesthetic *work* over aesthetic *works*, everyday aesthetic practice over timeless aesthetic achievements, and seeks not so much more artworks, however fine, but more artists, fine or otherwise.

This is undoubtedly a utopian vision in many respects and may seem far afield from the realities of such a thing as copyright law. And yet, though this pragmatist vision came too late for *Bleistein*, its development, especially in recent decades, has arrived right on schedule for the Web 2.0 world of massively-distributed authorship, a world perfectly suited to the pragmatist aesthetic vision of popular aesthetic practice. Following his philosophical hero Dewey, Richard Rorty developed in the late-twentieth century what was essentially a vision of long-term aesthetic progress, in which "the last five centuries of Western intellectual life may usefully be thought of first as progress from religion to philosophy, and then from philosophy to literature."[152] In Rorty's view, a new "poeticized culture"[153] is taking shape in the modern world, one which seeks "redemption" not in religion or reason, but in imagination, in the aesthetic. In this culture, the individual continually seeks out and adapts new vocabularies and metaphors, new modes of "imaginative redescription" of her circumstances, the better to develop her self, or in the vocabulary of *Bleistein*'s time, her "personality." And importantly, true to Rorty's insistence that "human beings are responsible only to each other,"[154] such individuals finds meaning in interaction and solidarity with others, "by telling the story of their contribution to a community."[155]

Rorty's vision of an aestheticized culture is certainly open to a variety of criticisms, for its narrow secularism, its apparent relativism, or perhaps its lack of a politics—or even Rorty's failure explicitly to engage the tradition of aesthetic thought. But it should at least be celebrated for its emphasis on the importance to the everyday individual of aesthetic engagement, aesthetic practice, and aesthetic play, in the form of the active assimilation, appropriation, and creative recombination of aesthetic expression. And more importantly, it recognizes that the goal of aesthetic progress, as of aesthetic practice itself, is not any kind of endpoint. As Rorty emphasized in an oft-quoted passage:

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[152] Richard Rorty, Fr*om Religion through Philosophy to Literature: The Way Western Intellectuals Went*, *in* COMPARATIVE ETHICS IN A GLOBAL AGE 75, 80 (Marièta T. Stepanjanc ed. 2007).

[153] *See supra* note 57.

[154] Richard Rorty, The Decline of Redemptive Truth and the Rise of a Literary Culture, Nov. 2, 2000, http://olincenter.uchicago.edu/pdf/rorty.pdf.

[155] Richard Rorty, *Solidarity or Objectivity?*, *in* RELATIVISM: INTERPRETATION AND CONFRONTATION 167, 167 (Michael Kraus zed. 1989).

> For in utopia the intellectuals will have given up the idea that there is a standard against which the products of the human imagination can be measured other than their social utility, as this utility is judged by a maximally free, leisured and tolerant global community. They will have stopped thinking that the human imagination is getting somewhere, that there is one far off cultural event toward which all cultural creation moves. They will have given up the identification of redemption with the attainment of perfection. They will have taken fully to heart the maxim that it is the journey that matters.[156]

Rorty did not live to see the Internet's evolution into a platform for the massively-distributed authorship of user-generated content, social-networking sites, and all manner of aesthetic play, but as many have noted,[157] he might have recognized the current Internet at its best as an epochal and profoundly ameliorative transformation in the long cultural "journey" he described.

Holmes, of course, could not have known of the kinds of cultural technologies that would arrive a century after *Bleistein*, nor could he have anticipated the implications of these technologies for American copyright law and for the constitutional command that it promote progress, both scientific and aesthetic. He was responding in 1903 to altogether different technological conditions and "felt needs." And so, as we will see, his *Bleistein* opinion was what set American copyright law on exactly the wrong course away from the realization of a pragmatist vision of aesthetic progress.

II. *Bleistein*, Personality, and the Market

"I fired off a decision upholding the cause of law and art and deciding that a poster for a circus representing décolletés and fat legged ballet girls could be copyrighted. Harlan, that stout old Kentuckian, not exactly an esthete, dissented for high art."[158] So wrote Justice Holmes soon after completing his *Bleistein* opinion. In his dissent, which Justice McKenna joined, Justice Harlan quoted at length from the heart of the Sixth Circuit's opinion and then grandly concluded: "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."[159] Harlan misquoted the Constitution—"Times" not "terms," "Writings" not "works—but his point was clear enough. His sympathies lay with a line of nineteenth-century opinions that

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[156] Richard Rorty, *Philosophy as a Transitional Genre*, *in* PRAGMATISM, CRITIQUE, JUDGMENT 3, 27 (Seyla Benhabib & Nancy Fraser eds. 2004).

[157] *See, e.g.*, Nathan Jurgenson & Geroge Ritzer, *Efficiency, Effectiveness, and Web 2.0, in* THE CULTURE OF EFFICIENCY: TECHNOLOGY IN EVERYDAY LIFE 51, 65 (2009).

[158] *Quoted in* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 254 (1989). Sheldon does not provide the source of this quotation.

[159] *Bleistein v. Donaldson Lithographic Co*., 188 U.S. 239, 252 (Harlan, J., dissenting).

denied copyright protection to advertisements and other apparently lesser forms of expression on the ground that such works did not meet the constitutional requirement that they promote progress.

Holmes's epistolary tone was casual, even irreverent. And who can blame him? The facts of *Bleistein* were perhaps trivial. As Diane Zimmerman recounts in her wonderfully detailed history of the case,[160] George Bleistein was the president of The Courier Company, a printing company based in Buffalo that developed and reprinted, among much else, circus advertisements. Courier owned the copyright in three posters it had produced to advertise a travelling circus, The Great Wallace Shows. The posters depicted, respectively, the bicycle act of the "Renowned Stirk Family", the circus's "Grand Spectacular Ballet" (making it "The Highest Class Circus in the World"), and the "Classic, Chaste and Culminating Living Triumphs of Imitative Art" consisting of performers whitened to represent statues and adopting various poses portraying mythological incidents ("Landing of Columbus," "Appollo [sic] and the Muses," etc.). Donaldson Lithographing Company of Newport, Kentucky copied the images in Courier's posters in its advertising for a different circus. Bleistein and Courier's other partners sued. Courier itself wished to reuse the images in advertising for other circuses at some point in the future.

Donaldson argued, among other things, that the posters failed to meet copyright law's originality requirement, that they did not qualify as "pictorial illustrations or works connected with the fine arts"[161] under the terms of the copyright statute, and that even if they did, extending copyright protection to them was unconstitutional under the Progress Clause because it covered only "Science and the useful Arts." The district court ruled in Donaldson's favor on the statutory argument, the appellate court on both the statutory and the constitutional argument. The Supreme Court reversed.

These facts, this litigation history, and Holmes's brief, breezy opinion mask the extraordinary tensions at work in the case—tensions that we have long failed to appreciate—and the fateful nature of Holmes's resolution of them. These tensions emerged out of the shifting state of copyright law at the time. As Oren Brach has shown, the status of the individual author was in substantial decline. The rise of collective, corporate forms of authorship reduced the prestige of aesthetic laborers and worked to strip them of ownership in the products of their labor. By the turn of the century, work for hire doctrine had "flipped":[162] in the absence of an express agreement to the contrary, it was no longer the employee but rather the employer who was

[160] Diane Leenheer Zimmerman, *The Story of* Bleistein v. Donaldson Lithographing Company: *Originality as a Vehicle for Copyright Inclusivity*, *in* INTELLECTUAL PROPERTY STORIES 77 (Jane Ginsburg & Rochelle Cooper Dreyfuss eds. 2005).

[161] Act of June 18, 1874, § 1, 43rd Cong., 1st Session, 18 Stat. 78.

[162] *See* Bracha, *supra* note 48, at 228.

assumed to be the "author" of any work created by the employee.[163] This shift was then written into the Copyright Act of 1909.[164]

The nature of the copyrighted "work" was also changing. Through the course of the late-nineteenth century, courts were increasingly extending protection beyond the verbatim language of the copyrighted work to protect non-literal elements such as plot, characters, setting, and structure. One commentator's description of the 1868 case of *Daly v. Palmer* is telling: the case "may be said to advance in literary law the doctrine of romantic equivalents, analogous to the doctrine of mechanical equivalents of the patent or mechanical law."[165] In the process, the "work" took on an almost mystical character as some "mysterious intellectual essence"[166] that ultimately existed only in the author's mind; the author's particular embodiment or "copy" of it merely gave evidence of its nature. As Drone explained in 1879:

> The thing itself is always the same; only the means of communication is different. The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation.... The means of communication are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity.[167]

The core of the property right came more and more to consist simply of the right to claim any commercial value for which the author could claim responsibility, or as George Ticknor Curtis put it quite presciently in 1847, "to the author belongs the exclusive right to take all the profits of publication which the book can, in any form, produce."[168]

Bleistein appeared at the crossroads of these two trends—of the decline of the authorial subject and the rise of the copyrighted object. As further explained in this Part, *Bleistein* settled the nature of two major requirements for copyright protection, the originality requirement and the progress requirement. With respect to the question of originality, Holmes invoked a long tradition of American romantic and transcendentalist thinking about what he, with Walt Whitman and many others, called "personality," which, as Holmes wrote in *Bleistein*, "always contains something unique," "something irreducible which is one man's alone." The result was an undemanding and inclusive originality

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[163] Id. at 248-255.

[164] Act of Mar. 4, 1909, ch. 320, § 62, 35 Stat. 1075, 1088 (providing that the term "author" "shall include an employer in the case of works made for hire").

[165] 3 Am. L. Rev. 453, 453 (1869) (citing Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552)) (quoted in Bracha, *supra* note 48, at 233 n. 194).

[166] *See* Bracha, *supra* note 48, at 228.

[167] EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 97-98, 384-85 (photo. reprint 1979) (Boston, Little, Brown, & Co. 1879) (quoted in Bracha, *supra* note 48, at 233).

[168] GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 238 (1847) (quoted in Bracha, *supra* note 48, at 227).

requirement that offered copyright protection to any expression not copied from another work and that contained the author's personality.

With respect to the progress requirement, Holmes accepted Donaldson's constitutional argument that for a work to qualify for copyright protection, it must "promote the Progress of Science and Useful Arts." As to how the "fine arts" fit into this clause, Holmes essentially bullied his way through to find the right result, which was that the Progress Clause somehow covers not just the useful arts, but also the fine arts. But this holding then compelled Holmes to decide whether the circus posters at issue promoted the progress of the fine arts. It forced upon Holmes the problem of aesthetic progress. In response, Holmes produced his famous excursus on judicial aesthetic neutrality, that "[i]t 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."[169]

We have failed to appreciate the significance of *Bleistein* because we have long misinterpreted the opinion. This is not surprising. Holmes's opinion is characteristically compact, elliptical, and aphoristic, and most of us now read it only in aggressively-edited casebook versions. Further, so effectively did Holmes both affirm and nullify the progress requirement that most scholars have forgotten that it even played a role in the opinion or the copyright law of the time. According to the standard misreading of *Bleistein*, Holmes reasoned that (i) judges should not judge aesthetic merit, and therefore, (ii) the originality standard must be set very low, so low that nearly any uncopied work should be able to meet it. This misreading is found throughout our scholarship[170] and survives even in the Nimmer treatise.[171] But this is not what Holmes held. Holmes's analysis of the originality requirement in *Bleistein* was altogether

[169] *Bleistein v. Donaldson Lithographic Co*., 188 U.S. 239, 251 (1903).

[170] See, e.g., Ryan Littrell, *Toward a Stricter Originality Requirement for Copyright Law*, 43 B.C. L. REV. 193, 198 (2001) ("The Court flatly rejected the notion that originality should be decided with reference to the artistic merits of the work. Since judges and juries cannot be presumed to be experts in aesthetic matters, the Court reasoned, it would be a 'dangerous undertaking' for them to make aesthetic value judgments."); Oren Bracha, *Commentary on* Bleistein v. Donaldson Lithographic Co. *(1903), in* PRIMARY SOURCES IN COPYRIGHT (1450-1900) 28, 34 (Lionel Bently & Martin Kretschmer eds. 2008) ("Holmes made the case against any attempt of enforcing a meaningful aesthetic merit originality requirement or subjecting copyright protection to substantive evaluations of the work."); Bracha, *supra* note 48, at 200 ("Justice Holmes reduced copyright's originality requirement to almost nothing. He combined a content neutrality argument, a market concept of value, and a stance of judicial abdication in order to find that copyright had no threshold requirement of objective aesthetic value."); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 476 (2009) ("Why shift away from an external, more demanding measure of creativity toward an easily-met effort standard? Here Justice Holmes raised the spectre of stifling judicial aesthetic edicts distorting the copyright field.").

[171] *See* 1 NIMMER ON COPYRIGHT § 2.01 (stating that "Justice Holmes' reasoning, in refusing to weigh the artistic merits of the work, provides the underlying rationale for the prevailing rule as to the determination of the necessary quantum of originality" and then quoting Holmes's aesthetic neutrality paragraph).

separate from his discussion of aesthetic neutrality. Holmes did not in any way *retreat* to the personality standard for originality because of the problem of aesthetic judgment. On the contrary, personality stood on its own in *Bleistein*, not as a last resort, but as something of great value, particularly in the American tradition. The broad egalitarian inclusiveness of its low standard of originality was its great virtue. Its invocation in *Bleistein* was arguably the high point of American romanticism's influence on our copyright law and laid a foundation for the institution of a pragmatist vision of aesthetic progress.

But crucially, when Holmes then sought to explain how the posters promoted aesthetic progress, he declined to continue to invoke the value of personality. He declined to hold that a work promotes progress to the extent that it contains the author's personality. Instead, he retreated to the purported aesthetic neutrality of the market. But this was hardly an aesthetically neutral choice. Holmes held, in effect, that a work promotes progress when someone other than the author values it. A work has merit, and represents progress, not because someone was willing to make the work and invest one's personality in it, but rather because someone else is willing to copy it. The work is valuable not because of its *intrinsic* value to its producer, but because of its *exchange value* on the open market. In thus embracing a market-value theory of aesthetic progress, Holmes divided the basis of copyright protection, originality in the form of personality, from the purpose of copyright protection, progress in the form of more things worth copying. The guiding purpose of copyright law became—as it remains—not the promotion of human personality, but the promotion of commodified forms of authorship.

In what follows in this Part, I seek to defend this reading of *Bleistein*. By way of background, Part II.A begins by explaining how nineteenth-century American courts separately construed the originality and progress requirements for copyright protection. Here, too, recent copyright commentary has fundamentally misinterpreted the case law. Part II.B then turns in earnest to Holmes's opinion in *Bleistein*. The better to expose the deeper tensions at work in the opinion, it first briefly focuses on an extraordinary but now-forgotten speech that Holmes delivered at Northwestern Law School four months before the Court handed down *Bleistein*,[172] a speech that reads like the antithesis of—and perhaps like atonement for—what Holmes would soon declare in his *Bleistein* opinion. It then proceeds in roughly the order of Holmes's reasoning in the opinion. It considers Holmes's constitutional analysis of the Progress Clause and his statutory analysis of the copyright act of the time. It then assesses his celebration of "personality" as the standard of originality in American copyright law and his subsequent turn away from a personality-oriented and towards a commodity-oriented definition of aesthetic progress.

[172] *See* Oliver Wendell Holmes, Jr., *Address of Chief Justice Holmes At the Dedication of the Northwestern University Law School Building, Chicago, October 20, 1902*, *in* THE ESSENTIAL HOLMES 98 (Richard A. Posner ed. 1992).

A. The Originality Requirement and the Progress Requirement Before *Bleistein*

Holmes treated the originality and progress requirements separately in *Bleistein*, and it makes sense that he would do so. American courts had maintained over the course of the previous century a clear separation between the two requirements. Recent commentary has confused nineteenth-century courts' treatment of the two requirements,[173] perhaps in an effort to claim nineteenth-century American originality doctrine as the source of the doctrinal tumult of the time. But the source of this tumult was not, in fact, the originality requirement, which was relatively stable in the nineteenth century. The problem was the progress requirement, which forced upon copyright law all the complications of aesthetic judgment and aesthetic progress. I turn first to originality.

1. The Originality Requirement in Nineteenth-Century American Copyright Law

The originality requirement in nineteenth-century American copyright law was reasonably straightforward and, for non-fact-based works,[174] arguably changed little in the nineteenth century. It consisted essentially of the subrequirements that the work be independently authored rather than copied from another author and that the work contain some minimal creativity. As Justice Story explained in the 1845 case of *Emerson v. Davies*: "He, in short, who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copyright therein; if the variations are not merely formal and shadowy, from existing works."[175] The leading American copyright treatises of the nineteenth century followed this thinking. Ticknor emphasized in 1847 the broad inclusiveness of the originality standard:

> The laws which protect literary property are designed for every species of composition, from the great productions of genius, that are to delight and instruct mankind for ages, to the most humble compilation that is to teach children the art of numbers for a few years, and then to disappear forever. Hence these laws must be so administered, that every literary laborer shall find in them an adequate protection to whatever he can show to be the product of his own labor.

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[173] *See* Bracha, *supra* note 48, at 192-97.

[174] As Robert Brauneis has made clear in a thorough study, the originality standard did change with respect to fact-based works in the late-nineteenth century, largely in connection with the debate of the time over whether news stories should receive copyright protection. *See* Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate Over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321 (2009).

[175] 8 F. Cas. 615, 617 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

Drone emphasized the same in 1879: "Almost every product of independent literary labor is a proper subject of copyright; and, to be entitled to protection, the author has simply to show something material and valuable produced by himself, and not copied from the protected matter of another."[176] For Drone, the "something material and valuable" prong of the test was highly permissive, so much so that, for him, "the true test of originality" boiled down simply to "whether the production is the result of independent labor or of copying."[177]

Of course, complications sometimes arose, as they did in *Emerson v. Davies*, and as they still do, if the work for which protection was sought was based on preexisting public domain or copyrighted works. This forced courts, as it still does, to engage in the difficult task of determining what, if anything, is significantly new in the new work. In the 1851 case of *Jollie v. Jacques*,[178] for example, the plaintiff had adapted a preexisting German melody. The court insisted that to qualify for protection the plaintiff's work must be "substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make."[179] The court explained its reasoning: "Any other construction of the act would fail to afford the protection intended to the original piece from which the air is appropriated."[180] This is not substantially different from present-day approaches, which undoubtedly remain consistent with *Feist*'s low standard of originality.[181]

Complications also arose in new technological contexts, such as photography. In the 1884 Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*,[182] the issue was whether Sarony's photographic portrait of Oscar Wilde was a "mere mechanical reproduction" of the scene in front of the camera "involv[ing] no originality of thought or any novelty," or was rather an "original intellectual conception…in which there is novelty, invention, originality."[183] The Court noted that copyright might not attach to the "ordinary production of a photograph," "the mere transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit."[184] But the carefully-contrived "graceful outlines"[185] of

[176] DRONE, *supra* note 167, at 199. As is clear from the context, "material and valuable" was, for Drone, a very low standard.

[177] *Id*. at 208.

[178] 13 F. Cas. 910 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1850) (No. 7437).

[179] *Id*. at 915.

[180] *Id*. *See also id*. ("The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copy-right would be worthless."). Admittedly, the *Jollie* court does invoke the image of "genius:" "The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment." *Id*. at 913.

[181] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340, 345-47 (1991).

[182] 111 U.S. 53 (1884).

[183] *Id*. at 59-60.

[184] *Id*. at 59.

Wilde's pose and setting, enhanced by the photographer's "arranging and disposing the light and shade,"[186] qualified the photograph as "an original work of art, the product of plaintiff's intellectual invention."[187] *Sarony* was an extraordinary case, and a remarkable sign of things to come. In it, an exceptionally powerful technology essentially forced humans to affirm how they are different from machines and, more broadly, how human agency survives technological agency. But it did not change the basic originality requirement in American copyright law any more than other outlier cases like *Emerson* or *Jollie*.[188] At the nineteenth century's end, with respect to non-fact-based works, the lower courts continued to apply an exceedingly low standard of originality very similar to the one they had applied at the beginning of the century and to the one we apply today.[189]

2. The Progress Requirement in Nineteenth-Century American Copyright Law

While the originality requirement was relatively stable in nineteenth-century American copyright law, the progress requirement was not, primarily because it licensed courts to engage in often highly-subjective content-based discrimination. And this they did with respect to all manner of works, including aesthetic works. With the exception of the district court in *Bleistein*, nineteenth century courts and commentators appear to have ignored the fact that the Progress Clause appeared to exclude the fine arts. Indeed, they frequently invoked the clause to deny protection to aesthetic works on the constitutional ground that such works lacked sufficient aesthetic merit to promote the progress of the fine arts.

As Drone attests, courts of the time considered the progress requirement independently of the originality requirement (and also, for Drone, of the "innocence" or public morals requirement):

> When a production meets the requirements of the law as to innocence and originality, the only inquiry relating to its character is, whether it is a material contribution to useful knowledge. This raises the question, whether literary merit, in the common meaning of that expression, is essential to copyright in a composition.[190]

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[185] *Id*. at 60.

[186] *Id*.

[187] *Id*.

[188] *See* Brauneis, *supra* note 174, at 334 (contra Bracha, characterizing *Jollie* as "an outlier that never had significant influence on copyright law").

[189] *See, e.g*., Ladd v. Oxnard, 75 F. 703, 731 (C.C.D. Mass. 1896) (No. 707) ("[T]he quality and grade of original work required by the courts under the copyright statutes are very moderate."); Brightley v. Littleton, 37 F. 103, 104 (C.C.E.D. Pa. 1888) ("The originality, however, may be of the lowest order...") (cited in Bracha, *supra* note 48, at 204 n. 55).

[190] DRONE, *supra* note 167, at 208.

Here, courts did not seek to ensure, as they did with the originality requirement, that a work's differences over whatever previously existed were minimally creative, i.e., more than "merely formal and shadowy." The question of "literary merit" under the Progress Clause was qualitatively different. It asked whether the work promoted "the Progress of Science." Thus, a work such as an illustration for a product label could easily meet the originality requirement, but be denied protection on the ground that it did not promote progress. Meanwhile, as the defendant argued in *Emerson v. Davies*, a work could fail to meet the originality requirement (because it was not significantly different from previous works), but easily pass the progress requirement (because it taught the "Science" of arithmetic).

Through the course of the nineteenth century, courts applied the progress requirement to deny protection to a wide variety of works that clearly met the originality requirement. As a measure of the instability of the progress requirement, though Drone sought to cast it in 1879 as only minimally demanding,[191] nineteenth-century courts nevertheless applied the requirement aggressively. In the 1829 case of *Clayton v. Stone*,[192] for example, Justice Thompson denied copyright protection to a newspaper's daily listing of stock prices. Making no mention in his opinion of the originality requirement,[193] he instead quoted the Intellectual Property Clause and held:

> The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term science cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use.[194]

In the 1867 case of *Martinetti v. Maguire*,[195] the work at issue was rather different, but equally as suspect under the Progress Clause. The district court refused copyright protection to a play that, as the court put it, "panders to a prurient curiosity or an obscene imagination by very questionable exhibitions

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[191] *See* DRONE, *supra* note 167, at 211. ("To be worthy of copyright, a thing must have some value as a composition sufficiently material to lift it above utter insignificance and worthlessness."). Bracha cites this language to support the proposition that a more permissive *originality* doctrine emerged in the late-nineteenth century, *see* Bracha, *supra* note 48, at 207, but Drone was very clearly writing here about the progress requirement under the Intellectual Property Clause, not the originality requirement. *See* DRONE, *supra* note 167, at 208-11.

[192] 5 F. Cas. 999 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872).

[193] Bracha cites *Clayton* to support the proposition that the *originality* requirement of the time imposed a "substantive merit" requirement for works to be eligible for copyright protection. *See* Bracha, *supra* note 48, at 205. But *Clayton* nowhere engages the issue of originality. The opinion addresses only the progress requirement.

[194] *Clayton*, 5 F. Cas. at 1003.

[195] 16 F. Cas. 920 (C.C.D. Cal. 1867) (No. 9173).

and attitudes of the female person."[196] Though the court belittled the originality of the play, which "consists almost wholly of scenic effect, or representation taken substantially from well[-]known dramas and operas,"[197] the court ultimately appealed to the progress requirement to deny protection: "The exhibition of such a drama neither 'promotes the progress of science or useful arts,' but the contrary. The constitution does not authorize the protection of such productions."[198] Finally, in the latter decades of the century, courts routinely denied copyright protection to expression appearing in advertising or product labels. This line of cases is best represented by Justice Fields' opinion for a unanimous Court in *Higgins v. Keuffel* (1891),[199] which addressed the copyrightability of a product label. The Intellectual Property Clause, explained Justice Fields,

> does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles, and no possible influence upon science or the useful arts…. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question.[200]

The originality of the advertising expression, particularly when it took the form of illustration, was never in question in these cases.

Some of these advertising cases instantiated a remarkable irony, one which culminated in *Bleistein*. With the 1874 amendment to the Copyright Act of 1870, courts no longer needed to rely on the Constitution—and specifically on a perverse reading of the Progress Clause as including the fine arts—to deny protection to works that in their view failed to promote the progress of the fine arts. Instead, what the Constitution arguably did not provide—or require—a statute finally did. The 1874 amendment explicitly established statutory protection for works of the "fine arts."[201] Specifically, the 1870 Act provided copyright protection for, among other things, any "engraving," "cut," or "print;" the 1874 Amendment specified that the 1870 Act's reference to any "'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts."[202] This explicit statutory reference to the category of the fine arts, a term the statute left undefined, produced strange results. One court in 1896 went so far as to deny copyright protection on the basis that the illustrations at issue "are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art."[203] By the turn of the century, the very constitutional clause whose reference to "Science and the useful Arts" might

[196] *Id*. at 925.
[197] *Id*. at 926.
[198] *Id*. at 927.
[199] 140 U.S. 428 (1891).
[200] *Id*. at 432.
[201] Act of July 8, 1870, 16 Stat. 198, § 86 (1870).
[202] *Id.*
[203] J.L. Mott Iron Works v. Clow, 72 F. 168, 169 (D. Ill. 1896).

have counseled against extending protection to fine art was instead understood to empower courts to apply a strict definition of fine art on the ground that only aesthetic works that could satisfy this definition would "promote the Progress."[204]

There were thus, under the progress requirement, three strikes against the circus posters at issue in *Bleistein*: they constituted advertising; they contained imagery perceived at the time by some to be indecent; and they were not fine art. The *Bleistein* district court cited the latter two grounds to find the posters unprotectable under the copyright statute and the Progress Clause. Showing "women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus,"[205] the chromolithographs were not "either useful art or fine art," but "something to be regarded as merely frivolous, and to some extent immoral in tendency"—though Judge Evans was quick to add that "the court by no means intends to intimate that the nude is not perfectly admissible in the fine arts."[206] For its part, the Sixth Circuit held that as mere advertisements, the posters were not fine art and thus were not "promotive of the useful Arts" under the Progress Clause:

> 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…. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.[207]

This was strange reasoning to say the least. The posters may have constituted expressions of the "useful Arts," the Sixth Circuit somehow found, but they were not "promotive" of these arts. Nor did they have any connection with the "fine arts." They were thus unaccounted for under the constitutional and statutory scheme and unprotectable.

By 1903, then, one phrase in the Progress Clause—"Science and useful Arts"—had been entirely denatured, but the other phrase—"to promote the

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[204] *Cf.* Barnes v. Miner 122 F. 480, 489 (C.C.N.Y. 1903) ("This provision of the Constitution not only limits the power of Congress in enacting copyright laws to matters which 'promote the progress of science and useful arts,' but serves to aid us in defining the words 'dramatic composition' found in the statute, for it is not to be supposed that Congress intended to include any compositions that would not tend to 'promote the progress of science and useful arts.' How anything contained in the production of the plaintiff tends in this direction it is difficult to ascertain.").

[205] Bleistein v. Donaldson Lithographic Co., 98 F. 608, 611 (C.C.D.Ky. 1899).

[206] *Id.*

[207] Courier Lithographing Co. v. Donaldson Lithographing Co., 104 F. 993, 996 (6th Cir. 1900).

Progress"—still seemed to carry real force. And unlike the originality requirement, which called upon courts to engage in only a minimal inquiry into the creativity of the work, the progress requirement opened the door to the difficult question of what constitutes progress in the realm of the aesthetic. Justice Holmes would seek to close this door in *Bleistein*.

B. *Bleistein*

1. Holmes the Aesthete

Donaldson could have been forgiven for thinking in the winter of 1903 that it had a good chance of winning the vote of at least one Supreme Court Justice. On October 20, 1902, Holmes gave an extraordinary speech at Northwestern Law School that engaged many of the themes of the *Bleistein* litigation and that spoke in defense, as Justice Harlan would, of "high art."[208] In the four-paragraph speech, parts of which deserve to be quoted here at some length, Holmes rather flamboyantly allied himself with the then-fashionable aestheticist view that, as Oscar Wilde put it in its most extreme form, "all art is quite useless."[209] One can only imagine what the law students assembled at the dedication of a new law school building must have thought when the Justice began: "Nature has but one judgment on wrong conduct—if you can call that a judgment which seemingly has no reference to conduct as such—the judgment of death." And then, within a few sentences, he observed: "[E]very joy that gives to life its inspiration is an excursion towards death, although wisely stopping short of its goal." And finally, art:

> The justification of art is not that it offers prizes to those who succeed in the economic struggle, to those who in an economic sense have produced the most, and that thus by indirection it increases the supply of wine and oil. The justification is in art itself, whatever its economic effect. It gratifies an appetite which in some noble spirits is stronger than the appetite for food. The principle might be pressed even further and be found to furnish art with one of its laws. For it is often said, as I often have said, and as I have been gratified to fine elaborated by that true poet Coventry Patmore, that one of the grounds of aesthetic pleasure is waste.[210]

Assuming, as he would in *Bleistein*, his audience's familiarity with John Ruskin's art criticism, and in particular with Ruskin's "The Nature of Gothic,"[211] Holmes then elaborated on this theme: "Who does not know how

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[208] The briefs in *Bleistein* are dated "October Term, 1902." Holmes delivered his speech on October 20, 1902. *See supra* note 172. *Bleistein* was argued on January 13-14, 1903, and the opinion is dated February 2, 1903. *Bleistein v. Donaldson Lithographic Co*., 188 U.S. 239, 247 (1903).

[209] OSCAR WILDE, THE PICTURE OF DORIAN GRAY at vii (1891).

[210] *See* Holmes, *supra* note 172, at 98.

[211] JOHN RUSKIN, 2 THE STONES OF VENICE 48 (1853).

his delight has been increased to find some treasure of carving upon a medieval cathedral in a back alley—to see that the artist has been generous as well as great, and has not confined his best to the places where it could be seen to the most advantage?"[212]

A notoriously ill-defined ism, nineteenth-century British Aestheticism consisted of a wide variety of artists and critics who held in common, if anything, a belief in the paramount importance of art and aesthetic experience to a properly-lived life.[213] Many aestheticists, including Ruskin, would likely have rejected Wilde's view that "all art is quite useless," and possibly also Holmes's view that "one of the grounds of aesthetic pleasure is waste." All, however, would have seen in the aestheticist emphasis on art a vehicle for the rejection and overcoming of what they perceived to be the cold utilitarianism of the leading thought of the time, the brute functionalism of industrial capitalism, and the sterile empiricism of modern science. Many would furthermore have seen the development of the aesthetic sense as the foundation for, or at least as interdependent with, the development of moral and civic virtue. Indeed, Linda Dowling has persuasively argued that, in its origins, aestheticist thought pursued a "project of aesthetic democracy"[214] that identified in the properly-cultivated common aesthetic sense of the people a legitimizing basis for popular democratic sovereignty.[215] But as Dowling has also shown, many aestheticists eventually abandoned this project as a failure.[216] The tension between aestheticist aspiration and the reality of popular taste proved unsustainable.[217] Ruskin, for example, had begun his career with the intention "to spread the love and knowledge of art among all classes."[218] By the end, he came to believe that those not belonging to "the higher ranks of life" could not appreciate art, "incomprehensible as it must always be to the mass of men,"[219] and as for the worker, "[a]bout many forms of existing Art, the less he knows about it the better."[220] Ruskin eventually concluded: "True taste…is unattainable by men employed in narrow fields of life."[221]

It was clearly within the more optimistic strains of the aestheticist tradition that Holmes placed himself at Northwestern. In language that would echo in

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[212] *See* Holmes, *supra* note 172, at 98.

[213] *See generally* LIONEL LAMBOURNE, THE AESTHETIC MOVEMENT (1996); R. V. JOHNSON, AESTHETICISM (1969).

[214] LINDA DOWLING, THE VULGARIZATION OF ART: THE VICTORIANS AND AESTHETIC DEMOCRACY at xiii (1996). *See also* DIANA MALTZ, BRITISH AESTHETICISM AND THE URBAN WORKING CLASSES, 1870-1900 (2006).

[215] *See* ELIZABETH K. HELSINGER, RUSKIN AND THE ART OF THE BEHOLDER 206 (1982) (discussing Ruskin's "democratization of imaginative perception").

[216] *See* Dowling, *supra* note 214, at 57-64.

[217] *See id*. at 56 (discussing "the tension between the aristocratic basis and the democratic claims of the moral-aesthetic sense").

[218] John Ruskin, *Letter to Osborne Gordon*, 15 THE WORKS OF JOHN RUSKIN 145 (E.T. Cook and Alexander Wedderburn eds. 1907) [hereinafter WORKS].

[219] 7 WORKS, *supra* note 218, at 441.

[220] 16 WORKS, *supra* note 218, at 183.

[221] 16 WORKS, *supra* note 218, at 144.

Bleistein, Holmes declared that "man as he is" may have material, "bodily needs," but his "uneconomic" ideals still took precedence:

> I only mean to insist on the importance of the uneconomic to man as he actually feels today…. [T]he ideals which burn in the center of our hearts…are categorical imperatives. They hold their own against hunger and thirst; they scorn to be classed as mere indirect supports of our bodily needs, which rather they defy; and our friends the economists would do well to take account of them … if they are to deal with man as he is.[222]

The university nurtures these ideals, the individual cultivation of which Holmes equated with the process of individual artistic effort:

> Mr. Ruskin's first rule for learning to draw, you will remember, was, Be born with genius. It is the first rule for everything else. If a man is adequate in native force, he probably will be happy in the deepest sense, whatever his fate. But we must not undervalue effort, even if it is the lesser half. And the opening which a university is sure to offer to all the idealizing tendencies—which, l am not afraid to say, it ought to offer to the romantic side of life—makes it above all other institutions the conservator of the vestal fire.[223]

Holmes acknowledged, *de gustibus*, that not all could be cultivated to share his aestheticist view:

> Our tastes are finalities, and it has been recognized since the days of Rome that there is not much use in disputing about them. If some professor should proclaim that what he wanted was a strictly economic world, I should see no more use in debating with him than I do in arguing with those who despise the ideals which we owe to war.[224]

Yet Holmes optimistically concluded that the majority were with him. They aspired above all to aesthetic experience, even themselves to engage, "if they can," in aesthetic creation: "But most men at present are on the university side. They want to be told stories and to go to the play. They want to understand and, if they can, to paint pictures, and to write poems, whether the food product is greater in the long run because of them or not."[225]

It must have been a beautiful speech, and all the more affective in that a man of Holmes's authority and experience would profess such an optimistic, perhaps even naïve, belief in the salutary effects of art and idealism. Holmes insisted upon not just the independence of the aesthetic from the economic, but the overriding primacy of aesthetic experience over any other basic human need. And where critics like Ruskin might have spoken primarily if not exclusively of connoisseurship, of aesthetic consumption, Holmes spoke to his

[222] *See* Holmes, *supra* note 172, at 999.
[223] *Id*.
[224] *Id*. at 99-100.
[225] *Id*. at 100.

audience of aesthetic production. The highest form of aesthetic experience, Holmes implied, is found in aesthetic creation itself, indeed, in even the mere "effort" at aesthetic creation that remains subpar ("even if it is the lesser half"). The speech was arguably Holmes at his best, which makes it all the stranger—and frustrating—that he would so thoroughly abandon all of its "idealizing tendencies" four months later in *Bleistein*. We can only speculate as to why he felt compelled to do so—though, as we have seen, he was certainly not the only expounder of aestheticism ultimately to turn against the enterprise.

2. The "Useful Arts" and the "Fine Arts"

To get an immediate sense of the almost schizophrenic quality of Holmes in *Bleistein* versus Holmes at Northwestern, consider Holmes's treatment in his *Bleistein* opinion of the main constitutional issue in the case. As mentioned above, Donaldson had argued that the Progress Clause empowers Congress to provide intellectual property rights only in works of "Science and the useful Arts," and thus that the copyright statute's reference to "fine art" should either not be read to protect Bleistein's posters or, if it should be so read, that the statutory provision was unconstitutional. The entirety of Holmes's "mention" of the issue consisted of the following:

> We shall do no more than mention the suggestion that painting and engraving, unless for a mechanical end, are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographic v. Sarony*, 111 U. S. 53.[226]

Thus Holmes swept aside centuries of conventional wisdom, of which he could not have been unaware, that distinguished between "useful arts" and "fine arts"—and to do so, he cited a Supreme Court opinion that made no effort to interpret the mysterious language of the Progress Clause but that did involve, of all people, Oscar Wilde. Holmes also abandoned the aestheticist conviction he professed at Northwestern that art is not useful and that aesthetic experience is by definition wasteful. Admittedly, the "bodily needs" of the Northwestern speech reappeared intact in *Bleistein* as a foil against which the aesthetic could be defined, but Holmes then dissolved the aesthetic back into the category of the useful. The result was that *Bleistein* would stand for the proposition, among others, that the fine arts somehow fell within the scope of the Intellectual Property Clause as "useful Arts." Courts have understandably avoided the issue ever since.

Holmes' treatment of the main statutory question in *Bleistein* was equally as abrupt and even more acutely in tension with his Northwestern pose. The issue was whether Bleistein's posters qualified as "pictorial illustrations or works connected with the fine arts" under the 1874 amendment to the Copyright Act of 1870. Bleistein argued that the statutory phrase should be read

[226] Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 249 (1903).

disjunctively to refer to "pictorial illustrations" and to "works connected with the fine arts," and since his posters easily qualified as "pictorial illustrations," they should be protected. Donaldson argued that the statutory phrase must be read conjunctively. Meanwhile, the legislative history of the 1870 Act and the 1874 amendment, which the parties' briefs never referenced,[227] strongly indicated that the term "fine arts" should be understood to exclude advertisements. The Copyright Office had wanted to stem the flood of registrations for advertising. As Senator Sherman of Ohio described the 1874 amendment, "[t]he only effect of the bill is to relieve the Library from a great mass of little stuff of no account to anybody in the world."[228]

Holmes analysis bordered on the fatuous. He never referenced the statutory history and betrayed no knowledge of the Copyright Office's decades of complaints. Instead, he forcefully held that even if the statutory phrase were read conjunctively, the *Bleistein* posters qualified as "connected with the fine arts":

> Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use—if use means to increase trade and to help to make money. 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.[229]

For the Holmes of *Bleistein*, a "real use" is "to increase trade and to help to make money." Holmes the aesthete makes an appearance only at the end, protesting that the law not "excommunicate" Degas, unquestionably an expositor of the fine arts.

But, of course, what was Justice Holmes supposed to do here? Hold that because the circus posters at issue were not "fine art", they could not receive copyright protection, even if they attracted the "crowd?"[230] The answer is that the copyright statute at the time provided protection only to "pictorial illustrations or works connected with the fine arts," not to all "original works of authorship fixed in a tangible medium of expression," as it does now. Regardless of what Justice Holmes' view might have been as to what copyright law should protect, the "crowd," through Congress, had spoken, and it had decided that copyright law would extend only to pictorial works of the fine arts. The advertisements were not fine art by even a broad definition of the term and

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[227] *See* Brief on Behalf of Plaintiffs in Error, Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903) (No. 117); Brief for Defendant in Error, Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903) (No. 117).

[228] 42nd Cong., 3rd Sess., Cong. Globe 1420 (Feb. 17, 1873), *quoted in* Rosen, *supra* note 38, at 8.

[229] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (U.S. 1903).

[230] On Holmes and the "crowd," see Rogat, *supra* note 43.

the *Bleistein* court should not have granted them copyright protection. Present-day accounts of *Bleistein* strangely overlook the statutory context of Holmes' ruling. They celebrate Holmes's statement later in the opinion of the principle that judges should not impose their own aesthetic standards when deciding copyright cases, but omit the fact that this is precisely what Holmes did in his highly tendentious statutory interpretation.

Though we continue to debate whether Holmes professed some version of American pragmatist philosophy,[231] it is clear that if the Holmes of *Bleistein* was doing so, it was a brand of pragmatism most susceptible to the caricature, much despised by Dewey, that pragmatism was "the philosophy of the American business-man."[232] The particular manner in which Holmes merged the aesthetic into the useful in *Bleistein* got exactly backwards what Dewey would try to accomplish three decades later in *Art as Experience*. There, as we have seen, Dewey went to great lengths to attack the traditional distinction between fine and useful art—and also between, though much more generously than Holmes, the connoisseur and the "crowd."[233] But in his emphatic meliorism, Dewey did so primarily to assert that the world of utility he saw around him, the world of "postponed living," could be made aesthetic. The difference between Holmes in 1903 and Dewey in 1934 was a difference in priority, in privileging. Dewey sought to raise the useful up to the level of the aesthetic; Holmes sought to reduce the aesthetic down to the level of the useful. This difference in emphasis set the tone for much, but not all, of the remainder of the opinion.

3. Personality and American Romantic Aesthetics

If, on the constitutional and statutory issues in *Bleistein*, Holmes's rhetoric conveyed an almost Babbitt-like coarseness, Holmes's treatment of the originality requirement brought a shift in rhetoric to an entirely different vein of the American cultural tradition. To appreciate the full meaning of Holmes's restatement of the originality requirement requires that we redirect a slightly misguided debate in American copyright law concerning the influence on it of Literary Romanticism. This will allow us properly to situate Holmes's restatement of originality in terms of "personality" within the aesthetic pragmatist approach to progress.

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[231] *See, e.g.*, Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Catharine Wells Hantzis, L*egal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988); Rand Rosenblatt, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123 (1975). See also PAUL L. GREGG, THE PRAGMATISM OF MR. JUSTICE OLIVER WENDELL HOLMES (1941).

[232] *See* Abraham Kaplan, *Introduction*, *in* DEWEY, *supra* note 128, at vii, xi.

[233] *See, e.g.*, DEWEY, *supra* note 128, at 11 ("The sources of art in human experience will be learned by him who sees how the tense grace of the ball-player infects the onlooking crowd…").

Copyright commentary has long debated the influence of Literary Romanticism on modern American copyright law and, in particular, on the law's conception of the author. Drawing upon the work of literary scholars Martha Woodmansee[234] and Mark Rose,[235] leading commentators such as Jessica Litman,[236] Peter Jaszi,[237] and James Boyle[238] argued in the early 1990's that copyright owners had justified the expansion of copyright rights by instilling in copyright law a conception of authorship drawn from Romanticism's purported ideal type of the heroic solitary genius, an autarchic individual who creates unique and heterodox creative works ex nihilo, or at least out of his own "singular inner being."[239] As Jaszi put it, "British and American copyright presents myriad reflections"[240] of "the full-blown Romantic conception of 'authorship,'"[241] though, to his credit, he admitted that "they sometimes remind one of images in fun-house mirrors."[242] More recent commentary has sustained[243] and refined[244] the romantic authorship thesis. Other scholars, however, have strongly criticized the core historical and theoretical claims of this Romantic Author School of copyright commentary,[245] not least because of *Bleistein*.[246]

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[234] *See* MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET (1994); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 229 (1992); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STD. 425 (1984).

[235] *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993).

[236] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1008-12 (1990) (discussing the "romantic model of authorship").

[237] *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992) [hereinafter *Author Effect*]; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) [hereinafter *Metamophoses*].

[238] *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

[239] Litman, *supra* note 236, at 1008.

[240] Jaszi, *Metamorphoses*, *supra* note 237, at 456.

[241] *Id*. at 463.

[242] *Id*. at 456.

[243] *See, e.g.*, LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (2007).

[244] *See, e.g.*, Margaret Chon, *The Romantic Collective Author*, 14 VAND. J. ENT. & TECH. L. 829 (2012). *See also* Mario Biagioli, *Genius Against Copyright: Revisiting Fichte's Proof of Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847 (2011).

[245] *See, e.g.*, Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, *in* ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTEMENT 69 (Reginald McGinnis ed., 2008) (arguing that "there is little reason to conclude that in the eighteenth century originality (understood as novelty or creativity) played even a tacit role in the definition of literary property").

[246] *See, e.g*, Erlend Lavik, *Romantic Authorship in Copyright Law and the Uses of Aesthetics*, *in* THE WORK OF AUTHORSHIP 45 (Mireille van Eechoud ed. 2014); Bracha, *supra* note 48; Lionel Bently, *R. v The Author: From Death Penalty to Community Service: 20th Annual Horace S. Manges Lecture*, 32 COLUM. J.L. & ARTS 1 (2008);

Bleistein has figured prominently in the debate because of a still often-quoted passage in the opinion that has significantly influenced the development of American copyright law—though perhaps not in the way we might have hoped. The *Bleistein* defendants had argued that the posters could not qualify for protection because, as Holmes put it, "the pictures represent actual groups—visible things…. [T]hey had been drawn from the life."[247] This would appear to us a strange argument, but it proceeded from the Supreme Court's dictum twenty years earlier in *Sarony*, quoted above, that in the case of photographs the "mere transferring…of the visible representation of some existing object" might not qualify for copyright protection—and the argument also anticipated the Supreme Court's holding ninety years later in *Feist* that authors cannot claim copyright in facts because authors do not "'create' facts but rather merely 'copy [facts] from the world around them.'"[248] Holmes responded:

> [E]ven if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[249]

This passage carried into twentieth century copyright law the low originality requirement at the core of nineteenth-century copyright law. If dicta in *The Trade-Mark Cases* had muddled things by suggesting that trademark law was different from copyright law because the former "required no fancy or imagination, no genius, no laborious thought,"[250] it was now clear that copyright law never required these qualities either.

Critics of the Romantic Author School have fastened upon *Bleistein*'s—and *Feist*'s—low originality standard as evidence that modern American copyright law has never been in thrall to any kind of Romantic notion of authorship.[251] Chief among these critics is Oren Bracha, who has argued that "[c]opyright's minimalist threshold originality requirement is but a mockery of the romantic vision of the author as an individual spirit who creates ex nihilo meritorious intellectual works."[252] Bracha instead identifies in the history of the

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Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997); Birnhack, supra note 4, at 5-6.

[247] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

[248] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340, 347 (1991).

[249] *Bleistein*, 188 U.S. at 250.

[250] The Trade-Mark Cases, 100 U.S. 82, 91 (1879).

[251] *See, e.g.*, Lavik, *supra* note 246, at 53.

[252] Bracha, *supra* note 48, at 265.

originality requirement a "full-fledged paradox"[253] that culminated in *Bleistein*. In the lead up to *Bleistein* and with the opinion itself, "[o]riginality, in the romantic sense, became the foundation of copyright law,"[254] yet *Bleistein* reduced "copyright's originality requirement to almost nothing"[255] by giving it "a restrictive and technical meaning"[256] that "has little to do with the romantic vision."[257]

What has been strangely missing from the debate over the romantic authorship thesis, aside from some of the nuance of Woodmansee's and Rose's initial historical claims, is any appreciation of the crucial differences between English and other strains of European Romanticism, on the one hand, and American Romanticism, on the other. With *Bleistein* American copyright law fully embraced a Romantic conception of the author, but it embraced a specifically *American* Romantic conception of the author that is altogether different from any stereotyped notion of heroic daemonic genius that legal scholars have associated with Literary Romanticism in general. Meanwhile, the "paradox" that Bracha identifies in which American copyright law glorifies originality at the same time that the law describes originality as commonplace and easily achieved is no paradox at all, nor is it a distorted image in Jaszi's "fun-house mirrors." On the contrary, it is, like Holmes' invocation of "[p]ersonality" in *Bleistein*, a completely unsurprising and straightforward reflection of the "Democratic Vistas"[258] of nineteenth-century American Romantic aesthetics, particularly as inflected by American Transcendentalism.

Indeed, Holmes's restatement of the originality requirement in terms of "personality" did something more than merely carry forward the nineteenth-century's low standard. It infused that standard with new meaning, or at least made explicit themes latent in nineteenth-century case law and commentary. Consider Holmes's declaration that "[t]he copy is the personal reaction of an individual upon nature. Personality always contains something unique." Well-informed readers of the *Bleistein* opinion in 1903 would immediately have recognized this as an article of American democratic intellectual faith, one that emerged out of American Transcendentalism and that by the turn of the century bordered on cliché. In the introduction to his best-selling 1903 anthology of Transcendentalist poetry, George Willis Cooke stressed the Transcendentalist orthodoxy that every individual's personality is unique. The Transcendentalists, Cooke wrote,

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[253] *Id*. at 208.

[254] *Id*. at 209.

[255] *Id*. at 200.

[256] *Id*. at 201.

[257] *Id*. at 267. Just as Jaszi had acknowledged in 1992 that Bleistein "both effaces and generalizes 'authorship,' leaving this category with little or no meaningful content and none of its traditional associations," See also Latvik question.

[258] Walt Whitman, *Democratic Vistas*, *in* WALT WHITMAN: COMPLETE POETRY AND COLLECTED PROSE 929 (Justin Kaplan ed., Literary Classics of the United States 1982) (1867).

> laid the greatest emphasis upon personality, and made of each individual man a distinct and unique expression of the Infinite Spirit…. That which makes man to be man, to have a character and personality of his own, to be different from all other creatures and men, is his immediate connection with the Universal Spirit, which manifests itself in him in a unique manner.[259]

Readers might also have recognized in Holmes's invocation of personality the influence of Walt Whitman, whom Holmes admired and with whom Holmes corresponded. Whitman, the author of such characteristic lines as "O climates, labors! O good and evil! O death! / O you strong with iron and wood! O Personality!,"[260] repeatedly described himself as, for example, the "bard of personality"[261] or the "Chanter of Personality… I project the ideal man, the American of the future."[262] Finally, consider John Dewey's possibly even more rhapsodic invocation of personality in his 1888 essay "The Ethics of Democracy." I quote it at length both because it expresses the deep significance of the concept of personality in American thought of the time and also because it explores the political dimensions of the concept:

> In one word, democracy means that personality is the first and final reality. It admits that the full significance of personality can be learned by the individual only as it is already presented to him in objective form in society, it admits that the chief stimuli and encouragements to the realization of personality come from society; but it holds, none the less, to the fact that personality cannot be procured for any one, however degraded and feeble, by any one else, however wise and strong. It holds that the spirit of personality indwells in every individual and that the choice to develop it must proceed from that individual. From this central position of personality result the other notes of democracy, liberty, equality, which are not mere words to catch the mob but symbols of the highest ethical idea which humanity has yet reached—the idea that personality is the one thing of permanent and abiding worth, and that in every human individual there lies personality.[263]

Three decades after *Bleistein*, in *Art as Experience*, Dewey was still talking about personality, and in terms similar to Holmes's: "But even the art that allows least play to individual variations—like, say, the religious painting and

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[259] George Willis Cooke, *Introduction*, *in* THE POETS OF TRANSCENDENTALISM: AN ANTHOLOGY 4, 8 (George Willis Cooke ed. 1903).

[260] Walt Whitman, *Apostroph*, LEAVES OF GRASS 219 (1900).

[261] Walt Whitman, *Starting from Paumanok*, LEAVES OF GRASS 89 (1900).

[262] Walt Whitman, *Notes*, LEAVES OF GRASS 286 (1900). *See also* Warren I. Susman, *"Personality" and the Making of Twentieth-Century Culture*, *in* CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 271, 277 (1984) (discussing Whitman's "frequent and consistent" use of the term "personality").

[263] John Dewey, *The Ethics of Democracy*, *in* JOHN DEWEY: THE POLITICAL WRITINGS 54, 61-62 (Debra Morris & Ian Shapiro eds. 1992)

sculpture of the twelfth century—is not mechanical and hence it bears the stamp of personality."[264]

The emphasis on personality in turn-of-the-century American culture also took more prosaic—and pessimistic—forms. In his statement that personality "expresses its singularity even in handwriting," Holmes called upon a conventional belief of the time, made clear in the first, lengthy chapter of the 1899 treatise *Ames on Forgery* entitled "Personality in Handwriting,"[265] that the details of personality were revealed in the interpretation of handwriting—which Holmes in his correspondence called "chirography,"[266] often when commenting on his own inscrutable script. And as Warren Susman has explained in an essay of enormous influence on American historiography,[267] the many popular self-help manuals of the time stressed the need for the democratic common man to develop "personality" if only to preserve his identity as against modern mass society, or in the most commonly used expression of the time, the "crowd."[268] Through the course of the early decades of the twentieth century, this appeal to personality as against the "crowd" sometimes took on a more desperate tone in certain strains of American Literary Modernism, with Ezra Pound, for example, calling for "rights of personality" and positing the central problem of the modern world as the "survival of personality."[269]

In conformity with American thinking of the time, then, Holmes's invocation of personality resulted not in a "restrictive and technical" originality requirement, but rather in one that was broadly inclusive and emphatically liberal, egalitarian, and humanistic—and American.[270] Holmes's statement that "a very modest grade of art has in it something irreducible which is one man's alone" calls to mind Ralph Waldo Emerson's insistence that each individual possesses an "infinitude,"[271] an "inner ocean;"[272] "every man has within him

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[264] DEWEY, *supra* note 128, at 251.

[265] DONALD T. AMES, AMES ON FORGERY: ITS DETECTION AND ILLUSTRATION WITH NUMEROUS CAUSE CÉLÈBRES 32 (1899). *See also* RICHARD WALOUER, HOW TO READ CHARACTER BY HANDWRITING (1902).

[266] *See* THOMAS HEALY, THE GREAT DISSENT 44 (2013).

[267] *See* Susman, *supra* note 262.

[268] *See id*. at 277.

[269] Ezra Pound, *Provincialism the Enemy*, 21 THE NEW AGE 268 (Quoted in Susman, *supra* note 262, at 281).

[270] *Cf.* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 119 (1998) ("[I]nstead of seeing personal expression as manifesting the 'romantic author,' it is better to see the melding of personal expression into 'creativity' as an egalitarian society's effort to move the 'romantic author' off center stage.").

[271] *See generally* MAURICE YORK, RALPH WALDO EMERSON: THE INFINITUDE OF THE PRIVATE MAN (2008).

[272] RALPH WALDO EMERSON, EMERSON: SELECTED JOURNALS 1820-1842, at 187 (Lawrence Rosenwald ed. 2010). *See also* GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE (1992).

something really divine."[273] This "something," declared Emerson, is the true source of originality: "And what is Originality? It is being, being one's self, and reporting accurately what we see and are."[274] Holmes also conveyed the continued receptiveness of American Romantic aesthetics to an older—essentially pre-Romantic—conception of individual genius, one well-exemplified in Samuel Johnson's declaration that "every man has his genius"[275] or in Whitman's celebration of the "genius…in the common people."[276] Much of the commentary both advocating and criticizing the Romantic Authorship School of copyright commentary proceeds from a stock notion of the Romantic "genius" as a revolutionary prodigy, a Promethean "creator ex nihilo of utterly new things."[277] Admittedly, there are elements of the Romantic tradition, including in America, to support this notion. But Holmes's formulation of the originality requirement in *Bleistein* invoked a different, distinctively American and distinctively democratic—and more particularly, Emersonian[278]—image of everyday, common genius.[279]

Proceeding in part from a misreading of *Bleistein*, commentators have lamented Bleistein's highly-permissive originality standard as a regrettable but necessary compromise with the reality that judges cannot reliably judge aesthetic merit, and thus as a standard perhaps not worthy of an ideal copyright law. Yet a closer reading of *Bleistein* better informed by the opinion's cultural context urges a different judgment: that its highly-permissive originality standard is not to be regretted, but to be celebrated. The standard emerged out of an individualistic and egalitarian cultural tradition that glorified "personality," and that did so in part because it was understood to adhere in every human being. For thinkers such as Dewey in 1888, furthermore, individual personality formed the basis of democratic legitimacy, and the ultimate goal of democratic society should be to provide the optimal conditions for its cultivation. In essence, *Bleistein* embraced a levelling conception of aesthetic creation, a conception of the common person as an author and the

[273] RALPH WALDO EMERSON, 3 JOURNALS 390 (Robert N. Linscott ed. 1960) (He continued: "therefore is slavery the unpardonable outrage it is.").

[274] RALPH WALDO EMERSON, 8 THE WORKS OF RALPH WALDO EMERSON 201 (1909).

[275] SAMUEL JOHNSON, 3 THE LETTERS OF SAMUEL JOHNSON: 1777-1781, at 284 (Samuel Johnson & Bruce Redford eds. 2014). *Cf.* RAYMOND WILLIAMS, KEYWORDS 143 (1983) (quoting Johnson).

[276] Walt Whitman, Leaves of Grass, in Walt Whitman: Complete Poetry and Collected Prose 1, 5 (Justin Kaplan ed., Literary Classics of the United States 1982) (1855).

[277] Bracha, *supra* note 48, at 193. For a strong critique of this depiction of Romanticism by copyright scholars, see Lavik, *supra* note 246

[278] *See* Perry Miller, *Emersonian Genius and the American Democracy*, 26 NEW ENGLAND QUARTERLY 27 (1953).

[279] Biagioli's intervention on this point is crucial. *See* Biagioli, *supra* note 244, at 1848 n. 2 ("Much smoke would be cleared on both sides by taking the romantic author to be a figure of irreducible expressive individuality rather than a creator ex nihilo, and by downplaying discussions of the relationship between originality and literary or artistic value.").

author as a common person. Critics that argue that the originality standard as formulated by *Bleistein* "has little to do with the romantic vision" are mistaken; it has everything to do with a romantic vision as seen by Americans of the time, if not still.

4. Personality, Progress, and the Market

One wonders how American copyright law might have evolved differently had Holmes put down his pen after he invested the originality standard—and American copyright law—with the dignity of democratic "personality." But Holmes had one more issue before him that required a response. Donaldson argued that the circus advertisements lacked sufficient aesthetic merit "to promote the Progress of Science and the useful Arts." The Sixth Circuit agreed, and so did Justices Harlan and McKenna as the sole basis for their dissenting votes. In his dissent, Harlan quoted the Sixth Circuit: "The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error."[280] Having opened copyright law up to this argument by holding that the fine arts fell within the scope of the Progress Clause, Holmes now had to face the consequences of this. He had to reconcile in some way the aesthetic with the Progress Clause's reference to progress. His effort to do so exposed a facet of Holmes's own personality altogether different from the one that so warmly glowed in his invocation of human personality just paragraphs earlier. Holmes's treatment of the progress requirement in *Bleistein* brought out his "bettabilitarian" stance that there are no "ultimates," no absolute, incontrovertible standards. Perhaps relatedly, it also brought out his unapologetic elitism, his dark fatalism with respect to popular democracy,[281] and, like the aestheticists he sought to emulate at Northwestern, his ultimate disappointment with the aesthetic sense of the "crowd."

Here in full is Holmes's famous statement of judicial aesthetic neutrality:

> 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 other end, copyright would be denied to pictures which appealed to a public

[280] *Bleistein v. Donaldson Lithographic Co*., 188 U.S. 239, 252 (Harlan, J., dissenting). Bracha cites Harlan's dissent as an example of courts' "continu[ing] to read some meaningful content into the originality requirement." *See* Bracha, *supra* note 48, at 205-06. But Harlan clearly dissented on the ground that the posters did not meet the progress requirement.

[281] *See* Rogat, *supra* note 43.

> 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.[282]

To find that the works at issue met the progress requirement, Holmes quite sensibly declined to apply his own aesthetic judgment of the circus posters. He did so, however, not on the ground that judges should never engage in aesthetic judgment, but rather on the ground that he, like most jurists, was "trained only to the law" and thus unqualified and prone to error. Caught in the middle, such judges might improperly deny protection to both very high and very low culture. Where once he rhapsodized about democratic personality, now Holmes presented an image of radical genius that is unintelligible, even "repulsive" to a public still behind the times, and a condescending image of popular taste "less educated than the judge."

Instead, to find evidence that the works promoted progress, Holmes retreated to the market's judgment of their worth, or more generally, to the infringer's judgment of their worth. If the works have "commercial value" or are subject to infringement in the "desire to reproduce them without regard to the plaintiff's rights," then the works have sufficient merit—"their worth and their success"—to promote progress. In pursuing this course, Holmes stood up for popular taste—"the taste of any public is not to be treated with contempt"—but made an altogether gratuitous show of doing so reluctantly—"It is an ultimate fact for the moment, whatever may be our hopes for a change." This is a remarkable shift in tone from his celebration of the "irreducible" uniqueness of the individual personality. As Mary Esteve has shown to be the case for many intellectuals—and aestheticists—of the time,[283] Holmes appears to have had great respect for the individual but something bordering on contempt for the "crowd." Yet Holmes believed that that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, right or wrong,"[284] and so he deferred to its judgment as expressed in the market as evidence of aesthetic merit.

For all of his claims of aesthetic neutrality, however, Holmes's particular solution to the problem of aesthetic progress was anything but aesthetically neutral. In deferring to market taste as the standard of merit, Holmes imposed on copyright law one particular view of the value of the aesthetic. This view holds that the realm of the aesthetic yields value primarily, if not exclusively, in

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[282] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

[283] *See* MARY ESTEVE, THE AESTHETICS AND POLITICS OF THE CROWD IN AMERICAN LITERATURE (1993).

[284] OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Mark DeWolfe Howe ed., 1963). Grant Gilmore found this statement to be "frightening." *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 49 (1977).

the form of aesthetic works, and that we can assess the aesthetic value of these works according to the extent to which they meet consumer demand, to the extent that they "command the interest of the public." This is a market definition of progress. It sees no value in what cannot be commodified and sold, such as one's own engagement in aesthetic play. Instead, it focuses on the value of the aesthetic only *after* a work has been completed and introduced to others.[285] *Bleistein*'s essentially industrial view of the purpose of aesthetic production has underpinned the accumulationist approach that intellectual property law has taken to aesthetic progress ever since.

Yet so apparently effective was Holmes's presentation of his aesthetic neutrality thesis and so thoroughly has it influenced the subsequent course of our law that it may be difficult to imagine that Holmes had any reasonable alternative other than deferring to market demand. Indeed, a third way beyond judge's themselves assessing aesthetic merit or judge's simply deferring to consumer demand may seem even more elusive in a consumer society where for most, deliberate aesthetic experience occurs purely in consumption, in leisure, rather than in production, in labor. But there was of course an alternative approach put squarely in front of Holmes by the very opinion he was writing, and it was based on the value of human "personality." In avoiding judgment of aesthetic merit, Holmes could just as easily have found—so thin was his reasoning—that a work's aesthetic "worth" was shown not by the mere fact that someone was willing to pay for it or that someone other than the author was willing to copy it, but rather by the mere fact that someone was willing to make the work, either for sale or otherwise, and that in making it, someone had invested one's personality in the work. Regardless of the work's value to others as a commodity, Holmes could have found merit in the aesthetic pleasure—and aesthetic cultivation—that attended the act of aesthetic creation, and further merit in the existence of whatever is "unique" and "irreducible" and "one man's alone" in the work created.

If this alternative approach seems unduly sentimental, even precious, consider that Holmes had just invoked all of this four paragraphs earlier in *Bleistein* as the very basis of the copyright property right. Importantly, as Holmes made clear at the conclusion of his aesthetic neutrality paragraph in referring to the preexistence of the property right—"without regard to the plaintiff's rights"—, the work's economic value did not form the basis of the property right. The property right was instead based on the already-established fact that the works contained personality. Their economic value simply showed that they met the progress requirement. Holmes thereby explicitly avoided circular reasoning of the "if economic value, then property right" variety. Instead, Holmes adopted an "if personality, then property right" logic with respect to the originality requirement and an "if economic value, then progress" logic with respect to the progress requirement. But what Holmes could not apparently bring himself to articulate was an "if personality, then progress" logic, and the result was that *Bleistein* separated the basis of copyright rights,

[285] *Cf.* Yoo, *supra* note 55

personality, from the purpose of granting those rights, progress in the form of "commercial value."

Why did Holmes refuse to embrace an "if personality, then progress" logic, the very logic that seemed to animate his Northwestern speech? We cannot know for sure. What is clear, however, is that such logic would not justify the incentive scheme that the framers established "to promote the Progress of Science and useful Arts" and that now undergirds the entire edifice of our intellectual property law—an incentive scheme that boils down essentially to the assumption that "if property rights are given, progress will follow." On the contrary, with respect to aesthetic works in particular, an "if personality, then progress" notion of progress might even suggest that there is no need to incentivize aesthetic labor through property rights when individuals might in any case engage in aesthetic labor as its own reward. Such a notion of progress might justify property-rights-like protections of the personality inherent in aesthetic work, protections in the nature of "moral rights"[286] to what is "one man's alone," but it might also counsel against the provision of property rights that undermine the cultivation of personality and creativity by infecting them with the profit motive.[287] It might further urge a limitation in those rights to facilitate other authors' ability to engage in aesthetic labor on the ground that such labor is in itself valuable and promotive of personality. And an "if personality, then progress" logic would certainly not justify the particular scheme of American intellectual property law as applied to the rest of copyrightable "Science" and patentable "useful Arts" of progress.

We are perhaps left, then, with the conclusion that, in *Bleistein*, the Intellectual Property Clause simply did the work that it was designed to do. It prompted Holmes to adopt a scheme of copyright protection that employs property rights to promote progress in the form of commodified intellectual goods. But when the aesthetic is brought under this scheme, much of what makes it unique is lost, and this has real consequences. In the resulting property rights regime, the imperative always to incentivize the production of more aesthetic works overrides the possibility that aesthetic work, aesthetic labor, is valuable in itself regardless of what, if anything, this aesthetic work produces. As in *Bleistein*, the focus shifts away from human personality and towards commodified things. As I seek to show in the next Part, *Bleistein*'s imposition on the fine arts of a property-rights-based incentive scheme best suited to "Science" and the "useful Arts" has worked a destructive effect on our copyright law, which helps us to appreciate how much better off we might have been if the framers had somehow managed to exclude from the Intellectual Property Clause any reference at all to the fine arts.

III. Misreading *Bleistein* and the "If Value, then Right" Circularity

[286] *See generally* MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY (2011).

[287] *See generally* Jeanne Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 2010.

In the decades immediately following *Bleistein*, it might have been appropriate to ask which aspect of *Bleistein* would ultimately prevail? As noted above, Holmes's opinion established a fundamental division in copyright law between the basis of copyright protection, originality in the form of personality, and the purpose of copyright protection, progress in the form of commodified "commercial value." But the relation between these two sides of *Bleistein* was particularly unstable, with the one driven by the imperatives of Romanticism and the aesthetic, and the other driven by the imperatives of industrial capitalism, which were the very imperatives against which Romanticism and the aesthetic at least in part defined themselves. It was thus perhaps inevitable that after *Bleistein*, this division would eventually erode, so that either personality or commercial value would come to dominate both the basis and purpose of copyright property rights and drive the evolution of the law.

There can be little doubt that in the post-*Bleistein* synthesis in which we find ourselves, *Bleistein*'s division between the basis and purpose of the law has indeed collapsed, with commercial value now defining both, and personality more or less forgotten, or seen at best as having always been an empty or meaningless category. Many factors likely contributed to this outcome. Most notably, as discussed above, the rise of collective, corporate forms of authorship and closely-related changes in work for hire doctrine made Holmes's concept of personality untenable with respect to an increasing proportion of copyrightable works. If corporate works weren't exactly created by a "crowd," neither were they created by a singular individual. They could not so readily claim the mantle of "irreducible" personality. Furthermore, courts were already shifting their focus towards commercial value as the primary concern of the law, and the "work" had taken on a life of its own, so much so that for some courts, it seemed that it was not the author's labor that constituted commercial value, but the work itself that did so.

Bleistein both expressed and substantially advanced these general trends in copyright law. Indeed, it arguably brought them to their full realization, but not for the reason conventionally given. The overthrow of personality by commercial value did not occur because *Bleistein* set any kind of "technical and anemic"[288] originality standard that "emasculate[d]"[289] the originality doctrine. As I have tried to show, understood in its context, Holmes's humanistic, egalitarian notion of personality was instead a quite vital, even passionate, affirmative vision of authorship. And criticisms that read it as a negative retreat arguably only further the dominance of commercial value by casting it as the only meaningful concept at hand.

Instead, the case law and commentary after *Bleistein* suggests a perhaps somewhat mundane explanation for why *Bleistein* performed such a decisive role in shifting the law to commercial value. The explanation is that Holmes's

[288] Bracha, *supra* note 48, at 267.
[289] *Id*. at 224.

reasoning—or more accurately, his swaggering rhetoric[290]—failed to make clear the distinction the opinion sought to draw between its separate analyses of the originality requirement and the progress requirement. Soon after *Bleistein*'s issuance, courts began to misread and misapply the opinion in exactly the way that current courts and scholars still do—which probably largely accounts for our current misunderstanding. They merged *Bleistein*'s call for judicial aesthetic neutrality with *Bleistein*'s discussion of originality. In essence, *Bleistein* made two separate holdings: first, to meet the originality requirement, copyrightable expression must (a) not be copied from another author and (b) contain the author's personality; and second, to meet the progress requirement, copyrightable expression must (c) contain economic value. But courts applied *Bleistein* to hold simply that to meet the originality *and* progress requirements, copyrightable expression must (a) not be copied from another author and (c) contain economic value. Holmes's opinion was highly stylized, but not especially analytic; it was beautiful to read, but did not support disciplined application by lower courts. Its more easily digestible economistic rhetoric of commercial value supplanted its more abstruse humanistic rhetoric of personality. Already in decline, the status of the authorial laborer collapsed. Already in ascendance, the status of the copyrighted "work" reached its apex. This helped to set in motion the "if economic value, then property rights" circularity that continues to undermine our copyright law.

Consider, for example, the 1911 district court opinion in *National Cloak & Suit Co v. Kaufman*.[291] The plaintiff asserted ownership of the copyright in a book of illustrations entitled "New York Fashions, Vol. 14, No. 4." The defendant argued, among other things, that the illustrations did not deserve copyright protection. In ruling for the plaintiff on the issue, the court's opinion took the form in large part of a word salad of phrases from *Bleistein* that blended together Holmes's discussions of personality and aesthetic neutrality.[292] It is not clear from the opinion whether it was a lack of originality or of merit that the defendant was arguing, nor did it matter. The court analyzed both issues together. It ultimately concluded that the illustrations "contain the something that appeals to the taste of an admiring public. It is this secret portrayed by the artist differing from other pictures of this kind in which lies their value and which apparently caught the eye of the defendant and furnishes the reason for protecting the fruits of the artist's labors by copyright."[293]

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[290] The treatise writer Arthur Weil openly criticized Holmes's *Bleistein* opinion for its style. ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW WITH ESPECIAL TO THE PRESENT UNITED STATES COPYRIGHT ACT 40 (1917) ("Some of its remarks appear, with all deference, to be in the nature of assumption."). Soon after his appointment to the Court, Holmes brethren also apparently began to take issue with his writing style. *See* WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 287-88 (1950) (noting criticism by other justices of "rapturous" passages in Holmes's opinions).

[291] 189 F. 215 (C.C.Pa. 1911).

[292] *Id*. at 217-218.

[293] *Id*. at 218.

Other courts through the course of the century similarly read *Bleistein*'s invocation of aesthetic neutrality and commercial value as bearing on the question of originality. In the 1939 case of *Vitaphone Corp. v. Hutchinson Amusement Co*.,[294] for example, the court adopted the now standard practice of merging quotations from *Bleistein*'s separate analyses. The court stated:

> [I]t must be admitted [that the photoplays at issue] showed originality. As the Court said in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250, 251: 'The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. * * * 'It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations * * * 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.'[295]

In the 1941 case of *Stuff v. La Budde Feed & Grain Co*.,[296] the court similarly quoted from *Bleistein*'s discussion of "commercial value" and "their worth and their success" to find that the work's market value proved "sufficient novelty" to trigger protection: "In the instant case, although the picture of the idiotic looking boy is almost repulsive to look at, the drawing contained sufficient novelty to attract and hold the attention of many people."[297] For a more recent and succinct example, the court in the 2000 case of *SHL Imaging, Inc. v. Artisan House, Inc*.[298] also quoted from both parts of *Bleistein* in assessing the originality of the works at issue: "Rather, [Holmes] noted that courts may reject protection for works within 'the narrowest and most obvious limits' and that works are protectible when there is a 'very modest grade of art.'"[299] Even the

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[294] 28 F.Supp. 526 (D. Mass. 1939).

[295] *Id*. at 529. *See also* Hoague-Sprague Corporation v. Frank C. Meyer Co. 27 F.2d 176, 179 (D.C.N.Y.1928) (assessing copyrightability in terms of the "worth and success" of the work).

[296] 42 F.Supp. 493 (E.D. Wisc. 1941).

[297] *Id*. at 495.

[298] 7 F. Supp. 2d 301 (S.D.N.Y. 2000).

[299] *Id*. at 309. For further examples of courts' merging Holmes's analysis of the progress requirement with their own analysis of the originality requirement, see Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012); Stern v. Does, 978 F. Supp. 2d 1031, 1040 (C.D. Cal. 2011) aff'd sub nom. Stern v. Weinstein, 512 F. App'x 701 (9th Cir. 2013); Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC, 560 F.3d 53, 60 (1st Cir. 2009); Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 289 (3d Cir. 2004) (Becker, J., concurring); Matthew Bender & Co. v. W. Pub. Co., 158 F.3d 674, 690 (2d Cir. 1998); Weissmann v. Freeman, 868 F.2d 1313, 1322-23 (2d Cir. 1989); Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 669 n. 7 (7th Cir. 1986); M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 439 (4th Cir. 1986); Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 282 (5th Cir. 1970); Paul Morelli Design, Inc. v. Tiffany And Co., 200 F. Supp. 2d 482, 487-88 (E.D. Pa. 2002); Diamond Direct, LLC v. Star Diamond Grp., Inc., 116 F. Supp. 2d 525, 528

Supreme Court has arguably skewed the distinction between *Bleistein*'s originality standard and its discussion of aesthetic neutrality. In its *Feist* decision, the court explained that some works, even if uncopied, may not qualify as original: "There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."[300] To support this proposition, the court cited *Bleistein*'s aesthetic neutrality paragraph: "*See generally* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (referring to "the narrowest and most obvious limits")."[301]

If *Bleistein* already leaned towards an accumulationist approach to aesthetic progress by setting commercial value as the index of progress, courts' misreading of *Bleistein* and the "if economic value, then property right" circularity this misreading abetted only intensified the law's commitment to the accumulationist approach. Now the subject matter of copyright law was uncopied commercial value. Personality no longer exerted a moderating influence on the circularity by introducing into the equation a value other than uncopied commercial value. To make matters worse, *Bleistein* offered no opportunity for Holmes to raise any other possible limits to the if value, then right circularity. Because the defendant has made verbatim copies, Holmes never had to address the other side of copyright law: infringement, and more importantly, non-literal infringement by other creative personalities. Holmes had before him a binary question of subject matter, not a continuous question of scope. Furthermore, the *Bleistein* posters were based on "nature," on the "original;" "[T]hey had been drawn from the life."[302] Holmes could emphasize "personality" and independent creation as much as he did because Bleistein's posters were not alleged to have drawn from or incorporated anyone else's copyrighted work. Thus, Holmes never addressed the most significant cost of the if value, then right circularity: its limitation on the ability of future authors to draw from the works of previous authors.

Bleistein did however touch upon the issue known as the "sweat of the brow"[303] basis for copyright protection, and this might have presented some

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(S.D.N.Y. 2000); Am. Dental Ass'n v. Delta Dental Plans Ass'n, No. 92 C 5909, 1996 WL 224494, at *8 (N.D. Ill. May 1, 1996) vacated, 126 F.3d 977 (7th Cir. 1997); Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 48 (D. Mass. 1990); Weissmann v. Freeman, 684 F. Supp. 1248, 1257 (S.D.N.Y. 1988) aff'd in part, rev'd in part, 868 F.2d 1313 (2d Cir. 1989); Moore v. Lighthouse Pub. Co., 429 F. Supp. 1304, 1309 n. 3 (S.D. Ga. 1977). But see Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 855-56 (5th Cir. 1979) (recognizing that *Bleistein*'s discussion of aesthetic neutrality pertained to the progress requirement).

[300] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340, 359 (1991).

[301] *Id*.

[302] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

[303] *See Feist*, 499 U.S. at 353 ("Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling facts."). *See also* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1875 (1990).

limiting principle external to the if value, then right circularity. Immediately after his invocation of "personality," Holmes continued:

> If there is a restriction [in the copyright act on the protectability of expression] it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real work,—suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day,—they will find themselves entirely beaten."[304]

The skill of the illustrator of the *Bleistein* posters thus easily exceeded a "very modest grade of art" and supported the originality of his expression.

But another irony of the legacy of the *Bleistein* case—and probably the clearest expression of the overriding logic of commodity fetishism in our law—is that in the one instance where we still employ *Bleistein*'s emphasis on personality, we do so only to suppress any concern with the laborer's "sweat of the brow." Holmes mentioned in passing that "directories and the like…may be copyrighted,"[305] and he was certainly correct that in the nineteenth and early-twentieth century, copyright law protected facts compiled in such media as maps or telephone books in light of the enormous amount of labor that went into their collection.[306] But this rule has since changed. In *Feist*, the Court held that an original selection and arrangement of facts may be copyrighted, but the facts themselves are not copyrightable.[307] In making this holding, the Court cited *Bleistein* exactly once, in passing, as quoted above.[308] Perhaps the Court dismissed *Bleistein* because it explicitly stated in dicta a rule contrary to that stated in *Feist*—or perhaps the Court was weary of the minefield of Holmes's undisciplined prose. Instead, the Court relied heavily on *The Trade-Mark Cases* and *Burrow-Giles*.[309] But Holmes's emphasis on the personality of the author arguably suffuses the opinion.[310] The Court explained that only an intellectual work that conveys authorial subjectivity—only the "fruits of intellectual labor,"[311] of "intellectual production, of thought, and conception"[312]—can qualify for copyright protection, and it so qualifies because any uncopied

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[304] *Bleistein*, 188 U.S. at 250.

[305] *Id*.

[306] *See* Ginsburg, *supra* note 303, at 1875-80.

[307] *Feist*, 499 U.S. at 347.

[308] *See supra* notes 300-301.

[309] *Id*. at 346-47.

[310] *See* Jaszi, *Author Effect*, *supra* note 237, at 302 (arguing that the *Feist* "opinion wears its values on its sleeve; from first to last, its rhetoric proceeds from unreconstructed faith in the gospel of Romantic 'authorship.'").

[311] *Feist*, 499 U.S. at 347

[312] *Id*.

expression of subjectivity will apparently always be original—as *Bleistein* put it, "personality always contains something unique." Mere mechanistic grunt work, by contrast, in the nature of the "industrious collection" of facts—or the "slavish copying" of the *Bridgeman Art Library* case[313]—does not rise to the level of personality and the products of such labor are not recognized by the law. Here alone in copyright law personality trumps commercial value, but only to devalue something even less important than "intellectual labor," the non-intellectual laborer's mere "sweat of the brow."

The demise of the "sweat of the brow" doctrine provides strong evidence of the more general collapse in the status of authorial labor in our copyright law after *Bleistein*. Now authorial labor is merely the means of producing intellectual works and of establishing who owns those works, and if we can accomplish the same amount of output with less labor, so much the better. Judge Easterbrook captured this sensibility quite effectively in a 1985 opinion:

> The copyright laws protect the work, not the amount of effort expended.… The input of time is irrelevant. . . . A photograph may be copyrighted, although it is the work of an instant and its significance may be accidental. In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's installment of *Bleak House*. The Laffer Curve, an economic graph prominent in political debates, appeared on the back of a napkin after dinner, the work of a minute. All of these are copyrightable.[314]

This sensibility has little real interest in the "input" of authorship—other than that it be made more efficient—and has come even to celebrate inadvertent, unconscious acts of authorship. For example, in the well-known 1951 case of *Alfred Bell & Co. v. Catalda Fine Arts*, the Second Circuit cited *Bleistein*, but only as approving the proposition that a work need not be the product of skill to qualify for copyright protection.[315] The court's deskilling of authorial labor went farther. Where a Romantic author might once have been understood to be inspired as if by a bolt of lightning, now the metaphor was different:

> There is evidence that they were not intended to, and did not, imitate the paintings they reproduced. But even if their substantial departures from the paintings were inadvertent, the copyrights would be valid. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently

[313] Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (in case involving highly-accurate photographs of public domain paintings, finding that mere "'slavish copying,' although doubtless requiring technical skill and effort, does not qualify" for copyright protection)

[314] Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, 768 F.2d 145, 148 (7th Cir. 1985). *See also id*. (expressing recognition that for one reason or another many of these examples were not or would not actually be copyrightable, but stating that "[t]he principle's the thing").

[315] Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951).

> distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it.[316]

Catalda's "clap of thunder" dramatically devalues both personality and labor, and why shouldn't it? Its version of copyright law is concerned purely with the work produced and with the production of more such works regardless of the means of production, which might as well all be thunderclaps (or perhaps artificial intelligence). Authorial labor is "drudgery," a necessary evil, a necessary means of no value in itself that is only worthwhile because of the ends it produces.

Copyright law's sole focus on ends, on commodified "commercial value," appears in other areas of copyright law. For a compelling example, consider transformativeness doctrine in fair use, which is often thought to be one of the more aesthetically progressive areas of copyright doctrine, concerned as it often is with artistic appropriation and apparently not at all with commercial value. But in adopting the transformativeness approach to fair use in *Campbell v. Acuff-Rose Music*, the Supreme Court declared that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works,"[317] because such works, rather than "merely supersed[ing] the objects of the original creation…instead add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[318] The Court construed the Progress Clause (as amended) to focus on the end product of transformative conduct: "transformative works," "new expression, meaning, or message." The Court never considered the value of the defendant's transformative conduct in itself, specifically, the pleasure and edification a second-generation author might derive from such conduct even if she never ultimately fixes and publishes a transformative work. The Court's silence on the issue is of course perfectly understandable. It was never argued in the case and is conventionally understood to have no bearing whatsoever on the fair use inquiry. To the extent that the fair use analysis considers such factors as whether the defendant's use was for a non-commercial or educational purpose, still the ultimate focus of the analysis is on how the defendant's conduct will affect the ultimate goal of copyright law, which is the accumulation of works of authorship.

In pulling the fine arts into the Intellectual Property Clause and then responding to the problem of aesthetic progress with a commercial standard of merit, what *Bleistein* and its prose ultimately gave rise to is what might be termed the argument from "more"—an argument altogether in tune with one vein of thinking in the present-day, which is prone to assess all modes of progress in quantitative, accumulationist terms. More copyright protection will generate more expression, goes the argument, and some of this expression, we trust, will promote aesthetic progress, be that progress in the form of more pleasingly diverse expression, more pleasingly beautiful expression, or simply

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[316] *Id*. at 104-05.
[317] Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).
[318] *Id*.

more pleasing expression.[319] Courts often rehearse this argument.[320] The Eleventh Circuit framed it most starkly: "This broad [copyright] protection encourages authors to create more works and thereby advance the progress of science and useful arts."[321] The argument from more arguably began with *Bleistein*. Though Holmes' couldn't help hiding his distaste for the works before him in *Bleistein*, his opinion nevertheless relied heavily on the view that by adopting a baseline of near-total propertization of anything uncopied that anyone else wants to copy, we will incentivize everything regardless of merit, and while this will produce more transitory bad, it will also produce more lasting good.

This argument works especially well in the world of *Bleistein*. As noted above, the facts of *Bleistein* never called upon Holmes to consider the extent to which Courier's illustrator drew on previous authors' works or the extent to which Donaldson's illustrator should have been able to draw on the work of Courier's. The argument from more generally declines to concentrate on such issues. This is because in its essential outlines, it assumes purely independent creation. For all of its economism, it embraces at least one aspect of romantic aesthetics: it assumes that works are drawn from "nature," not from other works. The work expresses the "singularity" of the author, "that which is one man's alone," not the degree to which it is based on another personality's work. Everything that is needed to progress can be found in the commons, not in the property of others.

The world of *Bleistein* may very well have existed in Holmes' time, particularly since copyright registration formalities pushed much of what might have been necessary to progress into the public domain.[322] But as I seek to consider in the next Part, it certainly does not exist now. If the aesthetic now consists primarily of popular cultural expression, and if nearly all of that expression is propertized the moment it is fixed in RAM, the ability of authors to participate in the aesthetic is very severely constricted. In the "Web 2.0" world, our "nature" is other people's copyrighted work. More copyright protection may very well incentivize authors to try to participate in the aesthetic, but more copyright protection will also prevent them from doing so.[323] The argument from more makes the facile assumption that the source of "more" is the inexhaustible creativity of the autonomous profit-seeking agent and some exogenous infinite commons, rather than the market itself.

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[319] *See* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1575 (2005) (criticizing the "uncompromising 'more is better' approach" of traditional copyright policy).

[320] *See, e.g.*, Hofheinz v. AMC Productions, Inc., 147 F.Supp.2d 127, 140 (E.D.N.Y. 2001) ("The very point of fair use is that, in certain circumstance, such as the one at bar, the law will not require an infringer of a copyrighted work to obtain such a license if it advances the overall goal of copyright—to create more works.").

[321] Greenberg v. National Geographic Soc., 533 F.3d 1244, 1272 (11th Cir. 2008).

[322] *See* Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 205 (2005).

[323] *See* Bently, *supra* note 246, at 98.

IV. Copyright Doctrine and a Society of Aesthetic Practice

Bleistein might have made some sense for the consumer society of twentieth century America, a society in which for most of its inhabitants, consumption (or religious worship) was the sole source of aesthetic meaning, and production, labor, was often little more than "anaesthetic"[324] drudgery. Nor did many have much option in this regard. The means of aesthetic production and of the communication of that production were highly-centralized. The raw materials of aesthetic production were scarce. In such a society, it might even have made sense to some to conceive of aesthetic progress in essentially aristocratic—or medieval—terms, as consisting simply of more great works, of more archivable excellence and more wings of the museum, since the aesthetic condition of the "crowd" remained intractably hopeless. To others, like those who committed to the aesthetic education movement of the early-century, industrialism and consumer society finally provided conditions of sufficient abundance that the time had come to democratize aesthetic experience. But even the most optimistic practitioners of such "missionary aestheticism"[325] recognized that this experience would largely, if not entirely, take the form of passive consumption rather than active production.

The new century has of course brought new technological and cultural conditions far different from those that motivated *Bleistein*. Like space law in the 1960's[326] and "cyberlaw" in the 1990's,[327] the newest wave of "legal futurism"[328] has taken the form of legal commentary on the advent of post-scarcity society, 3D printing, and "prosumerism."[329] Though the full potential of these technological and cultural developments likely remains quite far off, their implications for aesthetic progress and the law's role in promoting it are already becoming clear, particularly in the currently-existing world of digital user-generated content (UGC). In this world, the means of aesthetic production are nearly costless, and the channels of distribution have been radically decentralized. This helps to explain statistics like those released by YouTube, that its more than one billion users upload to the UGC site more content in a single month than the major TV networks in the U.S. produced in sixty years.[330] All of this content is freely provided. Much of it is non-commercial. Users

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[324] DEWEY, *supra* note 128, at 39.

[325] MALTZ, *supra* note 214, at 2.

[326] *See* Barton Beebe, L*aw's Empire and the Final Frontier: Legalizing the Future in the Early* Corpus Juris Spatialis, 108 YALE L.J. 1737 (1999).

[327] *See, e.g.*, Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995).

[328] *See* Barton Beebe, *Fair Use and Legal Futurism*, 24 LAW & LIT. 10 (2013).

[329] *See, e.g.*, Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015).

[330] Great Scott! Over 35 Hours of Video Uploaded Every Minute to YouTube, YOUTUBE OFFICIAL BLOG (Nov. 10, 2010), http://youtube-global.blogspot.com/2010/11/great-scottover-35-hours-of-video.html (cited in Lemley, *supra* note 329, at 486 n. 124).

generate this content, this aesthetic expression, because they enjoy and derive meaning from making it and sharing it.[331] How much of it consists of excellence, of great works worth accumulating in "some giant warehouse filled with works of authorship?" How many of these millions of videos have value other than to those who produced them and perhaps their friends and family? Very little, perhaps almost none of them. But "commercial value," let alone excellence, is not the goal of the undertaking any more than it is the goal of a pre-school art class.[332] The "more" we are interested in here is more aesthetic practice, more actualizing of "personality," more active human flourishing and human solidarity—even if much of it results in the making and sharing of more puppy videos. This is why the pragmatist aesthetics of the twentieth century—that arguably arose in part out of that century's aspirations for its new "abundant society,"[333] its own "economics of abundance"[334]—now makes so much more sense in the twenty-first. At its core, pragmatist aesthetics proposes a different, essentially egalitarian vision of what aesthetic progress entails. It does not judge progress by aesthetic monuments, by the aesthetic equivalent of ever taller buildings. Nor does it judge aesthetic progress by the new "aestheticization of everything," in which more and more everyday commodities are rendered aesthetically appealing[335]—the problem in an abundant society is not a lack of opportunities for aesthetic consumption, but a lack of opportunities for meaningful aesthetic production. Pragmatist aesthetics instead judges progress by the extent of popular access to and participation in aesthetic practice,[336] and our new technological and cultural conditions have begun to make that understanding of aesthetic progress altogether appropriate.

The massive democratization of aesthetic practice that has attended the rise of online UGC shows just how obsolete copyright law's purely accumulationist approach to aesthetic progress has become. Apologists for the present framework may cite the explosion in works of authorship on the Internet as evidence that the accumulationist approach has indeed produced

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[331] *See* DIGITAL LABOUR AND PROSUMER CAPITALISM: THE U.S. MATRIX (Olivier Frayssé & Mathieu O'Neil eds. 2015); COHEN, supra note 55, at 37 (discussing "produsage"); Philip Kotler, *The Prosumer Movement: a New Challenge For Marketers*, 13 ADVANCES IN CONSUMER RES. 510 (1986).

[332] *Cf.* David Lange, *At Play in the Fields of the Word*, 55 LAW & CONTEMP. PROBS. 139, 146 (1992) (comparing creative play in childhood to "the adult fantasy that we recognize in authorship").

[333] *See, e.g.*, WALTER A. WEISSKOPF & RAGHAVAN N. IYER, LOOKING FORWARD: THE ABUNDANT SOCIETY (1966). *See generally* RONALD SCHLEIFER, MODERNISM AND THE LOGIC OF ABUNDANCE IN LITERATURE, SCIENCE, AND CULTURE, 1880-1930 (2000).

[334] *See, e.g.*, STUART CHASE, THE ECONOMY OF ABUNDANCE (1934).

[335] *See* GILLES LIPOVETSKY & JEAN SERROY, L'ESTHÉTISATION DU MONDE: VIVRE À L'ÂGE DU CAPITALISME ARTISTE (2013).

[336] *Cf.* Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 349 (2005) (arguing that "the success of a system of copyright depends on both the extent to which its rules permit individuals to engage in creative play and the extent to which they enable contextual play, or degrees of freedom, within the system of culture more generally").

"more," but copyright law has hardly incentivized this expression, nor do many of these works have significant intrinsic value other than as outcomes of aesthetic practice and sources for further such practice. Rather, with respect to UGC, copyright law's role now is largely to suppress democratic aesthetic practice and participation;[337] its role is to encourage passive consumption rather than active production by the "crowd," all to incentivize the culture industries to produce ever more works passively to be consumed. This is particularly true for what might be termed "superstar works." It has been apparent for many years that the copyright system helps to underwrite a cultural star system, where certain works far exceed—on the order of a power-law distribution[338]—other works in their cultural impact and, if they are made for profit, their profitability.[339] These works become central to cultural conversation and important sources of shared meaning. They provide crucial raw materials for others to use in their own aesthetic practices.[340] Copyright law, however, ensures that these works are substantially protected from appropriation and redefinition, from the sort of "imaginative redescription" of which Rorty spoke. For all of its progressiveness, transformativeness doctrine, for the few who can afford it, remains inadequate—and itself focused on accumulation, on ends not means.

Had *Bleistein* adopted personality as both the basis and purpose of copyright protection, it is likely that the originality requirement would not be significantly different in effect from its current incarnation, but certain other areas of copyright law might be quite different and substantially more in sync with current cultural technology. But even if *Bleistein* was a missed opportunity, we can set aside the counterfactual briefly to consider more directly how a law constructed in pursuit of a pragmatist aesthetic vision of aesthetic progress might differently accommodate these new technological conditions. I consider two general themes.

First, the law would modestly shift its basic balance between incentives and access. If we accept that one component of aesthetic progress is facilitating the activity of second generation authors because this activity is intrinsically good (regardless of what is produced), then we must modify, in the context of aesthetic expression, our sense of the balance in copyright law between economic incentives to produce aesthetic works and limits on those incentives to allow aesthetic activity by others. The point is that when we worry about this

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[337] *See* Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VANDERBILT J. ENT. & TECH. L. 921 (2009). *See also* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

[338] *See* Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 U. TORONTO L.J. 525 (2009).

[339] *See* Alan B. Kreuger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 J. LABOR ECON. 1 (2005); 5. Lex Borghans and Loek Groot, *Superstardom and Monopolistic Power*, 154 J. INST. & THEOR. ECON. 546 (1998).

[340] *See* Cohen, *supra* note 336, at 368.

balance between incentives and access in the context of scientific and technological progress, we typically do so only in an effort to insure that second generation authors and inventors will be able to create second generation *works* that represent further progress. Our goal is ends, not means. Indeed, we would generally prefer less technological labor because we see it as no more than a means to the end that we actually value. In the context of the aesthetic, however, we would do well to add to the access-incentives equation the value of aesthetic production in itself, regardless of whether the second generation works themselves represent some form of additional value over what came before them.

As a concrete example of the impact on copyright doctrine of such a shift in the access-incentives balance, it would urge a fundamental change in our understanding of the purpose of the transformativeness analysis in the fair use inquiry. We would no longer apply the doctrine solely in pursuit of the accumulation of more transformative works dynamically over time. Our goal would also be more transformative practice statically in the present.[341] This would expand the scope of the doctrine, particularly for non-commercial uses, but not nearly as dramatically as the traditional cultural industries might fear. When the *Acuff-Rose* Court decided whether Two Live Crew's transformation of Roy Orbison's song should qualify as a transformative use, it considered only whether the end product represented "new expression, meaning, or message," and thus a new contribution to the giant warehouse of works of authorship. The Court did not consider how the act of transformation was itself meaningful to the band members themselves, how it helped to further their own self-actualization, the transformation of their own personalities. This may seem a trivial consideration in the context of professional, for-profit, mass-market artists, and perhaps it is. But it is not at all trivial in the context of the millions of UGC authors who create and share transformative content. The mindset of a different time, of traditional consumer society, would value transformative labor only to the extent that it produces a transformative work of value to consumers other than the transformative work's author. But as more and more "consumers" engage in active aesthetic production because of its value in itself and not because of any "commercial value" it may produce, transformativeness doctrine should be expanded to facilitate this production, this form of aesthetic progress.[342]

Similarly, such a shift in the access-incentives balance would urge a reformulation of certain of the anti-circumvention provisions attached to the Copyright Act by the Digital Millennium Copyright Act of 1995.[343] These provisions allow individual users to develop means to circumvent technological controls on the use of copyrighted digital works copies of which they have

[341] *Cf.* William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 267-68 (1988) (discussing the static and dynamic benefits of property rights).

[342] *See* COHEN, *supra* note 55, at 81.

[343] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C., 28 U.S.C., & 35 U.S.C.).

lawfully purchased—or in any case lawfully gained access to.[344] But these provisions prohibit the sharing of such means with others (for example, by posting the circumventing software online),[345] with the result that all but the most technologically sophisticated users are prevented from fully interacting with the digital works that they have lawfully purchased. It is a strange framework, one that seems to recognize the importance of allowing consumers to engage in more than mere passive consumption, but then denies that privilege to all but the priesthood of code writers. A copyright law that recognized the value of democractizing aesthetic practice would eliminate the prohibition against the sharing of technological means to circumvent controls on use.

Second, a copyright law committed to aesthetic progress would emphasize much more the nature and significance of the labor that goes into the production of works of authorship. Contrary to conventional wisdom, we need more Romantic authorship, not less, but Romantic authorship understood in the egalitarian, commonplace American Romantic sense in which Holmes used the term "personality." A copyright law that placed greater emphasis on the common human origins of each work might sensitize us to the extraordinary degree to which new works are based not on thunderclaps or bolts of lightning, or on "nature," but rather on other preexisting and often copyrighted works, which are themselves products of human labor.[346] Like any other commodity, intellectual works do not emerge ex nihilo but out of the social and intellectual relations of many intellectual laborers. The accumulationist orientation of our current copyright law tends to obscure this fact; if it romanticizes anything, it romanticizes, indeed fetishizes, the "Romantic work" rather than the "Romantic author."

The concrete implication of such a change in the sensibility of our copyright law would be a greatly expanded system of moral rights protections and limitations on those protections.[347] Our current, quite limited moral rights regime fully expresses the product-oriented rather than process-oriented stance of the law. We currently offer the moral rights of attribution and integrity only to the "author of a work of visual art," which the Copyright Act defines as any painting, drawing, print, sculpture, or photograph existing in a single copy (where, in the case of a photograph, that copy is signed) or existing in 200 copies or fewer where each copy is signed and consecutively numbered.[348] The law endows authors with moral rights based not on the nature of their means of production, but only on the nature of the work-product that they ultimately produce. It cares little about the personality, the moral "sweat of the brow," that went into the work provided that the work is limited in its number of copies.

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[344] *See* 107 U.S.C. § 1201.

[345] *See* 107 U.S.C. § 1201(b).

[346] *See* Bently, *supra* note 246, at 35.

[347] On moral rights, see generally MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY (2011).

[348] *See* 17 U.S.C. § 106A.

The commodity defines the status of the laborer, rather than the laborer the status of the commodity.

A revised regime, by contrast, would extend the attribution right to *all* works of authorship and impose the attribution duty on *all* publicly distributed such works. Particularly in the fair use context, any act of appropriation, any "imaginative redescription," would trigger the obligation at least to provide the source for any copying that would otherwise constitute infringement, and at best to provide the source for any significant copying at all, even of public domain works. Though this is routine practice in the open-source software world,[349] it may nevertheless seem a radical intervention outside of that world. But it is consistent with the pursuit of aesthetic progress understood as the pursuit of human personality and human solidarity rather than of more and more seemingly self-generating commodities.

Such a revised regime would meanwhile greatly limit the right of integrity if not eliminate it altogether. Such a proposal may seem to be in some tension with the goal of promoting personality and solidarity, since according to the traditional justification for the right of integrity, a work's integrity should be maintained out of respect for the human personality contained in the work. Our commitment to attribution increases this tension, because a copyist would be obligated to give the source of the copied work, and in cases of "mutilation,"[350] the source would be further associated with that mutilation. This conflict poses an essentially ethical and political question of whose interests should prevail. But a commitment to aesthetic progress understood as the expansion of aesthetic process and interaction would support a commitment to transformative conduct in the present over the integrity of any already-completed product of authorship, even one that is understood to contain human personality.

These are obviously only a few very general proposals as to how copyright law might be updated to promote aesthetic progress, and admittedly, perhaps the only concrete modification that is realizable in the near term is that courts should weigh as part of the fair use analysis—and perhaps also the remedies analysis—whether the defendant made attribution to the plaintiff. But in the longer run, as the technology of aesthetic production and distribution continues to evolve over the coming decades, and as twentieth-century consumer culture gives way to a new cultural mode, be it a "networked society," a "post-scarcity society," an "AI society," or something else, we would do well to appreciate that our overriding commitment always to increase the annual gross aesthetic product of the culture no longer makes complete sense, and is increasingly counterproductive. The aesthetic is different from the scientific or the technological, from "Science and the useful Arts," and the pursuit of aesthetic

[349] *See* Open Source Licensing Guide, New Media Rights, Sept. 12, 2008, http://www.newmediarights.org/open_source/new_media_rights_open_source_licensing_guide.

[350] *See* 17 U.S.C. § 106A(a)(3)(A).

progress will require a far more means-oriented rather than ends-oriented copyright law.

Conclusion

In his 1794 *Letters on the Aesthetic Education of Man*, Friedrich Schiller spoke of what he called the "problem of the aesthetic:" "If man is ever to solve the problem of politics in practice, he will have to approach it through the problem of the aesthetic, because it is only through Beauty that man makes his way to freedom."[351] Schiller was writing against his severe disappointment with the French Revolution, whose Enlightenment aspirations had by 1794 collapsed into terror. In the *Letters*, he looked to the cultivation of the aesthetic sense of the individual and the liberation of the individual's "*Spieltrieb*,"[352] or drive towards aesthetic play, as a means to move beyond further such reversals and realize the full promise of the Enlightenment project. Admittedly, European events a century-and-a-half later suggest that Schiller put perhaps too much trust in the aesthetic—and in the aestheticization of politics. But Schiller is certainly not the only modern thinker to seek in the aesthetic a means of coming to terms with the many complications of human "progress:" among them that progress requires standards to determine what constitutes progress; relatedly, that progress in the quantitative, in the scientific and technological, has apparently far outpaced progress in the qualitative, in the ethical and aesthetic; and also relatedly, that progress so often contains within itself the seeds of its own reversal.[353]

Intellectual property law has gained increasing appeal in recent decades because it treats of such matters as the latest high technology, media, entertainment, fashion, art, and branding, all of which areas can produce intangible "superstar works" of absolutely enormous economic value and global cultural influence. But of far greater appeal has always been the fact that intellectual property law is the one area of American law explicitly committed to the promotion of "Progress," and the constitutional language that enforces this commitment writes into its very structure the fundamental division in modern thought between the positive world of the scientific and technological and the decidedly non-positive world of the aesthetic.[354] Progress-driven, intellectual property law operates at the very center of modernity, and thus

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[351] FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN, IN A SERIES OF LETTERS 237 (Elizabeth M. Wilkinson & L.A. Willoughby trans. 1982).

[352] *Id*. at 230.

[353] *See, e.g*., HERBERT MARCUSE, EROS AND CIVILIZATION (1955); MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT (1972). *See generally* Martin Jay, *"The Aesthetic Ideology" as Ideology; or, What Does It Mean to Aestheticize Politics?*, 21 CULTURAL CRITIQUE 41 (1992)

[354] *Cf*. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 173 (1920) (discussing "the greatest dualism which now weighs humanity down, the split between the material, the mechanical and the scientific," on the one hand, and "the moral and ideal" on the other).

shares in its tensions and pathologies. At the same time that it is emphatically technologically progressive, it can also be socially and culturally reactionary,[355] and as this Article has sought to show, it can be aesthetically regressive as well. The "giant warehouse" of intellectual commodities that our copyright law continues to pursue has increasingly taken on the characteristics of an "iron cage."[356] The overriding imperative of the pursuit is the accumulation of ever more things. This pursuit has taken on a life of its own, one that has outlived the technological and cultural conditions in which it was born. It is a final, but perhaps happy, irony of the story of *Bleistein* and all that led up to and followed from it that the aesthetic, originally quarantined from the Intellectual Property Clause and its pursuit of progress, may ultimately redeem that pursuit and reorient it towards progress in our understanding of what progress actually should be.

[355] Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010)

[356] *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181 (Talcott Parsons trans. 1930).