

BLEISTEIN, THE PROBLEM OF AESTHETIC PROGRESS, AND THE MAKING OF AMERICAN COPYRIGHT LAW

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*This Article presents a revisionist account of the 1903 Supreme Court case *Bleistein v. Donaldson Lithographic Co.* and the altogether decisive and damaging influence it has exerted on the making of modern American copyright law. Courts and commentators have long misunderstood Justice Holmes's celebrated opinion for the majority in *Bleistein* in two fundamental ways. First, we have misunderstood Holmes's oft-cited declaration that a work need merely express its author's "personality" to satisfy copyright law's originality requirement. Scholars have cited *Bleistein*'s—and our current law's—nominal originality requirement as conclusive evidence that literary romanticism did not significantly influence American copyright law. In fact, when understood in its specifically American cultural context, *Bleistein*'s reliance on "personality" shows the profound influence that specifically American literary romanticism has had on the law. Second, we have misunderstood Holmes's equally oft-cited declaration in *Bleistein* that judges should refrain from judging aesthetic merit. We have read Holmes's call for judicial aesthetic neutrality as addressed, like his invocation of "personality," to copyright law's originality requirement. It was not. It was a direct response to Justice Harlan's dissenting view (and the Sixth Circuit Court of Appeals' ruling below) that the aesthetic works at issue were unprotectable because they failed to satisfy the constitutional requirement, as then understood, that the works must "promote Progress" to qualify for protection under the Intellectual Property Clause.*

*Our misreading of these two crucial moments in *Bleistein* and, more importantly, of how they interrelate has had significant historiographical and practical consequences. As a historiographical matter, we have failed to appreciate the degree to which the opinion formed the principal turning point in the development of U.S. copyright law. The effect of *Bleistein* was to substantially advance the rise of "commercial*

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value” as both the basis and purpose of copyright rights and to quicken the decline and eventual erasure of “personality” as a significant factor in the law. Perhaps more importantly, as a doctrinal and policy matter, our century-long misreading of Bleistein, particularly by courts, has only intensified both of these culturally regressive trends.

Drawing upon the tradition of American pragmatist aesthetic philosophy, this Article urges doctrinal reforms that may help to repair the damage that Bleistein has done. It advocates concrete reforms in functionality, transformativeness, and moral rights doctrine. The need for these reforms has grown more urgent. The technological and cultural conditions that originally underlay Bleistein have fundamentally changed. The pragmatist vision of aesthetic progress calls for reforms that seek to promote the progress of, rather than suppress, our current condition of massively distributed authorship, user-generated content, and, at least as an aesthetic matter, post-scarcity.

INTRODUCTION	320
I. THE PROBLEM OF AESTHETIC PROGRESS	331
A. The Origins of the Concept of Aesthetic Progress	335
B. The Mystery of the Progress Clause.....	337
C. A Pragmatist Vision of Aesthetic Progress.....	342
II. PERSONALITY, PROGRESS, AND THE MISREADING OF <i>BLEISTEIN</i>	348
A. The Originality and Progress Requirements Before <i>Bleistein</i>	352
B. The Originality and Progress Requirements in <i>Bleistein</i>	357
1. Holmes the Aesthete	358
2. The “Useful Arts” and the “Fine Arts”	361
3. Bleistein’s Originality Requirement and American Literary Romanticism	364
4. Bleistein’s Progress Requirement and “Commercial Value”.....	371
III. <i>BLEISTEIN</i> ’S AFTERMATH	376
IV. OVERCOMING <i>BLEISTEIN</i>	385
A. Personality and Aesthetic Judgment	386
B. Personality and Aesthetic Progress.....	388
CONCLUSION.....	395

INTRODUCTION

The Intellectual Property Clause of the U.S. Constitution states that Congress shall have power “[t]o 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 The clause

1. U.S. Const. art. I, § 8, cl. 8.

displays an elegantly interwoven parallel construction much favored in eighteenth-century prose and poetry:² At once, it empowers Congress, through copyright law, “to promote the Progress of *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*.”³ But for all of its apparent balance, the clause suffers from two fundamental asymmetries. Courts and commentators have pondered over one of these for more than two centuries. The other appears to have attracted in that same length of time only passing attention in one federal court case, the turn-of-the-twentieth-century case of *Bleistein v. Donaldson Lithographic Co.*⁴

The first problem goes to the unresolved relation between the Intellectual Property Clause’s two subclauses, 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 provide monopoly rights in intellectual works only when doing so will promote progress?⁵ 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 providing intellectual property rights?⁶ From the late eighteenth through much of the nineteenth century, the prevailing view in Congress and the courts answered yes to both questions: Congress

2. See 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).

3. U.S. Const. art. I, § 8, cl. 8 (emphasis added). 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 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01 n.37 (rev. ed. 2016); see also Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 *Buff. Intell. Prop. L.J.* 3, 35 (2001) (noting scholars “attribute ‘useful Arts’ to patents only, and reserve ‘Science’ for copyright”).

4. 98 F. 608, 610 (C.C.D. Ky. 1899), *aff’d sub nom. Courier Lithographing Co. v. Donaldson Lithographic Co.*, 104 F. 993, 996 (6th Cir. 1900), *rev’d sub nom. Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 249 (1903) (discussing the status of the fine arts under the Intellectual Property Clause). 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) (rejecting defendant’s argument that plaintiff’s dramatic composition should not receive copyright protection because it failed to promote the progress of science and useful arts).

5. See U.S. Const. art. I, § 8, cl. 8.

6. *Id.*

could only promote progress through intellectual property rights⁷ and could only provide intellectual property rights when doing so would promote progress.⁸ 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,”⁹ mere “introductory language,”¹⁰ the Progress Clause proposes but does not require that Congress promote progress;¹¹ the Exclusive Rights Clause simply volunteers an example of one possible means of doing so.¹²

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,”¹³ with one such statute entitled simply “An

7. See, e.g., H.R. Doc. No. 474 (1796), reprinted in 1 American State Papers: Miscellaneous 140 (Walter Lowrie & Walter S. Franklin eds., 1834) (reporting a committee’s opinion that “application to Congress for pecuniary encouragement of important discoveries, or of useful arts, cannot be complied with, as the constitution of the United States appears to have limited the powers of Congress to granting patents only”). 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 2 The Debates and Proceedings in the Congress of the United States 1604 (Joseph Gales ed., 1834); see also Walterscheid, *supra* note 2, at 169 (arguing that 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”). Concern over whether the Intellectual Property Clause limited congressional power to promote science and useful arts survived into the second half of the nineteenth century but eventually dissipated. See Aaron K. Perzanowski, *The Penumbral Public Domain: Constitutional Limits on Quasi-Copyright Legislation*, 10 U. Pa. J. Const. L. 1081, 1121 (2008) (discussing congressional debate over whether the Intellectual Property Clause precluded passage of the Morrill Act of 1862, which provided federal land to states for the purpose of establishing colleges and universities).

8. See *infra* notes 171–194 and accompanying text.

9. 1 Nimmer & Nimmer, *supra* note 3, § 1.03[A], at 1-88.19 to .20.

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

11. See, e.g., *id.* (rejecting the argument that the Progress Clause limits the Exclusive Rights Clause). But see *Lee v. Runge*, 404 U.S. 887, 888–90 (1971) (Douglas, J., dissenting from the denial of certiorari) (arguing that the Progress Clause “acts as a limit on Congress’ power to grant monopolies through patents”); *In re Shao Wen Yuan*, 188 F.2d 377, 380 (C.C.P.A. 1951) (discussing the Framers’ familiarity with the “struggle over monopolies” in England and concluding that the Framers intended the Progress Clause to limit the Exclusive Rights Clause); 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, 1810–16 (2006) (arguing that the Framers intended the Progress Clause to limit Congress’s intellectual property power).

12. 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 advances).

13. See Copyright Office, Library of Cong., *Bulletin No. 3, Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright* 4, 8, 9 (rev. ed. 1973) (reproducing the preamble to the Massachusetts copyright statute, copied by the New Hampshire and Rhode Island statutes); see also *id.* at 15 (providing the North Carolina

act for the encouragement of arts and sciences,”¹⁴ the Progress Clause conspicuously avoids the phrase “arts and sciences,” otherwise so pervasive in the eighteenth century.¹⁵ Instead, in the phrase “to promote the Progress of Science and useful Arts,” the clause appears to take pains to exclude any reference to a rather significant category of intellectual achievement: the fine arts. To be sure, the late eighteenth century had not definitively settled the meanings of the terms “science” and “useful arts,” but the former was generally understood to refer to systematic theoretical and empirical knowledge (i.e., *Wissenschaft*), the latter to technology or commercial practices.¹⁶ More significantly for our purposes, it was well recognized at the time that neither category encompassed the fine arts.¹⁷ 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 progressing¹⁸ and that “a flourishing state of the Arts and Sciences[] contributes to National prosperity and reputation.”¹⁹ Yet the Progress

copyright statute’s preamble, which references “the general extension of arts and commerce”).

14. *Id.* at 11 (providing South Carolina’s copyright statute).

15. See David Spadafora, *The Idea of Progress in Eighteenth-Century Britain* 34 (1990) (discussing the meaning of the phrase “arts and sciences” in the eighteenth century as referring “both to knowledge in general and to the performance of what in the strict sense could be called useful and ornamental activities”).

16. See *id.* at 29–34 (discussing eighteenth-century meanings of “science,” “useful arts,” and “fine arts”); see also Larry Shiner, *The Invention of Art* 80–88 (2001) (discussing the formation of the category of the “fine arts” in eighteenth-century European thought as distinct from science and arts that yielded utility); Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics* (I), 12 *J. Hist. Ideas* 496, 498 (1951) (arguing that the European conception of the fine arts as distinct from “the crafts, the sciences and other human activities” developed in the eighteenth century) [hereinafter *Kristeller, The Modern System I*]; Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics* (II), 13 *J. Hist. Ideas* 17, 20–22 (1952) (discussing the scholarly division of fine arts from mechanical arts in eighteenth-century European thought); *infra* text accompanying note 87. Professor Paul Oskar 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 *Brit. J. Aesthetics* 1, 1 (2009) (arguing that Professor Kristeller’s history of the rise of the modern system of the arts “matches up with no known historical reality”).

17. See *supra* note 16; see also *infra* text accompanying note 87.

18. See, e.g., 1 John Adams, *A Defence of the Constitutions of Government of the United States of America*, at i (London, John Stockdale 1794) (“The arts and sciences, in general, during the three or four last centuries, have had a regular course of progressive improvement.”).

19. George Washington, President of the U.S., *Eighth Annual Message to Congress* (Dec. 7, 1796), in *George Washington Writings* 982 (John Rhodehamel ed., 1997); see also Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 543–75 (2009) (discussing American cultural nationalism in the early-republic period).

Clause excluded the fine arts, and we have no records from the time or commentary since to explain this aporia, this banished category.²⁰

The exclusion of the fine arts may momentarily raise a rather awkward question, as it did for the courts in *Bleistein*: 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,”²¹ perhaps through the Commerce Clause,²² or perhaps by holding that the Progress Clause cannot limit the subject matter of the Exclusive Rights Clause. If the actual 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*, 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.”²³ If the Framers sought to write the fine arts out of the Intellectual Property Clause, we have since succeeded, when expedi-

20. Cf. Plato, *The Republic* 76, at 398a–b (Allan Bloom ed. & Trans., Basic Books 2d ed. 1968) (c. 380 B.C.E.) (calling for the banishment of imitative poets from the republic); Kenji Yoshino, *The City and the Poet*, 114 *Yale L.J.* 1835, 1841–59 (2005) (describing “the Platonic banishment . . . as an ancient analogue for the banishment of literature from the sphere of law”). In his exhaustive 500-page study of the Intellectual Property Clause, Edward Walterscheid never addresses the issue of why the Progress Clause fails to refer to the fine arts. 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 2, at 151.

21. See, e.g., *Burrow-Giles Lithographing Co. v. Sarony*, 111 U.S. 53, 56–58 (1884) (finding that photographs qualify as “Writings” under the Intellectual Property Clause). Justice Douglas was never satisfied with the reasoning in *Burrow-Giles*. In his dissent in *Mazer v. Stein*, Justice Douglas, joined by Justice Black, urged that the case be reargued in order to consider the question of whether the statuette at issue came within the meaning of “Writings.” 347 U.S. 201, 219–21 (1954) (Douglas, J., dissenting). The Supreme Court has not taken up the issue since *Burrow-Giles*.

22. See Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 *Colum. L. Rev.* 272, 277 (2004) (arguing that “Congress may grant exclusive rights without regard to the limits set out in the Intellectual Property Clause”). But see Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 *Duke L.J.* 1329, 1333 (2012) (arguing that the Intellectual Property Clause should be read to limit Congress’s Commerce Clause power except in certain situations).

23. 412 U.S. 546, 555 (1973); see also *Seminole Tribe of Fla. 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”); *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”); *Janky v. Lake Cty. 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 . . .”).

ent, in reading the word “useful” out of the clause. This Article does not wish to suggest a different course.²⁴

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, American intellectual property law has struggled to reconcile its fundamental purpose, the promotion of progress, with the aesthetic.²⁵ If the current incoherence of the law’s treatment of aesthetic issues is any indication, this struggle continues still—indeed, it will confront the Supreme Court this term in *Varsity Brands, Inc. v. Star Athletica, LLC*.²⁶ Though the Framers apparently sought in the Progress Clause to evade the aesthetic, we have overridden their efforts and treat 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,”²⁷ “literary progress,”²⁸ or, more grudgingly, “intellectual (and

24. But see Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. Rev. 259, 306–10 (arguing that the Intellectual Property Clause does not support the protection of speech unprotected by the First Amendment); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. Davis L. Rev. 1, 55 (2013) (arguing that the Progress Clause serves as a content-based standard for copyright eligibility).

25. The term “aesthetic” is notoriously difficult to define. For purposes of this Article, “aesthetic” means (1) concerned with beauty or art or the appreciation of beauty or art or (2) giving or designed to give pleasure through beauty or art. Cf. *Aesthetic*, English: Oxford Living Dictionaries, <http://en.oxforddictionaries.com/definition/aesthetic> [<http://perma.cc/9QVX-WH32>] (last visited Jan. 26, 2017) (defining “aesthetic” as “concerned with beauty or the appreciation of beauty” or “giving or designed to give pleasure through beauty”). The term “the aesthetic” denotes “[t]hat which is aesthetic.” *Id.* “Aesthetics” denotes a set of principles addressing questions of beauty or art. Cf. *Aesthetics*, English: Oxford Living Dictionaries, <http://en.oxforddictionaries.com/definition/aesthetics> [<http://perma.cc/Z3ZW-6FPP>] (last visited Jan. 26, 2017) (defining “aesthetics” as “[a] set of principles concerned with the nature and appreciation of beauty” or “[t]he branch of philosophy which deals with questions of beauty and artistic taste”).

26. 799 F.3d 468 (6th Cir. 2015), cert. granted in part, 136 S. Ct. 1823, 1823 (2016) (mem).

27. *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) (“[Copyright] is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990))); *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.”).

28. *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.). In the context of design-patent protection, courts also sometimes interject that the purpose of such protection is “to promote progress in the ‘art’ of industrial design.” *In re Laverne*, 356 F.2d 1003, 1006 (C.C.P.A. 1966); see also *In re Koehring*, 37 F.2d 421, 422 (C.C.P.A. 1930) (noting courts have declared that “by the enactment of the design patent law, Congress expressed a

artistic) progress.”²⁹ More recently, advocates seeking a new fashion-design protection law have declared as the law’s constitutionally sanctioned goal the “Progress” of fashion³⁰—though one Congressman in favor of reform struggled mightily to explain where exactly fashion fits among “Science and useful Arts.”³¹ 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.³²

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 explaining our present predicament: the 1903 Supreme Court opinion in *Bleistein*.³³ The basic question in the case was whether the illustrations in George Bleistein’s three posters advertising a

desire to promote more beauty, grace, and ornamentation in things used, observed, and enjoyed by our people”).

29. *Nash*, 899 F.2d at 1540 (“Once a work has been written and published, any rule requiring people to compensate the author slows progress in literature and art, making useful expressions ‘too expensive,’ forcing authors to re-invent the wheel, and so on.”).

30. See Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 82 (2006) (statement of Susan Scafidi, Associate Professor, Southern Methodist University) (quoting the Progress Clause and stating that “‘progress’ over time . . . is hindered by the lack of legal protection for fashion design”).

31. See *id.* at 187 (statement of Rep. Darrell Issa, Member, H. Subcomm. on Courts, the Internet & Intellectual Prop.). Representative Darrell Issa addressed the hearing:

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 . . .

Id.

32. This is particularly the case with respect to design-patent law. See Peter Lee & Madhavi Sunder, Design Patents: Law Without Design, 17 *Stan. Tech. L. Rev.* 277, 293–96 (2013) (discussing commentators’ efforts to justify design-patent protection as a means to promote aesthetic values); Mark P. McKenna & Katherine J. Strandburg, Progress and Competition in Design, 17 *Stan. Tech. L. Rev.* 1, 43 (2013) (noting courts’ “difficulty in measuring ‘progress’ in aesthetic aspects of design”). For a study of intellectual property law’s difficulties with architectural works, see generally Xiyin Tang, Narrativizing the Architectural Copyright Act: Another View of the Cathedral, 21 *Tex. Intell. Prop. L.J.* 33, 36 (2012) (arguing that the adoption of a “total concept and feel” test to determine the copyrightability of architectural works would best promote the progress of architectural design).

33. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903).

circus were copyrightable as “pictorial illustrations or works connected with the fine arts” under the terms of the 1874 Amendment to the Patent and Copyright Act of 1870.³⁴ The statute’s reference to the fine arts twisted the lower courts into knots. As the district court volunteered, “the curious might moot the question”³⁵ of whether the Intellectual Property Clause allowed copyright protection of the images. In the court’s view, the posters were clearly not “Science,” and it was doubtful that they qualified as “useful Arts”—the difference between the useful arts and the fine arts was, for the court, a “matter of common knowledge.”³⁶ But the court ultimately avoided the constitutional question by denying protection on the ground that the posters, designed merely “to lure men to a circus,” did not qualify as “connected with the fine arts” under the terms of the statute.³⁷ The Sixth Circuit Court of Appeals affirmed.³⁸ The terms of the Intellectual Property Clause guided its construction of the 1870 Act:

What we hold is this: that if a . . . 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.³⁹

The Sixth Circuit’s reasoning was remarkable. Because the illustrations lacked “any intrinsic merit or value” and failed to “rise to the dignity of art,” they were not promotive of the useful arts under the “obvious meaning” of the Intellectual Property Clause and therefore could not qualify as fine art under the statute.⁴⁰

Bleistein thus called upon the Supreme Court to decide whether 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 past⁴¹—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

34. *Id.* at 250 (internal quotation marks omitted) (quoting Act of June 18, 1874, ch. 301, § 3, 18 Stat. 79 (repealed 1939)).

35. *Bleistein v. Donaldson Lithographic Co.*, 98 F. 608, 611 (C.C.D. Ky. 1899).

36. *Id.*

37. *Id.* at 611–13.

38. *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 997 (6th Cir. 1900).

39. *Id.* at 996.

40. *Id.* at 994–97.

41. See *infra* section II.A (discussing decisions in which courts denied copyright protection to works on the ground that they lacked sufficient merit to meet the progress requirement).

whether these works promoted *aesthetic* progress. In *Bleistein*, in short, the constitutionally sanctified concept of “progress” was finally forced to come to terms with—and forced upon—the aesthetic. The result, as this Article seeks to show, would prove to be a disaster for American copyright 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.⁴² *Bleistein* called forth the many tensions in Holmes’s own personality and outlook—tensions that would then endure in our copyright law. On the one hand, the opinion allowed Holmes to make a great show of his aesthetic cultivation. Months before handing down *Bleistein*, he had adopted a flamboyantly aestheticist pose in a now-forgotten law school speech that anticipated much of *Bleistein*’s rhetoric.⁴³ In the short opinion itself, he somehow managed to allude to Velasquez, Whistler, Müller, Degas, Goya, Manet, and Rembrandt and to quote from Ruskin, all in two pages.⁴⁴ But on the other hand, *Bleistein* also brought out Holmes’s coldly unsentimental, even fatalistic understanding of the judge’s role in a democracy. Fully consonant with his larger political philosophy, 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”).⁴⁵ Consistent with this tradition and in direct repudiation of the Sixth Circuit’s foray into art criticism, Holmes produced his celebrated paragraph-length declaration that judges should not judge the merit of an aesthetic work but should rely instead on the work’s “commercial

42. Holmes was appointed to the Supreme Court in 1902. Thomas Healy, *The Great Dissent* 9 (2013).

43. See Oliver Wendell Holmes, Jr., *Address of Chief Justice Holmes: At the Dedication of the Northwestern University Law School Building* (Oct. 20, 1902), in *The Essential Holmes* 98, 98 (Richard A. Posner ed., 1992) [hereinafter *Holmes, Address of Holmes*].

44. The First Lady Edith Roosevelt, who sat in the audience as Holmes’s invited guest when he read out his opinion from the bench, must have been impressed. See Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 254 (1989).

45. On Holmes’s stance of disinterestedness, see generally Yosai Rogat, *The Judge as Spectator*, 31 *U. Chi. L. Rev.* 213, 245 (1964). For criticism of Holmes’s skepticism and belief in Social Darwinism, see Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 17 (2002). Consider also Holmes’s statement in a letter to Harold Laski:

[If] other fellers . . . would prefer to get rid of me and all my kind[,] . . . I have nothing to say, except that our tastes differ That is the justification of war—[I]f people vehemently want to make different kinds of worlds I don’t see what there is to do except for the most powerful to kill the others.

Letter from Justice Oliver Wendell Holmes, Jr., Assoc. Justice of the U.S. Supreme Court, to Harold J. Laski (July 8, 1928), in *2 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935*, at 1070, 1071 (Mark DeWolfe Howe ed., 1953).

value,” which could alone serve as an index of merit and as proof that the work promoted progress.⁴⁶

Cited in hundreds of federal court opinions and over a thousand law review articles, *Bleistein* is arguably the most influential copyright opinion the Court has ever produced, so influential that we now take much of its substance for granted as common sense. Yet as this Article seeks to show, the case remains underappreciated⁴⁷ and fundamentally misunderstood by courts and commentators. The purpose of this Article is to correct our understanding of *Bleistein* and explain the extraordinary impact of the case on our copyright law—in order finally to overcome it.

By way of background, Part I reviews the emergence of the concept of aesthetic progress in the Atlantic World in the seventeenth and eighteenth centuries. It speculates that the Framers omitted any reference to the fine arts from the Intellectual Property Clause in order to protect the aesthetic and the imperative of “Progress” from each other. It then draws upon early twentieth-century American pragmatist philosophy to outline a pragmatist aesthetic approach to aesthetic progress. As we will see, Holmes came close to adopting this approach in *Bleistein* but ultimately rejected it, embracing instead its antithesis.

Part II closely reads *Bleistein* and seeks to correct two significant misreadings of Holmes’s opinion. First, courts and commentators have long misunderstood Holmes’s oft-cited declaration in *Bleistein* that in order to satisfy copyright law’s originality requirement, a work need merely express the author’s “personality”⁴⁸ and, furthermore, that almost any uncopied expression will inevitably do so. Scholars have cited *Bleistein*’s nominal originality requirement, which survives in current law, as conclusive evidence that literary romanticism did not significantly influence

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

47. This is not to say that *Bleistein* has been ignored. For important work on *Bleistein*, see Zvi S. Rosen, Reimagining *Bleistein*: Copyright Advertisements in Historical Perspective, 59 J. Copyright Soc’y U.S. 347 (2012) (surveying the history of the copyrightability of advertisements and product labels in the lead up to *Bleistein* and emphasizing how statutory interpretation motivated and constrained much of Holmes’s opinion in *Bleistein*); Diane Leenheer Zimmerman, It’s an Original!(!): In Pursuit of Copyright’s Elusive Essence, 28 Colum. J.L. & Arts 187 (2005) (discussing the originality requirement in *Feist* and *Bleistein*); 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) [hereinafter Zimmerman, The Story] (reviewing the details of the *Bleistein* litigation and discussing *Bleistein*’s legacy); Oren Bracha, Commentary on *Bleistein v. Donaldson Lithographic Co.* (1903), Primary Sources on Copyright (1450–1900) (2008), http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_us_1903 [<http://perma.cc/NS3Z-VQN8>] [hereinafter Bracha, Commentary] (explaining *Bleistein*’s importance in “three interlocking spheres of copyright law and discourse”).

48. *Bleistein*, 188 U.S. at 250.

American copyright law.⁴⁹ In fact, when understood in its specifically *American* cultural context, *Bleistein*'s reliance on "personality" represents one of the strongest examples in the history of American copyright law of specifically *American* literary romanticism's influence on the law.⁵⁰ Second, we have misunderstood Holmes's equally oft-cited call for judicial aesthetic neutrality. We have long read it as addressed, like his invocation of "personality," to copyright law's originality requirement. It was not. It was a direct response to Justice Harlan's dissenting view and the Sixth Circuit Court of Appeals' ruling below that the aesthetic works at issue were unprotectable because they failed to satisfy the constitutional requirement, as then understood, that the works must "promote Progress" to qualify for protection under the Intellectual Property Clause.

As Part II explains, our basic misunderstanding of these two crucial moments in *Bleistein* has obscured the deeper workings of the opinion and the degree to which it formed the principal turning point in the development of our copyright law, making the law, for better and worse, distinctively modern and distinctively American. In *Bleistein*, Holmes drew upon American literary romanticism's glorification of "personality" to extol individual personality as at once commonplace and vital, so vital that its presence in the works at issue could alone satisfy copyright law's originality requirement. And yet strangely, he then declined to find that personality could also satisfy the law's progress requirement. Instead, he held that it was the work's "commercial value" that did so.⁵¹ The work constituted "Progress" not because someone was willing to make it and express his unique personality through it but only because someone else was willing to pay for it. Holmes's fateful mistake, one with which we are still living, was thus to divide the basis of copyright protection, personality, from the purpose of such protection, progress in the form of something other than, if not opposed to, personality—namely "commercial value."

Part III addresses *Bleistein*'s legacy. Compounding his error, Holmes struck his divide between personality and progress in such a characteristically cavalier, peremptory manner that subsequent courts and commentators easily confused—as they still do—*Bleistein*'s separate analyses of the originality and progress requirements. "Commercial value" came to dominate our understanding of both requirements. The effect of *Bleistein* was thus to substantially advance the rise of "commercial value" as both the basis and purpose of American copyright law and to quicken the decline and eventual erasure of personality as a significant factor in

49. See *infra* text accompanying notes 158, 254–257 (discussing the prevailing scholarly view that U.S. copyright law's low originality requirement is inconsistent with literary romanticism's concept of the author).

50. See *infra* section II.B.3.

51. *Bleistein*, 188 U.S. at 252.

the law. Where the law might have evolved into a personality-oriented regime focused on aesthetic subjects, it instead devolved into a commodity-oriented regime focused on aesthetic objects; where the law might have focused on the intrinsic value to the person of the *process* of aesthetic creation, it instead came to focus on the exchange value to the consumer of the *products* of aesthetic creation. In *Bleistein*'s aftermath, the law adopted for the aesthetic, as it has for the scientific and technological, an "accumulationist" model of progress, one which defines aesthetic progress as simply the accumulation over time of more and more aesthetic things.

Part IV returns to pragmatist aesthetic thought to outline, as a practical matter, how we might correct or at least overcome Holmes's mistake. It advocates concrete reforms in functionality, transformativeness, and moral rights doctrine. The need for these reforms has grown more urgent. *Bleistein* was not alone responsible for the underlying historical trend in American copyright law toward accumulation. Holmes's opinion partook of larger shifts in the law brought on by the rise of corporate authorship and of consumer society.⁵² Indeed, *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 technological and cultural conditions that underlay *Bleistein* have now fundamentally changed. The Part urges reforms that seek to promote the progress of, rather than suppress, our current condition of massively distributed authorship, user-generated content, and, at least as an aesthetic matter, post-scarcity.

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.⁵³ Indeed, in *Bleistein*, Holmes appeared to take the familiarity of aesthetic regress for granted when he addressed one of the defendant's main arguments, that the *Bleistein* posters could not qualify for copyright protection as "illustrations" under the terms of the 1870 Act because they were mere advertising posters.⁵⁴ Holmes responded: "The word 'illustrations' does not 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

52. See *infra* notes 315–317 and accompanying text (discussing how the rise of corporate authorship challenged assumptions undergirding American copyright law).

53. Cf. Virginia Woolf, Mr. Bennett and Mrs. Brown, in 1 Collected Essays 319, 320 (1966) ("[I]n or about December, 1910, human character changed.").

54. See Brief for Defendant in Error at 6–14, *Bleistein*, 188 U.S. 239 (No. 117).

able to produce them.”⁵⁵ 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 lifelong connoisseur of prints,⁵⁶ 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.⁵⁷ 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.⁵⁸

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?⁵⁹ 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”?⁶⁰ 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

55. *Bleistein v. Donaldson Lithographing Co.*, 23 S. Ct. 298, 300 (1903) (referencing Müller’s engraving). Interestingly, the U.S. reporter replaced the Müller reference with Moritz Steinla, another engraver of the *Madonna di San Sisto*. See *Bleistein*, 188 U.S. at 251.

56. See Susan-Mary Grant, Oliver Wendell Holmes, Jr.: Civil War Soldier, *Supreme Court Justice* 31 (2016) (discussing Holmes’s student essay on Albert Dürer and Holmes’s lifelong interest in reading about etchings and engravings); see also Richard A. Posner, Introduction to *The Essential Holmes*, supra note 43, at ix, xiv (characterizing Holmes as “a loving collector of prints”).

57. Michael Bryan’s then-authoritative *Dictionary of Painters and Engravers* recounts the heroic tale. 2 Michael Bryan, *Dictionary of Painters and Engravers* 184–85 (Walter Armstrong & Robert Edmund Graves eds., London, George Bell & Sons 1889).

58. See generally Olga Hazan, *Le Mythe du Progrès Artistique* (1999) (demonstrating that the ideas of progress and regress have structured much of art historical scholarship).

59. See Raymond Duncan Gastil, *Progress: Critical Thinking About Historical Change* 133–54 (1993) (considering arguments for and against the concept of “progress” in the arts). See generally Murray Krieger, *The Arts and the Idea of Progress, in Progress and Its Discontents* 449, 449 (Gabriel A. Almond et al. eds., 1982) (reviewing efforts to reconcile art with the idea of progress and concluding that the perfectibility of the work of art nurtures the idea of progress).

60. 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*”).

can a standard be established to evaluate aesthetic works in the context of their own time and place, let alone across time and place?⁶¹ 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, and intellectual property law commentary has largely sought to avoid them as well.⁶² Confronted with an aesthetic issue, even the strongest copyright judges invariably cite *Bleistein* and wash their hands of the problem of aesthetic judgment.⁶³ “We recognize that in aesthetics there are no standards,” asserted Judge Hand,⁶⁴ while Judge Posner has demurred on the basis that “judges can make fools of themselves pronouncing on aesthetic matters.”⁶⁵ 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*, 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.”⁶⁶ In thus justifying copyright protection, we make no distinction between aesthetic and nonaesthetic works; we do not say that we grant intellectual property rights in nonaesthetic 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

61. See generally Barbara Herrnstein Smith, *Contingencies of Value* (1988) (describing and defending the contingency of individual judgments of value).

62. But see Julie E. Cohen, *Configuring the Networked Self* 71–74 (2012) [hereinafter Cohen, *Configuring*] (discussing scholarly understandings of copyright’s role in promoting “cultural progress”); Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 *UCLA Ent. L. Rev.* 113, 149–54 (2012) (urging courts to evaluate art status according to a “Historical Definition of Art”); Christine Haight Farley, *Judging Art*, 79 *Tul. L. Rev.* 805, 836–39, 854–57 (2005) (discussing courts’ disguised engagement in aesthetic discrimination and urging courts to explicitly recognize their own aesthetic biases); Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 *Nw. L. Rev.* 343, 358–79 (2015) (noting areas of copyright law that require courts to engage in aesthetic judgment and urging judges to adopt a “Community of Practice” approach to aesthetic judgment); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 *S. Cal. L. Rev.* 247, 298–300 (1998) (noting parallels between aesthetic and legal reasoning in copyright opinions and urging courts to be conscious of aesthetic theory).

63. See Farley, *supra* note 62, at 811–15 (discussing courts’ perception of art as the “Law’s Other”); see also Zahr K. Said, *Reforming Copyright Interpretation*, 28 *Harv. J.L. & Tech.* 469, 485 (2015) (discussing *Bleistein*’s role in deterring judges from engaging in interpretive aesthetics).

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

65. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.).

66. 347 U.S. 201, 219 (1954) (alteration in original) (internal quotation marks omitted) (quoting *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

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.⁶⁷ Oftentimes, the same commentators who accept the orthodoxy that judges should not engage in aesthetic judgment nevertheless argue—as this Article does—that the law must be reformed in one way or another to promote “better” aesthetic expression, be that expression noncommercial, or appropriationist, or simply more diverse.⁶⁸ Such commentary is ultimately anything but aesthetically neutral, nor should it be.⁶⁹

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.”⁷⁰ This Part briefly surveys, in section I.A, the contentious origins of the concept in early-Enlightenment Europe. Section I.B 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. Section I.C turns from the past to the present. It focuses on an American pragmatist vision of aesthetic progress that emerged in the works of John

67. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283, 364–85 (1996) (urging reforms in copyright law to enhance copyright’s contribution to the democratic character of civil society); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *Yale L.J.* 535, 587–90 (2004) (urging reforms to copyright doctrine to further the free speech functions of self-expression, persuasion, and affirmation).

68. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *Harv. L. Rev.* 1659 (1988) (urging reform of the fair use doctrine). Professor William Fisher defends *Bleistein’s* aesthetic-neutrality principle on the ground, among others, that past examples of governmental regulations relating to aesthetic expression show that granting even “some degree of governmental control over the definition of good and bad art” is deleterious. *Id.* at 1779. 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.

69. See Cohen, *Configuring*, *supra* note 62, at 73–74 (“Copyright’s system of incentives and rules is not, and could not be, neutral about the content of progress. A useful model of copyright would take that proposition as the starting point”); see also Barbara Lauriat, *Copyright for Art’s Sake?*, 36 *Eur. Intell. Prop. Rev.* 275, 278 (2014) (“While there are sound reasons for avoiding a situation where judges make decisions based on aesthetic merit, it is not the same thing when legislators cogently determine that certain kinds of works, owing to their nature, require differing levels or term of copyright protection.”).

70. *H.C. White Co. v. Morton E. Converse & Son Co.*, 20 F.2d 311, 312 (2d Cir. 1927) (Hand, J.); see also Cohen, *Configuring*, *supra* note 62, at 70 (characterizing Holmes’s statement of judicial aesthetic neutrality in *Bleistein* as the “canonical statement of the copyright lawyer’s anxiety about the twin dangers of judgment and relativism”).

Dewey, too late, in the decades following *Bleistein*. As we will see in later Parts, Holmes came close to establishing a distinctively pragmatic reconciliation with the problem of aesthetic progress in *Bleistein* and in American copyright law, but he then decisively rejected it.

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.”⁷¹ 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 modernity—asserted the opposite.⁷² The battle lines of the *Querelle* were largely responsible for breaking the premodern “unity of the arts” and generating the distinctions among the categories of “science” and the “useful arts,” in which contemporary Europe was indisputably superior, and the “fine arts,” in which Europe was at best only arguably superior.⁷³ As a measure of the fitness of the category it identified, the term “fine arts” spread rapidly through European thought in the mideighteenth century.⁷⁴ 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, is principally responsible for the formation of the category of the aesthetic.⁷⁵ The very concept of the aesthetic was formed within the question of progress, as an exceptional category

71. See generally Joan DeJean, *Ancients Against Moderns: Culture Wars and the Making of a Fin de Siècle* (1997) (comparing the “culture wars” of late-seventeenth-century France to those of late twentieth-century America); Joseph M. Levine, *The Battle of the Books: History and Literature in the Augustan Age* (1991) (detailing the Battle in Britain); Spadafora, *supra* note 15, at 21–23 (discussing the Battle in seventeenth- and eighteenth-century Britain). For another discussion on the Battle, see Sean M. O’Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. Chi. L. Rev. 733, 786–87 (2015). For a satire of the Battle, see Jonathan Swift, *A Full and True Account of the Battle Fought Last Friday Between the Ancient and the Modern Books, in The Tale of a Tub and Other Works* 169 (Henry Morley ed., London, George Routledge & Sons 1889).

72. See Spadafora, *supra* note 15, at 21–23 (discussing the onset of the Battle between the Ancients and Moderns in England).

73. See DeJean, *supra* note 71, at 16 (noting that “literary progress” was the “principal bone of contention” in the Battle while “scientific progress was introduced only to provide a secure base from which progress in artistic domains could be argued for”); Spadafora, *supra* note 15, at 24–32 (discussing the seventeenth- and eighteenth-century debate concerning the superiority of modern fine arts over ancient fine arts).

74. See Shiner, *supra* note 16, at 84 (discussing the spread of the term “fine arts” in European thought).

75. See *id.* at 80–84 (discussing the opposition between pleasure and utility in eighteenth-century thought and how a “special kind of refined pleasure or taste would be transformed into the modern idea of the aesthetic”); *id.* at 130–51 (discussing “the intellectual process by which taste was transformed into the aesthetic”).

distinguished by its resistance to the concept of progress as then generally understood.

Yet notwithstanding this resistance, many at the time ultimately professed a belief in the superiority of the modern fine arts and in the importance of their continuing progression.⁷⁶ This was more than merely a matter of bragging rights. Linking aesthetics with politics, commentators believed that the progress of the fine arts promised to promote the overall progress of civic virtue and good government.⁷⁷ 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.”⁷⁸ As George Turnbull wrote in his well-known *Treatise on Ancient Painting*, “The Progress of the Arts and Sciences . . . depend[s] greatly on the Care of Society to encourage, assist, and promote them”⁷⁹

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

76. See, e.g., 3 Hugh Blair, *Lectures on Rhetoric and Belles Lettres* 11 (London, Walker & Greig 1823) (“[[I]n point of poetical fire and original genius, Milton and Shakespeare are inferior to no poets in any age.”); see also *An Essay on Perfecting the Fine Arts in Great Britain and Ireland* 4 (Dublin, William Sleater 1767) (“If the moderns have improved on those who went before them, those who come after will improve upon us.”); 1 Adam Ferguson, *Principles of Moral and Political Science* 299 (London, A. Strahan & T. Cadell 1792) (“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].”).

77. See Wood, *supra* note 19, at 549–50 (noting that by the mideighteenth century, the arts had come to be regarded as “public agents of reformation and refinement for the whole of society”); see also Henry F. May, *The Enlightenment in America* 355–56 (1976) (discussing the belief of the time that “pure and refined taste could uplift democracy, and redeem it from vulgarity and greed”); 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).

78. Augustus Chatterton, *The Buds of Beauty*, at v (New York, Francis Childs 1787). Leading figures of the Scottish—and American—Enlightenment took up this theme. See, e.g., 1 Henry Home, *Elements of Criticism*, at iv–vi (Edinburgh, A. Kincaid & J. Bell 1762) (“[C]onsidering 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[,] . . . for depravity of manners will render ineffectual the most salutary laws”). 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. 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, 152 (Eugene Heath & Vincenzo Merolle eds., 2009).

79. George Turnbull, *A Treatise on Ancient Painting* 109 (Vincent M. Bevilacqua ed., Wilhelm Fink Verlag 1971) (1740).

would eventually emerge as the country “where the best of all the arts and sciences would flourish.”⁸⁰

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.⁸¹ Madison proposed the power “[t]o secure to literary authors their copy rights for a limited time” as well as the powers “[t]o establish a University,” “[t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time,” and “[t]o encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries.”⁸² Pinckney went further. In addition to proposing the powers “[t]o secure to authors exclusive rights for a certain time” and “[t]o grant patents for useful inventions,” he proposed the power “[t]o establish seminaries for the promotion of literature and the arts & sciences.”⁸³ Yet nothing from the time indicates who was responsible for the phrasing that ultimately established Congress’s power “[t]o promote the Progress of Science and useful Arts,”⁸⁴ which was adopted without debate on September 5, 1787, in the waning days of the Federal Convention.⁸⁵ The mystery is all the

80. Wood, *supra* note 19, at 545; see also Ezra Stiles, Election Sermon, *in* *The United States Elevated to Glory and Honor* 397, 460 (New Haven, Isaiah Thomas 1785) (discussing his hope that “all the arts may be transported from Europe and Asia and flourish in America with an augmented lustre”).

81. 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. O’Connor, *supra* note 71, at 803–08. But see May, *supra* note 77, at 114–15 (expressing skepticism concerning the influence of the *Encyclopédie* on American thought of the time).

82. 2 Records of the Federal Convention of 1787, at 321–22, 324 (Max Farrand ed., 1937) [hereinafter Records of the Federal Convention] (reflecting Madison’s Notes for Saturday, August 18); 3 Documentary History of the Constitution of the United States of America 554–55 (Bureau of Rolls & Library, Dep’t of State, ed., 1900).

83. Records of the Federal Convention, *supra* note 82, at 325–26. Pinckney also proposed the power “[t]o establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.” *Id.*

84. U.S. Const. art. I, § 8, cl. 8. As Professor Michael Birnhack notes, neither Madison nor Pinckney’s proposed language included any reference to “progress.” Birnhack, *supra* note 3, at 35.

85. Madison and Pinckney made their proposals on August 18, 1787. Records of the Federal Convention, *supra* note 82, at 324–26. These were then referred to the Committee of Detail, which did not reference them in its August 22 report. *Id.* at 325, 366–79. On August 31, the proposals were referred on to the Committee of Eleven, *id.* at 481, which reported on September 5 a synthesis of the proposals very nearly in the form of the current Intellectual Property Clause. *Id.* at 505. According to the Journal of the Constitutional

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.⁸⁶ Their exclusion of the fine arts from the language of the Progress Clause appears to have been a deliberate act.⁸⁷

Convention, the Committee of Eleven reported the clause without any commas, see *id.* at 505, while according to Madison’s notes, the committee reported the clause with a comma after “inventors,” see *id.* at 509. The comma after “arts” appears to have been added by the Committee of Style and Arrangement. See *id.* at 595.

86. See *supra* notes 13–14 and accompanying text.

87. We have grown so accustomed to reading the Intellectual Property Clause as covering works outside of “Science and useful Arts” that it may be difficult to accept that these terms simply did not encompass the fine arts at the time the Framers drafted the Constitution.

First, “science” was understood not to include the “fine arts.” Admittedly, “science” sometimes covered the general principles of the fine as well as the useful arts. See, e.g., 2 Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) (explaining that “science” may be applied “even to an assemblage of the general principles of an art, as the science of agriculture; the science of navigation,” but noting “[a]rts relate to practice, as painting and sculpture”). Yet “science” was understood to be fundamentally distinct from these applied arts. See Spadafora, *supra* note 15, at 34 (discussing the distinctions among the three domains of “learning, encompassing the method and all fields of knowledge; practical skills and techniques, including what eighteenth-century Britons typically called trades and mechanical or useful arts; and what later became regularly known as the fine arts,” such as poetry and painting). The distinction between science and the applied arts was especially clear when the term “science” was used in conjunction with “arts.” See, e.g., 1 Webster, *supra* (defining “art” as “[a] system of rules, serving to facilitate the performance of certain actions; opposed to *science*, or to speculative principles; as the *art* of building or engraving”).

Second, the “useful arts” were clearly separate from the fine arts, which involved imitation or imagination or yielded pleasure rather than utility. See 1 Webster, *supra* (noting under the definition of “fine” that “*Fine Arts*, or polite arts, are the arts which depend chiefly on the labors of the mind or imagination, and whose object is pleasure; as poetry, music, painting and sculpture”); Kristeller, *The Modern System I*, *supra* note 16, at 498 (identifying fine arts as distinct from “crafts, the sciences and other human activities”); see also Wood, *supra* note 19, at 548 (“From the early eighteenth century, in France and England especially, amateur theorists had worked to distinguish several of the arts—usually painting, architecture, music, and poetry—from other arts and crafts and had designated them as possessing special capacities for civilizing humans.”).

For those who remain unpersuaded, consider that when the late-eighteenth-century *Encyclopedia Britannica* discussed the classical history of the fine arts next to the margin heading “Progress of the fine arts,” it took as common knowledge the distinction between the useful and the fine arts:

Useful arts paved the way to fine arts [in antiquity]. Men upon whom the former had bestowed every convenience, turned their thoughts to the latter. Beauty was studied in objects of sight; and men of taste attached themselves to the fine arts, which multiplied their enjoyments and improved their benevolence.

2 *Encyclopedia Britannica* 360 (Edinburgh, A. Bell & C. Macfarquhar, 3d ed. 1797). In an interesting contrast, Gordon Wood notes the attempt by American artists in the early nineteenth century to somehow connect their work to the useful arts, “[s]ince no one had

British practice of the time offers no explanation. To be sure, not until the Fine Arts Copyright Act of 1862 did Great Britain provide statutory copyright protection to paintings.⁸⁸ Yet by 1787, the British had extended statutory protection to certain other fine arts, such as poetry, novels, and music,⁸⁹ and it is hard to imagine that the Framers were concerned about the special case of paintings. Furthermore, the English story was arguably 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 forms of fine art.⁹⁰ 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 they were at best 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.”⁹¹ As John Adams conceded in various letters to Abigail Adams, the fine arts were mere “bagatelles introduced by time and luxury in change [sic] for the great qualities and hardy, manly virtues of the human heart”;⁹² they could “inform the Understanding, or refine the Taste,”⁹³ but they could also “seduce, betray, deceive, deprave, corrupt, and

any doubt of the value of the useful arts in contrast to the fine arts.” Wood, *supra* note 19, at 563–64.

88. 25 & 26 Vict. c. 68, § 7 (UK).

89. See Statute of Anne 1710, 8 Ann c.19 (extending statutory protection to works printed in books); *Bach v. Longman* (1777) 98 Eng. Rep. 1274, 1275; 2 Cowp. 623, 624 (finding that the Statute of Anne applied to musical compositions).

90. See, for example, the Engravers’ Copyright Act of 1735, entitled “An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints,” which extended statutory copyright protection to “any historical or other print or prints.” 8 Geo. 2 c. 13 (Gr. Brit.), http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_uk_1735&pagenumber=1_1 (on file with the *Columbia Law Review*).

91. Wood, *supra* note 19, at 560 (internal quotation marks omitted) (quoting B. Henry Latrobe, Fellow of the Am. Philosophical Soc’y of the Acad. of Arts, Anniversary Oration, Pronounced Before the Society of Artists of the United States (May 8, 1811)).

92. *Id.* at 549 (internal quotation marks omitted) (quoting Letter from John Adams to Abigail Adams (Apr. 12, 1778), in *The Book of Abigail and John: Selected Letters of the Adams Family, 1762–1784*, at 209, 209–10 (L.H. Butterfield et al. eds., 1975)) (misquotation).

93. *Id.* (internal quotation marks omitted) (quoting Letter from John Adams to Abigail Adams (Apr.–May 1780), in *The Book of Abigail and John: Selected Letters of the Adams Family, 1762–1784*, at 255, 255–56 (L.H. Butterfield et al. eds., 1975)).

debauch.”⁹⁴ Many of the founding generation were particularly suspicious of sentimental novels,⁹⁵ whose deleterious effects were understood to be especially harmful to their main readership, American women.⁹⁶ Indeed, as much of the above suggests, the fine arts, like the aesthetic more generally, comprised a gendered domain. 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 of “books of mere amusement.”⁹⁷ 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—a dichotomy which survives, incidentally, in the current colloquial distinction between “hard IP” and “soft IP.”⁹⁸

A third and the most compelling (and perhaps obvious) explanation for the Framers’ exclusion of the fine arts from the Progress Clause stems from what this Article has 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

94. *Id.* (internal quotation marks omitted) (quoting Letter from John Adams to Abigail Adams (Apr.–May 1780), in *The Book of Abigail and John: Selected Letters of the Adams Family, 1762–1784*, at 255, 255–56 (L.H. Butterfield et al. eds., 1975)).

95. See Cathy N. Davidson, *Revolution and the Word: The Rise of the Novel in America* 98 (1986) (observing that in early-republic America “reading for feminine edification was often condemned as a waste of time and a source of irresponsible ideas” and noting “even modest, moral fiction intended for women was still suspect”).

96. See Eve Kornfeld, *Creating an American Culture, 1775–1800*, at 54–65 (2001) (describing wide agreement among elites of the Founding generation that novels were a threat to feminine virtue).

97. See Royall Tyler, *The Algerine Captive* 27 (Don. L. Cook ed., Coll. & Univ. Press 1970) (1816) (observing “the extreme avidity with which books of mere amusement were purchased and perused by all ranks” of Americans). The question of sentimental fiction only heightens the mystery of the strange wording of the Progress Clause. Even if the Progress Clause excluded any reference to the fine arts, the Copyright Act of 1790 provided statutory protection to “books,” which included sentimental fiction. See Copyright Act of 1790, ch. 15, §§ 1–3, 1 Stat. 124, 124–25 (repealed 1831) (granting protection to “authors of any map, chart, book or books”). This raises a further problem with respect to the relation between the Intellectual Property Clause’s two subclasses. 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. U.S. Const. art. I, § 8, cl. 8. 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, the Framers gave little thought to any of this and, at least with respect to statutory law, simply followed the English example.

98. See Eric Goldman, *Let’s Stop Using the Term “Soft IP,”* Tech. & Marketing L. Blog (Jan. 8, 2013), http://blog.ericgoldman.org/archives/2013/01/a_phrase_to_ret.htm [<http://perma.cc/PA5Q-826C>] (calling for an end of the use of the term “soft IP” and questioning whether anyone uses the antonym “hard IP”).

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.⁹⁹ 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.¹⁰⁰

The Framers likely included the Progress Clause both to justify and to limit in some way 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 noncontroversial. But as a limitation on those rights, so that only aesthetically progressive works would qualify, the invocation of aesthetic progress would have been highly 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 from the Progress Clause.

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

99. See David Hume, *Of the Standard of Taste*, in *Four Dissertations* para. 23 (London, A. Millar 1777) (separately paginated work), <http://www.davidhume.org/texts/fd.html> (on file with the *Columbia Law Review*).

100. See, e.g., *Truth and Taste*, 1 *Columbian Mag.* 682, 682 (1787) (“No man reasons concerning another man’s beauty”); cf. Oliver Wendell Holmes, *Natural Law*, 32 *Harv. L. Rev.* 40, 41 (1918) (“[Y]ou can not argue a man into liking a glass of beer”).

the term “Science,”¹⁰¹ sometimes through the term “useful Arts,”¹⁰² usually without explaining how.¹⁰³ 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, and the better to understand the choices that Holmes made in his decision, it is worthwhile to consider a contemporary approach to aesthetic progress, one that may offer some hint of how copyright law could have done—and almost did—better.

C. *A Pragmatist Vision of Aesthetic Progress*

In the wake of Marcel Duchamp, 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.¹⁰⁴ 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 indifference,¹⁰⁵ has arguably resulted, as a historical matter, in an extreme “contemporaneity of the non-contemporaneous,”¹⁰⁶ “serv[ing] to make all stylistic means equally accessible.”¹⁰⁷ The result, as

101. 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).

102. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

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

104. See, e.g., Gianni Vattimo, *The End of Modernity* 59 (Jon R. Snyder trans., 1988) (discussing the “death or decline of art”); see also Amy M. Adler, *Against Moral Rights*, 97 *Calif. L. Rev.* 263, 295 (2009) (arguing that “the incoherence of the category of ‘art’ has become the subject of contemporary art”).

105. See Maarten Doorman, *Art in Progress: A Philosophical Response to the End of the Avant-Garde* 117–20 (Sherry Marx trans., 2003) (discussing developments in contemporary art that “make the idea of progress in the arts obsolete”); see also Jürgen Habermas, *Questions and Counterquestions*, in *On the Pragmatics of Communication* 403, 413 (Maeve Cooke ed., 1998) (discussing the “[f]orced novelty, dependence on the latest trends, and the accelerated pace of fads” that characterize avant-garde art).

106. Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* 95, 246 (Keith Tribe trans., 2004).

107. Habermas, *supra* note 105, at 413. Habermas continues:

[T]he development of art [is] the medium of a learning process—here, naturally, not in the sense of an accumulation of epistemic *contents*, of an aesthetic ‘progress,’ which is possible only in individual dimensions, but nonetheless in the sense of a concentrically expanding, progressive exploration of a realm of possibilities.

Id. at 413–14.

Peter Bürger has described it, is that “no movement in the arts today can legitimately claim to be historically more advanced *as art* than any other.”¹⁰⁸

But it is nevertheless crucial to recognize that a rejection of the idea of *artistic* progress, that is, of progress in the fine arts, need not necessarily entail a rejection of the idea of *aesthetic* progress.¹⁰⁹ 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—if not as exception and rule. Recognizing and moving beyond this fundamental distinction enables a better, more relevant, and more democratic vision of how intellectual property law might help to promote progress in the aesthetic, which this section seeks briefly to set out.

This vision draws inspiration from American pragmatist aesthetics, particularly as developed by John Dewey and more recently by Richard Shusterman.¹¹⁰ A number of themes of pragmatist aesthetics will prove useful for our purposes. First, pragmatist aesthetics focuses on the aesthetic experience of “non-art”¹¹¹ objects, practices, and phenomena, rather than on the connoisseurship of “mummified museum art.”¹¹² It is

108. Peter Bürger, *Theory of the Avant-Garde* 63 (Michael Shaw trans., 1984); see also Hoptman, *supra* note 60, at 14 (discussing the atemporality of contemporary art). But see Hal Foster, *The Return of the Real: The Avant-Garde at the End of the Century* 14–15 (1996) (criticizing Bürger’s claim).

109. John Dewey drew a different distinction between the “artistic” and the “[a]esthetic.” See John Dewey, *Art as Experience* 46 (1934) [hereinafter Dewey, *Experience*].

110. See generally Dewey, *Experience*, *supra* note 109 (formulating a pragmatist aesthetics); Richard Shusterman, *Pragmatist Aesthetics* (2d ed. 2000) [hereinafter Shusterman, *Pragmatist Aesthetics*] (formulating a post-Deweyan pragmatist aesthetics); Richard Shusterman, *Aesthetics*, in *A Companion to Pragmatism* 352 (John R. Shook & Joseph Margolis eds., 2005) (surveying pragmatist aesthetics). On the closely related study of “everyday aesthetics,” see generally Thomas Leddy, *The Extraordinary in the Ordinary: The Aesthetics of Everyday Life* (2012) (exploring the aesthetic experience of everyday phenomena); Katya Mandoki, *Everyday Aesthetics: Prosaics, the Play of Culture and Social Identities* (2007) (formulating a “prosaics” of everyday aesthetic experience); Yuriko Saito, *Everyday Aesthetics* (2007) (noting the neglect of and arguing for the significance of everyday aesthetic experience); Crispin Sartwell, *Aesthetics of the Everyday*, *Oxford Handbook Online* (Sept. 2009) (surveying the development of “everyday aesthetics”), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199279456.001.0001/oxfordhb-9780199279456-e-46?print=pdf> [<http://perma.cc/X8XU-HNK3>]. For criticisms of everyday aesthetics, see generally Christopher Dowling, *The Aesthetics of Daily Life*, 50 *British J. Aesthetics* 225 (2010) (questioning the value of defining certain everyday experiences as aesthetic in nature and challenging the view that art-centered aesthetics is incapable of accommodating the everyday); Brian Soucek, *Resisting the Itch to Redefine Aesthetics: A Response to Sherri Irvin*, 67 *J. Aesthetics & Art Criticism* 223 (2009) (critiquing Professor Sherri Irvin’s attempt to extend the definition of aesthetic experience to, for example, the scratching of an itch).

111. Saito, *supra* note 110, at 20.

112. Doris Sommer, *Ripple Effects: The Work of Art in the World*, 4 *Revista Letral* 153, 175 (2010).

fundamentally opposed to the notion, often associated with the Kantian tradition of aesthetics, that aesthetic experience ideally consists only of the disinterested contemplation of a preferably “autonomous”¹¹³ aesthetic object.¹¹⁴ Instead, pragmatist aesthetics celebrates the immediacy of everyday aesthetic experience—in Dewey’s words, the experience of “the fire-engine rushing by,”¹¹⁵ of “him who sees how the tense grace of the ball-player infects the onlooking crowd,”¹¹⁶ or in Shusterman’s more contemporary reference, the experience of the “creative virtuosity” of appropriationist hip-hop.¹¹⁷ It thus urges a movement beyond the “compartmental conception of fine art”¹¹⁸ that divides the “official arts”¹¹⁹ from the “popular arts.”¹²⁰ It seeks to group all arts, all practice, along a single continuum, all to “recover[] the continuity of [a]esthetic experience with normal processes of living.”¹²¹

Second, and related, pragmatist aesthetics urges—as Holmes did in *Bleistein*, though apparently for different reasons—a rejection of the distinction between aesthetic experience and the useful arts. Dewey admitted in 1934 that “[t]he division between fine and useful art has many supporters,”¹²² but he asserted that this “customary distinction is based simply on acceptance of certain existing social conditions,”¹²³ which his meliorist philosophy sought to change. The process of labor, Dewey claimed, could be intrinsically aesthetic, in the sense of providing a “complete experience . . . intensely and concentratedly felt.”¹²⁴ But industrialization and consumerism had rendered much of labor and its output “anesthetic”:¹²⁵

The story of the severance and final sharp opposition of the useful and the fine is the history of that industrial development through which 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.¹²⁶

113. Shusterman, *Pragmatist Aesthetics*, supra note 110, at 143.

114. See id. at 8–9.

115. Dewey, *Experience*, supra note 109, at 5.

116. Id.

117. Shusterman, *Pragmatist Aesthetics*, supra note 110, at 208.

118. Dewey, *Experience*, supra note 109, at 8.

119. Id. at 187.

120. Id. at 152.

121. Id. at 10.

122. Id. at 261.

123. Id. at 26.

124. Id. at 52.

125. Id. at 39 (referring to the “[o]ne great defect in what passes as morality” as its “anesthetic quality”).

126. Id. at 27.

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.”¹²⁷

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.¹²⁸ It is found not in inert “art products,”¹²⁹ which “exist externally and physically . . . apart from human experience,”¹³⁰ but in the dynamic experience of perceiving and creating aesthetic phenomena.¹³¹ For Dewey, the perception of an aesthetic work required an appreciation of the individual, human choices that led to its production.¹³² Indeed, the perceiver must actively recreate these choices: “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.”¹³³

These three themes underlie a pragmatist vision of aesthetic progress distinct from what might be called 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

127. Id. at 10.

128. For reasons which will be apparent in Part IV, the term “practice” is used here to emphasize, particularly to a nonspecialist audience, the more active qualities of what Dewey tended to call “experience.” On the distinction between “experience” and “practice” in Deweyan thought, see Shusterman, *Pragmatist Aesthetics*, supra note 110, at 53–55; Richard Shusterman, *Dewey’s Art as Experience: The Psychological Background*, 44 *J. Aesthetic Educ.* 26, 31–32 (2010).

129. Dewey, *Experience*, supra note 109, at 218.

130. Id. at 3.

131. See Shusterman, *Pragmatist Aesthetics*, supra note 110, at 55 (discussing the artistic experience as “both receptive undergoing and productive doing”).

132. See Dewey, *Experience*, supra note 109, at 54 (“For to perceive, a beholder must *create* his own experience. And his creation must include relations comparable to those which the original producer underwent.”).

133. Id. at 54.

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, in accordance with the *de gustibus* maxim, their relative merit cannot be objectively assessed. Thus, while a strong accumulationist model of progress is typically applied to scientific-technological progress, in which the goal is to accumulate ever-better scientific and technological achievements, a weak accumulationist model is typically applied to aesthetic progress. In the latter, the focus is not on better works but simply on more works. The weak accumulationist account of aesthetic progress retreats 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,¹³⁴ 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. Enhanced popular participation in scientific and technological research itself is not typically thought to constitute progress in those fields unless this participation would itself help to produce even greater discoveries and inventions. Instead, the standard view is that the production of scientific and technological advances proceeds most efficiently when there is no redundancy of research and development.¹³⁵ By contrast, it is conventional to observe that the process of aesthetic creation is more than merely an instrumental means to some separate end that is the sole object of value. It is not mere “drudgery” but rather “could only prove purposive (be a success) as play, i.e. as occupation which is agreeable on its own account.”¹³⁶ Aesthetic play has intrinsic value—as a source of pleasure, of moral and political cultivation, of imaginative freedom and self-actualization—even when it does not ultimately result in the

134. See José Rosario, Charles DeGarmo on Aesthetic Education, 11 *J. Aesthetic Educ.* 87, 93–98 (1977) (discussing Professor Charles DeGarmo’s efforts to further the “democratization of aesthetic activity”).

135. To the extent that one does focus on the means of scientific or technological progress as intrinsically pleasurable, these means and one’s focus would qualify as aesthetic in nature. See Dewey, *Experience*, supra note 109, at 5 (“The intelligent mechanic engaged in his job, interested in doing well and finding satisfaction in his handiwork, caring for his materials and tools with genuine affection, is artistically engaged.”).

136. Immanuel Kant, *Critique of Judgment* 133 (Nicholas Walker ed., James Creed Meredith trans., 2007) (1790).

production of an aesthetic work.¹³⁷ 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 supports a notion of aesthetic progress that privileges active aesthetic *work* over objectified aesthetic *works*, everyday aesthetic practice over timeless aesthetic achievements, and seeks not so much more artworks, however fine, but more artists, fine or otherwise.

In many respects this may seem a utopian vision far afield from the realities of copyright law. And yet, though this pragmatist vision came too late for *Bleistein*, its development, especially in recent decades in the work of Shusterman, has arrived right on schedule for the present day Internet, a network of massively distributed authorship 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 Rorty's view, a new "poeticized culture"¹³⁸ is taking shape in the modern world, one which seeks "redemption" not in religion or reason but in imagination, in the aesthetic.¹³⁹ 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." Rorty's vision of an aestheticized culture is certainly open to a variety of criticisms, 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

137. See Cohen, *Configuring*, supra note 62, at 135 (discussing the "play of everyday practice"); Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* 69 (2015) (reporting that the creative professionals she interviewed "define themselves by what they do and how they do it and less (if at all) by the output as a commodity, whether or not it is protectable as intellectual property"); see also Margaret Atwood, *Negotiating with the Dead*, at xx–xxii (2002) (describing the reasons why she writes); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *Cardozo Arts & Ent. L.J.* 81, 98 n.67 (1998) (recounting the story of the young Renoir's insistence that it was only to "amuse" himself that he painted).

138. Richard Rorty, *Contingency, Irony, Solidarity* 53 (1989).

139. See generally Ulf Schulenberg, *Romanticism and Pragmatism: Richard Rorty and the Idea of a Poeticized Culture* (2015) (examining American pragmatism's uses of American romanticism to establish an antifoundationalist narrative of progress).

kind of endpoint, any kind of “attainment of perfection.”¹⁴⁰ It is rather the process itself that is the purpose of the activity.

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 necessities of the time.”¹⁴¹ But the themes of pragmatist aesthetics were no less relevant to the technological and cultural conditions in which he wrote. In opposition to an increasingly powerful commercial society, the early-twentieth-century aesthetic-education movement sought to operationalize many of the ideas found in pragmatist aesthetics.¹⁴² More significantly, Holmes had the benefit of a nineteenth-century tradition of American thinking that would inform much of the spirit of twentieth-century pragmatist aesthetics. An exceedingly learned individual, Holmes was undoubtedly familiar with this tradition of American romantic and transcendentalist thought. As we will see, he spoke of it and through it in *Bleistein*—or more specifically, in one part of *Bleistein*.

II. PERSONALITY, PROGRESS, AND THE MISREADING OF *BLEISTEIN*

“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.”¹⁴³ So wrote Holmes soon after completing his *Bleistein* opinion.¹⁴⁴ Holmes’s epistolary tone was irreverent, even derisive. And who can blame him? The facts of *Bleistein* were perhaps trivial. As Diane Zimmerman recounts in her wonderfully detailed history of the case, George Bleistein was the president of the Courier Company, a printing company based in Buffalo that developed and reprinted, among much else, circus advertisements.¹⁴⁵ Courier claimed copyright in three posters it had produced to advertise a travelling circus, the Great Wallace Shows.¹⁴⁶ The posters depicted,

140. Richard Rorty, *Philosophy as a Transitional Genre*, in *Pragmatism, Critique, Judgment: Essays for Richard J. Bernstein* 3, 27 (Seyla Benhabib & Nancy Fraser eds., 2004).

141. See Oliver Wendell Holmes, Jr., *The Common Law* 1 (28th prt. 1945) [hereinafter *Holmes, Common Law*].

142. See Rosario, *supra* note 134, at 89–90 (discussing DeGarmo’s theories of aesthetic education as a response to industrial society and obsolete manufacturing techniques).

143. Novick, *supra* note 44, at 254 (quoting Holmes). Novick does not provide the source of this quotation. *Id.*

144. *Id.*

145. See Zimmerman, *The Story*, *supra* note 47, at 81.

146. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248–49 (1903).

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,” which consisted of performers whitened to represent statues and adopting various poses portraying mythological incidents (“Landing of Columbus,” “Appollo [sic] and the Muses,” etc.).¹⁴⁷ Donaldson Lithographing Company of Newport, Kentucky, copied the images in Courier’s posters in Donaldson’s advertising for a different circus. Bleistein and Courier’s other partners sued.¹⁴⁸ Courier itself wished to reuse the images in advertising for other circuses at some point in the future.¹⁴⁹

Donaldson argued, among other things, that the posters did not qualify as “pictorial illustrations or works connected with the fine arts” under the terms of the copyright statute,¹⁵⁰ 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.”¹⁵¹ The district court had ruled in Donaldson’s favor on the statutory argument.¹⁵² The Sixth Circuit Court of Appeals had affirmed on the statutory argument as informed by the constitutional argument.¹⁵³ The Supreme Court reversed.¹⁵⁴

These facts, this litigation history, and Holmes’s brief, breezy opinion mask the extraordinary tensions at work in the case and the fateful nature of Holmes’s resolution of them. For all of our citations to it in the case law and commentary, we have failed to appreciate the true significance of *Bleistein* because we have long misinterpreted the opinion. This is not surprising. Holmes’s opinion is characteristically compact, elliptical, and aphoristic; most readers encounter it only in aggressively edited casebook versions. Furthermore, so effectively did Holmes both affirm

147. Images of the posters at issue are available at the Library of Congress. The Great Wallace Shows: Colossal 3 Ring Circus, 2 Elevated Stages, LC-USZC4-13545, Prints & Photographs Online Catalog, Library of Cong., <http://www.loc.gov/pictures/resource/cph.3g13545/> [<http://perma.cc/QS8U-TWBS>] (last visited Oct. 28, 2016); [T]he [G]reat Wallace Shows: [C]olossal 3 Ring Circus, 2 Elevate[d Stages], LC-USZC4-13546, Prints & Photographs Online Catalog, Library of Cong., <http://www.loc.gov/pictures/resource/cph.3g13546/> [<http://perma.cc/HQP3-AQPC>] (last visited Oct. 28, 2016); The Great Wallace S[hows]: Colossal 3 Ring Circus, 2 Elevated Stages LC-USZC4-13547, Prints & Photographs Online Catalog, Library of Cong., <http://www.loc.gov/pictures/resource/cph.3g13547/> [<http://perma.cc/AZ5G-MUCM>] (last visited Oct. 28, 2016).

148. See Zimmerman, *The Story*, supra note 47, at 85.

149. *Id.* at 84.

150. Act of June 18, 1874, ch. 301, § 3, 18 Stat. 78 (repealed 1939).

151. Brief for Defendant in Error at 4–14, *Bleistein*, 188 U.S. 239 (No. 117).

152. See *Bleistein v. Donaldson Lithographing Co.*, 98 F. 608, 610 (C.C.D. Ky. 1899).

153. See *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 994 (6th Cir. 1900).

154. *Bleistein*, 188 U.S. at 252.

and nullify the progress requirement that most scholars have forgotten that it played any role in the case or the copyright law of the time.

According to the standard misreading of *Bleistein*, Holmes reasoned that (1) judges should not judge aesthetic merit, and *as a result*, (2) the originality requirement in copyright law must be set very low, so low that nearly any uncopied work should be able to meet it.¹⁵⁵ This misreading is found throughout our scholarship¹⁵⁶ and survives even in the Nimmer treatise.¹⁵⁷ More scholarly versions of the standard misreading go further. They assert that *Bleistein's* very low standard of originality disproves the proposition that literary romanticism had any real influence on American copyright law. As Professor Oren Bracha has written in an influential and important article, "Copyright'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."¹⁵⁸

But as this Part seeks to show, Holmes did not reason in *Bleistein* that judges' obligation to remain aesthetically neutral necessitated a low originality standard. He did not in any way *retreat* to *Bleistein's* "personality" standard of originality because of the problem of aesthetic judgment. On the contrary, personality stood on its own in *Bleistein*, separate from the issue of aesthetic judgment, and not as a last resort but as something of paramount value. As understood within the tradition specifically of *American* literary romanticism and transcendentalism, the broad egalitarian inclusiveness of *Bleistein's* personality standard was its great virtue. Holmes's affirmative invocation of personality was arguably the high

155. See *infra* notes 156–158.

156. See, e.g., Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *Yale L.J.* 186, 200 (2008) [hereinafter Bracha, *Ideology of Authorship*] ("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."); Ryan Littrell, *Toward a Stricter Originality Requirement for Copyright Law*, 43 *B.C. L. Rev.* 193, 197–99 (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."); Bracha, *Commentary*, *supra* note 47 ("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."); see also Joseph Scott Miller, *Hoisting Originality*, 31 *Cardozo L. Rev.* 451, 476 (2009) [hereinafter Miller, *Hoisting Originality*] ("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.").

157. See 1 *Nimmer & Nimmer*, *supra* note 3, § 2.01(b)(1) (stating under the heading "The Requirement of Originality" that "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).

158. Bracha, *Ideology of Authorship*, *supra* note 156, at 265.

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 if, in Holmes's reasoning, judges' obligation to remain aesthetically neutral did not necessitate a low standard of originality, it did apparently necessitate something else: a market definition of aesthetic progress. Here was the path of Holmes's actual retreat in *Bleistein*, one that represented a betrayal—a true “mockery”—of the American romantic tradition that he invoked only paragraphs earlier in his treatment of the originality requirement.¹⁵⁹ As we will see, Holmes held, in effect, that a work has merit and thus meets the progress requirement not because someone was willing to make the work and invest one's personality in it, but rather because someone else is willing to pay for it. The work is valuable not because of its *intrinsic* value to its producer but because of its *exchange value* on the open market.

Holmes's forceful invocation of individual “personality” and then, only paragraphs later, his equally forceful rejection of it for the market constituted the originating moment of modern American copyright law. Under the rubric of “romantic authorship,” copyright commentary has long argued that the law's “exaltation of authorship” has driven the expansion of the law.¹⁶⁰ But after *Bleistein*, the story of romantic authorship was little more than an occasional sideshow. Instead, it has been the exaltation—indeed, the “fetishization”¹⁶¹—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.¹⁶² 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 Professor 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.”¹⁶³

159. *Bleistein*, 188 U.S. at 249–50.

160. See, e.g., Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 Minn. L. Rev. 579, 589 (1985).

161. See Michael T. 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, no. 1, 1990, at 114, 120 (describing fetishism as “the masking of social relations through concern with objects per se”). See generally Roy Ellen, Fetishism, 23 Man 213 (1988) (surveying meanings of the concept).

162. See *infra* Part III (discussing the legacy of the *Bleistein* decision).

163. Jessica Litman, Lawful Personal Use, 85 Tex. L. Rev. 1871, 1880 (2007) [hereinafter Litman, Lawful Personal Use]; 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

Part II aims to defend this reading of *Bleistein* and its importance. To emphasize the division between Holmes's treatment of originality and his call for judicial aesthetic neutrality, section II.A seeks to make clear that nineteenth-century courts separately construed the originality and progress requirements for copyright protection, just as Holmes would do in *Bleistein*. Section II.B then turns in earnest to Holmes's opinion in *Bleistein*.

A. *The Originality and Progress Requirements Before Bleistein*

It makes sense that Holmes would treat the originality and progress requirements separately in *Bleistein*. 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,¹⁶⁴ perhaps in an effort to claim nineteenth-century American originality doctrine as the source of the doctrinal tumult of the time. But the originality requirement 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. Consider first originality.

The originality requirement in nineteenth-century American copyright law was reasonably straightforward and, at least for non-fact-based works,¹⁶⁵ 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.¹⁶⁶ Of course, complications sometimes arose if the

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. 401, 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].'" (quoting Martin Heidegger, *An Introduction to Metaphysics* 37 (Ralph Manheim trans., 1959))).

164. See, e.g., Bracha, *Ideology of Authorship*, supra note 156, at 192–97.

165. As Professor 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, 339–71 (2009).

166. See *Emerson v. Davis*, 8 F. Cas. 615, 619 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436) ("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."); Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* 199 (Boston, Little, Brown & Co. 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."); *id.* at 208 (summarizing "the true test of originality" as simply "whether the production is the result of independent labor or of copying"). As is clear from the context, "material and valuable" was, for Eaton Drone, a

work for which protection was sought was based on a preexisting public domain or copyrighted work. 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.¹⁶⁷ Complications also arose in new technological contexts, such as photography.¹⁶⁸ But these complications and the outlier cases they produced (which have arguably been overemphasized in recent scholarship)¹⁶⁹ did not change the basic originality requirement. 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 courts apply today.¹⁷⁰

While the originality requirement was relatively stable, the progress requirement was not, primarily because it licensed courts to engage in often highly subjective content-based discrimination. As Eaton 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.¹⁷¹

Here, courts did not seek to ensure, as they did with the originality requirement, that a work's differences from whatever previously existed

very low standard. See George Ticknor Curtis, *Treatise on the Law of Copyright* 171 (Boston, Charles C. Little & James Brown 1847) (formulating a broadly inclusive originality standard such that “every literary laborer shall find in [the laws that protect literary property] an adequate protection to whatever he can show to be the product of his own labor”).

167. See, e.g., *Jollie v. Jaques*, 13 F. Cas. 910, 910 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1850) (No. 7437) (holding that to qualify for protection, the plaintiff's work “must be substantially a new and original work; not a copy of a piece already produced, with additions and variations which a writer of music with experience and skill might readily make”).

168. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56–57 (1884) (discussing the extent to which copyright protection extends to photographs).

169. See Brauneis, *supra* note 165, at 334 (characterizing *Jollie* as “an outlier that never had significant influence on copyright law,” contrary to Bracha).

170. See, e.g., *Ladd v. Oxnard*, 75 F. 703, 731 (C.C.D. Mass. 1896) (characterizing the originality requirement as “very moderate”); *Brightley v. Littleton*, 37 F. 103, 104 (C.C.E.D. Pa. 1888) (stating that even originality “of the lowest order” may meet the originality requirement); Bracha, *Ideology of Authorship*, *supra* note 156, at 204 n.55 (quoting *Ladd*, 75 F. at 731; *Brightley*, 37 F. at 104).

171. Drone, *supra* note 166, at 208–09.

were minimally creative (i.e., more than “merely formal and shadowy”).¹⁷² The question of “literary merit”¹⁷³ under the Progress Clause was qualitatively different. It asked whether the work promoted “the Progress of Science.”¹⁷⁴ 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, a work such as an educational textbook could fail to meet the originality requirement (because it was not significantly different from works it copied) but easily pass the progress requirement (because it promoted learning).

Through the course of the nineteenth century, courts repeatedly denied protection to a wide variety of works that, though original, failed to meet the progress requirement.¹⁷⁵ Recent commentary has incorrectly presented these cases as denying protection on originality grounds.¹⁷⁶ They did not. Indeed, one of them never mentions originality.¹⁷⁷ In the 1829 case of *Clayton v. Stone*, Justice Thompson denied copyright protection to a newspaper’s daily listing of stock prices.¹⁷⁸ Making no mention in his opinion of the originality requirement,¹⁷⁹ 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

172. *Emerson v. Davis*, 8 F. Cas. 615, 617 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

173. Drone, *supra* note 166, at 208.

174. U.S. Const. art. I, § 8, cl. 8.

175. See, e.g., *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (6th Cir. 1900); *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9173); *Clayton v. Stone*, 5 F. Cas. 999, 1003 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872); see also *infra* notes 177–183 (reviewing the reasoning of each case in detail).

176. See Bracha, *Ideology of Authorship*, *supra* note 156, at 203–09; *infra* note 179.

177. See *Clayton*, 5 F. Cas. 999.

178. *Id.* at 1003.

179. 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, *Ideology of Authorship*, *supra* note 156, at 204–05. But *Clayton* nowhere engages the issue of originality. The opinion addresses only the progress requirement. *Clayton*, 5 F. Cas. at 999. Consider also Drone’s statement that “[t]o be worthy of copyright, a thing must have some value as a composition sufficiently material to lift it above utter insignificance and worthlessness.” Drone, *supra* note 166, at 211. Bracha cites this language to support the proposition that a more permissive *originality* doctrine emerged in the late nineteenth century, Bracha, *Ideology of Authorship*, *supra* note 156, at 207, but Drone was very clearly writing here about the progress requirement, not the originality requirement. See Drone, *supra* note 166, at 208–11 (referring to English and American statutory and constitutional language indicating the “object of copyright legislation” to be the encouragement of learning and the promotion of the progress of science and reviewing court interpretations of this language).

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.¹⁸⁰

In the 1867 case of *Martinetti v. Maguire*, the work at issue was rather different but equally as suspect under the Progress Clause.¹⁸¹ 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 and attitudes of the female person.”¹⁸² Though the court belittled the originality of the play, which “consists almost wholly of scenic effects, or representations taken substantially from well-known dramas and operas,” 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”¹⁸³

Finally, in the latter decades of the century, courts routinely denied copyright protection to expression appearing in advertising, product labels, and product catalogues. This line of cases is best represented by Justice Field’s opinion for the Court in the 1891 case *Higgins v. Keuffel*, which held that the product label at issue, consisting of the phrase “water-proof drawing ink,” could not be protected under copyright law.¹⁸⁴ Field questioned whether the label met the originality requirement,¹⁸⁵ but the progress requirement arguably drove the outcome of the case. The Justice gave various examples of simple product labels and explained that

The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink in a bottle as “black,” . . . or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question.¹⁸⁶

180. *Clayton*, 5 F. Cas. at 1003.

181. 16 F. Cas. 920, 923 (C.C.D. Cal. 1867) (No. 9173).

182. *Id.* at 922.

183. *Id.* at 922–23 (quoting U.S. Const. art. I, § 8, cl. 8).

184. 140 U.S. 428, 428–29 (1891) (Field, J.).

185. See *id.* at 431 (quoting the Intellectual Property Clause and asserting that “[t]his provision evidently has reference only to such writings and discoveries as are the result of intellectual labor”).

186. *Id.*; see also *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (6th Cir. 1900) (holding that a “mere advertisement,” having “no value aside

The Seventh Circuit Court of Appeals reasoned similarly in *J.L. Mott Iron Works v. Clow*, which denied copyright protection to illustrations of bathroom fixtures appearing in various product catalogues.¹⁸⁷ The court explained that in contrast to the British Parliament, “In this country, under the constitution, the power lodged with congress is not unlimited, but is restricted to the promotion of the progress of science and useful arts.”¹⁸⁸ In the court’s view, the simple illustrations failed to meet either the originality or the progress requirement.¹⁸⁹

Cases that denied protection to advertising instantiated a remarkable irony, culminating 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 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.¹⁹⁰ Instead, what the Constitution arguably did not provide, a statute finally did. The 1874 amendment explicitly established statutory protection for “works connected with the fine arts.”¹⁹¹ This explicit statutory reference to 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.”¹⁹² By the turn of the century, the

from this function,” does not promote the useful arts and thus should not receive copyright protection).

187. 82 F. 316, 321 (7th Cir. 1897).

188. *Id.* at 320. Specifically, the *J.L. Mott* court cited the British Court of Chancery case *Maple & Co. v. Junior Army & Navy Stores* (1882) 21 Ch D 369, which held that the preamble of the British Copyright Act of 1842, 5 & 6 Vict. c. 45, did not limit what could be copyrighted under the Act. The preamble of the Act began: “Whereas it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world.” *Id.* The *Mott* court observed that, by contrast, the Intellectual Property Clause limited the scope of what Congress could protect under copyright law. *Mott*, 82 F. at 320.

189. *Mott*, 82 F.2d at 318 (“We discover nothing original in the treatment of the subject.”); *id.* at 321 (“[M]ere advertisements, whether by letter press or by picture, are not within the protection of the copyright law.”). With respect to the progress requirement, the court saw fit to add that “[i]t is possibly not beyond comprehension that pictures of slop sinks, washbowls, and bath tubs, . . . though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and of advancement in knowledge of the arts.” *Id.*

190. See Act of June 18, 1874, ch. 301, § 3, 18 Stat. 78, 79 (providing copyright protection to pictorial illustrations or works connected with the fine arts).

191. Act of July 8, 1870, ch. 231, § 86, 16 Stat. 198, 212. Specifically, the 1870 Act provided copyright protection for, among other things, any “engraving,” “cut,” or “print.” *Id.* The 1874 Amendment later specified that the 1870 Act’s reference to any “[e]ngraving,” “cut,” and “print” shall be applied only to pictorial illustrations or works connected with the fine arts” Act of June 18, 1874, § 3.

192. *J.L. Mott Iron Works v. Clow*, 72 F. 168, 169 (C.C.N.D. Ill. 1896).

very constitutional clause whose reference to “Science and the useful Arts” might have counseled against extending protection to fine art was instead understood to empower courts to apply a strict definition of fine art.¹⁹³ The thinking was that only aesthetic works that could satisfy this strict definition would “promote the Progress.”¹⁹⁴

By 1903, then, one phrase in the Progress Clause—“Science and useful Arts”—had been entirely denatured, but the other phrase—“to promote the 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.¹⁹⁵ *Bleistein* thus presented a number of difficult issues to the Court. With respect to the progress requirement in particular, the case called upon the Court to decide three fundamental questions: (1) May Congress provide copyright protection to works of the fine arts under its Intellectual Property Clause power; if so, (2) does the Progress Clause limit Congress to offering protection only to those works of the fine arts that promote “Progress”; and if so, (3) do the circus posters promote “Progress”?¹⁹⁶ What was required to set American copyright law on a proper course in the new century was a clear, careful analysis of each of these issues. Enter Justice Holmes.

B. *The Originality and Progress Requirements in Bleistein*

In what follows, section II.B.2 examines Holmes’s consideration of whether the Intellectual Property Clause covered the fine arts and shows how he essentially bullied his way through to reach the right result. Section II.B.3 focuses on the originality requirement and locates Holmes’s invocation of personality within the tradition of nineteenth-century American literary romanticism. Section II.B.4 turns to *Bleistein*’s famous call for judicial aesthetic neutrality and its embrace of “commercial value” as the only workable measure of aesthetic merit under the progress re-

193. See, e.g., *Lamb v. Grand Rapids Sch. Furniture Co.*, 39 F. 474, 475 (C.C.W.D. Mich. 1889) (rejecting the plaintiff’s argument that illustrations of furniture were “intrinsically valuable, as works of art,” on the ground that “they were not published as such, but simply for trade purposes in aid of the [] sales” of furniture).

194. The court in *Barnes v. Miner* held:

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.’

122 F. 480, 490 (C.C.S.D.N.Y. 1903) (quoting U.S. Const. art. I, § 8, cl. 8).

195. See supra section I.C (discussing contrasting conceptions of aesthetic progress).

196. Brief for Defendant in Error at 10–14, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (No. 117).

quirement. First, however, to highlight the tensions in Holmes's own thinking about the issues before him in the case, section II.B.1 reviews an extraordinary speech that he delivered months before the Court handed down *Bleistein*. Apparently unremarked by previous scholarship on the *Bleistein* case, the speech reads like the antithesis of—and perhaps like atonement for—Holmes's opinion in *Bleistein*.

1. *Holmes the Aesthete*. — Donaldson, the alleged infringer, 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 delivered a brief speech at Northwestern Law School that spoke in defense, as Justice Harlan would in his *Bleistein* dissent, of “high art.”¹⁹⁷ The speech anticipated many of the themes and much of the rhetoric of his opinion for the Court.

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.”¹⁹⁸ 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.”¹⁹⁹ And then, within a few sentences, he observed: “[E]very joy that gives to life its inspiration consists in an excursion towards death, although wisely stopping short of its goal.”²⁰⁰ 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 might be said, as I often have said, and as I have been gratified to find elaborated by that

197. See Holmes, Address of Holmes, *supra* note 43. The briefs in *Bleistein* are dated “October Term, 1902.” See Brief on Behalf of Plaintiffs in Error, at 1, *Bleistein*, 188 U.S. 239 (No. 117); Brief for Defendant in Error at 1, *Bleistein*, 188 U.S. 239 (No. 117). Holmes delivered his speech on October 20, 1902. See Holmes, Address of Holmes, *supra* note 43, at 98. *Bleistein* was argued on January 13 to 14, 1903, and the opinion is dated February 2, 1903. *Bleistein*, 188 U.S. at 239.

198. See Oscar Wilde, *The Picture of Dorian Gray* 4 (Joseph Bristow ed., Oxford Univ. Press new ed. 2006) (1890).

199. Holmes, Address of Holmes, *supra* note 43, at 98.

200. *Id.*

true poet Coventry Patmore, that one of the grounds of aesthetic pleasure is waste.²⁰¹

Assuming, as he would in *Bleistein*, his intended audience's familiarity with John Ruskin's art criticism (and in particular with Ruskin's *The Nature of Gothic*)²⁰² Holmes then elaborated on this theme:

Who does not know how his delight has been increased to find some treasure of carving upon a mediaeval 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 most advantage?²⁰³

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.²⁰⁴ Many aestheticists, including Ruskin, would likely have rejected Wilde's view that "all art is quite useless"²⁰⁵ and possibly also Holmes's view that "one of the grounds of aesthetic pleasure is waste."²⁰⁶ 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 soulless 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. Linda Dowling has persuasively argued that, in its origins, aestheticist thought pursued a "project of aesthetic democracy"²⁰⁷ that identified in the properly cultivated common aesthetic sense of the people a legitimizing basis for popular democratic sovereignty.²⁰⁸ But as Dowling has also shown, many aestheticists eventually abandoned this project as a failure.²⁰⁹ The tension between aestheticist aspiration and the reality of popular taste proved

201. Id.

202. 2 John Ruskin, *The Stones of Venice* 151–230 (New York, Merrill & Baker 1853).

203. See Holmes, Address of Holmes, *supra* note 43, at 98.

204. See Ruth Livesey, *Aestheticism*, Oxford Bibliographies, <http://www.oxfordbibliographies.com/view/document/obo-9780199799558/obo-9780199799558-0002.xml> [<http://perma.cc/V3AK-TYHZ>] (last modified Mar. 2, 2011) ("Aestheticism can be defined broadly as the elevation of taste and the pursuit of beauty as chief principles in art and in life.").

205. Wilde, *supra* note 198, at 4.

206. Holmes, Address of Holmes, *supra* note 43, at 98.

207. Linda Dowling, *The Vulgarization of Art: The Victorians and Aesthetic Democracy*, at xiii (1996).

208. See Elizabeth K. Helsinger, *Ruskin and the Art of the Beholder* 206 (1982) (discussing Ruskin's "democratization of imaginative perception").

209. See Dowling, *supra* note 207, at xiii (discussing Ruskin's and Morris's "final disenchantment" with the idea of aesthetic democracy).

unsustainable.²¹⁰ Ruskin, for example, had begun his career with the intention “to spread the love and knowledge of art among all classes.”²¹¹ 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.”²¹²

It was clearly within the more optimistic strains of the aestheticist tradition that Holmes placed himself at Northwestern. In language that would echo in *Bleistein*, he 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.²¹³

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, I 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.²¹⁴

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

210. See *id.* at 56 (discussing “the tension between the aristocratic basis and the democratic claims of the moral-aesthetic sense”).

211. Letter from John Ruskin to Rev. Osborne Gordon (Mar. 10, 1844), *in* 3 *The Works of John Ruskin* 665, 665 (E.T. Cook & Alexander Wedderburn eds., 1903) [hereinafter *Ruskin, Works*].

212. John Ruskin, *Modern Painters*, *in* 7 *Ruskin, Works*, *supra* note 211, at 441, 441; John Ruskin, *Inaugural Address at the Cambridge School of Art* (Oct. 29, 1858), *in* 16 *Ruskin, Works*, *supra* note 211, at 177, 182.

213. Holmes, *Address of Holmes*, *supra* note 43, at 99.

214. *Id.*

debating with him than I do in arguing with those who despise the ideals which we owe to war.²¹⁵

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.²¹⁶

It must have been a beautiful speech, and all the more effective in that a man of Holmes’s authority and experience would profess to the students before him 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 also the overriding primacy of aesthetic experience over any other basic human need. And where other critics might have spoken primarily, if not exclusively, of connoisseurship, of aesthetic consumption, Holmes spoke to his 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”).²¹⁷ The speech was arguably Holmes at his best, which makes it all the stranger—and more frustrating—that he would so thoroughly abandon all of its “idealizing tendencies” four months later in *Bleistein*.²¹⁸

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 his 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 not be read to protect *Bleistein*’s posters or, if it should be so read, that the

215. *Id.* at 99–100.

216. *Id.* at 100.

217. *Id.* at 99.

218. The reader may object that it has long been customary for jurists to speak much more circumspectly in an opinion than they would in a public forum like a dedication speech, if only to further “the upholding of the marmoreal surface of the law.” *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1186 (9th Cir. 2010) (Fernandez, J., concurring). Thus, we should not expect continuity between Holmes’s Northwestern speech and his *Bleistein* opinion. The problem with this argument is that Holmes’s *Bleistein* opinion was just as unrestrained as his Northwestern speech, but it inverted many of the speech’s themes.

statutory provision was unconstitutional.²¹⁹ 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.²²⁰

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.²²¹ He 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.²²² 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's treatment of the main statutory question in *Bleistein* was equally as abrupt and even more acutely in tension with his Northwestern pose. The issue, to recall, 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 1870.²²³ Holmes's analysis bordered on the fatuous. He betrayed no knowledge of the Copyright Office's decades of complaints about a flood of registrations for advertising.²²⁴ Instead, he forcefully held that even if the statutory phrase were read conjunctively to apply only to those "pictorial illustrations" that were "connected with the fine arts," the *Bleistein* posters met this requirement:

219. See *supra* notes 150–153 and accompanying text.

220. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903) (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884)).

221. In *Sarony*, *Burrow-Giles* was held to have infringed *Sarony*'s copyright in his photograph of Oscar Wilde. See 111 U.S. at 54–55.

222. *Bleistein*, 188 U.S. at 249.

223. *Id.* at 249–50; see also Act of July 8, 1870, ch. 230, 16 Stat. 198, 212, § 86.

224. Senator John Sherman of Ohio referenced these complaints when he explained, with reference to the 1874 Amendment, that "[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." Cong. Globe, 42d Cong., 3d Sess. 1420 (1873); see also Rosen, *supra* note 47, at 353 (quoting Senator Sherman's statement). The parties' briefs never referenced the issue. See Brief on Behalf of Plaintiffs in Error, *Bleistein*, 188 U.S. 239 (No. 117); Brief for Defendant in Error, *Bleistein*, 188 U.S. 239 (No. 117).

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.²²⁵

For the Holmes of *Bleistein*, a “real use” is “to increase trade and to help to make money.”²²⁶ Holmes the aesthete makes an appearance only at the end, protesting that the law not “excommunicate” Degas, unquestionably an expositor of the fine arts—who was said to disdain Monet for his supposed commercialism.²²⁷

But what should Holmes have done here? Should he have held that because the circus posters at issue were not “fine art,” they could not receive copyright protection, even if they attracted the “crowd?” The answer is that regardless of what Holmes’s 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.²²⁸ The advertisements were not fine art by even a broad definition of the term, and the *Bleistein* Court should not have granted them copyright protection. Present-day accounts of *Bleistein* strangely overlook the statutory context of Holmes’s ruling. They celebrate his declaration later in the opinion that judges should not impose their own aesthetic standards when deciding copyright cases, but they omit the fact that this is precisely what he did in his highly tendentious statutory interpretation.²²⁹

Though Holmes was arguably a strong exponent of American pragmatist philosophy,²³⁰ the Holmes of *Bleistein* expounded a brand of

225. *Bleistein*, 188 U.S. at 251.

226. *Id.*

227. See Lara Marlowe, A Grumbling Genius? Impressions of Degas, *Irish Times* (May 14, 2015, 1:00 PM), <http://www.irishtimes.com/culture/art-and-design/visual-art/a-grumbling-genius-impressions-of-degas-1.2211221> [<http://perma.cc/HSG3-AEMD>] (noting Camille Pissarro’s opinion that, in reference to Monet’s work, Degas “regards it all as designed to sell”).

228. See Act of June 18, 1874, ch. 301, § 3, 16 Stat. 78, 79 (applying protection “only to pictorial illustrations or works connected with the fine arts”).

229. See, e.g., Robert C. Denicola, Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 *Minn. L. Rev.* 707, 708 n.10 (1983) (citing with approval *Bleistein*’s declaration that judges should not judge aesthetic merit).

230. See, e.g., Richard A. Posner, Law, Pragmatism, and Democracy 57–59 (2003) (discussing Holmes’s legal pragmatism); Denicola, *supra* note 229, at 118 (noting the “intellectual kinship between Dewey and Holmes”); Thomas C. Grey, Holmes and Legal

that philosophy most susceptible to the caricature, much despised by Dewey, that pragmatism was “the philosophy of the American businessman.”²³¹ The particular manner in which Holmes merged the aesthetic into the useful in *Bleistein* got exactly backward what Dewey would try to accomplish three decades later in *Art as Experience*.²³² There, as we have seen, Dewey went to great lengths to attack the traditional distinction between fine and useful art and also between the connoisseur and the “crowd”—though in this, he was much more generous than Holmes.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.²³⁴ 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. *Bleistein's Originality Requirement and American Literary Romanticism.* — If, on the constitutional and statutory issues in *Bleistein*, Holmes seemed to revel in the coarse commercialism of his stance, his treatment of the originality requirement in copyright law brought a shift in rhetoric to an entirely different vein of the American cultural tradition. To appreciate the full meaning of *Bleistein's* restatement of the originality requirement, it is necessary to redirect a sometimes misguided debate in American copyright law concerning the influence on it of literary romanticism. This will allow us, in Part IV, to properly consider how Holmes's restatement of originality in terms of “personality” may form the foundation for certain reforms of copyright law.

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 Woodmansee²³⁵ and Mark Rose,²³⁶ leading comment-

Pragmatism, 41 *Stan. L. Rev.* 787, 788 (1989) (arguing that much of Holmes's thought was consistent with American pragmatism); Note, Holmes, Peirce and Legal Pragmatism, 84 *Yale L.J.* 1123, 1124–25 (1975) (exploring parallels between Charles Sanders Peirce's early philosophy and Holmes's *The Common Law*).

231. See 10 Abraham Kaplan, Introduction to *The Later Works of John Dewey, 1925–1953*, at vii, xi (Joy Ann Boydston ed., 2008).

232. Dewey, *Experience*, *supra* note 109.

233. *Id.* at 5 (“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 . . .”).

234. *Id.* at 27.

235. See, e.g., Martha Woodmansee, *The Author, Art, and the Market* 35–55 (1994) (discussing the role of the figure of the inspired author in the emergence of German copyright laws); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 *Cardozo Arts & Ent. L.J.* 227, 281–82, 289 (1992) (discussing the persistence of

ators such as Jessica Litman,²³⁷ Peter Jaszi,²³⁸ and James Boyle²³⁹ argued in the 1990s 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.²⁴⁰ This romantic author figured as an autarchic individual who creates unique and heterodox creative works *ex nihilo*, or at least out of her own "singular inner being."²⁴¹ As Jaszi put it, "British and American copyright presents myriad reflections"²⁴² of "the full-blown romantic conception of 'authorship'"²⁴³—though, to his credit, he admitted that "they sometimes remind one of images in fun-house mirrors."²⁴⁴ More recent commentary has sustained²⁴⁵ and substantially refined²⁴⁶ the romantic-authorship thesis. Other scholars, however, have strongly criticized the core historical and theoretical claims of this romantic-author school of copyright commentary,²⁴⁷ not least because of *Bleistein*.

collaborative modes of writing in European literature notwithstanding the rise of the myth of the author as a solitary genius).

236. See Mark Rose, *Authors and Owners: The Invention of Copyright* 4–8 (1993) (tracing the invention of the author and the development of copyright law in eighteenth-century Britain).

237. See Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965, 1008–12 (1990) [hereinafter Litman, *Public Domain*] (discussing the "romantic model of authorship").

238. See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 *Cardozo Arts & Ent. L.J.* 293, 293–99 (1992) [hereinafter Jaszi, *Author Effect*] (arguing that the persistence of the ideology of romantic authorship in American copyright law impedes recognition of the significance of collective creativity); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 *Duke L.J.* 455 [hereinafter Jaszi, *Metamorphoses*] (tracing the impact of the romantic conception of authorship on American copyright law).

239. See James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* 53–56 (1996) (discussing the romantic vision of authorship and linking it to *Bleistein's* conception of originality in copyright law).

240. See Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 *Colum. J.L. & Arts* 1, 15–21 (2008) (reviewing the scholarship on this issue).

241. Litman, *Public Domain*, *supra* note 237, at 1008.

242. Jaszi, *Metamorphoses*, *supra* note 238, at 456.

243. *Id.* at 463.

244. *Id.* at 456.

245. See, e.g., Lior Zemer, *The Idea of Authorship in Copyright* 74 (2007) ("I argue that 'romantic authorship' plays a significant role in copyright discourse, even if we do not expressly mention it.").

246. See, e.g., Mario Biagioli, *Genius Against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting*, 86 *Notre Dame L. Rev.* 1847, 1848–49 (2011) (drawing upon Johann Gottlieb Fichte's *Proof of the Illegality of Reprinting* to identify the manner in which the figure of genius can both support and undermine the justification for copyright protection); see also Margaret Chon, *The Romantic Collective Author*, 14 *Vand. J. Ent. & Tech. L.* 829, 831–32 (2012) (extending the concept of the romantic author to collective authorship).

247. See, e.g., Bently, *supra* note 240, at 21 ("[T]here are other—and to my mind, better—explanations for the expansion of copyright. The romantic author was, at most, a minor accomplice."); Erlend Lavik, *Romantic Authorship in Copyright Law and the Uses*

Bleistein has figured prominently in the debate because of a still oft-quoted passage in the opinion that has significantly influenced the development of American copyright law—though perhaps not in the way one 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.”²⁴⁸ This might appear to be a strange argument, but it proceeded from the Supreme Court’s dictum twenty years earlier in *Sarony* that in the case of photographs, the mere “transferring . . . of the visible representation of some existing object” might not qualify for copyright protection.²⁴⁹ 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.”²⁵⁰ 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.²⁵¹

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 “require[d] no fancy or imagination, no genius, no laborious thought,”²⁵² 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—nominal originality standard as evidence that modern American copyright law has never been in thrall to any kind of romantic

of Aesthetics, in *The Work of Authorship* 45, 45–65 (Mireille van Eechoud ed., 2014) (criticizing the thesis that the image of the romantic author has significantly influenced the expansion of copyright protection); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *Tex. L. Rev.* 873, 879–95 (1997) (book review) (arguing against the romantic-authorship thesis).

248. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

249. *Burrow-Giles Lithographing Co. v. Sarony*, 111 U.S. 53, 59 (1884).

250. *Feist Publ’ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

251. *Bleistein*, 188 U.S. at 249–50 (citations omitted).

252. 100 U.S. 82, 94 (1879).

notion of authorship.²⁵³ Chief among these critics is Bracha, who identifies in the history of the originality requirement a “full-fledged paradox”²⁵⁴ 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,”²⁵⁵ yet *Bleistein* reduced “copyright’s originality requirement to almost nothing”²⁵⁶ by giving it “a restrictive and technical meaning” that “has little to do with the romantic vision.”²⁵⁷ In an excellent review of the issue, Professor Erlend Lavik has stated the problem more pointedly: “If copyright law has adopted an idea of originality premised on notions of poetic creativity as a gift bestowed on a few geniuses, then surely we would expect it to be exceedingly difficult to obtain copyright protection, yet the problem is precisely the opposite: it is granted remarkably easily.”²⁵⁸

What has been strangely missing from the debate over the romantic-authorship thesis, aside from much 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 “fun-house mirrors.”²⁵⁹ On the contrary, it is, like Holmes’s invocation of “[p]ersonality” in *Bleistein*, a completely unsurprising and straightforward reflection of the “Democratic Vistas”²⁶⁰ of nineteenth-century American literary romanticism, particularly as inflected by American transcendentalism.

Holmes’s restatement of the originality requirement in terms of “personality” did 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

253. See, e.g., Lavik, *supra* note 247, at 53.

254. Bracha, *Ideology of Authorship*, *supra* note 156, at 208.

255. *Id.* at 209.

256. *Id.* at 200.

257. *Id.* at 201, 267.

258. Lavik, *supra* note 247, at 53.

259. See *id.*

260. Walt Whitman, *Democratic Vistas*, in *Walt Whitman: Complete Poetry and Selected Prose* 455, 455 (James E. Miller, Jr., ed., 1959) (1871).

contains something unique.”²⁶¹ Well-informed readers of the *Bleistein* opinion in 1903 would have immediately recognized this claim as an article of American democratic intellectual faith, one that emerged out of American transcendentalism—and Emerson’s call for “an original relation to the universe”²⁶²—and that by the turn of the century bordered on cliché.²⁶³ Readers might also have recognized in Holmes’s invocation of personality the influence of Walt Whitman, whom Holmes admired and with whom he corresponded.²⁶⁴ 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!,”²⁶⁵ repeatedly described himself as, for example, the “bard of personality”²⁶⁶ or the “Chanter of Personality, outlining a history yet to be,/ I project the ideal man, the American of the future.”²⁶⁷ Finally, consider Dewey’s possibly even more rhapsodic invocation of personality in his 1888 essay *The Ethics of Democracy*, in which he celebrated “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.”²⁶⁸

261. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

262. Ralph Waldo Emerson, *Nature* (1849), reprinted in *Ralph Waldo Emerson* 1, 7 (Richard Poirier ed., 1990).

263. See, e.g., George Willis Cooke, Introduction to *The Poets of Transcendentalism: An Anthology* 1, 6 (George Willis Cooke ed., 1903). George Cooke explained that transcendentalism

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.

Id.

264. See, e.g., Novick, *supra* note 44, at 196 (quoting correspondence from Whitman to Holmes).

265. 2 Walt Whitman, *Leaves of Grass: A Textural Variorum of the Printed Poems: Poems, 1860–1867*, at 291 (Sculley Bradley et al. eds., 1980).

266. *Id.* at 283.

267. Walt Whitman, *Selected Poems, 1855–1892*, at 191 (Gary Schmidgall ed., 1999); 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”).

268. John Dewey, *The Ethics of Democracy* (1888), reprinted in *John Dewey: The Political Writings* 59, 62 (Debra Morris & Ian Shapiro eds., 1993) [hereinafter *Dewey, Ethics of Democracy*]. 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 sculpture of the twelfth century—is not mechanical and hence it bears the stamp of personality.” *Dewey, Experience*, *supra* note 109, at 251.

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,”²⁶⁹ 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,”²⁷⁰ that the details of personality were revealed in the interpretation of handwriting.²⁷¹ And as Professor Warren Susman has explained in an essay of enormous influence on American historiography, 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.”²⁷²

In conformity with American thinking of the time, then, Holmes’s invocation of personality resulted not in a “restrictive and technical”²⁷³ originality requirement but rather in one that was broadly inclusive and emphatically liberal, egalitarian, and humanistic—and American.²⁷⁴ Holmes’s statement that “a very modest grade of art has in it something irreducible, which is one man’s alone,”²⁷⁵ calls to mind Ralph Waldo Emerson’s insistence on “the infinitude of the private man”;²⁷⁶ “every man has within him some[thing] really divine.”²⁷⁷ This “something,” declared Emerson, is the true source of originality: “And what is

269. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

270. Donald T. Ames, *Ames on Forgery: Its Detection and Illustration with Numerous Cause Célèbres* 19 (1901).

271. In his correspondence, Holmes called the interpretation of handwriting “chirography,” often when commenting on his own indecipherable script. See Healy, *supra* note 42, at 44; see also Richard Walquer, *How to Read Character by Handwriting* 5–6 (1902) (adducing evidence that “the handwriting really reflects the personality of the writer”).

272. See Susman, *supra* note 267, at 277. 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. Ezra Pound, for example, called for “rights of personality” and identified the central problem of the modern world as the survival of personality. *Id.* at 281 (quoting Ezra Pound, *Provincialism the Enemy*, 21 *The New Age* 268, 269 (1917)).

273. See Bracha, *Ideology of Authorship*, *supra* note 156, at 201.

274. Cf. Hughes, *supra* note 137, at 119 (“[E]xtending legal protection to the meanest levels of creative activity has been in keeping with the rise of liberalism and a society of autonomous, equal citizens.”).

275. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

276. See Ralph Waldo Emerson, *Journal Entry* (Apr. 7, 1840), in 5 *Journals of Ralph Waldo Emerson, 1838–1841*, at 379, 380 (Edward Waldo Emerson & Waldo Emerson Forbes eds., 1911) [hereinafter *Journals of Emerson*]; see also G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 43–44 (1993) (discussing Emerson’s influence on Holmes).

277. Ralph Waldo Emerson, *Journal Entry* (May 9, 1840), in 3 *Journals of Emerson*, *supra* note 276, at 390, 390. Emerson continued: “[T]herefore is slavery the unpardonable outrage it is.” *Id.*

Originality? It is being, being one's self, and reporting accurately what we see and are."²⁷⁸ Holmes also conveyed the continued receptiveness of American romantic aesthetics to an older—essentially preromantic—conception of individual genius, one well-exemplified in Samuel Johnson's declaration that "every Man has his *genius*"²⁷⁹ or in Whitman's celebration of the "genius of the United States" as adhering "most in the common people."²⁸⁰ 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."²⁸¹ 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, Emersonian²⁸²—image of everyday, common genius.²⁸³

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, thus rendering it a standard perhaps not worthy of an ideal copyright law.²⁸⁴ Yet a closer reading of

278. 8 Ralph Waldo Emerson, *The Works of Ralph Waldo Emerson* 191 (Edward W. Emerson ed., fireside ed. 1909) (1875).

279. Letter from Samuel Johnson to Hester Thrale (July 10, 1780), in 3 *The Letters of Samuel Johnson: 1777–1781*, at 283, 284 (Bruce Redford ed., Hyde ed. 1992); cf. Raymond Williams, *Keywords* 143 (1983) (quoting Johnson).

280. Walt Whitman, *Preface to Leaves of Grass*, in *Walt Whitman* 29, 30 (Mark Van Doren ed., 1945) (1855); cf. Biagioli, *supra* note 246, at 1847 (discussing Johann Gottlieb Fichte's notion of genius).

281. Bracha, *Ideology of Authorship*, *supra* note 156, at 193. For a persuasive critique of this depiction of romanticism by copyright scholars, see Lavik, *supra* note 247, at 45–65.

282. See generally Perry Miller, *Emersonian Genius and the American Democracy*, 26 *New Eng. Q.* 27 (1953) (describing Emerson's notion of common genius). For a discussion of Emerson's views on the commonness of genius, see Richard Shusterman, *Performing Live: Aesthetic Alternatives for the Ends of Art* 206–07 (2000).

283. Professor Mario Biagioli's intervention on this point is crucial. See Biagioli, *supra* note 246, 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.").

284. See, e.g., *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (Posner, J.) (referring to the originality requirement and noting that "any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make"); see also Yen, *supra* note 62, at 301–02 ("Whether we like it or not, the existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary."). By contrast, Professor Joseph Scott Miller draws an analogy to the nonobviousness requirement in patent law to advocate that copyright law provide protection only "insofar as the author can show that the work departed from routine, typical, or conventional expression in the pertinent genre at the time he or she authored the work." Miller, *Hoisting Originality*, *supra* note 156, at 486.

Bleistein better informed by the opinion's cultural context urges a different judgment: that its nominal originality requirement is not to be regretted but to be celebrated.²⁸⁵ 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.²⁸⁶ In essence, in its formulation of the originality requirement, *Bleistein* embraced a leveling conception of aesthetic creation, a conception of the common person as an author and the author as a common person. Critics that argue that the originality standard as formulated by *Bleistein* "has little to do with the romantic vision"²⁸⁷ are mistaken; it has everything to do with a romantic vision as seen by Americans of the time, if not still.

4. *Bleistein's Progress Requirement and "Commercial Value."* — 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 he had one more issue before him that required a response. Donaldson argued to the Court that the circus advertisements could not qualify for protection because they lacked sufficient aesthetic merit "to promote the Progress of Science and the useful Arts."²⁸⁸ The Sixth Circuit agreed, and so did Justices Harlan and McKenna as the sole basis for their dissenting votes. 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."²⁸⁹ Harlan garbled the constitutional language—"Times," not "terms"; "Writings," not "works"—but his point was clear enough.

Having just held that the fine arts fell within the scope of the Progress Clause, Holmes now had to face the consequences. He had to

285. Cf. Arthur W. Weil, *American Copyright Law with Especial Reference to the Present United States Copyright Act 184* (1917) ("Copyright law is not an aristocratic institution.")

286. See Dewey, *Ethics of Democracy*, supra note 268, at 62–63.

287. See Bracha, *Ideology of Authorship*, supra note 156, at 267.

288. See supra notes 150–151 and accompanying text; see also Brief for Defendant in Error at 10–14, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (No. 117).

289. *Bleistein*, 188 U.S. at 253 (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, *Ideology of Authorship*, supra note 156, at 205–06. But Harlan clearly dissented on the ground that the posters did not meet the progress requirement.

reconcile in some way the aesthetic with the Progress Clause's reference to progress. His effort to do so exposed a facet of his 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"²⁹⁰ stance that there are no "ultimates," no absolute, incontrovertible standards.²⁹¹ Perhaps relatedly, it also brought out his unapologetic elitism, his dark fatalism with respect to popular democracy,²⁹² and, like the aestheticists he sought to emulate at Northwestern, his ultimate disappointment with the aesthetic sense of the "crowd."²⁹³

Here in full is Holmes's famous statement of judicial aesthetic neutrality, which he wrote, it must be emphasized, in response to the dissent's argument that the posters lacked sufficient merit to satisfy the progress requirement:

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 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

290. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice of the U.S. Supreme Court, to Morris Cohen (Jan. 15, 1930), in *The Holmes-Cohen Correspondence*, 9 J. Hist. Ideas 3, 48 (Felix S. Cohen ed., 1948); see also Healy, *supra* note 42, at 116 (characterizing Holmes's "bettabilitarian" stance as the belief that "[y]ou can't know anything for certain—you can only place bets").

291. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice of the U.S. Supreme Court, to Harold J. Laski (Aug. 4, 1929), in *1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935*, *supra* note 45, at 1168, 1169 ("I don't believe that we have any warrant for believing that we know cosmic ultimates and think therefore we had much better content ourselves with recognizing in good faith that we are finite creatures and can't formulate the infinite.").

292. See Rogat, *supra* note 45, at 254–56 (discussing Holmes's fatalistic view of popular sovereignty).

293. See *supra* notes 209–212 and accompanying text (discussing aestheticists' disenchantment with the project of aesthetic democracy).

by the desire to reproduce them without regard to the plaintiffs' rights.²⁹⁴

To find that the works at issue satisfied the progress requirement, Holmes quite sensibly declined to apply his own aesthetic judgment to 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"²⁹⁵ and thus unqualified and prone to error.²⁹⁶ 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."²⁹⁷

Instead, to find evidence that the works promoted progress, Holmes retreated to the market's judgment of their worth or otherwise 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 plaintiffs' rights,"²⁹⁸ then the works have sufficient merit—"their worth and their success"²⁹⁹—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."³⁰⁰ This is a remarkable shift in tone from his celebration of the "irreducible" uniqueness of the individual personality.³⁰¹ Like many intellectuals—and aestheticists—of the time,³⁰² Holmes appears to have had great respect for the individual but something bordering on contempt for the "crowd." Yet consistent with his belief, stated in *The Common Law*, 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, whether right or wrong,"³⁰³ he deferred to popular judgment as expressed in the market as evidence of aesthetic merit.

294. *Bleistein*, 188 U.S. at 251–52.

295. *Id.* at 251.

296. See Farley, *supra* note 62, at 817–18 (noting Holmes limited his call for aesthetic neutrality only to judges lacking training in art criticism).

297. *Bleistein*, 188 U.S. at 251–52.

298. *Id.*

299. *Id.*

300. *Id.*

301. See *id.* at 250.

302. See Mary Esteve, *The Aesthetics and Politics of the Crowd in American Literature* 5–6 (2003) (discussing "conventional tropes" in turn-of-the-century American thinking that described "a crowd's loss of personality").

303. Holmes, *Common Law*, *supra* note 141, at 41. Professor Grant Gilmore found this statement to be "frightening." See Grant Gilmore, *The Ages of American Law* 49 (1977).

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, he 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 the form of aesthetic *objects*. This market definition of aesthetic progress ignores 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.³⁰⁴ *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 American copyright law that it may be difficult to imagine that he had any reasonable alternative other than deferring to market demand. Indeed, a third way—beyond judges themselves assessing aesthetic merit or judges simply deferring to consumer demand—may seem even more elusive in a consumer society in which, 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, he could just as easily have found—so thin was his reasoning—that a work's aesthetic "worth"³⁰⁵ 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.³⁰⁶

304. Cf. Christopher S. Yoo, *Copyright and Personhood Revisited* 47 (Penn Law: Legal Scholarship Repository, Paper No. 423, 2012), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1422&context=faculty_scholarship [<http://perma.cc/9KQZ-B8EP>] ("The traditional view of personality theory takes a very narrow conception of the relationship between creative expression and personality that focuses exclusively on how works are treated after they have been created.").

305. *Bleistein*, 188 U.S. at 252.

306. See *id.* at 250.

If this alternative approach seems unduly sentimental, even precious (or European),³⁰⁷ consider that Holmes had just invoked all of this four paragraphs earlier in *Bleistein* as the very basis of the copyright property right.³⁰⁸ Importantly, as he indicated at the conclusion of his aesthetic-neutrality paragraph in referring to the preexistence of the property right (“without regard to the plaintiffs’ rights”),³⁰⁹ the works’ commercial 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 commercial value simply showed that they met the progress requirement. Holmes thereby explicitly avoided circular reasoning of the “if economic value, then property right” variety—a circularity in which legal protection is based on commercial value, but that commercial value depends on the extent of legal protection.³¹⁰ 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. The result was that *Bleistein* separated the basis of copyright rights, personality, from the purpose of granting those rights, progress in the form of “commercial value.”

What compelled Holmes to abjure an “if personality, then progress” logic, the very logic that seemed to animate his Northwestern speech? We cannot know for sure, and it would ultimately be a mistake to search for total coherence in his *Bleistein* opinion. For all of its brevity, the opinion, to borrow from Whitman, is large and contains multitudes.³¹¹ The tensions within Holmes’s own thinking no doubt grew out of and reflected larger tensions in turn-of-the-century America. These were captured perhaps most effectively at the time by Henry Adams.³¹² What seems clear is that Holmes’s opinion was ultimately much more of the

307. See Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* 39–40 (2010) (discussing French and German moral rights law).

308. *Bleistein*, 188 U.S. at 249–50.

309. *Id.* at 252.

310. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 815 (1935) (“The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected.”); cf. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 *Notre Dame L. Rev.* 397, 405 (1990) (criticizing trademark case law applying an “if value, then right” theory according to which anything of value should be the subject of property rights).

311. See Walt Whitman, *Song of Myself* (1855), reprinted in *Selected Poems and Prose* 5, 68 (A. Norman Jeffares ed., 1996) (“Do I contradict myself? // Very well then . . . I contradict myself; / I am large . . . I contain multitudes.”).

312. See Henry Adams, *The Education of Henry Adams: An Autobiography* 379–90 (1918) (discussing modern faith in the technological “dynamo”).

century to come, the world of Adams's "dynamo"³¹³ and mass-market commercial capitalism, than of the century that had just passed. Though Holmes could still speak stirringly of the "irreducible"³¹⁴ in the transcendental individual, he apparently would not conceive of progress in terms of that individual. Rather, progress expressed itself through social forces and, most significant among these, market forces. Holmes's innate elitism and distrust of the common people ultimately prevailed in *Bleistein* over any aversion his aestheticism might have held toward the market. This would be of interest only to Holmes's biographers but for its effect even now on our copyright law.

III. BLEISTEIN'S AFTERMATH

In the decades immediately following *Bleistein*, it might have been appropriate to ask which aspect of *Bleistein* would ultimately prevail: its emphasis on personality as the basis of copyright protection or its emphasis on commercial value as the purpose of copyright protection. The relation between these two sides of *Bleistein* was particularly unstable. One side was driven by the imperatives of romanticism and the aesthetic. The other was driven by the imperatives of industrial capitalism—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, 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.³¹⁵ If corporate works were not exactly created by a "crowd," neither were they created by a singular individual. They could not so readily claim the mantle of "irreducible" personality.³¹⁶ Furthermore, courts were already shifting their focus toward

313. See *id.* at 379.

314. See *Bleistein*, 188 U.S. at 250.

315. See Bracha, *Ideology of Authorship*, *supra* note 156, at 248–63.

316. See *Bleistein*, 188 U.S. at 250. For some jurists, this reasoning apparently applies not merely to corporate works but to all forms of collective creativity. See, e.g., *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, No. 92 C 5909, 1996 WL 224494, at *16 (N.D. Ill. May 1, 1996). Judge Zagel explained:

commercial value as the primary concern of the law, and the “work” had taken on a life of its own,³¹⁷ 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. Commercial value displaced personality not because *Bleistein* set any kind of “technical and anemic” originality standard that “emasculate[d]” the originality doctrine.³¹⁸ 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. Criticisms that read the opinion 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* suggest 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 reasoning—or more accurately, his swaggering rhetoric,³¹⁹ his “cryptic peacocking”³²⁰—failed to make clear the distinction the opinion sought to draw between its separate analyses of the originality requirement and the progress requirement. Courts of the time were likely unaware of the lower courts’ opinions in the case and the nineteenth-century case law that informed those opinions, and were perhaps unconcerned by the brief dissent. They cannot be blamed that they began to misread and misapply Holmes’s opinion in exactly the way that current courts and scholars still do. Furthermore, the progress requirement

But if creativity is intertwined with the personality of an individual, where does that leave those works which are the result of collaboration? Is “creation by committee” an oxymoron? If too many cooks are deemed to spoil the broth, the reason might be that in art, if not in life, more is less; the more participants that contribute, the less individual—and therefore the less personal—the result. Collectivism, by its very nature, necessitates dilution of the individual creative impulse.

Id.

317. Bracha, *Ideology of Authorship*, supra note 156, at 224–47.

318. Id. at 224, 267.

319. The treatise writer Arthur Weil openly criticized Holmes’s *Bleistein* opinion for its style. See Weil, supra note 285, at 40 (“Some of its remarks appear, with all deference, to be in the nature of assumption.”). Soon after his appointment to the Court, Holmes’s 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) (“[Holmes’s colleagues on the Court] did, however, criticize him from time to time for rapturous passages in his opinions.”).

320. Email from Robert Spoo, Chapman Distinguished Professor of Law, Univ. of Tulsa Coll. of Law, to Barton Beebe, John M. Desmarais Professor of Intellectual Prop. Law, N.Y. Univ. Sch. of Law (Oct. 9, 2016, 6:39 PM) (on file with the *Columbia Law Review*).

declined in significance through the course of the twentieth century, to the point where it now plays no appreciable role in our law. For that reason, courts and commentators could not have been expected to recognize, without clarification in the opinion itself, that the aesthetic-neutrality paragraph and its emphasis on “commercial value” addressed the progress requirement.³²¹ The result was that *Bleistein*’s discussion of originality was merged with its call for judicial aesthetic neutrality. 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.³²² Second, to meet the progress requirement, copyrightable expression must (c) contain economic value.³²³ But courts applied *Bleistein* to hold simply that to merit copyright protection an expression must (a) not be copied from another author and (c) contain economic value. As the progress requirement was forgotten, *Bleistein* came to stand for the proposition simply that uncopied commercial value could meet the originality requirement.

For evidence of the misreading of *Bleistein* just described, consider, for example, the 1939 case of *Vitaphone Corp. v. Hutchinson Amusement Co.*³²⁴ The *Vitaphone* court adopted the now-standard practice of reading *Bleistein*’s invocation of aesthetic neutrality and commercial value as bearing on the question of originality. The court merged various quotations from Holmes’s opinion:

[I]t must be admitted [that the photoplays at issue] showed originality. As the Court said in *Bleistein v. Donaldson Lithographing Co.*: “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.”³²⁵

In the 1941 case of *Stuff v. La Budde Feed & Grain Co.*, 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

321. See *Bleistein*, 188 U.S. at 251–52.

322. See *id.* at 250.

323. See *id.* at 249.

324. 28 F. Supp. 526 (D. Mass. 1939).

325. *Id.* at 529 (citation omitted) (quoting *Bleistein*, 188 U.S. at 250–51); see also *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 27 F.2d 176, 179 (E.D.N.Y. 1928) (assessing copyrightability in terms of the “worth and success” of the work).

drawing contained sufficient novelty to attract and hold the attention of many people.”³²⁶ For a more recent and succinct example, the court in the 2000 case of *SHL Imaging, Inc. v. Artisan House, Inc.* 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.’”³²⁷ Even the 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.”³²⁸ 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’).”³²⁹

In sum, Holmes’s opinion was highly stylized but not especially analytic; it was beautiful to read, but it did not encourage disciplined

326. 42 F. Supp. 493, 495 (E.D. Wis. 1941) (internal quotation marks omitted) (quoting *Bleistein*, 188 U.S. at 252).

327. 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) (quoting *Bleistein*, 188 U.S. at 250–51). 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, L.L.C.*, 691 F.3d 182, 186 (2d Cir. 2012); *Situation Mgmt. Sys., Inc. v. ASP Consulting L.L.C.*, 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. Publ’g Co.*, 158 F.3d 674, 690 (2d Cir. 1998); *Weissmann v. Freeman*, 868 F.2d 1313, 1322–23 (2d Cir. 1989); *Balt. 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); *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 282 (5th Cir. 1970); *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); *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 487–88 (E.D. Pa. 2002); *Diamond Direct, L.L.C. v. Star Diamond Grp., Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000); *Am. Dental 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); *Moore v. Lighthouse Publ’g Co.*, 429 F. Supp. 1304, 1309 n.3 (S.D. Ga. 1977); *Nat’l Cloak & Suit Co. v. Kaufman*, 189 F. 215, 217–18 (C.C.M.D. Pa. 1911). 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).

328. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991).

329. *Id.* For examples of copyright commentators’ merging of *Bleistein*’s treatment of originality with its treatment of aesthetic neutrality, see sources cited *supra* note 156; see also Niels B. Schaumann, *An Artist’s Privilege*, 15 *Cardozo Arts & Ent. L.J.* 249, 261 n.52 (1997) (“The exception to which Holmes refers [in the ‘narrowest and most obvious limits’] arises from the necessity of determining whether a given work possesses the requisite ‘originality’ to qualify as a copyrightable work at all.” (citing *Bleistein*, 188 U.S. at 251)).

application by lower courts.³³⁰ Its more easily digestible economic 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. Holmes’s opinion thus helped to set in motion the “if economic value, then property rights” circularity that continues to undermine our copyright law.³³¹ This was the very circularity that Holmes had carefully avoided in his opinion by asserting personality as the basis of the property right. *Bleistein* leaned toward an accumulationist approach to aesthetic progress by setting commercial value as the index of progress. Courts’ misreading of *Bleistein* and the circularity this misreading abetted only intensified the law’s commitment to accumulation. Now both the basis and purpose of copyright protection was uncopied commercial value. Personality no longer exerted a moderating influence on the circularity by introducing into the equation a value other than uncopied exchange value—the kind of moderating influence discussed in Part IV.

Bleistein did, however, touch upon the issue known as the “sweat of the brow” basis for copyright protection,³³² and this might have presented some 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.”³³³

330. Cf. Healy, *supra* note 42, at 207 (“Holmes, as his critics had long said, was more of an aphorist than a system builder. He believed that legal decisions, like art, should include only what is essential.”).

331. See Mark A. Lemley, Faith-Based Intellectual Property, 62 UCLA L. Rev. 1328, 1339–40 (2015) (discussing the “if value, then right” circularity).

332. See *Feist*, 499 U.S. at 352 (“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) (noting “[m]any United States and English copyright decisions in the eighteenth and nineteenth centuries characterized copyrightable authorship in terms of the labor invested in the work”).

333. *Bleistein*, 188 U.S. at 250 (citations omitted) (quoting John Ruskin, *Elements of Drawing* 3 (London, Smith, Elder & Co. 1857)).

The skill of the illustrator of the *Bleistein* posters thus easily exceeded a “very modest grade of art”³³⁴ 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 fetishism³³⁵ in our law—is that in the one instance in which the law still employs *Bleistein*’s emphasis on personality, it does so only to suppress any concern with the laborer’s “sweat of the brow.”³³⁶ Holmes mentioned in passing that “directories and the like . . . may be copyrighted,”³³⁷ and he was certainly correct that in the nineteenth and early twentieth centuries, 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.³³⁸ 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.³³⁹ In making this holding, the Court cited *Bleistein* exactly once, in passing, as quoted above.³⁴⁰ Perhaps the Court dismissed *Bleistein* because it explicitly stated in dicta a rule contrary to that stated in *Feist*—or perhaps the Court was wary of the minefield of Holmes’s undisciplined prose. In any case, the Court instead relied heavily on *The Trade-Mark Cases* and *Sarony*.³⁴¹ But as Jaszi has argued, Holmes’s emphasis on the personality of the author suffuses *Feist*.³⁴² The Court explained that only an intellectual work that originates in authorial subjectivity—only the “fruits of intellectual labor,”³⁴³ “of intellectual production, of thought, and conception”³⁴⁴—can qualify for copyright protection, and it so qualifies because any uncopied expression of subjectivity will apparently always be original; as

334. See *id.*

335. See 1 Karl Marx, *Capital: A Critique of Political Economy*, pt. I, ch. 1, § 4 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Charles Kerr & Co., 3d ed. 1906) (1897) (discussing the concept of commodity fetishism).

336. See *supra* note 332 and accompanying text (discussing the notion of “sweat of the brow” as a justification for copyright protection).

337. *Bleistein*, 188 U.S. at 250.

338. See Ginsburg, *supra* note 332, at 1875–80 (offering examples of American and English copyright decisions based on “laborious authorship”).

339. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

340. See *supra* notes 328–329 and accompanying text.

341. See *Feist*, 499 U.S. at 346–47 (citing *Burrow-Giles Lithographing Co. v. Sarony*, 111 U.S. 53, 59–60 (1884); *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

342. See Jaszi, *Author Effect*, *supra* note 238, at 302 (“[*Feist*] wears its values on its sleeves; from first to last, its rhetoric proceeds from unreconstructed faith in the gospel of Romantic ‘authorship.’”).

343. See *Feist*, 499 U.S. at 346 (emphasis omitted) (quoting *The Trade-Mark Cases*, 100 U.S. at 94).

344. See *id.* at 347 (quoting *Sarony*, 111 U.S. at 59–60).

Bleistein put it, “[p]ersonality always contains something unique.”³⁴⁵ Mere mechanistic grunt work, by contrast, in the nature of the “industrious collection” of facts—or the “slavish copying” of the *Bridgeman Art Library* case³⁴⁶—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 nonintellectual laborer’s merely “slavish” “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.³⁴⁷

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, Inc.*, the Second Circuit cited *Bleistein* but only as approving the proposition that a work

345. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). But see Zimmerman, *The Story*, supra note 47, at 107 (“[*Feist*] was intended to repudiate Justice Holmes’s claim that any work, so long as it ‘originates’ with an author and falls within the coverage of the statute, will bear enough of a distinguishing mark of personality to satisfy the Constitution’s originality requirement.”).

346. See *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (finding that mere “slavish copying [of public-domain paintings by highly accurate photographs],’ although doubtless requiring technical skill and effort, does not qualify” for copyright protection (quoting *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987))); see also *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1260 (10th Cir. 2008) (denying copyright protection to digital models copying the design of Toyota automobiles).

347. *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo.*, 768 F.2d 145, 148 (7th Cir. 1985) (citations omitted); see also *id.* at 148 n.2 (expressing recognition that for one reason or another many of these examples were not or would not actually be copyrightable, but stating that “the principle’s the thing”).

need not be the product of skill to qualify for copyright protection.³⁴⁸ *Alfred Bell's* deskilling of authorial labor went further. Whereas 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 distinguishable variations. Having hit upon such a variation unintentionally, the "author" may adopt it as his and copyright it.³⁴⁹

Alfred Bell's "clap of thunder" dramatically devalues both personality and labor, and why shouldn't it?³⁵⁰ 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 machine intelligence).³⁵¹ Authorial labor is "drudgery,"³⁵² a necessary evil, a requisite 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 the 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. 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," 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."³⁵³ The Court

348. 191 F.2d 99, 103 (2d Cir. 1951) ("No matter how poor artistically the 'author's' addition, it is enough if it be his own." (quoting *Bleistein*, 188 U.S. at 250)).

349. *Id.* at 104–05.

350. *Id.* at 105.

351. But see U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.2 (3d ed. 2014) (establishing a human-authorship requirement for registrability that excludes "works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author"). Consistent with *Bleistein's* embrace of "personality," the Copyright Office's human-authorship requirement represents an important backstop against the general trend toward an object-focused rather than a human-subject-focused copyright regime. This dead man's switch may someday prove to be a mechanism crucial to the proper functioning of the copyright system.

352. See *supra* note 136 and accompanying text.

353. 510 U.S. 569, 579 (1994).

construed the Progress Clause (as amended) to focus on the end product of transformative conduct: “transformative works,” “new expression, meaning, or message.”³⁵⁴ 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.

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, *Bleistein* ultimately gave rise to 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—in terms, that is, of “more.” 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 more pleasing expression.³⁵⁵ Courts often rehearse this argument.³⁵⁶ 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.”³⁵⁷ This accumulationist approach arguably began with *Bleistein*. Though Holmes could not help hiding his distaste for the works before him in the case, his opinion nevertheless relied heavily on the view that by adopting a baseline of near-total propertization of anything uncopyrighted that anyone else might want to copy, we will incentivize everything regardless of merit. And while this will produce more transitory bad, it will also produce more “works of lasting benefit to the world.”³⁵⁸

This argument works especially well in the world of *Bleistein*. *Bleistein*’s posters were based on “nature,” on the “original”; “they had

354. *Id.*

355. 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).

356. See, e.g., *Hofheinz v. AMC Prods., 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.”).

357. *Greenberg v. Nat’l Geographic Soc’y*, 533 *F.3d* 1244, 1272 n.27 (11th Cir. 2008).

358. *Washingtonian Publ’g Co. v. Pearson*, 306 *U.S.* 30, 36 (1939); see also *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 *F.2d* 852, 855 (5th Cir. 1979) (attributing to Congress the view that the purpose of the Progress Clause “is best served by allowing all creative works . . . to be accorded copyright protection regardless of . . . content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward”).

been drawn from the life.”³⁵⁹ Donaldson’s copies were identical.³⁶⁰ The facts of *Bleistein* thus never called upon Holmes to consider the extent to which Bleistein’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 Bleistein. The accumulationist approach 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.³⁶¹ The work expresses the “singularity” of the author, “which is one man’s alone,”³⁶² 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. Accumulationism 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.

IV. OVERCOMING *BLEISTEIN*

As this Article has shown, Holmes declined in *Bleistein* to hold that personality, which satisfied the originality requirement, could also satisfy the progress requirement.³⁶³ His resulting need for a separate analysis of the progress requirement prompted his call for aesthetic neutrality and deferral to the market. As we have also seen, courts and commentators merged his deferral to the market with his discussion of the originality requirement.³⁶⁴ This helped to create the conditions for exchange value to become both the basis and purpose of copyright protection and, more generally, for copyright law to adopt a commodity-oriented, accumulationist conception of aesthetic progress. This Part seeks to consider the implications of an alternative approach to aesthetic progress: the pragmatist aesthetic approach that engages in aesthetic judgment and assesses aesthetic progress according to the simple propositions that aesthetic labor in itself is its own reward and that the facilitation of more such labor represents progress.

Section IV.A first takes up the issue of aesthetic judgment in copyright law. Section IV.B then turns to aesthetic progress.

359. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

360. *Id.*

361. *Id.*

362. See *id.* at 250.

363. See *supra* sections II.B.3–4.

364. See *supra* Part III.

A. *Personality and Aesthetic Judgment*

Copyright commentary has long observed that despite *Bleistein's* admonition against doing so, judges in copyright cases are sometimes compelled to determine the existence or degree of aesthetic merit in the works before them.³⁶⁵ While some forms of contemporary art present considerable challenges in this regard,³⁶⁶ these cases are quite rare, as are cases under the Visual Artists Rights Act.³⁶⁷ More often, courts appear to engage in aesthetic discrimination when they assess close questions under the originality requirement³⁶⁸ or in connection with the conceptual separability test that applies to “useful articles.”³⁶⁹

The irony is that the particular terms of Holmes’s call for aesthetic neutrality did much to introduce into the originality analysis and even more so into the conceptual separability analysis the many problems of aesthetic judgment. *Bleistein's* deferral to market opinion opened the Pandora’s box of aesthetic judgment, which a reliance on personality would have kept closed.

Consider first originality. As courts and commentators merged Holmes’s deferral to the market with his discussion of the originality requirement, this allowed into the assessment of originality considerations other than personality, such as whether the market perceived the work as possessing uncopied commercial value and, more significantly, whether others perceived the work as “art.”³⁷⁰ The focus on personality was lost. This is highly regrettable. At least in the context of the originality analysis, judges should remain aesthetically neutral not because they may introduce their own bias into aesthetic judgment, or because aesthetic judgment is inevitably subjective, or even because they are “persons trained only to the law” and thus lack expertise.³⁷¹ Rather, they should remain aesthetically neutral because the only significant issue in

365. See, e.g., Farley, *supra* note 62, at 819–39 (reviewing situations in which judges are called upon to engage in aesthetic judgment); Walker & Depoorter, *supra* note 62, at 358–71 (reviewing areas in which copyright doctrine requires artistic appraisal); Yen, *supra* note 62, at 266–97 (reviewing areas of copyright law that call upon judges to make aesthetic judgments).

366. See, e.g., Cheng, *supra* note 62, at 115 (citing the example of Yves Klein’s *Blue Monochrome* consisting of a canvas covered in a single shade of blue).

367. 17 U.S.C. § 106A (2012) (providing rights of attribution and integrity to the “author of a work of visual art”); see Corp. Counsel’s Guide to Intellectual Prop.: Patents, Copyrights, Trademarks & Trade Secrets § 7:3 (2016) (“VARA has created very few cases.”).

368. See Yen, *supra* note 62, at 266–75.

369. See *id.* at 275–84.

370. See *id.* at 258–60 (discussing the “institutionalist” definition of art); *id.* at 274 (asserting that *Bleistein* applied an “institutionalist” definition of art); *id.* at 282–83 (asserting that *Mazer v. Stein*, 347 U.S. 201 (1954), applied an institutionalist definition of art).

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

the originality inquiry should be whether the work contains its creator's personality. Citing *Bleistein's* originality analysis, the *Alfred Bell* court wrote in an oft-quoted passage: "No matter how poor artistically the 'author's' addition, it is enough if it be his own."³⁷² For too long we have read such a summary of the originality requirement as a kind of grudging concession to the reality that aesthetic judgment is excessively contingent and that we must therefore retreat to the lowest common denominator among works of more or less aesthetic merit. But to read such a statement in the original spirit of *Bleistein's* originality analysis would be to understand it as an affirmation of the overriding importance that our copyright law should ascribe to any expression of individual subjectivity regardless of its commercial value or status as an art object.

Bleistein's call for aesthetic neutrality and deference to the market has also arguably weakened the role of personality in the conceptual separability analysis. The current leading test of conceptual separability is set forth in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*³⁷³ The *Brandir* test asks whether the claimed "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences."³⁷⁴ This test intensifies the core concern of Holmes's analysis of the originality requirement: human subjectivity. In the context of useful articles, *Brandir* offers copyright protection only to design elements that are expressions of pure subjectivity unconstrained by functional, technical considerations. In its close attention to subjectivity, the *Brandir* test is continuous with copyright law's emphasis on originality. The problem is that *Brandir* is not the only test courts have used—or at least proposed—for conceptual separability. Many alternative tests insist on engaging the endlessly mystifying question of what is and is not art, with several seeking to defer to social understandings of what constitutes art.³⁷⁵ They do so notwithstanding the fact that the drafters of the statutory section underlying the conceptual separability test deliberately omitted any reference to "art."³⁷⁶ Consistent with the commodity-oriented, accumulationist approach, these alternative tests focus not on personality but on the status (as art or non-art) of the object produced. Given trends in the art world, this inquiry is hopeless. This is why a more recent leading application of the *Brandir* test makes more sense. In *Pivot Point*

372. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (citing *Bleistein*, 188 U.S. at 250).

373. 834 F.2d 1142, 1145 (2d Cir. 1987).

374. *Id.*

375. See, e.g., 1 *Nimmer & Nimmer*, supra note 3, § 2.08(C)(1)(a) ("[I]f a work might arguably be regarded as a work of art by any meaningful segment of the population . . . then the work must be considered a work of art for copyright purposes.").

376. See *Denicola*, supra note 229, at 720 ("The 'works of art' classification of the 1909 Act was abandoned and replaced by a reference to 'pictorial, graphic, and sculptural works.'" (quoting 17 U.S.C. § 102(a)(5) (Supp. I 1978))).

International, Inc. v. Charlene Products, Inc., the Seventh Circuit focused on the subjective process by which the designer developed his design and asked whether this process was “unfettered by functional concerns.”³⁷⁷

B. *Personality and Aesthetic Progress*

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, or labor, was often little more than “anesthetic” drudgery.³⁷⁸ 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 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.³⁷⁹ 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”³⁸⁰ 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 1960s³⁸¹ and “cyberlaw” in the 1990s,³⁸² the newest wave of “legal futurism”³⁸³ has taken the form of legal commentary on the

377. 372 F.3d 913, 932 (7th Cir. 2004).

378. See Dewey, *Experience*, supra note 109, at 39.

379. Susman, supra note 267, at 277.

380. Diana Maltz, *British Aestheticism and the Urban Working Classes, 1870-1900: Beauty for the People 2* (2006).

381. See, e.g., Barton Beebe, Note, *Law's Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis*, 108 *Yale L.J.* 1737, 1758–71 (1999) [hereinafter Beebe, *Law's Empire*] (analyzing the surge of theorizing about space law in the 1960s as an instance of legal futurism).

382. See generally Lawrence Lessig, *The Path of Cyberlaw*, 104 *Yale L.J.* 1743 (1995) (discussing legal questions raised by the emergence of the Internet).

383. See Barton Beebe, *Fair Use and Legal Futurism*, 25 *Law & Literature* 10, 11–12 (2013) (defining legal futurism as a “mode of legal discourse that forecasts the future and law's role in it” whose primary purpose is “to assert the continued authority of law and the legal field of knowledge and practice in the future, whatever that future might eventually be”).

advent of post-rarity society,³⁸⁴ post-scarcity society,³⁸⁵ and 3D printing.³⁸⁶ 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. Users generate this content, much of which is noncommercial, because they enjoy and derive meaning from making it and sharing it.³⁸⁷ "Commercial value," let alone excellence, is rarely the goal of the undertaking any more than it is the goal of a preschool art class.³⁸⁸ It is essentially a culture of streaming in the moment rather than of archiving for future consumption. The "more" we are interested in here is more aesthetic practice, more actualizing of "personality," more active human flourishing and human solidarity, all in the present.³⁸⁹

This is why the pragmatist aesthetics of the twentieth century—that arguably arose in part out of that century's aspirations for its own hoped-for "economy of abundance"³⁹⁰—now makes so much more sense in the

384. See generally Barton Beebe, Intellectual Property Law and the Sumptuary Code, 123 Harv. L. Rev. 809 (2010) [hereinafter Beebe, Sumptuary Code] (discussing the social role of intellectual property law in a post-rarity society).

385. See generally Mark A. Lemley, IP in a World Without Scarcity, 90 N.Y.U. L. Rev. 460 (2015) (discussing the role of intellectual property law in a post-scarcity society).

386. See Beebe, Sumptuary Code, supra note 384, at 836 (asserting that in "an economy of universal printers . . . all goods would be essentially intellectual goods (that is, embodiments of intangible designs) and all property, excluding space and the self, would be essentially intellectual property"). See generally Deven R. Desai & Gerard N. Magliocca, Patents, Meet Napster: 3D Printing and the Digitization of Things, 102 Geo. L.J. 1691 (2014) (exploring the implications of 3D printing for patent law).

387. See Cohen, Configuring, supra note 62, at 53, 95–96 (discussing "produsage," a combination of "production" and "usage" that "signal[s] the erasure of the dichotomy between industrial production and passive consumption"); Eran Fisher, The Dialectics of Prosumption in the Digital Age, in *Digital Labour and Prosumer Capitalism: The U.S. Matrix* 125, 141–42 (Olivier Frayssé & Mathieu O'Neil eds., 2015) (discussing how prosumption overcomes producer and consumer alienation and facilitates self-actualization).

388. Cf. David Lange, At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium, *Law & Contemp. Probs.*, Spring 1992, at 139, 146 (comparing creative play in childhood to "the adult fantasy that we recognize in authorship"). A reviewer of the first edition of Shusterman's *Pragmatist Aesthetics* expressed precisely the opposite of the values asserted here when he wrote, "I would rather be a passive consumer of the excellent than an active producer of the mediocre." William James Earle, Book Review, 16 *Poetics Today* 375, 380 (1995) (reviewing Richard Shusterman, *Pragmatist Aesthetics: Living Beauty, Rethinking Art* (1992)).

389. See Silbey, supra note 137, at 68–69 (discussing, in terms of the moral philosophy of Alasdair MacIntyre, the value of practice and work for enhancing solidarity).

390. See, e.g., Stuart Chase, *The Economy of Abundance* 10 (1934) (defining the "Economy of Abundance" as "an economic condition where an abundance of material

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.³⁹¹ The problem in an abundant society, particularly one quickly shifting to automation, is not a lack of opportunities for meaningful 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 practice³⁹² and does so based on an ethical belief in the importance of allowing everyday, common genius to flourish. Our new technological and cultural conditions have begun to make this 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 “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 in particular, copyright law’s role now is largely to suppress democratic aesthetic practice and participation;³⁹³ its role is to encourage the “crowd” to passively consume rather

goods can be produced for the entire populations of a given community, a condition never obtaining anywhere until within the last few years”).

391. See Gilles Lipovetsky & Jean Serroy, *L’esthétisation du Monde: Vivre à l’Âge du Capitalisme Artiste* 29–30 (2013) (discussing the current “transaesthetic” stage of capitalism in which artistic design permeates all aspects of the marketplace).

392. Cf. Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *Fordham L. Rev.* 347, 349 (2005) [hereinafter Cohen, *Place of the User*] (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”).

393. See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 *Vand. J. Ent. & Tech. L.* 921, 922–23 (2009) (describing efforts by traditional content producers to suppress the “specter of massive copyright infringement”); see also Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 8 (2004) (“For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to draw within its control a vast amount of culture and creativity that it never reached before.”). But copyright holders may choose to make their work more accessible despite the present laws. See, e.g., Randy Kennedy, *Rauschenberg Foundation Eases Copyright Restrictions on Art*, *N.Y. Times* (Feb. 26, 2016), <http://www.nytimes.com/2016/02/27/arts/design/rauschenberg-foundation-eases-copyright-restrictions-on-art.html> (on file with the *Columbia Law Review*) (discussing

than actively produce. This is particularly true for what might be termed “superstar works.”³⁹⁴ It has been apparent for many years that the copyright system helps to underwrite a cultural star system in which certain works far exceed—on the order of a power-law distribution³⁹⁵—other works in their cultural impact and, if they are made for profit, their profitability.³⁹⁶ 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.³⁹⁷ 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 now be significantly different in practical effect from its current incarnation. Nearly all uncopied expression would qualify for copyright protection. However, the normative effect of placing personality at the center of our copyright law would likely have been profound, so that certain other areas of copyright law might be quite different in practical effect and substantially more in sync with current technology. Regardless, 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 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 shift

the Robert Rauschenberg Foundation’s decision to lift most copyright restrictions on Rauschenberg’s work).

394. See Kathy Bowrey, Book Review, 34 *Sydney L. Rev.* 391, 392 (2012) (reviewing William Patry, *How to Fix Copyright* (2011)) (internal quotation marks omitted) (quoting William Patry, *How to Fix Copyright* (2011)).

395. See Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 *U. Toronto L.J.* 525, 533 (2009) (comparing “the focus of human attention on a small number of copyright-protected works that are substantially more successful than all others” to a power-law distribution).

396. See Lex Borghans & Loek Groot, *Superstardom and Monopolistic Power: Why Media Stars Earn More than Their Marginal Contribution to Welfare*, 154 *J. Institutional & Theoretical Econ.* 546, 546 (1998) (noting that “in some markets, superstars can be compared with black holes: They capture the lion’s share of the net added value in the market, leaving little or nothing to their competitors”); Alan B. Krueger, *The Economics of Real Superstars: The Market for Rock Concerts in the Material World*, 23 *J. Lab. Econ.* 1, 17 (2005) (observing that in “superstar markets[,] . . . small differences in talent at the top . . . will translate into large differences in revenue”).

397. See Cohen, *Place of the User*, *supra* note 392, at 368.

where we strike the balance in copyright law between property-based 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 balance between incentives and access in the context of scientific and technological progress, we typically do so only in an effort to ensure 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 costly means to the end that is the actual benefit. 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.³⁹⁸ This is not a radical proposal. Copyright law arguably already proceeds along these lines when it grants protection to independently created works, even if identical to already existing works.³⁹⁹

More concretely, such a shift toward access in the access-incentives balance would urge a fundamental change in our understanding of the purpose of the transformativeness analysis in the fair use inquiry. Courts 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.⁴⁰⁰ This would expand the scope of the doctrine, particularly for noncommercial uses.⁴⁰¹ 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,"⁴⁰² and thus a new contribution to Litman's "giant warehouse"⁴⁰³ 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

398. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 *Wm. & Mary L. Rev.* 513, 527 (2009) [hereinafter Tushnet, *Economies of Desire*] (arguing that "[a] copyright law directed only at static products will make mistakes about how to foster progress").

399. Cf. Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 *Nw. L. Rev.* 1441, 1493 (2010) (discussing the independent-creation defense as facilitating "problem finding in artistic creativity").

400. 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).

401. See Tushnet, *Economies of Desire*, *supra* note 398, at 539 (advocating that fair use doctrine take into account noncommercial motivations for engaging in creative conduct).

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

403. Litman, *Lawful Personal Use*, *supra* note 163, at 1880.

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. Such authors have moved beyond passive reading or even traditional reader response. For them, as it was for Dewey, rewriting is the new reading.⁴⁰⁴ 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 labor, if only because of the value in itself of such labor, transformativeness doctrine should be expanded to facilitate this form of aesthetic progress.⁴⁰⁵ Such a reform could be grounded in the statutory language calling upon courts to evaluate, as part of the fair use analysis, the "purpose and character" of the defendant's use.⁴⁰⁶

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 clarify 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. 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

404. Such transformative conduct by reader-authors arguably represents a further stage in reader response, one in which the reader interprets a text by transforming it into a new text. Such conduct fully conforms to the spirit, if not the letter, of Roland Barthes's declaration decades ago that "the goal of literary work (of literature as work) is to make the reader no longer a consumer, but a producer of the text." Roland Barthes, *S/Z*, 4 (Richard Miller trans., 1974). On the relation between reader response and the fair use analysis, see Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 *Colum. J.L. & Arts* 445, 466 (2008) (urging that transformativeness analysis under copyright fair use take account not merely of the author's purpose in creating a work but also of readers' interpretation of and response to the work).

405. See Cohen, *Configuring*, *supra* note 62, at 101 ("[A] regime of copyright that aims to promote cultural progress must be assessed on its effects on creative practice by situated users, and on the extent to which it renders elements of the cultural landscape more or less accessible."). Copyright fair use cases addressing uses that promote learning may be as close as the case law currently comes to privileging the *process* of fair use over the *result* of fair use. See Pamela Samuelson, *Unbundling Fair Uses*, 77 *Fordham L. Rev.* 2537, 2580–87 (2009) (discussing such cases).

406. 17 U.S.C. § 107(1) (2012).

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. The law’s 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.⁴⁰⁷ 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 and publish. 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. 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. This reform is crucial. Its essential purpose would be to disenchant copyright law of the commodity fetishism—the erasure of authorial labor—that *Bleistein* did so much to encourage in U.S. law. It would emphasize that cultural production—and culture more generally—does not consist of social relations among works but social relations among people, among personalities, by means of works.⁴⁰⁸ More concretely, 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 expression and ideas.⁴⁰⁹ Though this is routine practice in the open-source software world,⁴¹⁰ it may nevertheless seem a quite radical intervention outside of that world. But such a democratized regime of moral rights is consistent with the pursuit of

407. See *id.* § 106A.

408. See Marx, *supra* note 335, pt. I, ch. 1, § 4 (describing a world in which “the social relations between individuals in the performance of their labour, appear at all events as their own mutual personal relations, and are not disguised under the shape of social relations between the products of labour”).

409. See generally Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, *Law & Contemp. Probs.*, Spring 2007, at 135, 153–60 (describing attribution practices in various creative subcultures).

410. See Open Source Licensing Guide, *New Media Rights* (Sept. 12, 2008, 9:41 AM), http://www.newmediarights.org/open_source/new_media_rights_open_source_licensing_guide [<http://perma.cc/3J2N-635G>].

aesthetic progress understood as the pursuit of human personality and human solidarity in the present and across time rather than of more and more seemingly self-generating commodities.

These are obviously only a few very general proposals as to how copyright law might be updated to promote aesthetic progress, and admittedly, given the realities of copyright lawmaking and regulatory capture, perhaps the only concrete modifications that are realizable in the near term relate to the fair use analysis. But in the longer run, the technology of aesthetic production and distribution will continue to evolve over the coming decades, and twentieth-century consumer culture will likely give way to some new cultural mode, be it a “networked society,” a “post-scarcity society,” an “artificial intelligence society,” or indeed Rorty’s “poeticized society.” In these emerging conditions, we would do well to appreciate that our overriding commitment always to increase the gross aesthetic product of the culture in the pursuit of “Progress” no longer makes complete sense and is increasingly counter-productive. *Bleistein*’s imposition on the aesthetic of a vision of progress grounded in “commercial value” and committed to accumulation has proven to be a significant mistake, which helps us to appreciate how much better off we might have been if the Framers had somehow managed to separate the aesthetic from the Progress Clause—perhaps by excluding from the language of the clause any reference at all to the fine arts.

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 that 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.”⁴¹¹ 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*,”⁴¹² or drive toward 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 too much trust in the aesthetic—and in the aestheticization of politics.⁴¹³ But Schiller is certainly not the

411. Friedrich Schiller, *On the Aesthetic Education of Man: In a Series of Letters* 9 (Elizabeth M. Wilkinson & L.A. Willoughby trans., 1982).

412. See *id.* at 96.

413. See Martin Jay, “The Aesthetic Ideology” as Ideology; or, What Does It Mean to Aestheticize Politics?, 21 *Cultural Critique* 41, 47–52 (1992) (addressing criticisms and defenses of Schiller’s “aesthetic ideology”).

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.⁴¹⁴

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 are areas that 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 nonpositive world of the aesthetic.⁴¹⁵ Progress-driven, intellectual property law operates at the very center of modernity and thus shares—as Holmes did in *Bleistein*—in its tensions and pathologies. At the same time that intellectual property law is emphatically technologically progressive, it can also be socially and culturally reactionary,⁴¹⁶ and as this Article has sought to show, it can be aesthetically regressive as well. The “giant warehouse”⁴¹⁷ of intellectual commodities that our copyright law continues to pursue has increasingly taken on the characteristics of an “iron cage.”⁴¹⁸ 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 fortunate, 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 toward progress in our understanding of what progress actually should be—and so the stone

414. See, e.g., Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment* 28 (John Cumming trans., 1990) (“The curse of irresistible progress is irresistible regression.”); Herbert Marcuse, *Eros and Civilization* 78–105 (1955) (discussing the “Dialectic of Civilization”).

415. 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).

416. See Beebe, *Law’s Empire*, *supra* note 381.

417. Litman, *Lawful Personal Use*, *supra* note 163, at 1880.

418. See Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 181 (Talcott Parsons trans., 1958).

that the Framers rejected might become the chief cornerstone of our copyright law.

