

Copyright's Framing Problem

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ABSTRACT

Copyright law has a framing problem. The problem is pervasive, unresolved, and often unnoticed, and it significantly impacts the nature and scope of copyright protection. Copyrighted works are complex: Books consist of chapters, newspapers consist of articles, and so on. Courts often need to decide whether to frame the work as one comprehensive whole, an approach we call “zooming out,” or to frame it as a combination of many small parts, an approach we call “zooming in.” This framing move occurs across many copyright doctrines: fair use, infringement analysis, statutory damages calculations, separability determination, and more.

This Article focuses on decisions heavily affected by a court’s framing choice. The results are troubling. The study of those decisions suggests that in the majority of cases, courts frame the work without noticing their framing move. When courts do explicitly provide reasoning for their framing choices, they use factors that are normatively questionable and increasingly less effective in today’s digital world. Consequently, copyrighted works are framed in an inconsistent way both across copyright law doctrines and within each doctrine. In fact, there is almost no area of copyright law in which courts consistently frame copyrighted works.

These variations in framing choices have costs. While these costs need to be acknowledged and addressed, we reject one intuitively appealing approach to addressing them. Copyright law, we show, should not provide a unified framing test, or unified definition of the “work,” across all its doctrines. Different areas of copyright law face different policy considerations. Sometimes the framing of the work itself may need to change, so that the policy balance behind copyright law can remain constant.

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INTRODUCTION

Copyright faces a framing problem. The problem is pervasive, unresolved, and often unnoticed, and it significantly impacts the nature, scope, and costs and benefits of copyright law. When courts adjudicate copyright disputes, they often begin their analysis by deciding either to frame the copyrighted work as a whole or to focus on its components or parts. We call the decision to look at the work as a whole “zooming out,” and the decision to instead focus on components “zooming in.”

The framing problem arises when courts consider complex copyrighted works: books consisting of chapters, newspapers consisting of articles, movies consisting of scenes, and so on. Even less complex works consist of recognizable subparts: An essay consists of paragraphs and sentences; a song consists of verses and a chorus and chords and notes. Should a court frame a novel as a whole or focus on its individual chapters or sentences? Should it count a CD as one work or as sixteen songs?

We show in this Article just how ubiquitous this framing problem is. It is apparent across most of the core doctrines of copyright law. When a defendant copies from a plaintiff’s work, courts frame each work to determine how substantial the copying was¹ and whether there was fair use.² Once infringement is established, courts frame a work to determine how many works were infringed for purposes of calculating statutory damages.³ The framing problem is apparent in many other areas of copyright doctrine. It is evident across many kinds of media, from books to music to clothing to software.

The determination of whether to zoom in or zoom out on a work influences the results of many copyright disputes. We explore numerous decisions where a court’s framing choice affected or even determined the outcome of the case. These include U.S. Supreme Court decisions,⁴ classic copyright cases,⁵ and recent prominent disputes.⁶

1. This is known as the substantial similarity test. See Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990).

2. 17 U.S.C. § 107 (2012).

3. See *id.* § 504(c).

4. See, e.g., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017), discussed in *infra* Part II.C.; *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001), discussed in *infra* Part II.F; *Louis DeJonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914), discussed in *infra* Part II.G. It should be noted that recently, in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), the Supreme Court dealt with a very similar question in the context of real property and the Taking Clause. A full analysis of the analogy between that decision and copyright’s framing problem explored herein is beyond the scope of this Article.

Framing matters. The framing of a copyrighted work affects the outcomes of cases, and thus has important implications for copyright policy. It affects the scope of the exclusive rights of the copyright owner. It influences the limitations on those rights and defenses against infringement claims. It impacts parties' procedural rights and remedies. The framing problem significantly affects the scope of copyright law and the benefits and costs of copyright protection. Consequently, it impacts core policy issues. It can influence the incentive-access tradeoff, affect transaction costs in copyright markets, and shape the types of incentives that authors receive for various works, channeling the production of particular kinds of goods.⁷

This Article explores myriad decisions in which the framing decision—whether to zoom in or zoom out on a work—significantly affected the outcome of a case. In the majority of those cases, courts made the framing decision without awareness that the framing move had even happened. In other cases, courts noticed that a framing determination was needed, but they still chose whether to zoom in or zoom out without reasoning. In the atypical cases in which courts provided an explicit framing test, we find that those tests were inconsistent both within and across doctrines. Surprisingly, there is almost no area of copyright law in which courts have come up with a unified way to frame the copyrighted work.⁸

Our analysis explains why the problem is so challenging. We show how courts that have explicitly addressed the issue generally use one or more of four factors: copyrightability, market factors, authorial intent, and registration.⁹ Each factor is appealing, and can provide some guidance and filter out more extreme results. After that initial filtering, however, courts are often left with several reasonable alternatives to choose from. In other words, we show that these factors fail to lead courts to a single clear and desirable framing choice. We further explain¹⁰ that copyright's framing problem is exacerbated

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5. See, e.g., *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), *discussed in infra* Part II.D; *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987), *discussed in infra* Part II.C; *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), *discussed in infra* Part II.A.
 6. See, e.g., *Star Athletica*, 137 S. Ct. 1002, *discussed in infra* Part II.C.; *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015), *discussed in infra* Part II.A, *cert. denied*, 136 S. Ct. 1390 (2016); *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc), *discussed in infra* Part II.B; *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339 (Fed. Cir. 2014), *discussed in infra* Part II.A, *cert. denied*, 135 S. Ct. 2887 (2015).
 7. See *infra* Part IV.A.
 8. The one, and only one, exception to this rule is the rarely litigated collective work privilege, *discussed in infra* Part II.F, in which the U.S. Supreme Court has set a framing test in *Tasini*, 533 U.S. 483.
 9. See *infra* Part III.
 10. See *infra* Part I.B.4.

by transformations in the markets for copyrighted works in the digital age. Those markets are rapidly changing, affecting both the usability of market factors and the reliability of judicial intuitions. Indeed, without the market as a benchmark and our intuitions as guidance, the framing possibilities will likely expand in the upcoming years.

We believe that the first step in tackling the framing problem is to acknowledge it. Framing decisions, which have such a crucial impact on copyright law, are often made unnoticed. This is problematic. Once courts and commentators recognize the existence of the framing problem, they will be encouraged to further explore the impact of framing choices. The law can then tackle this question on a case-by-case, or doctrine-by-doctrine, basis. Our analysis sheds light on framing choices and their impact, and we hope will encourage explicit acknowledgement of the framing move going forward.

This Article proceeds as follows: In Part I, we describe the framing problem and discuss explanations for its existence. In Part II, we track the framing problem as it occurs throughout multiple copyright doctrines. In Part III, we discuss the factors and tests courts have devised for handling the framing question, analyzing their advantages and limitations. In Part IV, we analyze the policy implications. We conclude with a discussion of the costs of inconsistencies within each doctrinal area and across doctrines, and our observations that some of those variations are not only inevitable, but in fact desirable.

Unlike other commentators,¹¹ we suggest that copyright law should not provide a unified framing test, or unified definition of the “work,” across all of its doctrines. Different areas of copyright law face different policy considerations. Therefore, sometimes the framing of the work itself may need to change, so that the policy balance behind copyright law can remain constant.

I. THE FRAMING PROBLEM

We begin by describing what we mean by copyright’s framing problem, and provide an illustrative example. We then discuss possible explanations for why the framing problem exists. We draw on the work of

11. See, e.g., Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. REV. 1175, 1178 (2011) (suggesting a uniform test for determining the copyrighted work that is primarily based on authorial intent); Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 621 (2005) (proposing a multifactor test for determining a minimum size threshold).

scholars who have recognized and studied related issues. We conclude by looking to possible psychological and sociotechnological explanations for the framing problem's prevalence.

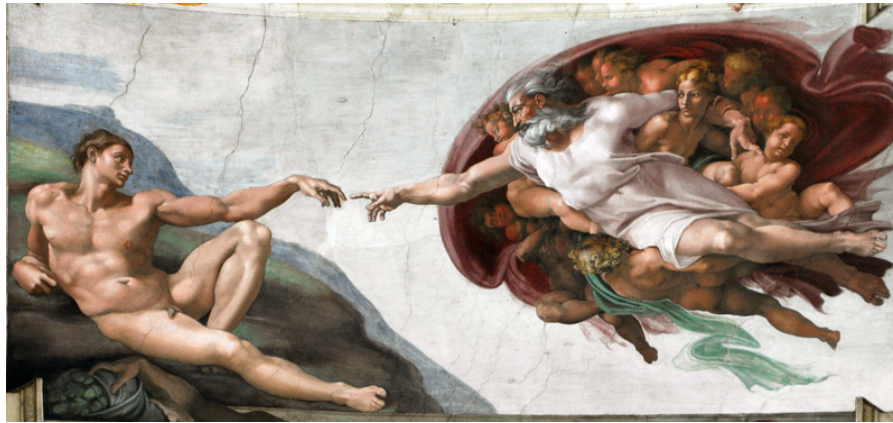
A. Explaining the Framing Problem

The adjudication of copyright disputes often requires a decision as to how to frame copyrighted works. When we refer to the framing problem, what we mean is the decision of how to look at (or read, or listen to) a particular fixed work. Framing decisions arise when judges or juries consider what constitutes the outer limits of the fixed work, where to focus the analysis of the work, and how to structure comparisons between several works.

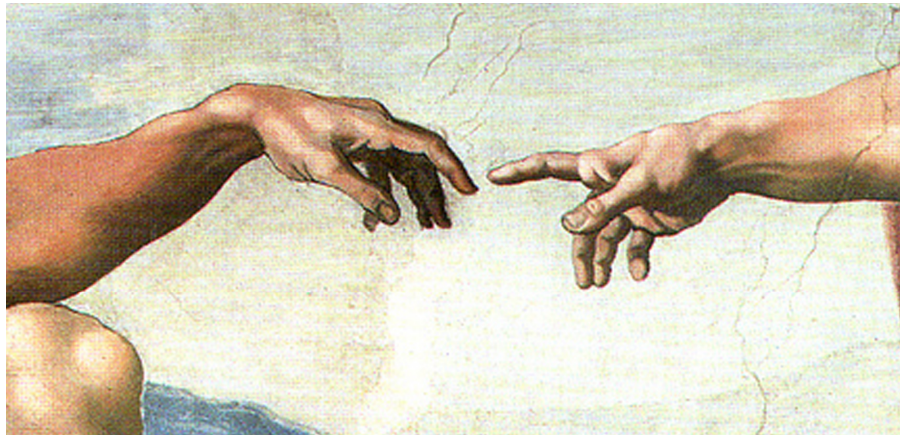
Consider, for example, the ceiling of Michelangelo's Sistine Chapel, one of the most famous works of art ever created. (Pretend, for our purposes, that it is not in the public domain.) The Sistine Chapel could be framed as a single, unified work for purposes of copyright analysis:



Alternatively, one could zoom in and see that within the Sistine Chapel's ceiling are a number of well-known individual works, such as *The Creation of Adam*.



Or one could zoom in even further, framing the work as a series of individual artistic moments, recognizable in their own right.



The decision of how to frame the Sistine Chapel ceiling has significant implications for copyright analysis. As we discuss in Part II, framing implicates, among other things, what counts as infringement, what counts as fair use, and how to calculate statutory damages.

Take the following example: a parody of the famous position of God's and Adam's fingers from *The Creation of Adam*.¹²

12. For more parodies, see *The Creation of Adam Parodies*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/the-creation-of-adam-parodies> [<https://perma.cc/S7AE-SJC6>].



Fair use analysis consists of looking to several factors to determine whether a use of a copyrighted work is fair. Two of these factors require considering the amount used in the allegedly infringing work in comparison with the original work as a whole and looking to the impact of the allegedly infringing work on the market of the original work. Framing impacts that analysis. If a judge chooses to zoom out on the Sistine Chapel ceiling and frame it in its entirety, then these two factors would support the finding of fair use. This parody references only an insignificant part of the Sistine Chapel ceiling as a whole and it likely does not interfere with the market for reproductions of the entire Sistine Chapel ceiling.

If, alternatively, a judge chooses to zoom in on the Sistine Chapel's imagery and look instead at the iconic fingers' position within *The Creation of Adam* painting as the relevant framing point, those same two factors (comparing to the work as a whole and looking to the impact on the market) would likely weigh against the parody's creator. Framing impacts what gets compared to what, which can substantively change the outcome of fair use analysis.

It is important to clarify what we do *not* consider to be a framing problem. Copyright law faces a well-known levels of abstraction problem, in which courts look at the fixation of a work and determine how far copyright protection extends from the fixation into the abstract realm, bound by the limitation that ideas are not copyrightable.¹³ As Judge Learned Hand famously noted, copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial varia-

13. See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065–71 (1990) (discussing abstraction and the definition of rights); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 404–05 (1989) (discussing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), a decision in which Judge Learned Hand famously explained the "series of abstractions" problem in copyright law); see also Tun-Jen Chiang, *The Levels of Abstraction Problem in Patent Law*, 105 NW. U. L. REV. 1097, 1100 (2011).

tions.”¹⁴ At some point, however, copyright no longer protects an abstraction of the work, “since otherwise [the plaintiff] could prevent the use of his ‘ideas.’”¹⁵ When we discuss framing, or the level of zoom, we mean framing of the actual fixed work—the fixed copy itself—not its abstractions.

However, the framing move can and often does become entwined with the abstraction issue. For example, a judge determining whether a character may be copyrighted can choose to zoom out on a series of works to determine the features of the character across the series. In doing so, the judge will often simultaneously abstract the character from its specific fixation. For example, in 2015, the Ninth Circuit decided that DC Comics owns copyright in the character of the Batmobile after zooming out and examining the characteristics of the car throughout the Batman series.¹⁶ Finding a protectable character partially involved framing the fixed work as a whole (the series) instead of parts (individual books or individual frames), and partially involved abstracting from the work to determine what constituted the abstract character of the Batmobile across the series.

The framing decision certainly affected the abstraction decision, but we wish to be clear that those decisions are distinct. Indeed, the framing problem cuts across multiple doctrines and contexts, and in some of them, such as statutory damages, it has little to do with abstraction. Future work could productively look to when and how the framing problem drives abstraction decisions.

B. Why the Framing Problem Exists

There are several explanations for the existence and prevalence of the framing problem. The framing problem exists in large part because there is no statutory definition of a copyrighted “work” in the Copyright Act.¹⁷ Framing can also be understood as a subset of the bigger problem of aesthetics and interpretation in copyright law: How do judges analyze and interpret creative works?¹⁸ There are possible cognitive explanations for the prevalence of the framing move as well.

14. *Nichols*, 45 F.2d at 121.

15. *Id.* (“[B]ut there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.” (citation omitted)).

16. *DC Comics v. Towle*, 802 F.3d 1012, 1021–22 (9th Cir. 2015). This decision is further discussed in *infra* Part II.A below.

17. See 17 U.S.C. § 101 (2012); Goldstein, *supra* note 11, at 1175.

18. See generally Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015) (discussing aesthetic interpretation in copyright law); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998) (tracing references to aesthetic theory in judicial approaches to copyright analysis).

Cognitive scientists have studied how framing decisions impact similarity analysis,¹⁹ and how experts frame and analyze information compared to novices.²⁰ Both lines of study may implicate the framing problem identified here.

Finally, the pervasiveness of the framing problem in recent years can also be explained by changes in modern technology. We claim that as technology and its social adoption rapidly change, judges will encounter the question of how to frame a copyrighted work with increasing frequency while the guidelines they have used for framing in the past will become less helpful. For all of these reasons, the framing problem is likely to become even more difficult and central in copyright law.

1. The Missing Definition of a “Work”

To a large degree, the framing move is made possible because the Copyright Act protects “original work[s] of authorship,”²¹ but does not define what a work is.²² The drafters of the Copyright Act noted that this lack of a statutory definition might create difficulties and they considered whether to include a definition of a “single work” in the Act to help clarify the scope of statutory damages.²³

Barbara Ringer, one of the lead architects of the 1976 Copyright Act and later the U.S. Register of Copyright, noted that “courts have struggled mightily with this rather common problem [of defining the work], and have not really come up with a satisfactory result.”²⁴ Ringer pleaded that “the concept [of a single work] cries out for a definition.”²⁵ Ultimately, however, no definition of the work was included in the Act.²⁶

19. See Kate Klonick, *Comparing Apples to Applejacks: Cognitive Science Concepts of Similarity Judgment and Derivative Works*, 60 J. COPYRIGHT SOC'Y U.S.A. 365 (2013) (applying cognitive science to copyright analysis).

20. See PATRICIA BENNER, *FROM NOVICE TO EXPERT: EXCELLENCE AND POWER IN CLINICAL NURSING PRACTICE* (1984); HUBERT L. DREYFUS & STUART E. DREYFUS, *MIND OVER MACHINE: THE POWER OF HUMAN INTUITION AND EXPERTISE IN THE ERA OF THE COMPUTER* (1986).

21. 17 U.S.C. § 102(a); Hughes, *supra* note 11, at 576–77.

22. See 17 U.S.C. § 101; Goldstein, *supra* note 11, at 1175.

23. See, e.g., H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION, PART 4 145 (Comm. Print 1964) (considering a suggestion by Melville Nimmer to define “single work”); *id.* at 147 (discussing the need to figure out what “the work” is that is being talked about).

24. *Id.* at 158.

25. *Id.*

26. Like the U.S. Copyright Act, copyright statutes in several other countries also rely and use the term “work” without defining it. See generally Brad Sherman, *What Is a Copyright Work?*, 12 THEORETICAL INQUIRIES L. 99 (2011) (discussing this phenomenon under British and Australian law). It is, however, important to note that copyright's framing problem predated modern statutory copyright law. For example, in as early as the sixteenth century, rabbis in Europe

Several scholars have noted this definitional absence. Paul Goldstein, for example, in a 2010 lecture, noted the lack of a definition of the work and discussed certain policy consequences.²⁷ Goldstein suggested that works should be defined by referring to authorial intent.²⁸ We analyze and reject this approach below.²⁹

Several scholars have noted that by not defining the work, copyright law contributes to what is known as the microworks problem. As intellectual property rights protect smaller and smaller works, or microworks, fragmented ownership can lead to policy problems, such as the tragedy of the anticommons.³⁰ If copyright law protects smaller and smaller works, this increases transaction costs and may make it harder to obtain permission to build upon existing works. Justin Hughes has linked the overprotection of tiny microworks to the lack of a statutory definition of works.³¹ Molly Van Houweling has also discussed microworks and their associated transaction costs against the backdrop of statutory and common law development.³² While the work of these scholars touches upon some of the factors we consider in Part III and frames some of the policy consequences we discuss in Part IV, it does not identify or name the framing move we discuss. Nor

started issuing reprinting bans with respect to certain books, primarily in Hebrew, and began to develop a set of rules regarding those bans that, to a degree, resembled modern copyright law protection. Like in modern copyright law systems, the framing question arose when authorities considered whether a given book constituted a prohibited reprint or not. More specifically, the question was whether the reprinting of a small section of a larger publication constituted a reprint. In 1720, for example, a rabbinic court in Frankfurt, Germany allowed the reprinting of an individual tractate—one value of the Jewish Talmud—although a ban on reprinting the entire Talmud—the central text of Rabbinic Judaism consisting of sixty-three tractates—was in force at the time. NEIL WEINSTOCK NETANEL, *FROM MAIMONIDES TO MICROSOFT* 135–36 (2016). (We thank Joseph Fishman for bringing this example to our attention.) A different approach was taken in other early (and statutorily based) disputes. For example, in 1819, the King’s Bench held that a piece of instrumental music, which was printed in a bound volume of musical compositions, was entitled to copyright protection on its own. *White v. Geroch* (1819) 106 Eng. Rep. 376, 376 (K.B.); see also Hughes, *supra* note 11, at 602–03.

27. Goldstein, *supra* note 11, at 1175–76 (observing that the Act “nowhere in fact delimits the metes and bounds of a copyrighted work, or even prescribes a methodology for locating a work’s boundaries” and commenting on how this affects statutory damages and fair use).
28. *Id.* at 1178 (concluding that the “copyrighted work is what the author says it is”).
29. See *infra* Part II.C.
30. See MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 9–16 (2008) (exploring how too much ownership can prevent the efficient creation and use of copyrighted goods). See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (exploring how fragmentation of ownership rights can prevent society from efficiently using certain properties).
31. Hughes, *supra* note 11, at 600–04 (tracing the current microworks problem to the lack of a statutory definition of the copyrighted work).
32. Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010) (discussing how many works are subject to ownership, how many people own rights, and among how many people each work is divided as seen in five different eras).

does it observe the framing problem's prevalence across nearly every area of copyright law.

Unlike other commentators,³³ and possibly counterintuitively, we do not think that copyright law should define a work or otherwise provide a unified framing test across all copyright law doctrines. As we further explain in the final pages of this Article, we believe that the missing definition of the term "work" is a feature and not a bug in our copyright law. It can allow courts the flexibility they need to promote socially desirable copyright policy. While variations within a doctrine (such as statutory damages) are costly, variations in framing between doctrines (such as between statutory damages and fair use) can be justified. Different areas of copyright law face different policy considerations, and we show below examples of how variations in framing the work are not only unavoidable, but sometimes necessary. We show that sometimes the framing of the work may need to change so that the policy balance behind copyright law can remain constant.³⁴

2. The Aesthetic Interpretation Problem

The framing problem is related to a larger question in copyright doctrine: how to handle aesthetic interpretation—that is, the artistic judgment of a work. When a judge decides to zoom in or zoom out on a work, that decision can be characterized as a moment of aesthetic interpretation, in which a judge chooses where to focus, or where a work's true value lies. The zooming decision may be made in conjunction with other aesthetically interpretative decisions, like determining the meaning of the work or determining whether it is adequately creative.

Aesthetic judgment is famously disfavored in copyright law. Courts repeatedly assert that judges should not make aesthetic judgments. As Justice Holmes famously observed: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . ."³⁵ The doctrine dislikes tasking judges with aesthetic valuations because such decisions are inherently subjective, and judicial outcomes could be viewed as censorial.³⁶ Those works that judges like might receive more copyright protection; those they do not might be disadvantaged and receive fewer incentives.

33. See Goldstein, *supra* note 11, at 1178 (suggesting a uniform test based on authorial intent); Hughes, *supra* note 11, at 621 (proposing a multifactor test for determining a minimum size threshold).

34. See *infra* Part IV.B.

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

36. Yen, *supra* note 18, at 248.

Yet in practice, judges make aesthetic judgments about copyrighted works all the time.³⁷ Judges have significant discretion in making interpretive choices around a work.³⁸ In performing aesthetic interpretation, just as in framing, judges may rely on explicit analysis or on gut intuition.³⁹

Consciously or not, judges often import strands of aesthetic theory into copyright law.⁴⁰ They may choose to look at works formalistically (focusing on the literal text or image of the work), or to analyze authorial intent, or to look instead to how audiences receive works or how cultural institutions characterize them.⁴¹ Alfred Yen has noted that these three modes of interpretation—formalism, intentionalism, and institutionalism—frequently arise in judicial reasoning in copyright cases.⁴²

In choosing how to frame the work—as a whole, or as parts—judges might be characterized as in fact artistically interpreting a work. Interestingly, the approaches judges use in attempts to solve the framing problem, discussed in Part III below, mirror the common approaches to aesthetic interpretation identified above. Sometimes judges seeking to frame the work look only at the work in isolation (or formalistically). Sometimes they look to the intent of the author. And sometimes they look to cultural context or the reception of the work in the marketplace to determine whether they should be zooming out or zooming in. These methodological parallels suggest that the framing problem is connected to the issue of aesthetic interpretation.

3. A Cognitive Perspective

The ubiquity of the zooming problem in copyright doctrine may also have cognitive origins. While we are not cognitive scientists, nor pretend to be, there is literature that suggests a cognitive basis for the ubiquity, significance, and often irrational nature of a wider variety of framing choices—beyond zooming in or out—in various decisionmaking processes. We leave the connection between cognitive science and the type of framing discussed here largely for others to explore, but offer some initial examples of the issues raised.

37. See Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343 (2015).

38. Said, *supra* note 18, at 510.

39. See *id.* at 482–83.

40. Yen, *supra* note 18, at 250.

41. *Id.* at 251–52 (describing three strands of aesthetic theory as formalism, intentionalism, and institutionalism); see also Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 582–83 (2016) (discussing and criticizing the use of authorial intent in fair use cases dealing with modern visual art); Said, *supra* note 18, at 491–98.

42. Yen, *supra* note 18, at 251–52.

First, cognitive science suggests that when people compare two things, framing of some kind is both inevitable and significant.⁴³ Decisions as to what to focus on, the order in which to compare things, and how to weigh one object versus the other are all framing decisions. These framing choices have real consequences. One famous cognitive model reveals this impact. When people are asked how similar *a* is to *b*, they give different answers from when they are asked how similar *b* is to *a*.⁴⁴ People may also find things to be more similar when the more prominent or important object is the referent.⁴⁵ Given the ubiquity and importance of framing decisions in various contexts, it is unsurprising that courts make zooming choices for comparison purposes and that those choices can be outcome-determinative.

Second, framing may not be rational or fully observable. Instead, framing choices might be the result of factors hidden even from the decisionmaker, which we generally do not consider here. Framing might be related, for example, to skill acquisition. The well-known Dreyfus model of skill acquisition suggests that there are five stages of adult skill acquisition: novice, advanced beginner, competence, proficiency, and expertise.⁴⁶ According to this model, novices tend to focus on details, follow rules, and ignore context. By the time people reach competence, however, they “learn, through instruction or experience, to . . . choose a perspective that then determines those elements of the situation . . . that must be treated as important and those that can be ignored.”⁴⁷ Perhaps, then, novices focus more on details, or zoom in, while experts make holistic judgments, or zoom out.⁴⁸ According to the Dreyfus model (which has been criticized),⁴⁹ in achiev-

43. Klonick, *supra* note 19, at 365–66 (“[C]opyright law is grounded in the subjectivities of human perception. . . . [T]he question of how to create reliable strictures to judge something as subjective as similarity is not unique to copyright law. . . . [C]ognitive scientists have struggled with the same questions for decades, creating various scientific and theoretical models to explain how humans prioritize, categorize and judge features to determine similarity between two or more objects.”).

44. *Id.* at 376–77 (describing Amos Tversky’s claim that “similarity is not just a judgment of certain common features, but is also dependent on features that are different between objects,” and describing additional work by Tversky, revealing that the referent matters (citing Amos Tversky, *Features of Similarity*, 84 PSYCHOL. REV. 327 (1977))).

45. Klonick, *supra* note 19, at 383.

46. Stuart E. Dreyfus, *The Five-Stage Model of Adult Skill Acquisition*, 24 BULL. SCI. TECH. & SOC’Y 177 (2004).

47. *Id.* at 178.

48. Fernand Gobet & Philippe Chassy, *Towards an Alternative to Benner’s Theory of Expert Intuition in Nursing: A Discussion Paper*, 45 INT’L J. NURSING STUD. 129, 132 (2008) (characterizing both Patricia Benner, who studied the development of expertise in nursing, and the Dreyfus brothers as “strongly argu[ing] that intuition and holistic perception are necessary for performing at expert level”).

49. *Id.*

ing expertise, a person moves from detail-focused, analytic modes of reasoning to a more intuitive assessment of the thing as a whole.⁵⁰

The full picture is likely much more complicated. Other studies, for example, show that experts may be better at identifying and recalling details when those details are the ones that matter.⁵¹ For example, experts were able to use color details to distinguish between types of birds, while novices had not yet learned to take color significance into account.⁵² Experts can use these important details to make sharper distinctions between objects and categories.⁵³

Thus, we do not come away from the cognitive literature with a clear and definitive characterization of the relationship between expertise and zooming. We do, however, note that this literature indicates that sometimes framing decisions may be the consequence of cognitive factors, and we suspect these factors might play a role in copyright decisions as well. This, too, is worthy of further study.

4. Sociotechnological Change

Copyright's pervasive framing problem is exacerbated by features of the digital age. The decrease in transaction costs and the prevalence of remix culture allows creators and users to create and consume works in ways that were unimaginable in the past.⁵⁴ Creators can now create and distribute works in smaller and smaller segments: a gif, a Vine video clip, a song on iTunes, a function in an open software code. Micro-licensing schemes, which are now more feasible and cheaper to set up online and which are receiving growing attention in copyright policy,⁵⁵ allow

50. See Dreyfus, *supra* note 46, at 181 tbl.1.

51. See, e.g., Simen Hagen et al., *The Role of Color in Expert Object Recognition*, J. VISION, Aug. 2014, at 2 (“[B]ird-watchers—whose objective is to make quick and accurate identifications of visually homogenous . . . objects at a species-specific level . . . are reported to be more likely to list surface information (e.g., color) as a diagnostic cue for recognition, relative to bird novices.”).

52. *Id.* at 11.

53. See Isabel Gauthier et al., *Training ‘Greeble’ Experts: A Framework for Studying Expert Object Recognition Processes*, 38 VISION RES. 2401, 2403 (1998) (observing that a novice is “faster to say that an object was a ‘bird’ than that it was a ‘sparrow’” (citing James W. Tanaka & Marjorie Taylor, *Object Categories and Expertise: Is the Basic Level in the Eye of the Beholder?*, 23 COGNITIVE PSYCHOL. 457 (1991))).

54. See, e.g., Van Houweling, *supra* note 32, at 613–30 (discussing the new ways in which copyrighted works are distributed and experienced in the Internet Age).

55. See INTERNET POLICY TASK FORCE, DEPT OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES (2016) [hereinafter WHITE PAPER ON REMIXES], <https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> [https://perma.cc/D4NT-WPM8]; U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 79 (2015), <http://copyright.gov/orphan/reports/orphan-works2015.pdf> [https://perma.cc/Z2DU-79ZM] (describing “the micro-licenses that are so critical to the digital economy”); Request for

copyright owners to offer licenses for tiny parts of their work, such as a single page of a book.

Changing consumption in the digital age does not push the framing problem towards only zooming in, however. In the age of Netflix, Hulu, and Amazon Video, consumers can now binge-watch digital works, collapsing dozens of television episodes into one long narrative experience. This expansion in modes of creation, distribution, and consumption erodes the traditional notions of copyright markets and likely affects our intuitive understandings of what a copyrighted work is.

As we further explore in Part III, without the market as a benchmark and our intuitions as guidance, the framing possibilities in the digital age are expanding.

II. THE FRAMING PROBLEM ACROSS COPYRIGHT LAW

The question of how to frame the copyrighted work—by zooming in on individual parts of a work or zooming out and looking at the work as a whole—occurs throughout copyright law. In this Part, we provide examples of the phenomenon across various copyright law doctrines. We assess substantial similarity analysis, fair use, useful articles doctrine, and more. Identifying this move is crucial for understanding the heretofore hidden role it plays in copyright law.

A. Copyrightability and Substantial Similarity

The fundamental elements of a copyright cause of action often involve framing choices. To show copyright infringement, a plaintiff must prove that (a) the work is protected by copyright, (b) the defendant infringed one of the exclusive rights in the work, and (c) the plaintiff is the copyright owner or exclusive licensee. In this Part, we discuss the first two elements. (We address authorship and ownership next in Part II.B). We focus on the ways in which courts tackle copyright infringement and show that in deciding this question courts often choose whether to zoom in or zoom out on the work. Moreover, we show that, at times, such as in the context of fictional characters,⁵⁶ courts need to decide how to frame a work in determining whether it is copyrightable.

Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013) (calling for commentary on the availability of micro-licenses); *see also* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016) (calling for the development of a compulsory license scheme for small music pieces for remixes in light of market failures).

56. *Infra* text accompanying notes 85–87.

The Copyright Act gives the copyright owner the right to control the creation of copies of the work.⁵⁷ This right is at the “heart of copyright protection.”⁵⁸ The framing problem arises both when courts consider how much copying is enough to constitute infringement and whether nonliteral copying is infringing.

When the defendant copies just a small part of the plaintiff’s work, a court needs to determine whether the copying passes the threshold of de minimis use and is thus infringing.⁵⁹ Deciding this question involves framing. Infringement “is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole.”⁶⁰ But what is the work as a whole? If the court zooms in on the plaintiff’s work, then even a very small copied portion will be quantitatively significant; if the court zooms out, then larger copied portions will be less quantitatively significant.

For example, in 2014, the Federal Circuit decided that, subject to a later determination regarding fair use, Google infringed Oracle’s copyright in Java when it developed the operating system for Android. As part of that decision, the court held that Google was liable for copying a function called `rangeCheck`, consisting of only nine lines of code. Google argued that considering the 2.8 million lines of code in Java, the copying of `rangeCheck` was de minimis.⁶¹

The Federal Circuit held that Google’s copying was not de minimis and therefore infringing (subject to Google’s fair use claim) after zooming in on the `rangeCheck` function. It held that Google’s defense failed because `rangeCheck` is “*qualitatively significant* and Google copied [it] in [its] entirety.”⁶² The court did not explain why the quantitative component of its inquiry should

57. 17 U.S.C. § 106(1) (2012) (“[T]he owner of copyright . . . has the exclusive rights . . . to reproduce the copyrighted work in copies . . .”).

58. See Jacqueline D. Lipton, *Copyright and the Commercialization of Fanfiction*, 52 HOUS. L. REV. 425, 441 (2014); see also Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 719 (2010) (discussing the rights of copyright owner to prevent the creation of substantial similar copies and noting: “At the heart of copyright infringement cases is ‘substantial similarity’ between the plaintiff’s and the defendant’s works.”).

59. See *W. Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909) (“Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted.”).

60. *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004). Compare *id.*, with 17 U.S.C. § 107(3) (requiring courts, as part of the fair use inquiry, to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

61. *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1351–52, 1378–79 (Fed. Cir. 2014).

62. *Id.* at 1379 (emphasis added).

zoom in on this one small function rather than conceive of it as a subpart of the much larger software.

In contrast to literal copying, nonliteral copying presents a problem that goes to the core of our understanding of copyrightability. When a defendant perfectly copies a plaintiff's work in its entirety, that copying is clearly copyright infringement (putting aside the available defenses).⁶³ More difficult cases arise, however, when the defendant imperfectly copies elements of the plaintiff's work. It is well established that copyright law extends to more than the literal work as it was fixed.⁶⁴ Sometimes, however, the copying of nonliteral elements is too insignificant to constitute infringement. In other cases, copying crosses a certain threshold and becomes "illicit appropriation"⁶⁵ and thus is infringing. The tests that help courts decide whether that threshold was crossed—collectively referred to as the "substantial similarity test"—are notoriously unsatisfactory and problematic.⁶⁶

There are multiple tests for determining if one work is substantially similar to another.⁶⁷ Those tests have been heavily criticized for many reasons, including their multiplicity⁶⁸ and incoherence,⁶⁹ the role of experts within each test,⁷⁰ the excessive role of intuition,⁷¹ the tests' inability to effectively refrain

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63. See Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1822 (2013).
 64. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) ("It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.").
 65. *Arnstein v. Porter*, 154 F.2d 464, 469, 472–73 (2d Cir. 1946).
 66. See, e.g., Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 268 (2014) ("[T]he complexities of the fair use doctrine pale in comparison to what is central to almost all cases of copyright infringement: the question of 'substantial similarity.'"); Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U. L. REV. 681, 682 (2016) ("[S]ubstantial similarity, copyright law's core infringement inquiry, is a mess."); Samuelson, *supra* note 63, at 1823 (describing the "conventional tests for judging nonliteral copyright infringement" as "problematic").
 67. See, e.g., Hickey, *supra* note 66, at 690–95 (classifying the substantial similarity decisions into four tests); Samuelson, *supra* note 63, at 1824–40 (classifying these decisions into five tests). All those tests were developed and applied by federal appellate courts. Surprisingly, to this day, the Supreme Court has decided only a single substantial similarity case.
 68. See Hickey, *supra* note 66, at 682–83; Samuelson, *supra* note 63, at 1823 ("One reason why conventional tests for judging nonliteral copyright infringement are problematic is that there are too many tests . . .").
 69. See Hickey, *supra* note 66, at 682; Samuelson, *supra* note 63, at 1825.
 70. See Lemley, *supra* note 58, at 736–38 (discussing the stages in which experts should and should not be used and suggesting that currently the "basic framework is exactly backwards"); Samuelson, *supra* note 63, at 1844–45 (suggesting that the leading cases "may have overreacted to the risks posed by expert testimony" and exploring the role of experts).
 71. See Said, *supra* note 18, at 485–90, 516–17.

from comparing and thus protecting non-copyrightable elements,⁷² and more. We here add another criticism: Those tests for nonliteral infringement are vulnerable to the framing problem.

The two main substantial similarity tests—the “ordinary observer test” used by the Second Circuit⁷³ and the “extrinsic-intrinsic test” used by the Ninth Circuit⁷⁴—share many features.⁷⁵ Both tests include two stages, one possibly involving the dissection of the work and expert testimony and the other relying prominently on the fact-finder’s intuitions. In both stages, the fact-finder, typically the jury, needs to compare the two works. But how exactly are the works to be compared? Copyright works are typically complex and consist of several subparts. Courts must therefore decide how to frame the work—whether to zoom in or zoom out.

In theory, the zooming determination has to be made with respect to both the plaintiff’s work and the defendant’s work. The law, however, deals with the framing decisions of the plaintiff’s work and the defendant’s work differently.

Defendants are typically not allowed to frame their works in a way that makes them less similar to the plaintiff’s work.⁷⁶ The defendant cannot zoom out on her own work to show that the parts that were copied are only a small subset of *the defendant’s* work as a whole. So if, for example, the defendant writes a book and copies the plaintiff’s entire poem in it, it does not matter how long the defendant’s book is. This principle has been widely adopted.⁷⁷

But this leaves open the problem of whether to zoom in or zoom out on the plaintiff’s work. That decision can have a significant effect on the results of many copyright law disputes. In some cases, zooming in on the plaintiff’s work allows the plaintiff to prove substantial similarity and thus infringement. For example, if the defendant nonliterally copied just small elements of the plaintiff’s work, zooming in can stress the similarity between those

72. See Lemley, *supra* note 58, at 739; Samuelson, *supra* note 63, at 1832 (suggesting that some substantial similarity tests make “it too easy for unprotectable elements to be swept into the infringement analysis”).

73. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

74. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

75. While we focus on the similarity between the tests, they, of course, are not identical. The differences between them are less important for our purposes.

76. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (Hand, J.) (rejecting a similar argument and famously stating that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate”).

77. See Hickey, *supra* note 66, at 710–13 (exploring the way in which other courts adopted the *Sheldon* rule, although some of them deviate from it, typically without noticing, from time to time).

elements. In other cases, however, zooming out leads to substantial similarity. For example, if a defendant does not copy any smaller elements of the plaintiff's work, but does copy the outline as a whole, zooming out benefits the plaintiff. We discuss examples of each case below.

The well-known dispute between Tufenkian Import/Export Ventures (Tufenkian) and the Bashian Brothers demonstrates how zooming in can bolster the plaintiff's infringement case. The plaintiff in this case (Tufenkian) created a rug (shown in the middle below) based on other rugs that were in the public domain (including the rug on the left below). The defendant created a rug (shown on the right below) that was partly based on the plaintiff's work. Specifically, the defendant copied many elements that were in the public domain, allegedly copied some of the elements added by plaintiff, and added its own elements.



The district court zoomed out on the plaintiff's work, repeatedly stressing that "[s]uch analysis requires this Court to consider the *total concept and feel* of the two works."⁷⁸ This zoomed-out framing doomed the plaintiff's case. After ignoring the many elements that were in the public domain, the original elements in the defendant's work (that were not copied from the plaintiff's work) created a different "concept and feel" between the works.⁷⁹

78. Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 237 F. Supp. 2d 376, 387 (S.D.N.Y. 2002) (emphasis added), *vacated by* 338 F.3d 127 (2d Cir. 2003).

79. *Id.* at 388 ("Defendants' design is symmetrical, while plaintiff's is asymmetrical, a difference which creates substantial changes in the total concept and feel of the two works . . .").

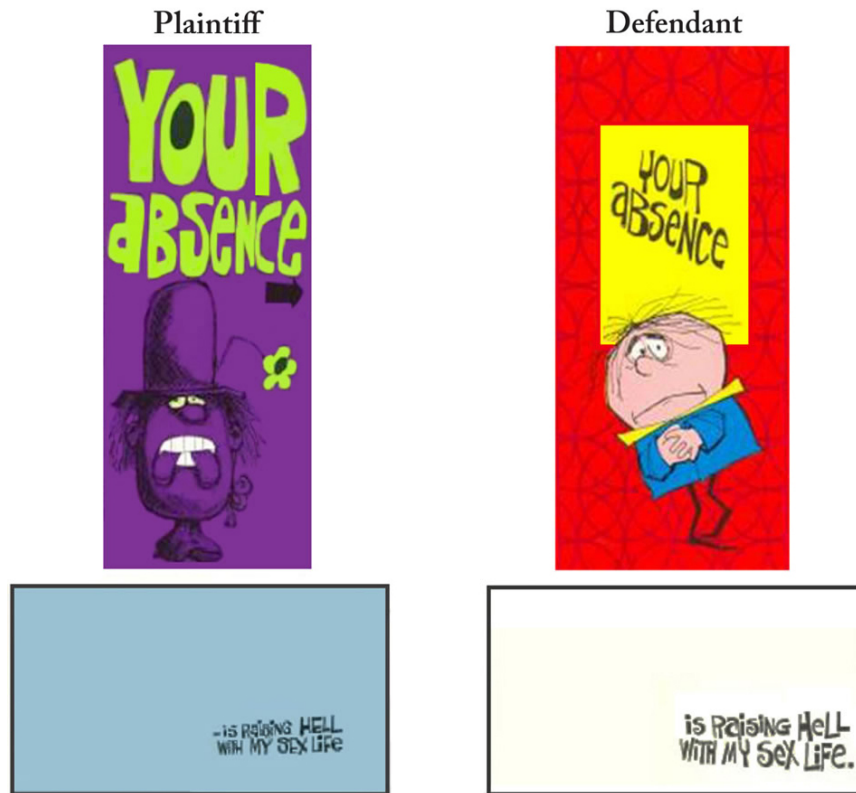
The Second Circuit reversed. Unlike the district court, it did not limit itself to the “total concept and feel” test. Instead, the court was willing to zoom in on specific elements within the plaintiff’s rug. Those elements, which might have only a limited effect on “the total concept and feel” of the rug, were created by the plaintiff and appeared in the defendant’s work.⁸⁰ For example, the court noted that the plaintiff decided to remove one of the three flowers in the public domain rug to create more space in its rug. A similar two-flower branch appeared in the defendant’s rug. Zooming in made these points of similarity apparent.



Zooming out, however, does not always help the defendant and hurt the plaintiff. In other cases, zooming out bolsters the plaintiff’s infringement claim. *Roth Greeting Cards v. United Card Co.*,⁸¹ a 1970 decision by the Ninth Circuit, demonstrates this. The defendant designed greeting cards that were similar to those of its competitor, the plaintiff. The plaintiff’s cards, such as the one on the left below, featured a cartoon-like drawing and a sentimental expression on the card. The defendant’s cards, including the one on the right below, used the exact same text, but with a different drawing expressing the same sentiment.

80. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 135–36 (2d Cir. 2003) (“[I]n its comparison of the two rugs, the district court failed to consider—apart from total concept and feel—whether *material portions* of the Bromley infringed on corresponding parts of the Heriz. Here the court erred.”).

81. 429 F.2d 1106 (9th Cir. 1970).



The district court zoomed in and ruled for the defendant.⁸² The text used by the plaintiff was too short to be granted copyright protection. Images can be protected by copyright, but the images used by the defendant were different from the images used by the plaintiff. Zooming in suggested that no single protected element was copied and the defendant won.⁸³

The Ninth Circuit zoomed out and reversed. It held:

[I]n total concept and feel the cards of [the defendant] are the same as the copyrighted cards of [the plaintiff]. . . . [T]he characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially the same as in [the defendant]'s cards.⁸⁴

82. Roth Greeting Cards v. United Card Co., No. 66-1219-R, at 4 (C.D. Cal. Mar. 27, 1968).

83. *Id.*

84. *Roth*, 429 F.2d at 1110.

Only by zooming out did the court identify collections of elements that together would be considered copyrightable and were copied by the defendant. Thus, which framing benefits the plaintiff versus the defendant can depend very much on the facts of the case.

The protection of characters provides another example of the framing problem in infringement analysis. Copyright law has long held that in some cases fictional characters can be protected by copyright, assuming they have unique and original traits.⁸⁵ But to figure out a character's traits, which are relevant for both copyrightability and infringement, a court must decide whether to zoom in on parts of a work, or zoom out.

The recent decision of the Ninth Circuit in *DC Comics v. Towle*, referenced above in our discussion of abstraction, demonstrates this framing move.⁸⁶ The defendant was sued for creating copies of Batman's car, the Batmobile. The plaintiff argued that the Batmobile is a character in the comic book series that deserves copyright protection. The Ninth Circuit agreed. It identified the Batmobile as having unique traits, such as being "bat-like in appearance" and "contain[ing] the most up-to-date weaponry and technology," that deserve copyright protection.⁸⁷

In order to identify these traits, the court had to examine the ways the Batmobile was portrayed throughout decades of development. If the court had zoomed in on any particular comic book or particular page, the plaintiff likely would have lost, as the defendant's work might not have been substantially similar to any specific image of the Batmobile created by the plaintiff. But by zooming out, the court could note shared characteristics in most of the plaintiff's Batmobile designs throughout the years. Because these shared and abstracted characteristics were copied by the defendant, the court found infringement. This case again points to future work that can be done on how framing and abstraction decisions are intertwined.

B. Authorship and Ownership

Another element of the prima facie copyright cause of action is ownership. Only copyright owners and exclusive licensees can bring copyright claims.⁸⁸

85. See, e.g., *Warner Bros. Entm't, Inc. v. X One X Prods.*, 644 F.3d 584 (8th Cir. 2011); *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003).

86. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

87. *Id.* at 1021–22.

88. 17 U.S.C. § 501(b) (2012). But claims for violation of moral rights, or more specifically "rights of attribution and integrity" are brought by authors and not copyright owners. *Id.* § 106A(a). Moral rights also include framing problems, which are beyond the scope of this Article. See *English v.*

Ownership is established by identifying the author and showing a chain of assignment or exclusive licenses from the author to the alleged copyright owner or exclusive licensee. Authorship is thus a crucial element in copyright litigation.⁸⁹ In many cases, finding authorship involves the framing problem.

In some respects, the debate over framing and authorship is centuries old. It can even partly explain the gradual emergence of authors as a separate class of creators whose labor was entitled to legal protection. As Martha Woodmansee has explored, during the Renaissance, writers were perceived, first and foremost, as craftsmen, as “master of a body of rules . . . for manipulating traditional materials in order to achieve the effects prescribed by the cultivated audience.”⁹⁰ Those of them who “managed to rise above the requirements of the occasion” were said to be inspired by an external force: a muse or God.⁹¹

However, in the late eighteenth century, writers in Germany departed from that characterization by minimizing or discarding the element of craftsmanship and by attributing the inspiration to themselves.⁹² Writers were thus able to reframe their contribution from being part of the overall construction of a physical book, to something that was distinct. They were not just one of several contributors, together with “the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, [and] the book binder” to a large unitary whole—the book.⁹³ Instead, a writer’s contribution was unique because it created something separate and independent: the intangible work.

Zooming in on the intangible work thus allowed writers to leave behind the other contributors to the book and to claim something separate as their own, entitled to legal protection in the form of copyright. That move had a profound

BFC&R East 11th Street LLC, No. 97 Civ. 7446(HB), 1997 WL 746444, at *3 (S.D.N.Y. Dec. 3, 1997) (considering but not deciding whether a certain public garden in New York City is one holistic work or several works such as murals and sculptures. The city was willing to relocate the sculptures but the plaintiffs-artists argued that this relocation will destroy the work as a whole—the garden), *aff’d sub nom.* English v. BFC Partners, 198 F.3d 233 (2d Cir. 1999).

89. Authorship is important for other reasons. It determines the term of copyright protection. *Id.* § 302(a) (“Copyright . . . endures for a term consisting of the life of the author and 70 years after the author’s death.”). It also provides certain inalienable rights. *Id.* §§ 106A (right of attribution and integrity), 203 (right to terminate a transfer of copyright in certain circumstances), 304(c) (same), 304(d) (same); see also Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 56–67 (2013) (exploring certain inalienable schemes within copyright law).

90. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’*, 17 EIGHTEENTH-CENTURY STUDIES 425, 426 (1984).

91. *Id.* at 427.

92. *Id.*

93. *Id.* at 425 (quoting GEORG HEINRICH ZINCK, ALLGEMEINES OECONOMISCHES LEXICON 442 (Martha Woodmansee trans., 3d ed. 1753)).

effect on our modern understanding of authorship and copyright, and on how we legally and intuitively perceive concepts such as “works” and “authors.”⁹⁴

The authorship debates nowadays are more constrained, if no less fraught. When a work has multiple contributors, the framing of the work has a significant effect as to whose contribution would be elevated to authorship status and whose not. It affects who is the author and what right each author will receive.

Take as an example a complex work consisting of individual parts, each created by a different author. Zooming in and perceiving each subpart as an individual work would make each individual author the sole author of that part.⁹⁵ If, for example, Anne writes one chapter of a book and Bob writes another, and the court decides to zoom in and consider each chapter as a work, Anne will be the sole author of the chapter she authored and Bob of the chapter he authored. This framing has significant practical implications. For example, if Anne and Bob are each the sole author of their own authored chapter, they have no rights with respect to the chapter written by the other.

If the court decides instead to zoom out and frame the complex work as one work, the rights of the authors will be determined by the tests for joint authorship.⁹⁶ If Anne and Bob are considered joint authors, they both have rights as tenants in common in the book in its entirety. Each now has rights in both chapters and each, for example, is allowed to grant nonexclusive licenses in *either* chapter, or both.⁹⁷

The framing problem can thus affect both the determination of authorship and the rights that each contributor receives in his or her contribution and in the larger creation. Consider, for example, open-code projects, such as Firefox, Linux, or Wikipedia. Hundreds or thousands of individuals contribute to each of those projects. Is each of them an author?⁹⁸ And if so, are they sole authors of

94. See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 294–95, 299 (1992).

95. It is, however, possible that an additional copyright will exist with respect to the collection of the individual parts, assuming it was original. See 17 U.S.C. § 103(a) (2012) (“The subject matter of copyright . . . includes compilations . . .”).

96. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 507–08 (2d Cir. 1991).

97. *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) (discussing the status of joint authors as tenants in common and explaining: “Joint authorship entitles the co-authors to equal undivided interests in the whole work . . . each joint author has the right to use or to license the work as he or she wishes . . .”).

98. In many cases, the significance of this classification is mitigated because those contributors have to accept license agreements that allow the platform and its users to use their contributions regardless of their status. See, e.g., *Wikipedia: Copyrights*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:Copyrights> [<https://perma.cc/GN4M-W3EV>] (“If you contribute text directly to Wikipedia, you thereby license it to the public for reuse under [Creative Commons Attribution-ShareAlike 3.0

their contribution or joint authors of the entire project? Zooming in can bolster the status of each contributor, while zooming out raises the threshold for finding authorship in general, and sole authorship in particular. Zooming in can therefore raise transaction costs for future users of a work, who would have to contact each individual author for permission, while zooming out could affect authors' incentives, depending on whether or not an individual is found to be a joint author of the larger work as a whole.

The recent Ninth Circuit en banc decision in *Garcia v. Google, Inc.* is an example of such an inquiry.⁹⁹ Cindy Lee Garcia, an actress, participated in a five-second segment of a fourteen-minute video that was uploaded to YouTube. The video, a trailer for an anti-Islam movie entitled *Innocence of Muslims*, portrayed Islamic prophet Muhammad as a murderer and pedophile and allegedly led to violent demonstrations in some countries. Garcia received death threats. She then claimed that under copyright law, as an author and owner of her acting performance in the video, she was entitled to require Google, the owner of YouTube, to remove the video from the site.¹⁰⁰

Framing played an important role in the Ninth Circuit's decision in this case. The majority zoomed out and framed the entire video as one work. Because Garcia's involvement in the video as a whole was insignificant, under the joint authorship test she could not be considered an author.¹⁰¹ The dissent, however, zoomed in and argued that the five-second segment in which Garcia participated was the relevant work.¹⁰² Because of Garcia's allegedly meaningful involvement in those five seconds, the dissent concluded that she was the sole author of that work. As such, the dissent argued, Garcia's approval was needed to present her work on YouTube.

In some respects, *Garcia v. Google, Inc.* presents a centuries-old question that involves a framing choice: out of the many who have contributed to a large work,

Unported License] and [GNU Free Documentation License] . . ."). But see Clark D. Asay, *Software's Copyright Anticommons*, 66 EMORY L.J. 265, 293 (2017) ("While these licensing models have undoubtedly helped address some anticommons concerns, they do not eliminate them and, in fact, may create some of their own.").

99. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

100. *Id.* at 737–38.

101. *Id.* at 741–43. There are numerous other issues with Garcia's claim for authorship which are beyond the scope of this Article. For example, Garcia acted in only the five-second scene, her voice was dubbed over, and she did not control any other aspect of the scene, such as the camera angle or the lighting, and thus did not exercise control over the fixation of her work. The majority in *Garcia* discussed all of those issues, sometimes together, *id.* at 743–44, and therefore, it is quite possible that Garcia would have lost even if the majority had been willing to zoom in on those five seconds. The dissent, however, placed significant weight on the majority's refusal to consider the five-second segment as the work. *Id.* at 749–50 (Kozinski, J., dissenting).

102. *Id.* at 749–50 (Kozinski, J., dissenting).

whose contribution(s) entitle the contributor to copyright protection? The more courts are willing to zoom in, the more authors, and perhaps the more types of authors, may be recognized.

C. Useful Articles

Framing affects the copyrightability of useful articles. When a plaintiff's work is the design of a useful article, such as a piece of clothing or furniture, it can be protected "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."¹⁰³ This inquiry, commonly referred to as "separability analysis," involves the framing problem.

Before the Supreme Court's recent 2017 decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, separability analysis was typically divided into physical separability and conceptual separability.¹⁰⁴ Physical separability was a relatively easy determination. When design features could be physically separated from utilitarian aspects, those design features were deemed protected by copyright. For example, in 1954 the Supreme Court held that a statue that served as the base of a lamp with physically separate electric mechanisms was protected under copyright law.¹⁰⁵ Similarly, items like a car hood ornament present relatively easy separability questions, because the hood ornament can be taken off the car with no effect on its function.

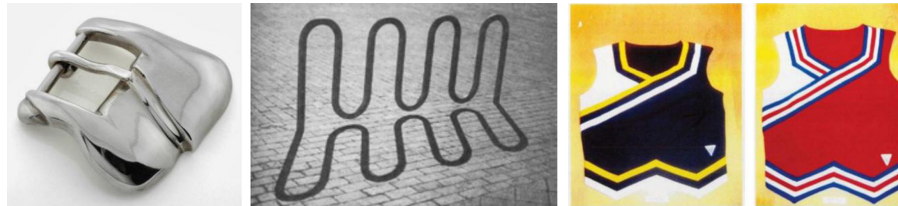
But when design features cannot be physically separated from utilitarian aspects, as shown in the images below,¹⁰⁶ courts historically inquired into whether they could nonetheless be separated for purposes of copyrightability.

103. 17 U.S.C. § 101 (2012); see also H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 1976 WL 14045 (stating that the purpose behind this language is "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design").

104. A reference to this distinction can also be found in the legislative history of the Copyright Act. H.R. REP. NO. 94-1476, at 55. However, the Supreme Court has now rejected the relevance of this distinction referring to it as "unnecessary." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1014 (2017).

105. See *Mazer v. Stein*, 347 U.S. 201 (1954).

106. These items were subject to famous copyright disputes. The belt buckle on the left was held protected by copyright in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990 (2d Cir. 1980); the bike rack in the center was held unprotected in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1148 (2d Cir. 1987); the cheerleading costumes on the right were recently held protected in *Star Athletica*, 137 S. Ct. 1002.



This inquiry, known as conceptual separability, was exceptionally complicated and controversial, and federal courts of appeals developed no fewer than ten (!) tests for determining separability.¹⁰⁷

In 2017, in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, the Supreme Court intervened, provided yet another test, and collapsed physical and conceptual separability into one analysis. As we explain below, this test will likely lead to further litigation and will require further clarification, both in general and as to the framing decisions it entails.

Framing is a central and overlooked component of separability analysis. Separability, at its core, deals with the relationship between the article's design features and its utilitarian aspects. We point out that before the design features and the utilitarian aspects of a work are compared and contrasted, they are also framed.

When conducting separability analysis, a court needs to make two framing decisions: First, the court must decide whether to zoom in or zoom out on the design features of the work—i.e., whether to consider each design feature separately or all of them as a whole design. Second, the court must decide whether to zoom in or zoom out on the utilitarian aspects of the work—i.e., whether to consider each possible utilitarian function of parts of the work, or focus, instead, on the main functionality of the work as a whole.

These framing choices impact the outcome of disputes over the copyrightability of useful articles. If framing decisions emphasize the work's design features, the work is more likely to be copyrightable. On the other hand, if the framing decisions emphasize the work's utilitarian aspects, it is less likely to be copyrightable. One of the failures of the recent Supreme Court opinion in *Star Athletica* is its lack of explicit framing of the utilitarian aspects (or aspect) of a work. This failure will potentially lead to an upsurge in the copyrightability of useful articles, as we discuss below.

107. See *Varsity Brands, Inc.*, 799 F.3d at 484–85 (identifying nine tests and proposing a tenth). There are, of course, other ways to group the existing separability tests together.

Separability tests can thus be grouped into four categories, distinguished by what method of framing they employ. We describe those four groups as: decisions that zoom in on both an object's design features and its utility, decisions that zoom in on design features but analyze the utility of the object as a whole, decisions that zoom out on design features but in on utility (an unusual approach), and decisions that zoom out on both design features and utility. In the chart below, we classify common separability tests by how they frame both utility and design.

	Zoom In on Utility	Zoom Out on Utility
Zoom In on the Design	<ul style="list-style-type: none"> • The Pivot Point Approach 	<ul style="list-style-type: none"> • The Objectively Necessary Approach • The <i>Brandir</i> Approach • The Stand-Alone Approach
Zoom Out on the Design	<ul style="list-style-type: none"> • The 6th Cir. Approach • The Supreme Court's approach in <i>Star Athletica</i> (maybe) 	<ul style="list-style-type: none"> • The Copyright Office's Approach • The Likelihood-of-Marketability Approach • The Primary-Subsidiary Approach • The Paul Goldstein Approach • Judge Newman's Approach (also known as the Ordinary Observer Approach)

1. Zooming In on the Design and Zooming In on Utility

In the first quadrant, we list tests that zoom in on both the design features of a work and its utilitarian features. With this zoom-in-zoom-in approach to separability, the court zooms in on individual design features, and for each of them asks whether it has been dictated by any utilitarian concern.

In *Jovani Fashion v. Fiesta Fashions*, an unpublished opinion dealing with the copyrightability of prom dress designs, the Second Circuit used a zoom-in-zoom-in approach to deny copyrightability.¹⁰⁸ While citing several possible tests for determining conceptual separability, the panel in practice went through individual design elements of the prom dress and asked if each of these features was in fact functional. The court reasoned that “a jeweled bodice covers the upper torso at the same time that it draws attention to it; a ruched waist covers the wearer’s midsection while giving it definition; and a short tulle skirt conceals the

108. *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 F. App’x 42 (2d Cir. 2012).

wearer's legs while giving glimpses of them."¹⁰⁹ As each design element was held to also be functional, the Second Circuit found that the garment's design was inseparable from its individual points of functionality, and could not be copyrighted.

In *Pivot Point v. Charlene Products*, the Seventh Circuit also used a zoom-in-zoom-in approach when it ruled that a fashion mannequin head was protected by copyright.¹¹⁰ The court zoomed in on the design of the mannequin head and asked whether each design decision was dictated by any functional concerns.¹¹¹ For example, the court explained that while the overall utilitarian purpose of the mannequin was makeup application, had the mannequin head's dimensions been dictated by the company's existing packaging system, this would have "weigh[ed] against a determination that [the mannequin] was purely the product of an artistic effort."¹¹²

The zoom-in-zoom-in approach to separability can, at times, provide fairly broad copyright protection. Under this approach, any design element not dictated by utilitarian concerns is protected by copyright, even if the design as a whole does not stand alone as a work of art, as required by some of the other approaches discussed below. The zoom-in-zoom-in approach, however, typically provides narrower copyright protection in comparison with the zoom-in-zoom-out approach discussed below.¹¹³ A court might under the zoom-in-zoom-in approach deny copyright protection to an item whose design is partly dictated by a utilitarian concern, even if that utilitarian concern (for example, over the need to meet packaging constraints) is incidental to the primary utility of the article as a whole.

2. Zooming In on the Design and Zooming Out on Utility

A second framing approach to separability is to zoom in on individual design features and ask whether they are separable from the overall utility of the article as a whole. The Second Circuit took this approach in *Carol Barnhart v. Economy Cover Corp.*, a case addressing fashion mannequin torsos.¹¹⁴ The court held that

109. *Id.* at 45.

110. *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 932 (7th Cir. 2004).

111. *Id.* (noting that the design might not have been copyrightable had the designer of the fashion mannequin heads been required to make "the sculpture's eyes . . . a certain width to accommodate standard-sized eyelashes, . . . the brow . . . arched at a certain angle to facilitate easy make-up application or that the sculpture as a whole not exceed certain dimensional limits so as to fit within Pivot Point's existing packaging system").

112. *Id.*

113. *See infra* Part II.C.2.

114. *See Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir.1985).

because the individual aesthetic features of the torsos were not separable from their overall use for modeling clothing, the torsos' design was not copyrightable.

This approach, which is sometimes referred to as the objectively necessary approach,¹¹⁵ can also be understood as looking to whether the utilitarian article as a whole can function according to its primary purpose once one has removed the purportedly ornamental elements.¹¹⁶ In order to make that determination, the court zooms in on the design elements and zooms out on the utility of the article, considering only the article's primary function and not any secondarily useful elements. In *Star Athletica*, the defendant encouraged the Supreme Court to adopt a similar test, finding the design of a useful article not copyrightable if the object (in that case, a cheerleader's uniform) no longer functions according to its primary utility if the design elements (the pattern identifying the team) were removed. The Court, however, expressly rejected this approach, stating that it was not required by the statute.¹¹⁷

The Second Circuit applied a slightly different zoom-in-zoom-out approach in a well-known case about bicycle rack design, *Brandir International, Inc. v. Cascade Pacific Lumber Co.*¹¹⁸ The court in *Brandir* proposed a test that considers the "relationship between the proffered work and the process of industrial design."¹¹⁹ This was done by identifying the overall utilitarian purpose of the article, and then asking whether individual design features "further" that overall "utilitarian purpose."¹²⁰ Under the *Brandir* approach, a court could potentially find an individual element that is useful—but not useful towards the overall utilitarian purpose of the article—to be copyrightable. This test was also expressly

115. See *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468, 484 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017). The Sixth Circuit also refers to a "stand-alone approach" that seems very similar to this test, asking whether overall functionality remains intact once design elements have been removed. *Id.*

116. See *Carol Barnhart*, 773 F.2d at 419 (observing of the fashion mannequin that the "human torso, in order to serve its utilitarian function, must have some configuration of the chest and some width of shoulders").

117. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1013 (2017).

118. 834 F.2d 1142 (2d Cir. 1987).

119. *Id.* at 1145 (quoting Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (1983)) ("[W]here design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists.").

120. *Id.* at 1147 ("In creating the RIBBON Rack, the designer . . . clearly adapted the original aesthetic elements to accommodate and further a utilitarian purpose. These altered design features of the RIBBON Rack, including the spacesaving, open design achieved by widening the upper loops . . . , the straightened vertical elements that allow in-and above-ground installation of the rack, the ability to fit all types of bicycles and mopeds, and the heavy-gauged tubular construction of rustproof galvanized steel, are all features that combine to make for a safe, secure, and maintenance-free system of parking bicycles and mopeds.").

rejected by the Supreme Court in *Star Athletica* because it is not “grounded in the text of the statute. . . . [The text] makes clear . . . that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.”¹²¹

In many cases, this zoom-in-zoom-out approach will benefit the plaintiff, at least in comparison to the other approaches we explore. Under this approach, the plaintiff can argue that the essence of the object’s functionality is not affected by the purportedly ornamental components.¹²² But, this does not mean that separability is always found. In fact, in both *Carol Barnhart* and in *Brandir*, the court eventually concluded that the articles in question were not protected by copyright.

3. Zooming Out on the Design and Zooming Out on Utility

Several courts have zoomed out on both aspects of the useful article: They zoom out on the design and zoom out on utility. The test proposed by the Copyright Office demonstrates one version of this approach. The Copyright Office asks whether artistic features of a work, viewed as a whole, can stand alone from the useful article, viewed as a whole.¹²³ The Copyright Office provides examples of designs that meet this test, which typically involve a figurative design that can be easily mentally lifted off of a useful object: an engraving on a chair, artwork printed on a t-shirt, or a drawing on wallpaper.¹²⁴

Another example of the zoom-out-zoom-out approach focuses on the market for the work. *Nimmer on Copyright* proposes this marketability test, and the Fifth Circuit has adopted it, at least with respect to garment design.¹²⁵ The test finds separability when the article “would still be marketable to some significant

121. *Star Athletica*, 137 S. Ct. at 1015.

122. Cf. *supra* notes 110–113 and accompanying text. In *Pivot Point*, the court suggested that the design choice regarding the measurement of a mannequin head would not be copyrightable because it is constrained by the packaging process. See *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7th Cir. 2004). But if the approach in *Brandir* would have been applied, the court would have zoomed out on the utilitarian aspects, considered the overall purpose of the article, and might have held that the measurement did not further that overall purpose.

123. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2(B) (3d ed. 2014) [hereinafter COMPENDIUM III] (stating that to be conceptually separable, the “artistic feature must be capable of being visualized—either on paper or as a free-standing sculpture—as a work of authorship that is independent from the overall shape of the useful article”). Paul Goldstein proposes a similar test, asking also if the utilitarian object can stand alone: A design is “conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.” 1 PAUL GOLDSTEIN, COPYRIGHT § 2.5.3.1(b), at 109 (1989).

124. COMPENDIUM III, *supra* note 123, § 924.2(B).

125. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[B][4] (2016) [hereinafter NIMMER ON COPYRIGHT]; see also *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 421 (5th Cir. 2005).

segment of the community” even if it had no utilitarian use.¹²⁶ This test splits the useful article into its utility and its design, each viewed as a whole from the perspective of a purchaser.¹²⁷ Again, in *Star Athletica* the Supreme Court expressly rejected this test, explaining that it is not “grounded in the text of the statute.”¹²⁸ The Court also dismissed the marketability test because it “threatens to prize popular art over other forms, or to substitute judicial aesthetic preferences for the policy choices embodied in the Copyright Act.”¹²⁹ This argument against judicial aesthetic preferences is particularly interesting because in our view, discussed further below, the test adopted by the Supreme Court invites judges to engage in evaluating “aesthetic preferences” more than previously suggested tests, including the marketability test.

The marketability test often reaches similar results as the Copyright Office’s stand-alone test. Both typically provide copyright protection to relatively few articles, because both the design and the useful article must be able to stand alone after separation.¹³⁰ Under both approaches, clothing design is usually not copyrightable, absent figurative depictions constituting fabric design. Notably, however, the Copyright Office did register the cheerleader uniforms protected in *Star Athletica*.¹³¹ This suggests—as criticized by Justice Breyer in his dissent in *Star Athletica*—that all one may need to do to achieve protection over fashion design is first register a two-dimensional drawing of the work.¹³²

Another version of a zoom-out-zoom-out approach is the ordinary observer approach, also known as the Judge Newman test.¹³³ Under this approach, a design is conceptually separable if it “creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously.”¹³⁴

126. NIMMER ON COPYRIGHT, *supra* note 125, § 2A.08[B][4].

127. This marketability test can also be understood under aesthetic theory as a reader-side reception test—testing how a reader, or cultural institution, reacts to a work. *See* Yen, *supra* note 18, at 259, 264.

128. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017).

129. *Id.*

130. The results of those two tests do differ at the margins. Thus, a court applying the marketability test might grant copyright protection to clothing in the rather unusual case in which it was marketed as a work of art. *See Galiano*, 416 F.3d at 420 (citing *Poe v. Missing Perss.*, 745 F.2d 1238 (9th Cir. 1984)).

131. *Star Athletica*, 137 S. Ct. at 1007.

132. *Id.* at 1030–31 (Breyer, J., dissenting) (“Look at the designs that Varsity submitted to the Copyright Office. You will see only pictures of cheerleader uniforms. And cheerleader uniforms are useful articles. A picture of the relevant design features . . . is a picture of, and thereby replicate[s], the underlying useful article of which they are a part.” (alteration in original) (citation omitted) (internal quotation omitted)).

133. *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468, 484 (6th Cir. 2015) (citing *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting)), *aff’d*, 137 S. Ct. 1002 (2017).

134. *Carol Barnhart*, 773 F.2d at 422 (Newman, J., dissenting).

This approach zooms out on both the design of the piece and the useful article, but instead of asking whether the design can truly stand alone, or be marketed for sale alone, it merely asks whether the design is conceptually separable. This test was rejected by the Second Circuit as “a standard so ethereal as to amount to a ‘nontest’ that would be extremely difficult, if not impossible, to administer or apply.”¹³⁵ It is also, we contend, quite similar to the test proposed by the Supreme Court in *Star Athletica*.

The “primary-subsidary” test, proposed in *Kieselstein-Cord v. Accessories*, offers yet another version of the zoom-out-zoom-out approach.¹³⁶ Under this test, the court asks whether the ornamental aspect of the article as a whole is conceptually separable from—and primary over—the overall “subsidiary utilitarian function” of the article. It differs from the Judge Newman test by requiring the court to analyze whether utility is subsidiary to design. This test, however, seems no more grounded than the Judge Newman test in providing more detailed guidance to courts.

4. Zooming Out on the Design and Zooming In on Utility

Courts rarely zoom out on the design of an article while zooming in on the useful article's utilitarian aspects. But recently in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, a case addressing the copyrightability of cheerleading costumes, both the Sixth Circuit and later the Supreme Court appeared to use this approach, at least in parts.¹³⁷ This section focuses on the test adopted by the Sixth Circuit while the next section discusses the Supreme Court decision.

In *Star Athletica*, the Sixth Circuit first identified the overall graphic design of the cheerleading costumes holistically, as exhibited in the two-dimensional works of graphic art registered with the Copyright Office.¹³⁸ The court then identified the multiple useful aspects of the cheerleading uniform as to “cover the body, wick away moisture, and withstand the rigors of athletic movements.”¹³⁹ These are largely the utilitarian aspects of individual pieces of cloth, rather than the overall utilitarian function of a cheerleader's uniform as a whole, which is both to clothe the cheerleader and to refer to the team with which the cheerleader affiliates. The Sixth Circuit rejected the approach of the district court and, over a

135. *Id.* at 419 n.5 (majority opinion).

136. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

137. *Varsity Brands*, 799 F.3d 468. It should be noted that at times the court seems to adopt a zoom-out-zoom-in approach, although at other places, *e.g.*, *id.* at 488, the court seems to apply a zoom-out-zoom-out approach.

138. *Id.* at 489.

139. *Id.* at 490.

strong dissent, refused to zoom out on the purpose of cheerleading uniforms as a whole as “to convey to others the fact that the wearer of the uniform is a cheerleader for a particular team.”¹⁴⁰

Zooming in on the utilitarian aspects of the uniform—its ability as individual pieces of cloth to cover the body and wick away moisture—but out on the graphic design of the uniform, the Sixth Circuit found that the design was copyrightable. The design of the uniform could, according to the court, stand by itself as a design, separate from the physical pieces of cloth on which it was printed.¹⁴¹ The court likely was influenced by the fact that the plaintiffs had registered two-dimensional design drawings with the Copyright Office. In the absence of explicit judicial analysis or even awareness of framing in separability doctrine, the plaintiffs were able to push the court to a more favorable framing by rendering the design as a holistic two-dimensional drawing.

Contrasting this approach with the Second Circuit’s zoom-in-zoom-in approach in the prom dress case, *Jovani Fashion*, shows how significant the framing decision is for determining copyrightability.¹⁴² Instead of zooming in on the skirt of the cheerleading uniform and explaining that it is simultaneously decorative and covers a particular body part, as the Second Circuit did, the Sixth Circuit zoomed out and held that the overall sketch of the pattern of a uniform was conceptually distinct from the cloth’s ability to cover individual parts of the body.

5. The Supreme Court decision in *Star Athletica v. Varsity Brands*

In March 2017 the Supreme Court delivered its decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, its first opinion on useful articles doctrine in over 60 years.¹⁴³ If we are hard pressed, we might classify the Court’s opinion as in practice zooming-out on design features and zooming-in on utilitarian aspects. However, this description is somewhat misleading. Even as the Court appeared to zoom out on the design (again probably guided by the fact that the design as a whole was registered with the Copyright Office), throughout the opinion it used language referring to individual design features, suggesting a zoom-in

140. *Id.*

141. *Id.* at 491–92 (holding that the designs in question “are transferrable to articles other than the traditional cheerleading uniform Indeed, ‘nothing (save perhaps good taste) prevents’ [the plaintiff] from printing or painting its designs, framing them, and hanging the resulting prints on the wall as art” (citation omitted) (quoting *Home Legend, L.L.C. v. Mannington Mills, Inc.*, 784 F.3d 1404, 1413 (11th Cir. 2015))).

142. *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 F. App’x 42 (2d Cir. 2012).

143. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). The previous and only other Supreme Court opinion on this matter is *Mazer v. Stein*, 347 U.S. 201 (1954).

approach.¹⁴⁴ The discussion on the utility aspect was similarly inconsistent, and quite succinct. The Court thus provided little clarity to lower courts on how to implement separability analysis in terms of how to frame both the design features and utilitarian aspects of useful articles going forward.

Indeed, the Court in *Star Athletica* addressed framing issues only in passing, and in an inconsistent way. As we explain further below, we are in particular troubled by the Court's lack of analysis of the utilitarian aspects of a useful article. If lower courts read this lack of attention as instructive and similarly downplay the importance of utility, this will lead to a significant expansion in copyright protection for useful articles. We expect that lower courts will struggle to implement the Court's approach because of both the lack of substantive clarity, and the Court's failure to address framing.

The Court held that Varsity Brands' cheerleading uniform designs were copyrightable, finding those designs separable from the underlying clothing on which they were printed.¹⁴⁵ Justice Thomas, writing for a 6-2 majority,¹⁴⁶ explained that the text of the statute imposes two requirements for separability: separate identification and independent existence. "The first requirement—separate identification," which the court suggested "is not onerous"—requires "[t]he decisionmaker [to] be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities."¹⁴⁷ In another place the Court described the first stage somewhat differently, requiring that a feature in the article "can be perceived as a two- or three-dimensional work of art separate from the useful article."¹⁴⁸

144. See, e.g., *Star Athletica*, 137 S. Ct. at 1007; see also, e.g., *id.* at 1011 ("The ultimate separability question, then, is whether the feature for which [a] copyright protection is claimed . . ."); *id.* at 1012 ("[A] feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.").

145. *Id.* at 1013 ("[T]he only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric.").

146. It should be noted that while six justices agreed to affirm and hold the designs protectable, Justice Ginsburg in her concurring opinion expressly stated that she "concur[red] in the Court's judgment but not in its opinion." *Id.* at 1018 (Ginsburg, J. concurring). Justice Ginsburg approach was fundamentally different from Justice Thomas's and the majority approach. Addressing that approach, as well Justice Breyer's dissenting approach, is beyond the scope of this Article.

147. *Id.* at 1010 (majority opinion).

148. *Id.* at 1007. It is not obvious that "pictorial, graphic, or sculptural qualities" is the same thing as "work of art." Moreover, both or those terms are not defined in the opinion. Judging whether something is a "work of art" is especially problematic, because it is well established in copyright jurisprudence that judges should refrain from determine what is art. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

The second requirement—independent existence—which the Court suggested “is ordinarily more difficult to satisfy,” requires “[t]he decisionmaker [to] determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article.”¹⁴⁹ The Court explained that this requirement means that “the [separated] feature[s] must be able to exist as its own [copyrightable] pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article.”¹⁵⁰

There are many things that can be said about this opinion. For example, it is curious that after decades in which dozens of judges and commentators found it advisable to develop tests that would clarify and give meaning to the statutory language, the Supreme Court chose to return to the text of the statute for guidance. Justice Thomas rejected calls for considering the larger policy purposes of separability doctrine, stating: “This is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation.”¹⁵¹ The Court suggested that the same statutory text that spawned the existing ten-test circuit split could have been interpreted using simple tools of statutory interpretation, such as the ordinary-meaning canon.¹⁵² And while the Court did refrain from explicitly considering the significant policy implications of its decision, it, maybe unavoidably, did not in fact restrict its opinion to the statutory text. In describing the separability test the Court repeatedly used terms—such as “pictorial, graphic, or sculptural qualities”—that are nowhere to be found in the Copyright Act. Our focus here, however, is on framing and how it intersects with separability.

To the extent the Court provided guidance for framing, it did so primarily on one side only: the design side. But even with respect to design features, the Court’s approach was unclear. On one hand, when the Court addressed the test it devised in the abstract, it seemed to zoom-in and address individual design features. For example, the Court stated that courts should consider “when *a feature* incorporated into a useful article ‘can be identified separately from’” its utility.¹⁵³ Comparable discussion of individual features appears when the Court addressed the second stage in the required inquiry.¹⁵⁴

149. *Star Athletica*, 137 S. Ct. at 1010.

150. *Id.*

151. *Id.* (internal citation omitted).

152. *Id.* (“The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written” (quoting *Estate of Cowart v. Nickolos Drilling Co.*, 505 U.S. 469, 476 (1992))).

153. *Id.* (emphasis added) (internal citation omitted).

154. *Id.* at 1011 (“The ultimate separability question, then, is whether the feature for which copyright protection is claimed . . .”); *id.* at 1012 (“[A] feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.”).

On the other hand, when the Court applied its test to the case before it, it clearly zoomed out. Indeed, when it examined the cheerleader uniforms the Court did not consider each chevron, curve, or stripe in isolation, but instead looked at the outfit design as depicted holistically in the registered works.¹⁵⁵ It is possible that the Court believed that it is the plaintiff's right to frame its work as it pleases for separability purposes, but this was not explicitly stated. Because the Court did not address framing explicitly, and because of the potentially conflicting guidance in its analysis, we expect lower courts to continue to vary in their approaches to the framing of design elements in separability cases.

The Court's analysis—or lack thereof—of the utilitarian aspects is even more troubling. As we explained above,¹⁵⁶ the framing of the utilitarian aspects of the cheerleaders' uniform played a central role during earlier stages of the litigation and in the briefs that were submitted to the Supreme Court. The Sixth Circuit inquired whether the cheerleader uniform's utility should be framed narrowly as a piece of clothing, or more broadly as a piece of clothing that is designed for rooting for a team. The Supreme Court did not find a need to address this question, and instead required that design features will be perceived as a "work of art separate from the useful article"¹⁵⁷ without defining the scope of what is considered to be useful.

The Court, for the most part, ignored the framing (or definition) of the utility of a work. What signals it did send were again conflicting. On the one hand, the Court in places appeared to zoom out and look at the utility of an object as a whole. For example, the Court rejected the dissent's claim that its approach might lead to the protection of shovels by suggesting that a shovel, even if displayed in an art gallery, is not copyrightable, because it is "an article having an intrinsic utilitarian function that is not merely to portray the appearance . . . or to convey information."¹⁵⁸ This reasoning zooms out on utility, effectively asking whether the article as a whole has a single intrinsic utilitarian function. As the Court noted: "a shovel as a shovel cannot [be copyrighted]."¹⁵⁹

155. *Id.* at 1008 (describing its task in this case as "to determine whether *the arrangements* of lines, chevrons, and colorful shapes . . . are eligible for copyright protection as separable features" (emphasis added)); *id.* at 1012 (rejecting petitioner's argument that "the decorations cannot be copyrighted because, even when extracted from the useful article, they retain the outline of a cheerleading uniform" and noting that "two-dimensional applied art correlates to the contours of the article on which it is applied" such as a guitar).

156. *See supra* Part II.C.4.

157. *Id.* at 1007.

158. *Id.* at 1008.

159. *Id.* at 1013 n.2.

On the other hand, in one place the Court explained that to qualify as a pictorial, graphic, or sculptural work, a design “feature cannot itself be a useful article or ‘[a]n article that is normally a part of a useful article’ (which is itself considered a useful article).”¹⁶⁰ This suggests that courts might zoom in on the design feature, and ask whether it is itself a useful article or “normally a part of a useful article,” zooming in on utility.

The analysis of what counts as “utilitarian aspects” is so short that we are reluctant to draw significant conclusions from it.¹⁶¹ This is perhaps the most worrisome feature of the opinion, because without a framework for analyzing utility the test does not effectively filter out useful articles to deny them copyright protection. Almost every useful article, including many shovels,¹⁶² could meet the test set forth by the Court. After all, in the age of modern art, almost any design feature of a useful article can be imagined on a canvas as a work of art, which is the exact reasoning the Court used for finding the cheerleader uniforms copyrightable.¹⁶³ Without a framework for how to filter out utility, lower courts will either rely on judicial instinct (“of course a shovel is useful!”) or again produce a wide variety of tests.

Useful article doctrine serves a subject-matter gatekeeping role, meaning that it ensures copyright law does not protect what might need to be protected, if at

160. *Id.* at 1010.

161. It should be noted that the Court did explicitly reject three of the tests that were previously adopted by some courts: the *Brandir* approach, *see supra* text accompanying notes 118–121, of looking to a designer’s intent, the objectively necessary test, *see supra* text accompanying notes 114–117, which asks whether the utilitarian article can still function once ornamental aspects have been removed, and the marketability test proposed in *Nimmer on Copyright* and adopted by the Fifth Circuit, *see supra* text accompanying notes 125–129. The rationale for rejecting the marketability test is especially interesting. The test is rejected because it has no grounding in the statutory text, and because it might allow judges to discriminate against art they do not like, which is inconsistent with the aesthetic non-discrimination doctrine. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017). However, while the marketability test might indeed at times penalize unpopular art, it at least applies a somewhat objective factor to identify design features separately from the utilitarian aspects. In contrast, moving away from objective factors and focusing on judicial perception, as the Supreme Court does (effectively asking, like the Judge Newman test, whether the design can be separately perceived as art), may in fact increase the problem of potential aesthetic discrimination at the both steps of the test. *See also supra* note 148.

162. Shovels might fail the first part of the test as lacking any design feature, but, as the Court suggests, that requirement is easy to satisfy. Coloring a shovel green might allow it to pass this part of the test. And because one can imagine that design feature (a green painting with the outline of a shovel) as a work of art if drawn on a canvas, the green shovel seems to satisfy the Court’s test, which, in our minds, makes little sense.

163. *Id.* at 1012 (“[T]he arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium—for example, on a painter’s canvas—they would qualify as ‘two-dimensional . . . works of . . . art.’” (quoting 17 U.S.C. § 101 (2012))).

all, by other intellectual property doctrines.¹⁶⁴ This easy-to-satisfy new test, however, shifts the subject-matter gatekeeping role to other parts of copyright law, such as originality or merger analysis.¹⁶⁵ As Justice Ginsburg observed in her concurrence, these alternate gatekeepers may not do the work the majority might believe they will do: for example, originality as a hurdle is “extremely low.”¹⁶⁶

The Court's failure in *Star Athletica* to address how to frame utility leaves a significant gap in guidance to lower courts. We (cautiously) predict that subsequent separability cases will flounder in particular over how to address the utility aspect of separability analysis. Given how little the Supreme Court said about utility in the opinion in general, the difficulties we predict will not be due solely to the framing problem. But by failing to guide courts as to how to frame the useful article, the Court left open yet another axis along which future variation might occur.

D. Fair Use

The most important defense to copyright infringement is fair use.¹⁶⁷ Fair use analysis often involves the framing problem. The fair use doctrine provides that certain actions that would otherwise be infringing are considered fair and thus legal. Since the doctrine's inception,¹⁶⁸ courts have applied a four-factor test to determine whether a use is fair or not. Those four factors are now codified in section 107 of the Copyright Act.¹⁶⁹ Both the third and the fourth fair use factors present the framing problem: The third factor addresses how much of the original work has been copied; the fourth addresses the impact of the use on the original work's market.

164. See *infra* Part IV.A.3.

165. See *Star Athletica*, 137 S. Ct. at 1012 n.1 (“We express no opinion on whether these works are sufficiently original . . . or on whether any other prerequisite of a valid copyright has been satisfied.” (citation omitted)).

166. *Id.* at 1018 n.2 (Ginsburg, J., concurring).

167. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . .”).

168. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

169. 17 U.S.C. § 107 (2012). The four factors are:
 (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 (2) the nature of the copyrighted work;
 (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

The third fair use factor instructs courts to explore “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁷⁰ If the defendant used just a portion of a complex work—for example, a page from a book or a song from an album—what is its substantiality relative to the “work as a whole”?¹⁷¹ If the court zooms in and considers an individual page to be the “work as a whole,” then the defendant has used the work in its entirety and the third factor will strongly support the rejection of fair use. On the other hand, if the court chooses to zoom out and consider the entire book as the “work as a whole,” then the defendant used only a small portion of the plaintiff’s work. In such a case, the third factor will support a finding of fair use.

These decisions—whether to zoom in or zoom out when deciding what constitutes the “work as a whole”—are fairly common. For example, in a series of cases, courts had to decide whether copying multiple articles from scientific journals constituted fair use. Courts split in framing the plaintiffs’ works for purposes of analyzing the third fair use factor.¹⁷² This split had consequences for the cases’ outcomes.

In *Williams & Wilkins Co. v. United States*, the court zoomed out and compared the number of articles copied by the defendants to the total number of articles published by the plaintiffs in all of the medical journals purchased by the defendants.¹⁷³ The court therefore found that the defendants copied a very small part of the relevant work in question. By contrast, the Second Circuit in *American Geophysical Union v. Texaco, Inc.*, and the Sixth Circuit in *Princeton University Press v. Michigan Document Services, Inc.*, zoomed in and held that each article in a journal constituted the work as a whole.¹⁷⁴ Because the defendants copied articles

170. *Id.* § 107(3).

171. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1677–78 (1988) (“[B]y according importance to the question of how a copyrighted work is defined, [the third factor] creates a bizarre and inefficient system of incentives. Artists who wish to maximize their protection against unauthorized copying will devise ways of subdividing . . . their works that make the copying of even short passages appear ‘substantial.’ Courts’ efforts to distinguish legitimate from sham identifications of the boundaries of copyrighted works can be expected to produce confusion.”).

172. Those decisions are part of a larger group of fair use cases that Pamela Samuelson called “uses that promote learning.” Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2580–87 (2009).

173. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1355 (Ct. Cl. 1973), *aff’d by an equally divided court*, 420 U.S. 376 (1975). This decision was governed by the Copyright Act of 1909 and not the current version of the Copyright Act, the Copyright Act of 1976. While the Copyright Act of 1909 did not codify the four-factor test, we do not find this fact significant. The four-factor test was created in its current form in the nineteenth century in *Folsom*, 9 F. Cas. 342, and it was broadly and uniformly applied for many decades.

174. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994); see *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc).

in their entirety, the courts found that the third factor supported the rejection of the fair use defense.¹⁷⁵ More recently, in *Cambridge University Press, Inc. v. Patton*, the Eleventh Circuit chose yet another perspective and suggested that each individual journal is the “work as a whole.”¹⁷⁶

In another set of cases, courts decided whether copying a page or image from a magazine or book was fair use. In these cases, courts chose whether to zoom in and characterize the page or image as the work as a whole or zoom out and perceive the book or the magazine as the work. Here, too, courts split on both framing choice and outcome.

In some cases, courts zoomed in and held that a single page or image was the work as a whole, finding that the third factor pointed away from fair use. In *Hustler Magazine, Inc. v. Moral Majority, Inc.*, the defendant copied one page from the plaintiff's 154-page magazine.¹⁷⁷ The Ninth Circuit held that for purposes of the third factor, the page was the work as a whole.¹⁷⁸ In *Schiffer Publishing, Ltd. v. Chronicle Books, L.L.C.*, the defendant copied 118 photographs that were included in thirteen of the plaintiff's books.¹⁷⁹ Those books together had close to 4000 images. The district court held that for purposes of the third factor, each image was the work as a whole.¹⁸⁰

But in other cases, courts chose to zoom out, holding that the books or magazines in question were the work as a whole. Therefore, by copying a page or several pages, the defendant had copied only a small portion of the work. In *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, the defendant copied covers of magazines.¹⁸¹ In *NXIVM Corp. v. Ross Institute*, the defendant copied parts of a seventeen-page module out of a 265-page book.¹⁸² In *Warren Publishing Co. v. Spurlock*, the defendant copied twenty-four artworks that were previously used as covers for magazines published by the plaintiff.¹⁸³ In all of these cases, the courts compared the portion copied to the magazine or the book as a whole, and concluded that the third factor supported the finding of fair use.

The framing problem also affects the fourth fair use factor. The fourth factor, which the Supreme Court has described as “undoubtedly the single most

175. *Am. Geophysical Union*, 60 F.3d at 936; see *Princeton Univ.*, 99 F.3d at 1390.

176. *Cambridge Univ. Press, Inc. v. Patton*, 769 F.3d 1232, 1273 (11th Cir. 2014).

177. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1154 (9th Cir. 1986).

178. *Id.* at 1154–55.

179. *Schiffer Publ'g, Ltd. v. Chronicle Books, L.L.C.*, No. Civ.A. 03-4962, 2004 WL 2583817, at *1 (E.D. Pa. Nov. 12, 2004).

180. *Id.* at *12.

181. *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1173 (5th Cir. 1980).

182. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 471, 480 (2d Cir. 2004).

183. *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402, 405 (E.D. Pa. 2009).

important element of fair use,¹⁸⁴ requires courts to evaluate “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁸⁵ The markets for a zoomed-in work and the markets for a zoomed-out work are typically different.

Zooming in on a subset of the work might help the defendant if that zoomed-in subset does not have a market of its own. For example, in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, the court zoomed in when analyzing the third factor and found that one page within a magazine was the “whole work,” which benefited the plaintiff.¹⁸⁶ The same framing decision, however, harmed the plaintiff’s case under the fourth factor. The court noted that individual pages did not have a market of their own and therefore the copying of a single page did not cause market harm.¹⁸⁷ In this case, zooming in on the work in fourth-factor analysis counter-balanced zooming in on the work in third-factor analysis. This suggests some policy benefits to holding the framing of a work steady; it can potentially prevent a plaintiff from gaming the system.

If a market for the zoomed-in work exists, however, zooming in will benefit the plaintiff. This is because that market for a zoomed-in work will suffer a more significant harm from the defendant’s actions. For example, in *American Geophysical Union v. Texaco, Inc.*, the Second Circuit zoomed in when analyzing the third fair use factor and held that each article copied by the defendant was the work as a whole.¹⁸⁸ Under the fourth factor, the court found that because the copyright owners had established a licensing scheme for individual articles, the harm for that market for each article also discouraged the finding of fair use.¹⁸⁹

Thus, when a licensing market for the zoomed-in work exists, zooming in can bolster the plaintiff’s position with respect to both the third and the fourth fair use factors. When a licensing market does not exist, zooming in might help the plaintiff or the defendant. As micro-licenses become more common,¹⁹⁰ zooming in might benefit plaintiffs more and more often in fair use analysis.

184. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

185. 17 U.S.C. § 107(4) (2012).

186. 796 F.2d 1148, 1154–55 (9th Cir. 1986).

187. *Id.* at 1155–56. It should be noted that the court suggested that even the existence of a potential for independent licensing of the page might suffice. *Id.* This is an early decision. Later decisions which dealt with the issue of potential licensing markets in the context of the fourth factor stressed that such markets must be “traditional, reasonable, or likely to be developed.” *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

188. *Texaco*, 60 F.3d 913, at 926.

189. *Id.* at 929–31.

190. *See supra* Part I.B.4.

E. Statutory Damages

Courts encounter the framing problem when setting statutory damages. The process by which courts set statutory damages can involve choosing the right perspective—whether to zoom in or zoom out—for framing complex works.¹⁹¹

The Copyright Act provides that “the copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages.”¹⁹² The Act provides a formula for such calculation.¹⁹³ In setting the amount of statutory damages, courts must answer two questions¹⁹⁴: (1) what should the damages per work be, in the range from \$750 to \$30,000; and (2) how many works were infringed. Answering that second question—how many works were infringed—can require courts to decide whether to zoom in or zoom out.

This decision is partly guided by the Copyright Act, which states that “[f]or the purposes of [statutory damages], all the parts of a compilation or derivative work constitute one work.”¹⁹⁵ Courts, however, have struggled to apply this statutory language. If the defendant copied a music album, the defendant might claim that the album is the work, and the statutory award per work should be multiplied by one. The plaintiff will conversely argue that every track included in the album is a work, and therefore the damages should be set by multiplying the award per work by the number of tracks included in the album. One can even go a step further and suggest that the sound recording, the lyrics, and the composition of each track included in the album are separate works.¹⁹⁶

There are dozens of decisions in which courts decided whether to zoom in or zoom out when setting statutory damages. In numerous cases, courts have zoomed in, holding that each TV episode in a series is a work and the statutory

191. In this Part, we refer to courts as those that need to set statutory damages. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (holding that the Seventh Amendment provides for a right to jury determination of the amount of statutory damages). The distribution of labor between judges and juries in this context is beyond the scope of this Article.

192. 17 U.S.C. § 504(c)(1) (2012).

193. *Id.* (“[W]ith respect to any one work . . . a sum of not less than \$750 or more than \$30,000 as the court considers just.”).

194. Another important question, which is beyond the scope of this Article, is whether the infringement was willful, which allows the court to increase the damages to up to \$150,000 per work, or whether it was subjectively and objectively innocent, which allows the court to reduce the damages to as low as \$200 per work. *See id.* § 504(c)(2); *see also* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 460 (2009).

195. 17 U.S.C. § 504(c)(1).

196. *See EMI Christian Music Grp., Inc. v. MP3tunes, L.L.C.*, 844 F.3d 79, 94–95 (2d Cir. 2016) (rejecting such claim and awarding one statutory award per each song infringed).

damages should be multiplied by the number of episodes infringed.¹⁹⁷ In other cases, courts split. In some cases, courts zoomed out and granted the plaintiff one statutory damage award per album infringed,¹⁹⁸ while in other cases, courts zoomed in and granted the plaintiff one statutory damage per song infringed.¹⁹⁹ Similarly, when a defendant copied images from books or databases published by the plaintiff, some courts zoomed in and granted one award per image infringed,²⁰⁰ while other courts zoomed out and granted one award per each book or database infringed.²⁰¹

Statutory damages doctrine contains the most explicit and fleshed-out versions of framing tests to be found in copyright law. Indeed, in statutory damages decisions, courts have developed numerous tests and factors that should be considered in deciding whether to zoom in or zoom out. Those tests and factors are analyzed in Part III below.

F. Collective Works Privilege: *New York Times Co. v. Tasini*

The Supreme Court faced the framing problem in an obscure area of copyright law: the collective works privilege. In *New York Times Co. v. Tasini*, the Court split over whether to zoom in on individual articles in an electronic database, or to zoom out and look at the database as a whole.²⁰² The Court addressed a little-litigated section of the Copyright Act that allows the owner of a collective work to reproduce individual components of that work in any revisions of the collective work, without obtaining a new license from the authors of the individual components.²⁰³ The Court needed to identify whether changes to the

197. See, e.g., *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295–96 (9th Cir. 1997), *rev'd on other grounds sub nom. Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768–71 (11th Cir. 1996); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1115–18 (1st Cir. 1993); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1380–81 (2d Cir. 1993).

198. See, e.g., *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–42 (2d Cir. 2010); *UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223, 224–25 (S.D.N.Y. 2000).

199. See, e.g., *Arista Records, L.L.C. v. Lime Grp., L.L.C.*, No. 06 CV 5936(KMW), 2011 WL 1311771, at *3–4 (S.D.N.Y. Apr. 4, 2011).

200. See, e.g., *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003).

201. See, e.g., *Tattoo Art, Inc. v. TAT Int'l, L.L.C.*, 794 F. Supp. 2d 634, 654 (E.D. Va. 2011), *aff'd*, 498 F. App'x 341 (4th Cir. 2012); *CoStar Grp., Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 712 (D. Md. 2001), *aff'd*, 373 F.3d 544 (4th Cir. 2004); *Phillips v. Kidsoft L.L.C.*, No. CCB-96-3827, 1999 WL 813939, at *4–6 (D. Md. Feb. 17, 1999); *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*, 783 F. Supp. 104 (W.D.N.Y. 1991).

202. *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

203. 17 U.S.C. § 201(c) (2012) (“[T]he owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that

original collective work were significant enough to change that work into an "entirely different . . . collective work" and thus forfeit the statutory privilege.²⁰⁴

In *Tasini*, the collective work at issue was the *New York Times*. The Court considered whether an electronic database of *New York Times* articles could be considered a revision of the original published paper, or equivalent to the original newspaper. In doing so, the Court faced the framing problem. Should it zoom out and compare the electronic database as a whole to the newspaper as a whole series, or should it zoom in and inspect each individual article, or each individual page?

The majority chose to zoom in on an individual article, in the context of an individual page. The Court asserted that the proper frame of reference was to "focus on the [individual] Articles as presented to, and perceptible by, the user of the Databases."²⁰⁵ Because the electronic databases reproduced the articles individually, "standing alone and not in context," the Court found that the articles were not part of the original collective work or a revision thereof.²⁰⁶ This constituted a win for the authors because it showed that the individual works were displayed to a user "disconnected from their original context" of the newspaper page.²⁰⁷ That missing context, the Court implied, constituted the essence of the original collective work. The *New York Times* could therefore not use the statutory defense that applies to revisions, and needed to get a license from authors to reproduce the works in its digital database.

Zooming out would have produced a different result, as evidenced in the dissent and the opinion at the district court. The district court, instead of looking at individual articles, looked to the collection as a whole and compared editorial choices over the entire collection.²⁰⁸ Justice Stevens, dissenting at the Supreme Court, similarly zoomed out and saw strong holistic similarities between the original collective work and the electronic databases. Justice Stevens explained that "the Print Publishers' all-important editorial selection is wholly preserved in the collection of individual article files sent to the Electronic Databases."²⁰⁹ Justice Stevens's zoom-out approach would have allowed the *New York Times* to use

particular collective work, any revision of that collective work, and any later collective work in the same series.").

204. H.R. REP. NO. 94-1476, at 122-123 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045 (noting that the question is when has the organization changed enough so that it is no longer "that collective work," but "a new anthology or an entirely different magazine or other collective work").

205. *Tasini*, 533 U.S. at 499.

206. *Id.* at 488.

207. *Id.* at 501.

208. *Id.* at 492.

209. *Id.* at 515 (Stevens, J., dissenting).

the collective works privilege and republish the articles in an electronic database without a license.

G. Notice

The Supreme Court faced the framing problem in a 1914 case about the then-existing copyright notice requirement.²¹⁰ Prior to 1988, U.S. copyright law required every work to include a copyright notice, stating the year of first publication, the name of the copyright owner, and that the work was protected by copyright.²¹¹ Failure to include such a notice would typically result in the work falling into the public domain.²¹² When it came to complex works, the notice requirement created a framing problem. Zooming in meant that every subpart of the work must bear its own notice. Zooming out meant that a notice attached to the work as a whole would descend, or trickle down, to every subpart.

The notice requirement plays more than just a historic role in copyright law. Because copyright protection lasts for many decades, many of the works that are still protected today were subject to the notice requirement. Any owner of copyright in a work that was published before 1988 must still show that its publication was accompanied by proper copyright notice.

In *Louis DeJonge & Co. v. Breuker & Kessler Co.*, the Supreme Court addressed the framing problem as applied to copyright notice.²¹³ The work in question was a strip of wrapping paper consisting of twelve copies of a single painting of mistletoe. Each strip of paper included only one copyright notice per twelve copies of the mistletoe painting.²¹⁴ The Supreme Court, in a short decision authored by Justice Holmes, held: “The thing protected and the only thing was the painting [of the mistletoe]” and therefore each reproduction of that painting had to include a copyright notice.²¹⁵ The failure to include such a notice on each individual copy of the mistletoe painting meant that the wrapping paper was in the public domain.

Other courts, however, have nonetheless chosen to zoom out. The Second Circuit decided one such case after the Supreme Court’s decision in *DeJonge*. In *H. M. Kolbe Co. v. Armigus Textile Co.*, the textile design in question consisted of

210. *Louis DeJonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914).

211. 17 U.S.C. § 401 (1976).

212. *Canfield v. Ponchatoula Times*, 759 F.2d 493, 497 (5th Cir. 1985) (“Since 1802, copyright laws have always provided that published copies of copyrighted works bear specified notice as a condition of protection.”).

213. *Louis DeJonge & Co.*, 235 U.S. 33.

214. *Id.* at 35–36.

215. *Id.* at 36.

clusters of squares, each including a purple rose.²¹⁶ The plaintiff's copyright notices were printed on one side of the fabric, at intervals of sixteen inches, providing one copyright notice for each eight full reproductions of the rose square. The defendant, who copied the design, argued that because the plaintiff failed to place notice on each square, the work fell into the public domain. The Second Circuit disagreed.²¹⁷ The court zoomed out, noting: "The 'work' . . . which Kolbe sought to copyright was not merely the single rose square It was rather the composite design itself" ²¹⁸ Because each zoomed-out work included a copyright notice, the court found that the work was protected by copyright and ruled in favor of the plaintiff.

III. EXISTING TESTS FOR FRAMING A COPYRIGHTED WORK

We have shown that the framing problem is pervasive across copyright law. Most of the building blocks of copyright law, including authorship, substantial similarity, and fair use, incorporate choices regarding the proper framing of the fixed work. Courts' choices of whether to zoom in or out on a work have a significant effect on the scope of the relevant doctrine and copyright law as a whole. This Part explores how courts make these framing choices and evaluates the effectiveness and desirability of the tests developed in the caselaw.

In this Part, we focus on the minority of decisions in which courts actually provide a test or point to factors that should be considered in determining whether to zoom in or zoom out. Those factors can be divided into four categories: factors based on the criteria for copyrightability, factors based on market conditions, factors based on authorial intent, and factors based on the registration of the work.²¹⁹ There are additional factors that do not fall under any of those categories; these are explored separately.

While each factor has some advantages, each also has significant shortcomings. While some factors might be useful in analyzing the framing problem in certain situations, no one factor can provide significant normative guidance to

216. *H. M. Kolbe Co. v. Armigus Textile Co.*, 315 F.2d 70, 72 (2d Cir. 1963).

217. *Id.*

218. *Id.*

219. It is interesting to note that several of these factors can be linked to major strains of aesthetic theory: Focusing on authorial intent implicates intentionalism, which defines art by reference to what an author wants. *See* Yen, *supra* note 18. Focusing on the market, by contrast, implicates institutionalism, which defines art by reference to the cultural community that receives it. *Id.* at 258–60. This suggests, as discussed above, that in some respects the framing problem is part of the larger issue of aesthetic judgment in copyright law. *See supra* Part I.B.2.

help a court in tackling the framing problem in all of the wide variety of situations in which it arises.

A. The Majority of Courts Use No Test at All

While this Part discusses the reasoning courts use when making framing choices, we note as an initial matter that the majority of courts use no test at all. For the most part, courts simply overlook the framing problem. There are numerous examples of decisions in which courts zoom in or zoom out without appreciating that a choice has been made. For example, most of the fair use decisions dealing with the copying of articles from a scientific journal or pages from a magazine involve an unnoticed framing move by the court.²²⁰

In cases in which courts notice the framing issue, they often address it without much reasoning. *Schiffer Publishing, Ltd. v. Chronicle Books, L.L.C.* demonstrates such an approach.²²¹ In that case, the defendant copied a few photographs from the plaintiff's book. As part of the fair use analysis, the court chose to zoom in, noting with no reasoning that "[e]ach photograph is an individually copyrighted work, and it is the amount used of each one that must be analyzed."²²² Five years later, in *Warren Publishing Co. v. Spurlock*, a different judge in the same district court reached the opposite result after deciding to zoom out.²²³ The court in *Warren Publishing* argued that the approach from *Schiffer* was not supported by binding precedence and therefore rejected it, but failed to point to any test or factors that led it to zoom out.²²⁴

Framing decisions made without reasoning are not limited to fair use. Both the majority's decision to zoom out and the dissent's decision to zoom in in *Garcia v. Google, Inc.* lack explicit reasoning.²²⁵ Similarly, most of the framing decisions made in analyzing separability, including the recent Supreme Court

220. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

221. *Schiffer Publ'g, Ltd. v. Chronicle Books, L.L.C.*, No. Civ. A. 03-4962, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004).

222. *Id.* at *12.

223. *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402, 423–24 (E.D. Pa. 2009).

224. *Id.* at 424.

225. *Garcia v. Google, Inc.*, 786 F.3d 733 (2015); see *supra* notes 99–102 and accompanying text. Judge Alex Kozinski's minority approach is especially interesting because he harshly criticized the majority for not explaining why Garcia's five-second scene cannot be considered the relevant work. *Garcia*, 786 F.3d at 749–50. In a way, Kozinski was correct. The majority framing move was unreasoned. Kozinski, however, also failed to suggest any test or factor that should lead a court to zoom in and consider one short scene the relevant work.

decision in *Star Athletica*,²²⁶ and the decisions regarding the notice requirement lack any explicit test or reasoning.²²⁷

In a minority of cases, many of them dealing with statutory damages, courts do use explicit reasoning. In the rest of this Part, we discuss the factors most commonly used by courts when they do reason through a framing decision. Courts for the most part refer to copyrightability, the market for a work, authorial preferences, and registration. We discuss each factor at greater length below.

B. Copyrightability

Courts sometimes consider copyrightability in making framing decisions. This suggests that copyright owners could require the court to set the level of zoom to any subset of their creation, as long as that subset can be protected by copyright.

Copyrightability was one of the factors that the Second Circuit considered in *Texaco*, a fair use case dealing with the copying of articles in scientific journals.²²⁸ The court zoomed in and held that individual articles (and not the journal in which they were printed) were the right reference point, relying, to a large degree, on the fact that each article can be protected by copyright. One leading copyright treatise, *Patry on Copyright*, has praised this approach because the copyright in a compilation (in this case, the journals) is separate from the copyright in each part thereof (the articles).²²⁹ Similarly, in many substantial similarity decisions, courts relied on the copyrightability of the element that the plaintiff asked the court to focus on.²³⁰

There is an intuitive appeal to relying on copyrightability. Because copyrightability defines what should be protected by copyright law, it might also define the scope and border of the copyrighted work. Another advantage of copyrightability is its relative consistency and predictability. While at the margins the exact scope of copyrightability might be unclear, this doctrine is well

226. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

227. *See supra* Parts II.C, II.G.

228. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (discussing the third fair use factor and noting: "As we emphasized at the outset, each article enjoys independent copyright protection . . . and what the publishers claim has been infringed is the copyright that subsists in each individual article . . .").

229. 4 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 10:144 (2015).

230. As further explained in Part II.A, those elements might include a small subset of a larger work which was allegedly copied by the defendant, which will cause the copyright owner to ask the court to zoom in to stress the significance of the defendant's actions. But, those elements might include larger themes within the work, such as characters or style, which are more observable when courts zoom out.

developed in copyright law and in the vast majority of cases entails only limited uncertainty.

Copyrightability can be used as a factor in framing decisions—to set outside boundaries for zooming in or zooming out—but by itself it cannot dictate the proper approach to framing. Courts should refrain from zooming in or zooming out if such a move blurs the line between what copyright law does and does not protect. Otherwise, copyright law might end up protecting elements that should be left unprotected. Excessive zooming in can allow the copyright owner to protect single words or very short phrases that lack originality, which is a constitutional and statutory requirement for copyright protection.²³¹ Similarly, when courts zoom out, they might perceive the work as including both protected and unprotected elements. As part of a substantial similarity inquiry, however, a court should not compare unprotected elements of the parties' works when zooming out because that would provide de facto protection to elements that are in the public domain.²³²

Copyrightability, however, cannot by itself be sufficient. If a court defers to a copyright owner's choice and looks to copyrightability as a boundary, copyrightability is too easy of a standard to meet. It provides too strong protection to the copyright owner and not enough guidance to the court in limiting a copyright owner's power to dictate framing decisions.²³³ Under copyright law, copyrightability requires only that a work be within the subject matter of copyright, fixed, and original.²³⁴ If the zoomed-out work is within the subject matter of copyright and

231. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (“The *sine qua non* of copyright is originality. . . . Originality is a constitutional requirement.”); *see also* 17 U.S.C. § 102(a) (2012).

232. *Compare* Samuelson, *supra* note 63, at 1832 (“There are several troubling things about using the total concept approach to judge nonliteral copyright infringement. . . . [T]his approach makes it too easy for unprotectable elements to be swept into the infringement analysis”), *with* *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003) (“Some commentators have worried that the ‘total concept and feel’ standard may ‘invite[] an abdication of analysis’ [O]ne may wonder whether a copyright doctrine whose aspiration is to protect a work’s ‘concept’ could end up erroneously protecting ‘ideas.’ But our caselaw is not so incautious. . . . [W]e generally have taken care to identify precisely the particular aesthetic decisions—original to the plaintiff and copied by the defendant—that might be thought to make the designs similar in the aggregate.” (alteration in original) (quotation omitted)). We believe that in the abstract, all should agree that zooming out can be acceptable only if unprotected elements are not being considered. In that respect, calling this approach “the total concept and feel” might be unfortunate, because concepts are unprotected. 17 U.S.C. § 102(b) (2012).

233. In that respect, copyright law might be different from patent law. The threshold to patent protection is much higher than that of copyright protection, which naturally limits the ability of courts to zoom in or zoom out on patents.

234. 17 U.S.C. § 102(a).

is fixed, it is practically certain that the zoomed-in work will meet those criteria as well.²³⁵

Originality might play a role in framing decisions, although a limited one. For example, if originality is required, excessive zooming in on, for example, a single word, may be curtailed. The problem with relying on originality as a hurdle is that the standard for originality in copyright law is very low. The zoomed-in piece needs just to “possess some creative spark,” or a “modicum of creativity.”²³⁶ Practically every page or image in every book, every few notes in a song, or every few seconds in a movie can easily meet this standard.

The microworks literature attempts to mitigate this problem by suggesting raising the threshold for copyrightability.²³⁷ Even if such an approach were adopted, however, we doubt that it would provide meaningful assistance with respect to the framing problem. From a framing perspective, raising the threshold for copyrightability places just modest limitations on a court's ability to zoom in.

The microworks literature suggests that a word, a sentence, or a short phrase cannot be protected by copyright. It does not suggest that a paragraph in a book or a short scene in a movie should not be protected. As such, even if the bar for copyrightability were slightly raised, it would not provide enough guidance by itself to courts making the framing determination. Accordingly, in our view, courts that heavily rely on copyrightability to dictate their framing choices err.

C. Market-Based Approaches

In determining framing, courts also commonly look to the markets for copyrighted goods. While courts phrase these tests in different ways, the core question is whether the copyright owner offered zoomed-out products to consumers or zoomed-in ones. Does the copyright owner sell photograph databases or individual photographs? Journals or individual articles? TV series or individual episodes? Music albums or single tracks? The question can alternatively be asked by focusing on the buyers: Do they buy zoomed-out works (albums) or zoomed-in works (tracks)? Do they access an entire newspaper or only individual articles? This market-based inquiry is the most common factor used by courts in determining framing. It is also the factor most threatened by the rise of digital marketplaces.

235. One notable exception to this rule has to do with useful articles. As further discussed in *supra* Part II.C, a part of a useful article might not pass the separability test, and then it will not be within the subject matter of copyright.

236. *Feist*, 499 U.S. at 345–46.

237. See, e.g., Hughes, *supra* note 11, at 620–22.

The various tests in statutory damages revolve, to a large degree, around the market for the copyrighted work. The most common test for determining the number of works infringed for the purpose of statutory damages is the independent economic value test. According to this test, “separate copyrights are not distinct ‘works’ unless they can ‘live their own copyright life.’”²³⁸ Most circuit courts use this test.²³⁹

Courts primarily use two factors to decide if a work can “live its own copyright life.” The first factor, and the more important of the two, focuses on whether each expression—each zoomed-in piece, such as one TV episode or one song—can be consumed separately. The factor centers on the ways in which consumers buy the copyrighted product or the ways in which they “enjoy” it.²⁴⁰ In other words, if buyers can buy the type of alleged zoomed-in work on the market, the court will zoom in and consider such zoomed-in work to be “independent.” The other factor of the independent economic value test focuses on authorial intent at the time of creation, explored in Part III.D below.

The independent economic value test is also used in other doctrines. For example, in fair use analysis in *Monge v. Maya Magazines, Inc.*, the Ninth Circuit decided to zoom in and held that each photograph stored on a memory chip is the “work as a whole.”²⁴¹ The court held that by copying just a few photographs out of the hundreds stored on the chip, the defendant copied each of the works in their entirety, leaning against a finding of fair use.²⁴² The court cited to and relied on a test previously used in a statutory damages opinion, and on the fact that “[e]ach of the individual . . . photos is a separate work because each photo ‘can live [its] own copyright life’ and ‘has an independent economic value and is, in itself, viable.’”²⁴³ *Nimmer on Copyright* supports the position, stating that the focus

238. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996) (quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993)).

239. See, e.g., *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003); *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds sub nom.* *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998); *MCA Television*, 89 F.3d 766; *Gamma Audio*, 11 F.3d 1106; *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990).

240. See, e.g., *Gamma Audio*, 11 F.3d at 1117 (“[V]iewers who rent the tapes [of the plaintiff’s work] from their local video stores may rent as few or as many tapes as they want, may view one, two, or twenty episodes in a single sitting, and may never watch or rent all of the episodes . . .”).

241. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1179–80 (9th Cir. 2012).

242. *Id.*

243. *Id.* at 1180 (alterations in original) (quoting *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d at 1193).

should be on “self-contained units” and “a unit that plaintiff itself actually combined.”²⁴⁴

The Second Circuit explicitly rejected the independent economic value test and used a different market-based approach to assess statutory damages in *Bryant v. Media Right Productions, Inc.*²⁴⁵ Instead of asking whether each work had economic value, the Second Circuit focused on the actions of the copyright owners, specifically on their decision to bundle the zoomed-in pieces (such as songs and TV episodes). The court held that when a copyright owner releases an album to the market, all the songs on the album constitute one compilation and therefore are considered one work for the statutory damages calculation.²⁴⁶

A few years later, a district court in the Second Circuit took yet another approach. In *Arista Records, L.L.C. v. Lime Group, L.L.C.*, the Southern District of New York tackled a case in which the plaintiff released both a bundled product (an album) and later released unbundled products (individual songs on iTunes).²⁴⁷ The court held that if the copyright owner offered both the bundled product and the unbundled product prior to infringement, then zooming in is allowed and every song will be considered separately for statutory damages purposes.²⁴⁸ Recently, the Second Circuit adopted this approach.²⁴⁹

Market-based factors appear in other contexts, too. In *Texaco*, a fair use case, the court relied on the existence of a market for individual journals articles and held that the market was harmed as a result of the defendant's copying.²⁵⁰ In *Tasini*, the Supreme Court considered the licensing market for individual articles

244. 4 NIMMER ON COPYRIGHT, *supra* note 125, § 13.05[A][3]. The problem with applying this approach, or any market-based approach, to the facts of *Monge* goes beyond the general limitations of market-based approaches. As also noted by Nimmer, applying a market-based approach to unpublished work is difficult and counterintuitive.

245. 603 F.3d 135 (2d Cir. 2010).

246. See 17 U.S.C. § 504(c) (2012) (“For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”).

247. *Arista Records, L.L.C. v. Lime Grp., L.L.C.*, No. 06CV 5936(KMW), 2011 WL 1311771 (S.D.N.Y. Apr. 4, 2011).

248. *Id.* at *3.

249. *EMI Christian Music Grp., Inc. v. MP3tunes, L.L.C.*, 844 F.3d 79, 101 (2d Cir. 2016). It should be noted that in an earlier stage of this litigation, the Southern District of New York held that copyright owners are entitled to separate statutory damage awards not only for each song that was separately offered, but also for every album cover that was copied, provided that it was also offered for sale separately. *Capitol Records, Inc. v. MP3tunes, L.L.C.*, 48 F. Supp. 3d 703, 723 (S.D.N.Y. 2014) (“Had Plaintiffs proved that the cover art was available separately, then Plaintiffs could recover for infringement of its cover art separate from the recovery of the sound recording.”), *aff'd in part and rev'd in part on other grounds*, *EMI Christian*, 844 F.3d 79.

250. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994); see also *Playboy Enters., Inc. v. Sanfilippo*, No. 97-0670-IEG (LSP), 1998 WL 207856 (S.D. Cal. Mar. 25, 1998) (using the same approach in the context of statutory damages).

released in a computerized database. Reasoning that zooming out and looking at editorial similarities between the electronic database and a newspaper would obviate the market for individual articles, the Supreme Court chose to zoom-in.²⁵¹ The Copyright Office also looks to market factors in registration, requiring that works be “distributed to the public as a single, integrated unit” for them to be registrable together as a “single unit of publication.”²⁵²

Market-based factors have clear merits that explain their popularity. They set a benchmark for the way in which market participants perceive and frame the work, and they provide an external limitation on excessive zooming in and zooming out. They thus potentially limit gaming of the framing problem by plaintiffs. Indeed, if there is no market for individual paragraphs, then it seems reasonable that courts will not zoom in and perceive each paragraph as the relevant work.²⁵³

Market-based factors, however, increasingly provide less guidance to courts. Copyright owners now routinely offer both zoomed-out and zoomed-in products. They sell whole databases to newspapers and single photographs to individuals; they sell journals to libraries and license single articles of part thereof through clearing centers;²⁵⁴ they sell full albums and individual tracks;²⁵⁵ they sell full series to TV stations and license individual episodes on pay-per-view platforms,²⁵⁶ and so on.

While this phenomenon—the multiplicity of markets for copyrighted goods—is not new, its scope and prevalence is increasing in today’s digital age. Traditional market structures are breaking down. Digital technology provides more choices to consumers of copyrighted goods and allows them to enjoy those goods in individualized ways that were not available in the past. Market decisions,

251. See *supra* notes 202–209 and accompanying text.

252. COMPENDIUM III, *supra* note 123, § 1107.1. The other requirements for a group of works to be considered a “single unit of publication” are that there is a “title for the unit as a whole that identifies it as a single, integrated unit” and that they are “packaged or physically bundled together as a single, integrated unit.” *Id.*

253. In that respect, this factor seems more reasonable than one that focuses on the ways in which buyers enjoy or use the work once they have purchased it. Some courts focus on the ways in which sellers distribute the work or the way in which buyers buy it, but some also mentioned as relevant the ways in which users enjoy or consume the work. See *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993) (“[V]iewers . . . may view one, two, or twenty episodes in a single sitting, and may never watch or rent all of the episodes . . .”). The problem with this approach is that it provides very little guidance regarding the proper framing, and, taken literally, would allow the court to zoom in (or zoom out) as much as the plaintiff requests. Buyers can certainly read just one paragraph of a book, listen to just ten seconds of a song, or watch just ten seconds of a TV show.

254. See *Am. Geophysical Union*, 60 F.3d 913.

255. See *Arista Records, L.L.C. v. Lime Grp., L.L.C.*, No. 06 CV 5936(KMW), 2011 WL 1311771 (S.D.N.Y. Apr. 4, 2011).

256. See *MCA Television Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996).

in other words, are now more tailored to the preferences of individual consumers, rather than made with respect to a majority of consumers. Just a few years ago, most viewers watched TV shows episode by episode, week after week. That might have given some indication that an individual episode would be a reasonable framing of a TV series.²⁵⁷ But nowadays consumers binge-watch entire seasons, watch short clips of TV shows on YouTube, and consume six-second Vine clips or online gifs consisting of replayed instances. When a court asks what the standalone market good is, the answer is increasingly likely to be complicated.

The same proliferation of options exists on the seller-distributor side. Some distribution platforms, such as Netflix and Amazon, release entire seasons of TV shows, in addition to individual episodes. Others release TV series that consist of short clips. Crackle, for example, distributes Jerry Seinfeld's web series *Comedians in Cars Getting Coffee*²⁵⁸ in weekly episodes of twelve to twenty-three minutes.

The market for licenses demonstrates even more clearly the fracturing of traditional markets for individual copyrighted goods. As transaction costs fall in online markets, licenses for subparts of works of all sizes and varieties can be purchased. More and more copyright owners and distributors now offer micro-licenses, which allow the licensee to take limited actions with respect to a work or a small part thereof.²⁵⁹

When a work is offered in both zoomed-in and zoomed-out versions, courts that consider market-related factors are faced with an increasing menu of possibilities. How should they choose? Courts that have directly addressed this question seem to defer to the copyright owner's choice.²⁶⁰ On the one hand, it is doctrinally difficult to deny copyright owners that choice; on the other hand, this deference undercuts much of the value in the market-related factors by allowing the copyright owner to largely control the framing outcome.

It is doctrinally difficult to deny a copyright owner the ability to frame his or her works because copyright law ordinarily grants copyright owners control over a multitude of markets, including, in many cases, markets that were not available at the time of creation or initial distribution of the work. Indeed, Congress intended

257. This argument is not without doubts even in the analogical world. See *id.* at 769 (discussing an argument by a TV station that it purchased TV episodes by the series and therefore each series and not individual episodes is the correct frame).

258. COMEDIANS IN CARS GETTING COFFEE, <http://comediansincarsgettingcoffee.com> [<https://perma.cc/E544-BXV7>].

259. See *supra* Part I.B.4.

260. See, e.g., *MCA Television Ltd.*, 89 F.3d at 768–71; *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 925–26 (2d Cir. 1994); *Arista Records*, 2011 WL 1311771.

for the 1976 Copyright Act to be “technology-neutral,” allowing copyright owners to capture new markets created by emerging technologies.²⁶¹

If a copyright owner is entitled to exploit both existing and new markets for the work, it initially seems reasonable to give that owner control over the framing of the work in litigation. This was the rationale of the Second Circuit in *Texaco*: If there is a market for just a subset of a work—an article in a journal—it is difficult to see why the copyright owner would not be allowed to exploit that market. This reasoning would lead courts that use a market-based approach to zoom in or zoom out as long as the plaintiff exploits such a zoomed-in or zoomed-out market.

With modern technology and the ability to micro-license copyrighted works, however, this approach gives the copyright owner tremendous power over the framing decision. The Copyright Clearance Center, for example, offers licenses to books on a cost-per-page basis. There might be a market for single-page excerpts from books, and owners might easily exploit them. Does that mean

261. This principle is demonstrated, for example, in the right to prepare derivative work, which is one of the exclusive rights of the copyright owner. 17 U.S.C. § 106(2) (2012); *see also* *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (holding that copyright owners can prevent distribution of their work through modern streaming technology); *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (holding that copyright owners have an exclusive right over the distribution of their work in digital databases); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1909 (2007) (“Copyright owners and Congress insist that they drafted the copyright law using general terms to ensure that the scope of copyright could be independent of specific technological changes.”).

This does not mean that future creators and users are barred from using copyrighted work in new ways that exploit new opportunities. The fair use doctrine, for example, allows users to exploit works in new ways, especially when such use is transformative, when the new markets are unrelated to the original markets of the work, or when the copyright owner does not exploit or plan to exploit those new markets. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–55 (1984) (holding that time shifting of TV shows using a VCR is fair use); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (holding that mass digitalization of copyrighted books is fair use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163–68 (9th Cir. 2007) (holding that storing and publically displaying thumbnail images is fair use); Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 410–11 (2005) (“[F]air use transfers significant policy making responsibility to the judiciary, allowing judges to develop the law in response to external changes. This structural role of fair use is significant because of the perceived inability of the legislative process to keep pace with the demands of rapid technological and social changes.”).

Some commentators have suggested additional tests to limit the copyright owner’s control over emerging markets. *See, e.g.,* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009) (suggesting that the rights of copyright owners should generally be limited to the foreseeable market at the time of creation); Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013) (suggesting that the right of copyright owners to control derivative works should be generally limited to works that are analogous to one of the nine exemplary derivatives included in the statutory definition of “derivative work,” such as translation, dramatization, and annotations). Those suggestions have not yet been adopted by courts and a full analysis thereof is well beyond the scope of this Article.

that at the request of the copyright owner, courts should zoom in on each individual page?

At least in some contexts, this argument leads to absurd results. If the defendant copies a 500-page novel for which the Copyright Clearance Center offers page-by-page licenses, it seems unreasonable to multiply the statutory damages per work by 500, which would result in damages from \$375,000 to \$15 million. It would similarly mean that if this approach is used in fair use analysis, at least as far as the third and the fourth factors are concerned, copying even one page would likely be considered unfair. If the work is defined against this potential licensing market then copying one page would copy the work as a whole; and if licensing is readily available for even one page then copying one page would interfere with that licensing market.

We do not dismiss market-based approaches entirely. Market-based approaches have some advantages and can guide the framing decision in some cases. For example, when deciding on statutory damages, a court should not zoom in to a subset of the work for which no market exists.²⁶² But market-based approaches are of only limited value as the markets for copyrighted works and their subparts multiply. As this happens, market-based approaches will allow copyright owners to frame the work as they please, as long as they have established a corresponding licensing scheme. As it becomes increasingly easy to license smaller and smaller parts of the work, this result seems inconsistent with reasonable copyright policy that balances the interests of copyright owners against those of future creators, consumers, and society at large.²⁶³

262. See Hughes, *supra* note 11, at 628 (explaining that the lack of markets for short phrases supports a conclusion that they should not be protected by copyright).

263. One can raise other concerns with respect to market-based approaches. For example, recently in *Star Athletica* the Supreme Court rejected a test it called “marketability” for useful article doctrine. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017). Under this test, discussed further in *supra* Part II.C.3, if the design elements in a useful article “would still be marketable to some significant segment of the community” then they are protected by copyright. *Star Athletica*, 137 S. Ct. at 1015. Could the *Star Athletica* rationale for rejecting marketability be used for the approaches we discuss in this Part?

For several reasons, for the most part, we think the answer is no. First, the “marketability” test that the Court was referring to does not use the market in order to zoom in or zoom out of a work, but to determine whether certain elements of a useful article can be protected by copyright. Second, the marketability test uses the market in a different way from the market-based approaches we discuss here. The marketability test invites courts to *estimate* whether something that typically does not exist (the separated design features of a useful article) would have a market while the market-based approaches focus on the *actual* ways in which works are being distributed. As such, the market-based approaches are less susceptible to judicial discretion and in particular to “judicial aesthetic preferences,” which troubled the *Star Athletica* Court. *Id.*

Third, even if the marketability test should be rejected because it is not “grounded in the text of the statute,” *id.*—an argument we are somewhat skeptical of, see *supra* Part II.C.5—it is difficult to

D. Authorial Intent and the Creative Process

In making framing determinations, some courts consider the intent of the author at the moment of the creation of the work. For example, courts that use the independent economic value test²⁶⁴ consider whether each zoomed-in work—such as each episode in a TV series or each song on an album—was “separately produced.”²⁶⁵

The intuitive appeal of this approach is clear.²⁶⁶ Authors are arguably the stars of the copyright ecosystem. The Constitution authorizes Congress to “secure[] to Authors . . . the exclusive Right to their respective Writings.”²⁶⁷ Arguably the main justification for copyright law under U.S. law is to incentivize authors to create.²⁶⁸ Therefore, it makes intuitive sense to at least partly rely on the author’s perspective at the time of creation. If the author perceives the book she wrote to be one holistic work, then maybe copyright should follow that framing.

There are two difficulties with this approach. First, it is difficult, in fact often impossible, to figure out an author’s actual intent at the time of creation. Consider, for example, a photographer who takes a series of photographs during

make the same argument with respect to the market-based approaches to framing. While they are too not “grounded in the text of the statute,” no other approach to framing is. The statute is, for the most part, silence on the question of framing. See *supra* Part I.B.1 (explaining that the framing problem is caused, to a large degree, by the lack of definition of the term “work” in the Copyright Act).

That being said, the final argument the Court raised in rejecting of the marketability test—that it “prize[s] popular art over other forms,” *Star Athletica*, 137 S. Ct. at 1015—might be partly applicable to the market-based approach to framing. These approaches place weight on the distribution decisions of the copyright owners and their distributors and it is quite likely that well-established and successful right-holders will have access to better and more diverse marketing strategies. There also may be something to the idea that indirectly awarding works that are being sold in more markets, while restrictive of copyright owners’ ability to unilaterally frame a work, might import values such as popularity into copyright law that might not make for good copyright policy.

264. See *supra* text accompanying notes 238–239.

265. See, e.g., *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117–18 (1st Cir. 1993); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1380–81 (2d Cir. 1993); *Playboy Enters., Inc. v. Sanfilippo*, No. 97-0670-IEG (LSP), 1998 WL 207856, at *5 (S.D. Cal Mar. 25, 1998) (“[E]ach [zoomed-in] image represents a singular and copyrightable effort concerning a particular model, photographer, and location”). The “separately produced” question is one of two main factors courts use as part of the independent economic value test. The other one is based on the market for the work. See *supra* text accompanying notes 238–239.

266. See Goldstein, *supra* note 11, at 1178 (“[C]opyrighted work is what the author says it is.”).

267. U.S. CONST. art. I, § 8, cl. 8.

268. See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982) (“Beginning in 1790, Congress passed a series of copyright statutes; the general goal of these statutes has been to establish an incentive for authors to create . . .” (footnote omitted)).

a wedding,²⁶⁹ a band that writes multiple songs one after the other, or a TV-show producer who chooses to tape a series one episode right after another.²⁷⁰ Were those works “separately produced”? Did the authors perceive them as independent works or not?²⁷¹

Courts that have addressed such questions of authorial intent have provided unsatisfactory answers. For example, in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, the Second Circuit noted that each episode of the Twin Peaks TV series had a separate script, although they shared an overarching story line (“Who murdered Laura Palmer?”).²⁷² The court did not explain, however, what made the scripts separate from one another. It is true that the episodes were aired separately, but they were probably recorded one after another and likely commissioned together.

Similarly, in *Gamma Audio*, the First Circuit held that each episode in the Chinese soap opera Jade Fox “was produced independently.”²⁷³ The court failed to explain its reasoning, noting only that “each episode of Jade Fox was *aired on television* independently from the preceding and subsequent episodes.”²⁷⁴ Thus, the only reason given to consider those episodes as being “produced independently” has more to do with their distribution (when did they air?) than with evidence of their actual production.

Technological changes make the authorial intent question even more problematic and show how entwined it is with market factors. Episodes of *House of Cards*, for example, are typically taped one after another and are released by Netflix season-by-season, thirteen at a time.²⁷⁵ Some of those episodes share a director and writer with the preceding episode, and some of them do not. It is unclear how a court would decide whether those episodes were intended by their authors to be “independently produced.”

The second difficulty with the authorial intent approach is more fundamental. It seems inconsistent with existing copyright law to place significant

269. Those are the facts of *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

270. Those are the facts of *Gamma Audio*, 11 F.3d 1106, and *Twin Peaks Prods., Inc.*, 996 F.2d 1366.

271. See Adler, *supra* note 41, at 584–599 (questioning whether the intent of authors should play a role in fair use transformative use analysis).

272. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1381. This is an early decision which did not explicitly mention the independent economic value test, but seems to have applied it. Later, the Second Circuit explicitly rejected the independent economic value test. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010).

273. *Gamma Audio*, 11 F.3d at 1117.

274. *Id.* at 1117–18 (emphasis added).

275. Alan Sepinwall, *Why Matt Weiner 'Would Lose' If He Wanted to Make a Weekly Netflix Show*, UPROXX (Jan. 26, 2016), <http://uproxx.com/sepinwall/ted-talk-state-of-the-netflix-union-discussion-with-chief-content-officer-ted-sarandos> [<https://perma.cc/43AM-HLMZ>].

weight on intent during creation. Again, copyright law does not freeze the scope of an author's protection at the point of distribution, so it likely should not freeze it at the time of creation. Even if at the time of creation the author perceived that the work would be used in a certain way, copyright law does not ordinarily limit the owner's rights when the work is later used in a different, unanticipated way. New markets can be explored by the copyright owner, subject to certain important limitations, in particular fair use.²⁷⁶ Therefore, restricting the framing possibilities because of the author's intent at time of creation seems problematic.

One notable exception has to do with joint authorship. The Copyright Act defines a "joint work" as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."²⁷⁷ The Act thus places weight on the joint authors' intent, often examined by courts at the time of creation, in determining whether there is joint authorship of the work.²⁷⁸ In this context of authorship determinations, framing could be dictated by authorial intent.

In *Garcia v. Google, Inc.*, for example, the court could have focused on the parties' intent in deciding whether to zoom in or zoom out on the work.²⁷⁹ The majority could have held that because Garcia intended her scene to be later merged into the longer movie, then, once the scene was actually merged, zooming out would be appropriate,²⁸⁰ and Garcia could not have been the author of that longer fourteen-minute movie.²⁸¹

276. See *supra* note 261 and accompanying text. As noted in that footnote, some have suggested that, at least in some circumstances, the law should limit the copyright owner's rights to markets that were foreseeable at the time of creation. See Balganes, *supra* note 261.

277. 17 U.S.C. § 101 (2012).

278. See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991); H.R. REP. NO. 94-1476, at 120–21 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 1976 WL 14045 (stating that the touchstone of joint authorship "is the intention at the time the writing is done, that the parts be absorbed or combined into an integrated unit"); see also Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1699–1702 (2014) (discussing the various ways in which courts use intent to find joint authorship).

279. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc); see *supra* Part II.B.

280. See 17 U.S.C. § 101 ("[W]here a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time . . ."); see also 16 Casa Duse, L.L.C. v. Merkin, 791 F.3d 247, 257–58 (2d Cir. 2015) ("[T]he Copyright Office has, in [*Garcia v. Google, Inc.*] . . . stated that an individual . . . who 'intend[s] her contribution or performance to 'be merged into inseparable or interdependent parts of a unitary whole' . . . may assert a claim in joint authorship in the motion picture, but not sole authorship ' We find [this] analysis persuasive" (internal alteration in original) (citations omitted)).

281. Ninth Circuit precedence, and in particular *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), sets a high threshold for the finding of joint authorship. It is extremely unlikely that Garcia could have met that threshold and be considered even the joint author, let alone the sole author, of the fourteen-minute movie.

E. Registration

Both courts and the few commentators who have noticed aspects of the framing problem have placed significant weight on registration. If each zoomed-in work were separately registered, the argument goes, then the court should zoom in and frame the work with reference to registration.

There are benefits to looking to registration. Registration can arguably serve as a way of indicating authorial intent at a fixed point in time, before the author has been influenced by a desire for a particular outcome in litigation. Registration also purportedly provides at least some friction or transaction costs in copyright law, requiring authors to affirmatively do something additional (that is, register) to indicate what they believe the work is.

Paul Goldstein, for example, has stated that “in cases where the copyright owner of the constituent element . . . has timely registered the contribution before the infringement, he should receive a separate statutory award.”²⁸² Justin Hughes has reasoned that “registration may be particularly appealing” for determining the bounds of a copyrighted work “when the registration occurred well before litigation.”²⁸³

Courts, from time to time, have looked at the registration form to determine whether to zoom in or zoom out. For example, in several statutory damages decisions, the copyright owner asked the court to zoom in for purposes of statutory damages, but had filed just one registration form covering the zoomed-out work (for example, the TV series). Recently, both the Supreme Court and the Sixth Circuit in *Star Athletica* appeared to be affected by the way in which cheerleader uniforms were holistically registered when they decided to zoom out on those designs.²⁸⁴ Should the copyright owner be limited by the registration form? As a policy matter, should courts rely on registration?

Courts have split, although the dominant approach is to disregard the registration form. In *XOOM, Inc. v. Imageline, Inc.*, the district court held: “[T]here should be only one award of statutory damages per registration”²⁸⁵ The Fourth Circuit affirmed, but on different grounds, stating that the district court’s reliance on registration was erroneous.²⁸⁶ The First Circuit similarly reversed a district court decision that partly relied on the plaintiff’s registration decision,

282. Goldstein, *supra* note 11, at 1185.

283. Hughes, *supra* note 11, at 634.

284. See *supra* text accompanying notes 138, 144.

285. *Xoom, Inc. v. Imageline, Inc.*, 93 F. Supp. 2d 688, 693 (E.D. Va. 1999), *aff’d in part and rev’d in part*, 323 F.3d 279 (4th Cir. 2003).

286. *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 284 (4th Cir. 2003).

holding that “the copyrights in multiple works may be registered on a single form, and thus considered one work *for the purposes of registration* while still qualifying as separate ‘works’ for purposes of awarding statutory damages.”²⁸⁷

One reason why courts and commentators suggest looking to registration is that it can indicate authorial intent. As discussed,²⁸⁸ however, it is unclear that an author who can benefit from unanticipated future markets for a work should be restricted to her earlier definition of the work through registration. It is also unclear that relying on authorial intent alone will drive good policy outcomes, versus consistently benefit the copyright owner. Moreover, as we explain in the following paragraphs, registration might not provide a reliable indication of authorial intent.

The second reason that makes registration seem initially attractive has to do with the cost of registration. Because there are filing fees for registration, and it takes some time to register, this might create a natural limitation on the ability of copyright owners to zoom in. Paul Goldstein, for example, noted that zooming in might not be a major concern:

[I]f it is remembered that the 1976 Act allows statutory damages only if the copyright owner obtained registration for the work before the infringer came into view. To be entitled to the statutory award, each of those deaths by a thousand cuts would have to have been registered before the catalogue owner knew which, if any, of them would be infringed—and this at an expense of upwards of \$35 a pop, no discount for quantity.²⁸⁹

This friction argument, however, is incorrect. Copyright registration does, in practice, sometimes give a “discount for quantity.” For example, in recent years, courts have addressed whether the registration of a database trickles down to each individual work within it. Most courts have held that it does. In other words, once that larger (zoomed-out) work is registered, each component of it (each zoomed-in work) is considered registered too.²⁹⁰ All this is to say

287. *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993) (citation omitted); *see also Phillips v. Kidsoft L.L.C.*, Civil No. CCB-96-3827, 1999 WL 813939, at *6 (D. Md. Feb. 17, 1999) (holding that when the copyright owner registered the zoomed-out work as a “compilation,” zooming in for purposes of statutory damages is not allowed because the Copyright Act provides one award of statutory damages per compilation).

288. *Supra* Part III.D.

289. Goldstein, *supra* note 11, at 1184.

290. *See, e.g., Alaska Stock, L.L.C. v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 685–86 (9th Cir. 2014) (holding that registration of database registers individual component photographs even if no titles have been listed); *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 596–600 (4th Cir. 2013) (holding that registration of automated database of real estate photographs registers the individual photographs, even if no titles or photographers are

that registration does not solve the problem of framing; registration itself contains, at least with respect to databases and compilations, its own framing problem.

The U.S. Copyright Office's policies on the registration of groups of works do away with both of the purported benefits of registration: authorial intent and friction. This is because the Copyright Office allows authors—and in some respects even encourages them—to register individual smaller works by registering one larger work in certain circumstances.

In the *Third Edition of the Compendium of U.S. Copyright Office Practices*, published in December 2014, the Copyright Office states that registration will be extended to the individual components of one work on one registration form in a number of circumstances.²⁹¹ If, as the Copyright Office intends, registration of a group of works also registers individual works, then registration neither signals the intent of the author with respect to works nor provides meaningful friction or cost to constrain zooming in.

Interestingly, one of the reasons for this policy has to do with statutory damages. The Copyright Office currently allows an author to register multiple individual unpublished works in one application. The reason for that policy, the Copyright Office explains, is that Congress has set statutory damages to one per compilation, and the Copyright Office wants to prevent authors from accidentally opting out of receiving statutory damages for each individual work by accidentally registering the group of works as a compilation.²⁹²

Thus, while some courts look to registration in establishing statutory damages, the Copyright Office in establishing its registration practices considers court decisions on statutory damages. The relationship between the Copyright

listed); *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 206 n.2 (3d Cir. 2005) (“Although the issue is not before us on appeal, we note that decisions of this Court and others counsel that registration of a collective work is sufficient to support an action for infringement of the underlying self-contained parts.”); *Szabo v. Errisson*, 68 F.3d 940, 942–44 (5th Cir. 1995) (holding that registration of a “collection” of individual songs, whose titles were not listed on the copyright registration, extends to both the collection as a whole and to individual songs); *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 538–39 (3d Cir. 1986) (holding that the fact that individual test questions on scholastic aptitude test were neither listed on the copyright registration nor on deposit did not affect their status). *But see* *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co.*, 712 F. Supp. 2d 84, 92–95 (S.D.N.Y. 2010) (holding that unless individual works are listed in the registration, they are not registered).

291. COMPENDIUM III, *supra* note 123, § 1101 (allowing registration of multiple works on one registration form (1) if the group of works is in an unpublished collection, (2) if the group of works is published in a single unit of publication, and (3) if the group of related works constitute a serial, daily newspaper, daily newsletter, contributions to periodicals, published photographs, or database updates and revisions). A full analysis of those exceptions and their exact scope is outside the scope of this Article.

292. *Id.* § 1104.5.

Office and courts is circular and interdependent; each references the other. This both indicates that courts should be careful in looking to registration to determine framing and demonstrates that registration does not serve as a clean proxy for authorial intent. Registration represents policy decisions by the Copyright Office, balancing the costs to authors with the costs to would-be licensees and the costs to the public. Registration practices can be dictated by the Copyright Office and its intent, not necessarily by the intent of an author.

Therefore, under both the caselaw and the rules of the Copyright Office, registration often does not provide solid guidance to the framing decision that the court should make. Copyright owners can and do register large works and databases, expecting their registration to trickle down to zoomed-in components, thanks to Copyright Office policy.

One could suggest a change in registration policy to help courts in tackling the framing problem. We are hesitant to advocate such an approach. Changing the registration system to solve the framing problem would impose costs both on copyright owners and on the Copyright Office. The administrative costs of abandoning the Copyright Office's current rules would mostly fall on copyright owners, who would have to individually register or at least individually name each registered work.²⁹³ The larger the group of works being registered, the higher the practical costs to the registrant.²⁹⁴ For smaller artists, the costs might be prohibitive, disadvantaging those creators with fewer resources, and for particular kinds of authors such as photographers, who now often create databases of individual works, the costs of registration would be disproportionately high.²⁹⁵ Some costs would also fall on government administrators, specifically the Copyright Office, who would consequently need to handle many more and much longer registration forms. Indeed, registration policy contains its own set of important policy decisions, which should probably not be altered just to fix the framing problem identified here.

F. Other Factors

When courts use an explicit test to make a framing decision, they usually use some combination of the above four factors: copyrightability, market factors,

293. See *Metro. Reg'l Info. Sys. Inc.*, 722 F.3d at 597 ("Section 408 . . . permits the Register of Copyrights to ease the burden on claimants of collective works" by allowing "for particular classes . . . a single registration for a group of related works" (citing 17 U.S.C. § 408(c)(1)(2012))).

294. *Id.* at 599 (observing that it would be absurd and costly to require registrant to list each of a very large number of works).

295. See *Alaska Stock*, 747 F.3d at 686 (expressing concern for independent photographers, "many of whose fortunes are small").

authorial intent, and registration. From time to time, however, courts mention factors that do not fall within any of these categories.

For example, in *Texaco*, the court mentioned that one of the reasons to zoom in and consider each article as the “work as a whole” is that they were written by different authors. To some degree, this factor is similar to examining whether the zoomed-in works were produced separately.²⁹⁶ It is unclear, however, why a collection of articles from several authors, published together, should be treated differently from a collection of articles by a single author, published together. This approach would discourage authors of articles or short stories from publishing collections of their own works, instead channeling production only into compilations with multiple authors. It is not clear why this would be a desirable result.

Other courts sometimes consider artistic merit in making the framing decision. Such considerations are rarely made explicitly, given the general distaste for aesthetic judgment discussed above in Part I.B.2. In *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*,²⁹⁷ the court was remarkably explicit about aesthetic judgment when it refused to zoom in, stating that each zoomed-in photograph within a database lacked artistic merit. Similarly, in two separability cases, both the Fifth Circuit and Ninth Circuit appeared to consider the artistic merits of pieces of clothing by looking to whether there was a market for them as art.²⁹⁸ We are not surprised that courts rarely adopt such considerations, at least explicitly.²⁹⁹ A test that focuses on artistic merits seems inconsistent, at least in spirit, with the idea that judges are not appropriate arbiters of artistic value.³⁰⁰ The fact that some courts use artistic merit to determine framing may indicate, as discussed above, that the framing decision is in fact a type of aesthetic decision.³⁰¹

Finally, some judges use their sheer intuition to make the framing decision. Justin Hughes similarly suggests that courts should consider their “intuitive sense” of the work.³⁰² We believe that the numerous examples that are explored throughout this Article explain why such an approach is difficult to implement. In some easy cases, intuition might help, but in the more difficult cases, it will

296. See *supra* Part III.C.

297. 783 F. Supp. 104 (W.D.N.Y. 1991).

298. See *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 421 (5th Cir. 2005); *Poe v. Missing Perss.*, 745 F.2d 1238, 1243 (9th Cir. 1984).

299. But see *Walker & Depoorter*, *supra* note 37, at 343 (“[I]mplicit aesthetic criteria are deeply embedded throughout copyright case law.”); *Yen*, *supra* note 18 (suggesting that copyright law adjudication requires judges to use aesthetic reasoning).

300. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“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.”).

301. See *supra* note 219.

302. Hughes, *supra* note 11, at 621.

not. Intuition arises not just from an individual, but from social norms. As norms change, intuitions may be able to support almost any framing decision, much as market factors increasingly do.³⁰³ In the digital world, in which copyright works reach such a diverse audience, our intuitive notion of a work might be especially illusive. Finally, judicial intuitions may vary widely from judge to judge and generation to generation, producing variation and uncertainty within the system. It is therefore undesirable to base such a central feature of copyright policy on intuition.

IV. POLICY CONSIDERATIONS

A court's choice of how to frame a work has significant consequences for copyright policy writ large. Framing implicates major recurring themes in copyright policy discussions: the need to balance incentives to create information goods with access to those goods (the incentive-access tradeoff); the desire to reduce transaction costs and prevent the fragmentation of rights (the microworks problem and tragedy of the anticommons); and concerns over possibly undesirable channeling effects on creative production, pushing authors towards creating or avoiding creating particular types of works.

Our policy discussion does not stop at identifying the impact of the framing problem on general copyright policy questions. Given the ubiquity and variety of framing choices both within each copyright doctrine and across copyright doctrines, we begin the inquiry into what role variation plays. Variation clearly has costs. We argue, however, that variation in framing the copyrighted work across doctrinal lines has, surprisingly, policy benefits—or at least avoids potentially costly policy harms. We thus reject attempts to offer one uniform test for framing copyrighted works.

A completely unified framing test is both unattainable and undesirable. The Copyright Act, by not defining the term “work,” in practice allows for flexible framing of copyrighted works. We should generally embrace this flexibility, not reject it. But we do find the inconsistency of framing within each copyright doctrine troubling. Addressing this problematic aspect, we explain, is exceptionally challenging, especially in the digital world. We show how some factors can help mitigate the problem and suggest that there is room here for significant doctrine-specific future work.

303. See also *supra* note 162 and accompanying text. Indeed, it seems that the Court in *Star Athletica* might have implicitly assumed that judges will use their intuition in decision separability questions. We explained in Part II.C.5 why we find this approach problematic.

A. General Policy Considerations

The framing problem implicates classic copyright policy considerations. We begin by discussing the incentive-access tradeoff—how to balance the need to incentivize today's authors with the need to allow access for tomorrow's. We then discuss implications of the framing problem for transaction costs and fragmentation. We close our discussion of broader policy impacts with an examination of the framing problem's impact on channeling certain kinds of creativity.

1. The Incentive-Access Tradeoff

How courts frame a copyrighted work implicates the classic incentive-access tradeoff. One of the central problems of copyright law is how to adequately balance the need to incentivize the authors of today with the desire to allow the authors and users of tomorrow to access these goods.³⁰⁴ This tradeoff has been explored in great depth in copyright literature.³⁰⁵ We show that framing choices have an immense impact on the incentive-access tradeoff.

Fair use, for example, is one of the focal points of this policy problem: Narrowing fair use might penalize socially desirable downstream use of a work, while broadening fair use might lessen the economic incentives an author receives.³⁰⁶ When courts frame a work for purposes of assessing fair use,³⁰⁷ they widen or narrow fair use's scope, affecting the incentive-access tradeoff.

Framing in statutory damages also affects the incentive-access tradeoff: Zooming in yields higher damages, which gives larger incentives to authors.³⁰⁸

304. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“[T]he [Copyright] Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.”).

305. See, e.g., Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801 (2000) (“Copyright law conceives and promotes progress in two distinct but related ways: First, it seeks to increase both the quantity and quality of creative output. Second, it seeks to broaden public access to creative works. . . . The two . . . goals exist in substantial tension with one another.”); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 763–65 (2015) (claiming that “[a] sound copyright policy must incentivize the creation and distribution of creative works and to provide wide access to those works” and exploring the tradeoff between those conflicting goals).

306. See Gordon, *supra* note 268, at 1602 (“Fair use . . . seeks to accommodate the author’s need for remuneration and control while recognizing that in specific instances the author’s rights must give way before a social need for access and use.” (internal quotation omitted)); Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (suggesting that in order to be considered fair “the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity”).

307. See discussion *supra* Part II.D (explaining that zooming in can impact two of the four factors—the third and the fourth—that courts use to determine if a use was fair).

308. See *supra* Part II.E.

Higher damages, however, can over-deter downstream authors and users, who will fear the high price of even incidental and unintentional infringement.³⁰⁹ This can create a chilling effect on future creators and users.

The incentive-access tradeoff arose before the Supreme Court in *Tasini* as well. The Supreme Court framed its decision about the collective works privilege as an incentive-access problem, justifying its framing choice (looking to individual articles) as avoiding a reduction in the authors' incentives.³¹⁰ The Court also addressed concerns that its ruling, requiring publishers to secure a license before republishing works in an electronic database, could "punch gaping holes in the electronic record of history" and thus limit downstream user access to collective works.³¹¹ The Court suggested that this access problem should be considered when lower courts decide whether to grant an injunction to prevent the use of articles in the digital version of newspaper collections.³¹²

The ways in which courts employ the standards for copyrightability and apply the substantial similarity test also affect the incentive-access tradeoff. For example, zooming in on microworks may incentivize more production of those works, but it reduces the store of public domain works from which new authors may draw.³¹³ Finally, the framing decision in useful articles analysis may impact incentives as well. When a court chooses a test that provides copyright protection to more useful articles, it incentivizes the creation of those works, while limiting future access to them.³¹⁴

2. Transaction Costs and Fragmentation

Another significant concern of copyright policy is the level of transaction costs in markets for information goods.³¹⁵ Protecting microworks, for example, doesn't affect only the incentive-access tradeoff; it also impacts transaction costs in the market for licensing.³¹⁶ The more willing courts are to zoom in and protect

309. WHITE PAPER ON REMIXES, *supra* note 55, at 70.

310. N.Y. Times Co. v. Tasini, 533 U.S. 483, 497 (2001) ("If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand . . .").

311. *Id.* at 505.

312. *Id.* at 505–06.

313. See Hughes, *supra* note 11, at 614–16.

314. See *supra* Part II.C.

315. See, e.g., Gordon, *supra* note 268, at 1628–30; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1053–56 (1997); Guy A. Rub, *The Economics of Kirtsaeng v. John Wiley & Sons, Inc.: The Efficiency of a Balanced Approach to the First Sale Doctrine*, 81 FORDHAM L. REV. RES GESTAE 41, 50–52 (2013).

316. See Hughes, *supra* note 11, at 614–16; Van Houweling, *supra* note 32, at 555.

microworks—the more they are willing to fragment copyright—the more licenses authors will need to secure to create new works. In remix culture, there is a real concern that those who create new works by pulling together many existing works face a classic anticommons problem: potentially exorbitant transaction costs for obtaining a license to each work, and a holdout problem if any one copyright owner decides not to license her work.³¹⁷

Transaction costs are also implicated by framing choices in the joint-authorship context. If a court determines that a movie is not one work, but many works consisting of individual actors' performances, then anyone wishing to publically perform the movie will face significant transaction costs in licensing the multiple tiny works from their many individual authors.³¹⁸

Transaction costs were implicated, too, when the Supreme Court in *Tasini* held that compilation owners would have to obtain licenses from individual authors to include their articles in an electronic database. Justice Stevens explained in his *Tasini* dissent that getting rid of the collective works privilege would raise transaction costs in updating compilations to new formats, as technology evolves.³¹⁹ By choosing to zoom in and hold for the individual authors, the Court might have maintained incentives for authors to write articles, but it also increased the transaction costs for newspapers desiring to create electronic databases or other new kinds of works.

3. Channeling Creativity

How courts frame a work—as a whole, or as many parts—shapes the contours of copyright protection in a way that can drive the production of particular kinds of creative goods. The incentives copyright provides can lead to overproduction of one type of work, and underproduction of another, in a way that might or might not be socially desirable. This is referred to as a channeling problem.³²⁰

For example, if courts routinely zoom out when awarding statutory damages, they might penalize creators who create complex works. Those creators will be granted only one statutory award, notwithstanding the complexity of their work.

317. See WHITE PAPER ON REMIXES, *supra* note 55, at 19; Van Houweling, *supra* note 32, at 551–52.

318. *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015) (en banc) (noting that the plaintiff's zoom-in theory “would result in . . . legal morass . . . splintering a movie into many different ‘works’” and it would “make[] Swiss cheese of copyrights”).

319. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 520 (2001) (Stevens, J., dissenting) (noting “the difficulties of locating individual freelance authors”).

320. See generally Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015) (exploring how various copyright law doctrines channel creation and incentivize authors to engage in certain creative activities and not others).

They thus will be incentivized to instead create smaller, less complex work, for which collectively they will be awarded larger statutory damages. It is hard to justify a rule that categorically encourages authors to publish short stories and simple drawings instead of long novels and complex paintings. Similarly, in the context of fair use, courts' willingness to zoom in when the copyright owner offers micro-licenses may encourage the creation of works that can be micro-licensed and the creation of micro-licensing schemes and markets, even when it is socially undesirable.

The channeling problem arises in another context: Framing choices may channel creators to use one kind of intellectual property protection over another.³²¹ Framing choices that expand the scope of copyrightability of useful articles³²² might channel a particular kind of work into the copyright ecosystem when it might be more socially appropriate to channel it into patent law, or outside of intellectual property protections altogether. Copyright protection is far easier to obtain than patent protection and lasts for a longer time than a patent does.³²³ Copyright does not require public disclosure of how to make something, the quid pro quo of patent policy. Thus, allowing more useful articles to be protected under copyright law could expand protection in ways that implicate broader policy decisions.

Legal protection over clothing design demonstrates these potential effects of the framing choice. Intellectual property law, at least until the Supreme Court's recent decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*,³²⁴ provided limited protection for clothing.³²⁵ If courts perform separability analysis in such a

321. See Julie E. Cohen & Mark A. Lemley, *Patent Scope and Innovation in the Software Industry*, 89 CALIF. L. REV. 1, 27 n.97 (2001) (“[C]opyright has used the idea-expression dichotomy to channel certain types of creativity into the copyright realm, and others into the patent realm.”).

322. See *supra* Part II.C.

323. See, e.g., *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 669 (3d Cir. 1990) (“Protecting the shape via the copyright laws might thus afford the artist a *de facto* patent on an industrial innovation that would otherwise not satisfy the more rigorous requirements necessary to obtain a patent, as opposed to a copyright.”); see also *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 932 (7th Cir. 2004) (Kanne, J., dissenting) (“If copyright provided protection for functional items simply because of their aesthetic qualities, Congress's policy choice that gives less protection in patent than copyright would be undermined.”).

324. 137 S. Ct. 1002 (2017).

325. See H.R. REP. NO. 94-1476, at 50 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 1976 WL 14045; Registrability of Costume Designs, 56 Fed. Reg. 56,530, 56,531 (Nov. 5, 1991) (“The Copyright Office has generally refused to register claims to copyright in three-dimensional aspects of clothing or costume design on the ground that articles of clothing and costumes are useful articles that ordinarily contain no artistic authorship separable from their overall utilitarian shape.”); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1699 (2006) (explaining that “the three core forms of IP law—copyright, trademark, and patent—provide only very limited protection for fashion designs”); see

way that increases the protection of clothing design, as the Supreme Court recently did, then the low-IP equilibrium within which fashion operates will change.³²⁶ Many companies and individuals that were not infringing before will become infringers, transaction costs might increase, and fashion may face a tragedy of the anticommons.³²⁷ If one believes that the current low-IP equilibrium is socially desirable, as it provides adequate incentives for production without a strong costly intellectual property regime,³²⁸ then such an outcome must be troubling. On the other hand, an argument can be made that if fashion is afforded stronger copyright protection, innovation will increase, and the distorting effects created by the limited IP protection it now receives will be reduced.³²⁹

We do not take a side in this debate, at least not in this work, but it is important to note the role of framing choices in tackling this question. Because framing affects the outcome in separability analysis, as discussed in Part II.C above, it implicates the scope of copyright's coverage with respect to the kinds of articles it covers. Framing might channel potential creators to create certain goods and not others, and to seek certain kinds of legal protections.

B. What to Do About Variation

We have identified wide variations and deep inconsistencies in how courts frame a copyrighted work. Courts vary in their choice of whether to zoom in or zoom out, and in the tests they use to tackle these decisions. These inconsistencies are apparent both within a particular doctrine and across doctrines. In fact, apart from the context of the collective works privilege, where the Supreme Court has implicitly weighed in on the framing issue,³³⁰ there is no one area of copyright law in which courts have been consistent in their approach to the framing question.

Variation has its costs. In this Part, we show that variation can to some extent be reduced. It cannot, however, be eliminated, at least not using the factors currently employed by courts. We then examine the effects of the remaining variation. We conclude with a perhaps surprising observation: While it is tempting

also COMPENDIUM III, *supra* note 123, § 924.3(A) ("Clothing such as shirts, dresses, pants, shoes, and outerwear are not eligible for copyright protection because they are considered useful articles.").

326. Raustiala & Sprigman, *supra* note 325, at 1698–99.

327. See *supra* note 30 and accompanying text.

328. See Raustiala & Sprigman, *supra* note 325, at 1733 (noting that certain practices within the fashion industry "have allowed the industry to remain successful and creative despite a regime of free appropriation").

329. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1175–77 (2009).

330. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001); *supra* Part II.F.

to propose a unified framing test, as some scholars have suggested, a completely unified test not only does not work in practice, but is normatively questionable.

1. Reducing Intra-Doctrinal Variation

The inconsistency within each doctrinal area—such as fair use, statutory damages, or useful articles doctrine—is likely socially undesirable. It introduces uncertainty and arbitrariness into copyright law, which can be socially costly. Uncertainty prevents parties from planning their actions, encouraging them to take an inefficient level of care,³³¹ and makes bargaining difficult and more expensive.³³² In addition, it can encourage litigants to forum shop for more favorable analysis, and nudge courts towards particular outcomes when framing decisions are not explicit.³³³ It is unlikely that a system that is subject to a high degree of randomness can properly achieve its policy goals, such as incentivizing creation and allowing access to information goods.

The current level of variation in framing choices also leaves an existential hole at the center of the copyright system. Copyright protects works—but what constitutes the work? Copyright doctrine is full of difficult variations of this question, many of which have to do with the levels of abstraction problem referenced in Part I.A, or the microworks problem referenced throughout.³³⁴ We have shown here that the hole at the center of copyright law is even more fundamental than previously observed. Even in analyzing a specific fixed work, courts cannot settle on how to frame it. If copyright law is primarily focused on incentivizing creative production, shouldn't we figure out how to define the bounds of what we aim to produce?

The analysis in Part III above indicates that courts can and do create some reasonable limitations on the framing possibilities. Courts can certainly use the factors we identify to bound framing variation in helpful ways. Below, we propose several principles that can assist in such a task.

331. See, e.g., *supra* Part III.B (explaining how excessive zoom in in statutory damages analysis can create a chilling effect). See generally STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 79–83 (1987) (explaining how uncertainty can lead to overprecaution); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. Rev. 1067, 1090 (1986) (explaining how uncertainty can create legal risk that can cause too high level of care).

332. See, e.g., Lemley, *supra* note 315, at 1055 (discussing how uncertainty “may also prevent bargaining parties from coming to terms”).

333. See generally Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1601–05 (2008) (discussing situations in which forum shopping can be harmful or benign); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1667–70 (2007) (discussing the practice of forum shopping, and some of its effects, in patent litigation).

334. See *supra* notes 13, 31–32 and accompanying text.

First, no framing decision should lead to legal protection of information goods that copyright law does not protect. Courts, in other words, should be sure that framing choices do not impinge upon copyright protection's boundaries. Courts should not extend *de facto* protection through framing choices either to *de minimis* and unoriginal zoomed-in subparts or to overarching zoomed-out abstract concepts and ideas. Thus, in the context of substantial similarity, zooming in should not be allowed if the zoomed-in segment cannot be protected by copyright, and zooming out must not lead to the comparison of abstract concepts and ideas.³³⁵ Framing decisions, in other words, should not constitute a veiled encroachment into the public domain.

Similarly, considering the market for copyrighted works can allow courts to eliminate some framing decisions, even if the mere presence of a market for a work should not by itself dictate the level of framing.³³⁶ For example, in setting statutory damages, courts should not zoom in to a subset of the work that does not have a market of its own, such as a paragraph in a book.³³⁷ Similarly, if there is no existing market for a tiny subpart of a work, a court should refuse to look at that subpart as the "work as a whole," required both as part of fair use analysis³³⁸ and for considering whether the defendant's level of copying is *de minimis*.³³⁹

Registration can also do some important work. Courts can and should use registration decisions to eliminate some possible framings. For example, if two authors registered their coauthored book rather than its individual chapters, courts should typically refuse to zoom in and hold that any of them is the sole author of any individual chapter.³⁴⁰ But courts should be aware of the circularity problem we have noted above, and not point to registration as an indicator of authorial intent when it in fact indicates underlying Copyright Office policy. As discussed, we think it is ill-advised to adjust the Copyright Office's registration policy to eliminate this circularity.³⁴¹

Thus, the factors that courts use in framing analysis—copyrightability, market-based approaches, registration, and even to some extent, authorial intent³⁴²—can serve to filter out certain extreme framing options. Within a

335. See *supra* note 232 and accompanying text.

336. See *supra* Part III.B.

337. See *supra* Part II.E.

338. See *supra* Part II.D.

339. See *supra* notes 59–60 and accompanying text.

340. See *supra* notes 278–281 and accompanying text (explaining that authorial intent is important in deciding joint authorship question. It is however important to note that intent is not the only test for joint authorship. See *supra* notes 96 and 281).

341. See *supra* notes 293–295 and accompanying text.

342. See *supra* Part III.

particular copyright doctrine, such as statutory damages, courts may wish to develop a unified framing analysis that incorporates these factors to at least reduce variation between circuits. This would close off some of the current opportunities for copyright owners to game the system by forum shopping or by proposing one level of framing in one case and another level of framing in another.

2. Coming to Terms With Intra-Doctrinal Variation

The analysis in Part III suggests that existing factors and tests cannot solve the framing challenge entirely. They can filter out some possibilities, but often still leave the court with several reasonable possibilities to choose from. This problem is exacerbated in the digital age, particularly in light of remix culture. The recent expansion in the modes of both distribution and creation erodes traditional notions of copyright markets and our intuitive understanding of copyrighted works.³⁴³ This expansion of framing options—which will only get more noticeable—is expected to trigger a corresponding expansion in doctrinal inconsistencies.

The first step in tackling the framing problem is to acknowledge it. It is unfortunate that framing decisions, which have such a significant impact on copyright law, are so often made unnoticed. Once courts and commentators recognize these previously overlooked decisions, they will be encouraged to further explore their impact. The law can then develop to tackle the framing question on a case-by-case, or maybe doctrine-by-doctrine, basis. For example, the caselaw might develop a unified framing test for statutory damages, or at least one unified test for statutory damages with respect to certain kinds of works, such as sound recordings. The analysis in this Article can shed light on those choices and their impact, and we hope it will encourage such doctrine-consolidating moves.

If the framing problem cannot be reasonably mitigated, even within a specific copyright law doctrine or subject matter, then courts and scholars will need to consider whether we can tolerate this level of variation and the uncertainty and arbitrariness it injects into our copyright ecosystem. If not, future work might need to consider whether it is possible and desirable to reshape some copyright law doctrines to avoid the framing problem altogether.

Maybe it is worth contemplating whether fair use should continue to consider how much of the work was used in comparison to the “work as a whole.”

343. See INTERNET POLICY TASK FORCE, DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 6–7 (2013), <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> [<https://perma.cc/BT7C-AM4J>]; *supra* Parts I.B.4, III.B.

Maybe substantial similarity should focus on the absolute amount of the portion copied and not look at copying in comparison to the work in its entirety.³⁴⁴ Maybe, even if we continue to use statutory damages, which are in themselves controversial, we should at least come up with a system that does not calculate them by multiplying the damage per work by the number of works infringed, and hinges instead on more direct consideration of the impact of the statutory damages system on the incentive-access tradeoff.³⁴⁵ In other words, if we understand the framing problem to introduce unacceptable but unavoidable variations, there may be ways to tweak individual aspects of copyright doctrine to more directly and better reflect policy goals, rather than continue to tolerate that variation and the gaming it enables.

3. The Benefits of Inter-Doctrinal Variation

The Copyright Act, we noted, extensively uses but does not define the term “work.” Some of the framers of the current Act noted the issue and suggested that a definition might need to be added, at least in some contexts, such as statutory damages.³⁴⁶

A few commentators have noted the missing statutory definition and have suggested ways to provide a unified concept of the copyrighted work. Paul Goldstein, for example, identified the missing statutory definition and explained its consequences in the context of statutory damages, fair use, and the notice requirement. He suggested a unified test that focuses on authorial intent.³⁴⁷ In Part III.C, we explored the shortcomings of such an approach. Justin Hughes also suggested a unified test for defining works, at least for the purpose of not extending copyright protection to microworks.³⁴⁸

At first, this Article might appear to support a unified test. Given the costs of variation and uncertainty, its existentially unsettling nature, and the abilities of litigants to game the system by asking to zoom in when arguing one doctrine and zoom out when arguing another, it is tempting to propose a unified definition of the “work,” or at least a unified framing test. In our research across copyright

344. See Hickey, *supra* note 66, at 725–31.

345. The current framework for statutory damages has been criticized in recent years and numerous proposals for significant changes have been made. See, e.g., WHITE PAPER ON REMIXES, *supra* note 55, at 86–100; Samuelson & Wheatland, *supra* note 194, at 497–510.

346. See *supra* notes 23–25 and accompanying text.

347. Goldstein, *supra* note 11, at 1178 (“[C]opyrighted work is what the author says it is.”).

348. Hughes, *supra* note 11, at 620–34.

doctrines, however, we have arrived at a perhaps counterintuitive conclusion: A completely unified test would not be desirable.³⁴⁹

The hole at the center of copyright law—the lack of a clear definition of a “work”—often serves an important purpose: It can provide courts with the necessary flexibility to analyze a work against the backdrop of policy considerations specific to a particular area of copyright doctrine. Our analysis leads us to the observation that while the same broad strokes of copyright policy debates run through most of copyright law, they instantiate very differently in different areas of the law. A court attempting to achieve the same incentive-access balance across copyright law will likely need to frame the work differently in different contexts to achieve that goal. The framing of the work may need to change so that the policy balance can remain constant.³⁵⁰

The most striking example of this arises when we compare copyrightability to nearly any other area of copyright law. Short of protecting true microworks such as single words or titles, copyright protects very small works.³⁵¹ If one writes a paragraph, that paragraph is protected by copyright law despite its size, as long as it originated with the writer and its content does not impermissibly merge with an uncopyrightable idea. Poems, too, are indisputably copyrightable. While some convincingly argue for the introduction of a minimum size principle for copyrightability to reduce transaction costs,³⁵² we currently allow authors to copyright works, and parts of works, that are extremely small.

Linking how courts frame the work in copyrightability analysis to how courts frame the work in other areas of copyright doctrine would often produce

349. Compare this with David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 199 (2001), which addresses the “perils of grand theories of unification” and suggests that a unifying theory that can encompass all copyright law as well as literary theory is an “Archimedes fallacy” that cannot be achieved, mainly because “[t]he reach of copyright protection is simply too broad for such theories to work.” *Id.*

350. It is important to note the context of this claim. Copyright law, as it currently exists, needs to frame copyrighted works across multiple doctrines. The term “work,” if it had been defined, would have affected all those doctrines. In that context, we suggest that a unified definition is undesirable. One can imagine a very different copyright law system, where different terms would be used within different doctrines. For example, the term “work” would be used in section 107, as part of the fair use factors, while the term “creation” would be used in section 504(c)(1), as part of the statutory damages formulation, and so on. If that was the technique used by the drafters of the Copyright Act, then defining those various terms (“work” and “creation” in that example) would not create the undesirable cross-doctrinal uniformity we are warning about, and it might therefore be desirable. Examining such a radical change is beyond the scope of this Article.

351. See 37 C.F.R. § 202.1 (2016) (denying registration for “[w]ords and short phrases such as names, titles, and slogans” but not to sentences or other small works); see also *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1379 (Fed. Cir. 2014) (holding Google liable for copying a function consisting of nine lines of code); Hughes, *supra* note 11, at 576.

352. See, e.g., Hughes, *supra* note 11, at 620–34. But see *supra* note 351.

distorting and even disastrous policy outcomes. Even though we recognize that a paragraph is clearly copyrightable, it would be absurd to award statutory damages based on the number of paragraphs in a book.³⁵³ The size of the statutory damages award would so over-deter downstream use as to chill even highly socially beneficial usage.

Thus, if we link the framing of the work in copyrightability to its framing in other doctrines, courts attempting to calibrate the incentive-access tradeoff will find their hands tied. It may be good policy to zoom in on the work for purposes of copyrightability, to provide incentives, while simultaneously zooming out on the work for purposes of statutory damages, to avoid overly deterring downstream users. It may similarly be desirable not to excessively zoom-in in fair use analysis, as is done with respect to copyrightability, in order to enable downstream access when justified.

The framing of the work in statutory damages analysis similarly should not be linked to framing in most other areas of copyright law, due to how large the award per work can become.³⁵⁴ Congress enacted statutory damages in copyright law to ease the burden of proving actual damages, which can be difficult, and to provide deterrence against infringement.³⁵⁵ The current scheme can lead to disproportionately large awards, however, leading to calls for reform.³⁵⁶ If we link the framing of the work in statutory damages to, say, the framing of the work in fair use, we will probably end up with a system that either awards excessive damages or ignores all legitimate licensing markets for subparts of works. If we link the framing of the work in statutory damages to the framing in substantial similarity analysis, we will again either miss instances of copying that should count as infringement or excessively deter downstream use. Either linkage would again threaten courts' abilities to calibrate the incentive-access tradeoff across copyright law's policy levers.

That is not to say that every copyright law doctrine must have its own separate framing test. We can envision cross-doctrinal connections. For example, the third fair use factor and the de minimis test both ask fact-finders to compare the portion copied to the "work as a whole." It might make sense to use similar tests to answer those two questions. In both substantial similarity and separability analysis, courts zoom in or zoom out in determining whether the whole work or a

353. Under 17 U.S.C. § 504(c) (2012), the award is \$750–\$30,000 per work, which, when multiplied by the number of paragraphs in a book, would lead to damages in the millions.

354. *Id.*

355. See Samuelson & Wheatland, *supra* note 194, at 444–45.

356. See *supra* note 345.

subset of the work will be the focus of their analysis. It is possible that the tests for framing in those two areas will also be at least partly similar.

Our conclusion, nevertheless, is clear. Whether or not the framers of the Copyright Act intended it, the missing definition of the term “work” should be considered a feature and not a bug of our copyright law. It allows courts the flexibility they need in order to promote socially desirable copyright policy.³⁵⁷ A completely unified test is, maybe surprisingly, undesirable.

CONCLUSION

In this Article, we identify a framing problem that arises across copyright law. Courts struggle with whether to zoom in on a work or zoom out. Usually, courts make this choice without noticing it or with no reasoned analysis. Even where courts do explicitly analyze the framing decision, there is significant doctrinal variation in how that decision is made, both within and across doctrines.

We explain that the factors courts use in this analysis can filter out certain extreme framing options. In many cases, however, once those extreme options have been filtered out, the court is left with several reasonable options. We show that this framing choice is becoming more challenging in this age of fast-changing media distribution and consumption. We further show that across copyright law doctrines, some variation is required for policy purposes.

The framing problem is ubiquitous. It may need to be handled differently in different cases and in different doctrines. If we are to promote the goals of copyright policy, the boundaries of the work itself may need to be mutable across copyright doctrines. The framing move in copyright law thus may be like the “reasonable person” standard in tort law: It occurs throughout the doctrine, its role varies, and its actual content is disputable.³⁵⁸

We have shown, however, that unlike the “reasonable person” test, the framing problem in copyright law is mostly invisible to courts and to scholars and is therefore subject to a level of inconsistency that might be intolerable. By describing the prevalence of framing choices, identifying the advantages as well as the weaknesses in factors used, considering approaches to intra-doctrinal

357. Cf. Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012) (exploring how flexibility in the application of substantial similarity can serve various copyright policies).

358. See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 817 (2001) (describing a variety of possible meanings for the “reasonable person” standard); Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2147, 2151, 2159 (2015) (explaining that “reasonableness” serves various functions in tort law discourse).

inconsistencies, and pointing out the positive role of at least some inter-doctrinal variation, we hope to have made the invisible visible and to have spurred explicit discussion of the role of framing copyrighted works in scholarship to come.