

ARTICLES

THE LINGERING EFFECTS OF COPYRIGHT'S RESPONSE TO THE INVENTION OF PHOTOGRAPHY

*Christine Haight Farley**

ABSTRACT

In 1884, the Supreme Court was presented with dichotomous views of photography. In one view, the photograph was an original, intellectual conception of the author—a fine art. In the other, it was the mere product of the soulless labor of the machine. Much was at stake in this dispute, including the booming market in photographs and the constitutional importance of the originality requirement in copyright law. This first confrontation between copyright law and technology provides invaluable insights into copyright law's ability to adapt and accommodate in the face of a challenge. An examination of these historical debates about photography across the domains of law, art, commerce and technology, the social sciences, and popular culture suggests that the particular contours of the author that continue to pose problems—particularly its predilection for creation over selection—can be located and attributed to this historical moment. The “author” took a particular shape in response to historically specific constraints, and the resulting doctrine has left a lasting impression on the way we read photography today.

* Associate Professor of Law, American University Washington College of Law. This article would not have been possible without the generous research support from my dean, Claudio Grossman, the intellectual generosity of Peter Jaszi, Tyler Ochoa, Jane Ginsburg, Keith Aoki, Joan Williams, Jonathan Baker and Alice Haemmerli, and the able research assistance of Kit Miller, Christianna Lewis, Anne Hardcastle, Nishan Kottahachchi and Simone Hofbauer. Please send comments to cfarley@wcl.american.edu.

Table of Contents

Introduction	386
I. Cultural Theory on Photography	392
II. How Photography Was Initially Understood	395
III. The <i>Burrow-Giles</i> Decision—The Problem	402
IV. The Development of the Photographic Industry & Technology	412
V. Art & Photography	416
VI. The <i>Burrow-Giles</i> Decision—The Solution	425
VII. Alternative Solutions	433
VIII. Consequences of the Doctrine	438
A. Photography Cases After <i>Burrow-Giles</i>	438
B. Recent Photography Controversies	446
C. Authorship Jurisprudence	451
Conclusion	454

INTRODUCTION

“The daguerreotype is not merely an instrument which serves to draw nature . . . [it] gives her the power to reproduce herself.”

~Louis Daguerre¹

The 1884 Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*² encapsulates many of the important issues raised at that historical moment. *Burrow-Giles* is not a forgotten case. On the contrary, it is a well-known case in copyright law frequently cited for propositions about the originality standard. Indeed, the Supreme Court has recently stated that the “originality requirement articulated in . . . *Burrow-Giles* remains the touchstone of copyright protection today.”³ Although copyright cognoscenti will remember that the case concerned a photograph of Oscar Wilde, they may forget that the issue raised was whether or not a photograph could ever be considered the product of an author and thus fall within the subject matter of copyright law. The reason for this article, is in part, the fact that the main issue the case addressed—that photographs are authored—now seems obvious to us.

1. From an 1838 notice circulated to attract investors. SUSAN SONTAG, ON PHOTOGRAPHY 188 (1978); see ROBERT HIRSCH, SEIZING THE LIGHT: A HISTORY OF PHOTOGRAPHY 13 (2000).

2. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

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

The subject matter of copyright law is defined as the work of an author.⁴ In recent scholarship, commentators have criticized courts as unwittingly invoking the Romantic Author in order to satisfy this requirement. These scholars, in the literary theory tradition, have exposed the authorship construct and have faulted developments in copyright law as being rooted in this myth.⁵ In furtherance of that project, this article examines one critical episode in the development of the authorship doctrine⁶ to see how the author is invoked, why

4. See U.S. CONST. art. I, § 8, cl. 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

5. The myth, according to these scholars, is that the author creates something from nothing. This idealized and radically individual author is a construct that suppresses actual practices of collaborative and corporate cultural production. See generally THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992) [hereinafter *Collective Creativity*]; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 [hereinafter *Metamorphoses*]; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992); see also Michael Foucault, *What is an Author*, in THE FOUCAULT READER 101 (Paul Rabinow ed. & Jose V. Harari trans., 1984).

6. Interestingly, the majority opinion of *Burrow-Giles*, 111 U.S. at 53, was written by Justice Miller who had five years earlier written the majority opinion in *The Trade-Mark Cases*, 100 U.S. 82 (1879), which struck down an act of Congress as unconstitutional because it exceeded the constitutional authority granted to Congress under the same clause of the U.S. Constitution as considered here: the so-called "IP" clause. *Id.* at 94 (discussing both the "IP" and Commerce Clause); see U.S. CONST. art. I, § 8, cl. 8. In both cases, Justice Miller laid the key foundations for our present-day understanding of authorship in copyright law. In *The Trade-Mark Cases*, Justice Miller amplified the distinction between trademarks and copyrights: Writings "are founded in the creative powers of the mind" and are the "fruits of intellectual labor" whereas trademarks are "often the result of accident rather than design" and can be "something already in existence." 100 U.S. at 94. A trademark does not depend on "novelty, invention, discovery, or any work of the brain" and requires "no fancy or imagination, no genius, no laborious thought." *Id.* Significantly, these requirements were being read in through the word "writings" and not the word "authors." The Court may have interpreted the word "writings" narrowly in light of the first part of the clause, "To promote the Progress of Science and useful Arts." See *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891). The Court stated:

This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. It was so held in *Trade-mark Cases*, 100 U.S. 82, where the court said that, "while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are *original*, and are founded in the creative powers of the mind." It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and *no possible influence upon science or the useful arts*. A label on a box of fruit giving its name as "grapes," even with the addition of adjectives characterizing their quality as "black," or "white," or "sweet," or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. *The use of such labels upon those articles has no connection with the progress of science and the useful arts.*

Id. (emphasis added).

the author is invoked, and what are the consequences of the particular contours of the author that this episode established.

The episode is, of course, the invention of photography. An in-depth examination of this moment provides many insights into the development of the authorship doctrine. First, this history uncovers the fact that in this first technological challenge, the law embraces the products of the technology as works of authorship—and this history shows why it is not surprising that the law finds authorship in photographs given the economies involved—but does not credit the technology as playing a role in the authorship.⁷ Next, this history reveals that the particular construction of authorship invoked is directly traceable to particular photographic discourses and practices dominant at that time. Finally, this case study demonstrates, how having adopted the then current thinking about photography, the law concomitantly adopts a definition of author as he who creates, as distinct from he who merely selects materials already in existence. These revelations have application in current disputes over authorship, especially those involving technological challenges to copyright protection.

But more important than its contributions to authorship theory, this case study illuminates the role of the law in shaping the general public's understanding of photography. Here again, the key observation is that the doctrine that develops is directly traceable to the dominant strands of the photography debate. The historical specificity of the response to the photography question means, in turn, that the doctrine provides no guidance in future cases—difficult issues of authorship in contemporary photography such as photographs produced by surveillance cameras and satellite images, for instance, are not easily resolved by the doctrine. Moreover, the means by which the law evaluates authorship in photography is now at odds with current thinking about the artistic nature of photography. Nevertheless, the doctrine endures. Far from being an outdated relic, the significance of the doctrine lies in its demarcation of photographs. The solution formulated by the U.S. Supreme Court in 1884, while ostensibly articulating one account of an authored photography, consequently preserves another reading of photography as unauthored. The articulation of and later adherence to this schism between examined and unexamined photographs in the law paved the way and deeply

7. Much copyright scholarship today is preoccupied with current technological challenges to copyright law. Thus, this article may at first seem unusual in that it instead reflects upon a technological challenge to copyright law that occurred in the late nineteenth century: the invention of photography. This early confrontation with copyright law has been relatively overlooked by copyright scholars, which is surprising since it represents one of the first major technological challenges to copyright law.

influenced the dual reading of photography that confounds cultural theorists to the present.

To begin with, this article demonstrates that when photography was invented in the mid-nineteenth century, the contest of meanings—still present today—was more pronounced and the rhetoric was more extreme.⁸ When photography was first invented, it was explicitly promoted as being a mechanical science whereby the machine was able to produce a direct transcription of the scene before it. It was argued that the image was not mediated by the human operator of the machine—it was produced directly by the technology. The perceived objectivity of the camera made it particularly well-suited for evidence in legal disputes and the first mentions of photography in court opinions are references to pieces of evidence. Even though the evidentiary doctrine eventually stabilized and treated photographs as visual aids of testifying witnesses, initially there was a tendency to allow the photograph to speak for itself,⁹ as photographs were seen as inscrutable conveyers of truth.

Photography makes its second court appearance in disputes over copyright in which the question was whether this object that had previously been described by courts as a direct transcription of nature could also be deemed to be the work of an author. In *Burrow-Giles*, in the face of the now famous portrait of Oscar Wilde by the acclaimed portrait photographer Napoleon Sarony, the Supreme Court concluded that another reading of photography was in fact possible. *This* work, said the Court, was clearly the work of an author, not a machine. *This* work was not an example of the “ordinary” production of a photograph.¹⁰

It is not at all surprising that the Supreme Court could appreciate the beauty of the Sarony portrait of Wilde, and with the economic interests at stake at that moment in the history of the photography industry, the result was all but a foregone conclusion.¹¹ What is, however, remarkable is how the

8. Judicial opinions can be helpful in understanding the consciousness that is dominant at any given time in history because they undertake the function of institutional justification. See Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96-116 (1978).

9. See Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998) (looking at the early use of photographic evidence in the American courtroom and finding that photography was often regarded as a taken-for-granted form of proof).

10. It is somewhat ironic that the photograph that became the well-known souvenir of Wilde's celebrity U.S. tour—in which he purportedly told U.S. customs that he had nothing to declare but his genius—would serve as the impetus to find artistic genius in photography. See JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 81 (1991).

11. The industry, which was facing an emerging piracy problem, was simply demanding that a legal

Court could seemingly articulate a standard that could differentiate between high and low art; between art and science. To effect this change in the doctrine, the Court had to translate the soulless labor of the machine into the creative expression of the artist. But how could the mindless mechanic be translated into the genius creator? How could the rote gesture of the shutter click be analogized to the brush stroke?

The Court was able to make this argument by locating the author in the posing, selecting and arranging of costumes and accessories, in the arranging of light and shadows, and in the suggesting and evoking of expressions.¹² In these acts, the Court argued that it found the imprint of the author.

Yet there were other, alternative ways to discuss the activities taken by the photographer that are curiously absent from the discussion about the author's intervention in the photographic process. The Court does not acknowledge ways in which a photographer can manipulate the image by intervening at other points in the process. For instance, surprisingly, there is no discussion of the possibilities for retouching, reworking, cropping, framing, redeveloping, coloring, etc. These activities, which the then-technology enabled, had definite analogies in the world of artistic production. In fact, it is this type of handiwork that most resembles the traditional labor of the artist. Moreover, the so-called "art photographers" at the time were using these techniques for precisely these reasons. Instead, the Court focuses only on the pre-shutter actions and processes. In this way, the work of the author would appear to be entirely separate and distinct from the work of the machine. There is no mingling of the labors.

The significance of this privileging of the pre-shutter activity means, of course, that the other reading of photography—the one simultaneously being advanced in other courts of law—could easily be maintained. Thus, the *Burrow-Giles* decision had no effect on the acceptance elsewhere of

property be recognized here. For a Marxist analysis of the law's response to this industry pressure, see generally BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* (Elizabeth Kingdom trans., Routledge & Kegan Paul 1979) (1973). "The soulless photographer will be set up as an artist and the film-maker as creator, *since the relations of production will demand it.*" *Id.* at 49 (emphasis in original). For a judicial acknowledgment of this fact see *Goldstein v. California*, 412 U.S. 546 (1973) (finding protection for sound recordings).

The history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy. As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated. *Id.* at 562.

12. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

photographs as incorruptible evidence of the scene it transcribed. These photographs record nature exactly because they are unmediated, in that no artist has arranged the scene. Consider if the Court had focused on the post-shutter activity as a rationale for granting copyright. Had the Court done this, then the law's acceptance of the objectivity of the camera in other contexts would have to be called into question. If the imprint of authorship was in the staging of the photograph then one may still maintain that there is no contamination of the *process*. Thus, the Supreme Court's articulation of authorship preserves the possibility of the other competing argument about photography. The two contradictory arguments about photography are simultaneously accommodated in the law.

As further evidence that the Court envisioned demarcated photographs, the Court explicitly stated that it was not deciding the question of authorship in the "ordinary production of a photograph."¹³ The photograph before the Court was not of ordinary production apparently because the artist created the scene. Thus, the question still remained as to whom the creator was of the not so obviously artistic photograph: the photographer or the camera. Later courts, in order to find authorship in photographs, as they invariably did, awkwardly repeated, almost verbatim from the *Burrow-Giles* case, the litany of actions taken by the photographer.¹⁴

Rather than being cited as a case that articulates a natural truth about copyright law—that a work of authorship is a work that owes its origin to its maker¹⁵—the *Burrow-Giles* case should be seen as a complex historical outcome. Rather than being seen as providing a smooth and natural development of copyright doctrine, this case should be seen as a site of complex negotiations. By failing to acknowledge the actual stakes involved here, an uncritical reliance on the case further obscures the notion of the romantic author that informs copyright law and continually produces incoherence in the decisions. The courts continue to encounter irreconcilable

13. See *id.* at 59.

14. See, e.g., *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914); *Altman v. New Haven Union Co.*, 254 F. 113, 118 (D. Conn. 1918); *Pagano v. Charles Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).

15. The Supreme Court acted as if it was completely unproblematic to define an author as "he to whom anything owes its origin" thus adopting the Romantic understanding of the author. *Burrow-Giles*, 111 U.S. at 58 (quoting *Worcester's Dictionary*: "He to whom anything owes its origin; originator; creator; maker, first cause." *WORCESTER'S DICTIONARY* (Rev. ed. 1851)); see Brief & Points for Defendant in Error, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). By equating the constitutional language of "author" with "originator," the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author." *Burrow-Giles*, at 58.

certainties in photography cases today just as they do in other cases that present technological challenges to copyright law. Understanding this history is useful because the encounter between photography and copyright produced an understanding of authorship that continues to confound courts to this day.

This article begins, in Part I, with a summary of the theorization of photography by art historians and cultural studies scholars who question the natural reading of photography as conveniently possessing and dispossessing an authorial presence. Part II of this article investigates how photography was initially understood in its early years leading up to the *Burrow-Giles* case. Part III examines the claims presented in *Burrow-Giles*, and the holding arrived at by the Court. Parts IV and V further contextualize the case in terms of the development of the photographic industry, the technology and finally, the movement to recognize photography as a fine art. Part VI analyzes the *Burrow-Giles* decision in light of this context, exposing its dependance on certain of the then-contemporary debates about photography. Part VII explores alternative approaches to locating authorship in photography including finding authorship in post-shutter activities, the contributions of the sitter, and the ways in which other jurisdictions dealt with the problem. Finally, Part VIII analyzes the consequences of the particular authorship doctrine that emerges from *Burrow-Giles*. In particular, it looks at how authorship was found in photography cases decided shortly after *Burrow-Giles*, how the *Burrow-Giles* solution is unhelpful in more recent controversies involving photographs and how *Burrow-Giles* has affected authorship jurisprudence outside of photography disputes. The article concludes that, though seemingly unhelpful to future photography and authorship disputes, the *Burrow-Giles* doctrine has been ultimately successful in accommodating the contradictory claims about photography that are resonant today.

I. CULTURAL THEORY ON PHOTOGRAPHY

“Photography is the only “language” understood in all parts of the world, and, bridging all nations and cultures . . . [i]ndependent of political influences . . . it reflects truthfully life and events, allows us to share in the hopes and despair of others”

~Helmut Gernsheim¹⁶

Against the weight of conventional understandings, cultural theorists have long challenged a reading of photography that appears natural. They question

16. HELMUT GERNSHEIM, CREATIVE PHOTOGRAPHY: AESTHETIC TRENDS 1839-1960, at 229 (1962).

this apparent naturalness and obviousness of the photograph. For instance, viewers may uncritically accept one meaning of a photograph when it hangs on a museum wall, and just as easily a very different meaning of the same photograph when it is used as evidence of a crime. In both cases, the viewer assumes that the meaning that they read into the photograph is in fact contained within it and not derived from external cues. Thus, photographs are at once able to be seen as the expression of the photographer who made it, but also as a direct transcription of nature. In other words, photographs are accepted both as a window on the world and also as a mirror on the soul of the artist. In this way, it is common to recognize authorship in some photographs while totally discounting the possibility of authorship in others. It is the paradoxical coexistence of these readings that have fascinated scholars of photography.¹⁷

Most importantly, these theorists critique the notion that the meaning of the photograph is contained within it. Instead, they locate the production of meaning in photographs within social practices and institutions. They maintain that particular cultural products and their particular meanings are related to particular conditions of existence. A photograph is not a self-contained structure of experience, but a kind of property or artifact produced and controlled within systems of ownership that define its character as cultural experience.¹⁸ The creation of meanings in photography is thus a process of complex cultural negotiation amongst these institutions.¹⁹ However, this negotiation—this intense battle between photography as art and photography as truth—has become invisible to us. In much the same way, the battle over authorship in copyright doctrine has become invisible to us.

It is precisely this seeming transparency of the photograph that is its most powerful rhetorical device.²⁰ Thus, cultural theorists and art historians have been primarily interested in photography's privileged status as a guaranteed

17. SONTAG, *supra* note 1; JOHN TAGG, *THE BURDEN OF REPRESENTATION: ESSAYS ON PHOTOGRAPHIES AND HISTORIES* (1988) [hereinafter TAGG, *BURDEN OF REPRESENTATION*]; JOHN TAGG, *GROUND OF DISPUTE: ART HISTORY, CULTURAL POLITICS, AND THE DISCURSIVE FIELD* (1992) [hereinafter TAGG, *GROUND OF DISPUTE*]; THINKING PHOTOGRAPHY (Victor Burgin ed., 1984); Rosalind Krauss, *Photography's Discursive Spaces: Landscape/View*, 42 ART J. 311 (1982); see also ROLAND BARTHES, *CAMERA LUCINDA* (Richard Howard trans., Jonathan Cape 1981).

18. Alan Trachtenberg, *Foreward* to GAINES, *supra* note 10, at ix.

19. John Tagg argues that the meaning of the photographs are negotiated in the very process of their use. See TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 104.

20. TAGG, *BURDEN OF REPRESENTATION*, *supra* note 17, at 35. "[E]very photograph is the result of specific and, in every sense, significant distortions which render its relation to any prior reality deeply problematic and raise the question of the determining level of the material apparatus and of the social practices within which photography takes place." *Id.* at 2 (emphasis omitted).

witness of the actuality of the events it represents. They have long questioned photography's claim to only "put the facts" directly before us through the report of "first hand experience."²¹ The seeming transparency of photography works to deny that it is a complex construction. However, each photograph involves a series of choices made by its producer. For instance, the photographer must select the distance at which the photograph is shot, the angle, the focus and the amount of light used in developing. In this way photographs are built up like an argument.

Therefore, any "truth" that may be found in photography is based on a complex reading. This reading is affected by the context in which a photograph is encountered,²² the technical limitations of the photographic apparatus, and the internal codes and iconography of the photograph. Common understandings of the meaning of the photograph is dependent on these considerations.²³

This is why "photographs do not and [cannot] validate their meanings within themselves."²⁴ The compelling weight of the photograph "is not phenomenological but discursive."²⁵ Not only are the individual images bound into larger photographic narratives, but they exert "a force only within

21. *Id.* at 8.

22. It may be helpful here to recall the lesson taught by Marcel Duchamp's famous urinal, which he took from the trash and submitted to the Society for Independent Artists Exhibit in 1917. Duchamp's work concerned the demonstration that the art object is not inherently valuable or meaningful, but rather its significance is actively constructed within a discourse. When the urinal was circulated in one set of relations, it had a specific currency—that of plumbing fixture or trash—but when the same cultural object was circulated in another set of relations, it acquired a different currency—it was "Art." Likewise, photographs have different currencies depending on which set of relations they are circulated in. See Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303 (1991).

23. See TAGG, *FOUNDATIONS OF DISPUTE*, *supra* note 17, at 128 ("Images can signify meanings only in more or less defined frameworks of usage and social practice. Their import and status have to be produced and effectively institutionalised, and such institutionalisations do not describe a unified field or the working out of some essence of the medium: they are negotiated locally and discontinuously and are productive of meaning and value.").

24. *Id.* at 103; see *id.* at 128 ("[P]hotography is not . . . an autonomous semiotic system: photographs do not carry their meanings in themselves . . .").

25. *Id.* at 103; see *id.* at 111.

[P]hotographs had to have their status as truth produced and institutionally sanctioned. The distinctive gaze of the . . . camera . . . was a complex and specific socio-discursive event. The image it produced . . . caught the eye of the legislators only in the play of a particular régime of power and sense. If this photography seemed to bring to the institutions involved certain powers they sought—the power of a new and intrusive look; . . . the power to structure belief . . . —the powers the photography wielded were never its own. They belonged to the agents and agencies which mobilised it and interpreted it, and to the discursive, institutional and political strategies which supported it and validated it.

Id.

a much more extensive argument and social intervention.”²⁶ The role the law has played in this negotiation over photographic meaning has been considered by only a few cultural theorists.²⁷ They noted that in one instance, the photograph is characterized by the law as a creative work of original authorship so that the creator is bestowed with a monopoly. In another instance, the photograph is characterized by the law as a mechanical reproduction that may stand as a witness for what transpired within its frame of reference. These hierarchical values are not inherent in photographs, but are institutionally produced. Photographs were circulated in both these “realms of representation—the honorific and the instrumental.”²⁸ Depending on which realm was operative, the photographs were accorded different statuses and explanations.

These theorists, however, have a tendency to treat law as a monolith as if it acted in a unified way in response to the invention of photography that was calculated to create these hierarchical meanings in photography. Although they have contributed helpful case studies that demonstrate how these negotiations have transpired in the instrumental spheres, they have not properly taken account of how the law participated in the discourse about the artistic meaning in photography.

II. HOW PHOTOGRAPHY WAS INITIALLY UNDERSTOOD

“Photography furnishes evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.”

~Susan Sontag²⁹

It may be difficult for a reader today to question the authorship in a photograph. Today photographs are read very differently than when photography was invented in the mid-nineteenth century. At that time, the photograph was not seen as the product of an author, but rather the product of

26. *Id.* at 103.

27. See EDELMAN, *supra* note 11; GAINES, *supra* note 10; TAGG, BURDEN OF REPRESENTATION, *supra* note 17, at 6 (“[T]he changing status of photography must also be pursued through courts of law . . . where the determinants of evidence . . . were defined and redefined . . . [and] as the object of copyright laws which defined the status of creative properties and thus contributed to that separation and stratification of photographic production into the amateur and professional, instrumental and artistic domains which was laid out in the last decades of the nineteenth century.”).

28. TAGG, GROUNDS OF DISPUTE, *supra* note 17, at 102 (“The legitimations of particular photographic practices derive from specific discursive economies that are sited in specific institutions and practices, supported by specific agents, and invested with specific relations of power.”).

29. SONTAG, *supra* note 1, at 5.

a machine. The photograph was seen as having the ability to re-present nature; to produce an unmediated copy of the real world. The medium itself was transparent.³⁰

Nineteenth century writing on photography referred to it with language that emphasized its unmediated agency. For example, photography was referred to as “the pencil of nature”³¹ and “heliography: the process of obtaining permanent images of objects by the chemical action of light on prepared surfaces.”³² The excitement, however, was not only positive, but the invention was also greeted with a great deal of suspicion if not out-and-out fear. A newspaper report stated:

“To try to capture fleeting mirror images,” it said, “is not just an impossible undertaking, as has been established after thorough German investigation; the very wish to do such a thing is blasphemous. Man is made in the image of God, and God’s image cannot be captured by any machine of human devising. The utmost the artist may venture, borne on the wings of divine inspiration, is to reproduce man’s God-given features without the help of any machine, in the moment of highest dedication, at the higher bidding of his genius.”³³

Both reactions appreciate the value of the technology for exact duplication of real scenes.

These references implicitly dismiss the human operator and argue for the direct agency of the sun. As a result of this reading of photographs, their value for the purposes of identification, proof, and surveillance was realized early on by the police and the introduction of photography conveniently coincided with, and was taken up by, the then-emerging social science

30. Of course today the latter reading of photography is accepted as well. See text *supra* at 393-94.

31. It was referred to in this way in the title of a book written by William Henry Fox Talbot in 1844. WILLIAM H.F. TALBOT, *THE PENCIL OF NATURE* (Da Capo Press ed. 1968) (1846). See NAOMI ROSENBLUM, *A WORLD HISTORY OF PHOTOGRAPHY* 31 (1984). Talbot also referred to photographs as “sun pictures.” *Id.*

32. VII *THE OXFORD ENGLISH DICTIONARY* 115 (2d ed. 1989). The word “photography” is derived from the Greek words for light (photo) and writing (graphos). XI *THE OXFORD ENGLISH DICTIONARY* 723 (2d ed. 1989). Samuel F.B. Morse announced that the accuracy of the technology was superior to the human eye. See ALAN TRACHTENBERG, *READING AMERICAN PHOTOGRAPHS: IMAGES AS HISTORY: MATHEW BRADY TO WALKER EVANS* 15 (1989). Similarly, Edgar Allen Poe remarked that the daguerreotype was able to achieve an unprecedented “[i]dentity of aspect with the thing represented.” *Id.* at 126.

33. Walter Benjamin, *A Small History of Photography*, in *ONE-WAY STREET AND OTHER WRITINGS* 124 (1979). “What is striking in the earliest articulated responses to the invention and dissemination of photography is how often the images it began to pour forth are hailed (or, alternatively denounced) as a totally new currency, not only quantitatively but qualitatively different from any previous kind of image production.” TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 122.

disciplines. The uses to which it was put were consistent with the view of photography as the soulless labor of a machine—photography as a witness.

Initially, photographers made no claims to be artists. Photographers stressed the mechanical nature of the process. The opportunities and possibilities that the camera presented for artistic creation were absent from the discourse. Even artists who took up photography had trouble articulating the value of creative, as opposed to documentary, photography.³⁴

Instead, the mechanical, scientific nature of photography emerged very early and most clearly. Because of the perceived objectivity, and because of the concomitant denial of subjectivity, photographs were immediately valued and used as a documented record. It was no surprise, therefore, that photography became a compliment to and a natural ally of the emerging social science disciplines and their eagerness to document and identify their world in the latter half of the nineteenth century.³⁵ The technology of photography fed right into the proliferation of archival systems that was occurring in the late nineteenth century. Early photographers documented prisons and criminals, asylums and the insane, slums and the poor, factories and colonized territories.³⁶ Photographs were used to record and exhibit in anthropological studies, and they were used to document and bear witness to crime scenes. In these ways, the photographic technology aided the growth of the social sciences and the practice of photography was affected by their adoption of it.

34. As one later nineteenth century art critic noted:

To most [artists] . . . it still seems impossible to disassociate photography from the prevailing ideas, that it can claim nothing . . . but the virtues of a mechanical industry. They are apt to attribute every artistic effect to the mechanism of the camera and to accident, and entirely to overlook those points which in fairness should be allowed to be due to personal influence of the worker and the direct control of a tool which otherwise would take a different direction.

SADAKICHI HARTMANN, *THE VALIANT KNIGHTS OF DAGUERRE: SELECTED CRITICAL ESSAYS ON PHOTOGRAPHY AND PROFILES OF PHOTOGRAPHIC PIONEERS* 86 (1978).

35. One of the most horrendous examples of this practice is the record made by photographs of Aborigines at the turn of the century. These photographs of Aborigines were widely exhibited as racial specimens in anthropological exhibitions. See HIRSCH, *supra* note 1, at 272.

36. See TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 128-29. Tagg describes this period as a social time in which there was a tremendous need to catalogue and categorize. *Id.* This period closely follows the period described by Michel Foucault in his *Discipline and Punish: The Birth of the Prison*, in which he connects the birth of the prison to a range of institutions—such as the army, the factory and the school—that emphasized the disciplining of the body through techniques of real or perceived surveillance. See MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed., 1995) (1978). His enduring illustration is Jeremy Bentham's *Panopticon*, which allows for the invisible surveillance of a large number of people by a relatively small number. Foucault argues that this emergence of a disciplinary society and a consequent new articulation of power gave rise to the prison. The history of legal punishment depends on the changes engendered by the emergence of institutions dealing with the formation of a knowledge of individuals. *Id.* at 195-228.

In fact, the discourse surrounding the introduction of photography cannot be separated from the discourse generated by these new disciplines and consequently may have influenced the emphasis on the evidentiary and scientific possibilities that the camera afforded.



Five Cents Lodging, Bayard Street, NYC
Jacob Riis 1889

The Spiritualists also found ready uses of the camera. In addition to the more mundane post mortem pictures of dead children that were supposed to capture and reveal their spirit, photographs were thought to also document the existence of spirits amongst us (through blurred objects appearing over the shoulders of portrait sitters). What the eye could not see, the camera could!



Mother & Dead Child
Juan J. Yas c. 1880

For instance, in one case in which a “spirit photographer” was accused of fraud, one of his defenses was actually that the existence of the apparent spirits in his photographs proved that he was not practicing deceit on his customers because the camera could not lie, and neither could the photograph.³⁷

In 1839, Francois Arago, a member of the French Chamber of Deputies, immediately advocated for the French government to purchase the patents on the first photographic camera.³⁸ In his address to the Chamber of Deputies, Arago’s claims about the power of photography and how revolutionary it would prove to be seem exaggerated in order to justify the purchase and release of the patents by the state.³⁹ He spoke of photography as “an immediate and transparent means of representation . . .”⁴⁰ For him it was “a tool for a universal science and a progressive technology that would provide the means for an unlimited private appropriation of the world, for unprecedented leaps in productivity, for the democratisation of art, and for the creation of . . . a[n] archive of knowledge.”⁴¹

No claims to authorship were made at first because if the human operator of the machine were to be perceived as having agency in the production of the photograph, the photograph would be far less neutral, transparent and true. In order to be a record, the photograph had to be seen to be strictly mechanical. In the domains of the social sciences it was critical that the photograph be stripped of any authorial presence in order for it to exert “the power of evidence, record and truth.”⁴² Thus it was important that photographs deny being constructed; deny that any choices have been made by the photographer. In order not to risk the accusation that the photograph had been manipulated or that a scene had been set up, photographers would downplay their role and emphasize the mechanical process.

Whereas artists “made” art, photographs, to be valuable as a record or evidence, needed to be produced by machine rather than man. The utter denial of the human agency is clear in the language used to describe this phenomenon: photographs were said to be “impressed by nature’s hand,” or

37. See Mnookin, *supra* note 9, at 27-35 (discussing the Mumler case); see also *Spirit Photographs—A New and Interesting Development*, 8 PHOTOGRAPHIC J. 324 (1863).

38. See AARON SCHARF, *ART AND PHOTOGRAPHY* 6 (1968). The inventors were Louis-Jacques-Mandé Daguerre and Joseph-Nicéphore Niepce. *Id.* at 5. William Henry Fox Talbot independently invented the silver nitrate process. See *infra* note 108.

39. See TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 122.

40. *Id.*

41. *Id.* at 122-23.

42. See *id.* at 99.

they were called “sun pictures.”⁴³ Photographs were “obtained” rather than made and the process was seen as being purely mechanical. The notion was that the technology enabled nature to reproduce itself. Illustrative of the initial understanding of photography, one photographer announced that with this technology “nature draws itself without the aid of an artist’s pencil.”⁴⁴

Of course, photography was also employed to document the Civil War. Even though these images were taken to be truthful eyewitness accounts of the war, in fact they were often highly constructed and manipulated. Photographers were reported to have arranged scenes for maximum effect.⁴⁵ The most well-known of these Civil War photographers, Mathew Brady, became so popular that he attained a quasi-artist status even though he was purportedly performing documentary photography.



Ulysses S. Grant
Mathew Brady 1864

Mathew Brady’s photographs of the Civil War played a role in catapulting this new technology into a national phenomenon, and also in the way its products were read. Brady became the most well-known photographer in America and with his rise to fame suddenly the personality of the photographer seemed important to the end products. Brady’s fame led to his practice of signing his employees’ pictures.⁴⁶ Perhaps he regarded authorship

43. Dr. Robert Leggat, *A History of Photography: Beginnings of Photography* (2000), at <http://www.rleggat.com/photohistory/history/begin-note.htm> (last visited Apr. 5, 2004).

44. William H.F. Talbot, *Some Account of the Art of Photogenic Drawing, or the Process by Which Natural Objects May Be Made to Delineate Themselves Without the Aid of the Artist’s Pencil*, ROYAL SOC’Y OF LONDON, Jan. 31, 1839.

45. HIRSCH, *supra* note 1, at 105-06.

46. *Id.* at 103-04.

as not in the actual operation of the camera, but in the larger directorial control of the project.

Although today an audience may marvel at the beauty of a Mathew Brady photograph, at the time they served as an important record of the war. Although artists could romanticize the event, photographs were, as they are today, assumed to merely document. Oliver Wendell Holmes Sr. expressed this view in 1863 stating: "It is well enough for some Baron Gros or Horace Vernet to please an imperial master with fanciful portraits. . . . (but) war and battles should have truth for their delineator', and photography would be more suitable for this."⁴⁷ However, there had already developed a practice of staged war photography where photographers were not witness to the event or even its immediate aftermath, but the scene would be carefully constructed sometimes long after the fact to maximum effect.⁴⁸ For instance, Alexander Gardner,⁴⁹ a photographer who at one time worked for Mathew Brady and



Gardner & O'Sullivan 1863

Photograph depicting a contrived scene.

47. Dr. Robert Leggat, *A History of Photography: Photography of War* (1999), at <http://www.rleggat.com/photohistory/history/war.htm> (last visited Apr. 5, 2004).

48. *Id.* In addition to Civil War photographers, practitioners of this art include Nadar in France and Joseph Cundall and Robert Howlett, whose "Crimean Braves" photographs were finished before the troops even set sail. *Id.*

49. Interestingly, he also produced an album of photographs of convicted criminals for the Washington police force. HIRSCH, *supra* note 1, at 108.

who was the author of a book of photographs of the Civil War,⁵⁰ may have exercised a bit too much agency in the photographic documentation of the Civil War. In one famous photograph, he is accused of arriving at the scene of the war at Gettysburg two days after it had been fought, dragging the body of a Confederate soldier forty yards, placing a rifle in a conspicuous place, and turning the soldier's head towards the camera to make him look like a fallen sharpshooter.⁵¹ Thus, the line demarcating documentary and art photography was blurred by photographers from the earliest days.

Because of its claim to mechanical objectivity, photography was very quickly taken up by the law as well. The word "photograph" first appeared in published opinions in cases in which they were being offered as evidence.⁵² Because the photograph was seen as an unmediated replication of nature, it was initially treated as an especially privileged form of evidence. In one early case, the court stated, "we cannot conceive of a more impartial and truthful witness than the sun"⁵³ The agent was the sun, but the photograph was entirely machine made and this understanding was crucial to its value as evidence.

III. THE *BURROW-GILES* DECISION—THE PROBLEM

"The true mystery of the world is the visible, not the invisible."

~Oscar Wilde⁵⁴

This debate about photography—whether it was an art or a science—played out in numerous disciplines, including law. Interestingly, photographers did not assert copyright in their photographs until the 1860s—twenty years after photography was invented. Even then, only a handful of photographers had the audacity to attach copyright notice to their photographs. Among these copyright proponents were the successful portraitists Matthew Brady, Napoleon Sarony, and Benjamin J. Falk.⁵⁵

50. Gardner's two-volume "Photographic Sketch Book of the War" was published in 1866. *Id.* at 106.

51. WILLIAM FRASSANITO, *GETTYSBURG: A JOURNEY IN TIME 187-92* (1974).

52. *See, e.g.,* United States v. Fossat, 25 F. Cas. 1157, 1159 (C.C.N.D. Cal. 1857) (No. 15, 137) (exhibiting a photograph as evidence that an oak tree was of "extraordinary proportions and striking appearance").

53. *Franklin v. Georgia*, 69 Ga. 36, 43 (1882).

54. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY DE PROFUNDIS* 24 (Random House 1926) (1926). In the preface to this book, Wilde also wrote: "The artist is the creator of beautiful things. To reveal art and conceal the artist is art's aim." *Id.* at vii.

55. *See* photograph reproduced in HARTMANN, *supra* note 34, at 230. Sarony was thought of as one

When finally there emerged a legal dispute about the copyrightability of photographs, the argument advanced by the defendant was that photographs were merely the product of the soulless machine and therefore not the work of an author, as is required. The *camera* had directly transcribed the facts before it, so the argument went. At the other extreme, the plaintiff argued that it was possible to see in the photograph the original intellectual conception of the genius author.

At first the courts wrestled with the photographer-authors' claims with a few reported decisions going each way, but none with any serious analysis of the problem.⁵⁶ The first cases to address this question unequivocally held that a photograph was not within the subject matter of copyright law.⁵⁷ Here the courts reasoned that the photograph was a product of light and the machine and evidenced nothing of the artist's own conception.

Finally, in 1884—forty-five years after photography was invented—the Supreme Court heard a case in which the copyrightability of photographs was the central question. Who better to decide whether photography belonged to the realm of art or science than the Supreme Court? Although this dispute may appear to present in part an aesthetic question that is particularly inappropriate for the Court—and it is⁵⁸—embedded in the dispute is a constitutional question. How photography is categorized matters because the Court had to decide whether it was within the scope of the constitutional provision dealing with copyrights for Congress to extend the Copyright Act to photographs. If photography is an art, the act is constitutional, if it is a science, it is not.

of the earliest photographers to post copyright notice. See HIRSCH, *supra* note 1, at 88.

56. See, e.g., *Udderzook v. Pennsylvania*, 76 Pa. 340 (1874).

It is true the photographs we see are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. . . .

. . . It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye.

Id. at 352-53.

57. See, e.g., *Wood v. Abbot*, 30 F. Cas. 424, 425 (C.C.S.D.N.Y. 1866) (No. 17, 938).

58. In *Bleinstein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903), the Supreme Court held that courts should not inject their view on what constitutes artistic merit when deciding questions of copyrightability.

The issue arose because copyright law requires a work to exhibit “authorship” in order to receive protection. The Constitution permits Congress to grant copyright monopolies only to “authors” for their “writings.”⁵⁹ The Copyright Act has, since its first enactment in 1790,⁶⁰ set out a list of works of authorship such as maps, charts and books.⁶¹ In 1865, seventy-five years after enacting the first copyright act, and twenty-six years after the invention of photography, Congress expanded the subject matter of copyright to specifically include photographs.⁶²

59. The limitation on Congress’s authority to extend and expand copyright monopolies is found in Article I, Section 8, Clause 8, where Congress is empowered “[t]o promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. The Copyright Act therefore provides that copyright only subsists in “original works of authorship.” 17 U.S.C. § 102 (2000). This term “photograph” has never been defined in the act and has plagued courts for years. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E] (2003). Originality and authorship are concepts whose meanings have developed through the years by their construction in courts of law. See discussion *infra* Part VIII.C.

60. Copyright Act of 1790, ch. 15, 1 Stat. 124. The first copyright act was enacted in Great Britain in 1710. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

61. Congress gradually expanded the act beyond maps, charts and books to prints, Copyright Act of 1802, ch. 36, 2 Stat. 171; cuts, engravings, musical compositions, Copyright Act of 1831, ch. 16, 4 Stat. 436; and dramatic compositions, Copyright Act of 1856, ch. 169, 11 Stat. 138. The Act of 1870, however, was the first to grant copyright protection to a substantial list of pictorial, graphic, and sculptural works. Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354 (1980); Copyright covered “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts” Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198. See David Rabinowitz, *Everything You Ever Wanted to Know About the Copyright Act Before 1909, But Couldn’t Be Bothered to Look Up*, 49 J. COPYRIGHT SOC’Y U.S.A. 649, 652 (2001).

62. Copyright Act of 1865, ch. 126, 13 Stat. 540.

[T]he provisions of [the Act of 1831] shall extend to and include photographs and the negatives thereof which shall hereafter be made, and shall ensure to the benefit of the authors of the same in the same manner, and to the same extent, and upon the same conditions, as to the authors of prints and engravings.

Id. § 1. It has been speculated that this amendment was probably in reaction to Mathew Brady’s fame and popularity as a photographer, although an analysis of the legislative history does not confirm this. See *Goldstein v. California*, 412 U.S. 546, 562 n.17 (1973); Gerald J. Mossinghoff & Ralph Oman, *The World Intellectual Property Organization: A United Nations Success Story*, 79 J. PAT. & TRADEMARK OFF. SOC’Y 691, 696 (1997); Brian A. Carlson, *Balancing the Digital Scales of Copyright Law*, 50 SMUL. REV. 825, 830 (1997); Anthony L. Clapes et al., *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. REV. 1493, 1497 n.4 (1987); Jane C. Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 691-92 (2000); Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 564 n.85 (2000); Lisa C. Green, Note, *Copyright Protection and Computer Programs: Identifying Creative Expression in a Computer Program’s Nonliteral Elements*, 3 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 89, 93 n.18

This inclusion was the center of the controversy in the case of *Burrow-Giles Lithographic Co. v. Sarony*⁶³ decided by the Supreme Court in 1884, almost twenty years after photographs were included in the Copyright Act.⁶⁴ There the Court reasoned that for the amendment to be constitutional, a photograph must be deemed to be a “writing” and the production of an “author.”⁶⁵ As the Court stated: “It is insisted in argument, that a photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author.”⁶⁶ Thus, in this case, for the first time, the Court had to grapple with what it meant to be an “author.”⁶⁷

(1992); Jennifer T. Olsson, Note, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1494 n.26 (1992); Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 579 n.65 (1995); Doreen G. Small, Note, *Stemming the Tide of Video Game Piracy: Copyright Protection for the Audiovisual Displays*, 49 BROOK. L. REV. 889, 889 n.2 (1983); George Smirnoff III, Note, *Copyright on the Internet: A Critique of the White Paper's Recommendation for Updating the Copyright Act and How the Courts Are Already Filling In Its Most Importation Shortcoming, On-Line Service Provider Liability*, 44 CLEV. ST. L. REV. 197, 200 n.16 (1996).

63. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

64. Copyright Act of 1865, ch. 126, 13 Stat. 540.

65. *Burrow-Giles*, 111 U.S. at 56.

66. *Id.*

67. The Court had previously considered what it meant to be a “writing” in a majority opinion authored by the same Justice. *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879). See *supra* note 6.



"Oscar Wilde No. 18"

by Napoleon Sarony

"Copyright, 1882,

by N. Sarony"

Burrow-Giles Lithographic Co.

v. Sarony

The photograph at the center of the case is the now-famous portrait of Oscar Wilde, "Oscar Wilde, No. 18," one of more than twenty taken in the course of this sitting. In it a young Wilde is seated on a settee covered by strewn tapestries and fur, and which itself sits atop an oriental rug mounded to perfectly provide a rest for one foot. His head, gently tilted, rests on his hand, his elbow on his knee. In his other hand is a small book that rests on his other knee—presumably a volume of his poems. He is dressed in a tailored velvet suit with satin trim and knee breeches, silk stockings, and shiny patent-leather shoes with bows. His hair is long and tussled. His expression is somewhat earnest. The scene suggests that the viewer has come upon Wilde in his natural environment, which is richly textured and luxurious, and he is characteristically deep in thought about all things beautiful.

The photograph was produced in 1882 by Napoleon Sarony (1821-1896),⁶⁸ who had by then become a very prominent and successful portrait photographer.⁶⁹ Napoleon Sarony learned lithography in New York and

68. See HARTMANN, *supra* note 34, at 363.

69. Indeed, he later photographed the sitting Justices of the United States Supreme Court who had decided his case. See Mitch Tuchman, *Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 299 & n.65 (2001).

studied painting in Paris.⁷⁰ In 1864, at the age of forty-three, he came to England and received some instruction in photography from his brother,⁷¹ and opened a studio in Birmingham.⁷² In 1866, Napoleon Sarony moved to New York and immediately opened up shop as a portrait photographer in Union Square.⁷³ In the course of the next thirty years, he rose to the unique position once held alone by Mathew Brady as one of America's best-known photographers.⁷⁴ He was called "The Napoleon of Photography," and was, by all accounts, a born actor and storyteller and a charming eccentric.⁷⁵ In short, he was a personality to be sure. Sarony specialized in celebrity portraits in the infancy of both the portrait industry and the phenomenon of celebrity. He is reported to have made 40,000 celebrity portraits.⁷⁶ He contributed enormously to the fad of collecting celebrity portraits and sold his cabinet cards through a diversity of outlets, including mail order. Sarony had photographed many important people including theatrical celebrities, famous authors, and prominent politicians.⁷⁷ His specialty was the portrait of the theatrical celebrity. Although he had developed a reputation as having an eccentric and flamboyant personality, many of his subjects, such as Oscar Wilde, Mark Twain, and Sarah Bernhardt to name a few, certainly did as well.

70. HELMUT GERNSHEIM, *THE RISE OF PHOTOGRAPHY: 1850-1880 THE AGE OF COLLODION* 198 (Thames & Hudson 1988) (1955).

71. Napoleon's older brother, Oliver Francois Sarony, was the most successful provincial photographer in England in the late 1800s. It was estimated that he made about 10,000 pounds a year as a photographer in provincial England. *Id.* Although born in Quebec, Canada, both Saronys had at some point emigrated to England. *Id.* Oliver Sarony's studio, referred to as a "palace," communicated his standing with its broad flight of steps leading up to the imposing entrance to his 120-foot long studio, which was furnished in Louis Quinze style. *Id.* It was "the embodiment of good taste and costly elegance." *Id.* "People came from many parts of the country to be photographed by [Oliver] Sarony, and as his business brought a good deal of money to the town, . . . [which later] renamed the square in which his establishment stood, 'Sarony Square.'" *Id.*

72. *Id.*

73. *Id.* Robert Hirsch dates this event in 1864. See HIRSCH, *supra* note 1, at 86.

74. *Id.* at 86.

75. *Id.* at 86-87.

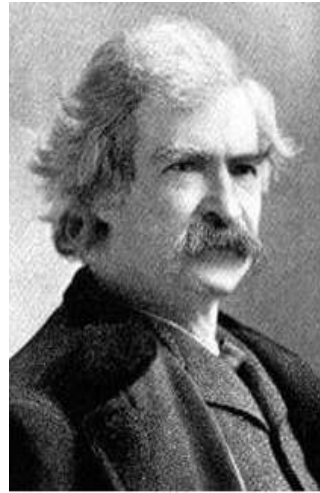
76. *Id.* at 87.

77. See Lee Schulman, *Thank Napoleon Sarony*, ASMP BULLETIN, Apr. 2002, at 5. For instance, he made portraits of Samuel Tilden (Governor of New York and Presidential candidate), General John Adams Dix (U.S. Senator and Governor of New York), and Schuyler Colfax, (United States Vice President and Speaker of the U.S. House of Representatives). Picture History, *Napoleon Sarony*, at <http://www.picturehistory.com/find/p/20451/mcms.html> (last visited Apr. 5, 2004). In addition, he photographed sitting Supreme Court justices. See Tuchman, *supra* note 69, at 299.

Sarony's Other Famous Clients



Sara Bernhardt
1887



Mark Twain
c. 1900

The richness of facts underlying this dispute is nowhere evident in the lower court's opinion that managed also not to engage the question of authorship, but stated simply that the defendants had not overcome the presumption of constitutionality afforded an act of Congress and decided in Sarony's favor in 1883.⁷⁸

In their briefs to the Supreme Court, the defense's position was stark. The argument was that there is no originality in the manual operation of a machine that produces an unaltered transcription of the scene before it. After all, its merit is its accuracy! They argued that the operator of the camera was in no way like the author of a creative work. To make this point, the defense contrasted engravings, paintings, and prints, which "embody the intellectual conception of its author, in which there is novelty, invention, originality"⁷⁹ with a photograph, which "is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and

78. *Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591 (C.C.S.D.N.Y. 1883).

79. *Burrow-Giles*, 111 U.S. at 58-59. Note that photographs were not contrasted with maps and charts, which were also listed in the Copyright Act.

involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.”⁸⁰ The defense admitted that there was genius in the process, but gave credit to the machine:

[W]hile the effect of light on the prepared plate may have been a discovery in the production of these pictures, and patents could properly be obtained for the combination of the chemicals, for their application to the paper or other surface, for all the machinery by which the light reflected from the object was thrown on the prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the process is merely mechanical, with no place for novelty, invention or originality.⁸¹

The operator of the machine, however, played only a minimal role: “It is simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit.”⁸²

Thus, the case was tied up with a battle of understandings over photography. Was it a scientific process involving the mere transmission of light, or did the resulting product reflect the genius of a Romantic author? The Supreme Court resolved the case in favor of the Romantic author. However, it did not resolve this dispute for all photography, but appears to have limited its determination to the one photograph before it. In fact, it stated explicitly that the defense’s view of photography may be accurate for other photographs: “This may be true in regard to the ordinary production of a photograph, and further, that in such case a copyright is no protection. On the question as thus stated we decide nothing.”⁸³ This is a remarkable position to take in this debate. In effect, the Supreme Court accepts that it may be true that generally photography is a purely mechanical process that merely transcribes the actual scene before the camera, but that there may be interventions in this process by authors. The obvious questions this position raises are, what would constitute such an intervention, and how can one recognize it?

There being no U.S. precedent on this question, the Court resorted to English case law,⁸⁴ the 1883 case of *Nottage v. Jackson*,⁸⁵ for guidance on how to find authorship in photographs. The case, involving a photograph of an Australian cricket team, decided that the plaintiffs, the owners of the

80. *Id.* at 59.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 60.

85. *Nottage v. Jackson*, 11 Q.B. 627 (1883) (Eng. C.A. 1883).

photography studio were not the authors of the photograph when they were not present at the shoot and they gave no direction in its production.⁸⁶ The Supreme Court in *Burrow-Giles* seems to have been persuaded by this English precedent. The *Nottage* decision is the only case relied upon by the Court in its determination of the authorship of photographs. As will be shown, the Court adopted some of the specifics of the *Nottage* court's analysis.⁸⁷

The *Burrow-Giles* Court quoted the reasoning of the *Nottage* court in regard to who was the author of a photograph: "The nearest I can come to, is that [the author] is the person who effectively is as near as he can be, the cause of the picture which is produced."⁸⁸ The English court acknowledged the view that the photograph is actually made by the camera and the sun, but that the human operator does have a supporting role. It also acknowledged that often many humans were involved in the production of a photograph. The *Nottage* court found that the most deserving candidate was "the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that" is the author.⁸⁹ The Supreme Court also quoted *Nottage* on the concept of "author": "[A]uthor' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected"⁹⁰ Finally, the Court quoted *Nottage* for the proposition that "photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination."⁹¹ Even though the *Nottage* court was not faced with the question of *if* there was an author of a photograph, but was instead occupied with the question of *who* the author was, the Supreme Court adopted its reasoning.

But how did the author invest its personality into this beautiful photograph? Where can the law locate the artistic skill in its production? In discussing the photograph, the Court quotes the lower court's finding that, it

86. *Burrow-Giles*, 111 U.S. at 60-61. Thus it can be thought of as an early case addressing the "work made for hire" doctrine whereby the employer becomes the "author." See 17 U.S.C. § 101 (2000) ("A 'work made for hire' is . . . a work prepared by an employee within the scope of his or her employment"); see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

87. However, it must also be said that this precise question was not presented to the Court. In the case at bar, the plaintiff, Sarony, was the owner of the photographic establishment and there was no contention that anyone else in the process was the author.

88. *Burrow-Giles*, 111 U.S. at 61 (quoting *Nottage*, 11 Q.B. at 632).

89. *Id.*

90. *Id.*

91. *Id.* (citing *Nottage*, 11 Q.B. at 637).

“is a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same . . . entirely from his own original mental conception.”⁹² According to the Court, Sarony

gave visible form [to the photograph] by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression,⁹³ and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit⁹⁴

This was enough for the Court. Beyond quoting Sarony's own brief the Court did not analyze the facts any further.

These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish, and sell⁹⁵

So the photograph receives legal protection on the condition of bearing the intellectual mark of its author.

That Sarony prevailed is not what is remarkable in this decision. After all, he had the advantage: the equities were on his side and he was a famous and successful portraitist—a photographer with status. It was therefore reasonable for the Court to want to make this ruling, but it faced the problem of how to do it. How was a court to find an authorial presence in photography as it was then understood? Clearly the Court was able to see Sarony in the authorial role, by heavy reliance on Sarony's own account. But this particular solution was not inevitable and the means by which the Court achieved the

92. *Burrow-Giles*, 111 U.S. at 54-55. Although the Court states that this quote is from the lower court's findings of fact, this language is also in Sarony's brief.

93. This theory that it is the photographer that is responsible for the expression of the sitter finds support in a quote by B.J. Falk (1853-1925), a successful portrait photographer who was a contemporary of Sarony and the *Burrow-Giles* decision: “The temperament of a photographer always gets into his work. There is no escape from it. And the temperament itself is due to changes. Some mornings when I am in bad humor, no matter what I may do, all my sitters will have a sour expression in their faces. On the other hand, when I feel particularly happy or elevated over some good news, my feeling is sure to impact itself to the countenance of my sitters.” HARTMANN, *supra* note 34, at 229-32.

94. *Burrow-Giles*, 111 U.S. at 55 (quoting lower court's findings of fact). This arranging is apparently what the art photographers, *see infra*, at the time thought was their skill. A turn of the century photography critic said of an art portrait photographer he greatly admired: “There is no photographer who can pose the human body better than he, who can make a piece of drapery fall more poetically, or arrange flowers in a man or woman's hair more artistically.” HARTMANN, *supra* note 34, at 46 (praising F.H. Day).

95. *Burrow-Giles*, 111 U.S. at 60.

result is problematic and consequential. Significantly, history demonstrates that this development in the law represents the least controversial and most risk-averse approach to the problem. In order to appreciate the other choices the Court had and the limitations on the Court's analysis, it is necessary to understand how photography had developed at that historical moment.

IV. THE DEVELOPMENT OF THE PHOTOGRAPHIC INDUSTRY & TECHNOLOGY

"[A]ny one who knows what the worth of family affection is among the lower classes, and who has seen the array of little portraits stuck over a labourer's fireplace . . . will perhaps feel with me that in counteracting the tendencies, social and industrial, which every day are sapping the healthier family affections, the sixpenny photograph is doing more for the poor than all the philanthropists in the world."

~*Macmillan's Magazine* [London], September 1871⁹⁶

The *Burrow-Giles* result is not at all surprising given the fact that photography had become big business in the forty-five years since its invention. At the time of the decision, the photography industry was booming.⁹⁷

Of course one of the first substantial uses of this new technology was portraiture.⁹⁸ The phenomenon of photographic portraiture can be explained by the emerging middle class's desire to confirm and mark out identities. The owning of a portrait was, in itself, a confirmation of social status.⁹⁹ Demand for these commodities fueled the rapid development of the photography industry and a search for new modes of production. Indeed, the portrait industry was a model of capitalistic growth in the second half of the nineteenth century.¹⁰⁰ It was not long before portraits were mechanically produced *en mass*. This mechanization served to bring down the price, thus making the commodity more readily available. As a result, portraits eventually came to lose their significance as symbols of status.

96. John Richard Green, *Edward Denison—In Memoriam*, *MACMILLAN'S MAG.*, vol. XXIV, May to Oct. 1871, at 382.

97. See JEAN-CLAUDE LEMAGNY & ANDRE ROUILLE, *A HISTORY OF PHOTOGRAPHY: SOCIAL AND CULTURAL PERSPECTIVES* 45 (Janet Lloyd trans., Cambridge Univ. Press 1987).

98. See ROSENBLUM, *supra* note 31, at 39.

99. Portrait painting had previously been the preserve of the upper class. In order to satisfy the desire of the new middle class to own portraits of themselves, other forms of cheap portraits such as silhouettes became popular prior to the invention of photography. TAGG, *BURDEN OF REPRESENTATION*, *supra* note 17, at 37-39.

100. See *id.* at 37.

The portrait industry became an extremely lucrative trade in the mid-nineteenth century.¹⁰¹ The growth of photographic establishments was swift. Portrait studios seemed to have cropped up everywhere. Within just ten years of the invention of photography, there were seventy-seven portrait studios in New York City alone.¹⁰² Photographs of oneself, one's family, but also celebrities, royalty, and other VIPs of the day were in great demand. The small "carte-de-visite" photographs invented in 1854, and then their larger replacement, the "cabinet card" introduced in 1866, became instant phenomena.¹⁰³

The development of the technology was fueled by this interest, and in turn, generated new interest. The complicated and inconsistent meanings ascribed to photography are explainable to some extent by the origins of the technology and the development of the camera. An examination of the history of the technological development of photography suggests that the limitations imposed by the technology have been translated into the uses and valuations of the photograph.

When photography was first invented, the public was excited about the possibilities it created for mechanical reproduction. In 1839, Louis Jacques Mandé Daguerre was the first to make public his photographic process.¹⁰⁴ The "daguerreotype" immediately generated enormous public interest. Publicity for the daguerreotype trumpeted that it "requires no knowledge of drawing" and that "anyone may succeed . . . and perform as well as the author of the invention."¹⁰⁵

The real potential of photography at that time, however, was limited to a great extent by the technology. Daguerreotypes were mainly used for portraits

101. *See id.* at 39.

102. *See* O. HENRY MACE, COLLECTOR'S GUIDE TO EARLY PHOTOGRAPHS 8 (1990). Because of the instant popularity of the daguerreotype, within two years of its introduction in the United States, every major town in the country had a daguerreotype studio. *Id.* at 7-8. Within fifteen years, 10,000 people were employed as "daguerreotypists." *See* HELMUT GERNSHEIM & ALISON GERNSHEIM, L.J.M. DAGUERRE: THE HISTORY OF THE DIORAMA AND THE DAGUERREOTYPE 141 (Dover Publications 1968). In Nathaniel Hawthorne's *The House of the Seven Gables*, the main character is a daguerreotypist. *See* NATHANIEL HAWTHORNE, THE HOUSE OF THE SEVEN GABLES (Heritage Press 1935) (1851). The development of the calotype fueled this growth further. For instance, in England while there were only a handful of photography studios in the mid-1840s the number had grown to sixty-six in 1855, and to 147 two years later. *See* HARTMANN, *supra* note 34, at 327 n.3.

103. "Carte-de-visites" were small paper prints (2½ x 4C) developed by André Adolphe Disdéri in 1854. Large numbers of prints could be made from this method. *See* PHOTOGRAPHY: A CRITICAL INTRODUCTION (Liza Wells ed., Routledge Press 2000).

104. *See* TAGG, BURDEN OF REPRESENTATION, *supra* note 17, at 41.

105. Dr. Robert Leggat, *A History of Photography: Louis Jacques Mande Daquerre* (2000), at <http://www.rleggat.com/photohistory/history/daguerr.htm> (last visited Apr. 5, 2004).

with few exceptions. Daguerreotypes were expensive and they could not be practically produced outside of a lighted studio. Moreover, the process could only produce a single, fragile print. These limitations were a barrier to documentary photography, but an advantage to portrait photography. Like the owner of a painted portrait, the owner of a daguerreotype could be certain that he had an original that could not be duplicated. Because the resulting image was expensive and delicate, it was kept safe in ornate cases so that the daguerreotype became something like a portable version of the painted portrait.

Even though the daguerreotype was mainly used for portraits, expensive, and one-of-a-kind, nothing of an art practice emerged. The poses used were quite standard—there was really nothing that could be called an arrangement or composition. There was no use of light and shade. The photographer at that time seemed to be more occupied with the mechanics and science of the pursuit. Daguerreotypists never signed their work as later photographers did.¹⁰⁶ Because there was no means by which to reproduce the daguerreotype (except to re-photograph it, which did not produce a satisfactory image), the issue of copyright protection was nonexistent.

The “calotype,” invented by William Henry Fox Talbot, provided the answer to the problem of the single print.¹⁰⁷ Talbot’s publication announcing his invention was entitled, “Some account of the Art of Photogenic drawing, or the process by which natural objects may be made to delineate themselves without the aid of the artist’s pencil.”¹⁰⁸ The title of his 1844 book, the first ever photographically illustrated book, “The Pencil of Nature” similarly emphasized that the artist was nature herself.¹⁰⁹

Since the calotype was produced from a reproducible negative, it enabled multiple production. This was a significant first step in reducing the price of photographs. Whereas the price of a daguerreotype would have been approximately a guinea (£1.05), the weekly wage for many workers, the price of a calotype would have been as little as a shilling (5p), making it much more accessible to a wider audience and opening the possibility of other uses in addition to portraiture.¹¹⁰ Talbot’s process also printed on paper, not metal.

106. See HARTMANN, *supra* note 34, at 146-47.

107. TAGG, BURDEN OF REPRESENTATION, *supra* note 17, at 44.

108. William H.F. Talbot, *Some Account of the Art of Photogenic Drawing, or the Process by Which Natural Objects May Be Made to Delineate Themselves Without the Aid of the Artist’s Pencil*, ROYAL SOC’Y OF LONDON, Jan. 31, 1839. Talbot’s publication actually precedes Daguerre’s paper, however, there was a significant delay in adopting this technology.

109. See HIRSCH, *supra* note 1, at 52.

110. Dr. Robert Leggat, *A History of Photography: The Beginnings of Photography* (2000), at

Of course this change permitted the copying of photographs. As a result, a significant pirate market emerged.¹¹¹ Thus, the sheer weight of the economic interests at stake virtually ensures that the courts would find some way of extending copyright to photographs.

The introduction of “carte-de-visite” photographs by Andre Disdéri in 1854, met with a huge success as well, although it took some time to take hold.¹¹² The advance here was that this process produced eight duplicate images on the same negative. This was photography for the masses and eventually developed into a mania.

At this point, accuracy in portraiture was highly valued. Somehow the less expensive the portrait was, the more it was regarded as true to life. With cheaper portraits, come less skilled practitioners and more routinized processes. The more mass-produced it was, the more mechanical it was regarded. Thus, mechanization seems to verify the truth.

As the photographic technology developed, it became cheaper and easier to use due to increased mechanization and the simplification of the process. Thus, the need for trained or skilled practitioners diminished. These developments not only brought down the prices of the photographs, but also made the technology accessible to a wider market. In particular, the phenomenon of the amateur photographer arose.¹¹³

As a market in photographs developed, the producers of these photographs realized they needed a means by which they could control their distribution as the technology itself provided a means to their competitors to share in the goodwill and profits of their work. The carte-de-visites and cabinet cards were highly sought after as they generally depicted famous persons. The photograph of Oscar Wilde by Napoleon Sarony that was at the center of the *Burrow-Giles* case was easily copied by a lithographic company and then used in an advertisement for men's hats.¹¹⁴

<http://www.rleggat.com/photohistory/history/beginnin.htm> (last visited Apr. 5, 2004).

111. In *Burrow-Giles*, the defendant was accused of selling some 85,000 copies of the copyrighted photograph of Oscar Wilde. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

112. See MACE, *supra* note 102, at 108. “Even the smaller studios in Britain did a lively business in cartes-de-visite. J.R. Sawyer of Norwich took 6,000 negatives a year and sold 50,000 prints, whilst Horatio Nelson King, who introduced the carte-de-visite into Bath, mentions an average sale of 60,000 to 70,000 *cartes* per annum.” GERNSEIM, *supra* note 70, at 198.

113. See TAGG, BURDEN OF REPRESENTATION, *supra* note 17, at 16-17. This development reached its apparent zenith with the now classic KODAK slogan: “You just press the button and we do the rest.” George Eastman was famous for and ultimately successful because of his unyielding objective to put the technology of the camera into the hands of amateurs and to make photography fully accessible to the emerging middle class. See ELIZABETH BRAYER, GEORGE EASTMAN: A BIOGRAPHY 57-72, 297 (1996).

114. See MERLIN HOLLAND, THE WILDE ALBUM 92 (1997). The ad suggests that it is a celebrity

V. ART & PHOTOGRAPHY

"Actually, I'm not all that interested in the subject of photography. Once the picture is in the box, I'm not all that interested in what happens next. Hunters, after all, aren't cooks."

~Henri Cartier-Bresson¹¹⁵

The contest in the *Burrow-Giles* case is representative of the debate that raged over whether photography was an art or a science in the late nineteenth century. That debate, however, represents a radical shift in the way photography was initially viewed by artists at the time of its invention.

An examination of the history of the portrait industry reveals much about how photographs were initially understood. Portraiture was one of the first uses of photography, but this use is difficult to classify either as art photography or documentary photography. Portrait photography entailed both classes of photography—the utilitarian and the aesthetic.¹¹⁶ All portraits were supposed to give a truthful record of the individual's characteristics, but some were also supposed to be admired as a thing of beauty to be enjoyed apart from any consideration of its being a good likeness. Thus, in portraiture, the general culture wars about photography are played out.

Sarony's claims about his photographs mirror the assertions that art photographers at this time were making. The claims of art photographers are linked to a broader debate about photography. The Court was probably impressed and possibly influenced by Sarony's status as a photographer, but it was also persuaded by his particular artistic practices. Sarony's argument to the Court was representative of the claims of other "art photographers" at

endorsement that today might be seen as a violation of Wilde's right of publicity; however, at the time this right did exist. The right of privacy, thought by some to be a genealogical cousin of the right of publicity was only just being conceived of then. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also Irwin P. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990); see also Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966).

115. Henri Cartier-Bresson, *The Decisive Moment in Photography and Print*, in PHOTOGRAPHY IN PRINT: WRITINGS FROM 1816 TO PRESENT 384-86 (Vicki Goldberg ed., 1981).

116. One prevalent type of photograph at the time perfectly illustrates the ambiguity of the categories. These were the so-called "Post-Mortem Portraits," which featured dead children in an effort to document them, but also to capture their essence or soul, which was believed to be ascertainable by the lens of the camera, but not the human eye. See HIRSCH, *supra* note 1, at 33; NAOMI ROSENBLUM, *A WORLD HISTORY OF PHOTOGRAPHY* 52 (3d ed. 1997) ("Even more joyless were the images of the dead made as keepsakes for bereaved families for whom they possessed 'the sublime power to transmit the almost living image of . . . loved ones.'").

the time. In order to be thought of as artists, this elite group of photographers strived to get artistic, painterly results. One way to achieve this goal was to create artistic compositions. Thus, these portrait photographers concentrated on the arranging of the subject, the background, the props, the costume, and the expression. The result of these efforts can be called picture-making, as opposed to picture-taking.¹¹⁷

Artists' relationship with photography goes all the way back to its invention.¹¹⁸ Artists were involved in the invention and development of the process and artists made first uses of cameras in their art.¹¹⁹ Prior to discovering the first camera, Louis Daguerre was an artist.¹²⁰ William Henry Fox Talbot, inventor of the calotype, was an amateur artist who used the camera lucida and camera obscura as aids to drawing.¹²¹ Daguerre had in mind opportunities for artistic creations with the aid of the camera. When he circulated his notice to attract investors in his invention in 1838, he mentioned portraiture specifically as one of its possible applications.¹²²

However, for the majority of artists, their first reaction to the invention of photography was outwardly hostile. Art historian John Tagg suggests that "the same conception of the photograph as a mechanised, automatic product evokes not futuristic fantasy, but the contempt of a Romantic theory of culture, which sees art as the élite and manly expression of a given human spirit."¹²³ Their reactions may also be read as evidence that they may have felt threatened by the new technology. For example, French painter Paul Delaroche is said to have exclaimed in reaction to Daguerre's announcement of his new invention: "From this day, painting is dead!"¹²⁴ Other reactions

117. Contrast the English "take a picture" with the French "faire un photograph." It is ironic then that the French law sought to take account of the extent to which creation of a monopoly right in a photograph would be a private taking of a public scene. See EDELMAN, *supra* note 11, at 16-17.

118. Maybe even further. See generally DAVID HOCKNEY, *SECRET KNOWLEDGE: REDISCOVERING THE LOST TECHNIQUES OF THE OLD MASTERS* (2001); see also Mel Gussow, *Old Masters Pursued by Artistic Gumshoes: Debating Whether Artists Used Optics*, N.Y. TIMES, Nov. 29, 2001, at E1; see also Richard B. Woodward, *The Truth Is Out: How Realists Could Be So Realistic*, N.Y. TIMES, Nov. 25, 2001 (reporting results of study by David Hockney suggesting that artists as far back as the Old Masters used mechanical devices such as the camera obscura and the camera lucida secretly as an aid to drawing).

119. "[T]hird-rate artists, who abandoned their former profession in favour of the new art" GERNSHEIM, *supra* note 70, at 36.

120. He was a successful painter and set designer for the Paris Opera. See SCHARF, *supra* note 38, at 5.

121. See *id.*

122. See *id.* at 6.

123. TAGG, *FOUNDATIONS OF DISPUTE*, *supra* note 17, at 125.

124. HARTMANN, *supra* note 34, at 145. However, Delaroche apparently later became a convert of the new technology stating:

expressed disdain and characterized photography as a mechanical helpmate for a sort of plagiarism of nature.¹²⁵ Charles Baudelaire, (1826-1867), a well known poet of the period offered this criticism of the medium:

[A] new industry arose which contributed not a little to confirm stupidity in its faith and to ruin whatever might remain of the divine in the French mind. The idolatrous mob demanded an ideal worthy of itself and appropriate to its nature A revengeful God has given ear to the prayers of this multitude. Daguerre was his Messiah. And now the faithful says to himself: "Since Photography gives us every guarantee of exactitude that we could desire (they really believe that, the mad fools!), then Photography and Art are the same thing." From that moment our squalid society rushed, Narcissus to a man, to gaze at its trivial image on a scrap of metal. . . .

. . . I am convinced that the ill-applied developments of photography, like all other purely material developments of progress, have contributed much to the impoverishment of the French artistic genius, which is already so scarce. . . . [B]y invading the territories of art, [this industry] has become art's most mortal enemy If photography is allowed to supplement art in some of its functions, it will soon have supplanted or corrupted it altogether, thanks to the stupidity of the multitude which is its natural ally. It is time, then, for it to return to its true duty, which is to be the servant of the sciences and arts—but the very humble servant . . . let it be the secretary and clerk of whoever needs an absolute factual exactitude in his profession—up to that point nothing could be better. . . . But if it be allowed to encroach upon the domain of the impalpable and the imaginary, upon anything whose value depends solely upon the addition of something of a man's soul, then it will be so much the worse for us!¹²⁶

Daguerre's process completely satisfies all the demands of art, carrying all the essential principles of art to such perfection that it must become a subject of observation and study even to the most accomplished painters. . . . Nature is reproduced in them not only with truth, but also with art. . . . When this method is made known, it will no longer be possible to publish inaccurate views, for it will be very easy to obtain in a few moments a most exact picture of any place.

PETER CASTLE, *COLLECTING AND VALUING OLD PHOTOGRAPHS* xiii (1973).

125. For instance, Alphonse de Lamartine, the powerful French Minister of Foreign Affairs and Romantic poet, wrote in 1848:

It is because of the servility of photography that I am fundamentally contemptuous of this chance invention which will never be an art but which plagiarises nature by means of optics. Is the reflection of a glass on paper art? No, it is a sunbeam caught in the instant by a manoeuvre. But where is the choice? In the crystal, perhaps. But, one thing is for sure, it is not in Man. The photographer will never replace the painter, one is a Man, the other a machine. Let us compare them no longer.

EDELMAN, *supra* note 11, at 45, citing VI ALPHONSE DE LAMARTINE, *COURS FAMILIER DE LITTÉRATURE. ENTRETIENS SUR LEOPALD ROBERT* 140 (1858); *see also* TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 125-26.

126. Charles Baudelaire, *The Salon of 1859 II: The Modern Public and Photography*, in *ART IN PARIS 1845-1862: SALONS AND OTHER EXHIBITIONS* 152-54 (J. Mayne trans., Phaidon 1965); *see also* TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 125-26. Baudelaire's outrageously harsh review of the photography exhibited as an adjunct to the Salon of 1859 has been pointed to as additional evidence of the contempt artists felt toward photographers. It has been suggested, however, that Baudelaire had not even seen the photography section of the exhibition and that his review was intended to be more of a diatribe "against the growing commercialization of photography." GERNSEIM, *supra* note 70, at 35. He had stated

These artists certainly did not condescend to recognize photography as a potential rival to their art.¹²⁷ Thus at first the exaggerated expectations that the public formed regarding Daguerre's invention aroused the suspicion and animosity of artists. Eventually, however, their response changed to "contemptuous indifference" and "the process was dismissed into the limbo of chemistry and mechanics."¹²⁸

Photography was, however, adopted by many artists, although most of the artists who jumped ship were seen as second rate artists to begin with. At the time the *Burrow-Giles* case was decided, very few photographers, and even fewer artists, considered photography to be within the realm of art. The photography critic, Sadakichi Hartmann, who was very friendly with the art photographers wrote in 1900 that "[t]he majority of photographers do not consider their profession an art. Even [Robert] Demachy and [Alfred] Stieglitz feel very sceptical [sic] about it."¹²⁹ Instead, photography was embraced by artists merely as aid to the production of a true art.¹³⁰

The dominance of portraiture, like photography as a whole, was divided, by the turn of the century, into three distinct classes of non-instrumental photography: the amateur or hobbyist; the mass-producing professional; and the so-called "artistic photographers."¹³¹ At this time, the art photographers began to assert themselves as artists. In fact, they became activists on the subject. They were well organized and had quite a public presence. They formed clubs, leagues, and societies dedicated to advancing their claims to art. They staged lectures and debates. They held photography exhibitions¹³²

that commercial photography was "the refuge of every would-be painter, every painter too ill-endowed or too lazy to complete his studies." *Id.* Baudelaire was particularly upset by the "vulgarization of taste as evidenced by the popular and frequently inane anecdotal and pornographic pictures for the stereoscope—none of which were shown at the Salon." *Id.* Of course, Baudelaire was not just upset about the vulgarization of photography, but of all French art. *Id.*

127. *See infra* note 155.

128. CHARLES H. CAFFIN, *PHOTOGRAPHY AS FINE ART* 3 (Morgan & Morgan 1971) (1901).

129. HARTMANN, *supra* note 34, at 69. Robert Demachy (1859-1937) was the leading French photographer. *Id.* at 321 n.34. And Alfred Stieglitz (1864-1946) was probably the number one proponent of art photography in the United States. As support for this proposition, Hartmann states that not a single turn of the century art critic had turned his attention to photography. *Id.* at 69.

130. *Id.*

131. *Id.* at 44. The reason this rupture occurred so many years after the invention of photography is that for a good many years the only persons who produced photographs were professional since the chemicals involved were so cumbersome and the equipment was so expensive. *See* CASTLE, *supra* note 124, at 69-70.

132. "In 1859, following protracted and difficult bargaining with the ministry, the SFP obtained permission to hold its exhibition at the same time as the Salon des Beaux-Arts and in the same building,

modeled on the art exhibitions from which they were excluded, and they published journals of “art photography” devoted entirely to making the argument for photography to be classed as a fine art.¹³³ For instance, they established the Philadelphia Photographic Salon, an exclusive and highly selective exhibition where in order to be included, photographs were required to demonstrate “distinct evidence of individual artistic feeling and execution.”¹³⁴ All of these activities can be seen as an argument about the rightful place of *their* photography alongside art.

Art photographers, in order to be taken seriously as artists, strained to achieve artistic effects. They imitated paintings in their compositions and pictorial qualities. They pushed lyricism as far as they could. Their subjects were primarily allegorical studies.¹³⁵ Their sitters rarely wore contemporary costumes and seemed always to be carrying urns. One critic ridiculed that they were always filled with “models, clad in cheese-cloth, masquerading as angels, Madonnas, fairies, or classic heroines.”¹³⁶ Their titles were deliberately arty and pretentious.¹³⁷ Thus, they simply repeated in a new medium what had already been done in another. Instead of capitalizing on this opportunity to represent images never before seen in two-dimension, in an effort to be recognized as artists, art photographers strained in their photographs to remind viewers of pictures they had seen before.

The quality of the print appeared to be of less importance to these photographers than the subject represented. While the public, artists, and art critics had begun to “judge painting by the exactitude of photography,” they had also begun to judge photography by the standards of painting, and in particular, as against creative composition.¹³⁸ For instance, speaking of Julia Margaret Cameron, the high priestess of “high art” photography, one critic stated that her work was reminiscent of the works of “Caravaggio, Tintoretto,

although in a separate area. This tricky compromise conferred upon photography a semi-recognition of its artistic status.” LEMAGNY & ROUILLE, *supra* note 97, at 45.

133. See HARTMANN, *supra* note 34, at 44-45. “While claiming that their distinction resided in the photographs themselves, they assiduously worked at setting up the institutional structures and frameworks of discourse—independent galleries, salons, journals, forms of patronage, and modes of criticism—which would negotiate the sought for status of Art for their aspiring, individuated work.” TAGG, *GROUND OF DISPUTE*, *supra* note 17, at 129.

134. CAFFIN, *supra* note 128, at 8.

135. “Some of the worst examples of ‘High Art’ photography were produced by artists who . . . attempted to ‘raise’ it from the reproduction of everyday things to the portrayal of ‘loftier’ subjects . . .” GERN SHEIM, *supra* note 70, at 36.

136. CAFFIN, *supra* note 128, at 3.

137. See HARTMANN, *supra* note 34, at 109.

138. See GERN SHEIM, *supra* note 70, at 36.

Giorgione, Velasquez, and other princes of their art. The aggroupments and figures are so skillfully arranged that it is difficult to determine what they could gain by being painted.”¹³⁹

Pictorialism reigned in the second half of the nineteenth century. Art photographers used this style as the first attempt to bring photography into the realm of fine art. Pictorialists used a painterly approach, often manipulating their images by hand. They attempted to create painterly results. The photographs they produced were deliberately blurred and misty. They used a soft focus, backlighting and printed the images on textured paper. In particular, many attempted to make a photograph look like an old master, and in particular a Holbein or a Dürer drawing.¹⁴⁰ In short, they intervened in the process of developing and printing to control the result—strengthening or diminishing various pieces until they achieved the desired result. For instance, Sir William J. Newton, R.A., Vice-President of the Photographic Society of London, stated that “an artistic photographer should improve his negatives ‘in order to render them more like works of art’ and further that any means was justified to attain that end.”¹⁴¹

Those art photographers whose practice placed emphasis on a manipulation of the image did not abandon their concern with the compositional values. Some even used the darkroom to achieve compositional effect. Three photographers, William Lake Price, Oscar Gustav Rejlander and Henry Peach Robinson, all artists turned photographers, had developed a process of creating elaborate compositions that were actually pieced together from numerous different negatives.¹⁴² For instance Rejlander’s “The Two Ways of Life,” exhibited at the Manchester Art Treasures Exhibition of 1857—the first exhibition in which photographs were to be displayed alongside fine art, was a large allegorical composition likely modeled after Thomas Couture’s “Les Romains de la Décadence” (1847) in the Louvre.¹⁴³ About this photograph he later said:

I think that as far as the conception of a picture, the composition thereof, with the various expressions and postures of the figures, the arrangement of draperies and costume, the

139. *Id.* at 50.

140. Gertrude Käsebier was known to attempt to reproduce Hans Holbein drawings in her photography. See HARTMANN, *supra* note 34, at 65.

141. GERNSEIM, *supra* note 70, at 36.

142. *Id.* at 36-40. Lake Price became successful in photographing Old Master paintings for printsellers who issued his reproductions in the form of engravings. Rejlander also photographed Old Masters. *Id.* at 36-38.

143. *Id.* at 38.

distribution of light and shade, and the preserving it in one subordinate whole- that these various points, which are essential in the production of a perfect picture, require the same operations of mind, the same artistic treatment and careful manipulation, whether it be executed in crayon, paint, or by photographic agency.¹⁴⁴

This composition was created “from thirty separate negatives of single figures and groups, and several more of the background.”¹⁴⁵

Robinson reacted to “[a]rtists [who] looked on photography as merely a dull means of recording uninteresting facts, ‘wilfully mistaking the instrument for the man, and always asserting that a photograph could have no influence on the feelings and on the emotions, that it had no soul,’” and sought to produce photographs “calculated to excite painful emotions.”¹⁴⁶ His 1858 photograph “Fading Away,” made up from five negatives, represented a dying girl surrounded by her grieving family and fiancé.¹⁴⁷ “Like a painter, Robinson built up his composition from numerous sketches, which were afterwards combined in a full-scale drawing. He then worked out what portions should go on each negative, and the best places for the joins. After that, he selected the models, costumes, and accessories.”¹⁴⁸

At the close of the century, a group of photographers rallied against the Pictorialist movement. These were the Photo Secessionists, and their purpose was the elevation of photography to a fine art. The group sought to bring photography into its own aesthetic and to move it further away from the realm of painting. The group stressed purity in their photography, thus turning away from painterly approaches like hand manipulation.¹⁴⁹ These photographers may have embraced this position more in theory, than in practice. Alfred Stieglitz, the champion of artistic photography, was interested in individual expression in photography.¹⁵⁰ This was thought difficult to achieve and for

144. *Id.*

145. *Id.* This photograph “provoked heated discussions” and some “complained of the semi-nudity of some of the models.” *Id.*

146. *Id.* at 40.

147. *Id.*

148. *Id.* at 42-44.

149. HARTMANN, *supra* note 34, at 111-13. Hartmann had this to say about Alfred Stieglitz, the leading art photographer: “He is by conviction and instinct an exponent of the ‘straight photograph;’ leaving his models to pose themselves, and relying for results upon means strictly photographic. He is to be counted among the Impressionists; fully conceiving his picture before he attempts to take it, seeking for effects of vivid actuality, and reducing the final record to its simplest terms of expression. He takes snapshots, but does not touch the button until he has completely thought out the pictures, studied exactly the scene, conditions of light and position of the figures, and then bides his time until the conditions are possible, and then again waits for the figures, unconsciously, to pose *themselves*.” *Id.* at 114.

150. See CAFFIN, *supra* note 128, at 39-40.

most it simply became synonymous with “painter-like expression.”¹⁵¹ Many art photographers who ran portrait studios strongly identified with this vision.



Alfred Steiglitz, “Steerage” 1907

The democratization of the photographic industry—the putting of cameras into the hands of amateurs—threatened to overthrow the professionally controlled art market and in turn, the structure of status within the portrait studios. In order to be seen as artists, art photographers realized that they needed to distance themselves from the growing numbers of professional and amateur photographers. Just as it would have been important for instrumental photographers to articulate and establish limits on creativity in their photographic practice, the art photographers tried to stand apart from other professional portraitists and hobbyists by emphasizing those practices that would allow them to distinguish their work from instrumental photography and categorize their products as art.

The non-art studios were distinguishable in the prices they charged and this of course affected how the portraits were produced. “Swamped with orders, photographers were inclined to serve Mammon rather than art. One operator boasted of taking ninety-seven negatives in 8 hours—just under 5 minutes a piece. In these conditions of mass production, it is to be wondered

151. See HARTMANN, *supra* note 34, at 112.

at if the poses are stereotyped? Few photographers had more than two ‘sets’ for posing”¹⁵²

Some art photographers deliberately raised their prices as an attempt to raise their status. They also made attempts to reinstate the aura of the image by limiting its reproduction.¹⁵³ Previously portraits were regarded as a sign of social identification and a luxury commodity. The originality bestowed upon them an aura.

The art photographers sought to demonstrate that amateur photography was of a lower status and mere access to the apparatus did not allow the masses to make art. From this impetus, frameworks for the separation of “ownable, exploitable aesthetic properties from mere mechanical products” were imagined.¹⁵⁴ Copyright allows the copyright owner to control distribution and circulation. In art, an object’s market value is most often dependent on its rarity and singularity.¹⁵⁵ Copyright law can function as a guardian of market value for works that are not unique. Copyrights can be used to maintain hierarchies.

By the early 1860s, the industry and market had so developed that the major studios, which had previously not participated in the debate over art in photography, now saw the commercial necessity in addressing the issue. For

152. GERNSEIM, *supra* note 70, at 198. “His head fixed in a vice, the sitter was told to look at an indicated spot on the wall, and to keep quite still.” *Id.* “[I]n 1867 a modified form of dentist’s chair was patented in which ‘the sitter may lounge, loll, sit, or stand in any of the attitudes easy to himself and familiar to his friends.’” *Id.* Sarony himself had received a patent in England for inventing a device to hold the sitter’s head still while posing.

153. *See* TAGG, BURDEN OF REPRESENTATION, *supra* note 17, at 45 (naming David Hill as an example from Britain); *see also* ROSENBLUM, *supra* note 31, at 31 (stating that David Octavius Hill’s portrait calotypes are “still considered among the most expressive works in the medium”).

154. *See* TAGG, GROUNDS OF DISPUTE, *supra* note 17, at 128-29.

155. Hence Walter Benjamin’s famous prophesy that the cult value of art would be destroyed by the limitless number of reproductions made possible by photography: “With the advent of the first truly revolutionary means of reproduction, photography, simultaneously with the rise of socialism, art sensed the approaching crisis which has become evident a century later.” Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 226 (Hannah Arendt ed., Harry Zohn, trans., Harcourt Brace & World 1968) (1936).

Benjamin offered a belated, 1930s Produktivist version. The invention of photography, he argued, had shattered not so much art itself, as the detached and contemplative mode of apprehension and the uniqueness, on which the cult of Art rested. The potentiality henceforth existed for the overthrow of the oppressive aestheticisation of the world by a mass, revolutionary grasping of factuality, through the new mechanical means of reproduction: photography. The intention is leftist, but the antinomies are the same: photography, mechanisation, multiple reproduction, factuality and mass revolutionary action line up on one side; Art, cult, uniqueness, contemplation, isolation and proto-fascist aestheticisation on the other.
See TAGG, GROUNDS OF DISPUTE, *supra* note 17, at 127.

instance, in 1862, Disdéri, who had never before addressed the issue, wrote a book entitled, "*L'Art de la photographie*." There he "set out a careful argument aimed at 'improving the reputation of photography in the eyes of the public' and attracting 'the enlightened sections of the public,' in other words, winning back a clientele by now alienated by the increasingly poor quality of pictures."¹⁵⁶ Meanwhile, in France in 1862, Mayer and Pierson timed the publication of their book, "*La Photographie considérée comme art et comme industrie*," to coincide with the lawsuit they were bringing for "unfair competition" against pirates of several of their portraits of famous men. Through both actions, they hoped to establish the artistic nature of their work and its copyrightability.¹⁵⁷

VI. THE *BURROW-GILES* DECISION—THE SOLUTION

"The creative act lasts but a brief moment, a lightning instant of give-and-take, just long enough for you to level the camera and to trap the fleeting prey in your little box."

~Henri Cartier Bresson¹⁵⁸

As was noted above, the remarkable aspect of the *Burrow-Giles* case is how the Court was able to locate authorship in photography, not that it did so. The Court's ultimate conclusion becomes less surprising with greater information about the market forces at that particular moment in the developing photography industry, and the position of the plaintiff Sarony within the photography market.

Just how and where did the Court locate authorship? The Court found the portrait of Oscar Wilde to be, "a useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception . . ."¹⁵⁹ According to the Court, Sarony "gave visible form" to the photograph

156. See LEMAGNY & ROUILLE, *supra* note 97, at 45.

157. *Id.*

The opponents of photography were also changing their methods: in May 1862, just at the time photographers were pressing hard to see their work as art, mainly for purposes of copyright, a group of artists, assisted by Alred Cadart, founded the Société des Aquafortistes to defend their own interests in the face of photography's incursions into the domain of artistic reproductions, and in November, Ingres, Flandrin, Henriquel-Dupont and other well-known artists of the day all signed a petition against the assimilation of photography to art.

Id.

158. TIME-LIFE BOOKS, PHOTOGRAPHY YEAR 1980, LIFE LIBRARY OF PHOTOGRAPHY 22 (1980).

159. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.¹⁶⁰

So the Supreme Court suggests that authorship can be seen in the photograph itself, although it relies entirely on the accompanying narrative supplied by the photographer to assist its eye.¹⁶¹ How did the Court arrive at this interpretation?

Does this simple laundry list of photographers' actions represent an appropriate rationale for extending copyright protection in this way? After all, this was no trivial move. Through this trope, copyright law responded to various forces, not the least of which was economic. What can be learned from an analysis of the manner in which this doctrine was extended? The objective here is to better understand the limits and constraints of the authorship doctrine.

The first thing to note is that this rationalization was a new one to copyright law. Many have commented on copyright law's slick ability to change in the face of new challenges without the appearance of any upset.¹⁶² It usually does this by rationalizing the exterior often by means of pithy statements, frank characterizations, and simple analysis. These are the usual suspects that are routinely rounded up when finding authorship is required.

Thus, copyright law's extensions have been rationalized in some cases by emphasizing the painstaking labor required, or the artistic skill needed to produce the work, or the great innovation shown, etc. But in the case of photography, none of these traditional rationalizations could be easily adopted. The Supreme Court had a greater challenge in *Burrow-Giles*.

160. *Id.*

161.

The idea of vision as a distinctive cognitive experience and the related notion of purely visual media, beholden to nothing but the eye, have been central to a mode of criticism intent on legitimising its powers by specialising its skills of attention and isolating a fundamental, defining term of difference for its objects. . . . In the writings of Victor Burgin, Norman Bryson and Rosalind Krauss . . . the immediacy and finality of vision and the transcendence of the optical subject have been deconstructed, giving place to a conception of seeing as a site of work, an active process of making sense, dependent on social practice and codes of recognition, and imbricated in structures of address through which viewers, or readers, are invested or denied as subjects.

TAGG, *GROUNDINGS OF DISPUTE*, *supra* note 17, at 118.

162. See, e.g., Keith Aoki, *Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); *Metamorphoses*, *supra* note 5; ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 139 (1998).

For example, the argument that something akin to authorship must be present, if for no other reason than the painstaking labor required to produce such a work, just did not apply in the case of photography. Whether or not the work was created by the machine or the human, the human clearly was assisted by machine. Although early photographers were required to labor long hours in the production of a single photograph, the swift technological development meant that the skill and knowledge required to produce a photograph was ever decreasing. The machine was simply doing more and more of the work of producing the photograph. Although initially only a select few could operate the machine, within a relatively short time a mass-marketed hand-held box became available enabling anyone to make photographs easily.¹⁶³ Ironically, as the technology was developing in this way simultaneously the doctrine was progressing toward a finding of authorship. So there is actually an inverse relationship between labor and authorship.

For the same reasons, it would be difficult to succeed on the argument that authorship could be attributed to the great skill involved in producing the photograph—a rationalization that has been advanced periodically.¹⁶⁴

Finally, the traditional argument that authorship could be found in the sheer innovation of the work was similarly unavailing. Because of the desire to be a cheap substitute for a painted portrait, photography adopted all the conventions of salon painting. There was really very little innovation in the subject matter or how it was presented.

So the Court wanted to reach this result, and whereas it might have done so by emphasizing the labor or innovation involved in the production of a photograph, these rationalizations were difficult because of the centrality of the machine. Thus, the Court was stuck with finding some human trace in photography. The Court located this human trace in the pre-shutter activities. It is the setting up of the photograph which is artistic and deserving of copyright. Beyond the click of the shutter, and incidentally, not including the actual click of the shutter, the Court did not conceive of any authorship. In this way, the Court was straining to locate authorship away from the box.

Although with a twentieth-century understanding of photography, one might have expected that the legal doctrine that found authorship in photography would have focused on the timing of the taking of a

163. See BRAYER, *supra* note 113, at 147. At the time *Burrow-Giles* is decided, amateur hobbyists were experimenting with photography. *Id.*

164. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959).

photograph—the ability to decide the moment when to capture a certain sentiment—instead the Court emphasized the composition-making aspect of photography. So the Court located authorship not in the act of capturing the image or in the post-photograph manipulation that many art photographers were doing, but in the preparation. Again, this might not have been the case had another work been at the center of the controversy. But with this case, the Supreme Court established distance between the human and the machine and in the process adopted a discourse from the category of art photographers just mentioned.

In the case of Sarony, although he produced beautiful portraits, as compared with his contemporaries which included the accomplished “art photographers” Alfred Stieglitz, Joseph Keiley, or F. Holland Day, one might find him lacking. It might be said that Sarony’s code of aesthetics was not voluminous. Like many of his contemporary portrait photographers, he can be fairly criticized for valuing composition over technique. To be sure, Sarony’s emphasis was on having an artistic eye in constructing a scene rather than having an artistic eye in observing one.

As shown, this emphasis on composition-making was not at all unique to Sarony. Most of the elite portrait photographers at the time saw “arranging” as primary artistic contribution to the field. This arranging is of course an overt strategy to adopt the techniques of the portrait painter. Again, partly in reaction to the perceived transparency of the camera and partly due to the need to distinguish themselves from non-art photographers, art photographers at the time saw this as the artistry in photography. In 1896, the art critic Sadakichi Hartmann noted when commenting on photographer Frank Eugene that “[l]ike most studios, his contains all sorts of paraphernalia, the use of which no ordinary mortal can solve, but which lend the place that atmosphere, apparently indispensable, to the production of a work of art.”¹⁶⁵ Sarony’s studio took up an entire building on Union Square. It was filled with an amazing array of props and backdrops including an Egyptian mummy, stuffed birds, Chinese gods, armor, statues, musical instruments and a crocodile.¹⁶⁶ He obviously took great pride in the selection and addition of props in his portraits.

165. HARTMANN, *supra* note 34, at 174. Hartmann was critical of the practice. He noted that a danger in photographer’s adoption of the portrait painter’s techniques in arranging a composition may, in fact, weaken the artistry of the photograph. “The scene may be too busy for the camera. The light and shade may not be right. The foreground and background may be off. In short, the composition may be wrong for a photograph.” *Id.*

166. See HIRSCH, *supra* note 1, at 86.

Sarony's narrative of the actions he took had another purpose in addition to informing the Court of his creative input. It was also meant to distinguish his photographic practice from the practice of the non-art photographer portraitists, who were so many in number. In this sense it was a borrowed narrative—one thrown about in other discourses. In the lower-cost portrait studios, they kept prices down by cycling as many customers through as quickly as possible. As a result, if there even was someone who played the director role, he would simply set up a one-size-fits-all scene in which sitters would in turn take the spot left warm by the previous sitter. They simply did not have the luxury of selecting individualized poses and props. The pose would be conventional in any event, as it was primarily intended to mimic the painted portrait. Moreover, the camera remained fixed in one position, which further limited the pre-shutter choices available to the cameraman.

Sarony's arranging was so extreme that he has been likened to a director in his activities of "cajoling, parodying, and even intimidating his sitters to elicit dramatic and expressive representations."¹⁶⁷ Because at the time exposures could take up to one minute, he relied on a mechanical posing machine to achieve unusual poses for the time.¹⁶⁸ Often his sitters would adopt a pose appropriate for the character role for which they had become famous.

167. *Id.* at 87.

168. *See id.*

Unusual Poses by Sarony



Sara Jennett & Linda Dietz

In some ways, *Burrow-Giles* presented an easy test case for the application of copyright to photography because the photograph at issue screamed out: “I am artistic!” The decision might have been more difficult had a “high art” photograph been involved. Instead, this “lowbrow,” “arty” photograph provided a much more accessible vehicle for a court to pronounce artistic genius. With this picture, the Court seems to take photography at its word. It accepts whole cloth the claims that were being advanced by the art photographers about their very active, non-technical artistry.

Technically, the Court reserves the question of the copyrightability in the ordinary production of a photograph. However, since the Court essentially holds that authorship consists of painterly composition, the casual amateur snapshot or even the highly standardized professional portrait would appear to lack the requisite creativity of a copyrightable work. The Court thus implies that it answered only so much as was necessary to decide the case. In fact, the Court decided much more than was necessary. The Court could have simply decided that the selection of a scene to photograph in and of itself constitutes something more than mere transcription and therefore was deserving of a copyright. Instead, the Court went on to pronounce the work

“art” and attempted to justify that conclusion.¹⁶⁹ In so doing, the Court weighed in on the debate about whether or not photography could be classed as an art.

As it was, this type of highly pretentious “art” photography that the Court had before it, the Supreme Court’s distinction between this photograph and the “ordinary production of a photograph”¹⁷⁰ at first glance seems self-evident. However, this dichotomy in the law has proven to be troublesome for courts in the sense that it has forced courts to manipulate the aesthetic categories in order to extend copyright to situations in which the *Burrow-Giles* type of authorship does not appear to apply.

In making this distinction, the Supreme Court in *Burrow-Giles* implies that images that are produced solely by mechanical means cannot be owned. Copyright law thus imagines a distinction between the human operator at the service of the machine and the machine at the service of the human operator. The law thus marked out the difference between artistic property and non-property. Interestingly, the dividing line the Court makes is not based on a traditional hierarchy of aesthetic values, but is instead based on a separation of photographies. The Court could have focused on the photograph itself, evaluating originality as measured by aesthetics, but instead it focused on how the photographer created the subject of the photograph. That is, it does not evaluate the final product for signs of the author, but rather evaluates the *practice* as authorial. Timing and happenstance are not articulated as art, but the active construction of scenes is.

So in reaching its holding in *Burrow-Giles*, the Court made two fateful determinations. The first was that it articulated photographies, demarcating art photography from ordinary photography. Secondly, the Court chose to

169. Obviously, this is not the proper role of the courts. Later, Justice Holmes cautioned courts against making aesthetic judgments along the lines that the *Burrow-Giles* Court proposes:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

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

170. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

make this demarcation with a focus on the practice rather than the product. Both of these determinations are consequential and revealing.

Interestingly, this demarcation of photographs is not based upon an analysis or characterization of the product, but instead upon an account of the nature of the particular practices that were presented to the Court in this case. The focus on practice can be explained by the unstated starting point for the Court, which is that some photographs are not produced by an author. Hence the need to locate an account of an authorial intervention in an otherwise authorless process. The focus on process is therefore evidence of a certain understanding of photography that has persevered to the present: that the photograph is simply a duplication of nature unless it is actively constructed. To hold otherwise would be to admit that all photographs—even the ones used to document the criminally insane—are constructed by choice.

I argue that the Court chose not to articulate a doctrine that would have been dependant on a characterization of the product. To do so would have necessarily entailed an aesthetic determination on the part of this Court, and would have obligated future courts to determine an authorial presence within the four corners of the photograph without the aid of any accompanying account of its artistry. But the Court here did characterize Sarony's photograph as a "useful, new, harmonious, characteristic, and graceful picture," and finally as "an original work of art."¹⁷¹ This language would seem to indicate that the Court is also making a judgment about the product. Yet the Court only states these conclusions, it does not support or explain them. Later courts are not given direction about how they are to determine whether a photograph is harmonious or original by looking at it. If the authorship is in fact visible in the photograph, the Court does not disclose how it is able to detect it. Perhaps what the Court is doing here is collapsing the two. Because the Court has sanctioned the process, the beauty of the photograph can be revealed and celebrated.

171. *Id.* at 60.

VII. ALTERNATIVE SOLUTIONS

"My portraits are more about me than they are about the people I photograph."

~Richard Avedon¹⁷²

With an understanding of the specific conditions of the production of the photograph in question, the means by which the Court located authorship in photography is explainable. The Court decided that the photograph in question was a work of authorship. Therefore Congress did not exceed its constitutional authority in amending the copyright act to include photographs because photographs could be original works of authors. In its reasoning, the Court suggests a reading of photography that privileges the before-the-camera activity as the activity of an artist and in turn eschews other possible readings of authorship, although it states that it is not deciding whether or not there is authorship in ordinary photographs. Even in the case of Sarony's wonderful photograph, it is reasonable to question why the Court had chosen not to locate authorship in other practices. Even if the focus is on the process and not the product, there are still alternative analyses and it is interesting to consider what the Court did not.

For instance, when one considers the theater credentials of the subjects he was photographing, the identification of Sarony's directorial activities with authorship seems a less promising choice than others. In these cases, who is more deserving of credit for the costume, pose and expression? For example, who is more responsible for evoking the expression in the face of the great Sarah Bernhardt, Sarony or Bernhardt? And while the pose of a theatrical star may have been in sharp contrast to the conventional portrait pose,¹⁷³ the result may be more attributable to the celebrity's experience playing a particular role, than to Sarony. In particular, it is difficult to imagine someone like Oscar Wilde, the self-proclaimed aesthete, who was so careful and deliberate in the construction of his celebrity persona, freely submitting to the whims of Napoleon Sarony.¹⁷⁴ Specifically, his trademark look with his head resting on his hand cannot be said to owe its origin to Sarony.

172. *Quotations About Photography*, at <http://www.quote garden.com/photography.html> (last visited Apr. 12, 2004).

173. *Olan Mills, Inc. v. Eckerd Drug of Tex., Inc.*, No. CA3-88-0333D, 1989 U.S. Dist. Lexis 13768 (N.D. Tex. Apr. 20, 1989) (discussing, but nevertheless rejecting the contributions made by the sitter in a conventional portrait).

174. See GAINES, *supra* note 10, at 73.

Significantly, the Court had a range of alternatives both in this particular photograph and in the larger question of photography generally.¹⁷⁵ For instance, the Court could have located authorship in the work of the cameraman, that is the person who actually looks through the viewfinder and clicks the shutter. With the benefit of a hundred and fifty years of experience with photography, this choice seems obvious. The person operating the camera always exercises choice in producing a photograph. There are creative choices in the precise timing to click the shutter, the angle of the shot, the frame, the focus, the distance from the subject, the centering of the subject, etc. Of course it is possible that a director could dictate many if not most of these choices to the cameraman and therefore be deemed the author even though he did not operate the camera. It may be that this activity is too near the box for the Court, and in the case of Sarony's work, the Court would have some difficulty relying on this possible act of authorship because Sarony did not actually operate the camera. Sarony was not a photographer in the modern or technical sense. He was not interested in the camera work. Instead, he regularly employed a cameraman, Benjamin Richardson, to work the camera.¹⁷⁶ Often today's readers of *Burrow-Giles* think that the Court granted copyright to the person who actually took the photograph assuming that Sarony was the one who operated the camera.¹⁷⁷ In fact, it was the regular practice of Sarony and his art photographer contemporaries to hire a cameraman.¹⁷⁸ In the case of Sarony, this role is possibly more authorial

175. The divergence of U.S. intellectual property doctrine from French and British law in and of itself suggests that the way the U.S. law developed was not natural, but constructed. The French and British solutions to this problem are also reasonable alternatives. In short, British law recognized that photography presented the problem that the person closest to the activity of the camera was its operator who was usually the employee of the person seeking copyright. The solution was to locate the author in that operator unless the owner of the materials was on hand giving input. See *Nottage v. Jackson*, 11 Q.B. 627 (C.A. 1883); see also EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 178-80 (Little Brown 1972) (1879). French law explicitly struggled with the idea of creating private property rights in the appropriation of vistas that properly belonged within the public domain. See generally EDELMAN, *supra* note 11. Thus, French law resolved that an image can only be personally appropriated if it was a creation; and not if it were a mere reproduction. All three faced the same question, at the same time with similar industries and practices. All hold that photographs are copyrightable, but they reach the same result through vastly differing approaches.

176. See HIRSCH, *supra* note 1, at 87.

177. See, e.g., Doug Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 692 (2003) ("[Sarony] posed Wilde, adjusted the background lighting, chose[] Wilde's wardrobe, and ultimately operated the camera that captured Wilde's image.") (emphasis added).

178. See HIRSCH, *supra* note 1, at 87. "In contrast to the impressive sums earned by a large number of photographers, their assistants, who worked from 8 a.m. to 6 p.m., received on the average £2 to £3 per week." GERN SHEIM, *supra* note 70, at 198.

because his cameraman was more than a mere technician. His cameraman had collaborated with him consistently over the years. To deny authorship to this person, even where there is another person acting as the director, implies that his job was merely to get into the box the scene crafted by Sarony. Furthermore, there is no evidence that Sarony, as directorial as he was, had given any direction to Richardson about these technical choices. There is no indication that Sarony cared about that dimension of choice. Indeed, he did not include them in his recital of all of his authorial actions taken to produce the photograph of Wilde. On this point too, Sarony is not alone. His contemporary art photographers did not treat the act of directing the cameraman as significant in their accounts of their practice. Thus, the Court did not find that if Wilde's expression owed its origin to someone other than Wilde himself, it may be to the camera operator who made the creative choice to click the shutter at that precise moment. Perhaps this conception of authorship is too near the box. Had the Court located authorship in these choices, the result would have been unsatisfactory for how photographs are regarded as evidence because it would have acknowledged that there is an element of choice in the production of all photographs.

Another possible place in which to locate authorship not considered by the Court is in the post-shutter activity. Although today this choice might seem the most obvious place in which the photographer exercises choice, the Court fails to examine the numerous possible creative choices that can be made in the developing of the photograph. For instance, the retouching of photographs by art photographers had become a common, though controversial, practice in the late 1800s.¹⁷⁹ Many art photographers at the time had taken to developing their photographs in a manner that caused them to look soft and almost misty. This was deliberate—another strategy to make their work look more like art.¹⁸⁰ In particular, many of the art photographers were heavy handed in their retouching of the photographs.¹⁸¹ Julia Margaret

179. The art critic Sadakichi Hartmann, another purist, was irked by the practice and noted it among some of the finest art photographers. He criticized Frank Eugene for covering up his mistakes by scribbling, scrawling and scratching his plate. HARTMANN, *supra* note 34, at 49. Frank Eugene invented a process of "photo-etching" where the plate is manipulated. *Id.* at 112. He notes that Gertrude Käsebier uses a "stopping out" process consisting of sprays, washes, and chemical bathes. *Id.* at 49. Others etched on the plate, deliberately over and under exposed their negatives and made prints very light or dark. *Id.* at 69.

180. It was, of course, the era of the Impressionists.

181. Sarony himself was known to infrequently hand-color his photographs. See BEN L. BASSHAM, *THE THEATRICAL PHOTOGRAPHS OF NAPOLEON SARONY* (Kent State University Press 1978).



Julia Margaret Cameron
“The rosebud Garden of Girls” 1868

Cameron is a good example of a photographer of the time who used this technique to great effect.¹⁸² The practice of retouching although embraced by some, was rejected by others. Alfred Stieglitz, the father of art photography who argued for pure art photography, denounced it. Although it was often rejected and denied even by its practitioners, retouching was perhaps the closest analogy to the traditional and established work of the artist.

Sarony was a skilled practitioner of the art of retouching. Since his work concentrated on celebrity portraits, his retouching was vital to their vanity and therefore his success.¹⁸³ However, Sarony’s case may not have provided the best vehicle for the Court to elevate this practice since he did not list it amongst his authorial interventions; probably because he was one of those practitioners who regarded retouching as cheating. Another reason for the Court not to acknowledge the activity of retouching was again, the veracity of photography would be compromised.

182. See MACE, *supra* note 102, at 98.

183. See HIRSCH, *supra* note 1, at 87.

Another post-shutter creative activity is the mere selection of which photograph to develop from amongst all that have been taken. No doubt a photographer of Sarony's rank would take numerous shots of his sitter and select the best to print. In this case, Sarony registered with the Copyright Office only eleven of the twenty-seven shots he took of Wilde that day,¹⁸⁴ indicating a post-shutter choice by the photographer.

Yet, what are the consequences of these other possible ways of locating authorship in photography? One consequence of privileging the pre-shutter activity is to preserve the veracity account of photography in general. If there are choices being made at the time of the click of the shutter and after the taking of the picture, then all of photography's credibility is at stake. One of the amazing benefits of locating the author in the pre-shutter activity is that it implies that the other stages of the process remain choice-free, thus author-free and therefore objective. As a result, viewers are free to imagine that photography without flamboyant directors running around in front of the camera constructing scenes remains a technological and scientific process in which the reality before the camera is directly and accurately transcribed by the camera. Thus, the landmark case in copyright law has no effect on how photographs are dealt with in evidence law. These areas of the law do not conflict because photographs remain separate. The Supreme Court's holding permits one to imagine separate spheres of activity in which the author and machine reside. The Supreme Court's solution to the dispute nicely permits the understanding of the medium as an automatic transcription, while at the same time permitting a role for genius.

Through the grant and denial of a copyright the law assigns distinct domains. It is the grant of this right that allows control over how the image will be circulated and also to enforce the meaning of the image. Although the Supreme Court admitted photography to the elite domain of art, it did not eradicate alternative and contradictory understandings of photography. Quite to the contrary, significantly, it preserved these understandings, which remain today, viable in courtrooms where photographs are presented as evidence.

184. See HOLLAND, *supra* note 114, at 64 (indicating the number of photographs Sarony had printed).

VIII. CONSEQUENCES OF THE DOCTRINE

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

~John Szarkowski¹⁸⁵

A. *Photography Cases After Burrow-Giles*

Although for more than one hundred years courts have been citing *Burrow-Giles* and crediting it for its formulation of the author in copyright law, in fact, upon closer inspection, the Court there had simply bought whole cloth Sarony’s argument and in fact adopted language from his brief to the Court as its opinion. Perhaps it is no wonder that the Court was so explicit that it was announcing a limited holding. It states that it decided authorship only in regards to the photograph before it and that it does not decide the copyrightability of the “ordinary production of a photograph”¹⁸⁶ and thus preserves the question of any authorship in that type of photograph.

With the Court having pronounced such a limited holding, later courts were entirely without guidance about how even to categorize the photographs in dispute, let alone how to locate authorship in the non-ordinary production of photographs.¹⁸⁷ Although authorship was found in most of the post-

185. SONTAG, *supra* note 1, at 192.

186. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

187. The first significant application of the doctrine from *Burrow-Giles* actually occurs in a case not about photography. *Schumacher v. Schwenke*, 25 F. 466, 468 (C.C.S.D.N.Y. 1885). *Schumacher*, decided a year after *Burrow-Giles*, expresses in extremely clear terms the understanding of the authorship that comes out of *Burrow-Giles*. The case involved a painting in which the head was copied from a wood-cut print of another painting, and the rest was painted by an artist under the direction of the alleged author of the work. *Id.* at 466. Again, it is interesting how these early cases dealing with authorship can be seen as precursors to the work made for hire doctrine. See *supra* note 86. In defending this type of work from accusations that it is not the work of an author, the court contrasted the artistic activity with that involved in photography:

It certainly needed a much higher order of merit to produce the pleasing and suggestive combination presented in this painting—requiring, as it must, imagination and artistic genius—than that required in placing a human being in a graceful attitude before a camera; and yet there is no longer a doubt that a photograph may be protected by a copyright. If a photograph, then a colored photograph, and, *a fortiori*, a painting, even though the artist borrows his design largely from others; for it belongs to a much higher type of art.

Id. at 468 (citations omitted).

Burrow-Giles cases, the result was mechanistically, and often awkwardly, achieved, especially where nothing was posed. In the cases that followed, the courts tended to repeat verbatim the same litany of pre-shutter activities advanced by Sarony.¹⁸⁸ Certainly, the courts that followed *Burrow-Giles* accepted unthinkingly the notion of authorship in photography that emerged from that case.

Many of the early photography cases that follow Sarony involve Benjamin J. Falk (1853-1925), a contemporary of Sarony and the *Burrow-Giles* decision.¹⁸⁹ He was also a very successful portrait photographer¹⁹⁰ who took a great interest in the issue of the copyrightability of photographs.¹⁹¹ He was one of the first photographers to post copyright notices on his photographs.¹⁹² He brought numerous lawsuits against pirates of his photographs.¹⁹³

In four of Falk's cases, the courts appear to assume that Falk's photographs contained the requisite authorship on the facts.¹⁹⁴ Since Falk's

188. See, e.g., *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914) (holding that a photographer infringed his own copyrighted photograph, which he had assigned, when he used the same "pose, light, and shade" with only a facial difference); *Pagano v. Charles Beseler Co.*, 234 F. 963, 964 (C.C.S.D.N.Y. 1916) (holding that a photograph of a building was copyrightable because artistic decisions such as adjunctive features of light, shade, position, etc. requires originality); *Altman v. New Haven Union Co.*, 254 F. 113, 117-18 (D. Conn. 1918) (holding that a photograph of a high school graduation class was copyrightable because photographer grouped the members of the class and arranged their positions).

189. Indeed, Falk was a close friend of Sarony. See HARTMANN, *supra* note 34, at 233.

190. His studio was located in the Waldorf-Astoria in New York. See HARTMANN, *supra* note 34, at 228. Like Sarony, he also was known for his cabinet card photographs of theatrical celebrities in the roles they made famous. For instance, he photographed Lillian Russell, one of the most successful actresses of the day as Fiorella in the "Brigands," in costume for the operetta "Nadja," in costume for the operetta "The Queen's Mate," as Lady Teazle in the operetta of the same name, and as the Queen of Bohemia in "Whirl-i-gig." These pictures are available at the New York Public Library collection.

191. See HARTMANN, *supra* note 34, at 233.

192. See *id.* at 230-32 (noting the copyright notices on Falk photographs reproduced therein). Sarony was thought of as one of the earliest photographers to post copyright notice. See HIRSCH, *supra* note 1, at 88. Given how activist Falk was on this issue, it seems almost unfair that Sarony rather than Falk should go down in history for successfully placing photography within the subject matter of copyright law.

193. At least ten cases are reported bearing his name in the caption. See *infra* note 196 and accompanying text. His attorney in most of these cases was his brother, Isaac N. Falk. See *id.*

194. *Falk v. T.P. Howell & Co.*, 37 F. 202, 202 (C.C.S.D.N.Y. 1888) ("Since the decision of the supreme court in *Burrow-Giles*, . . . there can be no doubt that a photograph which has the artistic merits possessed by the complainant's photograph is the subject of a copyright.") (citations omitted); *Falk v. Schumacher*, 48 F. 222, 222-23 (C.C.S.D.N.Y. 1891) (regarding a photograph of actress Lillian Russell); *Falk v. Curtis Pub. Co.*, 98 F. 989, 991 (C.C.E.D. Pa. 1900), *citing* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) ("The objection that 'the . . . photograph . . . is not a copyrightable subject-matter,' is not well taken."); see also *Falk v. Heffron*, 56 F. 299 (C.C.E.D.N.Y. 1893) (regarding photograph of Lillian Russell).

status, work, clients and, most importantly, his *process* were so similar to Sarony's, concluding that Falk's work was authorial seems logical. Because Falk's practices were so similar to those of Sarony, and because he was so litigious, the *Burrow-Giles* framework began to function as doctrine in the years that followed.

In *Falk v. Gast Lithograph & Engraving Co., Ltd.*,¹⁹⁵ Judge Coxe went through the *Burrow-Giles* analysis regarding a photograph by Falk of the actress Julia Marlowe. Marlowe and Falk perceived an identity of interests where the rights of the photographer served to protect the celebrity's reputation.¹⁹⁶ Falk is said to have "arranged the pose and lighting of the photograph in question, worked up the expression and decided upon the attitude"¹⁹⁷ "[H]e arranged the light, the background and all the other details, and finally posed her, when taken in connection with the picture itself, which certainly is artistic and unusually pleasing, is sufficient to sustain the copyright within the authority of [the *Burrow-Giles*] Case."¹⁹⁸ Similarly, on appeal, the court stated that "[t]he facts in regard to the originality of the photograph, its intellectual production as the result of thought and conception on the part of the author, are substantially the same as those in the case of [*Burrow-Giles*]"¹⁹⁹

*Falk v. Brett Lithographing Co.*²⁰⁰ involved a photograph of a mother and child where Falk arranged the two. The court treats as significant the fact that the child put her finger in her mouth without any direction from Falk. Says the court: "The chief difference between [*Burrow-Giles*] and this [case] . . . is that the *artist* did not do so much in preparing the subjects here as was done

195. *Falk v. Gast Lithograph & Engraving Co.*, 48 F. 262 (C.C.S.D.N.Y. 1891). This was Judge Coxe's third opportunity to consider the work of Falk. See also *Schumaker*, 48 F. 222; *T.P. Howell & Co.*, 37 F. 202.

196. In all of these cases, the interests of the photographer and the celebrity who is the subject of the photograph were aligned. Without any legally recognized right of publicity, the celebrity would have been grateful to the photographer for pressing his case to enjoin use of the photograph in advertising. But in one case, the photographer and celebrity were at odds. In *Press Pub. Co. v. Falk*, the actress Marie Jansen sought to permit *New York World* to illustrate a feature article on her with photographs of her including one taken by Falk, 59 F. 324 (S.D.N.Y. 1894) (holding that the photographer, not the subject, had exclusive copyright to celebrity photo). Jansen testified that Falk told her that he could protect her from being misrepresented and caricatured, and protect himself at the same time from losing sales by having his photographs reproduced, by procuring a copyright which would be used for their joint benefit. *Id.* at 325. It was acknowledged by all parties that the custom at the time was that celebrities did not pay photographers to take their photographs and that the photographer had the right to sell the photographs. *Id.*

197. *Gast Lithographic & Engraving Co.*, 48 F. at 264.

198. *Id.*

199. *Falk v. Gast Lithograph & Engraving Co.*, 54 F. 890, 891 (2d Cir. 1893).

200. *Falk v. Brett Lithographing Co.*, 48 F. 678 (C.C.S.D.N.Y. 1891).

there.”²⁰¹ Actually, Falk did as much as Sarony, but the court seems unable to avoid giving credit to the baby for the thumb-sucking motif. Nevertheless, the court is persuaded of Falk’s authorship. “The amount of labor or skill in the production does not seem to be material if the proper subject of a copyright is produced”²⁰² The court here recognized the trouble that can result from *Burrow-Giles* from putting too much emphasis on the pose. The authorship of the pose could be suppressed in the case of Oscar Wilde, but it is somehow more difficult to suppress in the case of this unnamed child. Having opened up this alternative analysis, the court quickly closes it off as it limps toward a conclusion that an author need not put so much effort into the pose.

*Falk v. Donaldson*²⁰³ involved another infringement action against a reproduction of a Falk photograph of Julia Marlowe. In this case, the production of the photograph in question involved Marlowe bringing with her several costumes and Falk taking photographs of her in twenty to thirty positions representing different characters assumed by her on the stage. The photograph in question is Marlowe as Parthenia from the play “Ingomar, the Barbarian.”²⁰⁴ Falk testified that he “posed Miss Marlowe . . . arranged the illumination and the background, . . . and secured the expression”²⁰⁵ He explained how he arranged the curtains, screens, and headlights, and he explained “at length” his methods for making the subject forget their surroundings so as to mentally assume the character represented. Falk then threw in for good measure: “[A]nd, outside of that, [I] did the mechanical work of attending to the camera, focusing, and exposing the image.”²⁰⁶

The defendants for the first time are reported in an opinion to have made the argument that the person who should receive credit for the costume, pose and expression is the acclaimed actress who was the subject of the photograph.²⁰⁷ In fact, they even entered testimony that she had been seen in the identical pose at the Bijou Theater. She was wearing the costume of that character and her hair was arranged in the style of the day. She had been photographed earlier that year in the same hair and costume and similar

201. *Id.* at 679 (emphasis added).

202. *Id.*

203. *Falk v. Donaldson*, 57 F. 32 (C.C.S.D.N.Y. 1893).

204. *Id.* at 33.

205. *Id.*

206. *Id.* At least then in the making of this photograph, Falk’s practices are distinguishable from Sarony’s.

207. *Id.*

pose.²⁰⁸ But Judge Townsend would have none of it: "I am unable to assent to the claims of defendants, for the following reasons: An examination of the photograph shows that it is the work of an artist. . . . He was an artist before he became a photographer."²⁰⁹ Furthermore, he was unpersuaded that Marlowe should receive any artistic credit for making the picture: "It will be noticed that the position assumed by Miss Marlowe is a side view. It is one where the direction of the head and eyes is such that she could not have judged, by herself, how far to turn the body, and raise the hands, or how to incline the head, so that the lights and shadows might best reveal the beauties of face and figure."²¹⁰ But here the court went beyond the *Burrow-Giles* routine and noted that a comparison of the two photographs of Marlowe in similar poses and costumes demonstrates "how strikingly poses, mechanically alike, may artistically differ."²¹¹ In any event, "[a] comparison of the two cases shows that what Sarony did, complainant did."²¹² This decision is a site of discomfort. The court is struggling with a lack of fit with *Burrow-Giles* and even Falk seems to be changing his story slightly. Nevertheless, the court in the end was able to collapse back onto a mechanistic application of *Burrow-Giles*. This approach, however, was not always possible.

In *Falk v. City Item Printing Co.*,²¹³ Falk lost. The court properly interpreted *Burrow-Giles* to require that a photographer prove that the photograph in question exhibit "intellectual production, of thought and conception, on the part of the author" to satisfy the originality requirement that is derived from the word author.²¹⁴ In this case, however, Falk only averred that he was the author of the copyright noticed photograph. The court stated that unlike the production of a map, book or statue that necessarily entails the injection of intellectual effort, one may be the producer of a photograph without any "intellectual effort involving invention or originality."²¹⁵ The court thus acknowledges that the author of a photograph has to show more than the author of a book, which lines up with the Supreme Court's dictum that there may be a category of "ordinary production of a

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 34.

212. *Id.*

213. *Falk v. City Item Printing Co.*, 79 F. 321 (C.C.E.D. La. 1897). It appears that his brother did not represent him in this case.

214. *Id.* at 321.

215. *Id.*

photograph.”²¹⁶ In addition to not being satisfied that Falk had distinguished his work from the mass of ordinary photographs without an account of his artistry, the court also entertained some skepticism about whether Falk could claim credit for the composition.²¹⁷

Of all of these early photography cases, perhaps *Gross v. Seligman*,²¹⁸ decided in 1914, best illustrates a blind adherence to *Burrow-Giles*. Here the emphasis on the pose in *Burrow-Giles* is fully accepted. The court begins the opinion with a statement that implies it regards the *work* as the composed scene even before it was made “permanent as a picture.”²¹⁹ Confirming this view, it states that after the composition has been arranged, it really does not matter whether the artist fixes it with a paint brush or a camera.²²⁰ This dispute is slightly unusual. Here, the defendant is the author of the original photograph—whose copyright he sold to the plaintiff—which he is accused of copying in his second photograph, produced two years later, of the same model in the same pose.²²¹ The original photograph is copyrightable, the court says, because it was “made . . . in the very method which the Supreme Court . . . in the Oscar Wilde Case [said] would entitle the person producing such a picture to a copyright . . .”²²² Because of this similarity to Sarony’s process, it is an “exercise of artistic talent” and thus the proper subject of copyright.²²³ Here the photographer imitates his earlier work rather than directly copies. Thus, it leads to the conclusion that if another photographer copied the pose, etc., but set up the second photograph rather than re-photographing the first photograph, it would be an infringement.²²⁴ But compare this result with

216. *Burrow-Giles*, 111 U.S. at 59.

217. *City Item Printing*, 79 F. at 322. The court commented on the defendant’s alleged infringement in which it published a wood cut of a pose actress Loie Fuller assumes on stage. “Unless petitioner has a copyright upon the poses assumed by Mme. Loie Fuller upon the stage in her dancing exhibitions, he ought not to complain that others, by wood sketches or other artistic means,—even by photographic process,—shall make and publish illustrations of such poses.” *Id.* This passage, although dealing with an issue of infringement, shows the court struggling with the *Burrow-Giles* conception of authorship found in the pose.

218. *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914).

219. *Id.* at 931 (“When the Grace of Youth [the title of the work] was produced a distinctly artistic conception was formed, and was made permanent as a picture in the very method which the Supreme Court indicated in the Oscar Wilde Case . . .”).

220. *Id.* (“It was there held that the artist who used the camera to produce his picture was entitled to copyright just as he would have been had he produced it with a brush on canvas.”).

221. *Id.*

222. *Id.* (citations omitted).

223. *Id.*

224. For a recent case involving a new production of a photograph in which a model assumes the pose of the original see *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (involving an

another art medium (painting, sculpture, drawing, etc.): If a second artist were to copy with complete accuracy a previous work, but from source, not from previous work, then no infringement.²²⁵ Yet this court stated that the medium is irrelevant to the authorship analysis.

The case of *American Mutoscope & Biograph Co. v. Edison Manufacturing Co.*,²²⁶ where a photograph that was not a portrait was involved, evidenced that the *Burrow-Giles* pre-shutter activity was still critical in finding authorship in a photograph. The court stated that “[w]hether a photograph of a building or any other object, which is a mere mechanical reproduction of the physical features or outlines of the object, involving no originality or novelty on the part of him who takes it, is the subject of copyright, may well be doubted.”²²⁷

The court in *Altman v. New Haven Union Co.*,²²⁸ decided in 1918, went to lengths to fit the photograph at issue—also not a portrait—into the *Burrow-Giles* formula. At issue was the class photo of the New Haven High School class of 1914. The scene was typical—taken on the front steps of the school. Nevertheless, the court stated that the photographer “grouped the members of the class, arranged their positions [there were 500 of them], and did all of the work necessary to secure a proper negative, . . . which resulted in a pleasing, satisfactory, and, so far as such a production may be, an *artistic* photograph, at least sufficiently so as to bring it within the realm of those things which may be copyrighted”²²⁹

alleged parody of the original photo). See also Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y USA 546, 584-85 (1998).

225. See *Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978) (“[A]n artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique.”).

226. *Am. Motoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262 (D. N.J. 1905).

227. *Id.* at 265. The issue of the treatment of ordinary photographs arose with special poignancy with the new motion picture industry where courts struggled with *Burrow-Giles*' denigration of ordinary photographs. In *Edison v. Lubin*, 122 F. 240 (3d Cir. 1903), the court had to consider whether 4,500 pictures taken in rapid succession on celluloid film 300 feet long by means of a specially constructed camera designed and owned by Thomas Edison, i.e. a moving picture, was copyrightable as a photograph. The film featured the christening of Kaiser Wilhelm's yacht. *Id.* at 240. The court, relying on *Bleistein* and a case involving a photographic rendering of a yacht under full sail, *Bolles v. Outing Co., Ltd.*, 77 F. 966 (2d Cir. 1897), was so eager to find that this film met the authorship requirements and was thus copyrightable, that it completely failed to analyze whether Edison, who neither took the pictures, nor seems to have directed the taking of the pictures, was the proper author. See *id.*

228. *Altman v. New Haven Union Co.*, 254 F. 113 (D. Conn. 1918).

229. *Id.* at 115 (emphasis added).

The court in *Pagano v. Charles Beseler Co.*,²³⁰ decided in 1916, articulated for the first time other choices made by the photographer and holds that these choices make up the photographer's original conception of the subject. These choices include the selection of lighting, shading, positioning and the timing. These choices were not articulated in *Burrow-Giles*. Significantly, this case involves a city scape rather than a portrait.²³¹ Thus the *Burrow-Giles* approach did not fit and the court was forced to analogize the timing choice to the choices in composition: "It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc."²³²

As these lines of authority are developing there are also other trends at work that might have reduced or even eliminated the ordinary production of a photograph problem with which *Altman* and *Pagano* struggled. However, this problem was not so easily resolved in part because of the remarkable persistence of the Romantic notion of authorship that was first fully articulated in *Burrow-Giles*. In 1918, for instance, Justice Brandeis in a dissenting opinion appears to have reaffirmed the separation of artistic from "ordinary" photography in *International News Service v. Associated Press*, where he stated that the "mere record of isolated happenings, whether in words or by photographs not involving *artistic skill*, are denied [copyright] protection."²³³ The authorship doctrine that followed from *Burrow-Giles* has proven to have remarkable staying power. In 1909, the new Copyright Act stated that photographs were within the subject matter of copyright law, and in 1921, Judge Learned Hand in *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*,²³⁴ read into the act "without regard to the degree of 'personality' which enters into them."²³⁵ Attempting to firmly resolve any lingering doubts about authorship in the ordinary production of a photograph, Learned Hand boldly stated that he could not conceive of a photograph that did not contain the imprint of the author.²³⁶ In essence, Hand, relying on

230. *Pagano v. Charles Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).

231. The photograph was of the main branch of the New York Public Library on Fifth Avenue in New York City. *Id.* at 963.

232. *Id.* at 964.

233. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 254 (1918) (Brandeis, J., dissenting) (emphasis added).

234. *Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co.*, 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922).

235. *Id.* at 934.

236. *Id.* Somewhat similarly, David Nimmer, author of the leading treatise on copyright law, can

Bleistein,²³⁷ proposes a pragmatic view of originality. But nevertheless, even today, the *Burrow-Giles* approach, and the problems associated with it, has shown a remarkable degree of persistence.

Burrow-Giles was supposed to resolve the long-standing debate about whether photographs had authorship. Not only did it not adequately decide this question, but it raised similarly difficult questions in other areas where authorship did not resemble the Romantic ideal. Thus, there emerged two ways out of the ordinary photography bind left over from *Burrow-Giles*. One is to stretch and distort *Burrow-Giles* as was done in *Altman* where administrative posing was deemed authorial. In these cases, the court does not look too closely at the photograph. A second way of dealing with this problem is to expand the *Burrow-Giles* doctrine to take account of different kinds of photographic artistry as was done in *Pagano*. These approaches remain current in contemporary photography cases.

B. Recent Photography Controversies

In subsequent cases close in time to the *Burrow-Giles* case that dealt with lowbrow art photographers, courts had tremendous difficulty finding authorship in photographs and as a result simply repeated *Burrow-Giles* list of the photographer's activities. One can even find this list of activity repeated in cases today.²³⁸ For instance, in a 1987 case involving a particularly mundane photograph the court stressed the composition and "the

conceive of at least two situations in which a photograph should not be deserving of a copyright. "The first involves a slavish copying of a negative or similar work, while the second occurs when, the photographer, in choosing subject matter, camera angle, lighting, etc., copies and attempts to duplicate all of such elements as contained in a prior photograph. . . . Such an act would constitute infringement of the first photograph . . . [and] [i]f the second photograph emerges without distinguishable variation, it should be denied protection for lack of originality." 1 NIMMER & NIMMER, *supra* note 59.

237. This new minimalist approach may have its roots in *Bleistein* with its famous disclaimer of judicial aesthetics. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903).

238. See *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."). The Court of Appeals in *Rogers v. Koons* attempted to clarify the requirement of originality: "[T]he quantity of originality that need be shown is modest—only a dash of it will do." *Rogers*, 960 F.2d at 307 (discussing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991)). See also *Davidov v. Tapemeasure Enter. Inc.*, 27 U.S.P.Q.2d 1382 (S.D.N.Y. 1993) (finding the arrangement and depiction of plastic jewelry in photographs copyrightable); *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113 (D. Nev. 1999) (finding posture of subject, lighting, angle, collective arrangement of points of interest to create pleasing configurations, and evocation of desired expressions or appearances all protectable).

lighting, camera angle, and camera position.”²³⁹ However, in cases involving more mechanized photo-making, the doctrine not only fails to assist, but proves an impediment to a coherent analysis. The litany of pre-shutter activity said to be authorship in *Burrow-Giles* is no aid at all in the difficult cases where the photographer less resembles a director. Over the years, courts have strained to fit facts into this construction of authorship, but it disserved them in many cases.²⁴⁰

In *Time Inc. v. Bernard Geis Associates*,²⁴¹ the photograph in question is the now famous film of the Kennedy assassination. The alleged author of that film was Abraham Zapruder, a Dallas dressmaker who just happened to have been at the right place at the right time with a home movie camera.²⁴² He had absolutely no credentials as a director or cameraman and he certainly could not be said to have constructed the scene in any way. In fact, ironically the reason the film became so valuable so as to cause litigation over the question of authorship was because of its power as a document and record of this tragic event—it was evidence, not art. In order to find authorship, the court could not list pre-shutter choices, but had to engage with the technology much more so than had previously been done. The court recognized that the selection of the camera, film and lens were creative choices.²⁴³ However, as if that were not enough, the court went on to assert that Zapruder had selected the location from which to film and the time to film. Thus, the court felt it necessary to describe happenstance as creative direction in order to come within *Burrow-Giles*. The court describes in detail all of the testing of spots from which to film as if to absurdly suggest that Zapruder had nothing but aesthetic considerations in mind.²⁴⁴

239. *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 384 (S.D.N.Y. 1987); *see also* *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000) (“photograph of an object is copyrightable”). *But see* Note, *Photographer's Rights: Case for Sufficient Originality Test in Copyright*, 30 J. MARSHALL L. REV. 149, 187 (1996) (“Courts assume that studio lighting and set-up are part of expression. It can be, as in the Saroni photograph, but normally it is not. In fact, a commercial photographer's reputation depends on delivering consistent and predictable results. Lighting and set-up generally follow standard published formulas.”).

240. *See, e.g.*, *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001) (holding that similar features of photographs involved elements not protected by copyright); *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371 (S.D. Ga. 1998), *aff'd in part, rev'd in part*, 212 F.3d 1210 (11th Cir. 2000) (holding that photographers have no claim over those elements in which they did not exercise creative control).

241. *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

242. *Id.* at 131.

243. *See id.* at 143.

244. *Id.* at 133.



Zapruder's Film - Frame 262

If a warm body is needed to make creative choices about the location from which to take pictures and the timing of the picture taking, and if happenstance alone does not qualify, photographs created by surveillance cameras and pictures produced by satellite imaging would seem to be excluded from protection. Yet one can imagine a case in which an image is produced by these means that has enormous commercial value. Then what technique will be used by the court to decide that the photograph nevertheless is a work of authorship? The doctrine that has developed from the cases that strictly adhere to *Burrow-Giles* encourage courts to search photographs for the presence of a Romantic author conceptualized in a particular historically situated way. However, the valuable images in these controversies, as in the Zapruder film, may serve as an important historical record. Both a natural reading of these photographs and the legal doctrines that separate them prove incoherent.

The legacy of *Burrow-Giles* and its particular conception of authorship in photographs has resulted in denials of authorship to photographers whose choices are more subtle and technical. For instance, in a dispute over who owned undersea footage of the Titanic wreck, the court had to decide which party most resembled the author: the cameraman who manually operated the camera under the sea or the director who was miles away, above sea level.²⁴⁵

245. See *Lindsay v. R.M.S. Titanic*, 1999 U.S. Dist. LEXIS 15837 (S.D.N.Y. 1999). The court may have been predisposed to find against the cameraman due to other facts in the case, but the *Burrow-Giles*

The court held that the director who created “storyboards” for the film indicating how it should look, briefed the cameraman, and screened the film daily was the author. The cameraman, the court held, was not even a joint author because he exercised no creative control over the production of the work. This example demonstrates that the *Burrow-Giles* framework is still at work: the court cannot conceive of an author acting through a machine, but only in advance of it. As this film was a documentary, the viewer’s belief in objectivity in reporting the scene exactly as it appears can be maintained.

This debate over authorship in photography presents the law with the perfect opportunity to come to grips with the Romantic impetus, but courts have continually chosen to adhere to the *Burrow-Giles* framework. Courts have not taken these opportunities to redefine or eliminate romanticism from the authorship requirement. These courts could have shown how artistry does not require solitary genius or invention or irreproducible skill, but that in some cases it may be the mere selection of views that is artistic. The artistry may be plodding; it may take time. Instead, the courts have squandered this opportunity and reinstated and reinforced the Romantic author by describing the process as similarly as it can to the process described to the *Burrow-Giles* Court by Sarony in 1883. Instead of resolving an easy question, it set us up for more difficult questions. What should be easy cases are now more difficult.

Courts are continuing to struggle with the question of *Burrow-Giles*’ emphasis on pose for analysis of scope of protection for photographs. For instance, recent courts have reconsidered the issue presented in *Gross v. Seligman* of whether the *Burrow-Giles* conception of authorship affords protection to the composed scene. In *Kisch v. Ammirati & Puris Inc.*,²⁴⁶ although the court confirmed that a photograph’s copyright cannot monopolize the pose or scene depicted, and that what is protectable is the author’s original conception of the subject, not the subject itself, it denied summary judgment for the defendant who argued that they could not as a matter of law have copied plaintiff’s photograph because they had taken it live rather than re-photographed the photograph.²⁴⁷ In *Caratzas v. Time Life, Inc.*,²⁴⁸ the court

framework provided the analytical means.

246. *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1987).

247. *Id.* at 384. Here, the second photograph depicted the same location, with same background, same pose (although man in one and a woman in other and both have musical instruments although saxophone in one and concertina in other), same lighting, camera angle, camera position. *Id.*

248. *Caratzas v. Time Life, Inc.*, No. 92 Civ. 6346, 1992 U.S. Dist. LEXIS 16285 (S.D.N.Y. 1992). *See also* 17 U.S.C. § 120(a) (2000) (stating that a copyright in an architectural work does not include the right to make and distribute photographs of a building visible from a public place).

stated, in dictum, that Justice Holmes' ruling in *Bleistein* "ensured that no photographer may obtain the exclusive copyright in images of a particular public object."²⁴⁹ Thus, the scene is a fact that no photographer may appropriate. The only prohibitions on a second comer is that they must not copy the original aspects of the work such as the lighting or placement of the subject.

The recent case of *Bridgeman Art Library, Ltd. v. Corel Corp.*,²⁵⁰ called into question the expansion of the authorship analysis supplied by *Bernard Geis* and others. At issue were photographs of works of art—all two-dimensional—owned by museums. These photographs were to serve as reproductions of the artworks for the purposes of publications and merchandizing. Therefore, they were produced with an effort to be faithful to the original work of art. In the hearing, plaintiff's attorney tried to explain to a skeptical court how there was authorship in these photographs:

[Plaintiff's attorney]: you have to have a mind operation, you have to evaluate the tones coming off the images, the type of films you use whether to use a high intensity, low intensity from the right from the left Court: But in developing the Xerox machine didn't they have to consider the tones coming off the paper, whether to use a high density [sic] light or a low intensity light, whether to use sensitized paper, how to get a toner, what the color tone of the toner ought to be [W]hile almost all photography is original, the key word is "almost," you may have found the exception.²⁵¹

249. *Caratzas*, 1992 U.S. Dist. LEXIS 16285, at *10. The "particularly public object" was Pompeii. The Plaintiff brought a copyright infringement suit against Time Life for printing photographs. The court held that while the Plaintiff had copyright to two books about Pompeii, this right did not include the individual photographs within the books. See *id.* at *11.

250. *Bridgeman Art Library Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *aff'd on reh'g*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

251. See Record at 3-6, *Bridgeman Art Library Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998) (No. 97 Civ. 6232).

[Plaintiff's Attorney:] It's not the camera, Judge. It's what you put . . . into the camera, how you process it when it comes out, what light you apply, what lens to use. It's a whole artistic process. If your Honor is going to take the position that photography is not an art, then I might as well go home.

[Court:] You don't have to go home. In fact, I've written on whether photography is an art, and I've written on the subject of the intellectual property protection of photographs, and it's obvious from the colloquy here that I'm a photographer myself as a hobbyist, but I have a feeling you're barking very much up the wrong tree here because I think what you're doing is that you're taking generalizations that apply to, first of all, art photography and second of all, an enormous range of photography that probably isn't properly characterized as art photography, and includes even things like family snapshots, and attempting to apply it to a very special case, the case of someone trying to create an exact copy

Id.

The court's response to plaintiff's arguments harken back over one hundred years to the defendant's brief in *Burrow-Giles* in its inclination to see the work as the product of the inventive, but soulless machine:

[O]ne need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. That is not to say such a feat is trivial, simply not original. The more persuasive analogy is that of a photocopier. Surely designing the technology to produce exact reproductions of documents required much engineering talent, but that does not make the reproductions copyrightable.²⁵²

The persistence of *Burrow-Giles* is suggested by *Bridgeman*, which is the most significant recent photography decision. Here the court reaffirms *Burrow-Giles* stating that "almost" all photographs contain an authorial presence, but, like *Burrow-Giles*, presumes a category of the ordinary production of a photograph. In this case, however, a strong argument has been presented about the number of choices a photographer makes even in the production of instrumental photographs. But in the court's mind, these are technical choices that relate to the operation of the technology and not to pre- or post-shutter activity. Like *Gross v. Seligman*, this case involves a scene already created. Therefore, under the influence of *Burrow-Giles*, the recapturing of that scene is not creative.

C. Authorship Jurisprudence

Outside of photography cases, the *Burrow-Giles* decision has been a major influence on the authorship and originality doctrines. The 1991

252. *Bridgeman*, 25 F. Supp. 2d at 427 (citations omitted); Tuchman, *supra* note 69, at 309. Judge Kaplan in *Bridgeman* responded:

To be sure, much, perhaps almost all, photography is sufficiently original to be subject to copyright. Certainly anyone who has seen any of the great pieces of photography—for example, Alfred Eisenstadt's classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V-J Day, the stirring photograph of U.S. Marines raising the American flag atop Mount Surabachi on Iwo Jima, Ansel Adams' work and the portraits of Yousuf Karsh—must acknowledge that photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations.

Bridgeman, 25 F. Supp. 2d at 427.

In the 1980s postmodern artist Sherrie Levine did a series of photographs in which she deliberately re-photographed famous art photographs to make a comment on originality. Hers was a slavish copy to be sure, but as postmodern artists have in common, if nothing else can bind them together, a focus on the conception behind their art, her conception should be thought of as the intellectual labor of an artist. See Constance Lewallen, *Sherrie Levine*, J. CONTEMPORARY ART, available at <http://www.jca-online.com/slevine.html> (last visited Feb. 10, 2004).

Supreme Court case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,²⁵³ occasioned a thorough discussion of the originality requirement in copyright law.²⁵⁴ There the Supreme Court, heavily relying on *Burrow-Giles*, announced that an author performs creative activity and therefore authorship cannot be simply equated to extensive labor, sweat of the brow, specialized skill, or technical knowledge in order to find a particular product copyrightable. As a result of this standard, the Court held that there could be no authorship in data bases that were compiled without creative choices.²⁵⁵ Although the Court trumpeted that “the *sine qua non* of copyright is originality” and in a lengthy opinion attempted to clarify just what copyright law requires of an author, the Court could cite no other authority on the creative requirement it espoused except that *Burrow-Giles* does not recognize anything else.²⁵⁶ Thus the author that emerges out of *Burrow-Giles* and is

253. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

254. *Feist* was not the first time the Supreme Court invoked *Burrow-Giles*. In previous cases the Court harkened back to *Burrow-Giles* for elucidation on what it means to be an author. In *Goldstein v. California*, the Court cited *Burrow-Giles* for the constitutional definition of “author” as “an ‘originator,’ ‘he to whom anything owes its origin.’” 412 U.S. 546, 561 (1972). In *Mazer v. Stein*, the Court quoted *Burrow-Giles* as stating that “writings” are to be defined as the literary productions of authors “‘by which the ideas in the mind of the author are given visible expression.’” 347 U.S. 201, 206 n.5 (1954). The Court stated that the originality standard requires “the author’s tangible expression of his ideas” and cited *Burrow-Giles*. *Id.* at 214.

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court stated that even a compilation of pure fact can entail originality and cited as an example *Burrow-Giles* as if a photograph is an original compilation of facts. 471 U.S. 539 (1985). In *International News Service v. Associated Press*, Justice Brandeis’ dissent argued that the facts of news stories are not copyrightable, stating that “intellectual productions are entitled to such protection only if there is underneath something evincing the mind of a creator or originator, however modest the requirement. The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection,” and compared the situation to *Burrow-Giles*. 248 U.S. 215, 254 & n.2 (1918) (Brandeis, J., dissenting).

In dissenting from the denial of certiorari in *Lee v. Runge*, Justice Douglas argued that the standard for copyrightability should be as high as it is for patentability. 404 U.S. 887, 887 (1971) (Douglas, J., dissenting). “No reason can be offered why we should depart from the plain import of this grant of congressional power and apply more lenient constitutional standards to copyrights than to patents. Indeed, . . . a copyright may have to meet greater constitutional standards for validity than a patent. The limitations set forth in *Graham v. John Deere Co.*, [363 U.S. 1 (1966)] therefore, apply with at least equal force to copyrights. 404 U.S. at 890 (Douglas, J., dissenting) (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884)) (footnotes omitted).

In *Bleistein v. Donaldson Lithographing Co.*, Justice Harlan, in a dissenting opinion, argued that the plaintiff’s work lacked original artistic design and thus lacked the intrinsic value needed in order to “promote the progress of science and useful arts.” 188 U.S. 239, 253 (1903) (Harlan, J., dissenting).

255. In this case, a typical white page telephone directory was at issue. *Feist Publications*, 499 U.S. at 340.

256. *Id.* at 346.

redployed in later cases is a Romantic figure, and not a plodding, useful worker.

If an author is someone who creates something artistic from nothing, then one who reworks that author's work is not an author. Similarly, others' contributions to that work must be discounted, be they the producers of previous works or those who assisted in some way with the current production.²⁵⁷ What then is privileged is innovation. According to the Romantic ideal, innovation is the embodiment of the human spirit. Genius works like that. A sudden burst of creativity and a new thing now exists. This sets up the demise of the labor or "sweat of the brow" theory of artistic production. Originality and authorship are only equivalent when authorship is understood in a Romantic sense.

The *Feist* Court stated that *Burrow-Giles* "defined the crucial terms 'authors' and 'writings.' In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. . . ."

The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." . . . [T]he Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," and stressed the importance of requiring an author who accuses another of infringement to prove "the existence of those facts of originality, of intellectual production, of thought, and conception."²⁵⁸

The *Feist* Court thus imagined a distinction between discovery and invention or creation: "facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its 'maker' or 'originator.'"²⁵⁹ In *Burrow-Giles*, the author did not discover facts, he created them. He set up the scene—he created it.²⁶⁰ The

257. See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991) (holding that each author must intend to be treated as joint authors at the time of creation for joint authorship to exist); *Thomson v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998) (holding that non-coauthorship constitutes copyrightable interests in a contribution to work); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232, 1235-36 (9th Cir. 2000) (holding that a consultant's contributions to movie did not establish that he was co-author of a joint work).

258. *Feist Publ'ns*, 499 U.S. at 346-47 (citations omitted).

259. *Id.* at 347. ("Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not 'owe its origin' to Rural.") *Id.* at 361 (citing *Burrow-Giles*, 111 U.S. at 58).

260. Of course the only construction that was recognized was in the pre-shutter activity. Constructing photographs by altering them after the fact was not recognized as the creative work. See *Burrow-Giles*, 111 U.S. at 58.

Burrow-Giles Court did not have before it a case in which the photographer was a discoverer of facts. Thus, there was no argument that authorship lie in the selection of when and what to capture from already discovered scenes. Instead, authorship is articulated as the creation of the scene that the camera took in. The Court accepted this account. The Court in *Feist* echoes *Burrow-Giles* when it states that “an author who claims infringement must prove ‘the existence of . . . intellectual production, of thought, and conception.’”²⁶¹

Thus, the common law has interpreted an author to be one who creates something that is original to him or her, something that is “the personal reaction of an individual upon nature.”²⁶² Far from being a simple prescriptive against copying, this jurisprudence carried with it a Romantic inflection. The *Burrow-Giles* Court certainly understood the Romantic impetus of the doctrine viewing copyright as “the exclusive right of a man to the production of his own genius or intellect.”²⁶³

CONCLUSION

“All photographs are accurate. None of them is the truth.”

~Richard Avedon²⁶⁴

In the end, copyright law is so interesting because it is fraught with fundamental problems. The first copyright law was written for books; however, over the years copyright law has been expanded and extended and new technologies have challenged its fundamental notions. These new technologies have raised serious issues over copying and control, but more important, they often challenged the boundary of the subject matter with never-anticipated commodities. Yet, somehow, copyright law always accommodates.

Burrow-Giles presents the first such confrontation in which the accommodation of a new technology was raised, but also where the fundamental concept of authorship was at stake. *Burrow-Giles* is cited continuously and often quoted for the proposition that the author is “he to

261. *Feist Publ'ns*, 499 U.S. at 362.

262. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 250 (1903); *Blunt v. Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1, 580). Ironically, in *Bleistein*, the Supreme Court got caught up in discussing the original work as the “copy.” *Bleistein*, 188 U.S. at 250. This however, was to indicate how an author copies from nature (being the original) and just goes to highlight this Romantic strain.

263. *Burrow-Giles*, 111 U.S. at 58.

264. RICHARD AVEDON, *EVIDENCE 1944-1994*, at 97 (Mary Shanahan ed., 1994).

whom anything owes its origin.”²⁶⁵ But the central question is glossed over as insignificant while the authorship doctrine that grows out of *Burrow-Giles* has every appearance of a natural development of the law.

When the context in which this case emerged is examined, revealing how photographs were understood at the time, the assertion of authorship in photography becomes both more complex and more interesting. Taken out of its historical context, *Burrow-Giles* may be seen to represent modernist claims of self-containment of the image and presence of the author. Instead, by situating the case within its particular context, its dependency on pre-existing conventional discourses is revealed. Thus, the *Burrow-Giles* opinion is a complex negotiation around debates of the day, expected results and feared consequences.

Ultimately, the Supreme Court arrives at its conclusion by accepting the accounts of photography given by both parties. Not only did the Court replicate Sarony's arguments as its explanation of authorship in photography, but it also does not reject the defendant's account of a photography in which the machine does all the work so that there is no author. I would argue that the Court is probably more influenced by the defendant's arguments in reaching this result than in Sarony's, which it recites as a convenient means to reach the outcome in this case. It is only because the Court does not reject a vision of a photography that has no author that it must in this case locate an activity by a human that it can pronounce authorial. The Court could have, as Judge Learned Hand did, proclaimed that all photography was the work of an author; that in the production of every photograph a human operator of the machine exercises choice, and so doing, the work originates with him. In order to reach this holding, though, the Court would have had to critically examine the practice of photography. The Court would have to acknowledge that all photographs are constructed and that some human activity takes the form of an intervention into the mechanical process. This or any other broader holding about the authorial presence in photography would have dramatically undermined the deployment of other photographs in other arenas by problematizing photography's claimed objectivity.

The complexity of the problem in closer cases—in cases where the human activity is closer to the box—is not represented in the ensuing doctrine of authorship in photography. This complexity was not presented; it was avoided. Cases after *Burrow-Giles*, however, are more complicated because

265. See *Feist Publ'ns*, 499 U.S. at 346; see also *Goldstein v. California*, 412 U.S. 546, 561 (1972) (citing *Burrow-Giles*, 111 U.S. at 58).

of the development of the technology and the propagation of new photographs. In these cases, in which authorship is inevitably found, the courts must strain to analogize the human activity involved to Sarony's activity in 1883. Even though amateur photographers like Zapruder are awkwardly forced to appear to be more like directors, nevertheless, the doctrine unavoidably is creeping dangerously close to the box, as film speed and location become credited activities. Still, the default is preserved. The point is that this activity continues to be analogized to Sarony's. Courts still go through this exercise. And for this reason, the authorship doctrine in photography perpetuates the authorless, objective photography.

The technique chosen to demarcate photographs turns out to be totally unhelpful and yet remarkably enduring. The *Burrow-Giles* opinion does not offer any meaningful framework to later courts because it avoids a direct confrontation with the unromantic author presented in the ordinary production of a photograph.²⁶⁶ Thus, courts are left without any guidance for how to determine whether the photograph at issue is an exceptional photograph or an ordinary photograph. They are left to attempt to analogize the process of producing the photograph at issue to the process used by Sarony. And in this way, the *Burrow-Giles* evasion turns out to be prophetic. Essentially, *Burrow-Giles* solves the problem by ignoring the problem. At first glance it may appear to be a short-coming; a chance missed. But by simply analogizing Sarony to an author, the Court set in place a lasting, though largely unstated, account of photographs.

266. *Bleistein* can be read as a post *Burrow-Giles* recognition of the failure of the Court.