

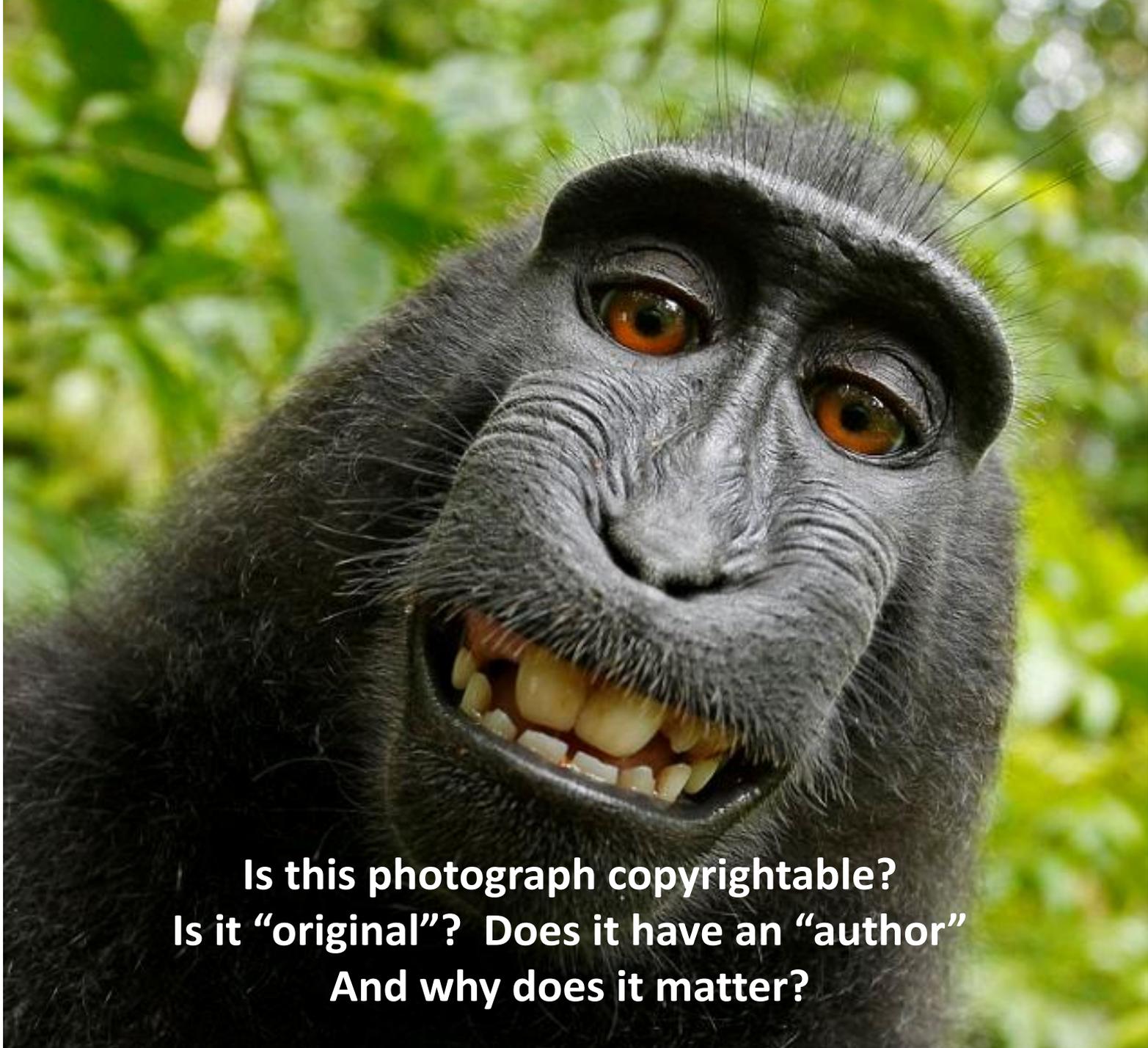
Copyright Law

Prof. Madison

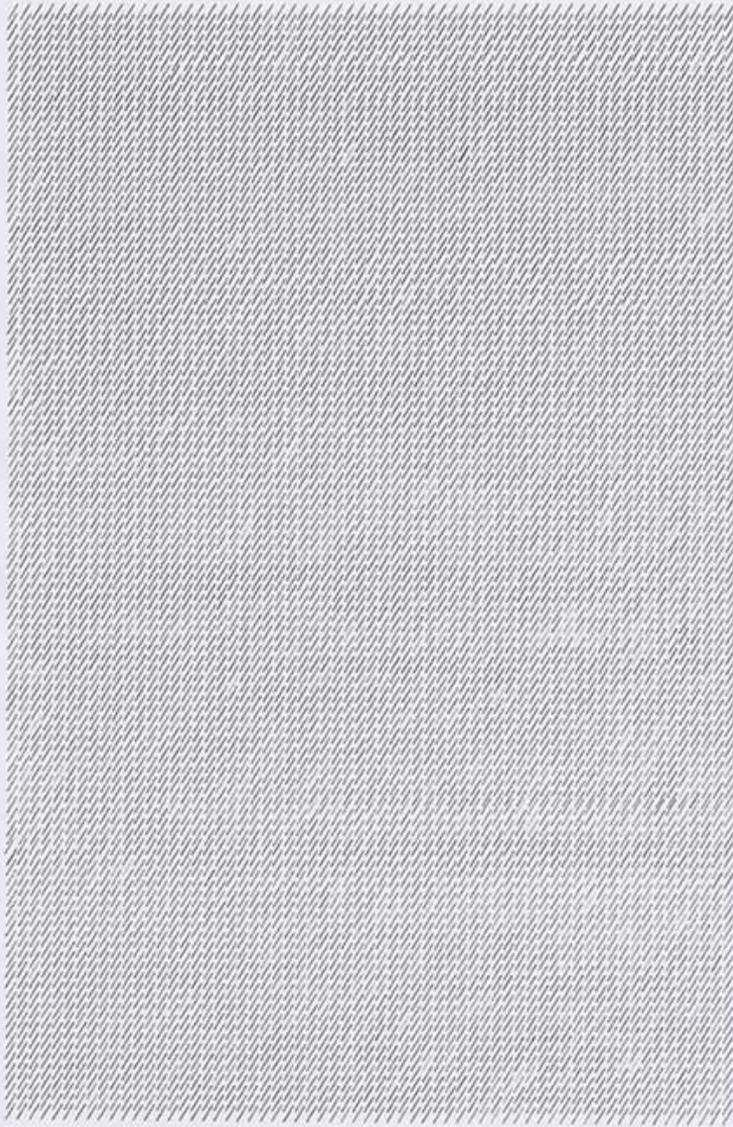
University of Pittsburgh School of Law

Topics:

- Copyrightability
- Originality and Authorship as Prerequisites for Copyright Protection
- Section 102(a) of the Copyright Act



**Is this photograph copyrightable?
Is it “original”? Does it have an “author”
And why does it matter?**



Is this an “original” work of authorship?

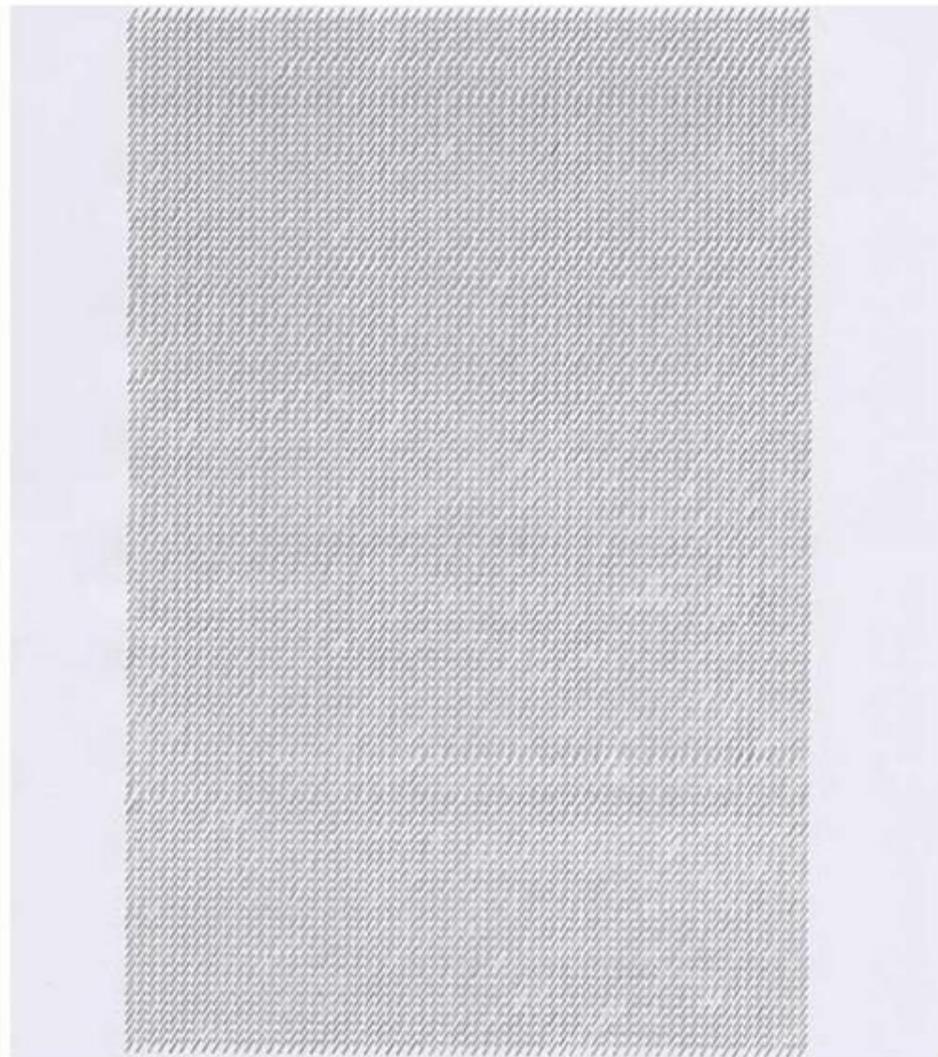


“Forward Slash” by Poppy Lekner (New Zealand), winner of the Parkin Drawing Prize (an annual competition in New Zealand with a \$25,000 (NZ) first prize).

The judge: “It’s such a beautiful ... minimal work where she’s really exploring a kind of meditation of process, literally just repeating forward-slash over and over again ... creating a beautiful woven pattern.”

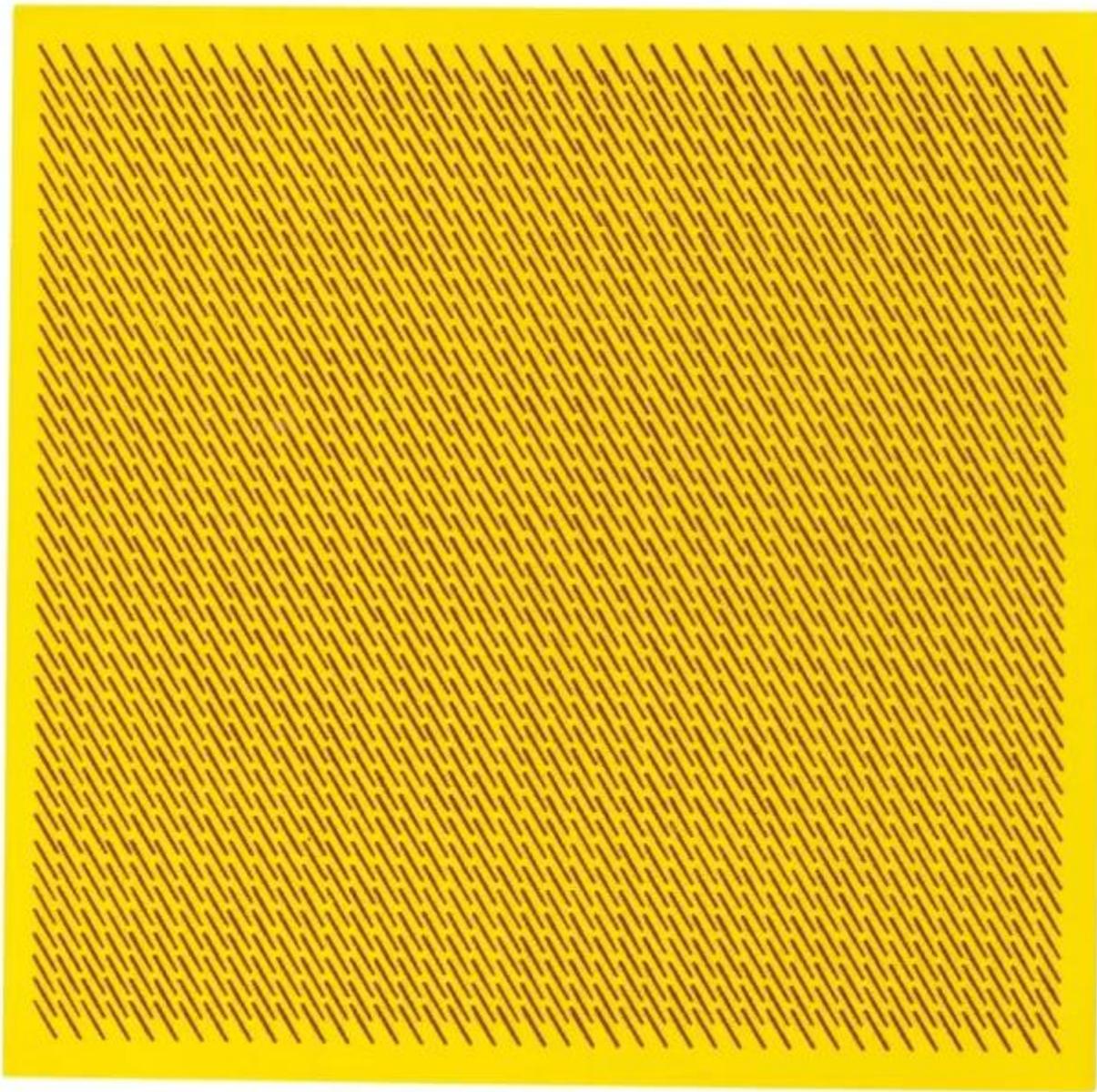


Lekner, "Forward Slash,"
New Zealand (2020)



Joel Swanson, "/" [forward slash],
US (2015)

It's "the same" (is it?), but it is not ... "copied."



Maurizio Nannucci, "Dattilogramme Typewriter Poem" (1964)

The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material: Copyright encourages the production of ... what? Why?

Constitution:

Congress shall have the power “to promote the progress of science and useful arts, by securing for limited times to **authors . . . the exclusive right to their . . . writings.** (U.S. Const., Art. I, sec. 8, cl. 8)

Statute:

“Copyright protection subsists, in accordance with this title, in **original works of authorship fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

17 U.S.C. § 102(a) (2022) (note “medium neutrality” implied by the text)

The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material:

Learn to parse the statutory text. Here: “original”

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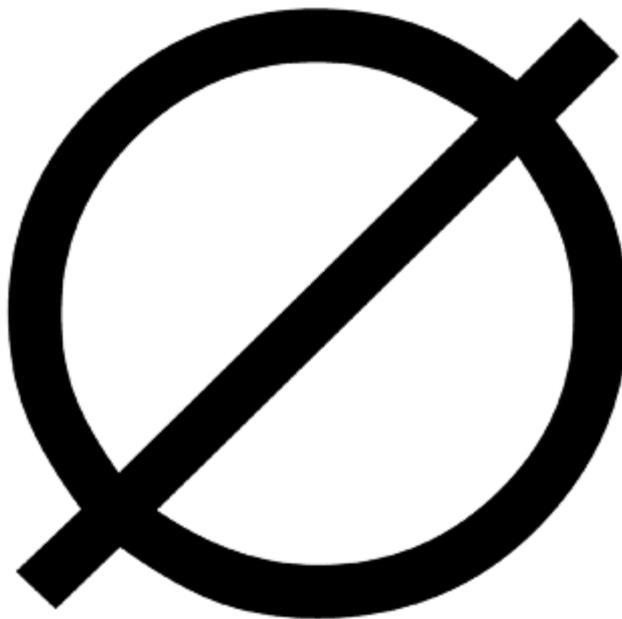
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The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material:
Learn to parse the statutory text. Here: “original”

Look to § 101 for the definition of “original.”



The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material:
Learn to parse the statutory text. Here: “original”

Evolving legal standards re: what can be ©:

1790 Copyright Act: “maps, charts, and books”

1909 Copyright Act: “all writings of an author”

(the statute identified specific items capable of registration, such as “books,” “periodicals,” “lectures,” “sermons,” “works of art,” “photographs,” and “prints”)

1976 Copyright Act: “original works of authorship”

(the statute identifies categories of works eligible for copyright, including (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.)

The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material:
The modern standard, interpreting Section 102(a):

Feist Publications, Inc. v. Rural Telephone Service Co.

(US 1991):

- ✓ ***Sine qua non* of copyright is originality.**
- ✓ **Originality is a Constitutional (not only statutory) requirement**
- ✓ **“Originality” requires that the work:**

1/ Be independently created by the author

**(cf. Alfred Bell & Co. v. Catalda Fine Arts (2d Cir. 1951);
Bleistein v. Donaldson Lithographing (US 1903)); and**

**2/ Demonstrate at least a “minimal degree of creativity”
(cf. Burrow-Giles v. Sarony (US 1884))**

X “Sweat of the brow” reasoning (© as reward for effort / hard work) “flouts basic copyright principles.”

- ✓ **Economic incentives are the key justifications for ©.**

Result: copyright in a factual compilation is “thin.”

**Originality problems and
“creating” via machines rather
than via hand:
The invention of photography**

Burrow-Giles Lithographic Co. v.
Sarony (US 1884)

***Holding:* Congress can authorize
copyright in all forms of writing “by
which the ideas of the mind of the
author are given visible expression . .
. so far as they are representatives of
original intellectual conceptions of
the author”**

***Note emphasis on the “Romantic”
(literary) author, not the
economically-incentivized author.***



Originality problems and the invention of art for the masses: modern commercial advertising

Bleistein v. Donaldson Lithographing Co.
(US 1903)

Holding: Artworks are not ineligible for © simply because they are parts of mass marketed advertising. Why? Because Congress can authorize copyright in “the personal reaction of an individual upon nature”



“Others are free to copy the original. They are not free to copy the copy.”
[Anachronistic language alert: “The copy” means “the original.”]

Note again the emphasis on the “Romantic” creator, not the economically-incentivized author.

Copyright's "aesthetic non-discrimination principle" [not really a principle!] at work



(C.M. Coolidge, 1910)

**Originality
problems:
Creating
(copying?) by
machine rather
than by hand**

Holding: The “author” [must have] contributed something more than a “merely trivial” variation, something recognizably “his own.”

Originality in this context “means little more than a prohibition on actual copying.”

[quotation but not the illustration from Alfred Bell & Co. v. Catalda Fine Arts, Inc. (2d Cir. 1951)]

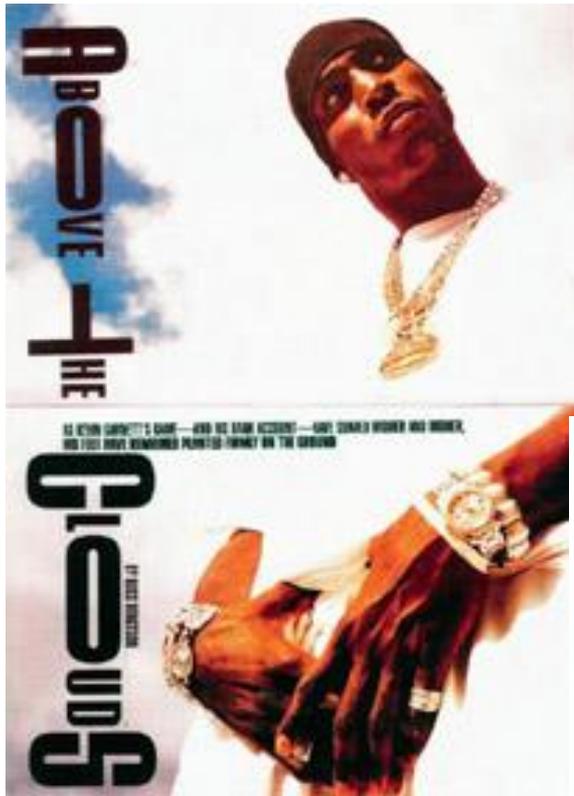


Harney v. Sony Pictures Television, Inc. (1st Cir. 2013)



vs.





(original)

1



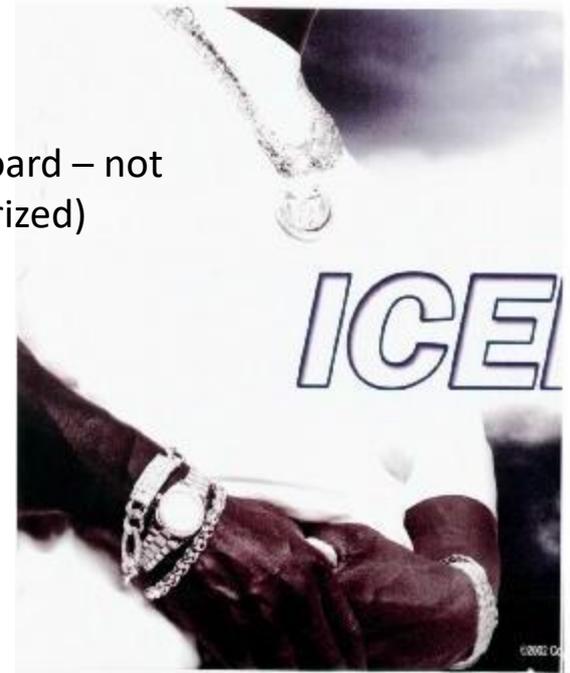
(comp board - authorized)

2



(final billboard – not authorized)

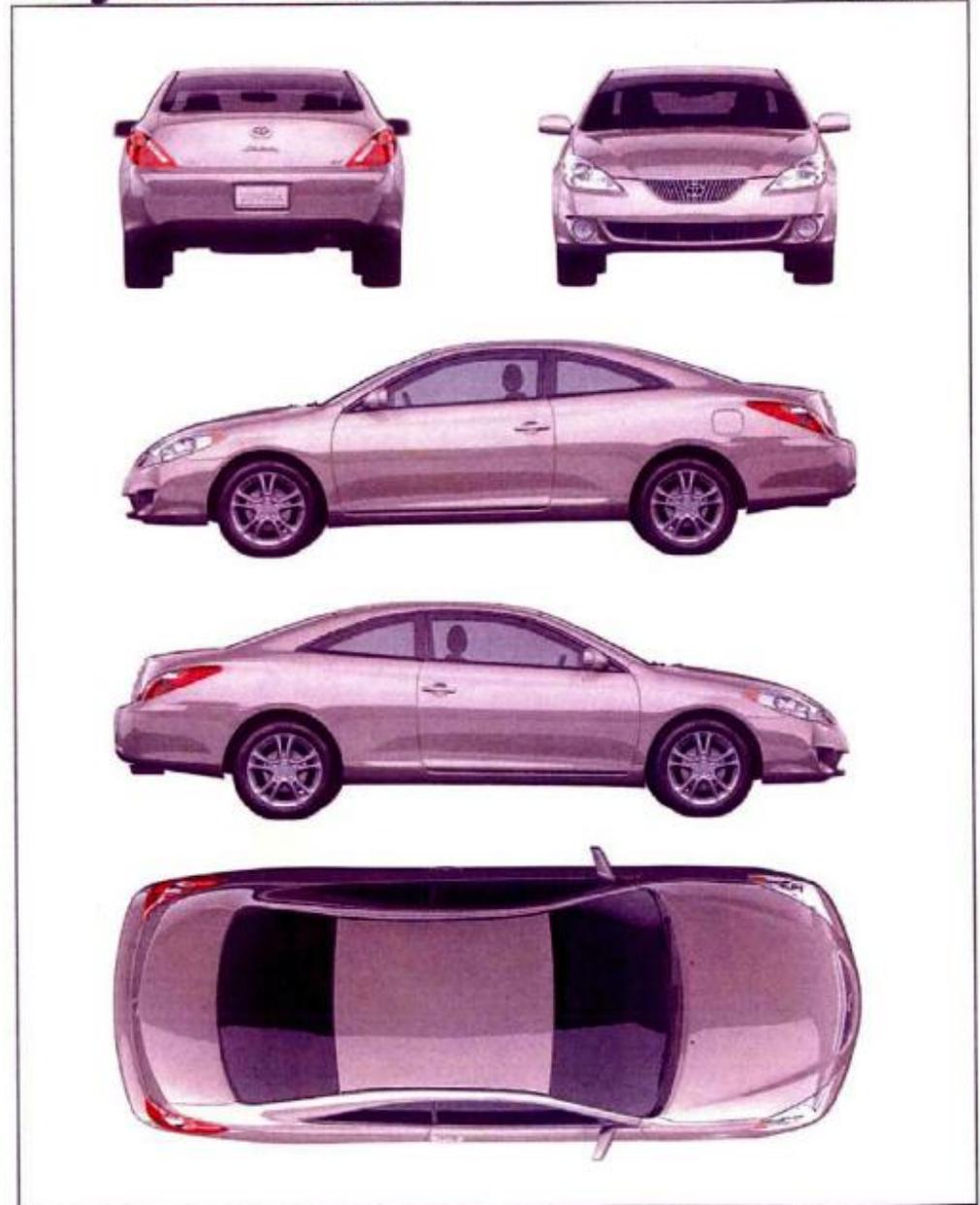
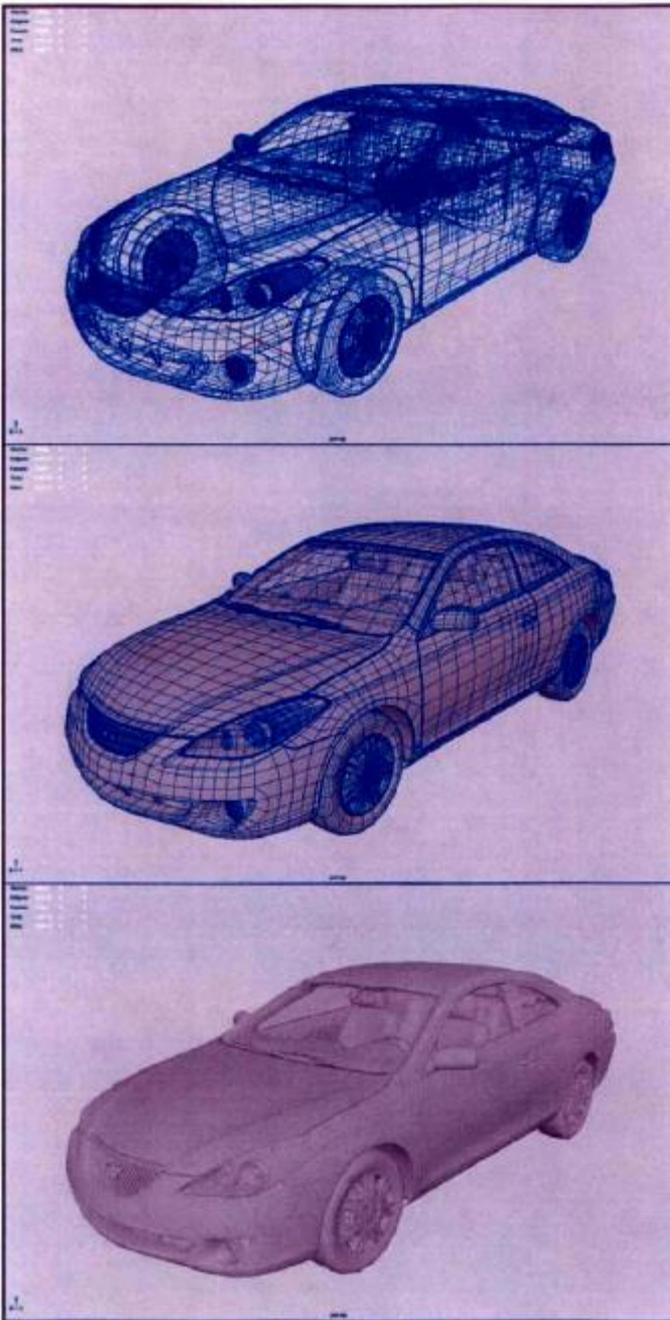
3



Is the original photograph copyrightable relative to the infringing billboard?
Mannion v. Coors Brewing Co. (S.D.N.Y. 2006)

Toyota Solara SE

July 14, 2003

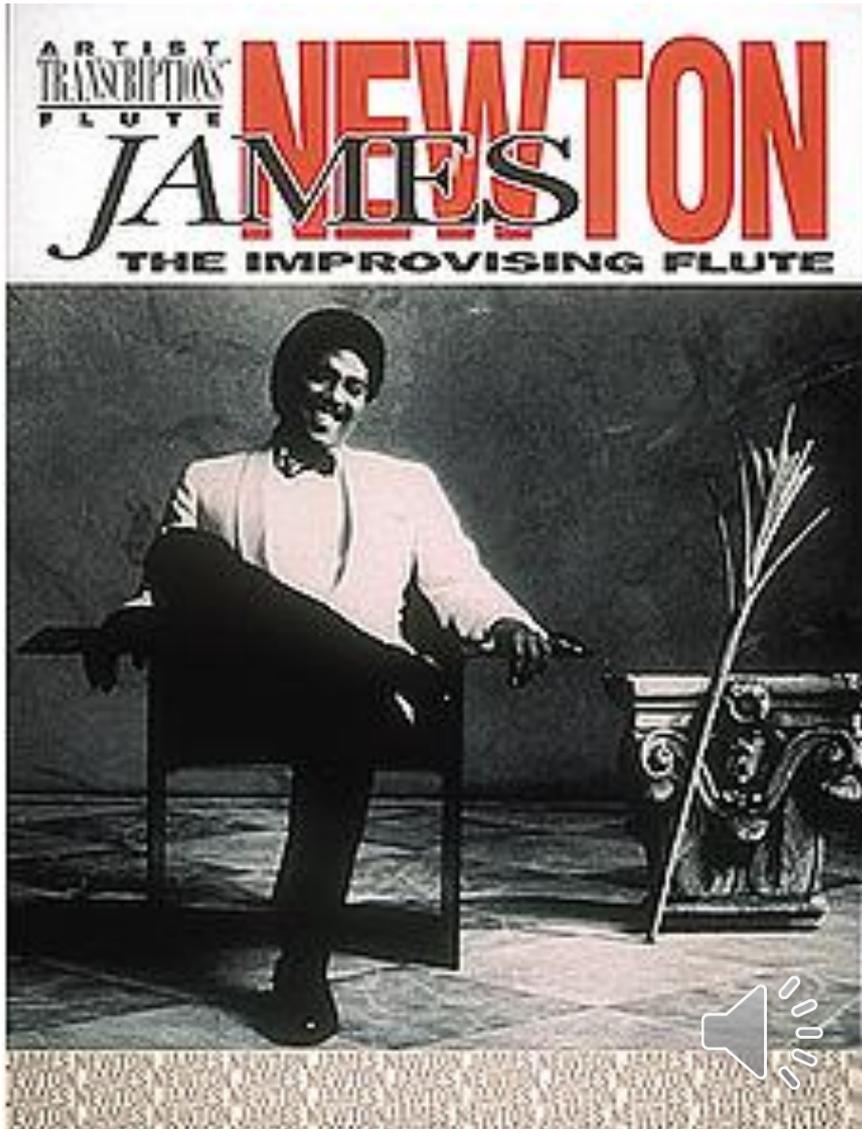


Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc. (10th Cir. 2008)



Is this photograph copyrightable?
Clifford Ross, "Mountain I"
Shot with the R-1 Camera

Originality problems: Short works (words) and phrases



Newton v. Diamond (9th Cir. 2004)



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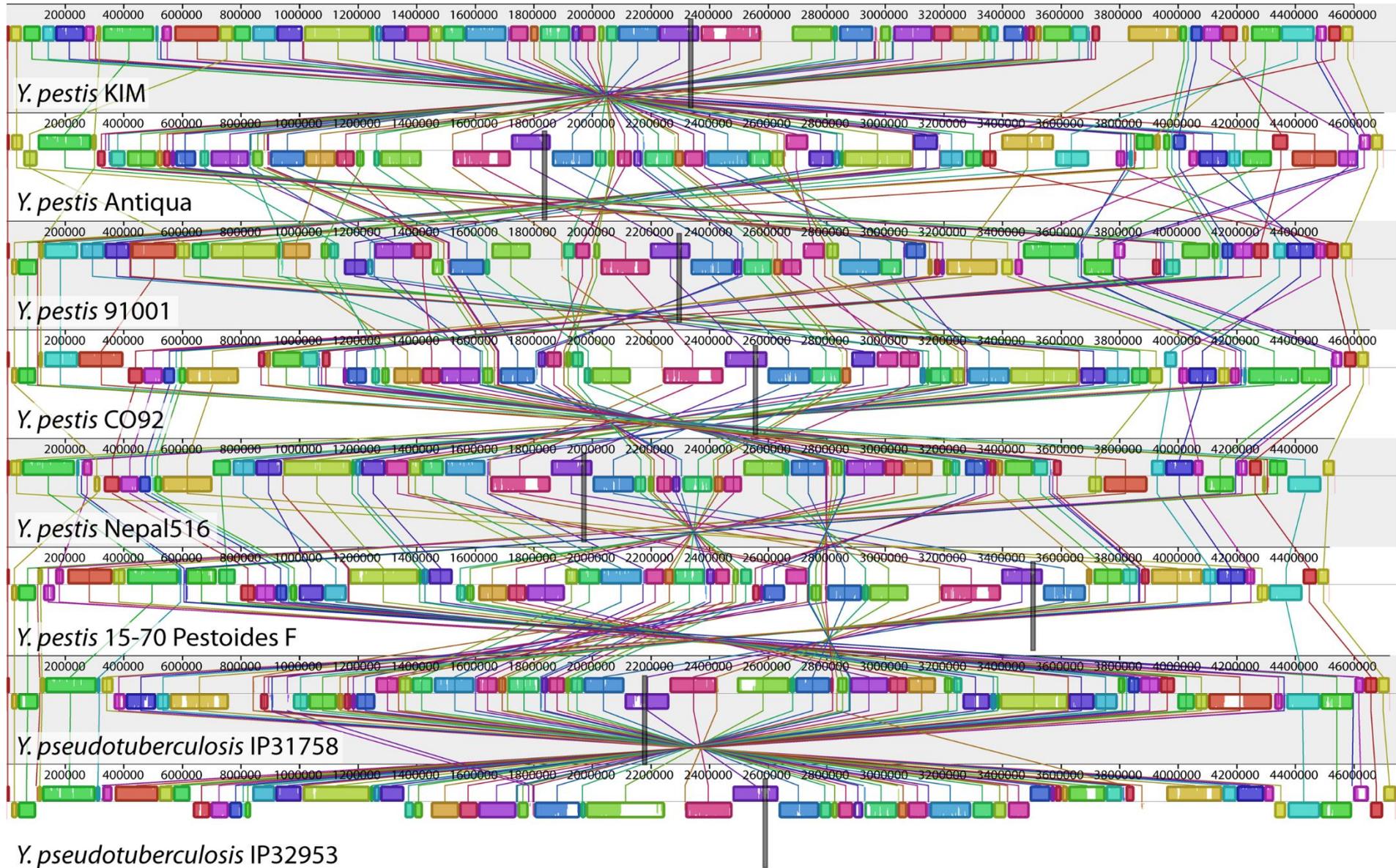
Does the photograph
possess copyrightable
originality?

Does the photograph
possess copyrightable
authorship?



Naruto in action

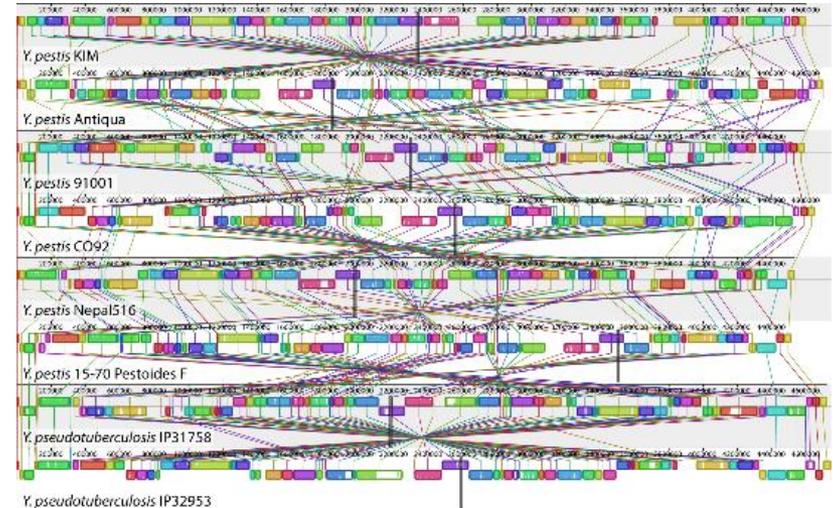




Who owns data and datasets? A “Big Data” challenge

Originality: Cutting edge problems in copyright. When does “originality” or “creativity” not count for copyright purposes?

Who owns data and datasets?
(Anyone?)
A “Big Data” challenge.



Biotechnology (inventions)
(creations):
Can “artistic” or “created” tissue be protected via copyright?
E.g., GloFish; engineered DNA sequences.

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GLOFISH® FAQ

Common Questions About GloFish® Fluorescent Fish

GloFish® fluorescent fish are born brilliant! They are not injected or dyed. They inherit their harmless, glowing color from their parents, and require the same care as any other community fish. GloFish are great for any home, office, or classroom and perfect for hobbyists and beginners alike.

GloFish are similar to other fish, except they have a much brighter disposition. GloFish are available in six stunning colors: Starfire Red®, Electric Green®, Sunburst Orange®, Cosmic Blue®, Galactic Purple®, and Moonrise Pink®.

Today's GloFish fluorescent fish are bred from the offspring of fluorescent fish that were originally developed several years ago. Each new GloFish inherits its unique color directly from its parents, maintains the color throughout its life, and passes the color along to its offspring.

If you have a question relating to a GloFish branded kit, light, filter, plant, or ornament, please contact Tetra, which manufactures these products under a trademark license from our company. Their customer service contact page is <http://www.tetra-fish.com/tetra-fish-customer-service.aspx> or you can call Tetra's customer service directly at 1-800-526-0650, anytime between 7:30am – 5:30pm EST, Monday through Friday.

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- Caring for GloFish
- Displaying GloFish
- GloFish Marketing and Media
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GLOFISH PRODUCTS

Originality: Cutting edge problems in copyright. When does “originality” or “creativity” not count for copyright purposes? *Of facts, ideas, and functions.*

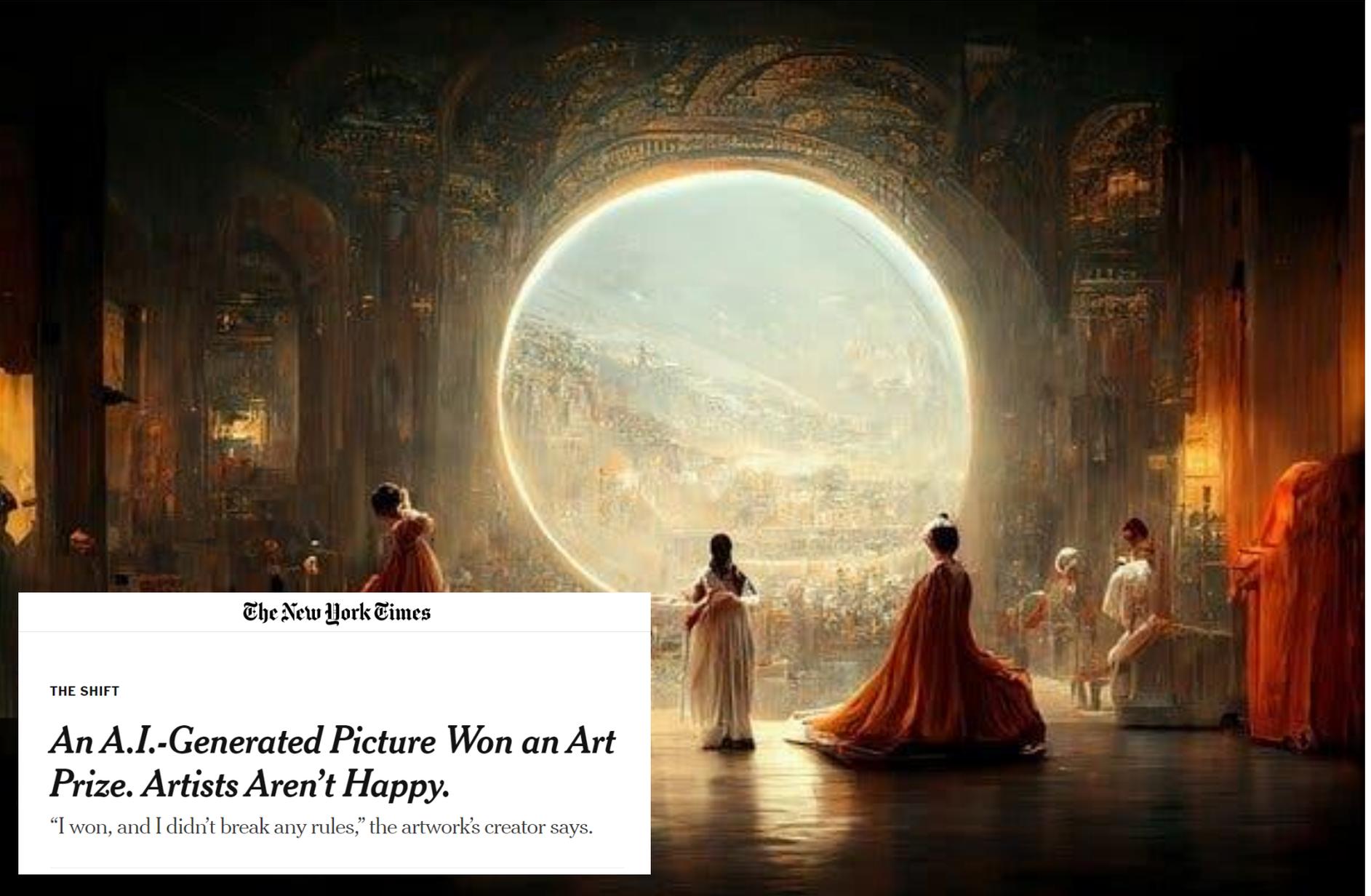
Can robot creations be protected via copyright?

E.g., the output of Google Translate; “smart” art-creating AIs; “procedural generation” of visual art (CGI backgrounds, videogame things – settings, objects)

What helps: Consider a kind of “proximate cause” style of thinking. A human set a chain of events in motion; was the human actor close enough to the end result to be said to have “caused” the creative expression?



Originality: Cutting edge problems in copyright. When does “originality” or “creativity” not count for copyright purposes? *Of facts, ideas, and functions.*



The New York Times

THE SHIFT

An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy.

“I won, and I didn't break any rules,” the artwork's creator says.



THE END



AN **MGM** CARTOON