

**THE ORIGINALITY OF PHOTOGRAPHS FOR PURPOSES OF
COPYRIGHT LAW BEFORE AND AFTER *BRIDGEMAN
ART LIBRARY, LTD. V. COREL CORP.***

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I. INTRODUCTION

Nothing says Season's Greetings quite like a personalized family photograph. Although professional photographers were essential to the outcome years ago, the emergence of digital cameras helps any amateur photographer produce professional looking images. Even if the photographs do not look professional after they are taken, photo editing software is readily available to make any photograph look flawless. There is no need for a dark room when numerous places exist where photographs can be printed to look like they were professionally developed. Some of these companies are even available on the Internet and can be accessed from the comfort of one's own home.¹

After all that hard work, nothing is more frustrating than to be told your photograph cannot be developed because it is *too professional*. This is exactly what happened to Mr. Bill Wolfson of Columbus, Ohio.² After taking photographs in his backyard with his "eight-megapixel Canon and retouch[ing] with Photoshop [a digital editing software program]," Mr. Wolfson went to Walgreens to have the pictures developed.³ A Walgreens representative told him that his photographs were too professional and could not be printed by the company.⁴

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¹ See, e.g., Kodak, Kodak Gallery, <http://www.kodakgallery.com> (last visited Feb. 25, 2009); Walgreens, W Photo from Walgreens, <http://photo.walgreens.com> (last visited Feb. 25, 2009); Wal-Mart, Wal-Mart Digital Photo Center, <http://www.walmart.com/photo> (last visited Feb. 25, 2009).

² See generally Brian Bergstein, *Copyright-worried Labs Reject Some Digital Printing Jobs*, USA TODAY, June 16, 2005, at Tech, available at http://www.usatoday.com/tech/news/2005-06-16-digital-picture-problems_x.htm.

³ *Id.*

⁴ *Id.*

Mr. Wolfson advised the representative that he was a serious amateur, but “[t]he photo supervisor wouldn’t budge.”⁵

Why would a company in the business of developing photographs turn down a paying customer who wanted to develop digital images? Because of the fear of violating copyright law and being held liable for damages.

Copyright law requires photo labs to be on the lookout for portraits and other professional work that should not be duplicated without a photographer’s permission. In the old days, questions about an image’s provenance could be settled with a negative. If you had it, you probably had the right to reproduce it.⁶

In today’s technological world, negatives are a thing of the past. Digital images are transferred over the Internet and stored on hard drives, CD ROMs, and memory cards where ownership is not readily apparent.⁷ This situation exemplifies the importance of the relationship between photography and copyright law in today’s world. Even the simplest task of taking a picture at home can be greatly affected by copyright law and how others interpret it.

In general, copyright protection is allowed when there is an “original work[] of authorship fixed in any tangible” form.⁸ With photography, the tangible form aspect is usually not at issue since few would argue against the tangible nature of a photograph.⁹ However, whether a photograph constitutes an “original work[] of authorship”¹⁰ is not as simple a concept to grasp. This article addresses the originality of photographs for the purposes of copyright law. Part II provides a brief overview of the statutes and case law framing the originality re-

⁵ *Id.* (Mr. Wolfson had to bring his driver’s license to the store as verification of the signature inscribed in the corner of the photograph before the store would process his order.).

⁶ *Id.*

⁷ *Id.*

⁸ 17 U.S.C. § 102(a) (2006).

⁹ *See id.* (a)(5) (noting pictorial and graphic works are included within the definition of works of authorship).

¹⁰ *Id.*

quirement in general, and how it relates to photography specifically. Part III discusses, in detail, the controversial decisions of *Bridgeman Art Library, Ltd. v. Corel Corp.*,¹¹ (referred to as *Bridgeman Art Library I*¹² and *Bridgeman Art Library II*¹³ separately, and *Bridgeman Art Library I and II* collectively), providing detailed analysis of the cases and their implications for photography and copyright law. Part IV discusses whether the District Court for the Southern District of New York's decisions in three recent photography copyright cases, *Eastern America Trio Products, Inc. v. Tang Electronic Corp.*,¹⁴ *Kaplan v. Stock Market Photo Agency, Inc.*,¹⁵ and *Mannion v. Coors Brewing Co.*,¹⁶ are consistent with *Bridgeman Art Library I and II*.

II. THE HISTORY OF ORIGINALITY AND PHOTOGRAPHS— PRE-BRIDGEMAN ART LIBRARY I AND II

A. *The History of the Originality Requirement*

Copyright law as it exists today is the product of a fusion between constitutional pronouncements, congressional legislation, and judicial jurisprudence that evolved over the course of many years. The initial grant of authority for Congress to regulate copyright law comes from the United States Constitution Article I, Section 8, Clause 8, which states Congress shall have Power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* and Inventors the *exclusive Right to their respective Writings* and Discoveries.”¹⁷

Implicit in the constitutional right to copyright protection is an originality requirement which allows the safeguarding of only “those components of a work that are original to the author.”¹⁸ Two United States Supreme Court cases, decided over one hundred years ago, clari-

¹¹ *Bridgeman Art Library, Inc. v. Corel Corp. (Bridgeman Art Library I)*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *modified on reconsideration*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

¹² *Bridgeman Art Library I*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998).

¹³ *Bridgeman Art Library, Inc. v. Corel Corp. (Bridgeman Art Library II)*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

¹⁴ *E. Am. Trio Prods., Inc. v. Tang Elect. Corp.*, 97 F. Supp. 2d 395 (S.D.N.Y. 2000).

¹⁵ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001).

¹⁶ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

¹⁷ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

¹⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

fied the originality requirement. In the *Trade-Mark Cases*¹⁹ and *Burrow-Giles Lithographic Co. v. Sarony*,²⁰ the Supreme Court “defined the crucial terms ‘authors’ and ‘writings.’ . . . [and] [i]n so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.”²¹ At present, “[t]he originality requirement articulated in the *Trade-Mark Cases* and *Burrow-Giles [Lithographic Co.]* remains the touchstone of copyright protection today.”²²

Almost twenty years later, plaintiffs presented the Supreme Court with the issue of whether three circus posters could be protected under the copyright law.²³ In *Bleistein v. Donaldson Lithographing, Co.*, three posters captured various members of the circus performing their particular acts.²⁴ The defendant copied the photographs in the posters without permission.²⁵ The Sixth Circuit Court of Appeals held that the posters did not warrant copyright protection because they were advertisements.²⁶ The Supreme Court was not swayed by the Sixth Circuit’s decision and pronounced two important theories that are still established concepts in copyright law today.²⁷ The first alludes to the slight level of originality needed for copyright protection.²⁸ The second conceives that the commercial nature of the photograph does not exclude it from copyright protection.²⁹ Even though the photographs were of real people, they were not less worthy of copyright protection than

¹⁹ *The Trade-Mark Cases*, 100 U.S. 82 (1879).

²⁰ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

²¹ *Feist*, 499 U.S. at 346. The *Feist* Court recognized an important holding in the *Trade-Mark Cases*: “The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.” *Id.* (emphasis added). The Court in *Feist* also noted that *Burrow-Giles* limited copyright to “original intellectual conceptions of the author.” *Id.*

²² *Id.* at 347; see also *Goldstein v. California*, 412 U.S. 546, 561-62 (1973) (citing *Burrow-Giles Lithographic Co.*, 111 U.S. 53, and *The Trade-Mark Cases*, 100 U.S. 82).

²³ *Bleistein v. Donaldson Lithographing, Co.*, 188 U.S. 239, 248 (1903).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 994 (1900).

²⁷ See *Bleistein*, 188 U.S. at 250-52.

²⁸ *Id.* at 250 (discussing originality).

²⁹ *Id.* at 252.

those considered fine art, as long as there was a reflection of personal reaction of the creator.³⁰

As early case law clearly demonstrates, “originality is a constitutionally mandated prerequisite for copyright protection.”³¹ The ambiguity of the Copyright Act of 1909 led to complications in the application of copyright law to photography.³² The statute did not explicitly address the originality requirement, but instead mentioned originality implicitly through the U.S. Constitution and the Supreme Court cases discussed above.³³ “By using the words ‘writings’ and ‘author’ – the same words used in Article I, § 8, of the Constitution and defined by the Court in the *Trade-Mark Cases* and *Burrow-Giles [Lithographic Co.]* – the statute necessarily incorporated the originality requirement articulated in the Court’s decisions.”³⁴ As a possible consequence of the Copyright Act of 1909’s ambiguity, some courts created and followed a “sweat of the brow” doctrine.³⁵ The “sweat of the brow” doctrine gave a “reward for the hard work” of the author and subsequently led to the “protection of factual compilations,” wholly against well-grounded theories of copyright law.³⁶

When Congress³⁷ requested the U.S. Copyright Office³⁷ overhaul the copyright statute,³⁸ it seemed the perfect opportunity to finally provide clarification for the originality requirement. The obvious dichot-

³⁰ *Id.* at 251.

³¹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991).

³² Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, TEX. INTELL. PROP. L.J., Fall 2006, at 31, 38.

³³ *See Feist*, 499 U.S. at 351.

³⁴ *Id.*

³⁵ *See id.* at 352.

³⁶ *Id.*

³⁷ United States Copyright Office, A Brief Introduction and History, <http://www.copyright.gov/circs/circ1a.html>, (last visited Feb. 25, 2009) (describing the duties of the U.S. Copyright Office as follows: “provides expert assistance to Congress on intellectual property matters; advises Congress on anticipated changes in U.S. copyright law; analyzes and assists in drafting copyright legislation and legislative reports and provides and undertakes studies for Congress; and offers advice to Congress on compliance with multilateral agreements, such as the Berne Convention for the Protection of Literary and Artistic Works”).

³⁸ *Feist*, 499 U.S. at 354.

omy between the established belief that originality is the “*sine qua non* of copyright”³⁹ and the blatant “absence of any reference to [originality] in the statute” troubled the U.S. Copyright Office.⁴⁰ With enactment of the Copyright Act of 1976, Congress explicitly included the originality requirement in the text of the statute.⁴¹ Both Congress and the U.S. Copyright Office made it clear that the additions to the Copyright Act of 1976 were mere clarifications of the existing law as it was under the previous act and established case law.⁴²

B. The Originality Requirement and Photography

The Copyright Act existed in its current form since 1976, codified in title 17 of the United States Code.⁴³ A textual analysis of the statute itself suggests that Congress intended for at least some forms of photography to garner copyright protection. Section 102(a)(5) states:

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. Works of authorship include . . . pictorial, graphic, and sculptural works⁴⁴

17 U.S.C. § 101 of the Copyright Act defines pictorial, graphic, and sculptural works to explicitly “include two-dimensional and three-dimensional . . . photographs”⁴⁵ Since as early as 1884, the Supreme Court considered at least some forms of photography copyright-

³⁹ *Id.* at 345 (emphasis supplied).

⁴⁰ *Id.* at 355.

⁴¹ 17 U.S.C. § 102 (2006) (replacing “all the writings of an author” with “*original* works of authorship”) (emphasis added).

⁴² *Feist*, 499 U.S. at 356 (citing H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664, and STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW 3 (Comm. Print 1965)).

⁴³ 17 U.S.C. § 101.

⁴⁴ 17 U.S.C. § 102(a)(5).

⁴⁵ 17 U.S.C. § 101.

able.⁴⁶ In *Burrow-Giles Lithographic Co.*, the Supreme Court found that “the constitution is broad enough to cover an act authorizing copyrigh[t] [sic] of photographs, so far as they are representatives of original intellectual conceptions of the author.”⁴⁷ The Supreme Court deemed the photograph of Oscar Wilde, at issue in the case, to be an original work of art.⁴⁸ The Court’s reasoning, after viewing all of the elements in total—the arranging of the lighting, the setting of the camera, the posing of the subject, etc.—was that the elements showed the photograph was clearly an intellectual invention.⁴⁹

Despite the extensive and complex historical background surrounding the articulation and clarification of the originality requirement, satisfying the requirement is relatively easy.⁵⁰ The “requisite level of creativity is extremely low . . . [and] [t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁵¹

The esteemed Judge Learned Hand seemed to apply the concept that only a minimal level of originality is necessary for copyright protection to its outermost limits when he announced in *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, that “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”⁵² However, Judge Hand articulated this premise prior to the 1976 amendment to the Copyright Act and, “[d]ue partly to the mechanical nature of photography, courts struggle with the question of how photographs meet the originality standard.”⁵³ Despite the minimal requisite level of originality necessary for copyright protection, two clear instances exist where photographs lack originality.⁵⁴ The first is “where a photograph of a photograph or other printed matter is made that amounts to nothing more than a slavish cop-

⁴⁶ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

⁴⁷ *Id.* at 58.

⁴⁸ *Id.* at 60.

⁴⁹ *Id.*

⁵⁰ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“[T]he requisite level of creativity is extremely low . . .”).

⁵¹ *Id.* (citing 1 NIMMER ON COPYRIGHT (MB) § 1.08[C][1] (2008)).

⁵² *Jewelers’ Circular Publ’g Co. v. Keystone Publ’g Co.*, 274 F. 932, 934 (1921).

⁵³ Cameron, *supra* note 32, at 38.

⁵⁴ 1 NIMMER, *supra* note 51, § 2.08[E][2].

ying.”⁵⁵ This is discussed in further detail in Part III *infra* with the discussion of *Bridgeman Art Library I and II*.⁵⁶ The second situation exists “where 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.”⁵⁷ This situation is discussed in further detail in *Mannion v. Coors Brewing Co.*,⁵⁸ analyzed in Part IV(C) *infra*.⁵⁹

C. Originality and Derivative Works

Section 103(a) of the Copyright Act extends copyright protection to derivative works⁶⁰ defined as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship⁶¹

It can be argued that “[s]ection 103(a) is merely declaratory of a basic principle of copyright law that would be recognized even without its express provisions. . . . because any ‘distinguishable variation’ of a prior work will constitute sufficient originality to support a copyright”⁶² The originality requirement for derivative works warrants a “distinguishable variation between the work in which copyright is

⁵⁵ *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (quoting 1 NIMMER, *supra* note 51, § 2.08[E][2]).

⁵⁶ See *infra* Part III.

⁵⁷ 1 NIMMER, *supra* note 51, § 2.08[E][2].

⁵⁸ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005) (a copyright case dealing with a similar, not identical, photograph).

⁵⁹ See *infra* Part IV.C.

⁶⁰ See 17 U.S.C. § 103(a) (2006).

⁶¹ 17 U.S.C. § 101.

⁶² 1 NIMMER, *supra* note 51, § 3.01.

sought and the underlying work.”⁶³ Additionally, any copyright in a derivative work does not extend copyright protection to the underlying work.⁶⁴

Leigh v. Warner Bros. illustrates the issues that arise with derivative photographs.⁶⁵ In *Leigh*, an author hired a photographer to take a picture of a sculpture entitled Bird Girl, located in a cemetery, for the cover of a book that was being published.⁶⁶ The photographer applied for a copyright for the photograph.⁶⁷ A few years later, Warner Brothers started production on a movie adaptation of the book, but advised the photographer that it was not interested in using the photograph from the book cover but might take its own picture of the Bird Girl sculpture.⁶⁸ Warner Brothers obtained the necessary permission to make a replica of the sculpture, placed it in a different location in the cemetery, and took pictures that the studio used to promote the film.⁶⁹ The original photographer brought a copyright infringement case against Warner Brothers, claiming the promotional photographs violated the photographer’s copyright.⁷⁰

Ruling in favor of Warner Brothers, the Eleventh Circuit Court of Appeals reiterated established law that “the copyrightable elements include the photographer’s selection of background, lights, shading,

⁶³ *Bridgeman Art Library I*, 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998), *modified on reconsideration*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (citing *L. Baitlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-91 (2d Cir. 1976)).

⁶⁴ *See Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927) (“While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will . . .”).

⁶⁵ *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371 (S.D. Ga. 1998), *rev’d in part*, 212 F.3d 1210 (11th Cir. 2000). The Eleventh Circuit Court of Appeals reversed the district court’s grant of summary judgment on the issue of substantial similarity of the photographs, holding it was an issue of fact for the jury to decide and there was insufficient evidence to support summary judgment. *Leigh*, 212 F.3d at 1213.

⁶⁶ *Leigh*, 10 F. Supp. 2d at 1374.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

positioning of subject, and timing.”⁷¹ In making the determination of whether the photograph was copyrightable, the Eleventh Circuit looked at all the individual components that made up the photograph to determine the protected portions.⁷² The Court noted that

plaintiff is not entitled to copyright protection of his choice of subject matter, i.e., the Bird Girl Since the sculpture had been in the same position in the Trosdal plot for approximately fifty (50) years, the plaintiff cannot claim originality in the background for his photograph [T]he plaintiff did not select the pose or expression of the statute nor did he alter its physical appearance in any way prior to taking his photograph. Therefore, he can claim no originality in the expression, pose, or appearance of the Bird Girl in his photograph.⁷³

D. Copyright Infringement

When issues come before the court regarding photographic replications and derivative photographic works, they are usually in the form of copyright infringement claims.⁷⁴ In order to bring an action for copyright infringement, a plaintiff must demonstrate the fulfillment of two elements: (1) established “ownership of a valid copyright,” and (2) copying by the defendant.⁷⁵ As a general rule, obtaining a certificate of registration from the U.S. Copyright Office serves as prima facie evidence that a valid copyright exists, satisfying the first element.⁷⁶

The second element requires more complex analysis concerning photography and copyright infringement cases. As a general rule, if the

⁷¹ *Id.* at 1376 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884), which also states it is the photographer’s original selection of these elements and not their coincidental occurrence that makes the elements copyrightable).

⁷² *Id.* at 1375-76.

⁷³ *Id.* at 1376-77.

⁷⁴ *See, e.g., Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 446 (S.D.N.Y. 2005).

⁷⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

⁷⁶ *See* 17 U.S.C. § 401(c) (2006); *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 667 (3d Cir. 1990) (“[U]nder 17 U.S.C. §410(c) registration certificates constitute prima facie evidence of the validity of the copyrights.”).

plaintiff can show “that the defendant had [both] access to the copyrighted work” and there existed a substantial similarity between the protectable elements of the two works,⁷⁷ the second element of copying will be deemed satisfied.

III. MAJOR TURNING POINT: *BRIDGEMAN ART LIBRARY I AND II*

For more than “100 years, it was axiomatic that photographs, in general, were protected by copyright law.”⁷⁸ That all became questionable with the Southern District of New York’s controversial decisions in *Bridgeman Art Library I and II*.

A. *Bridgeman Art Library I and II Facts*

The plaintiff in *Bridgeman Art Library I* is a British company in the business of making photographic replications of public domain artwork.⁷⁹ Bridgeman aimed to create exact copies of the artwork and attached “a color correction strip to each transparency to ensure that the image is a genuine reflection of the original work as it existed in the circumstances in which it was photographed.”⁸⁰ In 1997 “Bridgeman obtained from the Register of Copyrights a certificate of registration for a derivative work entitled *Old World Masters I*, which consists of digital images and transparencies” that Bridgeman claims Corel Corporation (Corel) copied.⁸¹

Corel is a Canadian corporation that markets and creates computer software.⁸² Corel manufactured a product consisting of “seven hundred digital reproductions of well known paintings by European masters.”⁸³ Bridgeman claimed that about 120 of the images included in Corel’s product were a result of copyright infringement.⁸⁴ Bridgeman claimed copyright infringement occurred in England, the

⁷⁷ *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993).

⁷⁸ 5 LINDEY ON ENT., PUB. & ARTS (West) § 12.1 (2006).

⁷⁹ *Bridgeman Art Library I*, 25 F. Supp. 2d 421, 423 (S.D.N.Y. 1998).

⁸⁰ *Id.* at 423-24.

⁸¹ *Id.* at 424.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

U.S., and Canada.⁸⁵ The origin of the works in question was Great Britain.⁸⁶ “Corel moved for summary judgment on the following grounds: (1) Bridgeman did not possess valid copyrights in its images, and (2) there was no evidence that Corel copied Bridgeman’s images. Bridgeman cross-moved for summary judgment on the validity of its copyrights under the laws of the United Kingdom.”⁸⁷

B. Bridgeman Art Library I *Holding and Reasoning*

Initially, the court discussed the elements of copyright infringement: first, “ownership of a valid copyright,” and second, copying.⁸⁸ However, in order to discuss the elements and the applicable law used to analyze them, the court had to determine which law to use: American, British, or Canadian.⁸⁹ The court ultimately decided it would apply the law of the United Kingdom for purposes of the copyrightability of the photographs and American law for purposes of copying.⁹⁰ In looking at the copyrightability of the photographs, the court discussed the applicable British law that extends copyright protection to “original literary, dramatic, musical or artistic works”⁹¹ The United Kingdom’s originality requirement is not satisfied when the work “is wholly copied from an existing work, without any significant addition, alteration, transformation, or combination with other material.”⁹² The court determined the photographs in question were not original because Bridgeman “admittedly [sought] to duplicate exactly the images of the underlying works,” therefore lacking the requisite originality.⁹³

⁸⁵ *Id.*

⁸⁶ *Id.* at 425.

⁸⁷ Robert C. Matz, *Public Domain Work of Art: Bridgeman Art Library, Ltd. v. Corel Corp.*, BERKELEY TECH. L.J., Winter 2000, at 3, 10.

⁸⁸ *Bridgeman Art Library I*, 25 F. Supp. 2d at 425.

⁸⁹ *See id.*

⁹⁰ *Id.* at 426 (holding that since the original works of art were all located in and first published in the United Kingdom, the United Kingdom had “the most significant relationship to the issue of copyrightability”).

⁹¹ *Id.*

⁹² (quoting 2 MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW & PRACTICE § 2[1][b][ii], at UK-19 (1998)).

⁹³ *Id.* at 426-27.

In discussing the British law, the court found “United States law [as being] persuasive in construing English law”⁹⁴ The court discussed the stark similarities between the American originality requirement and the English requirement and further noted that, in the past, English courts looked to American law to construe cases.⁹⁵ The court described the American originality requirement as satisfied if work “owes its creation to the author and was not merely copied.”⁹⁶ The court then seemed to channel Judge Hand’s thoughts on photography originality⁹⁷ by noting that “much, perhaps almost all, photography is sufficiently original to be subject to copyright.”⁹⁸ However, the court then made it clear that “one 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.”⁹⁹ The court ultimately held the photographs lacked the requisite originality for protection under United Kingdom law.¹⁰⁰

Even though the court found the first element for copyright infringement lacking, it completed the analysis for the second element of copying and concluded that even if the photographs were copyrightable, Bridgeman was unable to satisfy the copying element.¹⁰¹ In order to satisfy the copying element, Bridgeman had to show Corel had access to the images in question¹⁰² and additionally that “a substantial similarity exist[ed] between the defendant’s work and the protectible elements of the plaintiff’s work.”¹⁰³ The court then noted that because this situation dealt with derivative works,¹⁰⁴ “similarity would be judged only with respect to those elements materially altering or embellishing the underlying works, the public domain paintings.”¹⁰⁵ Here again, Bridgeman’s

⁹⁴ *Id.* at 427 n.41.

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

⁹⁷ *See supra* Part II.B.

⁹⁸ *Bridgeman Art Library I*, 25 F. Supp. 2d at 427.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 428.

¹⁰² *Id.* (citing *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)).

¹⁰³ *Id.* (quoting *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 746-47 (2d Cir. 1998)).

¹⁰⁴ *Id.*; *see supra* Part II.C.

¹⁰⁵ *Bridgeman Art Library I*, 25 F. Supp. 2d at 428.

admissions worked to its detriment. “Plaintiff readily concede[d] the only similarity between the two sets of reproductions is that ‘both are exact reproductions of public domain works of art.’”¹⁰⁶

The court then discussed the derivative work aspect, stating “copyright protection extends, and the similarity to be weighed in determining infringement pertains, only to the *original* elements contributed by the author.”¹⁰⁷ The court found no similarity between the two sets of works beyond what the plaintiff erroneously claimed was enough, that “both are exact reproductions of public domain works of art.”¹⁰⁸ The court noted that, “by definition, public domain works are not subjects of copyright, [therefore] this cannot serve as the requisite similarity for copyright infringement.”¹⁰⁹ The court granted summary judgment in favor of Corel because, “[e]ven if Bridgeman had a copyright in the one element distinguishable from the underlying works (i.e., the color bars plaintiff attaches to its images), there would be no similarity because Corel’s images do not include this feature.”¹¹⁰

C. *Bridgeman Art Library II Holding and Reasoning*

Shortly after the court decided *Bridgeman Art Library I* Bridgeman filed a motion to reargue under the premise that the court erroneously applied British law regarding originality.¹¹¹ At the outset, the court noted the *Bridgeman Art Library I* court concluded the plaintiff’s work lacked originality under British law and the same decision would have been reached under American law.¹¹² The *Bridgeman Art Library II* court held American law, rather than British law, controlled the originality issue, and the judges began their opinion with a detailed explanation of American law regarding the issue.¹¹³ After a slight his-

¹⁰⁶ *Id.* (quoting Plaintiff’s Memorandum at 27, *Bridgeman Art Library I*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998) (No. 97 Civ. 6232(LAK))).

¹⁰⁷ *Id.* (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991), and *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 746 (2d Cir. 1998)) (emphasis added).

¹⁰⁸ *Id.* (quoting Plaintiff’s Memorandum, *supra* note 106, at 27).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 192 (S.D.N.Y. 1999).

¹¹² *Id.*

¹¹³ *See id.* at 195.

torical analysis of originality, including a discussion of *Burrow-Giles Lithographic Co.*, the court then discussed situations from *Nimmer on Copyright*, when photographs lack originality.¹¹⁴ Of the two instances, the court found one particularly relevant: “where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying”.¹¹⁵ The court further noted that the required distinguishable variation was not obtained by a change in medium alone.¹¹⁶ Ultimately, the *Bridgeman Art Library II* court also used the admission of the plaintiff to rule against it:

plaintiff by its own admission has labored to create “slavish copies” of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality – indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.¹¹⁷

Although the *Bridgeman Art Library II* decision ultimately affirmed the earlier *Bridgeman Art Library I* decision, the earlier decision applied British law and the more recent decision applied American law.¹¹⁸ The *Bridgeman Art Library II* court held that since “sweat of the brow alone is not the creative spark which is the *sine qua non* of originality,” *Bridgeman’s* work was not copyrightable.¹¹⁹ The *Bridgeman Art Library II* case seems “to stand for the proposition that a photographic reproduction is never sufficiently original [to receive copyright protection] under any analysis of any standard.”¹²⁰

¹¹⁴ *Id.* at 195-96.

¹¹⁵ *Id.* at 196.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 197.

¹¹⁸ *Bridgeman Art Library I*, 25 F. Supp. 2d 421, 425-26; *Bridgeman Art Library II*, 36 F. Supp. 2d at 195.

¹¹⁹ *Bridgeman Art Library II*, 36 F. Supp. 2d at 197 (internal quotation marks omitted).

¹²⁰ Phillip Bangle, Note, *Casenote: The Bridgeman Art Library, Ltd. v. Corel Corp.*, TUL. J. TECH. & INTELL. PROP., Spring 2000, at 1, 5.

D. Were Bridgeman Art Library I and II Properly Decided?

An entire article could be written on whether or not the court properly decided *Bridgeman Art Library I and II* (and many authors wrote scholarly pieces discussing just that).¹²¹ Although such debate is beyond the scope of this article, it warrants brief attention here. On the one hand, there are those who believe *Bridgeman Art Library I and II* came out the only possible way they could, because the court properly interpreted and applied well-established copyright laws.¹²² The photographs were admittedly direct copies of public domain artwork, lacking any originality, and uncopyrightable.¹²³ One scholar proclaims

that the court correctly applied existing copyright doctrine to the facts of the case, thereby reinforcing important policy considerations against granting copyrights that would allow reproducers to harass competitors, stifle competition within the market for art reproductions, and impede access to and use of images of public domain¹²⁴

On the other hand, there are those who believe the court erroneously decided the *Bridgeman Art Library I and II* decisions.¹²⁵ For example, art enthusiasts, librarians, and museum representatives seem to generally feel that *Bridgeman Art Library I and II* prevent them from “furthering [their] mission of cultural preservation” and believe there

¹²¹ See, e.g., *id.*; Cameron, *supra* note 32, at 32-33; Robert C. Matz, *Public Domain Work of Art: Bridgeman Art Library, Ltd. v. Corel Corp.*, BERKELEY TECH. L.J., Fall 2000, at 1, 5.

¹²² See Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-the-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*; HASTINGS COMM. & ENT. L.J., Fall 1998, at 55, 110. Ms. Butler argued, like the *Bridgeman I* court, that differences inherent in translating a work of art into a photographic medium were not substantial enough to foster copyrightability, and “the grant of copyright protection must not affect the public-domain status of the original work being reproduced.” See *id.*; see also *Bridgeman Art Library I*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998).

¹²³ *Bridgeman Art Library I*, 25 F. Supp. 2d at 423, 426.

¹²⁴ Matz, *supra* note 121, at 5.

¹²⁵ See, e.g., Robin J. Allan, Comment, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 963 (2007) (“*Bridgeman* was wrongly decided, both from a legal standpoint and from a policy perspective.”).

should be a distinction made between art for those purposes and the misuse of copyright law to dominate the market.¹²⁶

Even after the *Bridgeman Art Library I and II* decisions, Bridgeman's website did not seem to reflect the court's ruling. The website stated:

[a]ll images supplied by the Bridgeman Art Library are copyrighted photographs. The Bridgeman Art Library either owns the copyright in the photograph or acts as the authorised [sic] agent of the copyright holder. . . . [N]o images may be reproduced, communicated to the public, distributed, re-used or extracted . . . without the prior written consent of The Bridgeman Art Library.¹²⁷

This statement is in complete opposition to the court's decision, since requiring written consent before reproduction suggests the photographs are copyrightable, even though the court decided twice (once under British law and once under American law) that they were not.

IV. POST *BRIDGEMAN ART LIBRARY I AND II*: HOW HAS THE SOUTHERN DISTRICT OF NEW YORK APPLIED THE ORIGINALITY REQUIREMENT TO PHOTOGRAPHY CASES?

The *Bridgeman Art Library II* court surmised "that the post-judgment flurry [after the *Bridgeman Art Library I* decision was announced] was occasioned chiefly by the fact that the plaintiff failed competently to address most of the issues raised by this interesting case prior to the entry of final judgment."¹²⁸ With all the attention these district court cases received, how have the *Bridgeman Art Library I and II* decisions affected, if at all, the analysis of photography cases in the Southern District of New York? The three cases that follow provide some perspective on the issue.

¹²⁶ Cameron, *supra* note 32, at 61.

¹²⁷ *Id.* at 48-49, (quoting Bridgeman, Copyright, <http://www.bridgemanart.com/copyright.asp> (last visited December 10, 2007)).

¹²⁸ *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 192 (S.D.N.Y. 1999).

**A. Eastern America Trio Products, Inc.
v. Tang Electronic Corp.**

A year after the Southern District of New York decided *Bridgeman Art Library II*, the court considered another photograph copyright case. In *Eastern America Trio Products, Inc. v. Tang Electronic Corp.*, the plaintiff obtained registered copyrights for various catalogs and flyers.¹²⁹ The defendant Tang admitted to the direct copying of some of the photographs in plaintiff's catalog, but moved for summary judgment on the grounds that Tang's reproductions lacked both the sufficiently similar element required for copyright infringement¹³⁰ and sufficient originality to warrant copyrightability.¹³¹

In holding that the plaintiff's photographs were copyrightable, the court first noted that the photographs encompassed the requisite level of originality.¹³² Acknowledging the minimal level of originality needed to satisfy the requirement, the court held that because the photographer "supervised the lay-out of the items that were photographed, positioned them in what she thought [was] an attractive manner, selected particular angles and lighting, and in some cases even had the images enhanced by a computer to achieve the desired outcome,"¹³³ the plaintiff's evidence satisfied the court of the requisite level of originality to garner copyright protection.¹³⁴

The court then went on to examine the second prong of the copyright infringement claim—the copying element.¹³⁵ The court began by reiterating that there exists a broad protection of photographs as long as they amount to more than mere slavish copying.¹³⁶ To prove the second prong, the plaintiff needed to show that not only did the defendant have access to the photographs in question, but also that the defendant's pho-

¹²⁹ E. Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 415 (S.D.N.Y. 2000).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* at 417.

¹³³ *Id.*

¹³⁴ *Id.* at 417-18.

¹³⁵ *See id.* at 418.

¹³⁶ *Id.* at 417 (citing *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999)).

tographs were substantially similar to the plaintiffs.¹³⁷ The plaintiff presented evidence of the wide distribution of the catalogs and flyers that the photographs came from, as well as evidence that the plaintiff distributed the catalogs and flyers at trade shows where the defendant was in attendance to demonstrate that the defendant had access to the photographs.¹³⁸ Upon examination of the photographs, the court found some photographs that were more subtle replicas than others; however, many photographs were clearly the result of copying as the defendant's photographs included the "reproduced photographic errors" of the originals.¹³⁹ While noting the defendant admitted to copying some of the plaintiff's photographs,¹⁴⁰ the court found that "[t]he identical yet arbitrary angles of wires and placement of the free ends of cords make it unlikely that certain photographs are not copies of plaintiff's original work."¹⁴¹ For the reasons stated within, the court held that the elements for copyright infringement had been met with regards to the photographs appearing in the catalogs.¹⁴²

Considering the court decided *Eastern America Trio Products, Inc.* a short year after the court announced the *Bridgeman Art Library I and II* decisions, it seems odd that the decisions are only cited once in the *Eastern America Trio Products, Inc.* opinion.¹⁴³ However, the holding in *Eastern America Trio Products, Inc.* does not appear inconsistent with the holdings of *Bridgeman Art Library I and II*. Unlike *Bridgeman*, the plaintiff in *Eastern America Trio Products, Inc.* was able to demonstrate originality in the creation of the photographs in question. The attention to detail in the lighting, angles, and enhancement of the photographs supported the finding of originality,¹⁴⁴ unlike *Bridgeman* who admitted to attempting to create exact replicas of the public domain works of art.¹⁴⁵ The *Eastern America Trio Products, Inc.* court also looked to the same standard outlined in the *Nimmer on*

¹³⁷ *Id.* at 418.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* ("Tang itself concedes that it copied approximately twenty-five of plaintiff's original photographs.")

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.* at 417 n.153.

¹⁴⁴ *Id.* at 418.

¹⁴⁵ *See Bridgeman Art Library II*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

Copyright treatise regarding slavish copying that the *Bridgeman Art Library I and II* courts examined in making their decisions.¹⁴⁶ Although attention to the *Bridgeman Art Library I and II* cases was lacking, the outcome in *Eastern America Trio Products, Inc.* appears to be consistent with a narrow interpretation of *Bridgeman Art Library I and II*, dealing with the exact replications of public domain works.

B. Kaplan v. Stock Market Photo Agency, Inc.

In *Kaplan v. Stock Market Photo Agency, Inc.*, plaintiff photographer created a photograph “entitled ‘Wing Tips Over the Edge.’”¹⁴⁷ “The photograph depicts a *businessperson standing* perilously on the ledge or roof of a tall building looking down onto a car-lined street, and is taken from the *viewpoint of the businessperson.*”¹⁴⁸ Plaintiff had the photograph copyrighted.¹⁴⁹ One of the defendant advertising agencies, Christopher Thomas Associates, Inc., worked on an ad campaign for a client that manufactured camera lenses.¹⁵⁰ According to this defendant, “an executive at the advertising agency wished to create a photo advertisement showing the shoes of a businessman standing on the ledge of a tall building directly opposite another tall building having sharp horizontal and vertical lines, a perspective which would demonstrate the new lens’ lack of distortion.”¹⁵¹ Plaintiff claimed that he sent a copy of his photograph along with his bid for the assignment to the camera lens manufacturer, but the manufacturer ultimately awarded the bid to another party.¹⁵² The final project was similar to the plaintiff’s original photograph in that “it depicted a *businessperson standing on the ledge or roof of a tall building looking down onto a car-lined street, from the viewpoint of the businessperson.*”¹⁵³ The winner of the bid “reworked the photograph he took for the . . . advertisement into a ‘final image,’

¹⁴⁶ E. Am. Trio Prods., Inc., 97 F. Supp. 2d at 417.

¹⁴⁷ *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 319 (S.D.N.Y. 2001).

¹⁴⁸ *Id.* (emphasis added). Compare italicized text accompanying this note (describing plaintiff’s photograph), with *infra* text accompanying note 168 (describing the photograph the defendant advertising agency ultimately used).

¹⁴⁹ *Kaplan*, 133 F. Supp. 2d at 319.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 319-20.

¹⁵² *Id.* at 320 n.4.

¹⁵³ *Id.* at 320 (emphasis added); see *supra* note 153.

which he submitted to Stock Market [named defendant] for licensing purposes.”¹⁵⁴ The plaintiff alleged that the winning bid photograph infringed upon the copyright that the plaintiff holds in his photograph.¹⁵⁵

As discussed in Part II(D) *supra*, in order to prove a copyright infringement claim, a plaintiff must demonstrate that two elements are satisfied: (1) ownership of a valid copyright, and (2) copying of original elements of the work.¹⁵⁶ There was no dispute regarding the validity of the plaintiff’s copyright, but the defendant moved for summary judgment regarding the second element, claiming the photographs in question were not substantially similar.¹⁵⁷ To analyze the substantial similarity requirement, the court applied the ordinary observer test.¹⁵⁸ Under this test, the court looked to “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”¹⁵⁹ Additionally, because these photographs contained both protectable and unprotectable elements, the court had to “exclude comparison of the unprotectable elements from its application of the ordinary observer test.”¹⁶⁰ It is well established that ideas or concepts are not protectable, but the *expression* of ideas or concepts is protectable.¹⁶¹

The major reason for the court’s finding that the two photographs were not substantially similar is “that nearly all the similarities between the works arise from noncopyrightable elements, thus rendering the works not substantially similar.”¹⁶² The court first discussed the subject matter of the photographs: “a businessperson contemplating a

¹⁵⁴ *Kaplan*, 133 F. Supp. 2d at 320.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 321 (quoting *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

¹⁵⁷ *Id.* at 319, 321.

¹⁵⁸ *See id.* at 322.

¹⁵⁹ *Id.* (quoting *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)).

¹⁶⁰ *Id.* (citing *Fisher-Price, Inc. v. Well-Made Toy Mfg.*, 25 F.3d 119, 123 (2d Cir. 1994)).

¹⁶¹ *Id.* (citing *Attia v. Soc’y of the N.Y. Hosp.*, 201 F.3d 50, 54 (2d Cir. 1999)).

¹⁶² *Id.* at 323.

leap from a tall building onto the city street below.”¹⁶³ The court found this to be the *idea* and not the *expression of the idea* and per se uncopyrightable.¹⁶⁴ Additionally, the court noted many similarities “flow predictably from the underlying subject matter.”¹⁶⁵ For example:

Both photographs depict [the businessperson] standing on the roof or ledge of a tall building, with his shoes partially extended over the edge. However, such positioning is essential to the businessperson’s contemplation of a suicide leap; it would be impossible to depict the photograph’s subject matter without portraying him in this pose.¹⁶⁶

The court then went through the same analysis for the similarity in the dress of the businessperson in each photograph¹⁶⁷ and the similar angle or viewpoints used.¹⁶⁸ The court reiterated that although “the most observable similarities between [the] two works relate[d] to elements flowing directly from their subject matter,” the court still needed to apply the ordinary observer standard to determine if there was a substantial similarity.¹⁶⁹ After examining some of the traditional aspects courts look at when determining protectability, i.e. “background, perspective, lighting, shading, and color,”¹⁷⁰ the court determined “that the differences between them [the two photographs] far outweigh the similarities, [both] quantitatively and qualitatively, such that no reasonable jury could find that the two works are substantially similar.”¹⁷¹ The

¹⁶³ *Id.* The court also discusses the idea of a businessperson being so overwhelmed that they contemplate leaping from a tall building, especially in a fast paced environment like New York, to be unprotected by the doctrine of *scenes a faire*. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 324.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 325 (holding that the suit and wing-tipped shoes are the “typical garb” of a business person that “might reasonably be expected to appear in any expression of the unprotectable idea in question here”).

¹⁶⁸ *Id.* at 326 (holding the “businessperson looking down at the street below” was not substantially similar because “[plaintiff’s] photograph shows the legs from about the knees down; the photographs are taken from different locations, depicting different buildings, roads and vehicles”).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

court granted summary judgment in favor of the defendant on the copyright claim.¹⁷²

The court decided *Kaplan* only two years after *Bridgeman Art Library I and II*, but interestingly there is no mention of the decisions in the *Kaplan* court's opinion. The initial reasoning of the *Kaplan* court is consistent with the *Bridgeman Art Library I and II* analysis. The court discussed the importance of separating the protectable from the unprotectable elements of a photograph in *Bridgeman Art Library I and II*.¹⁷³ There, the court held that because the only protectable element was the color strip Bridgeman included on the replica photographs, and the Corel photograph lacked that particular element, the defendant did not copy a protectable element.¹⁷⁴

However, the remaining analysis of the *Kaplan* court differs from that of *Bridgeman Art Library I and II*. The *Kaplan* court looked to an ordinary observer standard to determine if a substantial similarity existed between the two works.¹⁷⁵ This ordinary observer standard was not mentioned in *Bridgeman Art Library I and II*. However, this could have been because there were no protectable similarities to compare between the Bridgeman and Corel photographs. Despite this difference, the *Kaplan* decision appears to be consistent with a narrow application of the *Bridgeman Art Library I and II* decisions.

C. Mannion v. Coors Brewing Co.

In *Mannion v. Coors Brewing Co.*, a sport magazine hired the plaintiff photographer to photograph professional basketball player Kevin Garnett.¹⁷⁶ The court described the photograph at issue in painstakingly precise detail:

[A] three-quarter-length portrait of Garnett against a *backdrop of clouds* with some blue sky shining

¹⁷² *Id.* at 319.

¹⁷³ See generally *Bridgeman Art Library I*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998) (noting images that lack sufficient originality are not protectable under copyright law).

¹⁷⁴ See *id.* at 427; *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 199 n.54 (S.D.N.Y. 1999).

¹⁷⁵ *Kaplan*, 133 F. Supp. 2d at 322.

¹⁷⁶ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 447 (S.D.N.Y. 2005).

through. The *view is up and across the right side of Garnett's torso*, so that he appears to be towering above earth. He wears a *white T-shirt, white athletic pants*, a black close-fitting cap, and a large amount of *platinum, gold, and diamond jewelry* ("bling bling" in the vernacular), including *several necklaces, a Rolex watch and bracelet on his left wrist, bracelets on his right wrist, rings on one finger of each hand, and earrings*. His head is cocked, his eyes are closed, and his heavily-veined hands, nearly all of which are visible, rest over his lower abdomen, with the thumbs hooked on the waistband of the trousers. *The light is from the viewer's left, so that Garnett's right shoulder is the brightest area of the photograph and his hands cast slight shadows on his trousers*. As reproduced in the magazine, the photograph cuts off much of Garnett's left arm.¹⁷⁷

The defendant was in the advertising business and developed a picture comprised of "a manipulated version of the Garnett Photograph and superimposed on it the words 'Iced Out' ('ice' being slang for diamonds) and a picture of a can of Coors Light beer"¹⁷⁸ The advertising company obtained the requisite authorizations from the plaintiff to allow for use of the Garnett Photograph for the stated purpose.¹⁷⁹ Coors Brewing eventually decided on a billboard that was *based on* the Iced Out advertisement, but not the Iced Out advertisement itself.¹⁸⁰ The court described the reproduction as follows:

in black-and-white, the torso of a muscular black man, albeit a model other than Garnett, shot against a *cloudy backdrop*. The pose is similar to that in the Garnett Photograph, and the *view also is up and across the left side of the torso*. The model in the billboard photograph also *wears a white T-shirt and white athletic pants*. The

¹⁷⁷ *Id.* at 447 (emphasis added). Compare italicized text accompanying this note (describing the Garnett photograph), with *infra* italicized text accompanying note 181 (describing Coor's billboard).

¹⁷⁸ *Mannion*, 377 F. Supp. 2d at 447.

¹⁷⁹ *Id.* at 448.

¹⁸⁰ *Id.*

model's jewelry is prominently depicted; it includes a necklace of platinum or gold and diamonds, a watch and two bracelets on the right wrist, and more bracelets on the left wrist. The light comes from the viewer's right, so that the left shoulder is the brightest part of the photograph, and the right arm and hand cast slight shadows on the trousers.¹⁸¹

The court began its analysis by dismissing the issues of the validity of the plaintiff's copyright, the defendant photographer's access to the works, and the defendant's copying of the images in favor of the plaintiff.¹⁸² The major issue in this case involved the substantial similarity aspect "between [the] protected elements of the [plaintiff's] Garnett Photograph and the [defendant's] Coors [b]illboard."¹⁸³ The court also outlined an analytical process for determining if a similarity exists between the two works.¹⁸⁴

First, the court needed to determine the protectable elements of the original photograph.¹⁸⁵ The court discussed the originality requirement and stressed that protection is only extended "to those components of a work that are original to the author."¹⁸⁶ Although copyright protection is usually not extended to the subject matter of a photograph, this case presented a unique situation. "[I]f a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject."¹⁸⁷ To illustrate the importance of considering "the features of the work itself, [and] not the effort that goes into it,"¹⁸⁸ the court looked to

¹⁸¹ *Id.* at 448 (emphasis added); see *supra* note 177.

¹⁸² *Mannion*, 377 F. Supp. 2d at 449 ("Mannion concededly owns a valid copyright in the Garnett photograph. Access is undisputed. There is ample evidence from which a trier of fact could find that CHWA actually copied the Garnett Photograph for the Coors Billboard.").

¹⁸³ *Id.* at 449-50.

¹⁸⁴ See *id.* at 450 ("If any reasonable trier would be obliged to find such similarity . . . the plaintiff's motion must be granted and the defendants' denied. If a reasonable trier could . . . find substantial similarity . . . both motions must be denied.").

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 449 U.S. 340, 345 (1991)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 451.

the controversial *Bridgeman Art Library I* and *II* decisions that denounced slavish copies¹⁸⁹ and sweat of the brow analysis.¹⁹⁰

The *Mannion* court applied a slightly different standard for determining copying than used in *Kaplan*, *Eastern America Eastern America Trio Products, Inc.*, or *Bridgeman Art Library I and II*. In *Mannion*, the court makes a point of noting that

“Actual copying”—which is used as a term of art to mean that “the defendant, in creating its work, used the plaintiff’s material as a model, template, or even inspiration”—may be shown by direct evidence, which rarely is available, or by proof of access and probative similarities (as distinguished from “substantial similarity”) between the two works.¹⁹¹

The *Mannion* court seemed to require more guidance on the originality of the photograph than the *Bridgeman Art Library I and II* courts were able to offer, and interestingly chose to look to British copyright law for further clarification of the originality requirement.¹⁹² This is especially interesting considering the *Bridgeman Art Library I and II* decisions first applied British law and on reargument applied American law to ultimately reach the same result.¹⁹³ The fact that the *Mannion* court felt the need to address British law directly, even after discussing *Bridgeman Art Library I and II* is possibly redundant. Through examination of British law, the court came up with three different ways that a photograph can be original.¹⁹⁴

The first form of originality was in *rendition*.¹⁹⁵ This deals with “originality which does not depend on creation of the scene or object to be photographed . . . and which resides [instead] in such specialties as

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 449 (quoting 4 NIMMER, *supra* note 51, § 13.01[B]).

¹⁹² *Id.* at 451-52.

¹⁹³ *Bridgeman Art Library I*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998); *Bridgeman Art Library II*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999).

¹⁹⁴ *Mannion*, 377 F. Supp. 2d at 452 (noting the three ways photographs can be original “are not mutually exclusive”).

¹⁹⁵ *Id.*

angles of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc.”¹⁹⁶ Under this form of originality, courts extended protection regarding *how* something is depicted instead of *what* is depicted.¹⁹⁷ When applied to the facts of the case, the court found that the Garnett photograph was original in its rendition because the “relatively unusual angle and distinctive lighting” demonstrated the originality of the photograph.¹⁹⁸

The second form of originality was in *timing*.¹⁹⁹ Under this form, a party satisfies originality where “the memorability of [the photograph] which is attributable in significant part to the timing of its creation.”²⁰⁰ For example, a photographer catching the exact moment where a bear feasts on salmon for dinner would not prevent another photographer from taking the same exact picture because the original photographer obtains no copyright to the “natural world he captured.”²⁰¹ The court did not address this aspect in connection with the Garnett photograph.

The third form of originality was in *creation of the subject*.²⁰² The court noted this is a limitation to “the principle that copyright . . . confers no rights over the subject matter.”²⁰³ In other words, a court may allow copyright protection over those scenes or subjects that the photographer creates in making a photograph.²⁰⁴ Therefore, if a photographer creates a scene used in a photograph, they can “prevent others from duplicating that scene in a photograph or other medium.”²⁰⁵ The court found that in this instance, the plaintiff’s creation of a scene “composition-posing man against sky-evidences originality in the creation of the subject.”²⁰⁶ Additionally, the photographer “instructed Garnett to wear simple and plain clothing and as much jewelry as possible

¹⁹⁶ *Id.* (footnote omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 454-55.

¹⁹⁹ *Id.* at 452-53.

²⁰⁰ *Id.* at 453.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 454 (footnote omitted).

²⁰⁶ *Id.* at 455.

...”²⁰⁷ Based on these facts, the court opined that Mannion’s “orchestration of the scene contributes additional originality in the creation of the subject [at issue].”²⁰⁸

Of the three cases discussed, *Mannion* seems to stray most from *Bridgeman Art Library I and II*. Although *Mannion* and *Bridgeman Art Library I and II* all discuss British copyright law and originality, *Bridgeman Art Library I and II* looked to British law because it was directly at issue to rendering decisions in the cases.²⁰⁹ However, the *Mannion* court’s application of British principles seems to be for clarification that the court felt American case law lacked on the issue. Additionally, the *Bridgeman Art Library I and II* courts neither mentioned nor relied on the three forms of originality (rendition, timing, and creation of subject) from British law the way *Mannion* did. Since British law was not controlling in *Mannion*, the court’s decision to rely so heavily on it is questionable.

Mannion also introduces a new approach to analyzing the actual copying²¹⁰ element of copyright infringement claims. The court looked at *probative similarities* as distinguished from *substantial similarities* between the two works.²¹¹ It could be that the *Bridgeman Art Library I and II* cases never reached this issue because the only protectable element to be evaluated was the color strip, which, as discussed previously, was not located on the Corel photographs.²¹²

However, the court cited to *Bridgeman Art Library I and II* for clarification on the slavish copying issue, suggesting the *Mannion* court at least looked to the *Bridgeman Art Library I and II* decisions for guidance in analysis and application.²¹³

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See supra* Part III.B.

²¹⁰ *See Mannion*, 377 F. Supp. 2d at 449.

²¹¹ *Id.* (footnote omitted).

²¹² *See supra* note 110.

²¹³ *Mannion*, 377 F. Supp. 2d at 451.

V. CONCLUSION

Over eight years after the court decided *Bridgeman Art Library I and II*, the cases still garner a great deal of attention and spark much conversation. The cases have been cited by many, followed and distinguished by some, but not overturned. As demonstrated by *Eastern America Trio Products, Inc.*, *Kaplan*, and *Mannion*, the Southern District of New York has not heavily relied on the *Bridgeman Art Library I and II* decisions in analyzing photographic copyright cases. It could be because most of the law recited in the *Bridgeman Art Library I and II* decisions is merely a restatement of already well-established concepts in copyright law. The cases did not establish the minimal level of originality required for copyright protection. The cases did not introduce the idea that derivative works copyright protection does not extend to the underlying works. The cases were not responsible for coining the oft-cited term slavish copying, when discussing those works that fall outside of copyright protection. Those were all well-established principles prior to *Bridgeman Art Library I and II* that are still well-established principles after the decision.

It could also be that the underlying facts in *Bridgeman Art Library I and II* are so distinct that the courts have not come across another set of facts that warrant detailed analysis of the cases. Whatever the reason for the lack of attention shown to the *Bridgeman Art Library I and II* decisions by the courts in the Southern District of New York, it does not diminish the importance of the cases. The cases still stand for, at the very least, the important and distinct principle that exact replications of public domain works warrant no copyright protection. As a court could rightfully apply *Bridgeman Art Library I and II* narrowly or broadly, a proper understanding of the cases is essential for not only practicing intellectual property attorneys, but also artists and photographers who could be greatly affected by the cases' implications. As the introduction suggests, the application of copyright law to photography could potentially affect even amateur photographers.