

THE TWO BATTLEGROUND OF COPYRIGHT’S LEVELS OF GENERALITY ANALYSIS: SUBSTANTIAL SIMILARITY AND FAIR USE

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I. INTRODUCTION

While judges are experts in statutory interpretation, fitting statutes to the peculiarities of people's lived experiences is often a great deal harder than it may seem. When analyzing the individual fact patterns of each case, judges must decide how broadly or narrowly to interpret the literal text of the law. This conundrum is known as the levels of generality problem.¹

Although legal scholarship most commonly associates this problem with constitutional law,² the difficulties in selecting a level of generality are not unique to analyzing fundamental rights. Judges face the same dilemma in intellectual property cases when determining the scope of protection. In 1930, Judge Learned Hand coherently articulated this problem in the copyright context when analyzing the similarities between a play and a movie: "Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [B]ut there is a point in this series of abstractions where they are no longer protected"³ This insight demonstrates the line-drawing issue in copyright law when separating out an unprotectable idea from the protectable expression of a work.⁴

This Note will dive deeper into the levels of generality problem in copyright law. The first Part will discuss concepts important to grasping the levels of generality problem broadly, as well as specifically in the copyright context. Part II will examine the ways courts use the analytical framework of levels of generality to decide substantial similarity inquiries across a handful of media. Through an analysis of substantial similarity decisions in literature, visual arts, and software, this section will demonstrate that the levels of generality problem poses greater inconsistencies for non-literature media. Next, Part III will discuss policy implications, consequences, and possible solutions to these inconsistencies. The final Part will make a prediction regarding fair use as the future frontier of copyright's levels of generality problem.

1. See Thomas A. Bird, Note: *Challenging the Levels of Generality Problem: How Obergefell v. Hodges Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 579, 580 (2016).

2. See John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. FLA. J.L. & PUB. POL'Y 401, 403 (2005) (noting that the Supreme Court must characterize the legal issue at a certain level of generality when analyzing fundamental rights).

3. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

4. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13D.13[A] (rev. ed. 2025).

II.

DEFINING THE LEVELS OF GENERALITY PROBLEM

A. *Defining the Levels of Generality Analysis in
Terms of Constitutional Law*

The levels of generality problem is frequently linked with constitutional law and questions over unenumerated fundamental rights. There is a significant amount of legal scholarship about this line-drawing problem, which provides a helpful comparison to copy-right law.

In 1986, the Supreme Court decided *Bowers v. Hardwick*, which illustrates the important and outcome-determinative nature of favorably framing the question presented.⁵ Justice Byron White, writing for the majority, decided that the issue presented was whether the Constitution confers a fundamental right for homosexuals to engage in sodomy.⁶ This is quite a low level of generality for a question that relies on very detailed, fact-specific inquiries. Justice Blackmun on the other hand, argued in dissent that the case was actually about the much broader, more general right to be left alone.⁷ While the Justices were looking at the same exact facts, they came to wildly different conclusions regarding the constitutionality of Hardwick's behavior because of the level of generality each selected.⁸

In another seminal case, *Michael H. v. Gerald D.*, Justice Antonin Scalia proposed a solution to the levels of generality question.⁹ In denying parental rights to a man who claimed to be the biological father of a child born to a woman married to another man, Justice Scalia defined the question of the case very narrowly, as "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection."¹⁰ Supposedly, Justice Scalia believed he had discovered a "value-neutral" solution to the levels

5. 478 U.S. 186 (1986); see also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990) (remarking that the majority's narrow framing of the right drove the outcome and that the dissent's broader framing would have changed the answer).

6. Tribe & Dorf, *supra* note 5, at 1065 (quoting *Bowers*, 478 U.S. at 190).

7. *Id.* (quoting *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting)).

8. See *id.*

9. See Basiak, *supra* note 2, at 414 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989)) ("Justice Scalia, for the first time, explained his methodology and distinguished it from the broadly worded methodology of the Court's more liberal members.").

10. *Michael H.*, 491 U.S. at 124.

of generality problem by identifying the most specific level at which one could recognize a relevant tradition and looking into whether that behavior was historically protected.¹¹ By binding the Court “to an identifiable tradition,” Scalia believed he could curb judicial activism and avoid “arbitrary decisionmaking.”¹² He maintained that this method was value-neutral and sidestepped judges’ temptations to use political and social preferences when making their decisions.¹³

Justice Scalia’s most-specific-level theory has been criticized by scholars of constitutional law.¹⁴ Critics argue that it thinly disguises the “importation of values” and poses serious practical problems.¹⁵ It requires judges to identify the most specific level of generality that recognizes a relevant tradition and then evaluate “what has been traditionally and historically protected.”¹⁶ These tasks are quixotic, idealistic yet impractical, as there is no *ex ante* way to police how diligently a judge may research or how broadly or narrowly a judge defines the relevant tradition. This method also filters each analysis through the individual judge’s personal prejudices, philosophy, beliefs, and subjective analysis of history, which creates a situation rife with opportunity to stick value-laden analysis into a decision.¹⁷

B. Applying Constitutional Law’s Levels of Generality Analysis to Copyright Law

Applying Justice Scalia’s supposedly value-neutral method to the copyright context would be unworkable because using the most specific level of generality at which there has been historical protection would stunt progress and creativity. For the most obvious example, one need only look as far as *Burrow-Giles Lithographic Co. v. Sarony*, which considered whether a photograph was the writing of an author under the Intellectual Property Clause.¹⁸ There, since recognizing the copyrightability of photographs was completely

11. Tribe & Dorf, *supra* note 5, at 1058 (quoting *Michael H.*, 491 U.S. at 127 n.6).

12. Basiak, *supra* note 2, at 415 (quoting *Michael H.*, 491 U.S. at 127 n.6).

13. *Id.*

14. See, e.g., Edward Gary Spitko, *A Critique of Justice Antonin Scalia’s Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1344–46 (1990) (concluding that Justice Scalia’s approach in *Michael H.* is fundamentally flawed and lacks constitutional justification), Tribe & Dorf, *supra* note 5.

15. See Basiak, *supra* note 2, at 426–30 (arguing that Scalia’s approach asks judges to make difficult evaluations of history that inevitably collapse into subjectivity and fail to fulfill the purpose of the Fourteenth Amendment).

16. *Id.* at 427.

17. See *id.* at 427.

18. 111 U.S. 53, 56 (1884).

unprecedented,¹⁹ Scalia would have found no historical precedent protecting photographs as copyrightable art. Not only was the copyrightability of photographs unprecedented, but it was also deeply troubling to many artists at the time who believed the camera was doing all the work, replacing the creativity of the human author. Photographers were viewed as operating a machine, not as creating art.²⁰ Despite its technological novelty, the *Burrow-Giles* Justices recognized photography as worthy of protection,²¹ opening the door for centuries of creativity in the field and promoting progress in sciences and useful arts.²² Therefore, while Justice Scalia may have been right to worry about tempting judges to infuse social and political preferences into the law, it may not be such a bad thing in copyright.

By restricting the level of generality to the most specific level at which we find a relevant historic tradition, we stunt progress and entrench bias toward old art norms. This outcome would be directly contrary to the goals of the Intellectual Property Clause, which explicitly encourages progress in the arts and sciences.²³ Art norms are constantly evolving. What was once considered utilitarian, ugly, or machine-made can be transformed into high art that critics and the art market alike uphold as the next best thing.²⁴ Copyright

19. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.02 n.20 (rev. ed. 2025) (dating protection for photographic works to a 1908 revision of the Berne Convention for the Protection of Literary and Artistic Works).

20. Justin Hughes, *The Photographer's Copyright — Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 343 (2012).

21. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

22. See Ryan Phelan, *The Curious Case of Burrow-Giles Lithographic (an 1884 U.S. Supreme Court decision involving “new” camera technology), and how it could help Shape Today's thinking on Artificial Intelligence (AI) Inventorship*, PATENTNEXT (Aug. 30, 2022), <https://www.patentnext.com/2022/08/the-curious-case-of-burrow-giles-lithographic-an-1884-u-s-supreme-court-decision-involving-new-camera-technology-and-how-it-could-help-shape-todays-thinking-on-artificial/> [<https://perma.cc/9J47-YUDQ>] (discussing how the *Burrow-Giles* court's conception of authorship allowed for photos to be copyrighted and leaves room for the possibility of the copyrightability of AI art).

23. U.S. CONST. art. I, § 8, cl. 8; see also NIMMER & NIMMER, *supra* note 19, § 1.03 (deeming the “introductory phrase” of the Intellectual Property Clause, “To promote the Progress of Science and useful Arts,” “explanatory of the purpose of copyright.”).

24. “What constitutes art” is a long running debate, both in the art and legal worlds. For example, today, works created by artificial intelligence are often denounced by critics as ugly, uncreative, and not even art; however, Refik Anadol's “Unsupervised” captures audiences daily at the Museum of Modern Art. See Travis Diehl, *MoMA's Daydream of Progress*, N.Y. TIMES, (Dec. 15, 2022) <https://www.nytimes.com/2022/12/15/arts/design/refik-anadol-unsupervised-moma-review.html> [<https://perma.cc/BV8F-MUN4>] (describing Anadol's A.I.-generated art and providing insight into the decision to depict it at the MoMA). The legal definition

is an incentive-based law.²⁵ If copyright protection does not evolve and shift alongside art norms, authors²⁶ will not have the economic incentives to create outside-the-box, unique works.

However, criticism of a very specific level of generality must come with the balancing observation that selecting only the broadest level of generality also poses problems. For instance, if Justice Blackmun's characterization of the issue in *Bowers* as "the right to be left alone"²⁷ was taken to the extreme, Justices could constitutionally protect all kinds of problematic behaviors occurring in private.²⁸ Applying a blanket high level of generality gives judges significant amounts of discretion which they might use to act as quasi-judicial legislators, breaking down the separation of powers that is fundamental to our government.²⁹ Therefore, the only solution is to use a more middling, case-by-case approach. While more tedious and difficult, it is fairer and truer to each individual scenario. Luckily, copyright is well ahead of Justice Scalia on that principle; as the Second Circuit Court of Appeals recognized in 1960, decisions of substantial similarity, and the decisions regarding levels of generality inherent within them, must be made on an ad hoc, case-by-case basis.³⁰

of art has also changed significantly throughout history. *Contrast* United States v. Perry, 146 U.S. 71, 74–75 (1892) (setting forth a rigid four-class hierarchy defining fine art separately from minor objects of art, objects of art, and useful objects), *and* United States v. Olivotti & Co., 7 Ct. Cust. 46, 48 (App. 1916) (requiring a beautiful imitation of nature, that is distinctly not the work of a craftsman, to fit the legal definition of art), *with* Brancusi v. United States, 1928 Cust. Ct. LEXIS 3, at *7–8 (1928) (considering the changing art norms in which the exponents of the new school of art "attempt[ed] to portray abstract ideas rather than to imitate natural objects" as a basis for expanding the definition of art).

25. See *Copyright Basics*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/copyright-policy/copyright-basics> [<https://perma.cc/9FYU-VNAG>] (last visited Feb. 24, 2026) ("[C]opyright provides economic incentives to create new works and to make them available in the marketplace."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

26. As defined in the Intellectual Property Clause of the Constitution, the term "author" refers broadly to all creators of original expression, not just writers of literary works. See Definitions, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq-definitions.html> [<https://perma.cc/CL9P-7A5Z>].

27. *Bowers* v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, H., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, L., dissenting)).

28. See Basiak, *supra* note 2, at 424 ("Taken to its logical extreme, Justice Blackmun's characterization would hold as a constitutional guarantee the right to build a crystal methamphetamine lab in a person's basement.").

29. See *id.* at 426.

30. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

C. *The Levels of Generality in Copyright's Substantial Similarity Analysis*

In an infringement action, the plaintiff must prove that the defendant copied protected expression from the copyrighted work. This breaks down into two pieces: (1) copying in fact and (2) copying in law.³¹ Together, these pieces make up the infringement analysis.³² Copying in fact is a simple question of whether the defendant actually had access to and used the plaintiff's work while creating their own.³³ Copying in law asks the more consequential question of whether the copying was substantial enough and took enough protected material to be actionable.³⁴ Standards of substantial similarity emanate entirely from lower court decisions, as neither Congress nor the Supreme Court have defined this term.³⁵

While the substantial similarity analysis is used to decide whether one work is infringing on another, it is also the place where the levels of generality question is most prevalent and problematic in copyright law. There are a few crucial copyright concepts of concern when making this determination of substantial similarity. While there are multiple discordant substantial similarity tests,³⁶ at their core, they all look for whether the secondary work has copied enough protected expression to be infringing.³⁷ As codified in 17 U.S.C. § 102, ideas cannot be protected, but expressions of those ideas are.³⁸ Therefore, the "idea-expression dichotomy" is at the heart of this inquiry.³⁹

As simple as it sounds, there is an inherent levels of generality problem here. Here is an illustration of the idea-expression dichotomy and levels of generality problem using a scholar's analysis of the example of *Harry Potter*. If someone wrote another book and J.K. Rowling claimed it infringes on her copyright, a judge would need to

31. See NIMMER & NIMMER, *supra* note 4, § 13D.10.

32. *Id.*

33. See *id.*

34. See *id.*

35. *Id.*; see also Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 720 (1987) ("Under current copyright law . . . neither Congress nor the courts have articulated the substantive basis used to determine if one work infringes the copyright in another.").

36. See John W.L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 526-7 (1992).

37. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118-19 (9th Cir. 2018) (using a two-part "extrinsic" and "intrinsic" test to determine whether the defendant copied enough of the plaintiff's protectable expression such that the works were substantially similar).

38. 17 U.S.C. § 102.

39. See NIMMER & NIMMER, *supra* note 4, § 13D.13[A].

decide where *Harry Potter*'s idea meets its expression. Is *Harry Potter* a children's book about a wizard boy whose parents were murdered by an evil wizard and who attends a magical school with his best friends, a redheaded boy and a nerdy girl?⁴⁰ Or might *Harry Potter* just be a story about a wizard child going to a magical school?⁴¹ The levels of generality problem for the judge lies in deciding how narrowly or broadly to interpret the idea versus the expression. Giving J.K. Rowling a monopoly over any book about a boy wizard who goes to magic school is much more financially powerful than giving her a monopoly over the narrower storyline. Copyright attempts to balance the financial and creative incentives by only protecting expression, allowing free use of ideas. Importantly, an "idea" in copyright is a legal conclusion, not a natural fact.⁴² Copyright calls anything an "idea" which, if protected, might be too expansive, precluding other authors from creating.⁴³ Drawing that line, and thus deciding on a level of generality, is therefore more an art than a science.

When choosing a level of generality at which to assess substantial similarity, the court must consider the merger doctrine and the *scènes à faire* doctrine. Both doctrines significantly limit the scope of copyright protection. The merger doctrine affords no protection to expression that merges with the idea being expressed.⁴⁴ Typically, this occurs when the idea is incapable of being expressed in more than a few ways.⁴⁵ Similarly, when expression merges with facts, processes, laws, systems, or utilitarian elements, it cannot be protected by copyright.⁴⁶ This impacts the levels of generality analysis because the court must select a lower, more narrow level than the merged expression. For example, when thinking about the artwork

40. See Tun-Jen Chiang, *The Paradox of IP*, 30 HARV. J. L. & TECH. 9, 14 (2017).

41. *Id.*

42. *Id.* at 15 (quoting Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Tel.*, 92 COLUM. L. REV. 338, 346 (1992)).

43. *Id.* (quoting Ginsburg, *supra* note 43, at 346).

44. When there is only one form of expression or only a limited number of ways to express an idea or system, allowing copyright protection would exhaust all possibilities of future use. The limited number of ways to express the idea indicates that the idea has merged with the expression itself and protecting the expression would effectively provide protection for the idea. See Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 417 (2016).

45. *Id.* This concept is exemplified in *Baker v. Selden*, where a plaintiff wrote and copyrighted a book explaining a system of bookkeeping. 101 U.S. 99, 100–01 (1879). The plaintiff claimed infringement when the defendant then wrote a book with slight alterations to that bookkeeping system. *Id.* The Court found no protection over the actual system because its idea could only be expressed through this system. See *id.* at 102, 107.

46. See Samuelson, *supra* note 45, at 438–39.

*Comedian*⁴⁷ by Maurizio Cattelan, commonly known as the banana duct-taped to a wall, there are exceptionally few choices and meaningfully different ways of expressing the idea of a banana duct-taped to a wall. Therefore, the expression has completely merged with the idea, and there is no level of generality at which a judge could point to any protected expression.

The core of *scènes à faire*, on the other hand, asks whether the elements in common between two works are indispensable due to the genre or subject at issue.⁴⁸ Sometimes elements might necessarily flow from the common theme between the works, in which case, they cannot be monopolized.⁴⁹ For example, since it would be almost impossible to make a movie set in 1930s Germany without a scene in a beer hall, that creative decision is not protected by copyright.⁵⁰ Both of these doctrines help judges figure out where the line is between protectable expression and unprotectable ideas. That line represents the level of generality when analyzing a work under a substantial similarity test.

Three tests routinely dominate the analysis judges use to draw the line between protected expression and an unprotected idea. The first is Judge Hand's abstractions test. This test came about in 1930 when he decided *Nichols v. Universal Pictures Corp.*⁵¹ In essence, Judge Hand suggests that as you describe the work with less and less specificity, there is a point at which protection ends.⁵² For example, at the highest level of generality between the two works in *Nichols*, they are both romantic comedies that showcase the quarrels between Jewish and Irish families due to the marriage between their children, eventually ending with the birth of grandchildren and reconciliation between the families.⁵³ The similarities, however, end there; the specific plot elements, characters, and sequence of events are unique. Therefore, in holding for the defendant, Judge Hand found that the only "copied" parts were unprotected ideas rather than protected

47. *Comedian*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Comedian-by-Cattelan> [<https://perma.cc/HWF7-7ZX5>].

48. See Samuelson, *supra* note 45, at 448.

49. See Scott B. Cherrin, *Part II: Television Series & Motion Pictures: Copyright Protection of Fictional Characters & Plots*, 1 DET. COLL. L. ENT. & SPORTS L.F. 55, 71 (1994).

50. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980).

51. 45 F.2d 119, 121 (2d Cir. 1930).

52. See *id.* ("[T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

53. *Id.* at 122.

expressions.⁵⁴ This so-called “test,” however, is often criticized for failing to provide any real criteria for measuring the point at which a work crosses the line from idea to expression.⁵⁵

Professor Zechariah Chafee attempted to refine Learned Hand’s method by suggesting that “the line does lie somewhere between the author’s idea and the precise form in which he wrote it down . . . protection covers the ‘pattern’ of the work,” or “the sequence of events and the development of the interplay of characters.”⁵⁶ In essence, substantial similarity exists when there is a combination of “similarities of treatment, details, scenes, events and characterization.”⁵⁷ Even if similarities between any one of these elements would be trivial on its own, the combination of these gives weight to a claim of infringement by substantial similarity.⁵⁸ This is called the pattern test.⁵⁹ When applying the patterns test to two classics, *Romeo and Juliet* and *West Side Story*, readers can see that the interplay between the characters and sequence of events are nearly identical. Both begin with a girl and boy from hostile groups who meet at a dance and eventually acknowledge their love, causing the hostile groups to fight and kill an important character on each side.⁶⁰ The couple is separated and eventually the male lead dies.⁶¹ Based on the patterns test, these would be substantially similar.

While these tests are both geared toward literature, the court of appeals in *Computer Associates International v. Altai* translated them into the software context to create the abstraction-filtration-comparison test.⁶² Step one, “abstraction,” requires identifying each discrete element of the program, often including object code, source code, system architecture, and the program’s purpose.⁶³ Step two, “filtration,” requires sifting through the abstractions to separate

54. See *id.* (holding that the challenged similarities between the themes and characters in a movie and a preexisting play related only to general ideas and were too abstract to constitute copyright infringement).

55. See NIMMER & NIMMER, *supra* note 4, § 13D.13[B] (highlighting criticism from Judge Easterbrook and an alternative suggestion from Professor Zechariah Chafee).

56. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513–14 (1945).

57. *Reyher v. Child’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).

58. NIMMER & NIMMER, *supra* note 4, § 13D.13[B].

59. *Id.*

60. *Id.* § 13D.13[C].

61. *Id.*

62. 982 F.2d 693 (2d Cir. 1992).

63. See Ogilvie, *supra* note 36, at 547–48.

out the protected from unprotected elements.⁶⁴ This is where facts, merged expression, scènes à faire, ideas, and processes get filtered out.⁶⁵ Finally, in step three, “comparison,” the trier of fact compares protectable elements of the works to determine whether there is substantial similarity.⁶⁶

III.

SUBSTANTIAL SIMILARITY AND LEVELS OF GENERALITY

A. *Literature*

Since the abstractions and patterns tests were designed with literature in mind, they work fairly well in that context. The non-literal levels of abstraction in written works are essentially agreed upon—elements such as genre and scène à faire are at the high end, and the specific plots and storylines are at the low end.⁶⁷

In *Giangrasso v. CBS*, the plaintiff complained about similarities between their promotional radio play script, “WHY-53,” and the defendant’s TV episode of “WKRP Cincinnati.”⁶⁸ The court used a combination of the abstractions and patterns tests to find they are similar at the highest level of generality.⁶⁹ Both are comedies about a radio station’s staff who are interrupted by a robber with a gun.⁷⁰ However, the court used a lower level of generality to find the works are not substantially similar.⁷¹ The WKRP episode involves a hijacking during an episode where the hijacking is not for money but furthers the plot about the out-of-work radio host desperate to publicize himself.⁷² Furthermore, the disc jockey is acutely aware of the situation and sympathizes with the hijacker, helping him escape the police.⁷³ In WHY-53, the host is also live on air but is completely oblivious to the fact that he is being held up, speaking to the robber as if this were a typical interview.⁷⁴ Comparing the works shows

64. INTELLECTUAL PROPERTY COUNSELING & LITIGATION § 3.09[1][d] (Lester Horwitz & Ethan Horwitz, eds., 2025).

65. *Id.*

66. *Id.*

67. Dennis W. K. Khong, *Copyright Doctrines, Abstraction and Court Error*, 3 REV. L. & ECON. 715, 721 (2007).

68. *Giangrasso v. CBS, Inc.*, 534 F. Supp. 472, 473–74 (E.D.N.Y. 1982).

69. *See id.* at 476, 478 (describing high-level similarities among the works).

70. *Id.* at 476.

71. *See id.* (delving into the “handling, scenes, details and characterization used by plaintiffs and defendants in their works” to deny substantial similarity).

72. *Id.* at 477.

73. *Id.*

74. *Id.*

their similarities only exist at levels of abstraction too high to permit any wrongful appropriation claim to move forward because the patterns of the plot sequence and interplay of characters are entirely different.⁷⁵

In contrast, the California Supreme Court in *Golding v. R.K.O.* affirmed a jury judgment of substantial similarity.⁷⁶ At the highest level of generality, both dramas at issue took place on a boat where one person aboard suspects the captain of murder.⁷⁷ At a lower level of generality, the captain's psychological sufferings and adversarial relationship with his accuser are the "dramatic core" of both plots, where the captain's emotions shuffle between feeling definite that nobody will find out to feeling hyper-suspicious of being uncovered.⁷⁸ While there are superficial differences, including the setting of a cruise ship versus a freight ship and the background characters being cruise passengers versus crew members, these differences do not impact the nucleus of the plot.⁷⁹ The dissent suggested that the similarities are attributable to using common themes and plots in the public domain, but the majority found the plot sequences and interplay between characters to be similar enough to affirm the jury verdict of substantial similarity.⁸⁰

While the *Golding* and *Giangrasso* courts reached different conclusions, both used low levels of generality to determine substantial similarity. In cases involving literature, it is typically easier to select a level of generality to analyze for two reasons. First, literature is easier to analyze from a substantial similarity standpoint because there are words explaining plot and character interplay. Second, the different levels of generality are clearly defined; whereas themes are too broad, and individual words are too narrow, plot is the "Goldilocks" level of generality to assess substantial similarity. In contrast, the line between unprotected idea and protected expression is much harder to find in other media. The following sections will look deeper into the level of generality selections in the media of both visual art and software, though the implications are applicable to other media as well.

75. See *id.* at 476, 478 (applying pattern principles of event sequence and interplay of characters to find no substantial similarity).

76. *Golding v. R.K.O. Pictures, Inc.*, 221 P.2d 95, 96, 100–01 (Cal. 1950).

77. *Id.* at 96.

78. *Id.* at 96–97.

79. See *id.* (explaining the plaintiff's characterization of the characters and setting in each work as superficial variations on the same "dramatic core").

80. See *id.* at 101 (Traynor, J., dissenting); *id.* at 100–01 (majority opinion).

B. Visual Art

Without a script, how might judges know what constitutes the idea of a work? Courts are perplexed by this question and apply varying levels of generality on a case-by-case basis. Even Judge Hand noted that in relation to visual works, the test is more intangible.⁸¹ There is no designated way to go about this question, leading to inconsistent results. For example, while the *Boisson v. Banian, Ltd.* court used a low level of generality to find two quilts substantially similar,⁸² the *Rentmeester v. Nike, Inc.* court used a high level of generality to find two Michael Jordan photos not substantially similar.⁸³ Both of these are well-reasoned, close cases, neither of which is necessarily wrong in its analysis. The following subsection analyzes patterns arising in the way judges decide to choose a level of generality in a nonexhaustive sampling of varieties of visual art cases.

1. Typical Visual Art Cases

In *Steinberg v. Columbia Pictures Industries*,⁸⁴ the court used a low level of generality to find the visual artworks in question substantially similar. At the broadest level, both works are aerial views of a few blocks of New York City.⁸⁵ At a medium level of generality, both contain detailed foregrounds of New York City.⁸⁶ While moving towards expression, this is still an uncopyrightable idea because there are so many different ways to conceptualize it. Therefore, the court went lower to find substantial similarities in the expression of foreground construction of four New York City blocks (including two avenues and a two-way cross street) using similar color schemes, long shadows, building shapes, streetlights, and lettering.⁸⁷

Analogously, the *Mannion v. Coors Brewing Co.* court found that reasonable jurors could find substantial similarities between Mannion's photo and Coors Light's advertisement.⁸⁸ Coors claimed

81. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (explaining that infringement determinations are "of necessity vague").

82. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 273–74 (2d Cir. 2001) (analyzing substantial similarity on an element-by-element basis where unique shapes, patterns, colors, and texture indicated infringement).

83. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1122–23 (9th Cir. 2018) (holding that the general differences in "selection and arrangement of elements" forestalled a finding of infringement).

84. 663 F. Supp. 706, 710 (S.D.N.Y. 1987).

85. *Id.* at 712.

86. *Id.* at 710, 712.

87. *Id.* at 712–13.

88. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 463 (S.D.N.Y. 2005).

their advertisement only shared the “generalized idea and concept of a young African American man wearing a white t-shirt and a large amount of jewelry.”⁸⁹ However, the court found the defendant’s characterization of the similarities too broad, finding other similarities in angle, pose, cloudy-sky background, composition, arrangement of the jewelry, and lighting.⁹⁰ While there are many ways to photograph a black man in a white t-shirt and jewelry, at a low level of generality, the specific choices made by Coors were clearly a replication of Mannion’s expression. Though judges are not explicitly tying their decisions to the range of artistic choices available, the common thread in this case and others like it⁹¹ is that judges tend to choose a level of generality based on where the artist had room to make the most artistic choices.

2. Visual Art Stemming from Nature

Works that realistically depict natural subjects are an interesting subset of visual art because there is a much smaller range of artistic choices to be made given the constraints of trying to replicate a plant, animal, or natural scenery. Therefore, the test must be slightly tweaked to accommodate for the reality being represented. Whereas it would be easy to know when someone copies an abstract depiction of a bird, it is quite hard to know when someone copies a scientific rendition of one.⁹²

In *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, the artist produced two paintings of cardinals sitting on branches.⁹³ This idea cannot be copyrighted. Moving down a level of generality, the court of appeals described these paintings “depict[ing] two cardinals in profile, a male and a female perched one above the other on apple tree branches in blossom.”⁹⁴ Despite these being choices

89. *Id.* at 455.

90. *See id.* at 462–63 (cataloguing similarities).

91. *See, e.g.*, *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914) (“The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.”); *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001) (noting that copyright protection for photographs does not extend to the subject, but rather to the photographer’s original conception of the subject); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (“What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes.”).

92. *See Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978).

93. *Id.* at 66.

94. *Id.*

of expression—the artist could instead decide to paint the birds perched next to one another, facing front, or on a different type of tree—the court goes further into the details to find the paintings not substantially similar because the artist made those choices to convey the most realistic version of a cardinal sitting on an apple tree branch.⁹⁵ The court suggested the “color, body attitude, position of the birds and linear effect” are different: “In one, the attitude of the male is calm; in the other, he is agitated with his beak open.”⁹⁶ It also suggested variances in “the plumage of the birds, the foliage, and the general composition of the works.”⁹⁷

Comparably, the court looked to granular details in *First American Artificial Flowers v. Joseph Markovits, Inc.*,⁹⁸ examining plastic tea roses.⁹⁹ The court disregarded similarities that “follow nature,” instead noting the creative choices the artist did make, including differences in position of leaves on the stem, petal colors, shape and position of thorns, and “the distinctiveness of the veins [of the leaves].”¹⁰⁰

By drawing the idea-expression line at the specific “distinctive curls of particular tendrils” of a jellyfish,¹⁰¹ “the proportion, form, contour, configuration, and conformation” of a cocker spaniel statue,¹⁰² and the “pose, posture, and facial expression” of a concrete deer,¹⁰³ courts regularly use the lowest level of generality in works imitating nature. While consistent in applying a low level of generality, courts are far from consistent in what they determine counts as expression. Whereas pose was uncopyrightable in *Rentmeester* and *F.W. Woolworth*,¹⁰⁴ pose was explicitly considered a substantial

95. See *id.* at 66–67 (affirming the district court’s determination that “although some of the same source materials were used in all three paintings, similarity between the works necessarily reflected the common theme or subject and each painting was a separate artistic effort”).

96. *Id.* at 66.

97. *Id.*

98. 342 F. Supp. 178, 186–87 (S.D.N.Y. 1972).

99. *Id.*

100. *Id.* at 186–87; see also Morgan M. Stoddard, Comment, *Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 589 (2008) (“Comparing the two roses more closely, the court found a ‘pattern of differences’ sufficient to negate the inference of copying.”) (quoting *First Am. Artificial Flowers*, 342 F. Supp. at 186–87).

101. *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

102. *F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951), *aff’d* 344 U.S. 228 (1952).

103. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988).

104. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018); *F.W. Woolworth Co.*, 193 F.2d at 164.

similarity factor in *Concrete Machinery*.¹⁰⁵ Similarly, judges sometimes even acknowledge these differences would not be discernible by the ordinary observer, as the *F.W. Woolworth* opinion stated that the protectable elements are “too subtle for appreciation by anyone but a fancier.”¹⁰⁶ Therefore, given that the substantial similarity test is meant to judge whether there is substantial similarity between the works in the eyes of an ordinary observer, looking at too low a level of generality contravenes the entire purpose of the inquiry.¹⁰⁷

3. Fabric Design Works Stemming from the Public Domain

Notably, courts typically use higher levels of generality in fact patterns revolving around fabric designs stemming from the public domain. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, the court used a very high level of generality to determine the defendant’s fabric was substantially similar to the plaintiff’s Byzantium design.¹⁰⁸ While it analyzed the designs at a low level of generality and found the colors, scrolls, arches, symbols, and distribution of those patterns were distinctly not identical, the court nevertheless decided the case by using a high level of generality, ultimately holding that the compilation of color and general forms made the aesthetic appeal of the designs the same.¹⁰⁹

In much the same fashion, the court in *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, analyzed geometric design of two fabrics at a low level of generality but ultimately decided the case at a high one.¹¹⁰ When looking closely, the judges found the defendant’s “crescents are titled,” their scalloping “less gracefully treated,” and their designs generally “more discreet” than the plaintiffs.¹¹¹ Since the differences found under “courtroom scrutiny” faded away when viewed from a couple feet back, however, the court found protected elements at a high level of generality.¹¹²

105. *Concrete Mach. Co.*, 843 F.2d at 607.

106. *F.W. Woolworth Co.*, 193 F.2d at 164.

107. *But see* Cohen, *supra* note 36, at 732 (arguing that the ordinary observer test’s “ambiguity” leaves courts “to determine infringement on an unpredictable, impressionistic basis”).

108. *See* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”).

109. *Id.*

110. *See* 490 F.2d 1092, 1094 (2d Cir. 1974) (“[A]lthough small differences between the designs might be found to exist under courtroom scrutiny, those differences fade away within a few feet or absent sharp scrutiny.”).

111. *Id.* at 1093.

112. *Id.* at 1094.

Similarly, in *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, the plaintiff copyrighted their argyle plaid fabric pattern and accused the defendant of unlawful copying.¹¹³ The district court found no substantial similarity because the differences in the works “would be apparent to a furniture manufacturer, or . . . a consumer seriously contemplating purchase of a couch covered with one or another of the fabrics.”¹¹⁴ But while a furniture maker or consumer seriously considering purchasing the fabric would likely look quite meticulously at the fine details, the Second Circuit used a higher level of generality. The court applied the ordinary observer test, which asks whether the ordinary observer, “unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”¹¹⁵ In fabric design cases, the coordination and arrangement of elements within specific spatial configurations is often enough to find substantial similarity despite clear differences at the more granular levels.¹¹⁶

In the visual art context, courts seem to make levels of generality decisions based on what they find to be reasonable similarities in light of the artistic choices available to the work being created. From a policy perspective, it makes sense not to grant a monopoly on works that simply reflect reality. However, that dramatically changes in fabric design cases, where courts have seemingly provided much greater protections to the original artist. When deciding cases at high levels of generality, courts are privileging whoever arranged designs first. Since the copyright statute gives minimal guidance on how to approach these decisions,¹¹⁷ judges are trying to intuit their way around the idea-expression dichotomy. In the process, they are privileging earlier creators in certain art forms more than others, with greater protections under the law for those privileged works.

C. Software

“A computer program is often viewed as a collection of different parts, just as a book or play is seen as an amalgamation of plot,

113. 558 F.2d 1090, 1091–92 (2d Cir. 1977).

114. *See id.* at 1093 (quoting *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 425 F. Supp. 1008, 1012 (S.D.N.Y. 1977)).

115. *See id.* at 1093 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

116. *See, e.g.,* *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 103 (2d Cir. 1999) (finding substantial similarity where defendant duplicated the selection, coordination, and arrangement of floral elements in a fabric pattern despite differences in detail).

117. 17 U.S.C. § 102 (offering no objective minimum level of originality required for protection under the statute).

characters, and other familiar parts.”¹¹⁸ Since computer programs are considered literary works,¹¹⁹ one might assume that courts are able to faithfully apply the substantial similarity analysis using a consistent level of generality. However, drawing the line between protected and unprotected material in the software context is even more uncertain than in visual art cases. In part, this is because courts disagree over both the threshold question as to what the different levels of abstraction even are, and where to place the line between unprotected idea and protected expression.¹²⁰ Consequently, application of the abstraction-filtration-comparison test is prone to inconsistency.¹²¹

Before *Altai*, *Whelan Associates v. Jaslow Dental Laboratory, Inc.* decided “the purpose or function” of the work was its idea, and anything unnecessary to that purpose or function was expression.¹²² Benefits like consistency and stability stem from a bright-line rule like this. However, critics argue this test is “poorly adapted to the abstractions test” because it fails to differentiate between levels of abstraction within a program’s structure, sequence, and organization (SSO)¹²³ and that it fixes the level of generality analysis at too high a level.¹²⁴ While some courts attempted to refine the *Whelan* strategy by adding further layers into the SSO category,¹²⁵ most abandoned it altogether, instead following the *Altai* method, whether implicitly or explicitly.¹²⁶

The *Altai* court translated Judge Hand’s abstractions test to the software context, explaining its strategy for distilling idea from

118. Ogilvie, *supra* note 36, at 526.

119. *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (holding that a computer program in object or source code is a copyrightable “literary work” under 17 U.S.C. § 101).

120. See Ogilvie, *supra* note 36, at 527 (“Unfortunately, some courts classify certain program parts as ideas while others classify the same parts as expression . . .”).

121. See *id.*

122. 797 F.2d 1222, 1236 (3d Cir. 1986).

123. Ogilvie, *supra* note 36, at 554.

124. See William H. Wright, Comment, *Litigation as a Mechanism for Inefficiency in Software Copyright Law*, 39 UCLA L. REV. 397, 418 (1991) (arguing that a high level of abstraction “is a substantial barrier to a new competitor entering a marketplace”).

125. See, e.g., *Healthcare Affiliated Servs., Inc. v. Lippany*, 701 F. Supp. 1142, 1150 (W.D. Pa. 1988) (adding a layer of abstraction called “methodologies” between purpose and SSO and finding no evidence methodologies constituted more than an idea); Ogilvie, *supra* note 36, at 555 (describing different attempts by courts to refine the *Whelan* strategy).

126. See Mark L. Gordon, *Copying to Compete: The Tension Between Copyright Protection & Antitrust Policy in Recent Non-Literal Computer Program Copyright Infringement Cases*, 15 J. MARSHALL J. COMPUT. & INFO. L. 171, 181-87 (1996) (collecting cases).

expression in three steps.¹²⁷ The first step, abstraction, isolates each level from its ultimate purpose.¹²⁸ The isolated levels dissected from the program parts often include abstract data types, system architecture, and algorithms, but they are not solidly agreed upon or defined.¹²⁹ Scholars do agree that purpose is an idea and code is an expression, but the other abstraction levels are left unsettled.¹³⁰ The next step, filtration, requires examining each isolated level to determine if it is an idea or an expression, or whether it was “dictated by efficiency, by external factors, and taken from the public domain.”¹³¹ Again, courts routinely disagree about these factors. For example, in *Oracle America, Inc. v. Google Inc.*, although the district court held that 37 Java API packages, including the SSO, were not protectable, the court of appeals reversed.¹³² Lastly, the third step involves comparing the protectable elements between the two works.¹³³

In *Altai*, the Second Circuit agreed with the district court’s characterizations of the levels of abstractions in ascending order from “object code, to source code, to parameter lists, to services required, to general outline.”¹³⁴ After filtering out the elements dictated by efficiency, elements dictated by external factors, and elements taken from the public domain, the Second Circuit also agreed with the decision to analyze substantial similarity at the level of generality of parameter lists and macros, finding no substantial similarity when comparing what was left of the programs.¹³⁵ However, even the *Altai* court did not prescribe their version of the different levels of abstractions nor their level of generality selected, suggesting that the facts of a different case “might require that a district court draw a more particularized blueprint of a program’s overall structure.”¹³⁶

Despite reasoned analysis regarding the copyrightability of each of these levels, courts habitually make contrasting decisions,

127. See *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 706–12 (2d Cir. 1992) (outlining an “Abstraction-Filtration-Comparison” substantial similarity test for computer program structure).

128. *Computer Assocs. Int’l*, 982 F.2d at 706.

129. See Ogilvie, *supra* note 36, at 542 n.73 (listing different ways courts have defined the levels of abstraction in computer programs); see also Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 700–01 (1999) (discussing the difficulty of organizing even a simple computer program into “a hierarchy of abstractions”).

130. See Ogilvie, *supra* note 36, at 563.

131. NIMMER & NIMMER, *supra* note 4, § 13D.37[B][2].

132. 750 F.3d 1339, 1348 (Fed. Cir. 2014).

133. See NIMMER & NIMMER, *supra* note 4, § 13D.37[E].

134. *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 714 (2d Cir. 1992).

135. See *id.* at 714–15.

136. *Id.* at 714.

using incompatible reasoning and methodology, because there is no stable, complete, or manageable set of abstraction parts in accord with both programming conventions and existing law.¹³⁷ Unlike literature, computer programs are “not easily reduced to a hierarchy of abstractions.”¹³⁸ These inconsistencies result from judicial lack of knowledge about computer program functionality, lack of persistent definitions of each level of abstraction, and the way courts have attempted to fit the square peg of the idea-expression distinction into the round hole of software.¹³⁹ With all these obstacles in the way, choosing a level of generality is an inconsistent and unpredictable venture for software cases.

IV. CONSEQUENCES AND SOLUTIONS

This Note thus far has analyzed why and how courts choose different levels of generality in the substantial similarity analysis for three media of work. But we should also look to the bigger question of why it's important to care about selecting the right level of generality. Copyright's idea-expression analysis imperfectly attempts to balance the property interests of authors against the interests of the public in free-flowing information and creativity.¹⁴⁰ Both over-protecting and under-protecting works can stunt and disincentivize creativity. The Ninth Circuit even acknowledged that one of the guiding considerations in drawing the idea-expression line is the preservation of the balance of interests based on the judge's evaluation of the societal benefits each option presents.¹⁴¹ For fairness's sake, we should be concerned about the lack of consistency and clear-cut guidelines by which courts are making these decisions.

Since the idea-expression dichotomy arose in the literary context, it works in a more consistent manner in that space. But the

137. See Ogilvie, *supra* note 37, at 560; see also *Lotus Dev. Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 63–68 (D. Mass. 1990) (examining menu SSO); *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1134, 1137 (N.D. Cal. 1986) (examining structure, sequence, and layout of audiovisual display).

138. Newman, *supra* note 129, at 700.

139. See *id.* at 700–02 (discussing the need for “terms appropriate to the subject matter,” a recognition of “what is relevant in applying the idea-expression dichotomy to computer programs,” and “the help of knowledgeable experts”).

140. See Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 561–63 (1990) (discussing the underlying justifications for this “imprecise tool” (quoting *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987))).

141. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

dichotomy breaks down in other media.¹⁴² The resulting inconsistency in selecting a generality level for the idea-expression line can curtail the free flow of speech and creativity. The idea-expression line is only a product of litigation, with no *ex ante* process for deciding what is protected.¹⁴³ Therefore, artists face uncertainty and unpredictability, which may create a chilling effect.¹⁴⁴ When they do choose to create, they can become embroiled in lawsuits, which often result in subjective value judgments about what the “idea” behind a work is.¹⁴⁵ Judge Lewis A. Kaplan’s *Mannion* opinion captured this consequence perfectly when he suggested that little is gained by distinguishing idea from expression in visual art because “the line itself is meaningless” when the conceptual categories do not fit the subject matter.¹⁴⁶ While it makes sense to talk about the idea of a literary work, it is much harder to capture the idea of visual art or software because each observer may have a different and equally valid interpretation.¹⁴⁷

Judge Hand preemptively struck back at any criticism of his test, suggesting that although wherever the line is drawn “will seem arbitrary,” “that is no excuse for not drawing it.”¹⁴⁸ However, there may be ways to make this line-drawing exercise more seamless for non-literature media. First, this Note suggests more fully embracing the levels of generality structure in substantial similarity analysis. While courts sometimes speak in terms of levels of generality, they do so inconsistently and arbitrarily. More routinely employing this structure of parsing through the levels of abstraction, identifying the level at which protection is afforded, and then explaining why that level was selected would be a net benefit to copyright’s overall jurisprudence because it gives authors and their lawyers a much more nuanced understanding of why a work is or is not infringing.

142. See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455–59 (S.D.N.Y. 2005) (discussing the difficulty of bifurcating between ideas and expressions in visual arts and other non-verbal media).

143. Molly Shaffer Van Houweling, *The Freedom to Extract in Copyright Law*, 103 N.C. L. REV. 445, 453 (2025).

144. See 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.04[B] (rev. ed. 2025).

145. See Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 230 (1990) (arguing that the idea-expression dichotomy often boils down to “a determination of what is considered meritorious in a given work, based on particular judges’ assessments of the artistic value”).

146. *Mannion*, 377 F. Supp. 2d at 458.

147. See *id.* at 458.

148. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

Second, these difficult line-drawing decisions may become easier if courts use vocabulary more tailored to the medium of work at issue.¹⁴⁹ Courts already do this to some extent. For example, in music cases, there is rarely discussion of a musical “idea” being expressed.¹⁵⁰ Software cases in particular would benefit from using more tailored terms, given that computer programs are expressive and communicative in ways inherently different from art or literature.

Finally, another solution could be setting guidelines for what level of generality is best suited for different media. If Congress provided statutory guidance for what courts should try to better protect, judges may have an easier time making consistent decisions. These guidelines would reflect the policy considerations and preferences of what the democratic body prefers to protect. For example, we may want to generally use a higher level of generality for software to protect those who create totally new, creative, and productive programs.¹⁵¹ Or, we might prefer a low level of generality for visual arts depicting elements from nature so as to incentivize more creation of works based on nature. The possibilities are endless, and they are explicitly value judgments by our leaders based on both their priorities and the priorities of their voters. Making these value judgments at the congressional level, instead of in every single substantial similarity case, would lead to a more harmonious body of case law with consistency and fairness for authors.

As a counterargument, while Justice Scalia may have been right to worry about the temptations of judicial activism in the fundamental rights context, it may not be such a bad thing in the copyright context. Reasonable scholars could contend that fundamental constitutional rights should not be subject to judges’ personal preferences, but there may actually be a benefit to infusing current cultural, political, and social preferences into copyright case

149. See *Mannion*, 377 F. Supp. 2d at 458–59 (suggesting courts use different vocabulary to evaluate copyright infringement as appropriate in various artistic contexts (citing *Newman*, *supra* note 129, at 697)).

150. *Newman*, *supra* note 129, at 700; see also *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1070 (9th Cir. 2020) (associating ideas in music with themes, common musical elements, or building blocks of music); *Gray v. Perry*, No. 2:15-CV-05642, 2020 U.S. Dist. LEXIS 46313, at *5 (C.D. Cal. Mar. 16, 2020) (citing *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004) (“[W]hen certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright.”)).

151. *Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 956 (2005) (Breyer, J., concurring) (recognizing that this decision reflects a tradeoff of values between encouraging more technological innovation versus more stringently protecting authors’ copyright monopolies).

law. Given the art market's rapid changes and the ad hoc nature of substantial similarity decisions, allowing judges more discretion might better align and intertwine the copyright regime with the art market's norms and trends. For example, much of postmodern and contemporary art rely heavily on copying, which would be substantially similar.¹⁵² Allowing copyright to bend at the will of the art market through ad hoc judicial implementations of art market norms might promote progress and create efficiency gains greater than consistency and uniformity would.¹⁵³ However, this method depends on judicial knowledge of art, which is highly problematic.¹⁵⁴ It is also significantly more applicable to visual art than other forms of copyrightable material. Therefore, allowing wide judicial discretion could actually give rise to even greater uncertainty in substantial similarity litigation.

Realistically, if Congress does not act, courts will need to look to the common threads in substantial similarity cases across media. When selecting a level of generality, courts should choose a level based on the range of creative choices available to an author, and they should explain their choice when writing opinions. Whereas the choices are endless in photos and literature, the range of expressive choice is sharply curtailed in software and visual art depicting natural subjects. When dealing with infinite creative options, courts can be more skeptical of high-level similarities, but they should not punish authors who did not have a choice to copy given the medium they are working in. Once courts have chosen a level in each medium, they should uniformly stick to those levels to give authors more certainty and predictability in infringement litigation.

152. See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 352–55 (2018) (discussing how copying has become “both the subject of contemporary art and its technique”).

153. See *id.* at 342 (arguing that the art market’s “norm of authenticity” already polices detrimental copying of an artist’s first sale of a work, “rendering copyright law superfluous”).

154. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 574–75 (2023) (Kagan, J., dissenting) (“There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning. . . . [T]he majority plants itself firmly in the ‘I could paint that’ school of art criticism.”).

V. PREDICTIONS FOR FAIR USE'S LEVELS OF GENERALITY PROBLEM

It would not be possible to discuss the state of the levels of generality analysis in copyright without discussing fair use. Fair use operates as an affirmative defense which excuses liability for what would be infringement in circumstances which balance out the interests of the copyright holder with those of the broader public for reasons like education, personal use, criticism, parody, scholarship, news, etc.¹⁵⁵ The court must consider four facets of the infringing use in order to excuse liability. First, courts look at the purpose and character of the use. This factor includes analysis on how the party is using the copyrighted work, whether it is for a noncommercial purpose, and whether the use is transformative from the original copyrighted work.¹⁵⁶ Second, the court considers the nature of the copyrighted work, including whether the work is published, factual, or highly creative.¹⁵⁷ Third, the court will account for the amount and substantiality of the portion of the original work used in relation to the work as a whole.¹⁵⁸ Last, courts analyze whether the unlicensed use harms the market for the original work by acting as a substitute.¹⁵⁹

Outside of substantial similarity, the final part of this paper predicts that the fair use defense will become the next battleground where major levels of generality problems will be fought in copyright due to the Supreme Court's *Andy Warhol Foundation for the Visual Arts v. Goldsmith* decision.¹⁶⁰ That decision affirmed the Second Circuit's holding that Andy Warhol's *Orange Prince* was not a fair use of Lynn Goldsmith's Prince portrait when used to illustrate a magazine article about the musician Prince.¹⁶¹ This decision heavily implicated the importance of a levels of generality analysis within two of the fair use factors: factors one and four.

A. *The Purpose and Character of the Use*

The *Warhol* Court found the first factor of the fair use inquiry to be whether a work was transformative, meaning it did not "merely

155. 17 U.S.C. § 107; Nimmer & Nimmer, *supra* note 4, § 13F.04[B].

156. *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Aug. 2025), <https://www.copyright.gov/fair-use/> [<https://perma.cc/7ETM-KMUS>].

157. *Id.*

158. *Id.*

159. *Id.*

160. 598 U.S. 508 (2023).

161. *Id.* at 515–16, 519–20.

supersede[.]” the original piece, but rather added something new with a “further purpose or different character.”¹⁶² It means “altering the first with new expression, meaning, or message.”¹⁶³ But in the end, the key consideration was not about a different meaning or message, but whether the specific use had a similar purpose to the original.¹⁶⁴

Looking narrowly into the use was a substantial deviation from previous fair use cases which typically considered whether the work itself was fair, instead of its distinct use.¹⁶⁵ That departure greatly elevated the consequences of determining the purpose. For example, in the lower courts Goldsmith argued that hers and Warhol’s works had the same purpose by virtue of both being visual works.¹⁶⁶ At that extremely high level of generality, the fair use defense might have been obliterated, threatening artistic borrowing within similar media.¹⁶⁷ Putting this into perspective, in *Campbell v. Acuff-Rose Music, Inc.*, the works at issue were both songs.¹⁶⁸ At a high level of generality, both authors Roy Orbison and 2 Live Crew created songs with the purpose of telling a story and expressing emotion about love and desire through music and lyrics.¹⁶⁹ At this extremely high generality level, the first factor would favor the original creator, Orbison. However, at a narrower level of generality, the purpose of the songs could not have been more different. Orbison’s song tells the romantic story of a “man whose fantasy comes true,” while 2 Live Crew’s purpose is to express a crass demand for sex and relief from paternal responsibility.¹⁷⁰ While the *Campbell* Court exemplified a very traditional use of a low level of generality,¹⁷¹ the *Warhol* Court went even further. After much back and forth, the *Warhol* justices took an even narrower approach and found that the purposes of both works were to illustrate magazine articles about Prince.¹⁷²

162. *Id.* at 509.

163. See Amy Adler, *Roundtable on Warhol v. Goldsmith*, 94 GREY ROOM 20, 22 (2024) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

164. *Id.* at 22–24.

165. *Id.* at 24.

166. *Id.* at 33.

167. *Id.*

168. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

169. *Id.* at 582–83.

170. *Id.* at 583.

171. Andy Warhol Found. for the Visual Arts, 598 U.S. 508, 571 (2023) (Kagan, J., dissenting) (naming *Campbell* the “primary case on the topic” of the first factor of the fair use inquiry).

172. Adler, *supra* note 163, at 24.

The oral argument transcripts demonstrate the Justices' uncertainty about choosing a level of generality. One of Justice Elena Kagan's most salient points in her dissent demands explanation for the majority's failure to explain why they selected the level of generality for purpose at illustrating a magazine about Prince.¹⁷³ The Warhol lawyers conceded that there is a level of generality at which the purpose was to illustrate an article about Prince but asked the Justices to look even more narrowly into the contents of the article.¹⁷⁴ The article, titled "Purple Fame," was about Prince's emerging celebrity icon status.¹⁷⁵ The AWF lawyers suggested *Orange Prince's* purpose was to illustrate an article specific to Prince's celebrity status, given Warhol's intended message about the dehumanization of celebrity.¹⁷⁶ Whereas Goldsmith's photo might illustrate any article about Prince's life, Warhol's purpose was more specific to illustrating a perspective on the pop era of celebrity. Not only did the Court not select AWF's preferred level, but they also did not clearly identify why they chose their selected level.¹⁷⁷

In the next wave of fair use litigation, the interpretive battle over choosing the level of generality to define purpose will be highly consequential. After the *Warhol* decision, in the 2024 case *Philpot v. Independent Journal Review* (IJR), an online news site's use of the plaintiff's photo of the singer Ted Nugent was held to share the same purpose as the plaintiff's based on a *Warhol*-like analysis.¹⁷⁸ The judges found that the plaintiff originally took the copyrighted photo to take a portrait of Nugent, and IJR used the photo to "depict" the musician.¹⁷⁹ Had they gone to an even lower level of generality, like the AWF lawyers sought, it may have been relevant that the article was not at all about Nugent, as it was titled "15 Signs Your Daddy Was a Conservative" and listed enjoying Nugent's music as one of many signs.¹⁸⁰ However, the Fourth Circuit stayed true to the *Warhol* Court's

173. *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 577–80 (Kagan, J., dissenting).

174. See Transcript of Oral Argument at 20–28, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869).

175. *Id.* at 21.

176. *Id.*

177. *Id.* at 21–28; *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 526 ("As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share substantially the same purpose.").

178. See 92 F.4th 252, 258 (4th Cir. 2024) (describing the "purpose and character of the use" analysis (quoting *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 527–33)).

179. *Id.* at 258.

180. *Id.* at 256.

level of generality, and likewise offered no clear explanation of that choice.¹⁸¹

Larson v. Perry also followed *Warhol's* analytical footsteps but led to the opposite result.¹⁸² The plaintiff, Sonya Larson, claimed defendant Dawn Perry infringed on her letter posted to Facebook about a kidney donation, which Perry incorporated into an original short story.¹⁸³ When selecting a level of generality at which to analyze the work, the judge “took its analysis down to the very end of the contextual chain, starting with the medium of the work . . . but ending with the broader framework in which the work ultimately appeared.”¹⁸⁴ At a high level—akin to calling the purpose of Warhol’s and Goldsmith’s works “portraits”—the two letters were used to share motivations for donating a kidney to the recipient.¹⁸⁵ The court found that the more accurate level to judge purpose was at the level akin to illustrating magazine stories about Prince. At that specific level, the judge found the plaintiff’s letter’s purpose to be informing friends and family about her kidney donation, while the defendant’s use was to introduce a new character to the narrative.¹⁸⁶ Since the purpose at that specific level of generality was different, the first factor weighed in favor of the defendant’s fair use defense.¹⁸⁷

B. *Market Effects*

Justice Kagan’s *Warhol* dissent also critiques the majority’s conflation of the purpose and substitution inquiries. Since the majority concluded that the works have the purpose of operating in the same market, Justice Kagan argued that it follows that Warhol’s work has a detrimental effect on Goldsmith’s market.¹⁸⁸ The key question for this and future cases will now be determining whether the defendant’s work is likely to compete with a plaintiff’s work for that particular use, thus acting as a market substitute. But this is still a value judgment that courts have to make.

181. *Id.* at 260 (“Philpot took the Photo to identify Nugent. IJR used the Photo for precisely the same reason: to depict ‘The Nuge.’”).

182. *See* *Larson v. Perry*, 693 F. Supp. 3d 59, 79, 83 (D. Mass. 2023).

183. *See id.* at 67.

184. *See id.* at 79 (using the same language to describe the Supreme Court’s analysis in the *Warhol* opinion).

185. *See id.*

186. *Id.* at 79–80.

187. *Id.* at 78–80.

188. *See* *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 578 (2023) (Kagan, J., dissenting).

Applying antitrust principles to define substitution presents yet another framing question subject to the levels of generality problem.¹⁸⁹ This problem is easily exemplified by the classic Coca-Cola example.¹⁹⁰ Imagine you are thirsty and find a corner store to buy a drink. You go to the cooler section and see both Coca-Cola and milk.¹⁹¹ You prefer Coke, but the price is higher. If you decide to purchase the milk, has it become a market substitute for Coke?¹⁹² Both are beverages sold at the corner store with the purpose of quenching the customer's thirst.¹⁹³ However, most consumers would say they aren't really substitutes.¹⁹⁴

Similarly, many artists would suggest works are never substitutable. AWF made this argument when they asserted there was a specific reason the magazine editors chose *Orange Prince* over Goldsmith's photo; Warhol's purported purpose was to show the dehumanizing effect of celebrity as applied to Prince,¹⁹⁵ whereas Goldsmith's goal was to depict Prince.¹⁹⁶ Therefore, according to AWF, they could not be substitutes since the magazine editors chose Warhol's work of fine art over Goldsmith's regular photograph for this magazine article in part based on Warhol's intended meaning.¹⁹⁷ However, there is likely some price increase of Warhol's work at which the magazine editors would have switched to Goldsmith's.¹⁹⁸ Deciding if substitution occurs at a 5%, 10%, 20% or further price increase is just another example of the levels of generality problem at work.¹⁹⁹

189. See Christopher Jon Sprigman, *Copyright, Meet Antitrust: The Supreme Court's Warhol Decision and the Rise of Competition Analysis in Fair Use*, 134 YALE L.J. F. 298, 312 (2025) (noting that antitrust law "draw[s] a line between those that are 'in' and those that are 'out' of the sphere of competition").

190. *Id.* at 311.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. See Transcript of Oral Argument at 34, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869) (counsel for AWF stated that the picture's "meaning or message was about the dehumanizing effects of celebrity as applied to Prince").

196. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 526 (2023).

197. See Transcript of Oral Argument at 18, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869) ("[T]he Warhol work did not compete as a market substitute at Factor 4 with the Goldsmith photograph and this is really a Factor 1 case.").

198. *Cf. id.* at 50 ("[Y]ou'd look at the price to see whether there were market substitutes [and] you'd see that Warhol's works, even at the licensing as opposed to the . . . original works[] were selling for a lot more.").

199. Explicitly importing antitrust principles to define the market of a work might be beneficial to fair use's fourth factor. See Sprigman, *supra* note 189, at 312–16

VI. CONCLUSION

Without clear congressional guidance on how to make these levels of generality decisions, and without explicit use of the levels of generality framework by judges, there will be even less consistency in judicial decisions of copyright infringement. The uncertainty in fair use and the substantial similarity context means creators are more likely to face unexpected liability since there is no *ex ante* way to know what will be deemed infringement and what will not. This uncertainty will also make litigation even less desirable and might lead to a chilling effect in what and when artists decide to create.²⁰⁰ Or, risk-averse creators will seek licenses more frequently, even when not needed. This will give power to licensors who know the doctrine's ambiguity scares creators into thinking they need a license.²⁰¹ Even if an author believes they have a good case at both the substantial similarity and fair use stages, the price of being wrong can be prohibitively high, possibly including statutory damages, disgorgement of profits, and attorney's fees that are significantly higher than the license would have cost.²⁰² This will disincentivize new creativity, stifling progress, because, as commonly stated in intellectual property discussions, "[a] dwarf standing on the shoulders of a giant can see farther than the giant himself."²⁰³ Our Founding Fathers agreed that incentivizing progress is a worthwhile investment which benefits the public.²⁰⁴ While deciding substantial similarity and fair use on a case-by-case basis is necessary, Congress needs to step in and provide some guidelines to judges for even application of the law.

(describing how "[a]ntitrust assesses the substitutability of particular products or services principally as part of the task of defining relevant antitrust markets").

200. See PATRICIA AUFDERHEIDE ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 8–9 (2014), <https://www.collegeart.org/pdf/FairUseIssuesReport.pdf> [<https://perma.cc/9S5Y-L3C6>] (describing self-censorship by artists based on apprehension about fair use law).

201. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (explaining how uncertainty of doctrine creates risk aversion among creators).

202. *Id.* at 890.

203. Chafee, *supra* note 56, at 511.

204. See U.S. CONST. art. 1, § 8, cl. 8 (granting Congress the power to "promote the Progress of Science and useful Arts" by granting special rights to "Authors and Inventors" for their works).