

Inherent Inelegance: Copyright Law's Struggle with Aesthetic Subjectivity

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1. "Simplicity is the ultimate sophistication."
Leonardo da Vinci
2. "Simplicity of shape does not necessarily equate with simplicity of experience."
Robert Morris
3. "The line of beauty is the line of perfect economy."
Ralph Waldo Emerson
4. "Less is more."
Robert Browning

Kazimir Malevich painted *White on White* in 1918. The oil painting, presently housed at the Museum of Modern Art in New York,¹ essentially depicts a white square tilted to the right, resting on top of a blank canvas that is a slightly different shade of white. This painting epitomizes a specific movement of abstract art often entitled "suprematist;" it has inspired many critical essays and philosophical musings about idealism and communism, among other topics. To a casual observer – or even a careful observer who is not moved by minimalist art -- it may simply be a white square superimposed on another white square and not worthy of comment or appreciation. Just one year before Malevich painted *White on White*, Marcel Duchamp submitted a work of his art to a New York exhibition but was rejected.² Duchamp's *Fountain* was a urinal that he rotated ninety degrees from its normal, functional position, and left the piece unembellished except for the inscription 'R. Mutt 1917.'

¹ See The Museum of Modern Art, Provenance Research Project, *Malevich*, available at <http://www.moma.org/collection/provenance/items/817.35.html> (last visited Feb. 21, 2004).

² See The San Francisco Museum of Art, Recent Acquisitions, *Duchamp*, available at http://www.sfmoma.org/collections/recent_acquisitions/ma_coll_duchamp.html (last visited Feb. 21, 2004).

Are either of these works creative? The required level of creativity for an artwork to receive copyright protection is very low in the United States, but, depending on whether that artwork is also useful, it may not be eligible for copyright protection. This illustrates one of several gray areas in copyright law. Whether an object is more functional than it is aesthetic is a question sometimes left up to a single judge rather than a jury, although a jury's composite point of view is likely more objective and reflective of societal views and values at that time. Whether an object *expresses* an idea or *embodies* an idea is another issue left to courts to decide. This paper will explore some of the dichotomies that exist at the nexus of art and copyright law, specifically 1. the separability of aesthetics from function, followed by a brief comment on 2. the question of law versus question of fact as it plays out in the courtroom, and will finish with 3. the idea / expression dichotomy and the corollary issue substantial similarity. Having synthesized some of the case law and literature in these three interrelated areas, I suggest that the law is inherently ill suited to deciding some of these issues that occur at the periphery and on the forefront of creative endeavors. That being said, I also suggest that the partnership between the arts and the law is necessary.

The United States' copyright structure seems no better or worse than other regimes, all of which struggle with the same or similar uncertainties. As is true with every aspect of intellectual property, striking a balance between protecting the author and promoting the development of the "useful arts" for the benefit of society as a whole by enriching the public domain is not an obvious or easy task. Justice Holmes made the point in 1903 that the law is a strange prism through which to look at art:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of

the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.³

At first blush and without knowing about copyright law, it would seem logical to me that the United States offer copyright protection to haute couture clothing and to some instances of what I consider to be beautiful industrial design, like a Philippe Starck swivel chair. But then I catch myself being subjective, which is antithetical to legal standards as per the Holmes quote above, and opposes my own conclusions after delving into some case law and commentary. As discussed below, copyright is indeed a benefit but it is not conferred on the basis of artistic merit, but rather on the basis of seemingly unrelated and random factors that relate to public policy and economics. As such, I recommend and promote endeavors such as Lawyers for the Arts and other similar forums for communication so that artists understand, firstly, what copyright is and, secondly, which aspects of their works are potentially copyrightable.

I. The Separability Test: Tension between Copyright and Patent Subject Matter

“The wheel is beautiful because of the internal symmetry required to remain a wheel. The characteristics that make the wheel supremely functional also make the wheel inherently appealing.”⁴ This example, while arguably unsophisticated, demonstrates the fundamental reasoning behind a rejection of copyright in some objects that are both beautiful and useful. If the wheel were granted copyright protection, the list of useful objects that utilize the functionality of the wheel would be severely abridged.

³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-252 (1903).

The grant of a copyright in a work is a privilege that the United States grants to authors of original works; it bestows on them exclusive rights to their writings for a limited time.⁵

The Copyright Act of 1976 lays out more explicitly what this means, and grants copyright to artistic works that fall within the definition of “pictorial, graphic and sculptural works.”⁶ The Berne Convention, to which the United States acceded in 1989, is more concise still: “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ...cinematographic works...; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works...; [and] works of applied art...”⁷ American case law has ascribed copyright protection to “writings” ranging from sculpture to videotape to computer programs.

A sister intellectual property regime to copyright is patent, and there is a discontinuity between copyright and design patent that is, at best, difficult to define. A design patent is available to protect “the ornamental design for an article of manufacture.”⁸ A design patent protects a product’s appearance or nonfunctional aspects, and the protection it confers is “similar to copyrights.”⁹ Some examples of articles that are protected with this type of a patent are furniture, wristwatches, doorknobs, perfume bottles, and lawn sprinklers. In general,

Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface

⁴ Raymond M. Polakovic, *Should the Bauhaus be in the Copyright Doghouse? Rethinking Conceptual Separability*, 64 U. COLO. L. REV. 871 (1993).

⁵ U.S. Constitution, Art. I, § 8.

⁶ Copyright Act of 1976, 17 U.S.C.S. § 102(a).

⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 2, opened for signature September 9, 1886 (last revised July 24, 1971), reprinted in World Intellectual Property Organization 1978 Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971).

⁸ 35 U.S.C. § 171 (1996).

⁹ Black’s Law Dictionary, 1147. (7th ed., 1999).

ornamentation applied to an article, or to the combination of configuration and surface ornamentation. **A design for surface ornamentation is inseparable from the article to which it is applied and cannot exist alone.** It must be a definite pattern of surface ornamentation, applied to an article of manufacture.¹⁰

The Copyright Act addresses copyrightable articles in a parallel fashion, granting copyright protection to

works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article...shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural **features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.**¹¹

Design patents are typically difficult to secure and long delayed.¹² Design patents also offer a much shorter duration of protection than does copyright,¹³ another reason that copyright protection may be more attractive to a prospective intellectual property registrant. One author explains that the tension in copyright as it relates to utilitarian objects comes from “its low threshold of eligibility and long protection period...[C]opyright should not be allowed to encroach upon the traditional domain of patent to protect functional aspects of works absent a clearly articulated social policy basis.”¹⁴

The semantic crux of the difference between the design patent and copyright for works of creativity that hover on the line between the two is whether the element of artistry is physically separable from the utilitarian aspect of the work. The Senate Report

¹⁰ U.S. Patent and Trademark Office, *Definition of a Design Patent*, available at <http://www.uspto.gov/web/offices/pac/design/definition.html> (last visited Feb. 4, 2004). *Emphasis added.*

¹¹ 17 U.S.C. § 101 (1996) (*Emphasis added*).

¹² Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity*, 25 COLUM. J.L. & ARTS 1, 8 (2001).

¹³ Definition of “design patent,” *supra* note 10.

¹⁴ Dennis Karjala, *A Coherent Theory for the Copyright Protection of Computer Software and Recent Judicial Interpretations*, 66 U. CIN. L. REV. 53, 65 (1997).

accompanying the 1976 Act more fully explaining the practical meaning of the language of the Copyright provision excerpted above:

In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or...is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, **although the shape of an industrial product may be aesthetically satisfying and valuable**, the Committee's intention is **not** to offer it copyright protection under the bill. **Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.** The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design - that is, even if the appearance of an article is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable...¹⁵

One Supreme Court case and three cases from the Second Circuit are often cited or examined in relation to the "separability test" in copyright law; each offers its own contribution to the formation of what courts tend to see in examining whether "some element can be identified as separable from the utilitarian aspects..."¹⁶ of a work. The Supreme Court Case, *Mazer v. Stein*¹⁷ involved table lamps that had artistic bases, in the form of statuettes of male and female dancing figures made of semivitreous china.¹⁸ By analyzing the work in light of then-current regulations and cases, the Court decided that the statuettes were indeed copyrightable:

Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the

¹⁵ H.R. Rep. No. 94-1476 (1976) (*Emphasis added*).

¹⁶ *Id.*

¹⁷ 347 U.S. 201 (1954).

¹⁸ *Id.*, at 202.

words of the present Regulation... naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas....Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable.... What cases there are confirm this coverage of the statute.¹⁹

The Register of Copyrights thereafter promulgated a regulation to clarify the decision; it was used until the Copyright Act of 1976.

If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existence independently as a work of art, such features will be eligible for registration.²⁰

The Mazer decision -- along with some of the cases it cited to support its conclusion -- wrestles with the subjectivity involved in making decisions regarding what constitutes “art,” and rightly so. A string of more recent cases from the second circuit demonstrate the lack of coherency in this area of copyright law. *In Kieselstein-Cord v. Accessories by Pearl, Inc.*,²¹ the court was asked to decide whether a belt buckle was a copyrightable object. In this case, the buckles were sculptured designs cast in precious metals. The defendant copied the plaintiff’s designs and sold imitations. The court found that, while utilitarian objects such as belt buckles could not be copyrighted, elements of that object that are physically or conceptually separable and that are capable of existing independent of the article’s functional aspect could be copyrighted, and the sculptural part of the buckle was thus protected. Unfortunately, the court did not provide a useful definition for what “conceptually” separable means.

¹⁹ *Id.*, at 214. (*Emphasis added*).

²⁰ 37 C.F.R. 202.10(c) (1959)

²¹ 632 F. 2d 989 (2nd Circuit, 1980).

In *Carol Barnhart, Inc., v. Economy Cover Corp.*,²² the contentious objects were human torso forms made of expandable white styrene. The torsos were anatomically accurate and had hollow backs designed to hold excess fabric when a garment was fitted onto the form. This case brings to light the conceptual separability phenomenon. Unlike the lamp base and the belt buckle, the aesthetic element of the mannequins cannot be lifted off or physically separated from the functional element. The court decided that the mannequins were not copyrightable.

The last case in this Second Circuit trilogy is *Brandir International, Inc. v. Cascade Pacific Lumber Co.*²³ The issue was whether copyright protection was available for a bicycle rack that looked like a ribbon. The court decided that the final form was a product of industrial design, not minimalist sculpture as the plaintiff suggested. Because the aesthetic elements of the form were not conceptually separable from the utilitarian elements, the bicycle rack was denied copyright protection.

This line of cases is illustrative of current thinking on the separability test. The courts used slightly different tests and analyzed slightly different factors; the respective outcomes of the cases are arguably inconsistent. These incoherent court rulings have engendered debate and controversy. The rack won a national design award; should that make a difference beyond the separability test? The Kieselstein belt buckle was displayed in the Metropolitan Museum of Art; should that be a significant factor? As noted above, an expressive element of a useful article needs to be physically or conceptually separable from the utility of the article. But many courts do not attempt to apply the conceptually separable test because of its inherent subjectivity. One author has

²² 773 F. 2d 411 (2nd Circuit, 1985).

²³ 834 F. 2d 1142 (2nd Circuit, 1987).

suggested that “a pictorial graphic or sculptural feature incorporated in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.”²⁴ Other scholars and practitioners have suggested other tests for separability but none seems to be dominant; every case brings out idiosyncratic elements of an object’s design and function.

II. The Question of Law versus the Question of Fact

Another dichotomy in copyright law is brought to the forefront when the originality of an expression of idea is questioned. How the courts decide this question depends on whether it is deemed a question of law or a question of fact. “Inconsistency and lack of clarity are pervasive on this issue.”²⁵ A copyrightable work must possess a “minimal degree of creativity.”²⁶ This minimal degree is often presumed, but, in the odd case that it is questionable, the court must decide how to handle the contention. The courts have made it quite clear that creativity is not the same concept as artistic merit – the epitome of a subjective opinion – and that the amount of creativity needed is indeed quite minimal; a work can satisfy the originality requirement regardless of “how crude, humble or obvious.”²⁷

The Supreme Court commented on the “vexing nature of the distinction between questions of fact and questions of law,”²⁸ noting that there is “no rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”²⁹ Traditionally,

²⁴ Paul Goldstein, COPYRIGHT § 2.5.3.1 (1989).

²⁵ Julia Reytblat, *Is Originality in Copyright Law a ‘Question of Law’ or a ‘Question of Fact?’: The Fact Solution*, 17 CARDOZO ARTS & ENT. L.J. 181 (1999).

²⁶ *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 345 (1991).

²⁷ Melville B. Nimmer, COPYRIGHT, 1.08 (c)(1) (1990).

²⁸ *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (citation omitted).

²⁹ *Id.*

common law courts reserve “questions of fact” for a jury to decide, with the idea that whether to believe one thing or another is best left up to a panel rather than one person. A “question of law,” on the other hand, is a decision best left to a judge because of his or her legal expertise.³⁰ When deciding whether something is original or whether an alleged infringement has occurred because of substantial similarity, there has been no clearly applied practice. In Justice Holmes 1903 opinion,³¹ he underlined his fear that judges, by dint of their elitist education and upbringing would not evaluate works on their own merits, but would tend to make value judgments and condemn either highly original works or popular works intended for mass consumption.

Originality is therefore inextricably connected to a communal perception of what is creative, imaginative and inventive. The public, which is often the eventual audience and consumer of creative works, is more competent to determine originality than is a single judge. “It is reasonable to conclude, then, that originality should be a ‘question of fact,’ so that the jurors, as members of the intended audience, may have the opportunity to pronounce their judgment of originality.”³² The question of originality is intrinsically unanswerable in the first place, given that every act and expression of creativity is influenced by the world in which its author lives. Providing a modicum of objectivity by giving the question to a group of people instead of just one is a reasonable and necessary approach that is, unfortunately, not universally followed by the courts.

III. The Idea versus Expression Dichotomy

The scope of copyrightable subject matter is determined by two basic principles. The first is the separability test between aesthetic and utilitarian objects, discussed above,

³⁰ See Stephen A. Weiner, *The Civil Jury and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

³¹ *Bleistein*, *supra* note 3.

and the second is the test between whether something embodies or expresses an idea. It is only the *expression* of an idea that is granted copyright; the idea itself cannot receive protection; this provision is codified in the Copyright Act: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation ... regardless of the form in which it is ... embodied in such work.”³³ Stated differently, while the overall embodiment of a work exposing ideas or describing a process will be protected, the ideas or processes disclosed will not.

The inadequacies and subjective nature of the application of the idea / expression dichotomy have been widely discussed and debated for decades, but the concept continues to be used by courts. One important doctrinal point that has emerged from this attempt to find a principled way to draw the line between an idea and its expression is the notion that even where two works are nearly identical in appearance, if those similarities in appearance are held to have necessarily resulted from the defendant's use of the same idea as that used by the plaintiff, there will be no infringement. “Thus, the subject matter and those elements which are necessary or commonly used to depict it are defined as the uncopyrightable ‘idea’ in works of the visual arts.”³⁴ The reasoning is that, by keeping an idea free from copyright, more people beyond the first person to express that idea can express it in their own fashion. “An artist who paints a still life of a bowl of fruit does not have a monopoly on the idea of the bowl and fruit. What is protected, rather, is the

³² Reytblat, *supra* note 25, at 196.

³³ 17 U.S.C.S. § 102(b).

³⁴ 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, 211 (1990).

way the bowl and fruit were expressed: the combination of the medium, the colors, the light, the placement, etc.”³⁵

Recent case law that illustrates the fundamental principle in the idea / expression dichotomy and the resultant issue of substantial similarity is *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*³⁶ In the summer of 1972, a gentleman began to implement a plan of organizing a business model based on the publication and marketing of limited edition wildlife prints. At issue in the case was whether the artist infringed a copyright by painting a picture that had the same general subject matter as one of these wildlife prints. On appeal, the court found that, while the ideas in the paintings were similar – cardinal birds and apple blossom trees – the expressions of that idea were not.

The test the court used was not enunciated with precision, but it did address the nature of the work insofar as the realm of fine art is a special case in some ways. “The ‘copying’ proscribed by copyright law...means more than tracing the original, line by line. To some extent it includes the appropriation of the artist’s thought in creating his own form of expression.”³⁷ As an addendum to this case, the issue of infringement was left to the jury: “It is well settled that credibility determinations are uniquely the province of the fact-finder.”³⁸

Another recent case, *Steinberg v. Columbia Pictures Industries, Inc.*,³⁹ addresses the idea / expression dichotomy in a situation with a different visual art component. Steinberg was an artist whose cartoons and illustrations in *The New Yorker* magazine were well known and recognized. Columbia Pictures was, at the time, promoting a

³⁵ John H. Merryman and Albert E. Elsen, *LAW, ETHICS, AND THE VISUAL ARTS*, 409 (Kluwer Law International) (4th ed., 2002).

³⁶ 575 F. 2d 62 (3d Cir. 1978).

³⁷ *Id.*, at 65.

movie called “Moscow on the Hudson.” The poster Columbia Pictures used to promote the movie was similar in many respects to a cover illustration that Steinberg had drawn for a 1976 cover of the *New Yorker*. Steinberg’s illustration presented a bird’s eye view of part of Manhattan and a telescope-like view of the rest of the United States and foreign countries beyond that. Columbia Pictures’ poster depicted the three main characters in the movie superimposed on a similarly-composed background: a bird’s eye view of New York City with a telescope-like view of other places, including Moscow, beyond that. The court noted: “There is no dispute that defendants cannot be held liable for using the idea of a map of the world from an egocentrically myopic perspective. No rigid principle has been developed, however, to ascertain when one has gone beyond the idea to the expression...”⁴⁰ Admitting that it had no clear precedent or rule to follow, the court decided that, even at first glance, “one can see the striking stylistic relationship between the posters, and since style is one ingredient of ‘expression,’ this relationship is significant,”⁴¹ and the court granted summary judgment in favor of the plaintiff. Unlike the *Franklin Mint* case from the Third Circuit, this court found precedent to decide this case as a question of law: “The central issue of ‘substantial similarity,’ which can be considered a close question of fact, may also validly be decided as a question of law.”⁴²

A recent case in the United Kingdom sheds some light on current British consideration of the dichotomy. In *Designers Guild Ltd. v. Russell Williams Textiles, Ltd.*,⁴³ the judge cited “an observation...that there is no clear boundary between what

³⁸ *Id.*, at 66.

³⁹ 663 F. Supp. 706 (S.D.N.Y. 1987).

⁴⁰ *Id.*, at 712.

⁴¹ *Id.*

⁴² *Id.*, at 711.

⁴³ [1998] FSR 803 (Ch.D), [2000] FSR 121 (CA), [2000] 1 WLR 2416 (HL).

amounts to a substantial part of a copyright work and what does not.”⁴⁴ The case concerned the copying of fabric designs that were derived from an original artistic work. The copying involved was not a literal or exact copy but rather echoed the style, technique and ideas behind the plaintiffs’ works. The plaintiff won at first instance, lost in the Court of Appeal and then had the trial judge’s order restored in the House of Lords.⁴⁵ Whether this case would come out the same in the United States is not clear, given the wavering line of case law, but does echo some of the findings in *Steinberg* regarding a discussion of *style*; something the courts are reluctant to define.

II. Conclusion

Visual art comes in an array of media, styles, sizes, skill levels, and philosophical approaches. The broad gamut of all these elements of art are partially what keep the art world an interesting and vibrant environment. In terms of how and when the law is applied to issues of copyright in fine art, however, there is a lack of coherency and predictability regarding how or why a court might decide whether something is copyrightable and, if it is, whether an allegedly infringing work is similar enough to the original to constitute illegal infringement. Because the law does not want to grant monopolistic rights to ideas (which would chill the growth of innovation and creativity), but rather *expressions* of ideas (to protect authors and promote future creativity), it often happens that the simplest, most elegant form of expression does not receive copyright protection. Thankfully for artists, this does not often extend to two-dimensional works, so the Malevich painting would probably still receive copyright protection. A similar

⁴⁴ *Id.*

⁴⁵ Simon Stokes, *ART AND COPYRIGHT*, 49. Hart Publishing, Oxford and Portland, 2001.

issue has come up again recently in *Bridgeman Art Library v. Corel Corporation*,⁴⁶ however, wherein a New York court decided that photographs of two-dimensional fine art in the public domain cannot receive copyright. The invention of photography engendered debate as to whether photographs are copyrightable;⁴⁷ it is not surprising that the introduction of the Internet and digital imagery will engender even more debate.

Furthermore, the artist who creates a simple, beautiful *and* useful object is probably not going to be granted a copyright -- an inherently inelegant outcome, but one that is meant to foster creativity in other artists and enrich the public domain. Simplicity may be the “ultimate sophistication,”⁴⁸ so one may hope that the artist who creates this type of work will be content with the thought of having contributed to collective human knowledge and forego copyright. That, indeed, would be sophisticated.

⁴⁶ 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

⁴⁷ See, e.g., *The Graves' Case*, 1869 LR 4 QB 715, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), *Jeweler's Circular Publishing v. Keystone Publishing*, 274 F. Supp 932 (S.D.N.Y. 1921), and *Simon v. Birraporetti's Restaurants, Inc.*, 720 F. Supp. 85 (S.D.T. 1989), for opinions that embrace or condemn the idea that photographs should be granted copyright protection.

⁴⁸ Leonardo da Vinci.