

2013

Only Part of the Picture: A Response to Professor Tushnet's Worth a Thousand Words

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Recommended Citation

Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet's Worth a Thousand Words*, 16 STAN. TECH. L. REV. 349 (2013), <https://digitalcommons.law.uw.edu/faculty-articles/190>

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STANFORD TECHNOLOGY LAW REVIEW
VOLUME 16, NUMBER 2 WINTER 2013

ONLY PART OF THE PICTURE: A RESPONSE TO
PROFESSOR TUSHNET'S *WORTH A THOUSAND
WORDS*

Zahr Kassim Said*

CITE AS: 16 STAN. TECH. L. REV. 349 (2013)
<http://stlr.stanford.edu/pdf/onlypartofthepicture.pdf>

ABSTRACT

Professor Rebecca Tushnet's recent article Worth a Thousand Words: The Image of Copyright elucidates a number of difficulties in copyright that flow from judicial failures to treat images consistently and rigorously. She argues that courts both assess copyrightability and evaluate potential infringement in ways that rely on a naïve understanding of the way artists create, and indeed, the way viewers receive works of art. The problem is particularly pronounced with respect to what Tushnet calls non-textual works because copyright law's default to textuality means that the tools and methods that judges use misalign with the objects of their examination.

In this Article, I explain why I am less than fully convinced by Tushnet's exclusive focus on the visual (or visual exceptionalism). I argue that copyright's adjudication of all expressive works, not simply visual ones, falls short of ideal. Tushnet's illuminating analysis helps us see partly why that is. Expressive works—whether visual or verbal or constituted in some other fashion, such as aural, or kinetic—pose a particular and typically unacknowledged problem for courts. Tushnet shows us how, in dealing with images, courts abandon interpretation, or believe it unnecessary. Images are either interpretively opaque—too difficult or impossible to see through and thus adjudicate—or they are transparent—too obvious to necessitate interpretation. Tushnet's emphasis is on the visual yet her powerful insight may be used as a lens through which to understand copyright's problems with all expressive works. All expressive works

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require an interpretive step that courts do not typically acknowledge, a step that delineates what method of interpretation a court will adopt. Thus all cases involving expressive works stand to benefit from the improvements and adjustments Tushnet proposes.

This Article calls into question the difference Tushnet builds between visual works and other kinds. I argue that while differences between the visual and the verbal do in some instances exist, the differences may not hold the weight that Tushnet's visual exceptionalism attributes to them. These differences may, as Tushnet discusses, be the product of such far-ranging causes as cultural construction, or innate biological tendency; and or they may be a function of pragmatic considerations embedded in technical and institutional and generic contexts, as I argue. Both visual and verbal modes of expression conform to, or resist or rework, generic and theoretical conventions (such as romance, pastoral, noir, the sentimental; or realism, modernism, surrealism, avant-gardism, postmodernism, respectively). Whether or not it acknowledges it openly, copyright law traffics in aesthetic theories when it deals with artistic works. It follows therefrom that if copyright suffers from aesthetic naiveté, images and words probably suffer equally. If this view is accurate, the issue is less one of visual exceptionalism, and more one of copyright's need to develop a more finely-tuned (or simply more consistent) way of treating expressive works. A fix offered for one might also be a fix well-suited to the others.

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INTRODUCTION

Professor Rebecca Tushnet's article offers an incisive critique of copyright law as it pertains to protection for and interpretation of visual images. Tushnet elucidates a number of difficulties in copyright that flow from judicial failures to treat images consistently and rigorously. She argues that courts both assess copyrightability and evaluate potential infringement in ways that rely on a naïve understanding of the way artists create, and indeed, the way viewers receive works of art. The problem is particularly pronounced with respect to what Tushnet calls non-textual works because copyright law's default to textuality means that the tools and methods that judges use misalign with the objects of their examination.

Tushnet's article persuasively shows how copyright law is inconsistent in its treatment of artistic works containing visual images. Indeed, Tushnet has given us one heuristic for understanding much of the doctrinal incoherence in copyright cases involving expressive works. But is it the right heuristic? I am fully convinced by Tushnet's view of courts' naïve treatment of artistic works, especially in their treatment of such works as either opaque, or transparent. However, I am somewhat skeptical in regards to Tushnet's exclusive focus on the visual with respect to the jurisprudential failures she highlights. I will refer to this focus on the visual as visual exceptionalism. As a former literary scholar

with what is probably an over-determined relationship to verbal texts, I concede I may be viewing copyright with text-colored glasses. From my vantage point, however, copyright often produces the same inconsistent analysis with respect to both the visual and the literary, whereas in Tushnet's estimation, verbal or literary works do not, in most cases, suffer from the same inconsistent analysis and mistreatment as do visual ones.¹ I would venture, based in part on certain high-profile cases, and many instances of pro-image dicta,² the visual might even be said to have achieved a certain primacy. From this same vantage point, text, despite its privileged foundational status, has been left behind. Tushnet's title becomes, in my reading of it, then, both a quip and a deeper meditation on the power and importance of images. In the old adage, the economic disparity is striking. After all, each image is worth *a thousand words*! Indeed, from the textual take on copyright, images do seem more powerful, weightier, more easily treated as legal property that is more relevant than text in a substantial number of cases.

Perhaps precisely because of my different interpretation of the problem Tushnet identifies, I find Tushnet's analysis extremely relevant well beyond the world of the visual. In other words, the problem Tushnet artfully identifies is broader than she acknowledges here: the adjudication of *all* expressive works, not simply visual ones, falls short of ideal. Tushnet's analysis helps us see partly why that is. Expressive works—whether visual or verbal, or constituted in some other fashion, aural, kinetic, even haptic—pose a particular and typically unacknowledged problem for courts. Tushnet notes, referring to images, “[r]ight when interpretation is most needed, courts abandon interpretation, or at least think they have no need to engage in it.”³ Tushnet's emphasis is on the visual yet her powerful insight may be used as a lens through which to understand copyright's problems with all expressive works. For example, many of the problems Tushnet describes arise in the context of musical works as well. Indeed, in an important early musical composition case, the court treated two works as essentially transparent in the way Tushnet intends transparency. Under the court's reasoning, two works, despite not being

1. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 708 (2012) (“Legal audiences would be much more savvy about the possible meanings of what's shown . . . if they were dealing with text.”).

2. See, e.g., *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (holding that its own prior case law appearing to bar copyright protection for literary characters did not apply to visually depicted characters, because “a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”); *Gaiman v. MacFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (Posner, J.) (noting that “[t]he description of a character in prose leaves much to the imagination, even when the description is detailed Even after [reading *The Maltese Falcon*], one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like.” Posner attributed that to “the difference between literary and graphic expression.”).

3. Tushnet, *supra* note 1, at 708-09 (citation omitted).

exact copies, could be capable of being found to be “so extensive and striking as, *without more*, both to justify an inference of copying and to prove improper appropriation.”⁴ In *Arnstein v. Porter*, Judge Jerome Frank arrived at his legal decision about the two works’ non-similarity with no more explanation of his analytical method than the following conclusory language: “*After listening to the compositions as played in the phonograph recordings submitted by defendant, we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied.*”⁵ The dissent takes the majority opinion to task for the cursory analysis, and points to prior legal analysis suggesting the court’s capacity to analyze music more precisely.⁶ Nonetheless, the decision stands as one of copyright’s important early precedents.

Various music infringement cases reveal that courts have often struggled with the same questions: how much borrowing crosses from permissible (or de minimis) use to infringing?⁷ What sorts of additions does it take for a borrowed sequence of notes in a subsequent work, or an entire song borrowed without permission but parodied, to be found transformative for fair use purposes?⁸ Is it possible to dissect things that seem, intuitively, quite similar, and if so, how?⁹ What sorts of tools will a judge use in determining what the musical work comprises, or in some sense, *means*? Given the number of significant cases in which an expressive work is the subject of copyright litigation, providing greater clarity and integrity to the doctrine in this area is desirable. Insofar as Tushnet’s proposal ought to be adopted based on the terms of her own argument then, Tushnet’s insights are not diminished—on the contrary, they are magnified—if future scholars view her article’s contributions as potentially

4. *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946) (emphasis added).

5. *Id.* (emphasis added).

6. *Id.* at 476 (Clark, J., dissenting) (“In our former musical plagiarism cases we have, naturally, relied on what seemed the total sound effect; but we have also analyzed the music enough to make sure of an intelligible and intellectual decision.”).

7. See, e.g., *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 F. App’x 873, 880 (11th Cir. 2007); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-802 (6th Cir. 2005); *Newton v. Diamond*, 388 F.3d 1189, 1192-93 (9th Cir. 2003); *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338 (S.D. Fla. 2009) *aff’d*, 635 F.3d 1284 (11th Cir. 2011). Notwithstanding the bright-line rule announced in *Bridgeport*, subsequent courts have not widely adopted it. See 410 F.3d at 801 (“Get a license or do not sample. We do not see this as stifling creativity in any significant way.”)

8. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-94 (1994).

9. “For the uninitiated, much of rock music sounds the same, and a hasty comparison of SYS and TAP could result in a finding of superficial similarity, as both songs employ a standard usage in rock music: an introduction, verse, chorus, and bridge, with harmonic and rhythmic similarities common to many musical genres, including pop rock. A closer review of the two compositions reveals, however, that they are significantly different. Even to one unversed in the genre, the two songs can be heard to be quite dissimilar.” *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000).

applicable to jurisprudential failures not just in images, but also in words and other forms of aesthetic expression. The problem with the visual exceptionalism Tushnet posits is that the concerns which her analysis throws into welcome relief, and which her proposal seeks to correct, are only one part of the . . . picture. The benefit to backing away from a visually exceptionalist framing of the problem at hand is that addressing copyright's failures with images could potentially also correct copyright's failures with words and other expressive works. Hence Tushnet's contributions have even greater significance than her work acknowledges.

I. THE DIFFERENCE THAT MAKES IMAGES

I borrow from and adapt Professor Tushnet's first heading, "The Difference that Images Make," to signal that the difference between images and words may be a construct with less inherent validity than it would, at first, seem to possess.¹⁰ Put another way, I am not certain that the visual and the verbal ought to be quite so readily and materially differentiated, given the many copyright-relevant similarities the two modes of expression share. To some extent, the question about differences inherent in text and image is an empirical one. Do viewers and readers actually encounter and process works differently when these works consist of images instead of words? Do creators of such works create in a dissimilar fashion, possibly suggesting a normative justification for structuring rewards and incentives in a manner that differentiates the visual from the verbal? Are the marketplaces for the two media different? As Tushnet's exhaustive research reveals, there is a wealth of science in various branches suggesting that humans *do* respond differently in some respects to visual and verbal stimuli.¹¹ Yet to the extent what we are seeking is not a descriptively perfect model of the world, but a normatively appropriate legal regime to craft or to improve, the differences in the visual and the verbal should not be accorded as much legitimacy and weight as they are in Tushnet's article.

Perhaps the different treatment words and images receive can be attributed to theoretical or analytical differences that have no basis in doctrine. Still another possibility is that the difference is a product of pedestrian or pragmatic factors rather than deep aesthetic preference or innate cognitive preferences. The pragmatic explanation is especially likely, I would think, in the context of the evolving shift from print to digital publication, which Tushnet discusses. Tushnet bookends her article with examples from the Google Book Search Settlement, the process by which millions of books were scanned and digitized, even works for which permission to do so was both presumptively necessary by

10. Tushnet, *supra* note 1, at 688.

11. *Id.* at 691, *inter alia*.

law and actually absent in practice.¹² Images and words contained in the same volumes received different treatment under various iterations of Google's attempt to settle litigation brought against it by, among others, the Authors Guild.¹³ Tushnet gets it exactly right when she laments that "the proposed settlement [would have] enact[ed] the prominence of text over other methods of communication—despite copyright's formal medium neutrality—but almost all public discussions of the settlement have proceeded as if the Google database would give users access to the 'books.'"¹⁴ Tushnet's view aligns here with contemporary scholars of critical bibliography. These are bibliographically minded literary scholars—some of whom are known as critical bibliographers, some of whom analytical bibliographers—whose emphasis lies on the material conditions of the physical text.¹⁵ Thus how it looks, how it is bound, the material onto which it is printed or otherwise marked, how its typeface is set, are all important questions that deserve critical attention just as much as the intangible textual aspects such as theme, character, tone, and so on. Bibliographic scholars would raise serious objections to the notion that books as such could be equated with their words alone, once the books' images had been stripped from them; those images would be considered fundamental aspects of the original work, whether or not the images dropped from subsequent editions.¹⁶

12. Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1308-09 (2010) (describing Google as intending to scan a large number of books for which it did not have permission).

13. Jeffrey Toobin, *Google's Moon Shot*, THE NEW YORKER, Feb. 5, 2007, at 30.

14. Tushnet, *supra* note 1, at 686.

15. The different forms of scholarly bibliography concern themselves with different aspects of a book's material and textual history, and I am eliding for the purpose of simplicity here the differences among these different schools of bibliography. For this last group of scholars, the material dimensions of the book matter, but they matter because of what they tell us about the book's contents. See Fredson Bowers, *Bibliography, Pure Bibliography, and Literary Studies*, in 46 PAPERS OF THE BIBLIOGRAPHIC SOCIETY OF AMERICA 186, 190, 191, 194 (1952). Regardless, all forms of this scholarship that emphasize the book's physical dimensions rebut the idea that the text exists in intangible, non-visual form. In this sense, they align with Tushnet's view of the importance of the images embedded within a given text.

16. W.W. Greg, *The Function of Bibliography in Literary Criticism Illustrated in a Study of the Text of King Lear*, 18 NEOPHILOLOGUS 241, 243-44 (1933). "Bibliography is the study of books as tangible objects. It examines the materials of which they are made and the manner in which those materials are put together. It traces their place and mode of origin, and the subsequent adventures that have befallen them. It is not concerned with their contents in a literary sense, but it is certainly concerned with the signs and symbols they contain (apart from their significance) for the manner in which these marks are written or impressed is a very relevant bibliographical fact. And, starting from this fact, it is concerned with the relation of one book to another: the question of which manuscript was copied from which, which individual copies of printed books are to be grouped together as forming an edition, and what is the relation of edition to edition. Bibliography, in short, deals with books as more or less organic assemblages of sheets of paper, or vellum, or whatever material they consist of, covered with certain conventional but not arbitrary signs, and with the relation of

That said, the tendency to conceive of books in terms of their words, apart from their images or physical trappings, hardly seems to belong uniquely to copyright.¹⁷ It would be taking too large a step to move from that anachronistic perception of the book to the notion that copyright necessarily valorizes the image over the word. In the popular consciousness, it may be that books are typically conceptualized as collections of words rather than physical objects, unless a special release or particular edition of a book is in question. Anecdotally, the understanding of the material thing as existing apart from its intangible contents (the printed words, typically) is evoked by the exhortation not to judge a book by its cover. The shift to the digital publishing industry reflects and capitalizes on that tendency—the earliest e-readers tended to downplay the visual aspects of the book itself and deliver the barest textual schema of the original work. Beyond popular conceptions of the book, modern scholars of literature in the era of mass publication have, more often than not, focused largely on the words conveyed within the covers of the physical object of a book, rather than the physical object itself.¹⁸ Except where the point of a verbal text was to draw explicit attention to its visual dimensions—See, for one example, the category of shape poems such as John Hollander’s poem “Swan and Shadow,” which is shaped like a swan and its shadow, in Appendix I—the elements most commonly stressed in a verbal text were primarily aural rather than visual. Numerous metrical conventions and poetic devices like the caesura, the enjambment, and the development of formal patterns such as blank verse all suggest the focus of poetry on sound over sight. Of the three classic genres, poetry, prose and drama, poetry and drama may provide more convincing examples than prose, given their inherent emphasis on aural reception and audiences.

Yet typically the critical emphasis in the study of prose, too, has tracked

the signs in one book to those in another.”

17. Copyright cases treat books as including their layout and paratexts and covers, though these elements can be severed and distinguished from the book’s intangible contents (let’s call these the “work”) for the purposes of deciding who owns the bundle of rights in the work, and for determining its scope of protection. *See, e.g.,* Toho Co., Ltd. v. William Morrow and Co., Inc., 33 F. Supp. 2d 1206, 1213 (C.D. Cal. 1998) (finding that disclaimers of no endorsement are not effective as designed, and predicting readers’ behavior as they take in the entire work, including the book’s cover and its contents); *Frederick Warne & Co., Inc. v. Book Sales Inc.* 481 F. Supp. 1191, 1197 (S.D.N.Y. 1979) (“Covers of books as well as their contents may be entitled to copyright protection,” but “the fate of a book cover is [not] necessarily wedded to the fate of the underlying work.”); *see also* Gérard Genette, *Introduction to the Paratext*, 22 *NEW LITERARY HIST.* 261, 261-62 (1991) (Marie Maclean trans.) (defining paratext as “the means by which a text makes a book of itself and proposes itself as such to its readers” and including such elements as “an author’s name, a title, a preface, illustrations,” the “exterior presentation of a book”).

18. There are of course notable exceptions, as when authors’ own illustrations or book bindings accompanied their expressive works, thus justifying or normalizing scholarly attention in their own right. Famous examples include the poets William Blake, Dante Gabriel Rossetti, and Emily Dickinson.

literary questions reflected in authorial choices about the verbal more than the visual, such as point-of-view, framing, narrative structure, and so on. Indeed, attention to the book as a material object is arguably a relatively recent development in mainstream literary criticism,¹⁹ following on the heels of so-called “new critical” or strictly formalist attitudes towards the text.²⁰ Book history and other forms of materially minded textual criticism built on or emerged along with the rise of Marxism, cultural studies, critical bibliography, post-structuralism, and various forms of historicist inquiry. D.F. McKenzie’s work in the early 1980s led to a rethinking of texts in terms of the “sociology” of their production and dissemination.²¹ Jerome McGann’s work described the “socialization” of the text, and built on Gérard Genette’s foundational work in the study of narrative to move the discussion into all aspects of the text, including material matters such as “ink, typeface, paper, [and] the physical production process itself.”²² The text shifted from being seen as a hermetically sealed passive object of study to being seen as a dynamic site mediated through concurrent or collaborative practices of authorship, editing, printing, disseminating, and reading whose “status and interpretation . . . depend on material considerations.”²³ Hence the academy has witnessed a scholarly turn to intense focus on the physical dimensions and contents of a book, in addition to or in spite of the book’s intangible “content.”²⁴ Close reading, or sustained textual analysis, was, for the better part of the twentieth century, the default in literary studies; it occupies a vaunted place still.²⁵ The humanistic academy has, accordingly, emphasized the study of interpretive methods and objects of analysis that were verbal rather than visual.²⁶ In that chronicle of critical

19. Bowers, *supra* note 15, at 30, describing earlier movements in literary scholarship whose interest lay exclusively in the book’s material dimensions, but whose views were not widely adopted in the humanistic academy.

20. FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* 3-5 (1983).

21. DAVID FINKELSTEIN & ALISTAIR MCCLEERY, *AN INTRODUCTION TO BOOK HISTORY* 11 (2005).

22. *Id.* at 15.

23. ROGER CHARTIER, *ON THE EDGE OF THE CLIFF: HISTORY, LANGUAGE, AND PRACTICES* 85 (Lydia G. Cochrane trans., 1997).

24. Early print culture scholars have long focused on the questions produced by the physical object and losses or variations produced in its preservation and transmission. But for works born in an era of mass production and dissemination, it is not at all obvious that the scholarly turn to the book as a material object would be an inevitable scholarly development. See, e.g., Robert Darnton, *What is the History of Books*, in FINKELSTEIN & MCCLEERY, *EDS.*, 8 (2002); D.F. MCKENZIE, *MAKING MEANING: PRINTERS OF THE MIND AND OTHER ESSAYS* (Peter D. McDonald & Michael F. Suarez, S.J. eds., 2002).

25. LENTRICCHIA, *supra* note 20, at 6.

26. Johanna Drucker & Bethany Nowviskie, *Speculative Computing: Aesthetic Provocations in Humanities Computing*, in *A COMPANION TO THE DIGITAL HUMANITIES* 431, 435 (Susan Schreibman et al., eds. 2004) (“Critics trained in or focused on the modern tradition (in its twentieth-century form and reaching back into eighteenth-century aesthetics) have difficulty letting go of the longstanding distinction between textual and visual forms of representation—as well as of the hierarchy that places text above image.”).

aesthetics, book history is, depending on how one views it, either a recent development wrapped up with the rise of cultural studies and flourishing with the development of digital technologies, or a return to literary origins, when the manuscript's material dimensions naturally invited scholars to attend to physical dimensions of the work.²⁷ In sum, the nominal logo-centrism that Tushnet finds at the heart of copyright law may not be about a tendency representative of a problem particular to copyright. Instead, it might merely reflect critically anachronistic attitudes, and it might reveal more about conditions of production and dissemination that have governed much of the modern era of print publication. The conceptualization of print is, of course, especially relevant at the historical moment in which copyright was born.²⁸

Rather than reflecting a pernicious tendency in copyright law as such, these emphases reflect instead, if anything, a bias within the world of textual studies and publication when the medium is textually based. Importantly, pragmatic reasons (such as the technical issues involved with delivering color, or pricing concerns about certain aspects of proprietary e-book software) may drive what appears to be a bias here. Text was "one of the first formats to be digitized, even before music and movies."²⁹ Digital technology entered (and began to revamp) the publishing industry decades ago.³⁰ In spite of the tremendous growth in the e-reader market, many devices (including Amazon's Kindle) remain largely focused on delivering a textual (rather than multimedia) experience. These more old-fashioned e-readers offer mostly black-and-white text.³¹ Any textual bias that exists here is different from a bias according to which images are considered second-class semiotic citizens, and are accorded different copyright status in consequence. Instead, joining image and text in many simple word processing and publication media often raises real difficulties in practice. Even at the more formal level of the world of scholarly publication, it is well known that including images in a monograph can be a difficult and costly proposition, requiring selection of an image-friendly press; dictating the preclearance (by a typically under-resourced author) of any rights in the images; and requiring that an author pay out of pocket for any such precleared rights.

Finally, I should note that in the e-mailed copy of the article to which I was invited to respond, Tushnet's own work had been stripped of the image labeled "Image I," even though, here, as in the case Tushnet discusses, "in the actual work[] [itself] images were integral to the expression or were discussed in the

27. FINKELSTEIN & MCCLEERY, *supra* note 21, at 9.

28. *Id.* at 62.

29. Niva Elkin-Koren, *The Changing Nature of Books and the Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1712, 1712 (2011).

30. *Id.*

31. Nick Bilton, *For E-Reader Fans, Competition is Paying Off*, N.Y. TIMES BITS (Oct. 29, 2010, 7:30 AM), <http://bits.blogs.nytimes.com/2010/10/29/for-e-reader-customers-competition-is-paying-off/>.

text as if they were present.”³² On the legal databases through which I would surmise the article is likely to be accessed by the greatest number of its readers, the same omission holds true, though the image is included in the PDF posted on the Harvard Law Review website.³³ The usual omission seems to me to be evidence of a tacit convention about what is most important to this genre, but also evidence of the practical difficulty of including different content formats in the same place or file. (One wonders whether it would have been omitted had it more clearly constituted part of the article’s evidence, as, for example, if it had contained a figure portraying empirical data to which the article referred.) One might read the image’s absence as normatively problematic for any number of reasons, a form of “epistemic hubris” as Tushnet puts it in an analogous context.³⁴ Still, a solution to it ought to address the practical format issue before concluding that it reflects an insistent—and legally material—preference for verbal over visual materials with policy-relevant implications for copyright law. A scholar, a century from now, trying to recreate twenty-first century copyright culture, ought to understand, in finding an archived copy of Tushnet’s article, that the image (whether omitted from that scholar’s copy or not) is an integral part of the text. An indispensable visual element in the overall verbal whole. If the image has been dropped out, it may well be that the practical exigencies of digital preservation are the likely culprit, along with perhaps, a deeper misunderstanding of the importance to a text of its paratextual elements. If preservation continues to move in the direction of capturing data by PDF or other similar transmission of visual copies, the questions will not disappear, they will simply shift to other areas of inquiry. What did those charged with the duty of copying underlying works omit in their selection of what to preserve? Were there haptic qualities or other material dimensions to the original materials that transmission only faithful to two dimensions will eliminate from the bibliographic record?

My point here has been to raise the possibility that while differences between the visual and the verbal do in some instances exist, the differences may not hold the weight that Tushnet’s visual exceptionalism attributes to them. These differences may, as Tushnet discusses, be the product of such far-ranging causes as cultural construction, or innate biological tendency; or they may be a function of pragmatic considerations embedded in technical and institutional and generic contexts, as I argue. Yet these differences need not play an important role in copyright law, nor be seen to do so.

II. IMAGES AND WORDS: DIFFERENT BUT COPYRIGHT-EQUAL?

In my reading of the problems in copyright law Tushnet presents, there are,

32. Tushnet, *supra* note 1, at 686.

33. *Id.*

34. *Id.* at 721.

on balance, more copyright-relevant similarities between images and texts than there are differences. Copyright may be literal—and indeed, even logocentric—but that does not mean the problems it displays in adjudicating pictures³⁵ do not also apply in adjudicating words. Copyright gets both equally muddled in certain areas, typically when judges consider artistic value despite the Bleistein anti-discrimination principle.³⁶ This lack of clarity is especially apparent in the really difficult areas involving finer questions of aesthetic nuance, originality, artistic reception, and transformative use. If copyright does indeed treat aesthetic questions poorly or inconsistently, there are at least two plausible explanations we ought to consider.

The first possibility is that perhaps copyright is equally naïve in its treatment of both words and images for reasons that are *particular to and different* with respect to words versus images. Under this view, perhaps images constitute a different form of evidence that departs from verbal evidence; Jennifer Mnookin has suggested as much with respect to photographic evidence. Mnookin's work shows how early judicial use of photographs tended to cluster photographs into one of two types, both in contrast with verbal evidence. In her account, photographic evidence was either the best possible sort, faithful and unmistakable, or the worst sort, capable of manipulation and deceit.³⁷ If it is accurate that visual and verbal evidence present challenges for judicial interpretation, but for differing reasons, then addressing copyright's illness here might necessitate different cures, tailored to the particular symptoms displayed in the respective realms of the visual and the verbal. This diagnosis of the problem follows from Tushnet's visual exceptionalism, that is, her view of copyright's failure to treat images, in particular, in adequate fashion.^{38,39}

The second possibility is that perhaps copyright is equally naïve with respect to both words and images for reasons that are *common to both* words and images. The jurisprudential weakness might inhere in copyright's legislative structure, or its adjudication, or some other element internal to copyright itself. If this is so, perhaps we might adopt the view that this jurisprudential weakness exists, at least in part, because, as Tushnet points out, copyright is unsophisticated aesthetically and “tend[s] to read images using naïve theories of realism and representation.”⁴⁰

35. *Id.* at 687-688.

36. *Id.* at 712.

37. See Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *YALE J.L. & HUMAN.* 1, 5, 14, 20-21 (1998).

38. Tushnet, *supra* note 1, at 703-704, 708.

39. *Id.* at 703-04, 708.

40. *Id.* at 689; cf. Christine Haight Farley, *Judging Art*, 79 *TUL. L. REV.* 805, 807-08 (2005) (“[A]esthetic judgments are often implicit and, sometimes even explicit, in the law in areas including obscenity, copyright, customs, and tax.”); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 *S. CAL. L. REV.* 247, 252 (1998) (characterizing copyright

Once it is established that copyright approaches images naively, it seems at least plausible that it brings that same naïveté to its adjudication of disputes over words. Indeed, elsewhere in the law, verbal narrative often becomes conflated with truth, perhaps partly because humans seek narrative as a way of ordering their experiences, and the most persuasive account of a set of events trumps what actually may have unfolded. As listeners at trial seek to understand the truth of what happened, for instance, they are presented with narratives that assist them to understand, for themselves, “what really happened.” Their experience of the truth is mediated with narrative, such that the story itself, when convincing enough, becomes the proxy for truth, whatever may have in reality “actually happened.” Under this view, we might say that narrative collapses, in some sense, with truth.⁴¹ Language—especially prose—is taken to be more reliable and transparent in precisely the ways Tushnet suggests occurs with images. This naïveté with respect to images is thus often present with respect to words as well.

Indeed, artists deploy both images and words in expressive works according to (or in rough conformity with) diverse theories of reality and representation. Otherwise put, both visual and verbal modes of expression conform to, or resist or rework, generic and theoretical conventions. Examples of such genres and conventions, respectively, include: romance, pastoral, noir, and the sentimental; and realism, modernism, surrealism, avant-gardism, and postmodernism. Whether or not it acknowledges it openly—as Alfred Yen has shown—copyright law traffics in aesthetic theories when it deals with artistic works.⁴² It follows therefrom that if copyright suffers from aesthetic naïveté, images and words probably suffer equally. If this view is accurate, the issue is less one of visual exceptionalism, and more one of copyright’s need to develop a more finely-tuned (or simply more consistent) way of treating expressive works. A fix offered for one might also be a fix well-suited to the other.

I believe that images and words in the context of copyright adjudication can be characterized as more similar than different in two interrelated ways. First, images and words raise similar issues with respect to the protocols, or methods, that judges do (or in some cases should, but do not) follow in encountering the works. The interpretive method a judge selects can have an important effect on how she decides a case. This is true in part because a crucial aspect of determining copyright infringement involves distinguishing

law’s aesthetic sensibilities as “profound” to the extent that outcomes in cases rely on legal reasoning, but align with aesthetic principles).

41. Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1, 25 (2006) (“[O]ften we as listeners or readers know ‘what happened’ in the world only through its tellings. We are always summoned to consider the possible omissions, distortions, rearrangements, moralizations, rationalizations that belong to any recounting.”).

42. Yen, *supra* note 40, at 248-51.

between ideas (unprotectable) and expression (potentially protectable).⁴³ In turn, deciding what parts of a work are idea and what parts are expression necessarily implicates some methodological decisions. Second, images and words resemble one another in terms of the way they exert influence over those who behold or read them, that is, what we might term the works' reception. Reception can include, too, the historical or sociological context in which the works emerge and circulate, beyond how a given individual understands that work. Given that a lay observer's understanding of the works can be relevant at numerous points in copyright litigation, the works' reception very often holds legal significance.

Together, these two factors—the interpretive method used when adjudicating works, and the role the works' reception plays—establish a strong common foundation between visual and verbal works. Indeed, all expressive works are equally affected by these factors. Sometimes case law dictates how courts must interpret works, methodologically speaking, but when an option does exist in terms of how judges may proceed, it is not a neutral proposition for a judge to decide to default silently to an approach as though no others exist. Professor Yen identifies in three major groupings the schools of thought to which different modes of interpretation belong: formalism, intentionalism, and institutionalism.⁴⁴ For example, a judge might decide to set aside context (or authorial intention, or reception, or other factors some might deem to be “external” to a work) in favor of a formalist, textualist, or four-corners approach that analyzes the work only in terms of factors deemed to be “internal” to it.⁴⁵ The reverse is also true. How judges decide to treat works while adjudicating both words and images could skew outcomes. My inclination is to suggest that this commonality may have more explanatory power than the differences between the visual and the verbal.

For reasons of space, let us assume *arguendo* that the choice of interpretive method matters while acknowledging that an unanswered empirical question may exist.⁴⁶ Tushnet herself seems in sympathy with such a view; at least, she sees *Mannion v. Coors Brewing Co.* as a case in which an interpretive method selection determined an issue critical to the case's outcome.⁴⁷ Doctrinally, at a

43. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

44. Yen, *supra* note 40, at 252-53.

45. For present purposes, I use these three terms here, formalist, textualist, and four-corners, very loosely and thus interchangeably.

46. Daniel Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 *Nw. U. L. Rev.* 1409, 1410-11 (2000) (arguing that, at least with respect to a small selection of cases, “theoretical differences seem to have had only a marginal relationship with outcomes.”).

47. Tushnet, *supra* note 1, at 715-16. Tushnet critiques *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005), particularly its visual exceptionalism, the idea that photographs are somehow different because their medium means that they merge idea and expression in ways particular to photography. Tushnet is quite right that one can derive a

minimum, the unstated default to one method over another takes place in copyright cases in ways that appear to correlate with outcome-driven decisions. When judges adopt the view Tushnet describes in terms of “transparency,” they tend to eschew formalist analysis (like the extrinsic analysis described but rejected in *Krofft* and the “dissection” set out in *Arnstein v. Porter*)⁴⁸ and they turn instead to the trier of fact’s application of an intuition-based test that assumes the average observer’s reaction.⁴⁹ To the extent this involves selecting a method at all, we might say it is anti-formalist; it is also reception-based, since it involves a set of assumptions: there is one natural way to understand the work; all viewers will adopt this same understanding; and I, as a factfinder, can intuit what that understanding is. The anti-formalist approach is one embodied by the “total concept and feel” standard set out in *Roth Greeting Cards v. United Card Co.*, about whose misguidedness I could not agree with Tushnet more.⁵⁰ In that analysis, courts look to the “total concept and feel” created by the works, thus pressing intuition into heavy service and often actively ignoring the evidence formalist analysis would have exposed. The case has been very frequently cited, suggesting that the test may be appealing, or at a minimum, influential.⁵¹ In a certain sense, this intrinsic approach could be characterized as treating the texts as transparent under Tushnet’s terminology. The total impression an observer gets is thought to be predictable because of the text’s semiotic transparency.⁵²

It is possible that with respect to some works, or even some categories of works, one interpretive method might make more sense than another. For example, perhaps conducting analytic dissection is difficult in certain works, or will require “mental . . . and technological gymnastics.”⁵³ Alternatively, some works with a long critical history could have reception issues a court might find it difficult to avoid, thus suggesting the limited benefits of a strictly formalist approach.⁵⁴ Tushnet argues that perhaps detecting substantial similarity is

different idea out of the same expression depending on how one decides to interpret, and that is true across both visual and verbal media.

48. *Krofft*, 562 F.2d at 1164; *Arnstein v. Porter*, 154 F.2d 464, 477 (2d Cir. 1946).

49. Somewhat confusingly, because it is not intrinsic to the work but based on viewers’ responses to the work, *Krofft* calls this the intrinsic test. 562 F.2d at 1164.

50. Tushnet, *supra* note 1, at 719 (discussing *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)).

51. ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 261 (1st ed. 2012) (stating that *Roth* has been invoked in more than 400 copyright cases).

52. *See, e.g.*, *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985) (finding two works substantially dissimilar and offering nothing but two sentences of conclusory analysis by way of explanation).

53. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

54. *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001), in which the Eleventh Circuit Court of Appeals found Alice Randall’s parodic rewriting of Margaret Mitchell’s *Gone with the Wind* a fair use. The court held:

the parodic character of [*The Wind Done Gone* or] *TWDG* is clear. *TWDG* is not a general

difficult if not impossible in the visual realm. But I would suggest that the thriving practice of art forgery detection proves that as a practical matter, the practice of analytic dissection of visually perceptible is alive and well. Even when it occasionally fails in an individual case, it is nonetheless operational across “multiple lines of defense.”⁵⁵ Perhaps it is not that images can’t be analyzed, and more that practically speaking, they often aren’t. Tushnet points out that images are not routinely challenged, and if her charge hits the mark, she is revealing a potentially important problem.⁵⁶ She argues that “[i]mages are more vivid and engaging than mere words.”⁵⁷ She draws on cognitive research that shows that brains process direct sense experiences, such as visual inputs, more immediately than they process words.⁵⁸ Apparently, “because we process images so quickly and generally, we may stop looking before we realize that critical thought should be applied to them.”⁵⁹

Whether this different mediation of visual and verbal inputs makes a copyright-relevant difference, however, presents another question. In my view, the failure to remember to apply critical thought could conceivably apply equally well to collections of words. At least it could in the copyright context. By the time courts adjudicate disputes over expressive works, after all, viewers of the works in question have moved well beyond an initial first perception. Indeed, parties to the litigation are likely to have looked so long and hard at the works at issue that they have probably memorized many of the details. The familiar in them has probably become defamiliarized and gone back to being familiar; this is arguably the usual pattern with works whose apprehension we repeat over many intervals.

Yet Tushnet moves from an important cognitive difference (we take in

commentary upon the Civil–War–era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in [*Gone with the Wind* or] *GWTW*. The fact that Randall chose to convey her criticisms of *GWTW* through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive *TWDG* of fair-use protection.

268 F.3d at 1269. The court’s logic here necessarily moves beyond formalist analysis to situate the work historically. The court can do so partly because of Mitchell’s text having had such a long and storied reception history. The text’s canonical status is both what draws parodists or fair users in the first place, and what induces judges to treat it methodologically in a manner that goes beyond formalism to take account of the text’s historical underpinnings and its reception. See Zahr Said Stauffer, ‘*Po-Mo Karaoke*’ or *Postcolonial Pastiche?*: What Fair Use Analysis Could Draw from Literary Criticism, 31 COLUM. J.L. & ARTS 43, 81-82 (2007) (describing the novel’s canonical status and emphasizing that this novel, and many other canonical ones, are targets for fair use rewritings precisely because of their canonical status).

55. Patty Gerstenblith, *Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 323 (2012).

56. Tushnet, *supra* note 1, at 690.

57. *Id.*

58. *Id.* at 691 (citation omitted).

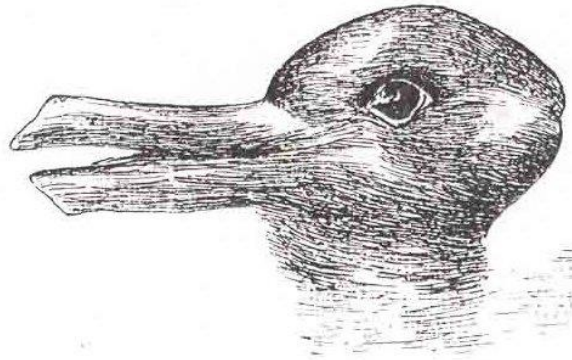
59. *Id.* at 690 (citation omitted).

images more rapidly than we do language) to a conclusion about the way copyright law prefers words to images, without considering the important middle step. In my view, that step involves a naturally arising buffer zone, time in which to process works more carefully, and in ways that embed the works in legal and critical argument that will guide those who would view the works, such as judges, factfinders, and expert witnesses. That middle step also involves interpretive moves that necessarily bring methodological decisions into play. The semiotic flexibility of both words and images is, crucially, at this stage, probably the same for the two media. Tushnet offers Mark Twain's example of the lightning bug. Separated by only a single word, lightning and the insect are two totally different things, which images of the two of them would make immediately plain.⁶⁰ But the converse is true; many visual puns suggest that images can look like the equivalent of homonyms until a tiny thing is added, like the visual equivalent of "bug" in Twain's example. A number 8 could, with simple eyes and a triangle for a nose, become a snowman. What is more, visual puns may take on radically different connotations depending on the context. Fingers extended in a peace sign can, in a shadow on a wall, become a bunny. On their own, the same two fingers may mean a variety of things to different viewers, some of them informational ("I'd like two please"), celebratory ("victory!") and some more ambivalent or obscene (though the "two fingered salute" typically features the palm facing in, not out). The very premise of the Rohrschach inkblot test, in fact, is that a class of images is susceptible to multiple meanings which might be narrowed or clarified with the addition of minor details, or depending on psychological tendencies. The Rorschach is just one of many "projective methods" which involve "presenting people with ambiguous images, words or objects" to discern certain psychological traits or states of mind.⁶¹ The visual and the verbal thus share, in that context, the ability to be interpreted in multiple overlapping ways. That images possess this same capacity to be multiple things at once is captured by the well-known drawing that could be seen as either a rabbit or a duck, made famous by the philosopher of language, Wittgenstein.⁶²

60. *Id.* at 691 (citation omitted).

61. Scott O. Lilienfeld, James M. Wood & Howard N. Garb, *What's Wrong with This Picture?*, *SCI. AM.*, May 2001, at 81

62. Wikipedia, *Duck-Rabbit Illusion*, http://en.wikipedia.org/wiki/File:Duck-Rabbit_illusion.jpg (last visited Apr. 9, 2013).



Moreover, the view of images as readily perceptible because of cognitive immediacy presupposes a particular view of consumption or reception of expressive works: in legal terms, this is the “intrinsic” approach advocated in *Arnstein* and *Krofft*; in aesthetic or literary terms, it is similar to an “implied reader” approach, which considers that the literary critic’s task is not to analyze the text from a critic’s perspective, but from that of the imagined reader’s perspective.⁶³ Such an approach thus inquires into the impact of a given work on a reader whom it will “imply” into the critical process.⁶⁴ If one can be said to grasp an image’s meaning immediately upon receipt, one necessarily implies that the work’s critical reception, its genre, and its author’s intention matter less, if at all. Typically, what texts demand of us, whether they are visual or verbal texts, is at least in part a function of genre. Texts, whether verbal or visual, are often virtually incomprehensible without reference to the generic tradition to which they belong, however uneasily. In a rare opinion dissenting from the Court’s denial of certiorari, Chief Justice Roberts offered a gem of a judicial text. Reading it without a firm grasp of the genre within which it operates would leave one baffled; the four-page opinion begins with a statement of the facts narrated in the style of hard-boiled detective fiction.⁶⁵

63. WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* 19, 20-21 (1978). To be clear, both the implied reader and the formalist approaches assume that texts can yield their meanings through a reading solely on the face of the text. A formalist approach would require thorough and careful analysis of the work before it could be said to yield its meanings. But formalism, like the strictest form of implied reader theory, maps onto the idea that, in theory, one needs nothing but the text itself to decode it. As far as copyright law is concerned, the test as originally laid out has undergone variation that confuses the distinction slightly. In *Shaw v. Lindheim*, the court stated that analytic dissection, or extrinsic analysis, involves objective analysis—which I would term formalist in nature—whereas intrinsic analysis—and I would term it intuitive—is subjective, relying as it does on general perception of a work as a whole. 919 F.2d 1353, 1357 (9th Cir. 1990).

64. Iser, *supra* note 63, at 274-75.

65. *Pennsylvania v. Dunlap*, 555 U.S. 964, 964 (Roberts, C.J., dissenting from denial of cert.) (2008). The following passage includes Justice Roberts’s entire statement of the

The many distinctive features of this passage, from its clichéd simile (“tough as a three-dollar steak”); to its staccato sentence fragments (“[h]ead downtown and book him”); and jaded tone (“Devlin knew this guy wasn’t buying bus tokens”); can be fully perceived only as a function of a genre whose conventions must be learned outside the text and brought to bear upon it.

Both image and text are prey to the possibility of being misunderstood to be *not* socially constructed, *not* complex, and, in all respects, transparent. “Otherwise put, both the visual and the verbal can possess “inherent inscrutability” that requires “critical evaluation.”⁶⁶ Tushnet bemoans Justice Scalia’s genre myopia in an opinion in which he refers to videotape of a car chase as both a Hollywood chase scene (that is, highly constructed) and as unmediated reality (the opposite of highly constructed).⁶⁷ Tushnet’s point here is spot on: the “majority’s understanding, however, was itself shaped by visual codes learned in other fora.”⁶⁸ Tushnet’s point also underscores how naïve even one as rhetorically apt as Scalia can be about the way genre functions in mediating representations of reality. All this is simply a long way of saying that—unless one adopts a very strict formalist mode of reading—both images (like Scalia’s car chase) and texts (like Roberts’s dissent in *Dunlap*) are socially constructed, full of meanings that exist and depend on the world beyond the text.⁶⁹ These meanings, under this antiformalist view, are discernible only because of prior “collective decision[s]” about what “will count as literature,” and they require compliance with certain conventions of reading and interpretation.⁷⁰

These points concern how viewers encounter and decode images, and also words. Yet this line of thinking ultimately concerns styles of “reading” or interpreting expressive works more generally: what one “hears” in music is no more opaque or transparent than what one sees or reads. The same is true for dance, and architecture, and the full range of expressive works in any medium. Rather, the encounter with expressive art is conditioned by prior knowledge; by

facts, set apart from the legal analysis which followed it, dropping the noir style: “North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He’d made fifteen, twenty drug busts in the neighborhood. Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn’t buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy’s pocket. Head downtown and book him. Just another day at the office.”

66. Jessica Silbey, *Images In/Of Law*, 57 N.Y. L. SCH. L. REV. 171, 176 (2012).

67. Tushnet, *supra* note 1, at 701.

68. *Id.*

69. ERIC MARGOLIS, LUC PAUWELS, *THE SAGE HANDBOOK OF VISUAL RESEARCH METHODS* 654 (2011) (“[O]f course, images are never entirely transparent . . . they are always socially constructed”).

70. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 11 (1980).

context; by all sorts of information external to the notes or words or pixels and their delivery.

If Tushnet's analysis holds true for words and other forms of expressive works too, perhaps the difference between words and images is a difference without a copyright-relevant distinction.

CONCLUSION

For Tushnet's analysis to be extremely valuable, as I believe it to be, it need not rigidify or even affirm the difference between the visual and verbal. Indeed, Tushnet herself states that courts treat images as different but that "[t]hey just can't agree on what the difference is or whether it makes images uniquely valuable or worthless."⁷¹ Perhaps one way to understand courts' inconsistency on this point is to recognize that images and words are not always as different as they might seem for the purposes of the adjudication of expressive works, and to acknowledge that the ways in which the media do sometimes differ are varied and sometimes shifting; sometimes these differences play no copyright-relevant role, but exist because of practical factors or industry idiosyncrasies. To be sure, some differences exist, and some are meaningful: speech act theory, for example underscores that words sometimes work in the world in a legally relevant manner in which images typically do not.⁷² Even there, however, the differences exist by tacit convention rather than by intrinsic semiotic necessity.⁷³ Images and words share many common features that rather consistently bedevil copyright analysis in precisely the ways Tushnet has shown with respect to the visual alone. To

71. Tushnet, *supra* note 1, at 703-04. It may be possible to read in this passage some ambivalence in Tushnet's view of the rigidity of the line separating the visual and the verbal, or perhaps the scope of its power. That ambivalence is on display on occasion elsewhere in the article, too, as for example, when she concedes that "copyright's problems with images regularly affect text-based works as well." *Id.* at 711.

72. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5 (1962). Austin was an important philosopher of language whose focus lay on the speech act as a unique utterance which "is, or is a part of, the doing of an action." *Id.* at 5. Jurisprudential theorists have focused on Austin's speech act theory in terms of its applicability for law: when do speech acts—that is, utterances that are both words and actions—take on legal significance because they are not only words and actions, they are also legal events. Austin's classic examples involve speech acts such as these: I bet; I confess; and I wed. *Id.* at 5-6.

73. It is not clear to me that images ever function as a shortcut for legal action in the same way as words that are speech acts. But when speech acts function in that way, they do so because of prior consensus about which conventions we will adopt in order to convert certain words into actions. Under speech act theory, the only reason that "I bet" or "I confess" or "with this ring I thee wed" have a quasi-legal status is because we agree by convention that those phrases can stand in place of action in a way that "I suppose" or "I feel guilty if I caused harm" or "I agree to spend a really long time lovingly arguing with you over the household's division of labor" do not. In other words, it is nothing magical about the words themselves. Their power lies in the legal significance with which we decide to imbue them.

the extent this is true, again, Tushnet's analysis has greater significance than her article claims for itself. It is not without minor irony to state that Professor Tushnet's insightful and far-ranging article provides us with a new way to see copyright jurisprudence in images. Tushnet's learned exposition of the problems she describes and her deft interdisciplinary approach do indeed promise to reorient the discussion in this field, whether defined narrowly (images) or more broadly (expressive works).