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Hoisting Originality

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Copyright's originality standard is ripe for reappraisal. Many have described how copyright exclusion claims now intrude into the everyday lives of ordinary folk - making an "infringement nation," coated in "billowing white goo." (Tehrani (2007); Litman (2008)). And many have proposed ways to cope with copyright's expansion, from strengthening the fair use privilege to trimming the derivative work right to modifying the basic "substantial similarity" infringement standard. A few have tackled the matter at the front end - putting, as it were, less goo in the billowing machine. (E.g., Hughes, *Size Matters* (2005); Sprigman, *Reform(Aliz)ing* (2004)). Virtually no one, however, has gone back to the source - copyright's originality standard. *Feist*, the phone book white pages case, tells us that, at least as a constitutional matter, "the requisite level of creativity is extremely low." 499 U.S. 340, 345 (1991). But the Copyright Act's statutory originality requirement can, and should, be more demanding. I pattern this exploration on patent law's rejuvenated nonobviousness requirement, which the Supreme Court's *KSR* decision (2007) grounds on incenting the unconventional and unexpected. We should put copyright's creativity requirement on the same footing, protecting expression in proportion to its unconventionality. Indeed, the conditions that justify a nonobviousness requirement for useful inventions - distilled to the wisdom that "[w]ith greater rights come more stringent requirements for obtaining the rights" (Duffy, *Inventing Invention* at 10 (2007)) - are strikingly similar to those that bear on creative expression. I also identify the critical wrong turn in *Bleistein* (1902), where Justice Holmes concluded that the alternative to a low creativity threshold was a stifling aesthetic orthodoxy policed by the judiciary. He was right to turn away from such orthodoxy, of course, but missed a third, and better way - rewarding, and thus encouraging, the heterodox itself. The progress at which we should aim, for copyright as much as for patent, is the new vista to which we're led by those who break through conventional boundaries.