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**IN DEFIANCE OF BRIDGEMAN: CLAIMING COPYRIGHT IN PHOTOGRAPHIC REPRODUCTIONS OF
PUBLIC DOMAIN WORKS**

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***32 I. Introduction**

The sale of photographic reproductions of famous artworks is an essential source of revenue for museums and art libraries alike. These photographs are marketed in every conceivable fashion, from high-resolution transparencies of Rembrandt's *The Night Watch*, to tee-shirts sporting Hokusai's *In the Hollow of a Wave off the Coast at Kanagawa*, to Monet's *Water Lilies* on a coffee mug.¹ Today, internet sites provide extensive access to digitized photographs of collections. The appearance of

museum websites has been accompanied, naturally, by digital versions of the museum gift shop.

These websites reach new markets, attract more visitors, and have become a “robust source of revenue.”² This expansion, based in large part on the availability of photographic reproductions of artwork, has also proven somewhat problematic for museums and art libraries alike. When a museum obtains a work for its collection, it gains the ability to control access to the work. Once a photograph of this work appears online, however, locking the gallery doors at night becomes largely a symbolic gesture. Museums and art libraries have turned to copyright law in order to maintain as much control as possible over their collections. In so doing, they assert rights over photographic reproductions of artworks that may not be copyrightable.

Bridgeman Art Library, Ltd. v. Corel Corp.³ stands as a singular case that produced two judgments favoring public access to public domain works. Although the decisions sparked a brief academic discussion, Bridgeman has subsequently been ignored. Museums and art libraries alike persist in claiming copyright in uncopyrightable photographic reproductions of public domain artworks.

This paper examines the Bridgeman decision and its ramifications. Section II summarizes relevant copyright law in the United States and the United Kingdom, focusing on copyright in photographs and derivative works. Section III analyzes the judgments from Bridgeman Art Library, Ltd. v. Corel Corp and The Bridgeman Art Library’s subsequent appeal. Section IV examines the effects of *33 the Bridgeman decision on art libraries and museums, and profiles academic discussion of the decision. Section V comments on the “skill and labour” standard as a justification for copyright.⁴ Finally, Section VI discusses the use of copyright by art libraries to increase revenue and control access to collections.

II. Copyright Generally

The Constitution of the United States grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ The subject and scope of copyright in the United States are further defined under Title 17 of the United States Code. Section 102 grants copyright to enumerated categories of “original works of authorship fixed in any tangible medium of expression.”⁶

Although individual countries have independent systems of copyright protection, these systems may be affected by international agreements. Of primary concern is the principle of national treatment found in the Berne Convention. This principle provides that an author from one member state “shall enjoy . . . , in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”⁷ Essentially, the Berne Convention creates minimal standards under which a work by a foreign national of a Berne member state receives the same treatment as a domestic work.⁸ The law of the forum therefore determines the scope of protection.⁹ Should a British copyright holder, for example, file suit in the United States, she will be accorded the same rights a U.S. author possesses and the court will apply U.S. copyright law.

The owner of a copyright has several exclusive rights, including the rights to reproduce and distribute the work, display the work publicly, and prepare derivative *34 works based upon the copyrighted work.¹⁰ In both the United States and the United Kingdom today, these rights generally subsist from the work’s creation “for a term consisting of the life of the author and 70 years after the author’s death.”¹¹ Once this term expires, the work is no longer protected, the author no longer possesses exclusive rights, and the work enters the public domain.¹²

A copyright owner can file an infringement claim to protect these exclusive rights. The two elements of a valid infringement claim are “(a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.”¹³ The first element of the claim implies that the plaintiff has a valid copyright. The second element, improper appropriation, includes not only the defendant’s copying, but the copying of protected expression from the plaintiff’s work. A primary defense to an infringement claim is to attack the validity of the plaintiff’s copyright.¹⁴

A. The Originality Requirement

For a work to qualify for copyright protection, it must be original, meaning that “the work owes its origin to the author, i.e., is independently created, and not copied from other works.”¹⁵ Copyright will not subsist in the work if this standard is not met.

Nobody will possess the bundle of exclusive rights, and the work will be free for others to use.

The Supreme Court clarified the originality requirement in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁶ Feist, a publishing company, created an area-wide phone book.¹⁷ Rural, a telephone company, refused to license the listings from its local directory for Feist's use.¹⁸ When Feist used the listings *35 without Rural's permission, Rural sued for infringement of its copyright in the directory.¹⁹

In finding for Feist, the Supreme Court referred to originality as "the sine qua non of copyright," asserting that a work must be independently created and have a minimal degree of creativity to qualify for copyright protection.²⁰ The Court stated that "originality does not signify novelty," but simply that the author must impart some creative spark to the work to qualify for protection.²¹ Thus, two identical, independently created works would both be copyrightable despite their similarity, as long as the similarity did not result from copying.²²

Facts, however, "do not owe their origin to an act of authorship," and are not copyrightable.²³ Facts are discovered, not created, and therefore may not alone fulfill the minimally creative prong of the originality requirement.²⁴ The Court held that copyright in a compilation of facts only protects the author's original expression and not ideas.²⁵ Consequently, copyright might subsist in Rural's particular selection and arrangement of names and telephone numbers, but not in the numbers themselves. Since the telephone directory was "nothing more than [a] list [of] Rural's subscribers in alphabetical order," Rural had not contributed any expression and did not fulfill the minimal creativity requirement.²⁶ Therefore, the telephone directory was not original, not copyrightable, and Feist could not have infringed.²⁷

The Supreme Court made clear that originality, not the effort the author contributed to the work, was the constitutional requirement for copyright. The "sweat of the brow" theory, a concept of ownership as "a reward for the hard work" an author contributed, was not an acceptable justification for copyright.²⁸ The sweat of the brow theory allowed copyright to protect facts, rather than subsisting in the author's original contribution to the work.²⁹ The Court held that, *36 while the author's original expression should be protected, facts should remain free for others to copy.³⁰

B. Originality and Derivative Works

A derivative work is one "based upon one or more preexisting works, such as . . . [an] art reproduction . . . or any other form in which a work may be recast, transformed, or adapted."³¹ Copyright in a derivative work subsists in the original expression added by the derivative work's author.³² Should the author simply reproduce the preexisting work without recasting, transforming, or adapting it, then he has not added any expression and does not possess a valid copyright.³³

Copyright in a derivative work will not give the author rights in the underlying work.³⁴ In *Leigh v. Warner Brothers*, the court found that the plaintiff's copyright in a photograph of a sculpture did not extend to copyright in the sculpture itself.³⁵ At issue was the "now-famous photograph of the Bird Girl statue in Savannah's Bonaventure Cemetery that appears on the cover of the best-selling novel *Midnight in the Garden of Good and Evil*."³⁶ The photograph of the sculpture was a valid derivative work because it recast the preexisting work. Derivative works receive thin copyright protection that only prohibits exact copying of the expression contributed by the author of the photograph. The court found that, while other authors could not copy the photograph, the author could not restrict others from creating new derivative works by taking their own photographs of the sculpture.³⁷

The Supreme Court in *Feist* stated that the "requisite level of creativity is extremely low," and that the "vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it *37 might be."³⁸ Yet a higher standard of the originality requirement for derivative works is often applied.

In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, Alfred Bell had created and copyrighted eight mezzotint engravings of public domain paintings, including Gainsborough's Blue Boy.³⁹ Catalda had created and sold lithographs of Bell's mezzotints.⁴⁰ When the plaintiff filed suit for copyright infringement, Catalda replied that Bell's mezzotints had not fulfilled the originality requirement and therefore could not be protected by copyright.⁴¹

Writing for the district court, Judge Smith recognized that the primary purpose of the mezzotints was to capture "the basic idea, arrangement, and color scheme" of the original paintings.⁴² Noting that mezzotint does not produce an exact, photographic copy of the original painting, Judge Smith concluded that an engraver "is trying to express in another medium

what the original artist expressed in oils on canvas. It is only this treatment in another medium which is original, but it is a distinguishable effect which can itself be copied by photography.”⁴³

The Second Circuit also held that the engravings were protected, stating that copyright would subsist in a copy of a public domain work if it contained any distinguishable variation from the underlying work.⁴⁴

Fifty years later, however, the standard had shifted. In *L. Batlin & Son, Inc. v. Snyder*, the court found that copyright did not subsist in trivial variations resulting from the creation of a plastic version of a cast iron Uncle Sam bank.⁴⁵ Rather, the court required “at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”⁴⁶ For *38 copyright to subsist in a derivative work, a “considerably higher degree of skill is required, true artistic skill,” not simply physical ability.⁴⁷

C. Originality and Photographs

United States copyright law specifically protects photographs as both a type of “pictorial, graphic, or sculptural work” and, if produced in a limited edition, as a “work of visual art.”⁴⁸ Section 101 also includes prints and art reproductions as types of “pictorial, graphic, or sculptural works,” a category which generally includes “two-dimensional and three-dimensional works of fine, graphic, and applied art.”⁴⁹ As Leigh demonstrates, many photographs are derivative works as well.⁵⁰

Although specifically protected by statute, photography has proven itself a problematic medium for copyright law. Differing opinions as to the level of protection that photographs deserve have made international agreements especially challenging.⁵¹ Due partly to the mechanical nature of photography, courts struggle with the question of how photographs meet the originality standard.

In *Burrow-Giles Lithographic Co. v. Sarony*, the lithographer sold 85,000 copies of Sarony’s portrait of Oscar Wilde, and Sarony brought an action for copyright infringement.⁵² In response to Burrow-Giles’s defense that no photograph was copyrightable, the Supreme Court construed the Constitutional term “writings” broadly to include photographs as “intellectual conceptions of the author.”⁵³ As this was a case of first impression, Justice Miller specifically acknowledged looking to English law, which authorized “the author of a photograph” to hold a copyright in the work.⁵⁴

*39 The Court held that Sarony’s work met the originality requirement because of the way the photographer had controlled and manipulated the subject, scene, and lighting.⁵⁵ Sarony’s creativity was evident in “posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression . . .”⁵⁶

Justice Miller expressly declined to state whether “the ordinary production of a photograph” necessarily exhibits sufficient originality to claim copyright.⁵⁷ Almost forty years later, Judge Hand implied that all photographs were copyrightable because “no photograph, however simple, can be unaffected by the personal influence of the author . . .”⁵⁸ This personal influence is sufficient creativity to fulfill the originality requirement for copyright protection. Evidence of the photographer’s personal influence can be seen in choices such as type of camera, type of lens, type of film, shutter speed, lighting, angle of the shot, and setting.⁵⁹

Nimmer On Copyright (Nimmer) indicates two situations when a photograph will not meet the requisite level of originality.⁶⁰ That is, although the photograph may be “independently created by an author,” it would not meet the “minimal degree of creativity” required for copyright protection.⁶¹

The first situation occurs when “a photograph of a photograph or other printed matter is made that amounts to nothing more than a slavish copying.”⁶² This is analogous to making another print from a negative. Neither the photograph of a photograph nor the new print from a negative rises to the distinguishable variation standard required by Alfred Bell or the substantial variation standard applied in *L. Batlin*.⁶³

*40 In *Simon v. Birraporetti’s Restaurants, Inc.*, Simon created a poster based on his own photograph of Santa Claus that had fallen into the public domain.⁶⁴ Birraporetti’s then created an advertisement using Simon’s copyrighted poster, and Simon sued for infringement. Quoting Nimmer’s proposition, the court found that Simon’s poster and the public domain photograph

were “pictorially identical” and concluded “that the poster fail[ed] to meet the requirement of originality necessary in a derivative work.”⁶⁵ Simon’s work did not possess even minimal creativity to meet the originality standard, thus copyright did not subsist in the poster, and Simon could not sue for infringement.⁶⁶

The second situation occurs when the photographer purposely arranges the scene in order to copy another photograph. “Here, the second photographer is photographing a live subject rather than the first photograph, but insofar as the original elements contained in the first photograph are concerned, there is no meaningful distinction.”⁶⁷

In *Gross v. Seligman*, a photographer created two photographs of the same model and assigned his copyright in the first photograph to Gross and the second photograph to Seligman.⁶⁸ The second photograph featured the same young, female model in the same pose, but smiling and holding a cherry stem between her teeth.⁶⁹ The court found that the originality “which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.”⁷⁰ While not commenting on copyrightability, the court upheld an injunction against the second photograph.⁷¹

D. Copyright of Photographs in the United Kingdom and the Skill and Labour Standard

British law today, through the Copyright, Designs, and Patents Act, protects photographs as artistic works, “irrespective of artistic quality.”⁷² The author of a photograph is, simply enough, “the person who creates it.”⁷³ British case law has *41 further defined an author as “the person who had expended skill and labour in a photograph’s production.”⁷⁴

In the United Kingdom, the skill and labour an author contributes to the creation of a work remains a primary justification for copyright. The skill and labour standard essentially states that one who expends time and energy creating a thing thereby gains exclusive rights in it.⁷⁵ This same justification existed in the United States as the sweat of the brow theory, which the Supreme Court expressly discredited in *Feist*.⁷⁶

The skill and labour standard is commonly used to justify copyright in derivative works, such as reproductions of preexisting art. In *Graves’ Case*, the defendant had copied the plaintiff’s photographs of engravings that had been made from paintings.⁷⁷ In response to the defendant’s contention that the photographs were not original, the court replied simply that “a photograph taken from a picture is an original photograph.”⁷⁸ Unlike Judge Hand’s statement in *Jewelers’ Circular*, *Graves’ Case* has not stood for the proposition that all photographs are original.⁷⁹ Rather, *Graves’ Case* implies “that photographs which do require skill and labour in their taking, even if only technical skill applied to achieve a quality reproduction, do satisfy the originality test.”⁸⁰ This statement embraces a broad spectrum of skill and labour to fulfill a permissive originality requirement. In fact, almost any expenditure of skill and labour will meet the originality requirement under U.K. copyright law.⁸¹ The spectrum of skill and labour runs from “merely the selection of the image through the viewfinder . . . [to] the much more skilful choice of film, aperture, speed, lighting, composition of the subject, *42 the selective development of the negative . . . and possible digital manipulation.”⁸²

This general standard has been qualified by more recent cases. At issue in *Interlego A.G. v. Tyco Industries, Inc.* was whether copyright could subsist in new drawings of Lego building blocks that imperceptibly modified the earlier design.⁸³ The court relied on prior cases that stressed that the author’s skill and labour should differentiate the new product and impart some new quality or character to the work.⁸⁴ Although quality copying requires skill and labour, the copy painting or photographic enlargement is not an original artistic work “simply because the process of copying it involves the application of skill and labour.”⁸⁵ The court concluded that an author creating a copy must contribute more than skill and labour to the work to confer originality: “There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work. . . . But copying, *per se*, however much skill or labour may be devoted to the process, cannot make an original work.”⁸⁶

This interpretation of the skill and labour standard was applied in *Reject Shop v. Manners*, when the High Court of Justice decided that an image, which had been enlarged by ten percent on a photocopier, was not an original work.⁸⁷ The court noted that the defendant’s enlarged photocopies did not possess any new contribution from the author and “did not result in a depiction substantially different from the [original] drawings themselves.”⁸⁸ Perhaps inadvertently qualifying the skill and labour standard, the court held that for copyright to subsist, a work required an “expenditure of artistic skill and labour . . .”⁸⁹

E. Copyright in Photographs of Three-Dimensional Objects

In this area, U.S. and U.K. courts generally agree, and tend to grant copyright protection to photographic reproductions of sculptures. In *SHL Imaging, Inc. v. Artisan House, Inc.*, the U.S. District Court for the Southern District of *43 New York found sufficient originality for copyright to subsist in photographs of mirror frames.⁹⁰ Evidence of originality in these photographs could be found in “the totality of the precise lighting selection, angle of the camera, lens and filter selection.”⁹¹ Like the photograph of the Bird Girl sculpture in Leigh, these photographs constitute derivative works.⁹² Therefore, they receive only thin copyright protection.⁹³ While the plaintiff had valid copyright in the photographs, he could not “prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors.”⁹⁴

British copyright will subsist in a photographic reproduction of a three-dimensional object if the photographer fulfills approximately the same criteria. At issue in *Antiquesportfolio.com, Plc. v. Rodney Fitch & Co., Ltd.* was the copyrightability of photographs of antique furniture, sculptures, and glassware.⁹⁵ Evidence of the photographer’s skill and labour could be found in “the lighting, angling and judging the positioning” of the objects.⁹⁶ The court found that copyright did subsist in the photographs because they had been taken in order to exhibit specific qualities of the three-dimensional subjects, including colors, features, and details.⁹⁷ Although the British court justified copyright in the photographs in terms of the author’s skill and labour, both United States and British courts relied on the same criteria to determine whether copyright subsisted in the photographs.

III. Bridgeman Art Library, Ltd. v. Corel Corp.

The court in *Bridgeman Art Library, Ltd. v. Corel Corp.* strongly rejected a claim of copyright in exact photographic reproductions of public domain paintings. Although the decision ignited discussion among academics, its ruling is largely ignored today by museums and art libraries, including the Bridgeman Art Library itself.

*44 The plaintiff, the Bridgeman Art Library, is a British company that markets reproductions of art owned by museums and other collectors.⁹⁸ Bridgeman attempts to ensure each high-resolution color transparency is an exact reproduction of the original work and includes a color correction strip with each transparency.⁹⁹ In addition to licensing these transparencies to clients, Bridgeman at the time distributed a catalog on CD-ROM, free of charge, which contained images in a lower resolution format.¹⁰⁰

The defendant Corel, a software manufacturer, sold several CD-ROMs with seven hundred reproductions of antique paintings by European masters.¹⁰¹ Bridgeman brought a copyright infringement suit for 120 of the images on the theory that:

(1) the owners of the underlying works of art, all of which [Bridgeman] concedes are in the public domain, strictly limit access to those works, (2) Bridgeman’s transparencies of those works . . . are “the only authorized transparencies of some of these works of art,” and (3) [therefore Corel’s images] must be copies of Bridgeman’s transparencies . . .¹⁰² Bridgeman argued that British law should apply to the infringement, alleging that the copying occurred in England.¹⁰³ In *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, however, the Second Circuit Court of Appeals had recently held that the principle of national treatment in the Berne Convention simply requires similar treatment for foreign and domestic authors without professing any choice of law rule.¹⁰⁴ Judge Kaplan followed the *Itar-Tass* decision, holding that the court should choose the law of the state with the most significant relationship to the property and the parties.¹⁰⁵ The court held that since the photographs were first published in the United Kingdom, U.K. law controls on the issue of copyrightability. *45¹⁰⁶ Because the infringement occurred in the United States, U. S. law controls the issue of infringement.¹⁰⁷

In considering the copyrightability of Bridgeman’s transparencies, Judge Kaplan noted that only “original” works are copyrightable under British law.¹⁰⁸ British copyright will not subsist in works “wholly copied from an existing work, without any significant addition, alteration, transformation, or combination with other material.”¹⁰⁹ In light of this standard and relying on the *Interlego A.G.* court’s statement that skill and labour “merely in the process of copying cannot confer originality,” Judge Kaplan found that Bridgeman’s images were not copyrightable under British law.¹¹⁰ The variation in medium from painting to photograph was not a sufficient alteration or transformation because the photographs precisely reproduced the public domain works of art.¹¹¹

The court went on to hold that, even if Bridgeman’s images were copyrightable, it had “raised no genuine issue of fact as to infringement.”¹¹² Bridgeman provided no proof that Corel had access to its images in order to copy them.¹¹³ More importantly,

since the transparencies were derivative works, any possible copyright would only extend to the original elements contributed by the author that materially altered or embellished the underlying work.¹¹⁴ Both Bridgeman's and Corel's photographs were exact reproductions of public domain paintings. Therefore, the only similarities between the photographs were the public domain paintings themselves. Since the photographs contained no original elements, they were not copyrightable, and the court granted summary judgment to Corel.¹¹⁵ Three months later, on a motion for reconsideration, the court applied U.S. law *46 to the issue of originality and again found that Bridgeman's transparencies were not copyrightable.¹¹⁶

Addressing the choice of law issue, Judge Kaplan considered an unsolicited letter from William Patry which argued that because the Copyright Clause of the United States Constitution only protects original works, there could be no choice of law issue.¹¹⁷ After reviewing the requirements of National Treatment, Judge Kaplan considered it clear that the Berne Convention was not self-executing and that no rights could be claimed exclusively under it.¹¹⁸ Therefore, U.S. copyright law should be applied to Bridgeman's claims.¹¹⁹

The Court found that Bridgeman's copyright claims also failed under U.S. law because the exact reproductions were not original.¹²⁰ Citing Burrow-Giles and Nimmer, Judge Kaplan noted that, while only a modest amount of expression would constitute sufficient originality, no originality exists when the photograph amounts to nothing more than slavish copying.¹²¹ Turning to the "distinguishable variation" test from L. Batlin & Co., the court noted that protecting "minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work."¹²² This appears to be exactly what Bridgeman was seeking when claiming copyright for precise photographic reproductions of public domain paintings.¹²³ Although creating the photographs required both skill and effort, the court found that "no spark of originality" subsists when "the point of the exercise was to reproduce the underlying works with absolute fidelity."¹²⁴ Therefore, Bridgeman's reproductions were not copyrightable under U.S. law.¹²⁵

*47 The court reiterated that the reproductions would not be copyrightable in the United Kingdom.¹²⁶ Plaintiff Bridgeman argued that Graves' Case applied and that copyright would subsist in photographic reproductions that required skill and labour.¹²⁷ The Court, however, relied on a modern British treatise by Sir Hugh Laddie. Laddie suggests that Graves' Case is no longer good law, having been decided "before the subject of originality had been fully developed by the courts."¹²⁸

Judge Kaplan concluded that Bridgeman's photographs "stand in the same relation to the original works of art as a photocopy stands to a page of typescript."¹²⁹ The change in medium from painting to photographic transparency was insignificant because the transparencies did not vary at all from the underlying works.¹³⁰ Because an author using skill and labour merely in the process of copying imparts no originality to the work, copyright can not subsist in the reproductions.¹³¹

IV. Reactions to Bridgeman

The Bridgeman decision was not particularly radical, especially in light of the extended originality discussion in Feist.¹³² It demonstrated a straightforward application of U.S. copyright law to the question of whether new works, which themselves contain nothing original, can claim a valid copyright in the United States. The conclusion reached by the Bridgeman court was inescapable--no.

The authority of Bridgeman is binding only in the Southern District of New York, but the principle remains the same throughout the United States. Photographs that precisely reproduce public domain paintings are not copyrightable. They are, by definition and design, slavish copies that contain no original contribution from the photographer, no originality, and no distinguishable variation in which valid copyright can subsist. Any federal court, presented with the facts that arose in Bridgeman, would invariably reach the same result. That the issue has only arisen in the Southern District of New York does not imply that *48 precise photographic reproductions of public domain paintings in California constitute original works. Because the authors of these photographs contribute nothing original to the public domain image, these photographs are simply not copyrightable, despite claims otherwise.

In light of this, the reaction to the Bridgeman decision appears utterly remarkable. The Bridgeman Art Library and most museums seem to be wholly ignoring the fact that this holding invalidated Bridgeman's claims of copyright in exact photographic reproductions of public domain images. Some British academics rushed to defend the skill and labour standard while more recent articles suggest that skill and labour is an outdated standard and propose a new system of copyright for photographs.

In the years since Bridgeman, the internet has supplanted CD-ROMs as an efficient means of communicating and transferring images, as well as opening new markets for reproductions. A website has become an essential tool, allowing art libraries and museums to reach new customers. For example, over fifteen million people a year visit the website for New York's Metropolitan Museum of Art, compared to 4.5 million who visit the actual museum on Fifth Avenue.¹³³ Simply put, almost every museum and art library has a website, and they all have a special section addressing copyright law. The statements on these websites, however, seem rather odd in light of the Bridgeman decision.

A. Art Libraries

The website for the Bridgeman Art Library labels itself "the world's leading source of fine art with images from over eight thousand collections and twenty nine thousand artists."¹³⁴ The site allows users to search for specific images, browse the library, and even offers an educational program.¹³⁵ Photographic reproductions of artwork are available for sale. Bridgeman's "art on demand" offers prints of paintings by Old Masters, Impressionists, Pre-Raphaelites, and Neo-Classical painters in addition to more modern works.¹³⁶

Bridgeman's website also features a lengthy page on copyright law which unequivocally states that "[a]ll images supplied by the Bridgeman Art Library are copyrighted photographs. The Bridgeman Art Library either owns the copyright *49 in the photograph or acts as the authorised agent of the copyright holder."¹³⁷ While this statement would certainly hold true for the library's modern works, it stands in stark contrast to Judge Kaplan's ruling in Bridgeman that Bridgeman's transparencies of public domain paintings were not, in fact, copyrightable. The website goes on to claim that "no images may be reproduced, communicated to the public, distributed, re-used or extracted . . . without the prior written consent of The Bridgeman Art Library."¹³⁸ This warning may be a common one, but note that the rights Bridgeman asserts by requiring permission are precisely those granted by copyright.¹³⁹ After the Bridgeman decision, at least in the United States, Bridgeman has no standing to restrict anyone from reproducing, communicating, or distributing its photographs of public domain paintings. Again, those rights belong to the owner of a valid copyright. Bridgeman's transparencies did not possess sufficient originality for copyright to subsist.¹⁴⁰ Yet Bridgeman still claims the rights that subsist in a valid copyright in order to control its uncopyrightable reproductions.

The Bridgeman decision appears to have little influence on art libraries in the United States. Corbis bills itself as "a comprehensive digital archive of art and photography from public and private collections around the globe."¹⁴¹ Founded by Bill Gates and headquartered in Seattle, Washington, this art library licenses over 70 million images, including photographs of paintings by Raphael, Botticelli, and Van Gogh.¹⁴² Corbis commercially distributes images both to professional publishers, for incorporation into their products, and directly to consumers.¹⁴³

In contrast to the Bridgeman Art Library's aggressive assertions, Corbis's author-friendly copyright page provides only general information on copyright law. Corbis even offers a program to register photographs on behalf of photographers *50 and information on protecting copyrights from infringement, with links to statutes and the Bridgeman decision.¹⁴⁴

Statements from Corbis, however, may belie any acceptance of Bridgeman's validity. Stephen Davis, then counsel for Corbis, asserted otherwise:

It has been accepted for some time that a photograph--and hence all photography--involves more than a mechanical process and is subject to copyright protection. Accordingly, copy photography is protected by the Copyright Act. For example, a photographer who is asked by a museum to take a detailed photograph of an oil painting . . . can assert ownership of the copyright of that derivative photograph . . .¹⁴⁵ In fairness, this comment was made publicly before Bridgeman arose. The fact remains, however, that the degree of control Corbis or the Bridgeman Art Library are able to exercise over their images has tremendous financial ramifications. Whether either company can use copyright, legitimate or not, to enhance that control remains an imperative issue. Therefore, the relatively neutral view Corbis presents via its website may be indicative of a corporation ducking the issue rather than strictly complying with the Bridgeman decision.

B. Museums

The issue of copyright in reproductions is also important to museums. The Museums Copyright Group consists of representatives from British museums and strives to “protect and guide” museums’ intellectual property rights and concerns.¹⁴⁶ Alarmed by Bridgeman, the Group commissioned a report that reinforced the notion that the decision was not binding on British courts and disparaged its authority in the United States.¹⁴⁷ The first assertion seems obvious, the second sinister, as Bridgeman has not been overruled nor has a similar issue come before a U.S. court since.

The Group’s position is that revenue from reproduction fees and licensing allows museums to “support their primary educational and curatorial objectives . . . *51 [and] protect their collections from inaccurate reproduction and captioning.”¹⁴⁸ This statement is certainly true, but it does not address the issue of whether an individual institution should be able to restrict public access to public domain images. Most art lovers support museums and are willing to tolerate gift shops filled with art reproductions on mugs, posters, and magnets. This by no means implies that museums should be able to further restrict use of public domain images through copyright.

Statements from individual museums in the United States further demonstrate a refusal to acknowledge any authority of the Bridgeman decision. The website for New York’s Metropolitan Museum of Art (the Met) includes reproductions of permanent and special collections as well as interactive educational programs.¹⁴⁹ The Met also runs an image library consisting of “black-and-white photographs, color transparencies, slides, and digital images documenting the Museum’s vast and rich collection, available for purchase and/or licensing for study, editorial, and commercial usage.”¹⁵⁰ The Met’s “Terms and Conditions” webpage covers both the website and the image library, stating simply that all images are protected by copyright, and the museum retains all rights.¹⁵¹

While the Met allows users to obtain images for non-commercial, educational, or personal use, it restricts users from placing images on a CD-ROM or altering images in any way.¹⁵² Just like the statements on Bridgeman’s website, the rights the Met claims are those of the owner of a valid copyright. These are not the statements of an organization complying with a decision that copyright will not subsist in exact photographic reproductions of public domain paintings.

Far outside the Southern District of New York, the J. Paul Getty Museum in Los Angeles (the Getty) uses similar language to protect the images on its website, many of which are precise reproductions of public domain paintings.¹⁵³ The Getty expressly withholds permission for commercial use of any image downloaded from their website.¹⁵⁴ A user would be reproducing an image by *52 downloading it. To use an image commercially would involve distributing it. The rights to reproduce and distribute a work are rights that flow from a valid copyright.¹⁵⁵ If Bridgeman correctly construed federal copyright law, it is not at all clear that the Getty possesses valid copyrights in its reproductions of public domain paintings. The Getty, therefore, may have no right to restrict another’s use of an image.

It appears as though the Met and the Getty seem to merely assert these rights without actively attempting to enforce them. Although museums and art libraries may claim that copyright subsists in their photographic reproductions, these institutions are not filing infringement suits. While an assertion of copyright may seem relatively harmless, these assertions alone could create a tremendous chilling effect, regardless of whether actual litigation ensues. The Getty’s website has received 10.5 million visitors each year, and over 1 million in March 2005.¹⁵⁶ One cannot measure the deterrent effect these copyright claims have on potential authors who would use the uncopyrightable reproductions to create new works. If a false claim to copyright can bully potential authors away from using uncopyrightable reproductions of public domain images, no museum need ever pursue an infringement action, nor ever acknowledge the Bridgeman decision. The threat alone may be enough to maintain control of the collection, as though valid copyright indeed subsisted in a museum’s precise photographic reproductions of public domain paintings.

C. Academic Debate in the United Kingdom

While Bridgeman provoked denial among museums and art libraries, the decision ignited a flurry of commentary among British academics. Recent articles have begun to question copyright in photographic reproductions and the skill and labour standard in general.

Kevin Garnett, Q.C. defends the Bridgeman Art Library’s copyright in exact photographs of two-dimensional artworks and attacks Judge Kaplan’s reasoning and construction of British copyright law.¹⁵⁷ Garnett contends that the court should not have dismissed Graves’ Case, which remains good law for issues of photography, or relied on Interlego A.G., which dealt with drawings rather than photographs.¹⁵⁸ According to Garnett, Judge Kaplan also read the wrong treatise.¹⁵⁹ Rather than Laddie,

the court should have looked to a treatise by Copinger, which postulates that no reason exists “why there should be any distinction *53 between . . . a photograph which is intended to reproduce a work of art” and one which does not.¹⁶⁰ Under this standard, as long as an author expends skill and labour creating the photograph, the subject matter remains irrelevant, and the photograph is copyrightable.¹⁶¹

Garnett also produces a list of reasons why such exact photographic reproductions of ancient art should be copyrightable in the United Kingdom. British law protects all photographs, regardless of subject matter, as long as they can fulfill the British originality requirement.¹⁶² Since the purpose of photographs is often to reproduce exactly the scene before the lens, this requirement can be fulfilled by a demonstration of the author’s skill and labour.¹⁶³ A photographic reproduction of a public domain painting qualifies as a derivative work under British law because the change in medium from, say, oil on canvas to a photographic print suffices to impart a different quality and character to the new work.¹⁶⁴ Crucially, Garnett does not view a copyright claim like Bridgeman’s as an abuse of copyright because Bridgeman’s ability to copyright its own photographs does not prevent others from taking their own photographs.¹⁶⁵ Additionally, copyright is not abused should the owners of a public domain work prevent others from taking photographs by denying them access to the painting.¹⁶⁶

Ronan Deazley’s response to this article primarily criticizes Garnett’s interpretation of the relevant case law.¹⁶⁷ Deazley qualifies the validity of Graves’ Case, which neither defines originality in relation to photographic works nor discusses the skill and labour involved in creating a photograph.¹⁶⁸ Most importantly, Deazley notes, courts in 1869 did not have to consider the possibility of organizations using photographs to control images after the copyright term expired.¹⁶⁹

*54 In Deazley’s view, the argument that a change in medium creates a valid derivative work is tenuous when the image itself remains visually unchanged.¹⁷⁰ Accordingly, skill and labour alone should not be enough to qualify for copyright.¹⁷¹ A court must consider the subject of a photograph to ensure an institution will not attempt to extend the copyright term of an image and prevent works from entering the public domain. For Deazley, the primary question Bridgeman raises is how to define the “limits of public access to those works of art that are . . . of especial historical, social and cultural importance.”¹⁷²

Deazley’s criticism provoked a terse response from Simon Stokes, who suggests that British law would indeed protect exact photographic reproductions of public domain artworks.¹⁷³ Exact reproductions demand a high degree of skill and labour, which remains a primary justification for copyright.¹⁷⁴ In Stokes’s view, the economic interests of museums soundly trump whatever right the public has to access images in the public domain.¹⁷⁵ Despite any problematic issues, Stokes’s views remain firmly planted in the British tradition, which would protect these reproductions.

In responding to Stokes’s arguments, Deazley focuses on a museum’s attempt to control public domain images in their collections. Deazley asserts that museums use copyright in exact photographic reproductions as a pretext to charge licensing fees to those who wish to reproduce publicly owned paintings in the public domain.¹⁷⁶ At the same time, museums absolutely restrict members of the public from taking their own photographs of public domain images in the museum’s collection.¹⁷⁷ Arguing that the purpose of museums is to preserve cultural treasures, Deazley maintains that public domain artwork should be made available to the public. Museums, in turn, should stop artificially restricting access to these images, confine their copyright claims to works legitimately protected, and allow works in the public domain to circulate among the public.¹⁷⁸

*55 While that particular exchange has ended, the debate over the skill and labour standard and the copyrightability of photographs continues. One recent article suggests that allowing an author’s skill and labour to fulfill the originality requirement is antithetical to the Berne Convention and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁷⁹ Daniel Gervais argues that the skill and labour justification may have arisen due to a lack of a tort remedy for misappropriation.¹⁸⁰ The term *original* as it relates to the skill and labour standard “is interpreted in the sense of ‘origin’ . . . far from its common meaning.”¹⁸¹ The originality test in the Berne Convention, however, requires “that the work must embody an author’s creative input.”¹⁸² Relying on the skill and labour standard to justify copyright is, therefore, incompatible with the Berne Convention’s definition.¹⁸³

Richard Arnold Q.C. suggests a new copyright standard that would treat all photographs like television broadcasts.¹⁸⁴ Copyright would subsist in the photograph itself, rather than the subject matter.¹⁸⁵ Therefore, the only way to infringe the copyright would be to copy the actual photograph. Copyright would simply not subsist in a photograph that reproduced an existing photograph.¹⁸⁶ Extending the analogy, one could assume this proposal would also render any copyright claims in exact photographic reproductions of paintings void as well. Yet despite new suggestions and extensive debate, the skill and labour standard remains a pillar of traditional British copyright law.

V. The Skill and Labour Standard

Justifying copyright in reproductions by the author's skill and labour results in a generous standard. British copyright protects many works that would not, in the United States, be deemed to possess a minimal degree of creativity.¹⁸⁷ Despite *56 this apparent disparity, the British skill and labour standard and the U.S. originality standard may not be so different.

Consider Copinger's statement:

[If an] author can demonstrate he expended some small degree of time, skill and labour in producing the photograph (which may be demonstrated by the exercise of judgment as to such matters as the angle from which to take the photograph, the lighting, the correct film speed, what filter to use, etc.) the photograph ought to be entitled to copyright protection, irrespective of its subject matter.¹⁸⁸ These are the same factors considered by United States courts in *Burrow-Giles and Jewelers' Circular*.¹⁸⁹ A comparison of the reasoning of the U.S. and British courts in *SHL Imaging and Antiquesportfolio.com, Plc.* reveals that both courts rely on the same criteria.¹⁹⁰ Although the British court couches its analysis in terms of the author's skill and labour, each court weighs the same factors to discern whether copyright subsists in a work.¹⁹¹

For courts, evaluating art can prove problematic.¹⁹² The permissiveness of the skill and labour standard could be useful in analyzing works in which the artist's original contributions are not readily apparent. One goal of some realist or post-modernist works, for example, may be to render the author's contribution invisible.¹⁹³ Adopting the skill and labour standard in these situations would allow copyright protection to subsist based on the author's creation of the work, rather than a court's perception of the work's originality.

The skill and labour standard fails because, in the United States, the purpose of copyright is to establish a system that enables authors to create new works for the public to use, not to reward authors for the act of creation, nor to allow authors to unduly restrict older works.¹⁹⁴ While the realist artist pushes the definition of art, he does not push the definition of copyright. He is free to sell his painting that looks precisely like a photograph, just as the Bridgeman Art Library is free to sell a reproduction of a public domain painting. Neither the realist artist *57 nor the Bridgeman Art Library can utilize copyright law to restrict other authors from using the works.

By maintaining the originality standard, copyright law protects original works rather than artistic statements. "Congress . . . protects art reproductions not to promote dissemination of copies but to promote the original contributions that may occur when an art reproduction is made."¹⁹⁵ Put another way, United States copyright law is not interested in what an author contributes to a work, but that an author makes some unique contribution. The Supreme Court followed this ethic in *Feist* by discrediting the sweat of the brow theory.¹⁹⁶ Though it may be protected under the skill and labour standard, a realist painting reflects no unique contribution from the author. A realist painting skillfully conveys a fact, which should remain free for other authors to utilize. Copyright as a system works by rewarding an author for original contributions, but also by maintaining a public domain which is free for all authors to use. False claims of copyright diminish the public domain and harm the system of copyright law.

VI. Controlling Public Access to Public Domain Works

Just as Deazley asserts, the issue at the core of Bridgeman is to what extent museums and art libraries should be able to control access to public domain works and reproductions of those works in their collection.¹⁹⁷ Those who physically visit a museum do so under strict regulations as to the time, place, and manner in which they can view art. As Deazley indicated in his response to Stokes, museums generally no longer permit photography of any kind.¹⁹⁸ This is a simple way to extend the basic physical control over a public domain work, that control which allows an owner to lock the gallery door at the end of the day, into control over the public domain image itself. Although the public is not allowed to create new photographic copies of a public domain work, a museum shop or website will offer reproductions of the image. Garnett is technically correct when he asserts that denying access to the physical copy of a public domain painting is not an abuse of copyright.¹⁹⁹ Copyright no longer subsists in a painting that has fallen into the public domain. If nobody owns those exclusive rights, copyright is not capable of *58 being abused. But preventing others from creating new derivative photographs is an abuse nevertheless.

Preventing others from taking photographs of public domain paintings does a disservice to the system of copyright, which was created to promote the progress of art and to encourage the creation of new works.²⁰⁰ New authors will not be able to use public domain images to create new works if museums keep public domain artwork locked away and claim copyright in the only available reproductions. By restricting access to public domain paintings, museums and art libraries becomes the singular or primary source of a reproduction of a public domain work. Through a claim of copyright in a reproduction, the nature of stewardship over a public domain painting changes from control over when and where the public can view the work (setting the visiting hours at the gallery) to what the public can view and how (becoming the sole providers of all images of the public domain painting).²⁰¹ Thus, museums and art libraries actively stifle the creation of new works, rather than fostering a policy that promotes new art.

This is a consequence of convenience. Copyright law provides a facile and opportune vehicle to control access to all works in a collection. With a blanket copyright statement, museums and art galleries can easily protect their rights in legitimate works. At the same time, those rights are extended, perhaps unintentionally, to works that are not likely able to meet the originality requirement for copyright to subsist. To control reproductions of a public domain work, a museum does not need a valid copyright. It simply needs an effective deterrent. Using copyright as a deterrent allows owners of precise reproductions of public domain paintings the same ability to restrict access to a public domain work as would a valid copyright. It also largely eliminates the need to litigate in order to control these reproductions.

Today, neither museums nor art libraries seem eager to litigate copyright claims against competitors. After the Bridgeman decision, an independently-produced exact reproduction contains nothing original to infringe with. Thus, litigating copyright claims in exact photographic reproductions of public domain art is far from a guaranteed success.

It may be possible, however, for the owner of an uncopyrightable reproduction of a public domain work to successfully litigate based on other legal theories. ***59** Construing a copyright infringement claim as reverse passing off might allow an art library, for example, to sidestep the originality requirement.²⁰² This theory would require proof of actual copying, likelihood of deception, and likelihood of commercial harm.²⁰³ These requirements present their own difficulties, one being how to distinguish between two precise photographic reproductions of the same work in order to prove copying. Also, the commercial harm requirement might imply that an art library would not be able to successfully sue a museum because the two may cater to different markets.²⁰⁴

Museums and art libraries have not yet needed alternative legal theories to protect uncopyrightable photographic reproductions. In a perhaps inadvertent end-run around copyright law as construed in Bridgeman, owners of collections now commonly assert what appear to be invalid copyright claims on uncopyrightable photographic reproductions of public domain paintings. By simply asserting copyright without taking further action, museums and art libraries have found a way to allow access to reproductions while still maintaining extensive control and deterring potential authors from actually using the uncopyrightable images. In so doing they manage to avoid both the ramifications of the Bridgeman decision and charges of copyright misuse. Indeed, they manage to maintain the rights of a copyright owner without having a valid copyright, without having to pursue litigation, and without having to pursue alternate theories of ownership.

An assumption implied in construing the motivation to claim copyright in photographic reproductions of public domain paintings is that the additional control over the photographs creates an opportunity to generate more revenue. This means that museums likely make more money by licensing and selling photographs than they would by selling photographs outright. How much more revenue can be attributed directly to this additional control is unclear. The number of souvenir seekers, however, looking for a photograph of a favorite Monet on a coffee mug probably dwarfs the number of potential licensees.

The situation for art libraries might be markedly different. The Bridgeman Art Library, for example, allows a casual customer to purchase prints online.²⁰⁵ Unlike the Met, the Bridgeman Art Library website only offers photographs of art.²⁰⁶ It does not provide a gift shop, allow visitors to purchase memberships, or ***60** offer an abundance of ways to make a donation.²⁰⁷ This could explain one unavoidable interpretation of Bridgeman: that the Bridgeman Art Library tried to use copyright law to bully Corel out of Bridgeman's expanding market.²⁰⁸ Dealing in reproductions is an art library's only source of income. Thus, the degree of control an art library is able to extend over images in its collection could have a significant impact on the art library's fiscal health.

For many museums, even a slight loss of funding could have dire results. Thus, the motivation driving a museum to maintain as much control as possible over images in its collection may not be greed so much as sheer desperation. A current example of that desperation can be seen in the exclusive deal struck between the Smithsonian Institution and Showtime television.²⁰⁹

After granting Showtime the right of first refusal for all films made using its archives, the publicly financed Smithsonian faced an angry backlash first from researchers and documentary filmmakers, then the Congressional Subcommittee on Interior, Environment, and Related Agencies.²¹⁰ Congress has since responded to the deal with a new bill “limiting the Smithsonian’s ability to execute any contract or legal agreement which could limit public access to the Smithsonian collections.”²¹¹ This same concern with public access to public collections is not reflected in the Smithsonian’s disclosure statement that all images on its website “are copyrighted by the Smithsonian Institution . . .”²¹² This lesser concern may be due to the fact that although museums and art libraries tend to claim copyright in these images, these claims are not commonly enforced.

***61** Recent guides to copyright law written for museums recognize the financial importance of these copyright claims. A guide published in the United States discusses internet marketing, licensing images, and the importance of securing copyright in a derivative work.²¹³ The British version strongly encourages museums to gain control over copyright in reproductions of works in their collections, stating that “for museums to raise income from merchandising, licensing or the commercial ‘development’ of any part of their collections, the museum must quite simply build, somehow, exclusive rights to its collections.”²¹⁴

The emphasis of both guides leads, rightly, to the conclusion that asserting copyright ownership will allow museums greater control of their collections and create lucrative revenue streams. Securing these exclusive rights will create the resources needed to allow museums to safeguard cultural treasures for the public good.²¹⁵ With the exclusive right to copy a work, museums stifle the creation of new derivative works. Yet the revenue generated by the sales will enable the museum to continue protecting the public domain works already in its collection. Thus, museums are both serving the public by preserving this art and harming the public by falsely claiming copyright in public domain images.

Defiance of the Bridgeman decision reveals the fine line between an art library or museum legitimately furthering its mission of cultural preservation and one misusing copyright to dominate a market. Today, art libraries and museums alike assert copyright in photographic reproductions in defiance of the standard legal interpretation of copyrightability. Copyright has become a tool not only to control legitimate rights and secure legitimate revenue, but to restrict public access to public domain works over which the owners of collections have no rightful control. While ostensibly acting on behalf of the public to safeguard cultural heritage, art libraries and museums misuse copyright to restrict access to works that should be available to all.

Footnotes

^{a1} The author would like to thank Hans W. Baade, Sara T. Cameron, and R. Anthony Reese.

¹ See, e.g., Tate Art on Demand, Welcome, <http://tate.artgroup.com/mall/departmentpage.cfm/tate/> (last visited Oct. 1, 2006) (promising “[y]our favourite Tate image . . . printed . . . onto archival quality paper or canvas in a variety of sizes, with a selection of frames - all delivered directly to your door!”).

² Carol Vogel, Three Out of Four Visitors To the Met Never Make It To the Front Door, N.Y. Times, Mar. 29, 2006, at G18.

³ Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999); Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998), reconsidered, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

⁴ The British spelling is used to reflect “skill and labour” as a term of art in British copyright law.

⁵ U.S. Const. art. I, §8, cl. 8.

⁶ Copyright Act of 1976, 17 U.S.C. §102(a) (2000).

⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 5(1), Sept. 28, 1979, available at http://www.wipo.int/clea/docs_new/pdf/en/wo/wo001en.pdf; see also London Film Prods., Ltd. v. Intercontinental Commc'ns, Inc., 580 F. Supp. 47, 50 n.5 (1984) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §12.05 (1982)).

⁸ Ralph E. Lerner & Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists* 1114 (2005). Note also that article 9(1) of the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) requires compliance with the Berne Convention, except for the moral rights provisions. See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §18.06[a][2] (2006).

⁹ See *supra* note 9.

¹⁰ 17 U.S.C. §106 (2000). British copyright endows authors with a similar bundle of rights. See *Copyright, Designs and Patents Act (CDPA)*, 1988, c. 48, §16(1) (Eng).

¹¹ 17 U.S.C. §302(a) (2000); see also CDPA, 1988, c. 48, §12(2). Length of copyright term differs depending both on the type of work and the date of the work's creation. Compare CDPA, 1988, c. 48, §12(7) (specifying a 50-year term for computer-generated works), with CDPA, 1988, c. 48, §12(2) (granting a 70-year term for literary, dramatic, musical or artistic works).

¹² *Cordon Art B.V. v. Walker*, 40 U.S.P.Q.2d (BNA) 1506, 1509 (S.D. Cal. 1996).

¹³ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

¹⁴ See, e.g., *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 74 F. Supp 973 (S.D.N.Y 1947), modified, 191 F.2d 99 (2d Cir. 1951).

¹⁵ 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §2.01[A] (2006).

¹⁶ *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁷ *Id.* at 343.

¹⁸ *Id.*

¹⁹ *Id.* at 343-44.

²⁰ *Id.* at 345.

²¹ *Id.* at 345; see also *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (stating that originality does not require a work to be "strikingly unique or novel").

²² *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²³ *Id.* at 347; see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (finding that 17 U.S.C. §102(b) prohibits copyright protection for facts).

²⁴ Feist, 499 U.S. at 347.

²⁵ Id. at 350.

²⁶ Id. at 363.

²⁷ Id. at 364.

²⁸ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991).

²⁹ Id.

³⁰ Feist, 499 U.S. at 352.

³¹ 17 U.S.C. §101 (2000).

³² Nimmer & Nimmer, *supra* note 16, §2.01[A].

³³ See *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (holding that an image mounted on tile was not recast, transformed, or adapted and thus did not constitute a derivative work); but see *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (finding that an image mounted on tile did create a derivative work).

³⁴ 17 U.S.C. §103(b) (2000). The original, preexisting work, which functions as a foundation for the derivative work, is also referred to as the “underlying work.”

³⁵ *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998), aff'd in part, rev'd on other grounds, 212 F.3d 1210 (11th Cir. 2000).

³⁶ *Leigh v. Warner Bros.*, 212 F.3d 1210, 1212 (11th Cir. 2000).

³⁷ *Leigh*, 10 F. Supp. 2d at 1376-77.

³⁸ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (emphasis added) (citing 1 Nimmer & Nimmer, *supra* note 16, §1.08[C][1]).

³⁹ *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 74 F. Supp 973, 974-76 (S.D.N.Y 1947), modified, 191 F.2d 99 (2d Cir. 1951).

⁴⁰ Id.

⁴¹ Id. at 975.

⁴² Id.

⁴³ *Id.* at 976.

⁴⁴ *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (citing *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927)).

⁴⁵ 536 F.2d 486, 489-90 (2d Cir. 1976).

⁴⁶ *Id.* at 491.

⁴⁷ *Id.* (emphasis in original). Other cases have identified artistic skill, rather than physical or mechanical skill, as required to fulfill the originality requirement. See, e.g., *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909-11 (2d Cir. 1980) (rejecting the contention that the originality requirement can be fulfilled by “physical” rather than “artistic” skill); *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir. 1995) (finding originality only in the manufacturing process not sufficient for copyright). Note, however, that *Durham Indus.* was decided before the Supreme Court overruled the “sweat of the brow” justification for copyright.

⁴⁸ 17 U.S.C. §101 (2000).

⁴⁹ *Id.*

⁵⁰ *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371 (S.D. Ga. 1998), aff’d in part, rev’d on other grounds, 212 F.3d 1210 (11th Cir. 2000).

⁵¹ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* P 6-33 et seq. (1987).

⁵² 111 U.S. 53, 54 (1884).

⁵³ *Id.* at 58.

⁵⁴ *Id.* at 60 (citing *Nottage v. Jackson*, 11 Q.B. Div. 627 (1883)).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 59.

⁵⁸ *Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (D.C.N.Y. 1921), aff’d, 281 F. 83 (2d Cir. 1922).

⁵⁹ See *Pagano v. Chas. Beseler Co.*, 234 F. 963 (D.C.N.Y. 1916) (holding a photograph of the New York Public Library to be original); *Time Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130 (D.C.N.Y. 1968) (finding originality in Zapruder’s film of John F. Kennedy’s assassination due to the photographer’s choice of camera, lens, film, and angle of the shot).

60 1 Nimmer & Nimmer, *supra* note 16, § 2.08[E][2].

61 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

62 1 Nimmer & Nimmer, *supra* note 16, § 2.08[E][2].

63 1 Nimmer & Nimmer, *supra* note 16, § 2.08[E][2].

64 720 F. Supp. 85 (S.D. Tex. 1989).

65 *Id.* at 88.

66 *Id.*

67 Nimmer & Nimmer, *supra* note 16, § 2.08[E][2].

68 212 F. 930 (2d Cir. 1914).

69 *Id.*

70 *Id.* at 931.

71 *Id.* at 932.

72 CDPA, 1988, c. 48, §4(1)(a) (Eng).

73 *Id.* §9(1).

74 Alistair Abbott & Kevin Garnett, Who Is the “Author” of a Photograph, 20(6) *Eur. Intell. Prop. Rev.* 204, 207 (1998) (citing *Ellis v. Marshall & Son*, [1895] 64 L.J.Q.B. 757). For further decisions about photographs with multiple authors in the U.S., see *Lindsay v. R.M.S. Titanic*, 52 U.S.P.Q.2d 1609 (BNA) (S.D.N.Y. 1999). See also *Andrien v. S. Ocean Country Chamber of Commerce*, 927 F.2d 132 (3d Cir. 1991).

75 Carys J. Craig, Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law, 28 *Queen’s L.J.* 1, 9-11 (2002) (citing John Locke, *Second Treatise of Civil Government* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

76 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991). See *supra* Section II(A).

77 *Graves’ Case*, [1868-69] 4 L.R.Q.B. 715, 717.

78 *Id.* at 723.

79 See Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (D.C.N.Y. 1921), aff'd, 281 F. 83 (2d Cir. 1922). .

80 Kevin Garnett, Copyright in Photographs, 22(5) Eur. Intell. Prop. Rev. 229, 231 (2000) (emphasis added).

81 Abbot & Garnett, *supra* note 75, at 209.

82 Abbot & Garnett, *supra* note 75, at 209.

83 Interlego A.G. v. Tyco Indus., Inc., [1989] 1 A.C. 217, 221 (P.C. 1989) (appeal taken from Hong Kong).

84 *Id.* at 258 (citing Macmillan & Co., Ltd. v. Cooper, (1923) 40 T.L.R. 186 (P.C.)).

85 *Id.* at 262-263.

86 *Id.* at 263.

87 [1995] F.S.R. 870, 876 (Q.B.).

88 *Id.*

89 *Id.* at 871 (emphasis added). However, Lord Whitford's speculation in L.B. (Plastics) Ltd., that drawings of a three-dimensional prototype, which itself was neither created from a drawing nor an artistic work, would qualify as original works, could indicate that artistic skill and labour has been an implicit requirement all along. See L.B. (Plastics) Ltd. v. Swish Prods. Ltd., [1979] R.P.C. 551, 568-569 (H.L.).

90 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000).

91 *Id.* This is essentially the same criteria used in Burrow-Giles, Pagano, and Geis, *supra* Section II(C), notes 53-60.

92 See *Leigh v. Warner Bros.*, 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998), aff'd in part, rev'd on other grounds, 212 F.3d 1210 (11th Cir. 2000).

93 SHL Imaging, Inc., 117 F. Supp. 2d at 311.

94 *Id.*

95 [2001] F.S.R. 23, 2000 WL 976010.

96 *Id.* at *354.

97 Id. at *353-54.

98 Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 423-24 (S.D.N.Y. 1998), reconsidered, 36 F. Supp. 2d 191 (S.D.N.Y. 1999). See also The Bridgeman Art Library, <http://www.bridgeman.co.uk> (last visited Oct. 1, 2006).

99 Bridgeman Art Library, 25 F. Supp. 2d at 423-24.

100 Id. at 424.

101 Id.

102 Id. Note how this claim incorporates the concept of “thin” copyright found in *SHL Imaging v. Artisan House, Inc.*, 117 F. Supp. 2d 301 (S.D.N.Y. 2000). Were Bridgeman’s transparencies copyrightable, they would only be protected against exact copying. Any derivative works Corel had authored by taking its own photographs of the public domain paintings would be independently copyrightable and would not infringe Bridgeman’s thin copyright. Thus, Bridgeman charged Corel not with creating its own derivative works, but with copying Bridgeman’s reproductions.

103 Bridgeman Art Library, Ltd., 25 F. Supp. 2d at 425.

104 Id. (citing *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 & n.8 (2d Cir. 1998)).

105 Id. at 425 (citing Restatement (Second) Of Conflict of Laws §222 (1971)).

106 Id. at 426.

107 Id.

108 Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 425 (S.D.N.Y. 1998) (emphasis in original).

109 Id. (citing Melville B. Nimmer and Paul E. Geller, 2-UK International Copyright Law & Practice §2[3][b], at UK-28 (1998)).

110 Id. at #426 (citing *Interlego A.G. v. Tyco Indus., Inc.*, [1989] 1 A.C. 217, 220 (P.C. 1989)(appeal taken from Hong Kong)).

111 Id. Compare this to the reasoning in *Alfred Bell & Co.* where, due to the variations produced by the mezzotint process, the reproductions were indeed copyrightable. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 74 F. Supp 973, 976 (S.D.N.Y 1947), modified, 191 F.2d 99 (2d Cir. 1951). See also *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980).

112 Bridgeman Art Library, Ltd., 25 F. Supp. 2d at 428

113 Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 428 (S.D.N.Y. 1998).

114 Id.

115 Id.

116 Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 192 (S.D.N.Y. 1999). The rehearing came after a post-judgment flurry of activity “occasioned chiefly by the fact that the plaintiff failed competently to address most of the issues raised ... prior to the entry of final judgment.” Id.

117 Id. at 193. Mr. Patry is the author of a treatise on copyright law and a law professor. For more information, visit Mr. Patry’s internet journal at <http://www.williampatry.blogspot.com>.

118 Id. at 195.

119 Id.

120 Id.

121 Id. at 196.

122 Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492); see also *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (stating that the purpose of the originality requirement for derivative works is to ensure sufficient differences between the underlying and derivative work, and avoid harassing infringement claims).

123 36 F. Supp. 2d at 197.

124 Id.

125 Id.

126 Id.

127 Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

128 Id. at 198 (citing Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs*, §3.56 at 238 (2d ed. 1995)).

129 Bridgeman Art Library, Ltd., 36 F. Supp. 2d at 198.

130 Id. at 199.

131 Id. at 198 (citing *Interlego A.G. v. Tyco Indus., Inc.*, [1989] 1 A.C. 217, 262-63 (P.C. 1989)).

132 *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). In fact, a similar situation had come before the New York district courts several years earlier. See *Hearn v. Meyer*, 664 F. Supp. 832 (D.N.Y. 1987) (holding plaintiff’s great expenditure of effort and time reproducing illustrations was not sufficient to find originality).

¹³³ Vogel, *supra* note 3, at G18.

¹³⁴ The Bridgeman Art Library, <http://www.bridgeman.co.uk> (last visited Oct. 1, 2006).

¹³⁵ The Bridgeman Art Library, Bridgeman Education, <http://www.bridgemaneducation.com/default.asp?section=15> (last visited Oct. 1, 2006).

¹³⁶ The Bridgeman Art Library, Bridgeman Art on Demand, <http://www.bridgemanartondemand.com/bridgemanartondemand.htm> (last visited Oct. 1, 2006).

¹³⁷ The Bridgeman Art Library, Creator's Right, <http://www.bridgemanart.com/about/copyright.asp> (last visited Oct. 1, 2006) (emphasis added).

¹³⁸ *Id.*

¹³⁹ See 17 U.S.C. §106 (2000) (granting the owner of a copyright the exclusive rights to reproduce the copyrighted work, distribute copies to the public, or to perform the copyrighted work publicly); CDPA, 1988, ch. 48, §16(1).

¹⁴⁰ Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 198 (S.D.N.Y. 1999).

¹⁴¹ Microsoft, Biography of Bill Gates, <http://www.microsoft.com/billgates/bio.aspx> (last visited Oct. 1, 2006).

¹⁴² Hoover's, Corbis Corporation, <http://www.hoovers.com/corbis/ID43433--free-co-factsheet.xhtml> (last visited Oct. 1, 2006). See also Corbis.com, Images, <http://www.corbis.com/corporate/Overview/Images.asp> (last visited Oct. 1, 2006).

¹⁴³ Columbia-VLA Journal of Law & The Arts Roundtable on Electronic Rights, 20 Colum.-VLA J.L. & Arts 605, 610 n.8 (1996).

¹⁴⁴ Corbis.com, Corbis on Copyright, <http://www.corbis.com/corporate/Photographers/copyright.asp> (last visited Oct. 1, 2006). Ironically, Corbis's presentation of the Bridgeman decision is formatted in a way one can easily recreate by merely copying the online layout of the case from Westlaw.com and pasting it into a text document. For more on the copyrightability of court reporters, see *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674 (2d Cir. 1998); see also *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693 (2d Cir. 1998).

¹⁴⁵ Columbia-VLA Journal of Law & The Arts Roundtable on Electronic Rights, 20 Colum.-VLA J.L. & Arts 605, 640-41 (1996).

¹⁴⁶ Museums Copyright Group, <http://www.museumscopyright.org.uk/index.htm> (last visited Oct. 1, 2006).

¹⁴⁷ Museums Copyright Group, Copyright in Photographs of Works of Art, <http://www.museumscopyright.org.uk/bridge.htm> (last visited Oct. 1, 2006).

¹⁴⁸ *Id.*

¹⁴⁹ The Metropolitan Museum of Art, <http://www.metmuseum.org/home.asp> (last visited Oct. 1, 2006).

¹⁵⁰ The Metropolitan Museum of Art, The Image Library, http://www.metmuseum.org/education/er_photo_lib.asp (last visited Oct. 1, 2006).

¹⁵¹ The Metropolitan Museum of Art, Terms and Conditions, <http://www.metmuseum.org/copyright.htm> (last visited Oct. 1, 2006).

¹⁵² *Id.*

¹⁵³ For instance, reproductions of paintings by Anthony van Dyck (1599-1641) have spent over 300 years in the public domain. See The Getty, Artists: Anthony van Dyck, <http://www.getty.edu/art/gettyguide/artMakerDetails?maker=453> (last visited Oct. 1, 2006).

¹⁵⁴ The Getty, Ordering and Reproducing Images from The Getty's Collections, http://www.getty.edu/legal/image_request.html (last visited Oct. 1, 2006).

¹⁵⁵ 17 U.S.C. §106 (2006).

¹⁵⁶ Vogel, *supra* note 3, at G18.

¹⁵⁷ Kevin Garnett, Copyright in Photographs, 22(5) Eur. Intell. Prop. Rev., 229, 229-37 (2000).

¹⁵⁸ *Id.* at 233, 236.

¹⁵⁹ *Id.* at 236.

¹⁶⁰ *Id.* (citing 117 Walter Arthur Copinger, Copinger and Skone James on Copyright (14th ed. 1999)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Kevin Garnett, Copyright in Photographs, 22(5) Eur. Intell. Prop. Rev., 229, 229-37 (2000).

¹⁶⁴ *Id.* at 229-37.

¹⁶⁵ *Id.* at 237.

¹⁶⁶ *Id.*

¹⁶⁷ Ronan Deazley, Photographing Paintings in the Public Domain: A Response to Garnett, 23(4) Eur. Intell. Prop. Rev., 179, 179-84 (2001).

¹⁶⁸ Id. at 184.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Simon Stokes, *Photographing Paintings in the Public Domain: A Response to Garnett*, 23(7) *Eur. Intell. Prop. Rev.* 354, 354 (2001).

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Ronan Deazley, *Copyright; Originality; Photographs; Works of Art*, 23(12) *Eur. Intell. Prop. Rev.* 601 (2001).

¹⁷⁷ Id. (inviting Mr. Stokes to visit the National Gallery with a camera in hand and observe the custodians' reaction).

¹⁷⁸ Id.

¹⁷⁹ Daniel J. Gervais, *The Compatibility of the Skill and Labour Originality Standard with the Berne Convention and the TRIPs Agreement*, 26(2) *Eur. Intell. Prop. Rev.* 75, 75-80 (2004).

¹⁸⁰ Id. at 78.

¹⁸¹ Id. at 76.

¹⁸² Id. at 80.

¹⁸³ Id.

¹⁸⁴ Richard Arnold, *Copyright in Photographs: A Case for Reform*, 27(9) *Eur. Intell. Prop. Rev.* 303, 303-305 (2005).

¹⁸⁵ Id. at 304.

¹⁸⁶ Id. This echoes Nimmer's concept that copyright will not subsist in photographs that are slavish copies. See *supra* Section II(C).

¹⁸⁷ See, e.g., Simon Stokes, *Art and Copyright* 40-42 (2001) (arguing both that the means of reproduction can decide copyrightability

and that a change in medium imparts a significantly different quality and character to an image).

¹⁸⁸ Walter Arthur Copinger, *Copinger and Skone James on Copyright* 118 (14th ed. 1999).

¹⁸⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (D.C.N.Y. 1921), aff'd. 281 F. 83 (2d Cir. 1922).

¹⁹⁰ See *supra* Section II(E).

¹⁹¹ See *supra* Section II(E).

¹⁹² See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (stating 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").

¹⁹³ See Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 *Cardozo Arts & Ent. L.J.* 1 (1992).

¹⁹⁴ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (presenting arguments against extending copyright term from fifty to seventy years after the author's death).

¹⁹⁵ Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*, 21 *Hastings Comm. & Ent. L.J.* 55, 126 (1998).

¹⁹⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

¹⁹⁷ See *supra* Section IV(C).

¹⁹⁸ See Deazley, *supra* note 168; see also Whitney Museum of American Art, Statement of Rights and Reproductions, <http://www.whitney.org/www/information/FAQ.jsp#rights> (last visited Oct. 1, 2006).

¹⁹⁹ Garnett, *supra* note 164.

²⁰⁰ U.S. Const., art. I, §8, cl. 8.

²⁰¹ Certainly a museum has a more overt duty of stewardship than does a for-profit art library. Compare Supporting the Louvre/Musée du Louvre, http://www.louvre.fr/11v/common/home_flash.jsp (follow "English"; follow "Help" hyperlink; then follow "FAQ: Complete List" hyperlink) (last visited Oct. 1, 2006) ("On a larger scale, the Louvre's mission is to transmit some of mankind's greatest masterpieces to future generations.") with Corbis, Fact Sheet, http://www.corbis.com/corporate/pressroom/PDF/Corbis_Fact_Sheet.pdf (last visited Oct. 1, 2006) ("Corbis enables creative innovation for advertising, corporate marketing and editorial clients.").

²⁰² See Restatement (Third) of Unfair Competition §5 (1995) (One is subject to liability by causing the mistaken belief that the actor created goods produced by another if the representation is to the likely commercial detriment of the other).

203 See *id.* § 5 cmt. a-b.

204 It follows that the Bridgeman Art Library would have a difficult time proving that Corel's reproductions on CD-ROM could harm the market for high-resolution transparencies.

205 Bridgeman Art on Demand, <http://www.bridgemanartondemand.com/bridgemanartondemand.htm> (last visited Oct. 1, 2006).

206 *Id.*

207 See The Metropolitan Museum of Art: Ways to Give, http://www.metmuseum.org/Ways_to_Give/index.asp?HomePageLink=support_r (last visited Oct. 1, 2006)

208 Because British law recognizes valid copyright in works that entailed skill and labour, this could have been bullying in good faith. But it was bullying nonetheless.

209 Showtime is a group of subscription television networks owned by the CBS Corporation. See Hoovers, Showtime Networks Inc., http://www.hoovers.com/showtime/--ID__104060--/free-co-factsheet.xhtml (last visited Oct. 1, 2006).

210 Edward Wyatt, Smithsonian Agreement Angers Filmmakers, *N.Y. Times*, Apr. 1, 2006 at B9; Letter from Norman D. Dicks and Charles Taylor, Subcommittee on Interior, Environment, and Related Agencies, Congress of the United States, to The Honorable Lawrence Small, Secretary, Smithsonian Institute (April 27, 2006), [http://www.americanprogress.org/atf/cf/\[E9245FE4-9A2B-43C7-A521-D6FF2E06E03\]/DEAR_secretary.pdf](http://www.americanprogress.org/atf/cf/[E9245FE4-9A2B-43C7-A521-D6FF2E06E03]/DEAR_secretary.pdf) (last visited Oct. 1, 2006). One would certainly expect this critical response to an exclusive deal between the publicly funded Smithsonian archive and a private corporation. We can therefore construe this as a deal born from the desperation of an under-funded museum, rather than considering ulterior motives.

211 Press Release, The U.S. House of Representatives Committee on Appropriations, Highlights of the FY107 Interior and Environment Appropriations Bill (May 4, 2006), http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=597 (last visited Oct. 1, 2006).

212 The Smithsonian Institution, Smithsonian Institution Disclosure Statement (Oct. 26, 2004), http://www.nmnh.si.edu/paleo/si_disclosure.doc (last visited Oct. 1, 2006).

213 Michael S. Shapiro & Brett I. Miller, *A Museum Guide to Copyright and Trademark* 123 (Christine Steine, ed., American Association of Museums 1999).

214 Peter Wienard, Anna Booy & Robin Fry, *A Guide to Copyright for Museums and Galleries* 52 (Routledge 2000).

215 *Id.*