COPYFRAUD

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Copyfraud is everywhere. False copyright notices appear on modern reprints of Shakespeare's plays, Beethoven's piano scores, greeting card versions of Monet's Water Lilies, *and even the U.S. Constitution. Archives claim blanket copyright in everything in their collections. Vendors of microfilmed versions of historical newspapers assert copyright ownership. These false copyright claims, which are often accompanied by threatened litigation for reproducing a work without the "owner's" permission, result in users seeking licenses and paying fees to reproduce works that are free for everyone to use.*

Copyright law itself creates strong incentives for copyfraud. The Copyright Act provides for no civil penalty for falsely claiming ownership of public domain materials. There is also no remedy under the Act for individuals who wrongly refrain from legal copying or who make payment for permission to copy something they are in fact entitled to use for free. While falsely claiming copyright is technically a criminal offense under the Act, prosecutions are extremely rare. These circumstances have produced fraud on an untold scale, with millions of works in the public domain deemed copyrighted, and countless dollars paid out every year in licensing fees to make copies that could be made for free. Copyfraud stifles valid forms of reproduction and undermines free speech.

Congress should amend the Copyright Act to allow private parties to bring civil causes of action for false copyright claims. Courts should extend the availability of the copyright misuse defense to prevent copyright owners from enforcing an otherwise valid copyright if they have engaged in past copyfraud. In addition, Congress should further protect the public domain by creating a national registry listing public domain works and a symbol to designate those works. Failing a congressional response, there may exist remedies under state law and through the efforts of private parties to achieve these ends.

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INTRODUCTION

Copyright, commentators say, lasts too long.[1] Congress has steadily increased the duration of copyright protection, from an original period in 1790 of fourteen years plus a one-time renewal,[2] to a period today of seventy years following the author's death.[3] Critics contend that keeping works out of the public domain for long periods stifles creativity[4] and that modern copyright term extensions, particu-

[1] *See generally* Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?,"* 52 FLA. L. REV. 989 (2000) (arguing against retroactively extending copyright terms); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996) (arguing that duration of copyright protection is too generous); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001) (arguing that extending copyright terms violates Framers' intent that copyrights have limited term); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000) (arguing that Congress has limited power to protect intellectual property that it exceeded when it extended copyright protection via 1998 Extension Act).

[2] Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802) (providing for initial term of fourteen years from date of publication, renewable for additional fourteen years if author survived first term).

[3] Copyright Act of 1976, 17 U.S.C. § 302(a) (2000). The seventy-year period applies to works created on or after January 1, 1978. *Id.*

[4] Leslie A. Kurtz, *The Methuselah Factor: When Characters Outlive Their Copyrights*, 11 U. MIAMI ENT. & SPORTS L. REV. 437, 440 (1994) (arguing that keeping works out of public domain risks "clogging the channels of creativity and commerce and curtailing the ability of new authors to pursue their own works"); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 465–66 (2003) (arguing that creativity depends on existence of robust public domain); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1205 (1996) ("Any copyright protection beyond that necessary to compensate the author for lost opportunities would generate no additional

larly when applied retroactively, are inconsistent with Congress's constitutional authorization to "secur[e] for *limited* Times to Authors . . . the exclusive Right to their respective Writings."[5] These often-repeated critiques may have merit, but a more pervasive and serious threat to a robust public domain has largely gone unnoticed: copyfraud.[6]

Copyfraud, as the term is used in this Article, refers to claiming falsely a copyright in a public domain work. These false copyright claims, which are often accompanied by threatened litigation for reproducing a work without the putative "owner's" permission, result in users seeking licenses and paying fees to reproduce works that are free for everyone to use, or altering their creative projects to excise the uncopyrighted material. A stunning example: A pocket version of the Constitution popular among law students contains a copyright notice, along with the admonition that "[n]o part of this publication may be reproduced or transmitted in any form or by any means . . . without permission in writing from the publisher."[7] Whatever the Constitution's framers and ratifiers had in mind when they authorized Congress to create copyright law, they surely did not expect that somebody would one day claim a copyright in the Constitution itself.

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incentive to create and would discourage production of additional copies even when the cost of producing those copies was less than the price consumers would be willing to pay.").

[5] U.S. CONST. art. I, § 8 (emphasis added). The Supreme Court rejected this argument in upholding the 1998 Copyright Term Extension Act, which extended copyright protection by twenty years. Eldred v. Ashcroft, 537 U.S. 186, 208 (2003). *See* Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), (d), 112 Stat. 2827, 2827–28 (codified as amended at 17 U.S.C. §§ 302, 304 (2000)).

[6] The problem has not been entirely ignored. *See* STEPHEN FISHMAN, THE PUBLIC DOMAIN: HOW TO FIND & USE COPYRIGHT-FREE WRITINGS, MUSIC, ART & MORE 2/9, 3/52–54 (2d ed. 2004) (deploring "spurious copyright claims in public domain materials" and "misuse of copyright notices"); 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 (1998) (discussing copyright claims in photographic and digital reproductions of public domain art); Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259 (1994) [hereinafter Heald, *Payment Demands*] (discussing copyright claims to public domain materials and possibility of breach of warranty, unjust enrichment, fraud, and false advertising actions to respond to problem); Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 255–58 (1996) [hereinafter Heald, *Reviving the Rhetoric*] (discussing spurious claims to copyright in musical arrangements).

[7] TERRY L. JORDAN, THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 2 (7th ed. 1999). Other versions of the Constitution also carry copyright notices. *See, e.g.*, THE CONSTITUTION OF THE UNITED STATES: AN INTRODUCTION (New America 1999) (asserting 1999 copyright held by Floyd G. Cullop).

This case is hardly isolated. False assertions of copyright are everywhere. In general, copyright belongs to the author of a published work and expires seventy years after the author's death.[8] Yet copyright notices appear on modern reprints of Shakespeare's plays, on Beethoven's piano scores, and on greeting card versions of Monet's *Water Lilies*. Archives claim blanket copyright in everything in their collections, including historical works as to which copyright, which likely never belonged to the archive in the first place, has long expired. The publishers of school textbooks do not explain that their copyright notices apply only to the authors' own words and original arrangements and not to the books' reproduction of the Declaration of Independence, the Gettysburg Address, Supreme Court cases, or *George Washington Crossing the Delaware*. Corporate websites include blanket copyright notices even when they feature the U.S. flag, list stock reports, contain a calendar, or rely on other materials squarely in the public domain. Following several high-profile lawsuits,[9] many universities now pay licensing fees for virtually everything they reproduce and distribute to their students, whether warranted by copyright law or not.

Copyright law suffers from a basic defect: The law's strong protections for copyrights are not balanced by explicit protections for the public domain. Accordingly, copyright law itself creates strong incentives for copyfraud. The limited penalties for copyfraud under the Copyright Act, coupled with weak enforcement of these provisions, give publishers an incentive to claim ownership, however spurious, in everything. Although falsely claiming copyright is technically a crim-

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[8] This Article is limited to U.S. copyright law. As a result of the Berne Convention there are some basic similarities in copyright law throughout much of the world. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised at Paris on* July 24, 1971, 1161 U.N.T.S. 30; Berne Convention Implementation Act of 1988, Pub. L. 100-568, §§ 2–3, 102 Stat. 2853, 2853 (codified as amended in scattered sections of 17 U.S.C.) *See generally* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1888–1986 (1987) (discussing history and current operation of Berne Convention). However, specific nations' copyright laws vary, and a work in the public domain according to U.S. law might be protected under the law of another country. *See generally* INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller ed., 2005) (providing overview of international copyright laws and country-specific practices).

[9] *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1387 (6th Cir. 1996) (rejecting fair use defense and finding copyright infringements when commercial copying service compiled and sold course packets to students at University of Michigan containing large portions of copyrighted works); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (rejecting fair use defense and finding copyright infringement by Kinko's in preparing course packets for students at New York schools).

inal offense under the Act,[10] prosecutions are extremely rare.[11] Moreover, the Copyright Act provides no civil penalty for claiming copyrights in public domain materials. There is also no remedy under the Act for individuals who, as a result of false copyright notices, refrain from legitimate copying or who make payment for permission to copy something they are in fact entitled to use for free.[12] The U.S. Copyright Office registers copyrighted works, but there is no official registry for works belonging to the public.[13] As a result, publishers and the owners of physical copies of works plaster copyright notices on everything. These publishers and owners also restrict copying and extract payment from individuals who do not know better or find it preferable not to risk a lawsuit. These circumstances have produced fraud on an untold scale, with millions of works in the public domain deemed copyrighted and countless dollars paid out every year in licensing fees to make copies that could be made for free. Imprecise standards governing de minimis copying and fair use exacerbate copyfraud by deterring even limited reproduction of works marked as copyrighted.

Copyfraud has serious consequences. In addition to enriching publishers who assert false copyright claims at the expense of legitimate users, copyfraud stifles valid forms of reproduction and creativity and undermines free speech. Copyright is a limited exception to the Constitution's strong commitment to free expression. By extending control over writings and other works beyond what the law provides, copyfraud upsets the constitutional balance and undermines First Amendment values.

Efforts to protect and enhance the public domain have focused on limiting the scope and duration of copyright.[14] This Article offers

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[10] 17 U.S.C. § 506(c) (2000). *See also infra* notes 48–49 and accompanying text.

[11] From 1999 to 2002, there were just eight prosecutions under this provision. *See infra* notes 56–57 and accompanying text.

[12] *See infra* Part I.A.

[13] *See* United States Copyright Office, http://www.copyright.gov (last visited Mar. 29, 2006).

[14] "Free the Mouse" (a reference to Disney's copyright on Mickey Mouse) became the slogan for these efforts in the context of the challenge to the Copyright Term Extension Act in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). *See* Eldred v. Ashcroft, http://eldred.cc/eldredvashcroft.html (last visited Jan. 20, 2006) (online collection of material related to *Eldred* case); *Face Value: Free Mickey Mouse*, ECONOMIST, Oct. 12, 2002, at 67 (describing efforts of Professor Lawrence Lessig, petitioners' counsel in *Eldred*). There is a vast academic literature arguing in favor of reducing the current scope and duration of copyright protection. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267–68 (2002) (arguing that effect of digital technology on cost of distributing content reduces need for copyright protection); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003) (presenting case for initial period of

an alternative approach. Instead of changing copyright law by reducing the rights of creators, this Article urges the development of mechanisms to keep those rights within their designated limits. A robust public domain can emerge by respecting and enforcing the copyright limits Congress has already set.

Part I examines the problem of copyfraud and traces the causes and effects of the problem. Part II proposes two principal ways to remedy copyfraud. First, Congress should amend the Copyright Act to make false claims to copyright actionable. The Copyright Act should allow individuals injured by copyfraud to collect damages from publishers that make false copyright claims. The Act should also reward copyright bounty hunters who track down copyfraud and bring its perpetrators to justice. To avoid liability, publishers should be required to specify clearly which portions of a book or other work are protected and which are not. Publishers who use the blanket © should do so at their own peril. Second, courts should extend the availability of the copyright misuse defense to prevent copyright owners from enforcing an otherwise valid copyright if they have engaged in copyfraud. Finally, Part II also explores supplemental remedies for copyfraud beyond the terms and enforcement of the Copyright Act. Congress should enhance protection for the public domain with the creation of a national registry listing public domain works and a symbol to designate those works. Further remedies may exist under state law and through the efforts of private parties.

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protection of twenty years followed by indefinite renewals for which fee would be charged); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002) (arguing that scope of fair use should be greater for older works); Gerard N. Magliocca, *From Ashes to Fire: Trademark and Copyright in Transition*, 82 N.C. L. REV. 1009, 1044 (2004) (arguing that "the protection of the 1976 Copyright Act was a sound baseline"); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 923–30 (1997) (critiquing copyright extensions); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 489 (2004) (arguing that because "[t]he majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted," copyright protection should require compliance with greater formalities); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1244 (1998) (rejecting as "scarcely credible" argument that modern extended copyright terms will impact decisions of authors and publishers); *see also* Creative Commons, http://creativecommons.org (last visited Jan. 20, 2006) (offering licensing system by which creators can make available their works with fewer restrictions than under copyright law).

I
COPYRIGHTS AND WRONGS

A. *The Copyright Imbalance*

A basic defect of modern copyright law is that strong statutory protections for copyright are not balanced with equally strong protections for the public domain. As discussed in this section, copyright law provides authors with broadly available and long-lasting exclusive rights. These rights are backed by severe penalties for infringement, and, in addition to private enforcement, copyright is protected by federal governmental agencies. By contrast, there are very few protections for the public domain.

Article I of the Constitution grants Congress the power "[t]o 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."[15] Congress enacted the first copyright statute in 1790.[16] Today, the governing statute is the Copyright Act of 1976, which took effect on January 1, 1978.[17] By granting monopolistic rights to authors, copyright has always had an uneasy relationship with the First Amendment,[18] though courts have not been keen to recognize it.[19] The Constitution strikes a delicate balance between

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[15] U.S. CONST. art. I, § 8.

[16] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[17] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

[18] *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 892 (2002) (because "copyright grants its holder the power to stop other people . . . from saying certain things or distributing certain messages[,] . . . [a] legislative grant of this private power . . . is in overt tension with the constitutional guarantees of speech and press freedom"). Scholars have approached this tension in various ways. *See, e.g.*, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 987–88 (1970) (proposing accommodative principles to resolve conflicts between copyright and free speech); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 59–67 (2001) (advocating strong First Amendment scrutiny of copyright); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1193–1200 (1970) (discussing limited instances when free speech should trump copyright); William W. Van Alstyne, *Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review*, 66 LAW & CONTEMP. PROBS. 225, 238 (2003) ("[A]ny feature of any portion of any act Congress has . . . provide[d] under sanction of [the copyright] clause, may always be brought into question respecting whether . . . it offends against the . . . First Amendment"); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 740 (1992) (advocating that "we . . . start . . . from the other end . . . with the question, what room is left for private property rights after we have attended to the claims of free speech?").

[19] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the

supporting authorship and suppressing speech by permitting copyrights only for "limited Times." Once the copyright expires, the work falls into the public domain, where anybody is free to use it.

The Copyright Act, which preempts state law,[20] provides copyright protection to "authors"[21] for any "original work[ ] of authorship fixed in any tangible medium of expression."[22] The scope of copyrightable works is therefore very broad: The Act lists literary, musical, dramatic, and other kinds of works that can be copyrighted.[23] Copyright exists at the moment of creation: Doing away with the requirement of the 1909 Act for publication with notice or registration,[24] the 1976 Act provides protection as soon as the work is fixed in a tangible form.[25] While in theory the Act requires that a copyright owner deposit with the Library of Congress two copies of any work published in the United States, compliance is not a condition to securing copyright protection.[26] The Copyright Act specifies the symbol © as the mark denoting copyright,[27] but an author need not

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Framers' view, copyright's limited monopolies are compatible with free speech principles."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (explaining that First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas").

20 *Id.*

21 *Id.* § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

22 *Id.* § 102(a).

23 *Id.*

24 Act of Mar. 4, 1909, ch. 320, §§ 9, 12, 19–21, 35 Stat. 1075, 1077–80.

25 *See* 17 U.S.C. § 408 (2000) (allowing copyright of unpublished works). The Act specifies that a work is "fixed" when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* § 101.

Though registration is not required to secure copyright, registration is required before commencing an infringement action. *Id.* § 411(a). (The registration requirement does not apply to claims under the Visual Artists Rights Act. *Id.*) Registration is also prima facie evidence of copyright ownership. *Id.* § 410(c). A defendant who demonstrates that the registration was obtained by fraud on the Copyright Office can rebut the evidentiary nature of the registration. *See, e.g.*, Whimsicality, Inc. v. Rubie's Costume Co., 891 F.2d 452, 456 (2d Cir. 1989) (explaining that defendant must show that plaintiff knowingly misrepresented or omitted material facts on registration application which might have occasioned rejection of application); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 828 (11th Cir. 1982) (noting that element of scienter is required to deny copyright based on omission or misrepresentation in copyright application). Timely registration allows for the recovery of statutory damages. 17 U.S.C. § 412. If registration is made within three months of publication or prior to an infringement, the copyright owner may recover statutory damages and attorney's fees; without such registration, only actual damages and a defendant's profits are recoverable. *Id.*; *see also infra* notes 39–40 and accompanying text (discussing statutory damages and attorneys' fees).

26 17 U.S.C. § 407(a).

27 *Id.* § 401(b).

attach any notice to a work—the only effect of a missing notice is that a defendant may be able to assert innocent infringement as a basis for reducing statutory damages.[28]

In addition, the Copyright Act assigns the copyright owner various exclusive rights, including the right to reproduce the work, to make derivative works, to make and sell copies of the work, and to perform and display the work publicly.[29] The author may transfer ownership of the copyright, in whole or in part, by written agreement; a copyright can also be bequeathed by will or pass as personal property under state laws of intestate succession.[30] Further, the specific rights comprised in a copyright, and portions thereof, can be individually transferred and owned separately.[31]

To the benefit of authors, Congress has taken a liberal view of its constitutional power to afford protection for "limited Times." In the very first copyright statute, the period of copyright lasted just fourteen years, renewable for an additional fourteen years.[32] As a result of the amendments to the 1976 Act made by the Copyright Term Extension Act of 1998,[33] copyright in works created on or after January 1, 1978 now lasts for the life of the author plus seventy years.[34]

Remedies for infringement of copyright[35] are severe. A copyright owner can seek injunctive relief;[36] impounding and disposition of infringing articles;[37] actual damages and profits earned by the infringing party, or statutory damages up to $30,000 per work, or $150,000 per work in the case of willful infringement;[38] and, at the discretion of a court, reasonable costs and attorneys' fees.[39] In addition to these civil remedies, section 506(a) of the Copyright Act contains a criminal infringement provision.[40] As a result of the 1982

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28 *Id.* § 401(d).

29 *Id.* § 106.

30 *Id.* § 201(d)(1).

31 *Id.* § 201(d)(2).

32 Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124.

33 Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (extending copyright protections by twenty years); *see* Eldred v. Ashcroft, 537 U.S. 186, 221–22 (2003) (holding that Congress could apply extension retroactively).

34 17 U.S.C. § 302(a) (2000); *see also infra* note 65 (discussing copyright term under various conditions).

35 *See id.* § 501 (describing conduct that constitutes actionable infringement).

36 *Id.* § 502.

37 *Id.* § 503.

38 *Id.* § 504.

39 *Id.* § 505.

40 *Id.* § 506(a) (specifying that "[a]ny person who infringes a copyright willfully either—(1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or distribution [of copyrighted works], which have a total retail value of more than $1,000, shall be punished as provided under [18 U.S.C. § 2319]").

Piracy and Counterfeiting Amendments Act (passed to deal with large-scale infringement of movies and records),[41] and the Copyright Felony Act of 1992,[42] violations of section 506(a) can trigger prison time and other substantial penalties.[43] Further, section 506(d) criminalizes fraudulent removal of copyright notices from works.[44] In addition to the Copyright Act, other federal statutes provide civil and criminal remedies for specific kinds of copyright violations.[45]

Finally, a variety of federal agencies and personnel are charged with protecting copyrights, including the FBI, the U.S. Attorneys and their Computer Hacking and Intellectual Property (CHIP) prosecution units, the Bureau of Customs and Border Protection, and the Computer Crime and Intellectual Property Section (CCIPS) of the Department of Justice.[46] In sum, copyright owners enjoy broad and easily obtained statutory protections, access to substantial remedies for infringements, and federal personnel to safeguard their property interests.

By contrast, there exist few specific statutory provisions explicitly protecting the public domain. Congress has enumerated the rights of copyright holders but has left protections for the public domain largely dependent upon holders respecting the limits on those enumerated rights. The Copyright Act provides no civil remedy against

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[41] Pub. L. No. 97-180, 96 Stat. 91 (1982) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.).

[42] Pub. L. No. 102-561, 106 Stat. 4233 (1992) (providing for prison sentences of one, five, and ten years) (codified as amended at 18 U.S.C. § 2319 (2000)).

[43] 18 U.S.C. § 2319 imposes criminal penalties, including imprisonment for up to ten years for repeat offenders making ten or more illegal copies with a value of more than $2500.

[44] 17 U.S.C. § 506(d) (2000) ("Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.").

[45] *See* 17 U.S.C. §§ 1201, 1204 (2000) (criminal penalties for circumventing anti-piracy protections contained in software and for making, selling, or distributing code-cracking devices used to copy software illegally); 18 U.S.C. § 1961(1)(B) (2000) (making counterfeiting and criminal infringement of copyright predicate RICO offenses); 18 U.S.C. § 2318 (2000) (making punishable by fines and up to five years imprisonment these acts: trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audio visual works, and trafficking in counterfeit computer program documentation or packaging); 18 U.S.C. § 2319A (2000) (prohibiting unauthorized fixation of and trafficking in sound recordings and music videos with fines and up to five years imprisonment for first-time offenders and ten years imprisonment for repeat offenders); 47 U.S.C. § 553 (2000) (prohibiting unauthorized reception of cable services with maximum penalty of six months imprisonment and $1000 fine for individual use, two years imprisonment and $50,000 fine for commercial gain, and five years imprisonment and $100,000 fine for repeat offenders).

[46] *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 205800, SPECIAL REPORT, INTELLECTUAL PROPERTY THEFT, 2002, at 2–4 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipt02.pdf.

publishers who improperly claim copyright over materials that are part of the public domain. A federal Copyright Office registers copyrighted works,[47] but there exists no federally supported Public Domain Office to catalog publicly owned materials. While the © designates what is copyrighted, there is no corresponding mark to indicate public domain works.

Just two provisions of the Copyright Act deal in any manner at all with improper assertions of ownership to public domain materials. Section 506(c) criminalizes fraudulent uses of copyright notices:

> Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.[48]

Section 506(e) also punishes, by the same amount, "knowingly mak[ing] a false representation of a material fact in the application for copyright registration."[49]

Yet these criminal provisions are all bark and no bite. In requiring knowledge and intent, the provisions impose a higher level of proof than is needed to show copyright infringement in a civil action. In addition, false assertions of copyright carry much smaller penalties than those available for copyright infringement. Most seriously—and in contrast to the general pattern of copyright law—the provisions do not create a private cause of action.[50] Left to the government, these provisions are almost never enforced.

During 2002, the most recent year for which comprehensive statistics are available, 2084 civil copyright cases were filed in district courts in the United States.[51] By contrast, only 210 matters with copyright violations as the lead charge were referred to the U.S. Attorney.[52] Of those referrals, the overwhelming majority (138 referrals) involved copyright infringement under section 506(a).[53] The

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[47] *See* United States Copyright Office, http://www.copyright.gov (last visited Mar. 22, 2006); *see also supra* note 25 (setting out benefits of registration).

[48] 17 U.S.C. § 506(c) (2000).

[49] *Id.* § 506(e).

[50] *See, e.g.*, Evans v. Cont'l Homes, Inc., 785 F.2d 897, 912–13 (11th Cir. 1986) (finding no private cause of action under section 506).

[51] MOTIVANS, *supra* note 46, at 8. Of course, most cases do not go to trial. Of the 1889 civil copyright cases disposed of by district courts in 2002, just 1.5% resulted in a judgment following a trial. Most cases (77.6%) were dismissed, largely as a result of settlement (42.3%) or voluntary dismissal (19.1%). Remaining cases were either dismissed in a pretrial ruling or on a motion that resulted in a final judgment. *Id.* at 8 tbl.8.

[52] *Id.* at 4 tbl.2.

[53] *Id.*

other referrals involved counterfeiting labels of copyrighted items (thirteen referrals); bootlegging musical performances (five referrals); violations of the DMCA (five referrals); and cable or satellite television piracy (forty-nine referrals).[54] Actual prosecution is of course lower than referral figures.[55] Not a single defendant in 2002 was referred to the U.S. Attorney's office—and so nobody at all was prosecuted—for fraudulent uses of a copyright notice under section 506(c) or for making false representations in registering a copyright under 506(e).[56] Prior years show a similar pattern of nonenforcement, with rare section 506(c) or 506(e) prosecutions and convictions.[57]

Finally, no federal agency is specially charged with safeguarding the public domain. There is no Public Domain Infringement Unit of the FBI and no Copyright Abuse Section in the Department of Justice. Protecting the public domain is the work of the government, but no one in government is specially charged with the task.

To summarize, federal copyright law provides strong protections for works that fall within the scope of the Copyright Act, but the law only very weakly safeguards the public's interest in accessing and using works that are not copyrighted or copyrightable. On the one hand, the Act specifies in detail the kinds of works that are protected and for how long; creates protection even without registration or notice; assigns exclusive rights and allows for transfer and division of

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[54] *Id.*

[55] The 405 total cases involving intellectual property matters referred to the U.S. Attorney (including 210 copyright cases) led to just 182 suspects being prosecuted. *Id.* There were only seven prosecutions for copyright infringement in 2002. *See* Fed. Justice Statistics Res. Ctr., Bureau of Justice Statistics, U.S. Dep't of Justice, Dataset: Defendants in Criminal Cases Filed in U.S. District Court, Fiscal Year 2002, http://fjsrc.urban.org (follow "Statistics by U.S. Code Title and Section" hyperlink; then search by "Number of defendants in cases filed," "2002," "title and section within U.S.C.," and "17 - copyrights") (last visited Feb. 3, 2006) (reporting two prosecutions under 17 U.S.C. § 102 and five prosecutions under 17 U.S.C. § 506(a)).

[56] *See* MOTIVANS, *supra* note 46, at 4 tbl.2.

[57] *See* Fed. Justice Statistics Res. Ctr., Bureau of Justice Statistics, U.S. Dep't of Justice, Dataset: Defendants in Criminal Cases Terminating in U.S. District Court, Fiscal Year 2002, http://fjsrc.urban.org (follow "Statistics by U.S. Code Title and Section" hyperlink; then search by dataset, year, and U.S.C. section) (last visited Feb. 3, 2006) (four cases under 17 U.S.C. § 506(c); no cases under § 506(e)); Dataset: Defendants in Criminal Cases Filed in U.S. District Court, Fiscal Year 2001 (two cases under 506(c); no cases under 506(e)); Dataset: Defendants in Criminal Cases Terminating in U.S. District Court, Fiscal Year 2001 (two cases under 506(c); no cases under 506(e)); Dataset: Defendants in Criminal Cases Filed in U.S. District Court, Fiscal Year 2000 (no cases under 506(c) or (e)); Dataset: Defendants in Criminal Cases Terminating in U.S. District Court, Fiscal Year 2000 (one case under 506(c); two cases under 506(e)); Dataset: Defendants in Criminal Cases Filed in U.S. District Court, Fiscal Year 1999 (no cases under 506(c) or (e)); Dataset: Defendants in Criminal Cases Terminating in U.S. District Court, Fiscal Year 1999 (one case under 506(c); no cases under 506(e)). The figures for cases filed and terminating in a single year do not match because some cases filed in one year terminated in a later year.

ownership and rights; and creates various remedies including damages and fines. Other federal criminal statutes also protect copyrighted works, and federal agencies investigate and prosecute offenders. On the other hand, only two rarely enforced criminal provisions of the Copyright Act address false claims to copyright ownership. There exists no civil cause of action under the Act to deal with false assertions of copyright. Protecting the public domain is not specifically the province of any federal agency.

The end result is that copyright law creates an irresistible urge for publishers to claim ownership, however spurious, in everything. Facing no threat of civil action under the Copyright Act for copyfraud, and little risk of criminal penalty, publishers are free to put copyright notices on everything and to assert the strongest possible claims to ownership. Like a for-sale sign attached to the Brooklyn Bridge,[58] the upside to attaching a false copyright notice is potentially huge—some naïve soul might actually pay up. The only downside is that the false copyright notice will be ignored when savvy individuals understand the legal rules and call the publisher's bluff. Under these conditions, a publisher would be crazy *not* to try to sell off pieces of the public domain. Indeed, that is exactly what many publishers have done.

B. Selling the Brooklyn Bridge: Varieties of Copyfraud

This section considers some common examples of copyfraud. It explores first how contemporary publishers routinely attach false copyright notices to books and other materials that republish public domain works. The discussion also considers how publishers' restrictions on de minimis copying and fair uses of legitimately copyrighted works exacerbate copyfraud. The section then turns to the problem of archives asserting copyright ownership to public domain materials in their collections.

1. Public Domain Republications

Two basic features of copyright law are that (1) copyright belongs to the creator of an original work, and (2) copyright protection is limited in duration. Copyright notices appear today, however, on virtually everything that is published—whether or not there exists a legitimate claim to copyright ownership.

In order to receive copyright protection, a work must be the author's own creation, displaying some "minimal degree of crea-

[58] Thanks to Sam Murumba for suggesting the analogy.

tivity."[59] Mere exertion—"sweat of the brow"—does not a copyright confer.[60] Accordingly, for compilations and derivative works, a copyright "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."[61] Hence, any copyright in a work that compiles or is derivative of preexisting work "does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."[62]

The term of copyright protection is limited, and once it expires the work falls into the public domain. Section 302 of the Copyright Act provides that for works created on or after January 1, 1978, copyright lasts for a period of seventy years following the author's death.[63] The duration of copyright protection for pre-1978 works is more complicated; other authors have usefully summarized the various rules.[64]

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[59] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (rejecting copyright claim over telephone directory that merely compiled uncopyrightable names, towns, and telephone numbers).

[60] *Id.* at 359–60.

[61] 17 U.S.C. § 103(b) (2000).

[62] *Id.*

[63] 17 U.S.C § 302. For works with multiple authors, the term is seventy years after the death of the last surviving author. *Id.* § 302(a). If the date of the author's death is unknown, the copyright lasts for 120 years from the date of creation or ninety-five years from the date of first publication, whichever is earlier. *Id.* § 302(e). For anonymous works, pseudonymous works, and works made for hire, the copyright also lasts for 120 years from the earlier of the date of creation and ninety-five years from the date of first publication. *Id.* § 302(c). Note that for purposes of copyright protection, a work is published when the copyright owner makes the work available to the general public. *See* Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214–17 (11th Cir. 1999) (holding that oral delivery of speech by Martin Luther King did not constitute publication for copyright purposes, and discussing standards for publication and collecting cases). With respect to works of art created after 1977, mere display of the work is not publication—a change from the preexisting law—but publication occurs if the general public can obtain a copy of the art or the work itself, for example if the work is offered for sale or photographs of it are made available. *See* Roy Exp. Co. Establishment v. CBS, Inc., 672 F.2d 1095, 1102 n.14 (2d Cir. 1982) (noting that publication occurs when work is made available for public sale); Burke v. Nat'l Broad. Co., 598 F.2d 688, 691 (1st Cir. 1979) ("A general publication occurs when a work is made available to members of the public at large without regard to who they are or what they propose to do with it.").

[64] *See* FISHMAN, *supra* note 6, at 18/4–18/12; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 6 (3d ed. 2005); ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 347–60 (6th ed. 2002 & Supp. 2005); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 9 & 9(A) (2005); U.S. COPYRIGHT OFFICE, CIRCULAR 15A, DURATION OF COPYRIGHT: PROVISIONS OF THE LAW DEALING WITH THE LENGTH OF COPYRIGHT PROTECTION (2004), http://www.copyright.gov/circs/circ15a.pdf (last visited Jan. 31, 2006). For a useful summary chart, see Peter B. Hirtle, Cornell Inst. for Digital Collections, Copyright Term and the Public Domain in the United States (Jan. 1, 2006), http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

For present purposes it suffices to note four major categories of works that are in the public domain in the United States: (1) any work published in the United States before 1923; (2) any work published in the United States between 1923 and 1963 for which copyright was not renewed; (3) unpublished works by authors who died more than seventy years ago; and (4) all works published outside the United States before July 1, 1909.[65]

Despite the fact that copyrights are limited by time and original authorship, modern publishers routinely affix copyright notices to reprints of historical works in which copyright has expired.[66] The publisher making the reprint is not the creator of the original work; absent a transfer by the creator of the work, the publisher would not be entitled to claim copyright in the first place. And since the copyright on the original work has expired—indeed, that is the very thing that allows the modern reprint to be made and sold—the work is in the public domain. Browse any bookstore, buy a poster or a greeting card, open up sheet music for choir or orchestra practice, or flip through a high school history text: Copyfraud is everywhere.

Copyright notices appear on modern reprints of William Shakespeare's plays, even though the new publisher had nothing to do with their creation, and Shakespeare's writings are squarely in the public domain.[67] Reprints of *The Federalist* carry copyright notices even though the words of James Madison, Alexander Hamilton, and John Jay cannot be copyrighted by anyone.[68] Similar misuse of copyright exists in reprints of works by Charles Dickens,[69] Jane Austen,[70]

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[65] *See supra* note 64.

[66] The discussion is limited to false assertions of copyright specifically and therefore does not consider other sources of restrictions on the availability of works such as law governing trademark, rights of publicity, defamation, or confidentiality.

[67] *See, e.g.*, WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN (A.R. Braunmuller ed., Oxford 1989) (blanket copyright notice); WILLIAM SHAKESPEARE, MEASURE FOR MEASURE (Barbara A. Mowat & Paul Werstine eds., Washington Square Press, Folger Series 1997) ("All rights reserved including the right to reproduce this book or portions thereof in any form whatsoever.") (notice on copyright page); WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO THE MOOR OF VENICE (Russ McDonald ed., Penguin, Pelican Series 2001) (blanket copyright notice).

[68] *See, e.g.*, THE FEDERALIST (Robert Scigliano ed., Modern Library 2000) (copyright claimed by Random House).

[69] *See, e.g.*, CHARLES DICKENS, A CHRISTMAS CAROL AND OTHER CHRISTMAS STORIES (Signet Classics 1984) (copyright notice plus warning that "no part of this publication may be reproduced . . . in any form . . . without . . . written permission") (notice on copyright page); CHARLES DICKENS, A TALE OF TWO CITIES (Barnes & Noble 2003) (stating that introduction, notes, and suggestions for further reading are copyrighted but also claiming that "[n]o part of this publication may be reproduced . . . without the prior written permission of the publisher") (notice on copyright page).

[70] *See, e.g.*, JANE AUSTEN, SENSE AND SENSIBILITY (Claudia L. Johnson ed., Norton 2002) (blanket copyright notice); JANE AUSTEN, SENSE AND SENSIBILITY (Barnes & Noble

and Benjamin Franklin,[71] none of which are copyrightable. Not every modern publisher of historical works is an offender, but the publisher making proper use of copyright symbols is an exception to the general pattern of copyright abuse.[72]

Books compiling public domain documents also improperly carry blanket copyright notices.[73] For example, Richard D. Heffner's *A Documentary History of the United States* has a copyright symbol even though the book consists entirely of reproductions of historical documents ranging from the Declaration of Independence to the Supreme Court's decision in *Roe v. Wade*.[74] Nick Ragone's *The Everything American Government Book* carries a blanket copyright and states that "[t]his book, or parts thereof, may not be reproduced in any form," although parts of the work are reproductions of the Constitution and the Declaration of Independence.[75] Dictionaries of famous quotations bear blanket copyright notices and admonitions against reproducing their contents—even though these books themselves just reproduce the words of others.[76] Law school casebooks bear copyright notices that do not distinguish between the copyrightable editorial comments and the public domain cases reproduced.[77]

Modern publishers hawk greeting card versions of Monet's water lilies, van Gogh's sunflowers, and Cézanne's apples—each bearing a

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2003) (noting that introduction, explanatory notes, and suggestions for further reading are copyrighted but also claiming that "[n]o part of this publication may be reproduced . . . without the prior written permission of the publisher") (notice on copyright page).

71 *See, e.g.*, BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (Barnes & Noble 2004) (stating that work was originally published in 1733–1758, that introduction and suggested reading are copyrighted by Barnes & Noble, but that "[n]o part of this book may be used or reproduced in any manner whatsoever without written permission of the Publisher") (notice on copyright page).

72 *See, e.g.*, CHARLES DICKENS, OLIVER TWIST (Philip Horne ed., Penguin 2002) (noting that "[e]ditorial material" is copyrighted, but not making blanket copyright claim, and acknowledging that work was first published in 1837–1838) (notice on copyright page).

73 This is not to deny that a copyright can exist with respect to an author's original selection and arrangement of non-copyrightable materials. *See supra* notes 59–62 and accompanying text.

74 RICHARD D. HEFFNER, A DOCUMENTARY HISTORY OF THE UNITED STATES (7th ed. 2002).

75 NICK RAGONE, THE EVERYTHING AMERICAN GOVERNMENT BOOK 269–72, 273–90 (2004).

76 *See, e.g.*, JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS (Justin Kaplin ed., 17th ed. 2002); THE NEW PENGUIN DICTIONARY OF MODERN QUOTATIONS (Robert Andrews ed., 3d ed. 2003); THE OXFORD DICTIONARY OF QUOTATIONS (Elizabeth Knowles ed., 6th ed. 2004).

77 *See, e.g.*, RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE (3d ed. 1995) (containing copyright notice with warning that "[n]o part of this book may be reproduced . . . without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review").

copyright mark.[78] There is no basis for claiming copyright in mere copies of these public domain works.[79] Poster-sized reproductions of works by Monet and van Gogh, each embossed with a false copyright notice, brighten the walls of college dorm rooms across the country.[80] Museum gift shops are among the worst offenders: Postcards of works in their collections often carry copyright notices even though physical possession of art does not equal copyright ownership.[81] Copyfraud is also not limited to the works of old masters: Publishers of collections

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[78] Postcard: Claude Monet, Bridge Over a Pool of Water Lilies (Metropolitan Museum of Art 2001) (on file with the *New York University Law Review*); Postcard: Vincent van Gogh, Sunflowers (Metropolitan Museum of Art 2001) (on file with the *New York University Law Review*); Postcard: Paul Cézanne, Still Life with Apples and a Pot of Primroses (Metropolitan Museum of Art 2001) (on file with the *New York University Law Review*).

[79] *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 857 (1976) (finding that "'the mere reproduction of a work of art in a different medium should not constitute the required originality for the reason that no one can claim to have independently evolved any particular medium'") (quoting 1 MELVILLE B. NIMMER, THE LAW OF COPYRIGHT § 20.2, at 94 (1975)); Earth Flag Ltd. v. Alamo Flag Co., 153 F. Supp. 2d 349, 354 (S.D.N.Y. 2001) (holding that cloth reproduction of photograph of Earth taken by Apollo astronauts lacked sufficient creativity to merit copyright protection because reproduction was "nothing more than a public domain photograph transferred from the medium of paper to the medium of fabric"); Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998) (holding that under U.K. law, construed by reference to U.S. law, exact photographic reproductions onto color transparencies and CD-ROMs of old paintings lack sufficient originality to merit copyright protection because "a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality"). Of course, some photographic reproductions contain sufficient originality to merit copyright protection. *See, e.g.*, Schiffer Publ'g Ltd. v. Chronicle Books, LLC, No. Civ.A. 03-4962, 2004 WL 2583817, at *8 (E.D. Pa. Nov. 12, 2004) (holding that photographs of fabrics involved significant creative decisions by photographer and therefore were original works).

[80] During my visit to the gift shop at the Metropolitan Museum of Art in New York on March 15, 2006, I found for sale poster reproductions of van Gogh's *The Starry Night* (1889) priced at $30 and *Flowering Garden* (1888) priced at $17.95, each bearing the notice "© 1999 The Metropolitan Museum of Art." A poster reproduction of Monet's *Bridge Over a Pool of Water Lilies* (1899) was $17.95 and also carried the same copyright notice. Other "copyrighted" items in the gift shop included a note cube pad of Monet's *Bouquet of Sunflowers* (1881) ($11.95), van Gogh playing cards ($16.95), and plastic rulers ($11.95).

[81] *See* Butler, *supra* note 6, at 74 (noting that "[t]he most significant control museums exert over public-domain art is to assert that the photographic reproduction provided by the museum is itself a copyrighted work and that the museum holds the copyright to the reproduction"). Curator publications often encourage the practice, *see, e.g.*, Nancy Kirkpatrick, *Rights and Reproductions in Art Museums*, MUSEUM NEWS, Feb. 1986, at 45, 47 ("Through the use of copyrighted photographs, museums can control the reproduction of works they own that are in the public domain."), as do some legal experts, *see, e.g.*, Rhonda L. Berkowitz & Marshall A. Leaffer, *Copyright and the Art Museum*, 8 COLUM.-VLA ART & L. 249, 265–66 (1984) ("[A]lways claim copyright in any reproduction that appears in a poster, postcard, advertisement, brochure, or three-dimensional model.").

of public domain clip-art assert restrictions on their subsequent use and copying.[82]

Sheet music commonly bears false copyright notices. Nobody has to pay to reproduce, or for that matter to perform, Beethoven's piano concertos, Chopin's nocturnes, Bach's cantatas, Handel's *Messiah*, or *The Star Spangled Banner*.[83] Yet publishers selling sheet versions of these works assert copyright ownership over them,[84] with the result

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[82] For example, Dover Publications markets scores of collections of public domain clip-art in printed and CD-ROM formats. The art is not protected by copyright. *See, e.g.*, READY-TO-USE OLD-FASHIONED ILLUSTRATIONS OF BOOKS, READING & WRITING (Carol Belanger Grafton ed., 1992) (stating on front cover that book contains "[c]opyright-[f]ree [d]esigns" for "[h]undreds of [u]ses"). Nonetheless, Dover asserts limitations with respect to use of the art and even claims to own the product purchased by way of the following notice:

> This book belongs to the Dover Clip Art Series. You may use the designs and illustrations for graphics and crafts applications, free and without special permission, provided that you include no more than ten in the same publication or project. . . . However, republication or reproduction of any illustration by any other graphic service whether it be in a book or in any other design resource is strictly prohibited.

Id. (notice on copyright page). *See also* READY-TO-USE ILLUSTRATIONS FOR HOLIDAYS AND SPECIAL OCCASIONS (Ed Sibbett, Jr. ed., 1983) (same); READY-TO-USE SEASHORE LIFE ILLUSTRATIONS (Mallory Pearce ed., 1999) (same).

[83] One wrinkle is that effective January 1, 1996, the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624) (2000), implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), restored the copyright on certain foreign-published materials previously in the public domain under U.S. law. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 18.06 (2005) (discussing adoption of Uruguay Agreements). The change has particular applicability to classical music. GATT restored copyright on a vast body of music first published in the former Soviet Union prior to 1973 (when there were no copyright relations between the Soviet Union and the United States), including works by Shostakovich and Stravinsky. *See* FISHMAN, *supra* note 6, at 4/17, 15/1–15/15. The American Society of Composers, Authors and Publishers (ASCAP) provides a catalog of works for which copyright was restored. *See* Am. Soc. Composers, Authors & Publishers, Restoration of Copyright Protection Under URAA: Its Impact on the ASCAP Repertory, http://www.ascap.com/restored_works (last visited Jan. 31, 2006). As a result of this copyright restoration, orchestras were suddenly required to pay substantial fees to rent sheet music, and recording restored works became prohibitively expensive. *See* DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 153 (2005). In the wake of *Eldred*, 537 U.S. 186 (2003), a district court rejected a constitutional challenge to the restoration of copyright under the Uruguay Agreements. Golan v. Gonzales, No. 01-B-1854 (BNB), 2005 WL 914754 (D. Colo. Apr. 20, 2005).

[84] *See, e.g.*, J.S. BACH, 1 THE WELL-TEMPERED CLAVIER 5 (William A. Palmer ed., Alfred Publishing 2004) (blanket copyright claim even while noting that "the primary source for the main text . . . is the . . . copy of the first volume, in J.S. Bach's own hand"). *But see* LUDWIG VAN BEETHOVEN, SYMPHONIES NOS. 5, 6 AND 7 IN FULL SCORE (Dover Publications, Inc. 1989) (containing no copyright notice and stating that "[t]his Dover edition, first published in 1989, is a republication of three . . . *Symphonies* . . . . Lists of instruments and a table of contents have been added.") (text on copyright page). *See generally* M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 251 (7th ed. 1995) ("[Music publishers] claim full originality when they are really only 'finders' of

that choirs and other users purchase additional sets rather than simply making a legitimate photocopy.[85] Likewise, opera scores often carry improper copyright notices.[86] Even church songs are not safe: Christian Copyright Licensing International, which sells licenses to songs for congregational use, offers seventy-eight versions of "Jesus Loves Me," with just one properly marked as within the public domain.[87]

While their products are of great use to historians and to genealogists, vendors of microfilmed and digitized versions of old newspapers and other historical documents wrongly attach copyright notices to their products.[88] Microfilming or scanning an old newspaper or

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public domain songs . . . [and] register copyrights to such songs . . . thereby falsely and unfairly obtain[ing] the benefit of the Copyright Act."); Heald, *Reviving the Rhetoric*, *supra* note 6, at 245 ("Music publishers . . . intimidate the public into buying what they already own by affixing copyright symbols to virtually all public domain music.").

To be sure, a new arrangement or adaptation of a public domain work qualifies for copyright if it is sufficiently original. There might also be a copyright in a selection and compilation of music scores. *See* Woods v. Bourne Co., 60 F.3d 978, 991 (2d Cir. 1995) (holding that arrangements of "When the Red, Red, Robin Comes Bob, Bob, Bobbin' Along" were insufficiently original to merit copyright protection and explaining that new arrangement can be copyrighted if "something of substance [has been] added making the [public domain] piece to some extent a new work with the old song embedded in it") (quotation omitted); Plymouth Music Co. v. Magnus Organ Corp., 456 F. Supp. 676, 679–80 (S.D.N.Y. 1978) (holding that where new lyrics and music were added to public domain songs there was sufficient originality to merit copyright protection); Consol. Music Publishers, Inc. v. Ashley Publ'ns, Inc., 197 F. Supp. 17, 18–19 (S.D.N.Y. 1961) (holding that valid copyright existed in selection and grouping of six Bartok piano pieces even though pieces themselves were each in public domain). A proper copyright notice, though, should make clear the basis for asserting copyright.

[85] *See* Heald, *Reviving the Rhetoric*, *supra* note 6, at 245:

> The expense of buying rather than copying public domain sheet music is directly absorbed by the taxpayers who fund music education in public schools, the church congregations who must raise money for the church music budget, and the patrons of the fine arts who finance music ensembles with their admission fees or donations.

Heald estimates that church choirs unnecessarily spend at least $16.2 million annually on public domain sheet music. *Id.* at 245 n.23.

[86] There are, however, numerous websites devoted to making public domain compositions available. *See, e.g.*, Choral Public Domain Library, http://www.cpdl.org (last visited Jan. 31, 2006).

[87] Christian Copyright Licensing International, http://www.ccli.com/SongSearch (search for "Jesus Loves Me") (last visited Mar. 31, 2006).

[88] For example, ProQuest offers a subscription-based Historical Newspapers service, containing digital versions of newspapers from the nineteenth century to the present. *See* ProQuest Info. and Learning, ProQuest Historical Newspapers (Graphical), http://www.proquest.com/products_pq/descriptions/pqhn_graphic_version.shtml (last visited Jan. 31, 2006). Every single newspaper page reproduced in the database includes ProQuest's own copyright notice. Similarly, the popular series of historical newspapers on microfilm made available by University Microfilms (UMI)—today also part of ProQuest—carries copyright notices. *See* ProQuest Info. and Learning, UMI Newspapers in Microform, http://www.proquest.com/products_pq/descriptions/newspapers_microfilm.shtml (last visited Jan. 31, 2006). The American Periodical Series, a digital collection of magazines and jour-

broadside is not an act of creation. It is copying pure and simple—no different from making a photocopy.[89] Copyright is not renewed just because somebody puts the work on film or a CD-ROM or posts it online and sells it to researchers.

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nals from the eighteenth century produced by Chadwyck-Healey—a company also now belonging to ProQuest—attaches copyright notices to the pages it reproduces. *See* ProQuest Info. and Learning, American Periodical Series Online, http://www.proquest.com/products_pq/descriptions/aps.shtml (last visited Jan. 31, 2006).

[89] The Copyright Act's definition of copying readily encompasses microfilming: "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (2000). As the House Report noted in explaining the reach of the Copyright Act:

> [I]n the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

H.R. Rep. No. 94-1476, at 53 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666. The Supreme Court has recognized that microfilming is a "mere conversion . . . from one medium to another." New York Times Co., Inc. v. Tasini, 533 U.S. 483, 502 (2001). *Tasini* involved the interpretation of section 201(c) of the Copyright Act that allows newspapers, magazines, and other publishers of collective works to republish individual contributions in revisions of the collective work. *See* 17 U.S.C. § 201(c). The *Tasini* Court held that this provision did not permit a publisher to license the works for inclusion in computer databases that allowed the operator to retrieve articles individually, outside of the collective context in which they were originally published. *Tasini*, 533 U.S. at 501–04. In contrast to mere microfilming, the databases did not involve republication as part of a revision of the collective work. *Id. See also* New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 225 (D.N.J. 1977) (noting that unauthorized microfilming of copyrighted work would infringe copyright).

To be sure, a publisher that selects and arranges non-copyrightable works in a particular way might own a copyright with respect to the original selection and arrangement. *See, e.g.*, West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1226–27 (8th Cir. 1986) (holding that West Publishing Company's arrangement and pagination of legal decisions in its reporter series was sufficiently original to merit copyright protection). *Cf.* Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 693, 707–08 (2d Cir. 1998) (declining to follow Eighth Circuit and holding that West's pagination is not entitled to copyright protection and that competitor's "star pagination" to West's reporters did not infringe any copyright in West's arrangement of cases); Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 674, 677 (2d Cir. 1998) (holding that West's enhancements to judicial opinions including parallel citations and information about counsel were also not protected); United States v. Thomson Corp., 949 F. Supp. 907, 926 (D.D.C. 1996) (expressing "serious doubts about the continuing vitality of the Eighth Circuit's 1986 opinion in *Mead Data* in view of the subsequent decision of the Supreme Court in *Feist Publications*"). The computer search mechanisms a publisher develops to retrieve materials from a database of non-copyrightable works might also be protected. *See generally* Stacey L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203, 207–30 (2005) (providing overview of copyright protections applicable to software).

Publications of the U.S. government are also in the public domain.[90] If you have printed out this Article from Westlaw or Lexis, you will see the company's notice disclaiming any ownership of governmental works. Westlaw and Lexis are unusually honest in this regard. Many other publishers claim copyright ownership when they reproduce and distribute government documents. For example, Barnes & Noble recently issued the 1964 Warren Commission Report in book form.[91] It states that in addition to the two-page "Editor's Note" being copyrighted, "[n]o part of this book may be used or reproduced in any manner whatsoever without written permission of the Publisher."[92] Since the whole book is just a photocopy of the original government report, Barnes & Noble owns no copyright in it. Fictionwise, a popular website selling electronic versions of books and other materials, includes blanket copyright assertions on its website.[93] Among the government documents Fictionwise sells is *The 9/11 Commission Report*, available for $1.99.[94] The downloaded version contains the following notice:

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The statement is pure nonsense. Fictionwise does not obtain a copyright in a governmental report simply by distributing it in electronic form. As the U.S. Copyright Office has explained: "[D]igitization . . . does not result in a new work of authorship. . . .

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90 17 U.S.C. § 105 (2000). *See also* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 593 (1834) (noting that "[n]o reporter . . . can . . . have[ ] any copyright in the written opinions delivered by the court").

91 PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT KENNEDY, THE WARREN COMMISSION REPORT (Barnes & Noble 2003) (1964).

92 *Id.* (notice on copyright page).

93 *See* Fictionwise, eBook Basics, http://www.fictionwise.com/help/eBook_FAQ.htm (last visited Apr. 6, 2006). Fictionwise warns its customers:

> Because of copyright restrictions, you cannot print or copy eBooks. . . . If we catch a violator, we will prosecute him or her to the fullest extent of the law, which can include heavy fines and even imprisonment. . . . We charge reasonable prices, don't steal from us and our authors.

Id.

94 Fictionwise, http://www.fictionwise.com/ebooks/eBook24549.htm (last visited Jan. 31, 2006).

95 NAT'L COMM'N ON TERRORIST ATTACKS UPON U.S., THE 9/11 COMMISSION REPORT (2004), http://www.fictionwise.com/ebooks/eBook24549.htm (downloaded Apr. 30, 2005). *Cf.* NAT'L COMM'N ON TERRORIST ATTACKS UPON U.S., THE 9/11 COMMISSION REPORT (Norton 2004) (without similar copyright notice).

Protection depends on the status of copyright in the [preexisting work]; digitization does not add any new authorship."[96] Neither does copyright prohibit lending; making a copy of *The 9/11 Commission Report* will not lead to prison time. From Fictionwise's perspective, though, the warning makes perfect sense. Some people who see the notice will believe it and buy a second version of *The 9/11 Commission Report*—Fictionwise encourages purchasing additional copies for friends—rather than recognize the bluff.

2. *The Spillover of De Minimis Copying and Fair Use*

Copyfraud involves false ownership claims to the public domain, but the problem is not entirely removed from the behavior of legitimate copyright holders. Copyfraud is exacerbated when owners of valid copyrights interfere with lawful de minimis copying and fair use and thereby impose restrictions beyond what the law allows. These actions deter even limited reproduction of falsely marked public domain works, reproduction that would be lawful even if the works were in fact under copyright.

Not all copying of a copyrighted work is infringement. Instead, as the Court of Appeals for the Second Circuit has explained, there is a "difference between factual copying and actionable copying."[97] Infringement—which is actionable copying—exists only where there is a "substantial similarity" between the copy and the original work—as measured by a "qualitative" and "quantitative" comparison.[98] The qualitative component of the analysis concerns whether there has been copying of expression,[99] rather than of the facts and ideas that are not protected by copyright.[100] The quantitative component con-

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[96] Policy Decision on Copyrightability of Digitized Typefaces, 53 Fed. Reg. 38,110, 38,113 (Sept. 29, 1988). To be sure, web pages often contain some copyrighted material—including the HTML code used to design the page. *See, e.g.*, Computer Assocs. Int'l Inc. v. Altai, Inc., 982 F.2d 693, 702 (2d Cir. 1992) ("It is . . . well settled that the literal elements of computer programs, i.e., their source and object codes, are the subject of copyright protection.") (collecting cases); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983) ("[A] computer program, whether in object code or source code, is a 'literary work' and is protected from unauthorized copying . . . ."); *see also* Lawrence Lessig, *The Death of Cyberspace*, 57 WASH. & LEE L. REV. 337, 344 (2000) (discussing copyright in HTML code). Nonetheless, a public domain document does not become copyrighted simply by being posted on a website.

[97] Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997).

[98] *Id.*

[99] *Id.*

[100] 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); *see* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[E]very idea, theory, and fact in a copyrighted work becomes instantly available for

siders the amount of the copyrighted work that has been reproduced.[101] If the reproduction is de minimis, that is, "copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity," there is no infringement.[102] However, these standards, which depend upon the particular circumstances of a case, provide no hard and fast rules.[103]

In addition to the lawfulness of some forms of copying under this doctrine, fair use exists as a defense in an infringement action. The Copyright Act specifies that the "fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[104] However, the Act itself, while listing relevant considerations, does not specify precisely when a reproduction of a copyrighted work is fair,[105] and the highly fact-specific case law has not produced reliable standards.[106]

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public exploitation at the moment of publication."); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 n.5 (1994) (discussing exclusion of facts and ideas from copyright protection); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.") (alteration in original) (citation omitted) (quoting U.S. CONST. art. I, § 8).

101 *Ringgold*, 126 F.3d at 75.

102 *Id.* at 74.

103 *See, e.g.*, Gordon v. Nextel Commc'ns, 345 F.3d 922, 924–25 (6th Cir. 2003) (basing finding of de minimis use on duration of appearance of copyrighted material in defendant's television advertisement); Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217–18 (2d Cir. 1998) (finding no infringement where plaintiff's images were virtually unidentifiable in defendant's film, stating that "where the unauthorized use of a copyrighted work is de minimis, no cause of action will lie for copyright infringement, and determination of a fair use claim is unnecessary"); Newton v. Diamond, 204 F. Supp. 2d 1244, 1256–59 (C.D. Cal. 2002) (finding hip-hop group's use of three-note sequence was de minimis copying).

104 17 U.S.C. § 107 (2000). In addition to fair use, sections 108 through 122 of the Act specify additional limitations on the creator's exclusive rights. *Id.* §§ 108–122.

105 The Act lists four factors for courts to take into account in deciding whether a use of a copyrighted work is fair:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. § 107. In addition, in an infringement action seeking statutory damages, the court is required to remit statutory damages if the infringer "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use" and the infringer is an employee of a school or library or of a public broadcasting entity. *Id.* § 504(c)(2).

106 Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1145 (2001) ("Fair use offers no bright line rules protecting individual users from claims of copyright infringement."); R. Polk Wagner, *The Perfect Storm: Intellectual*

By leveraging the vagueness of these doctrines, publishers regularly interfere with de minimis copying and fair uses of copyrighted works.[107] Books published nowadays carry copyright notices that suggest de minimis copying and fair use are nonexistent. One recent work of fiction claims: "[N]o part of this publication may be reproduced . . . in any form, or by any means . . . without the prior written permission of both the copyright owner and the . . . publisher."[108] That is not the law: De minimis copying is not infringement, and fair use also permits certain kinds of reproduction. Permissions departments of major presses assert authority to restrict any use—de minimis or not, fair or not—of their works and insist that quotes and reproductions carry a proper acknowledgment.[109] For instance, Penguin USA claims on its website that permission is required "for the use of an excerpt from copyrighted material to be used in another work" including "a short quotation from one book used in another book."[110] A short quotation may be de minimis, and it is quintessential fair use. Some publishers even state, more sweepingly, that their

Property and Public Values, 74 FORDHAM L. REV. 423, 430 (2005) ("[F]air use [has] become[ ] so vague and abstract as to preclude its effective use by the vast majority of users.").

107 *See generally* William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 CAL. L. REV. 1639, 1654–59 (2004) (discussing and providing examples of copyright owners and their lawyers who deem fair use to constitute infringement, and identifying doctrine of copyright misuse as potential remedy to this problem). Notably, there is no remedy under the Copyright Act against copyright holders who interfere with fair use of their works by others. Instead, fair use operates only as a defense in an infringement action—a refuge for the law-abiding citizen only after being hauled into court.

108 HARI KUNZRU, TRANSMISSION (2004) (notice on copyright page).

109 Random House claims that "[a]ll published material by Random House, Inc. and its divisions is protected under copyright law. Written permission is required from the publisher if you wish to reproduce any of our material." Random House, Inc., Copyright & Permissions, http://www.randomhouse.com/about/permissions.html (last visited Feb. 2, 2006). According to Oxford University Press, "[i]f you would like to copy, reprint or in any way reproduce all or any part, including illustrations, diagrams, and graphics, of a book or journal published by Oxford University Press, you must request permission." Oxford University Press, Permissions, http://www.us.oup.com/us/information/permissions/?view=usa (last visited Feb. 2, 2006). The University of Virginia Press advises that "[q]uoting more than three lines of poetry without seeking permission is inadvisable if the poem is still in copyright. . . . [I]f the poem is only ten lines long, quoting even one full line would likely exceed fair use." Univ. of Va. Press, Guide to MS Preparation, http://www.upress.virginia.edu/authorinfo/msprep2.html (last visited Feb. 2, 2006). Tyndale House Publishers, which publishes bibles and other religious works, claims that "[w]ritten permission is required to reproduce selections or excerpts of copyrighted material published by Tyndale," except for reproducing fewer than 500 words for a one-time noncommercial use. Tyndale House Publishers, Consumer Services: Frequently Asked Questions, http://www.tyndale.com/consumer/faqs.asp?id=7 (last visited Feb. 2, 2006).

110 Penguin Group (USA), Inc., Permissions FAQ, http://www.penguinputnam.com/static/html/us/permissions/PermissionsFAQ.html (last visited Feb. 2, 2006).

books cannot be "used or reproduced in any manner" without permission.[111] Yet a book is arguably "used" by reading. The term is too general to reflect the limited rights the publisher retains. Although the law allows some reproduction of copyrighted material without permission, a publisher's bluff is rarely called. Books today routinely contain unnecessary statements that permission has been obtained to quote small excerpts from copyrighted works—the very thing the de minimis doctrine permits and fair use encourages.[112]

At the same time, publishers create substantial hurdles for their *own* authors who wish to reproduce, quote from, or otherwise draw upon prior works. Publishers often edit out quotations from a manuscript before publication to avoid legal liability.[113] They impose on their authors the responsibility for obtaining permissions and paying fees.[114] The de minimis doctrine permits some copying; fair use is meant to allow and encourage conversations among authors. Yet when an author insists on using a prior work, the author must indemnify the publisher for any liability that may arise for copyright infringement.[115] *The Chicago Manual of Style*, a widely-used author

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111 *See, e.g.*, FRANKLIN, *supra* note 71 ("No part of this book may be used or reproduced in any manner whatsoever without written permission of the Publisher.") (notice on copyright page).

112 *See, e.g.*, A. SCOTT BERG, KATE REMEMBERED (2003) (acknowledging permission to quote ten lines of poem by H. Phelps Putnam); RICK BRAGG, ALL OVER BUT THE SHOUTIN' (1997) (acknowledging permission to reprint brief excerpts from four songs); FRANK RICH, GHOST LIGHT 317 (2000) (acknowledging permission from copyright owners to quote few lines from seven show tunes); ANITA SHREVE, THE PILOT'S WIFE (1999) (acknowledging permission to quote four lines from poem).

113 KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 249–59 (2005) (reporting on authors' experiences with academic presses).

114 *See, e.g.*, Houghton Mifflin Coll., Prepare Your Manuscript: Copyrights and Permissions, http://college.hmco.com/instructors/ins_custompub_prepare_script_permission.html (last visited Feb. 3, 2006) ("[E]very publisher has its own set of guidelines" and "copyright holders (and, in some cases of serious dispute, the courts) decide what is considered fair use and what is not"; "you [the author] are . . . responsible for providing information regarding permission for any quoted or borrowed material that is utilized to illustrate or amplify your own arguments"; and "[i]f you want to quote or reproduce an item someone else has written, said, sung, or otherwise originated, the holder of the copyright must grant and give written permission to do so."); Syracuse Univ. Press, Author Guidelines: Manuscripts, http://syracuseuniversitypress.syr.edu/guidelines.html#permissions (last visited Apr. 6, 2006) ([A]cquiring permission to quote . . . from . . . published . . . material is the responsibility of the author, as are any required fees); Univ. of Va. Press, *supra* note 109 ("As author of your MS, you are responsible for obtaining permissions to use material owned by others.").

115 *See, e.g.*, Andrews Univ. Press, Description of the Publication Process, Copyright and Permissions, http://www.andrews.edu/universitypress/content/Publication%20Description.pdf (last visited Apr. 6, 2006) (press requires author to "promise[ ] to hold harmless and to indemnify the Press against any costs or damages sustained . . . because . . . [the author's work] infringes any copyright"); N.Y. Univ. Press, Author's Manuscript Guide-

handbook, explains that "[p]ublishing agreements place on the author the responsibility to request any permission needed for the use of material owned by others" and "stipulate that any fees to be paid will be the author's responsibility."[116] In addition, "many publishers tend to seek permission if they have the slightest doubt whether a particular use is fair."[117] The *Manual* also notes that "excessive permissions processing tends to slow down the gestation of worthwhile writings."[118] The import is clear: Everything has to be licensed and licensing is a hassle so it is better to avoid any form of reproduction.[119]

Adding to the problem, pro-publisher organizations posing as public interest groups disseminate misinformation about copyright and fair use. The "Friends of Active Copyright Education"—an initiative of the Copyright Society of the U.S.A.—is no friend to de minimis copying or to fair use. The organization makes the following pro-publisher statements on its website: "[C]onsent is required from the copyright owner to use clips or photographs in a motion picture, no matter [how] de minimis or short,"[120] and "[u]se of any copyrighted music . . . no matter how short (even if only a few notes) . . . must be cleared with the copyright owner."[121] Further, the Friends advise, since "relying on the doctrine of 'fair use' . . . is risky[,] . . . [t]he best course of action is simply to seek permission for all copied material you intend to use."[122] In addition, "[i]f you intend to quote or even paraphrase the words of another author, you should obtain

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lines, Transfer of Copyright (author warrants that work "does not violate or infringe any copyright" and agrees to indemnify and hold harmless the publisher "from and against any and all loss, damage, liability or expense, including reasonable attorneys' fees"); Texas A&M Univ. Press, Publishing Agreement, http://finance.tamu.edu/contracts/forms/stdcontracts/pubagree.htm (last visited Apr. 6, 2006) (requiring author to warrant that work does not infringe copyright and indemnify publisher against any claim).

116 THE CHICAGO MANUAL OF STYLE 132, 133 (15th ed. 2003).

117 *Id.* at 137.

118 *Id.* at 138.

119 Anecdotal evidence also suggests that publishers require their own authors to obtain a "license" from a museum, library, or archive holding a physical copy of a work long out of copyright. Historian François Furstenberg reports that his book publisher preferred he pay an archive a fee to reproduce John James Barralet's *Apotheosis of George Washington* (1802) rather than scan a poster version in Furstenberg's own collection. E-mail from François Furstenberg, Professor, University of Montreal, to author (April 11, 2006, 15:33 EST) (on file with the *New York University Law Review*).

120 Friends of Active Copyright Educ., Moving Images: Frequently Asked Questions, http://www.csusa.org/face/movim/faqs.htm (follow "Moving Images FAQ's" hyperlink) (last visited Apr. 10, 2006).

121 *Id.*

122 Friends of Active Copyright Educ., Words: Copyright Basics, http://www.csusa.org/face/words (follow "Words Copyright Basics" hyperlink) (last visited Feb. 3, 2006).

that author's permission before doing so."[123] And some more friendly advice: "[It] is almost always the case that the distribution of unauthorized copies of musical recordings—even if to your friends and even if for free—constitutes copyright infringement and is not a 'fair use,'"[124] and "[t]he odds are excellent that anything you see on the Internet is copyrighted and that using it without permission constitutes an infringement."[125] These statements, virtually denying any possibility of de minimis copying or fair use of copyrighted works, expand copyright beyond its proper scope.[126]

Denying the lawfulness of de minimis copying and fair use has a spillover effect onto copyfraud. When de minimis copying and fair use are routinely discouraged, a copyright notice comes to signal not merely that the work is protected, but that every reproduction is prohibited. Under the standards employed by the publishing world, using even the smallest excerpt of a work marked as copyrighted requires the copyright owner's permission. Accordingly, the user who heeds a copyright notice will neither reproduce a mislabeled public domain work, nor even engage in de minimis copying or make fair use of the work without first obtaining a license.

3. *Archives and Public Domain Collections*

Owning a physical copy of a work does not by itself give rise to ownership of a copyright in the work.[127] Yet many archives claim to hold a copyright in a work merely because they possess a physical

123 Friends of Active Copyright Educ., Words: Frequently Asked Questions, http://www.csusa.org/face/words (follow "Words FAQ's" hyperlink) (last visited Feb. 3, 2006).

124 Friends of Active Copyright Educ., Internet: Frequently Asked Questions, http://www.csusa.org/face/softint (follow "Internet FAQ's" hyperlink) (last visited Feb. 3, 2006).

125 Friends of Active Copyright Educ., Still Images: Frequently Asked Questions, http://www.csusa.org/face/stilim (follow "Still Images FAQ's" hyperlink) (last visited Feb. 3, 2006).

126 Other examples abound. The Music Publishers' Association of the United States includes among its frequently asked questions the following: "[Q.] What do I do if I want permission to reprint portions of a work in my thesis, book, or journal article? [A.] Permission from the copyright holder must be granted prior to use. Contact the publisher to first find the copyright holder." Music Publishers' Ass'n of the U.S., Copyright: Frequently Asked Questions, http://www.mpa.org/copyright/faq.html (last visited Feb. 3, 2006). The American Society of Composers, Authors and Publishers advises, "[m]usic is like all personal property; when you want to use it, you need permission." Am. Soc'y of Composers, Authors and Publishers, A Crash Course in Music Rights for Colleges & Universities, http://www.ascap.com/licensing/educational.pdf (last visited Feb. 3, 2006). Writers Services advises that "if you want to quote someone else you cannot do so without clearing it first with whoever [sic] owns the rights." WritersServices.com, Fact Sheet: Plagiarism & Permissions, http://www.writersservices.com/edres/r_factsheet_17.htm (last visited Feb. 3, 2006).

127 17 U.S.C. § 202 (2000).

copy of the work.[128] For example, the American Antiquarian Society in Worcester, Massachusetts, is one of the largest archives of early American materials, including early broadsides, pamphlets, newspapers, and almanacs.[129] The vast majority of these materials, dating as they do from the eighteenth and nineteenth centuries, are in the public domain. Yet the Society states on its website that "[a]ll uses . . . of images from the collection[ ] . . . must be licensed by the Society in consequence of its proprietary rights."[130] The Society licenses images (including engravings, prints, photographs, art works, and pages from books and manuscripts) at a rate of $100 each for reproduction in a commercial work.[131] According to the Society's "License Agreement," it "owns various proprietary materials protected by common law, copyright laws and/or other applicable laws restricting use of such materials."[132] In executing the agreement

> the Licensee [must] acknowledge[ ] that the copyrights and all other proprietary rights in and to the Licensed Material are exclusively owned by and reserved to the Society and [that] the Licensee shall neither acquire nor assert copyright ownership or any other proprietary rights in the Licensed Material or in any derivation, adaptation, or variation thereof.[133]

Further, "the Society may require . . . the [Licensee's] Project . . . to bear a credit line and/or a permanently affixed copyright notice in the Society's name (i.e., '© American Antiquarian Society')."[134]

The American Antiquarian Society is hardly alone in making these kinds of false copyright claims. Many other archives assert broad copyright ownership with respect to materials in their physical

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128 An archive might own both a physical copy of a work and the copyright in the work. The most usual case is where the author of the work or some other owner of the copyright—for example, the author's heir—has transferred the copyright to the archive. Of course, if there is no copyright because it has expired then there is nothing to transfer. It is also important to note that a transfer of copyright must be pursuant to a written instrument. *Id.* § 204(a). In particular, selling a copy of a work or donating it to an archive does not transfer a copyright to the archive. *Id.* § 202. This is also a good place to mention that the Copyright Act gives libraries and archives special privileges to make, under certain conditions, limited copies of copyrighted works in their collections for preservation and scholarship. *See id.* § 108.

129 *See generally* Am. Antiquarian Soc'y, Mission Statement, http://www.americanantiquarian.org/mission.htm (last visited Feb. 3, 2006) (describing history of Society and size of collection).

130 Am. Antiquarian Soc'y, Rights and Reproductions, http://www.americanantiquarian.org/reproductions.htm (last visited Feb. 3, 2006).

131 *Id.*

132 Am. Antiquarian Soc'y, License Agreement pmbl. (undated) (on file with the *New York University Law Review*).

133 *Id.* para. 2.

134 *Id.* para. 5.

possession.[135] As the President of the Society of American Archivists has remarked, "[m]any repositories would like to maintain a kind of quasi-copyright-like control over the further use of materials in their holdings, comparable to the monopoly granted to the copyright owner," and "[o]ne strategy . . . is based on their ownership of the physical manifestation of a once-copyrighted work."[136] The trend is fuelled by the ever-growing number of books and seminars marketed to archivists about the minefield of copyright laws and the need to assume everything is protected.[137] A refreshing exception: The Library of Congress appropriately makes clear it does *not* own copyrights in the materials in its collections.[138] With respect to specific materials, the Library provides information about whether any copyright exists and the identity of the copyright owner.[139]

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135 *See, e.g.*, Me. Historical Soc'y, Permission Request for Publication or Display, http://www.mainehistory.org/PDF/MHS_Permissions.pdf (last visited Feb. 4, 2006) ("The Society reserves the right to use its own material and retains any and all rights . . . ."); New-York Historical Soc'y, Guide to the Records of the American Art-Union: 1838–1869, http://dlib.nyu.edu:8083/nyhsead/servlet/SaxonServlet?source=/americanart.xml&style=/saxon01n2002.xsl&part=body (last visited Feb. 4, 2006) ("Permission to quote from this collection in a publication must be requested and granted in writing. . . . Unpublished materials created before January 1, 1978 cannot be quoted in publication without permission of the copyright holder."); N. C. Sch. of the Arts, Copyright and Publication: Access Restrictions, http://www.ncarts.edu/ncsaprod/library/archreference.asp (last visited Feb. 4, 2006) ("Copyright . . . belongs to the creator of the material. Copyright descends to the heirs of the creator. Except in cases in which donors of the papers have given the rights to the public, permission to publish previously unpublished material must be obtained from the owner of the rights.").

136 Peter B. Hirtle, President of the Soc'y of Am. Archivists, Presidential Address: Archives or Assets? (Aug. 21, 2003), http://www.archivists.org/governance/presidential/hirtle.asp.

137 *See, e.g.*, GARY M. PETERSON & TRUDY HUSKAMP PETERSON, ARCHIVES & MANUSCRIPTS: LAW 82 (1985) ("[T]he archivist must presume that . . . every item in the holdings . . . is copyrighted and reproduction could be an infringement of the copyright."); Soc'y of Am. Archivists, Continuing Professional Education Catalog, Copyright: The Archivist and the Law, http://www.archivists.org/prof-education/course_catalog.asp (last visited Feb. 4, 2006) (describing two-day workshop on "the complex issues relating to . . . intellectual property" and "the sequence of decision making needed for your management of copyright issues").

138 Library of Congress, Legal Notices: About Copyright and the Collections, http://www.loc.gov/homepage/legal.html (last visited Feb. 4, 2006). The notice states:

> [T]he Library generally does not own rights in its collections. Therefore, it does not charge permission fees for use of such material and generally does not grant or deny permission to publish or otherwise distribute material in its collections. Permission and possible fees may be required from the copyright owner independently of the Library.

Id.

139 *See, e.g.*, Library of Cong., The Hannah Arendt Papers: Copyright and Other Restrictions, http://memory.loc.gov/ammem/arendthtml/res.html (last visited Feb. 4, 2006). The notice states:

An archive, like other owners of physical copies of public domain works, is certainly free to make and sell copies of materials in its collection and to impose conditions on how those copies are used.[140] It is free to refuse to provide reproductions and free to deny access to its collection to individuals who do not abide by the archive's terms.[141]

> Copyright in the published writings of Hannah Arendt contained in the collections of her papers that are in the custody of the Library of Congress is held by the Hannah Arendt Literary Trust. Copyright in her unpublished papers contained in such collections has been dedicated to the public, with the important exception of papers which, at the time of her death in 1975, were the subject of contracts with publishers. Copyright in all such contracted materials is retained by the Hannah Arendt Literary Trust. Harcourt, Inc. acts as literary agent for the Trust . . . .

Id. *See also* Duke Univ., Rare Book, Manuscript, and Special Collections Library, Historic American Sheet Music, Frequently Asked Questions, http://scriptorium.lib.duke.edu/sheetmusic/faq.html#6 (last visited Feb. 4, 2006) ("The sheet music included in this site is dated between 1850 and 1920 and to our knowledge is in the public domain, meaning that it may be copied and performed without paying royalties to the original author."); Library of Cong., The James Madison Papers: Rights and Reproductions, http://memory.loc.gov/ammem/collections/madison_papers/mjmrights.html (last visited Feb. 4, 2006) ("[T]he Library is not aware of any copyright or other rights associated with this Collection.").

140 Many archives do this. *See, e.g.*, Columbia Univ., The Papers of John Jay: Copyright and Use, http://www.columbia.edu/cu/lweb/eresources/archives/jay/copyright.html (last visited Feb. 4, 2006) ("[M]uch of the material may be in the public domain" but "[t]he University does not authorize any use or reproduction whatsoever for commercial purposes."); Historical Soc'y of Pa., Permission to Quote Form, http://www.hsp.org/files/HSP_PermissiontoQuoteform.pdf (last visited Feb. 4, 2006) (requiring "[p]ermission of [t]he . . . Society[,] . . . as owners of the material, to cite or quote from the collections" even though "the Society does not claim to control literary rights" and "[t]he publishing party assumes all responsibility for clearing copyright"); N.Y. Pub. Library, Manuscripts and Archives Div., Duplication of Materials: Publication, http://www.nypl.org/research/chss/spe/rbk/duplication.html (last visited Feb. 4, 2006) ("Permission to publish or quote from any material from the collections must be obtained . . . ."); Univ. of Ga., Hargrett Rare Book and Manuscript Library, Permission to Publish Hargrett Library Materials, http://www.libs.uga.edu/hargrett/resources/permission.html (last visited Feb. 4, 2006) ("If you wish to use any Hargrett Library Materials (whole or in part) for publication in electronic or any other form, including all of the uses below, you must obtain the specific written permission of both the owner of the physical property and the holder of the copyright."). Digital archives use click-through agreements. *See, e.g.*, Johns Hopkins Univ., Roman de la Rose, Digital Surrogates of Three Manuscripts: Conditions for Use of this Site, http://rose.mse.jhu.edu/pages/intro_frameset.htm (follow "Sign In" hyperlink) (last visited Feb. 4, 2006) ("Copying of images is permitted for personal use only. . . . Every copy, in electronic or print form, must include the copyright notice and shelfmark-reference as found at the edge of each image."). For a parallel discussion of access and photographic restrictions by art museums, see Robert A. Baron, Paper Presented at the VRA/NINCH Copyright Town Meeting: Making the Public Domain Public (Apr. 5, 2000), http://www.studiolo.org/IP/VRA-TM-SF-PublicDomain.htm ("[M]useums are prisons and the pictures are prisoners serving to bolster the self image of the museum.").

141 While lawsuits might seem unlikely, they are not unknown. In 2005, author Richard Schwartz filed a lawsuit against the Berkeley Historical Society in connection with his use of public domain photographs from the Society's collection. Complaint for Declaratory Relief, Schwartz v. Berkeley Historical Soc'y, No. C05-01551 JCS (N.D. Cal. Apr. 15, 2005). The Society had given Schwartz access to its photographs and, in a "one-time use

An archive can also sue for breach of contract for violations of conditions that the licensee agreed upon to access or use works in the collection.[142] Yet none of this means the archive, by virtue of owning

agreement," permission to use some of the photographs in his book, *Berkeley 1900*. *Id.* paras. 7, 11. Subsequently, in promoting the book, Schwartz displayed enlarged versions of seven of the book's photographs—two of which Schwartz had purchased from the Society—in the window of a hardware store where the book was sold. *Id.* paras. 8–9. The Society asserted that the store window reproductions violated the agreement Schwartz had signed and the Society's access policies, and it demanded they be taken down. *Id.* paras. 10–12. Schwartz argued that the contract was unenforceable because the photos were in the public domain, and the Copyright Act preempts state law. *Id.* paras. 14–15. *See also* Erik Cummins, *Who Owns Pictures of the Past?: Historic Photo Dispute Pits Copyright Act Against Contract Law*, S.F. DAILY J., Aug. 2, 2005, at 1, 5. The parties stipulated and agreed to dismissal. *See* Stipulation of Dismissal, *Schwartz*, No. C05-01551 JCS (Sept. 9, 2005).

142 The Supreme Court has at times suggested that that the states cannot interfere with copying of public domain works. *See* Sears, Roebuck & Co. v. Stiffel, Co., 376 U.S. 225, 232–33 (1964) (invalidating state unfair competition law preventing copying of unpatented work, stating that "a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying"). In a companion case, the Court stated that:

> [W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in . . . the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.

Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964).

However, more recent courts have held that publishers of public domain works can impose restrictions through contracts on the use of the works. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that "shrinkwrap" license agreement prohibiting user of CD-ROM containing public domain business telephone listings from copying CD was enforceable against user); Howard v. Sterchi, 974 F.2d 1272, 1277 (11th Cir. 1992) ("Although enforcement of this contractual limitation would make [the defendant] subject to limitations with respect to . . . materials that are in the public domain, this contractual restriction is clearly stated in the contract and plaintiffs would not receive the benefit of their bargain if the restriction is not enforced."). *But see* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 270 (5th Cir. 1988) (holding that state law licensing provision prohibiting adaptation of licensed computer program by decompilation or disassembly was preempted by Copyright Act and was therefore unenforceable). Commentators have expressed a range of views as to whether parties should be permitted to use contracts to impose restrictions unavailable under copyright law. *See generally* Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1110–23 (1977) (arguing against federal copyright preemption of state law); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1264 (1995) (arguing that Uniform Commercial Code should not allow for enforcement of "unbargained shrinkwrap license provisions that reduce or eliminate the rights granted to licensees by the federal intellectual property laws"); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1134, 1139 (1998) (writing that "information law [should] be a . . . federal preserve" and suggesting that Congress assign to federal courts power to make federal common law governing copyright and contract); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 76 (1999) ("[A]ttempts to rework, alter, or eviscerate aspects of copyright through the vehicle of state contract law

physical copies of works, possesses a *copyright* in those works. Acknowledgment by the licensee that the archive owns a copyright does not make it so.[143] It is wrong for archives to use their control over access to a work to assert a copyright in the work.

Similarly, donor restrictions do not create copyrights. It is not unusual for donors of works, including public domain works, to impose, as a condition of a donation to an archive, a prohibition on making copies of the work—along with other conditions attached to

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are illegitimate."); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 482 (1995) ("[T]here are many circumstances in which the law should not preempt parties' agreements to surrender . . . rights, despite the fact that such agreements contract around the [Copyright] Act's background rules."); David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543 (1992) (arguing that license provisions that prohibit reverse engineering are preempted by copyright and patent law).

Two considerations weigh against the conclusion that federal copyright law should preempt a licensing restriction enforceable under state law. First, a licensing restriction only applies to the individual entering into the agreement—whereas copyright is a right held against everyone. Second, the licensee is presumably (because he or she would otherwise obtain the work for free) receiving something of value: for example, the convenience of having the public domain material readily available or the desirability of having it in a certain form, like on a CD-ROM. Refusing to enforce licenses of this nature would deter vendors from packaging and making available public domain works, possibly impeding the availability and circulation of such works. On the other hand, there are things short of a prohibition on copying—the very thing that is the province of copyright law—that might more properly form the basis of a licensing agreement. For example, the license might specify that if the user makes a copy the licensor will be entitled to some additional fee or some portion of proceeds if the copies are subsequently sold. Licenses of this nature would protect both copyright law and provide an incentive to circulate public domain works.

There is also little rationale for upholding contracts of adhesion—for example, a book that says on the first page, "By proceeding you agree not to copy this book. If you do not agree, return the book for a refund," or websites that impose various "browse-wrap" restrictions in a terms and conditions statement hidden somewhere on the site. *See* Specht v. Netscape Commc'ns. Corp., 306 F.3d 17, 32 (2d Cir. 2002) (holding that website that offered free software could not enforce license limiting use of software viewable only if user scrolled down screen). *But see* Ticketmaster Corp. v. Tickets.Com, No. CV99-7654-HLH(VBKx), 2003 U.S. Dist. LEXIS 6483, at *9 (C.D. Cal. Mar. 6, 2003) (holding that deep links—links to another website that bypass its home page—do not violate copyright law, suggesting browse-wrap license is enforceable).

[143] The American Antiquarian Society perhaps understands this principle. An indemnity provision in the Agreement makes the Licensee liable for all claims against the Society resulting from the Licensee's use of the reproduction and provides that while "[t]he Society warrants that it owns the Licensed Material[,] . . . no warranty . . . is given by the Society with respect to any liability . . . arising from any claim that the use of the Licensed Material under this Agreement infringes on any right of any party," and therefore "[t]he Licensee will obtain all required consents and releases, if any, necessary for its use of the Licensed Material." Am. Antiquarian Soc'y, License Agreement para. 6 (undated) (on file with the *New York University Law Review*). In fairness, though, the "liability" might refer to something else, such as infringement of a right of publicity, or a claim of defamation arising from reproduction.

the gift.[144] Such restrictions are especially common with respect to films donated to film archives, which, as a result, allow members of the public to view the film but, in accordance with the donor's wishes, prohibit copying of it.[145] However, a restriction on a donated work does not create a *copyright* in the work. If the archive ignores the donor's condition on the gift and distributes copies of a work, the archive will have breached the contract with the donor and will have to answer for the breach. But if the work is in the public domain, there is no copyright violation. A visitor to the archive who steals the work and makes copies at home, or sneaks a recording device into the archive, might face legal actions—theft, for instance, or breach of an access agreement signed with the archive. But again, no copyright violation has occurred.

C. *The Costs of Copyfraud*

Copyfraud has costs. Following a general discussion of how copyfraud upsets the constitutional balance between copyright and free expression, this section considers two case studies that demonstrate specific harms that result from copyfraud. First, as a study of university course packets shows, copyfraud imposes financial burdens.

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144 The Society of American Archivists and the American Library Association have adopted a joint statement that while "private donors have the right to impose reasonable restrictions upon their papers to protect privacy or confidentiality for a reasonable period of time," archivists should "discourage . . . unreasonable restrictions" and "work toward the removal of restrictions when they are no longer required." ALA-SAA Joint Statement on Access: Guidelines for Access to Original Research Materials (Aug. 1994), http://www.archivists.org/statements/alasaa.asp (last visited Feb. 3, 2006). More generally, archives "should facilitate access to collections by providing reproduction services." *Id.* *See also* PETERSON & PETERSON, *supra* note 137, at 24–27 (discussing various kinds of donor restrictions).

145 Three prominent examples illustrate the point. The UCLA Film and Television Archives advises that "[d]ue to copyright laws and contractual agreements with our donors and depositors, Archive holdings (*including public domain titles*) are available for on-site research viewing only." UCLA Film and Television Archives, Archive Research and Study Ctr., Frequently Asked Questions, http://www.cinema.ucla.edu/access/arscfaq.html (last visited Feb. 3, 2006) (emphasis added). The Motion Picture Department at George Eastman House provides researchers access to the films in its collection for a fee; films are loaned out only to non-profit organizations that meet various exhibition criteria, and no copies of films are made for individuals. *See* George Eastman House, Int'l Museum of Photography and Film, Archival Film Loans, http://www.eastmanhouse.org/inc/collections/archival.php (last visited Feb. 3, 2006). The Motion Picture Broadcasting and Recorded Sound Division of the Library of Congress makes copies of its holdings available for a fee, but only after verifying there is no copyright infringement, and then only if the copying is permitted by the terms of the donor's grant. Library of Cong., Motion Picture & Television Reading Room, Obtaining Copies of Audio and Moving Image Material, http://www.loc.gov/rr/mopic/copies.html (last visited Feb. 3, 2006). The Library notes that "many donors place restrictions on the use of the materials they give to the Library." *Id.*

Second, as evidenced by the effects on filmmaking, copyfraud imposes expressive costs.

1. The Constitutional Balance

By granting monopolistic rights to authors, copyright has always had an uneasy relationship with the First Amendment.[146] The Constitution strikes a delicate balance between supporting authorship and protecting speech by permitting copyrights only for "limited Times."[147] Publishers upset that balance when they interfere with uses of public domain materials. When individuals, fearful of a lawsuit or mistaken about whether something is protected, forgo use of public materials, false claims of copyright chill creativity and expression. The public domain should be a large and ever-growing depository of works that everyone is—and feels—free to use.

Copyfraud undermines copyright's purpose. The Constitution gives Congress power to create copyright protections in order to encourage creative production by allowing authors to monopolize, for a limited period, revenues from their own works.[148] Precisely because copyright entails a monopoly, the Copyright Act sets careful limits on the scope and duration of copyright, limits that are best designed, at least in Congress's judgment, to promote creativity.[149] When pub-

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[146] *See supra* note 18.

[147] U.S. CONST. art. I, § 8.

[148] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that limited monopoly conferred by copyright "is intended to motivate the creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . ."); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 888 (1997) ("The rather unusual constitutional grant of power to enact the . . . copyright laws is decidedly instrumental in nature . . . ."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 970 (1990) ("Copyright law is a legal scheme, prescribed in the Constitution and put in place by Congress, to encourage the enterprise of authorship.") (footnotes omitted); Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in* Eldred v. Ashcroft, 55 SUP. CT. REV. 143, 147 (2003) ("The historic Anglo-American hostility to government grants of monopolies caused the framers of the Constitution to authorize the granting of copyrights only for limited periods and only for the purpose of promoting intellectual and cultural progress by inducing the creation of expressive works.") (footnotes omitted).

[149] Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 515 (1996) ("The length of term and the kind and scope of [intellectual property] rights protected represent a particular political judgment about the excess of benefits in increased production of valuable information over the costs to exclude would-be users and the costs of implementing the system.").

lishers leverage copyright law to expand the monopoly beyond that granted to authors in the name of creativity, those careful limits are upset. Copyright is not meant to permit publishers to profit from ordinary Americans, forced to pay unnecessarily for the use of public domain works.

Publishers shut down uses of the public domain if they are able to convince authors that all previous works are off-limits and that reproducing or using them will lead to trouble. Even when copyfraud does not deter expression altogether, it provides publishers with an opportunity to control the content of expression that does occur: It is not difficult to imagine publishers granting a license only where they approve of the licensee's project.[150] Citizens should be encouraged to reproduce and make use of public domain materials, not treated as though they are breaking the law.[151]

2. *The Costs of Course Packets*

Copyfraud affects pocketbooks by increasing the price people have to pay to obtain reproductions. Course packets, the photocopied (and increasingly digitized) collections of required readings sold to students, provide striking evidence of this problem.

Following several high-profile lawsuits,[152] many universities now pay licensing fees for everything they reproduce and distribute to their

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[150] Publishers have demonstrated this propensity in licensing copyrighted works. For example, the estate of Sylvia Plath famously refused to allow biographers critical of her husband Ted Hughes to quote from Plath's (copyrighted) works. *See* Dinitia Smith, *A Portrait of the Artist's Troubled Daughter*, N.Y. TIMES, Nov. 22, 2003, at B9; Anne Whitehouse, *Bios Shine a Light into Sylvia Plath's Dark Corners*, ATLANTA J. & CONST., Nov. 3, 1991, at N10. The estate of Lorenz Hart allegedly refused biographer Frederick Nolan permission to quote Hart's lyrics because, years earlier, Nolan had shared his research with other authors, who wrote that Hart was gay. Frederick Nolan, *Obituary: Dorothy Hart*, INDEPENDENT, Apr. 25, 2000, at 6; *see generally* FREDERICK NOLAN, LORENZ HART: A POET ON BROADWAY (1994). *See generally* Richard Morrison, *Touched by Lunacy Beyond the Grave*, LONDON TIMES, May 17, 1997, at 21 (observing how "in recent years we have seen dozens of estates exercising proprietorial rights in the form of censorship. Biographers who take even a moderately critical stance are prevented from quoting their subject's work."). The problem is not entirely new. *See* Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 725–30 (1945) (discussing problems of estates preventing uses of copyrighted works).

[151] In this respect, the provision of the Digital Millennium Copyright Act of 1998 (DMCA) creating procedures for copyright owners to issue takedown notices to internet service providers and subpoena identifying information about subscribers, 17 U.S.C. § 512(c), (h) (2000), risks removing public domain and fairly used material from websites. *See* Elec. Frontier Found., Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands, http://www.eff.org/IP/P2P/?f=20030926_unsafe_harbors.html (last visited Feb. 3, 2006) ("The DMCA has been used to invade the privacy of Internet users, harass Internet service providers, and chill online speech.").

[152] *See supra* note 9. Digitally distributed course packets have produced a new wave of lawsuits. *See* Andrea L. Foster, *Publishers Sue Over Online Sales of Course Packets,*

students—even when copying a public domain work or making a fair use of copyrighted materials. Schools shift responsibility to individual faculty members for resolving copyright issues and tell their professors they must avoid any risk of litigation and therefore use only licensed works.[153] As a result, students pay hefty fees, often several hundred

Alleging Copyright Violations, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 27, 2004, at A29 (reporting on lawsuits filed against copy shops in Austin, Texas, involving sale of course packets online).

153 For example, Colorado State University advises its faculty:

> The Fair Use doctrine set forth in the 1976 Copyright Act does not apply in many instances. Under the law, the owner of copyrighted works has the right to prevent all others from copying or selling it. Accordingly, photocopying copyrighted works without obtaining permissions may violate the rights of the author/creator and is directly contrary to the academic mission to teach respect for ideas and the intellectual property that expresses those ideas. Infringement can result in an award of money damages against the infringing party. Colorado State University employees have the responsibility when utilizing copyrighted materials to determine whether their use of the copyrighted materials would violate any copyright held by the author, or whether it would be considered fair use. . . . In general, the Copyright Law applies equally to material that is on the Internet. Unless explicitly designated as public domain, one should assume it is copyrighted. . . . Copyright infringement is illegal. What authors create and publishers publish, belongs to them and to reproduce that material without their permission is not only wrong, it is against the law. Failure to obtain proper clearance may result in the potential of significant liability on the part of the faculty/staff member.

Colo. State Univ., Copyright Guidelines for Classroom and General University Use, http://universityrelations.colostate.edu/index.asp?url=course_guidelines (last visited Feb. 3, 2006). The University of Minnesota discourages fair use, advising its faculty: "[A]lthough this exemption [for fair use] can prove invaluable for educational purposes, any adaptation or reproduction of copyrighted works without consent is a risk and caution should be used when claiming fair use." Univ. of Minn., Copyright Permissions Ctr., Copyright Laws & Guidelines, http://www.copyright.umn.edu/laws.html (last visited Feb. 3, 2006). Portland State University advises its faculty members to secure licenses because, in light of the litigation against Kinko's, copy shops will not reproduce without explicit authorization:

> Many faculty members have already experienced one of the effects of the Kinko's decisions. Some commercial copy centers are turning away the kinds of jobs which in the past they routinely accepted, unless faculty members present proof that they have obtained copyright clearance from every relevant publisher or copyright holder. It may be that some copy centers will ignore the law and run the risk of a copyright infringement suit. A faculty member who makes use of a copy service to produce, without permission, a course packet for use at Portland State University will be doing so in explicit violation of University policy and will be subject to both legal liabilities and appropriate disciplinary action.

Portland State Univ., PSU Copyrighted Print-Media Materials Use Policy, http://www.gsr.pdx.edu/orsp_policies_print.html (last visited Feb. 3, 2006). The Univ. of Tex. provides an online "crash course" in copyright law for its faculty. University of Texas, Crash Course in Copyright, http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm (last visited Feb. 3, 2006). Although the course offers detailed instruction on how to go about obtaining necessary permissions, the faculty member is told that "[s]omeone owns just about everything." *Id.* If explicit authorization cannot be secured, the work should not be reproduced:

dollars per semester, for their course packets—which, unlike real books, cannot typically be resold.[154]

These practices by educational institutions are not entirely surprising. Certainly, universities are concerned about keeping down costs for their students, and they are invested in the free exchange of ideas. However, beyond wanting to avoid lawsuits, universities also have a strong institutional interest in promoting a culture of licensing. Universities are both users and publishers. Universities operate their own presses and thus have copyrights of their very own to protect.[155]

> Sometimes, even if you go through all the right steps, you may not figure out whom to ask or the owner may not respond. There truly may be no one who cares about what you do with a particular work, but the bottom line is that no amount of unsuccessful effort eliminates liability for copyright infringement. Copyright protects materials whether the owner cares about protection or not. While it is possible that a thoroughly documented unsuccessful search for an owner would positively affect the balance of the fair use test under the fourth factor or lessen a damage award even if the court determines that there was an infringement, there are no cases addressing this issue, so it's only a theory. Because the University is likely to be liable, along with an accused individual, for the infringements of faculty, students and staff, U.T. System must advise such individuals not to use works for which required permission cannot be obtained.

Univ. of Tex., Getting Permission, http://www.utsystem.edu/ogc/intellectualproperty/permissn.htm (last visited Feb. 3, 2006).

[154] *See* Kristin Cretella, *Durham Copy Gets Sued, Students Get Screwed*, NEW HAMPSHIRE, Sept. 24, 2004, http://www.tnhonline.com/media/storage/paper674/news/2004/09/24/News/Durham.Copy.Gets.Sued.Students.Get.Screwed-732668.shtml?norewrite200603312017&sourcedomain=www.tnhonline.com (describing course packets costing as much as $119); Rebecca Dana, *Pricey Textbooks Frustrate Students*, YALE DAILY NEWS, Feb. 7, 2002, http://www.yaledailynews.com/article.asp?AID=18008 (describing student complaints about high-priced course packets); Laura Russell, *Copyright Law Raises Course Packet Prices*, MUHLENBERG WKLY, Sept. 9, 2004 (describing "sticker shock" resulting from copyright licensing fees); ILL. BD. HIGHER EDUC. FACULTY ADVISORY COUNCIL, REPORT ON COURSE PACKETS (2005), http://www.ibhefac.org/HTMLobj-710/REPORT_ON_Course_Packets.doc (last visited Feb. 3, 2006) (reporting that course packets are often as expensive as textbooks and that there is no resale market for course packets); Univ. of Or. Bookstore, Textbook Pricing Information, http://www.uobookstore.com/coursebooks/pricing.cfm (last visited Mar. 31, 2006) ("Copyrighting all of the photocopied material in course packets . . . can result in a rather pricey collection.").

[155] The University of Minnesota, for example, has an office devoted to processing copyright permissions:

> The Copyright Permissions Center is a division of Printing Services and a comprehensive permission service established for the University of Minnesota in 1992. The Copyright Permissions Center works closely with publishers, rightsholders, and the University of Minnesota Office of the General Counsel to ensure proper use of copyrighted materials. The center, in conjunction with Printing Services Copy Centers, has also partnered with University Bookstores and University Libraries to facilitate the dissemination of copyrighted material through course packets and library reserve. Additionally, we assist in reviewing material and securing permission when needed for copyrighted materials to be used in books, theses, workshops, seminars, multimedia projects, websites, and all types of departmental activities.

"As we get serious about protecting everyone else's copyrights," the University of Texas tells its professors, "we'd better get serious about our own copyrights and begin to manage them more effectively."[156] Copyfraud can therefore produce a chain reaction: If universities, as users, experience over-enforcement of copyright by others, universities, as publishers, will seek in the same manner to extend their own copyrights.[157]

Typically, universities obtain reproduction permissions through the Copyright Clearance Center, a not-for-profit entity that offers online processing and payment for licenses to millions of works.[158] This system conveniently connects professors with publishers. However, by failing to distinguish copyrighted from public domain works, the system encourages publishers to overreach, and it encourages professors to overpay for materials they distribute to students.

> The Copyright Permissions Center has two full-time staff with extensive knowledge of copyright laws and experience with the permissions process. Each year we process over 15,000 permissions requests utilizing a database comprised of over 3500 publishers and rightsholders. The center is registered with Copyright Clearance Center (CCC) and has agreements with several large publishers, including Harvard Business School Publishing and the American Psychological Association, enabling us to offer immediate clearance on registered works. In terms of volume, the Copyright Permissions Center is one of the largest academic permissions centers in the country and has placed the University of Minnesota at the forefront of copyright compliance.

Univ. of Minn., The ©opyright Permissions Center, http://www.copyright.umn.edu (last visited Mar. 31, 2006).

156 Univ. of Tex., Comprehensive Copyright Policy, http://www.utsystem.edu/ogc/intellectualproperty/cprtpol.htm (last visited Feb. 3, 2006). Perhaps not unrelatedly, universities are not always willing to support efforts by their faculty members to post materials online. *See* Brock Read, *Online Work in American Literature Needs More Support, Report Says*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 7, 2005, at A38 (reporting that in field of American literature, "many book-digitization projects are maintained by scholars as 'a labor of love,' without any significant support from their colleges").

157 The chain reaction problem may extend to other fields in which producers are also users. One study reports that although documentary filmmakers deplore the strict licensing requirements they must meet to include footage, music, and other works in their films, these same filmmakers support strong intellectual copyright protections for—and sell licenses to others to use—their own work. PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 22–24 (2004), http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf (last visited Feb. 3, 2006).

158 Copyright Clearance Center, http://www.copyright.com (last visited Feb. 3, 2006). The Center has recently branched out from licensing print reproductions to licensing materials disseminated through the popular Blackboard courseware. *See* Scott Carlson, *New Courseware Feature Eases Copyright-Permission Process*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 4, 2005, at A44. The article includes a comment by a representative of the Association of Research Libraries warning that this feature, by making licensing so easy, will encourage professors to pay unnecessarily for course materials. *See id.*

Many of the licenses for sale through the Copyright Clearance Center are to public domain works. A recent search turned up more than two-dozen editions of *The Federalist*, priced at between nine cents and twenty cents per page for each copy. Just two editions of *The Federalist* were marked, as they should be, as "Public Domain."[159] Other public domain works being sold at the Copyright Clearance Center are Joseph Story's *Commentaries on the Constitution*, at fifteen cents per page per copy;[160] Blackstone's *Commentaries*, at fifteen cents per page per copy;[161] Madison's notes from the Philadelphia Convention, also fifteen cents per page per copy;[162] numerous plays by Shakespeare at various prices;[163] and Thomas Paine's *Common Sense*, at eleven cents per page per copy.[164]

To be sure, some modern versions of public domain works, including versions available for licensing from the Copyright Clearance Center, contain introductory essays, editorial comments, and other original material—all of which can be copyrighted. For instance, the edition of *The Federalist* edited by Jacob E. Cooke contains Cooke's own introduction,[165] which is subject to copyright protection, even though the words of Hamilton, Jay, and Madison are not. But you wouldn't know it by visiting the Copyright Clearance Center's website, where *every* page of Cooke's reprint of *The Federalist* is available for licensing at fifteen cents per page per copy.[166]

In fairness, the Copyright Clearance Center, through its website, provides general information about the scope of copyright law and fair use, and it directs users to the U.S. Copyright Office for additional information on copyright law.[167] The careful user might take the trouble to investigate these matters more closely and eventually figure

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159 Copyright Clearance Center, http://www.copyright.com (search for "Federalist") (search conducted Feb. 23, 2006).

160 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Press 1995) (1833), http://www.copyright.com (last visited Feb. 3, 2006).

161 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Garland Pub. 1978) (1765–1769), http://www.copyright.com (last visited Feb. 3, 2006).

162 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Norton 1984) (1893), http://www.copyright.com (last visited Feb. 3, 2006).

163 Copyright Clearance Center, http://www.copyright.com (search for "Shakespeare") (search conducted Feb. 3, 2006).

164 THOMAS PAINE, COMMON SENSE (Penguin 1983) (1776), http://www.copyright.com (last visited Feb. 3, 2006).

165 THE FEDERALIST xi–xxx (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

166 Copyright Clearance Center, http://www.copyright.com (click "Find Title" link, choose "Classroom use" under the "for Academic use" tab, click "Continue," enter "0819530166" in "Standard Number" field, click on "Quick Price") (last visited Apr. 23, 2006).

167 Copyright Clearance Ctr., Copyright Education, http://www.copyright.com/ccc/do/viewPage?pageCode=cr100-n (last visited Feb. 24, 2006).

out from the provided links that public domain documents do not require payment. However, the Center's bias is clear. In failing to disclose, with respect to works like the Cooke edition of *The Federalist*, just what is copyrighted and what is in the public domain, the site is heavily tilted toward the interests of publishers, and it nudges faculty members into paying fees for all reproductions whether warranted or not.[168]

Fifteen cents to read a page of *The Federalist* may not sound like much, but it can add up to a mountain of free cash for the overreaching publisher who enlists the Center's services. A professor unnecessarily purchasing a license to copy Madison's *Federalist No. 10*, which runs ten pages in the Cooke edition, incurs $1.50 in fees per course packet. For each class of one hundred undergraduates, the publisher—in this case, Wesleyan University—receives $150 in undeserved licensing payments.[169] One hundred college professors teaching one course per year in which *Federalist No. 10* is assigned create an annual publisher's windfall of $15,000.

The savvy professor might of course know that the publisher does not own a copyright in Madison's work. Yet knowledge does not necessarily translate into action. The professor's department or university has almost certainly told the professor to obtain licenses for all course packet materials—perhaps with a reminder that if infringement is later found, the professor will personally be held responsible for any resulting liability, and will be subject to internal disciplinary action. The copy shop to which the professor delivers the originals for reproduction will be under similar instructions if it is part of the university—or otherwise wary if it is a commercial copier. Kinko's, for example, has a strict requirement of "written permission from the copyright owner before reproducing or modifying any copyrighted mate-

168 The information the Center provides about copyright reflects this bias. For example, it reports that "enforcement is a proven way to increase copyright compliance and create a level playing field for content users who do comply with copyright law," which "helps ensure that copyright holders receive compensation for the use of their content." Copyright Clearance Ctr., Licensing Services for Publishers, http://www.copyright.com/ccc/do/viewPage?pageCode=pu3-n&segment=publisher (last visited Feb. 3, 2005). Yet the interests of publishers receive primary attention: Since users are often "unaware of, or simply do not understand, their responsibilities under copyright law," the Center "works directly with industry groups and other organizations to address and resolve compliance issues." *Id.*

169 Copyright Clearance Center, http://www.copyright.com (last visited Feb. 3, 2006) (price quote for 100 packets containing ten pages from THE FEDERALIST (Jacob E. Cooke ed., Wesleyan Univ. Press 1961)). There is also a $3 processing fee collected by the Copyright Clearance Center. Copyright Clearance Ctr., Academic Permissions Service FAQs, http://www.copyright.com/ccc/do/viewPage?pageCode=h5#apsfaq (last visited Mar. 22, 2006).

rial"[170] and requires customers to indemnify the business and pay lawyers' fees if it is sued for infringement.[171] It will often be easier for a professor to simply pay the fees than to explain to the average Kinko's employee that Jacob Cooke and Wesleyan do not really own the copyright in *Federalist No. 10*. Passing along $1.50 to each student, still cheaper than buying the entire book, is easier than dealing with an administrative hassle. Paying a fee is especially attractive when the university copying center requires a professor submitting course packets for copying to sign a broad indemnification agreement.[172] Feeding this problem is uncertainty as to what counts as de minimis copying and fair use of copyrighted works, as well as publishers' narrow constructions of these standards.[173] When de minimis copying and fair use are poorly defined and liability for course packets is in the news, universities and copy shops naturally err on the side of caution.[174]

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170 FEDEX KINKO'S, COPYRIGHTS AND TRADEMARKS (2004) (on file with the *New York University Law Review*).

171 FedEx Kinko's, Terms of Use, http://www.fedex.com/us/officeprint/termsofuse.html/?link=5 (last visited Feb. 3, 2006).

172 *See, e.g.*, Univ. of Tex., Health Sci. Ctr. at Houston, Quick Copy Ctr., Course Packet Information, Indemnification Form (undated) (on file with the *New York University Law Review*).

173 *See supra* Part I.B.2. The U.S. Copyright Office has issued "Circular 21," which contains excerpts from several legislative provisions and other documents dealing with reproduction by librarians and educators. U.S. COPYRIGHT OFF., CIRCULAR 21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS, http://www.copyright.gov/circs/circ21.pdf (last visited Feb. 3, 2006). The circular quotes the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals," a set of fair-use guidelines for educators that was agreed to by a contingent of publishers' and educators' representatives. *Id.* at 7–10 (quoting H.R. Rep. No. 94-1476, at 65–74 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678–88). Among other things, the guidelines allow teachers to make a single copy of a copyrighted book chapter or a newspaper article; the teacher may copy and distribute to each student 250 words of a copyrighted poem, a complete article if it runs fewer than 2500 words, an excerpt of 1000 words from a work of prose, and up to ten percent of a copyrighted piece of sheet music. *Id.* at 8–9. The guidelines impose various additional restrictions, including no copying of more than two excerpts from works by a single author and no more than nine total instances of copying per course per term; a prohibition on copying workbooks and other "consumable" texts; and a requirement that copies be made available to students at no more than cost. *Id.* at 8. While the guidelines do not have the force of law, they were endorsed in a congressional committee report, H.R. Rep. No. 94-1733, at 70 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 5810, 5811, and courts have deferred to them. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1390 (6th Cir. 1996) (stating that guidelines "evoke a general idea, at least, of the type of educational copying Congress had in mind"); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 919 n.5 (2d Cir. 1994) (describing guidelines as "persuasive authority").

174 Typical of the advice schools give faculty members, Stanford University cautions:

> The difficulty in claiming fair use is that there is no predictable way to guarantee that your use will actually qualify as a fair use. You may believe that your use qualifies—but, if the copyright owner disagrees, you may have to

Frugal students, aggravated by the high costs of course materials, might realize that a course packet contains some public domain works. However, even if those students—who are unlikely to be given a breakdown of the total price—are able to figure out that they have been asked to pay unnecessary licensing fees, there is little recourse. Course packets are bundled goods. A student cannot typically elect to purchase from the supplier only those items for which a license is truly required; declining the course packet entirely leaves the student without ready access to class readings, some of which may be inconvenient or nearly impossible to obtain independently. Were the student the direct customer of the Copyright Clearance Center, there would be greater opportunity to reject unnecessary licensing fees. However, under the current system, the arrangements are all made in advance between the professor and the publisher and presented as a done deal to the student, who is left with no real option but to accept it.

3. *The Impact on Documentary Films*

The impact of copyfraud on documentary filmmakers illustrates how it affects creative expression. Documentary filmmakers face hurdles and incur substantial costs when licensing music, archival photographs, and footage to use in their films.[175] They also encounter difficulties clearing sounds and images that happen to be captured during filming of real life scenes.[176] Filmmakers face pressures to

> resolve the dispute in a courtroom. Even if you ultimately persuade the court that your use was in fact a fair use, the expense and time involved in litigation may well outweigh any benefit of using the material in the first place.

Stanford Univ. Libraries and Academic Info. Res., Copyright and Fair Use, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-d.html (last visited Feb. 3, 2006).

[175] Patricia Aufderheide and Peter Jaszi report, based on interviews with forty-five documentary filmmakers, that rights-clearance costs have risen dramatically in the last two decades, such fees today comprise a substantial portion of the typical film's budget, and lawyers' fees incurred in negotiating clearance rights are also substantial. AUFDERHEIDE & JASZI, *supra* note 157, at 5, 7–9. Clearing rights also takes longer today because of difficulties in identifying the rights holders, negotiating licensing fees, and receiving permission. *Id.* at 10–16.

[176] Amy Sewell, the producer of "Mad Hot Ballroom," a documentary about New York City children and ballroom dancing, paid out $170,000, more than a quarter of her $500,000 budget, for clearance costs for music played during filming, including $2500 to EMI because a cellphone belonging to one of the film's subjects had a six-second ringtone that played the theme from "Rocky." *See* Nancy Ramsey, *The Secret Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, §2, at 13. Although Sewell thought she could invoke fair use, her lawyer advised her that "for your first film, you don't have enough money to fight the music industry" and that she should license everything, however short. *Id.* The "fear factor" prompted her to pay up. Carrie McLaren, *How Did* Mad Hot Ballroom *Survive the Copyright Cartel?*, STAY FREE! DAILY, http://blog.stayfreemagazine.org/2005/06/mad_hot_ballroo.html (last visited Mar. 29, 2006).

obtain authorization with respect to everything they use—whether authorization is required under the law or not.[177] "We can't say . . . 'We feel confident that this image can be used safely,'" says filmmaker Jeffrey Tuchman.[178] "[T]he broadcaster or cablecaster will not accept a film if the paperwork does not conform to their lawyers' standards."[179]

In addition to finding themselves generally unable to rely upon fair use of copyrighted works,[180] filmmakers can find it hard to use public domain works. "Don't ever assume that any film clip is in the public domain," warns *MovieMaker* magazine.[181] Similarly, "It is always safest to clear," states an entertainment lawyer.[182] A popular guide for independent filmmakers written by three entertainment lawyers advises against using *any* kind of prior footage because of the inherent "clearance nightmare."[183]

Distributors and broadcasters impose strict clearance procedures on filmmakers. Broadcasters have required filmmakers to obtain permission to include public domain movie trailers in a film, and studios have prohibited use of public domain trailers altogether.[184] "Before relying on using a work or part of a work because of . . . 'public domain,' the Filmmaker should consult an experienced attorney to ascertain whether these concepts truly apply," says one distributor.[185]

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177 AUFDERHEIDE & JASZI, *supra* note 157, at 9–10 (describing gatekeepers who insist on clearances).

178 *Id.* at 9.

179 *Id.*

180 *See id.* at 24–28 (reporting that while filmmakers understand concept of fair use, as practical matter many do not see it as option and those who do rely on fair use do so without drawing attention to it); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 97–98 (2004) (describing how broadcasters are reluctant to allow filmmakers to rely on fair use).

181 Walter J. Coady, Jr., *Your Film: Blockbuster Hit or Lawsuit in Waiting?*, MOVIEMAKER, Winter 2003, at 46.

182 MICHAEL C. DONALDSON, CLEARANCE & COPYRIGHT: EVERYTHING THE INDEPENDENT FILMMAKER NEEDS TO KNOW 221 (2d ed. 2003).

183 GUNNAR ERICKSON ET AL., THE INDEPENDENT FILM PRODUCER'S SURVIVAL GUIDE: A BUSINESS AND LEGAL SOURCEBOOK 290 (2d ed. 2005). The authors state:

> Using excerpts or clips from someone else's movie or television program in your picture is a clearance nightmare. It is complicated and expensive because you may have to make multiple deals to clear a single clip, and even when you get permission it is generally of a very qualified kind. Frankly, we discourage you and our clients from using clips.

Id.

184 AUFDERHEIDE & JASZI, *supra* note 157, at 9 (discussing experience of Robert Stone with PBS); *id.* at 14 (discussing studios' refusals to allow public domain trailers to be used by A&E).

185 Atomfilms, Clearance Procedures, http://www.atomshockwave.com/clearance_procedures.htm (last visited Feb. 3, 2006).

Further, the distributor informs filmmakers that "[f]ilm and audio clips are dangerous unless licenses and authorizations . . . are obtained from not only . . . the owner of the clip or party authorized to license the same, but also from all persons . . . supplying material contained [there]in."[186]

In addition, distributors require filmmakers to indemnify them for any resulting liability.[187] Insurers issuing the universally required errors and omissions insurance impose very high clearance standards and expect to see authorization for every prior work included in the film.[188] A recent analysis notes that "[w]hile many filmmakers are willing to take risks on using images . . . their distributors and producers are not."[189] One law firm advises that the filmmaker must obtain clearances for every use of distinctive buildings, props, and wardrobe items with logos, artwork, posters, music, stock footage, and trailers.[190]

In a recent interview, filmmaker Gordon Quinn of Kartemquin Films in Chicago recounted the problems he has encountered when using public domain materials in his documentaries.[191] Quinn stated that in one instance a director of an earlier work asserted copyright and insisted upon payment before allowing Quinn to include footage, though in fact the footage in question had been produced by the federal government and so was in the public domain.[192] Quinn also noted problems he has encountered with archives. Beyond asserting copyright over public domain works, archives sometimes have refused Quinn permission to access or use works in their collections on the ground that the work is in fact in the public domain; the archives are

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186 *Id.*

187 *See, e.g.*, Clickflicks.net, Film Submission Application, Appendix I: Submission Agreement (on file with the *New York University Law Review*) (filmmaker agrees to "indemnify Company from and against any and all claims . . . or liabilities . . . that [may] be asserted against Company . . . at any time in connection with the Submission, or any use thereof").

188 *See* Brandt Goldstein, *Law Professors Help Filmmakers on "Fair Use,"* WALL STREET J. ONLINE, Jan. 13, 2006, http://www.wsj.com (subscription required), *available at* http://www.nyu.edu/classes/siva/archives/wsjarticle.pdf (last visited Mar. 28, 2006) ("[Errors and Omissions] policies often demand that a filmmaker clear the rights to just about everything in the final version of a film, regardless of what copyright law allows.") (quoting law professor Jennifer Jenkins); DONALDSON, *supra* note 182, at 198–203, 209–16 (discussing requirements for errors and omissions insurance).

189 Matt Dunne, *The Cost of Clearance: The Expense and Complications of Using Copyrighted Materials*, INDEPENDENT, Apr. 2005, at 30, 30.

190 David Albert Pierce, Pierce Law Group LLP, Clearance Procedures Guidelines, http://www.piercegorman.com/Clearance_Procedures.html (last visited Mar. 28, 2005).

191 Telephone Interview with Gordon Quinn, President, Kartemquin Films (Dec. 16, 2005).

192 *Id.*

concerned that because they do not own rights to the public domain work, they could be held responsible for Quinn's uses.[193] In some cases, Quinn noted, an archive has given him access to a public domain work on a "don't ask, don't tell" policy: Quinn is allowed to use the material in his film, but he must not identify the archive as the source.[194] In other cases, Quinn has had to obtain the same material from another source.[195]

Michael Donaldson, a prominent entertainment lawyer, provided other examples of how control over the public domain affects filmmaking. According to Donaldson, filmmakers have faced false copyright claims and unnecessarily paid out licensing fees to use excerpts from an early science fiction film.[196] Donaldson also emphasized that various gatekeepers working with a filmmaker—insurers, studios, distributors, and these parties' lawyers—are often the ones responsible for unnecessary permissions and fees.[197] Even when represented by counsel, filmmakers who use public domain footage are told by studios to obtain permission and pay a licensing fee—sometimes many thousands of dollars—to the original creator or owner of the master reel.[198] Rather than persuade these gatekeepers that a license is not necessary, the filmmaker must normally comply with the request or else eliminate the material from the film.[199]

Filmmakers seeking to use public domain footage must obtain it from somewhere, such as a collector, the original studio, or an archive. Access can also be a serious impediment to making use of public domain works: The owner of a physical copy of a work—especially if it is the only copy—can simply prevent anybody from using it. Independent film distributor Mitchell Block states that access is often the most difficult aspect of using public domain material.[200]

While owners of physical copies of a work have no obligation to grant access to it, in the filmmaking context the distinction between access restrictions and copyright often blur. Owners of the physical copy of public domain footage often impose copyright-like restrictions on it: charging licensing fees for reproduction, limiting the ways in which the footage can be used, and prohibiting future sublicensing.[201]

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193 *Id.*
194 *Id.*
195 *Id.*
196 Telephone Interview with Michael C. Donaldson, Attorney (Jan. 7, 2006).
197 *Id.*
198 *Id.*
199 *Id.*
200 Telephone Interview with Mitchell Block, President, Direct Cinema Ltd. (Jan. 10, 2006).
201 *Id.*

When filmmaker Jan Krawitz sought to include an excerpt from an early public domain instructional film in one of her films, the archive that owned the reel told her it made no distinction between copyrighted and public domain works in its collection.[202] To use the film, Krawitz would have to pay the archive a substantial licensing fee just as if the film were copyrighted.[203]

Copyfraud impacts expression. Distributors advise filmmakers that if there is any doubt about something, they should eliminate it from the film: "The Filmmaker should continually monitor the Film at all stages, from inception to final cut, with the objective of eliminating material that could give rise to a claim."[204] The motto is: "When in doubt, cut it out."[205] Filmmakers who face what one commentator has termed the "pay-or-cut dilemma"[206] are often forced to change their creative plans. Rather than deal with the hassles of licensing, filmmakers end up avoiding certain types of projects altogether.[207] One popular journal for filmmakers concludes that with so many filmmakers "abandoning projects because of cost or self-censoring materials," the "sense in the [independent filmmaker] community [is] that the problem [of clearance] has reached a crisis point."[208]

II
REMEDYING COPYFRAUD

This Part turns to remedies for copyfraud. It argues first that the Copyright Act should be modified to create civil liability for copyfraud. Private parties should be permitted to bring civil causes of action for false copyright claims; federal and state government agencies should be empowered to impose civil fines; and there should be

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202 E-mail from Jan Krawitz, Professor, Stanford Univ. Dep't of Commc'n, to author (Jan. 18, 2006 15:22 EST) (on file with the *New York University Law Review*).

203 *Id.*

204 IndieProducer, Clearance Procedures 1–2 (on file with the *New York University Law Review*).

205 Fernando Ramirez, *The Many Meanings of "Fair Use,"* INDEPENDENT, Dec. 2005, at 47, 48.

206 Goldstein, *supra* note 188.

207 *See* AUFDERHEIDE & JASZI, *supra* note 157, at 29 (explaining that filmmakers "shape their film projects to avoid the problem of rights clearance, omitting significant details" and that "the avoidance of clearance problems may help to dictate filmmakers' choices of subject-matter, influencing them (for example) to avoid projects involving current events or modern history—which tend to be minefields . . . because strict compliance through licensing is required"). Further, subsequent distribution of existing works can be impeded by the need to renew licenses. For example, the civil rights movement documentary, *Eyes on the Prize*, is no longer available for purchase and cannot be broadcast because it contains archival footage for which licenses have expired. The public's access to the work is therefore limited. *Id.* at 19.

208 Dunne, *supra* note 189, at 30–31.

enforcement by private parties operating as copyfraud bounty hunters. Second, courts should extend the availability of the copyright misuse defense to prevent copyright owners from enforcing an otherwise valid copyright if they have engaged in copyfraud. In addition, this Part proposes several supplemental remedies. Congress should more generally enhance protection for the public domain by creating a national registry listing public domain works and a symbol to designate those works. Lastly, several possible remedies might be available under state law and through efforts by private parties.

A. Civil Liability

Congress should amend the Copyright Act to impose liability against publishers who make false copyright claims and to allow individuals injured by copyright cheating to collect damages. The proposal is not entirely unprecedented. The Copyright Act currently discourages—albeit gently—false claims to copyright in U.S. government works. Section 403 of the Act penalizes a failure to state in a copyright notice that no copyright is claimed in any reproduced governmental works.[209] The copyright owner who omits the proper designation cannot invoke the provisions of the Act that prevent a defendant from asserting innocent infringement when prior notice of a copyright was provided.[210] Westlaw, Lexis, and other law-abiding commercial providers of government materials therefore carry notices on their products making clear that they do not claim any copyright in original government works. Congress should expand this principle to protect the rest of the public domain as well—but with more severe consequences for false or misleading copyright assertions. If government publications are important enough to protect from copyright cheats, so too are the writings and other works of citizens.

Determining the best liability scheme, one that achieves a balance between deterring copyfraud and minimizing burdens of litigation on defendants and the judicial system, will require further study. For present purposes, it suffices to identify some of the possibilities and their relative strengths and to set out the issues Congress will need to take into account. Creating a civil liability scheme for copyfraud requires choices about the kinds of behavior that will give rise to liability; who will have standing to bring a lawsuit; and the available remedies. Although various arrangements are imaginable, combating copyfraud will likely demand a liability scheme that relaxes some traditional elements of fraud, that extends standing to govern-

209 17 U.S.C. § 403 (2000).
210 *Id.*

ment agencies and private plaintiffs even in the absence of personal injury, and that makes available substantial monetary damages and injunctive relief.

1. Liability

The clearest case in which copyfraud liability should arise is under a straight-up fraud theory: when the defendant has made an intentionally deceptive copyright statement upon which the plaintiff has detrimentally relied.[211] If a publisher intentionally attaches a copyright notice to a public domain work in order to cause deception and then extracts licensing payments from individuals who rely on that false notice, the publisher should be liable to the licensee for damages incurred. Some statutorily specified bonus amount might also be appropriate in these circumstances so as to deter publishers from engaging in copyfraud and to make bringing the lawsuit worth its cost.

Also on a simple fraud approach, publishers should be held liable to individuals who detrimentally refrain from using a public domain work as a result of the publisher's intentionally false claim to copyright ownership. Exactly what would be required to prove detrimental reliance would depend on the individual circumstances of the case, but the clearest kind of proof would be evidence that a plaintiff, believing that a copyright notice was valid, purchased the work instead of copying it. For example, if the members of a chorale society purchase additional sets of public domain sheet music marked as copyrighted because they believed the copyright notice, they have detrimentally relied upon the false copyright notice.

In many such instances, the precise amount of actual damages will be readily calculable. An individual who purchases at full price her own copy of a work, rather than copies her friend's, suffers a determinable loss, as do college students directed to pay for works because their professors believe the works cannot be posted on a website or otherwise made freely available. Additional, deterrence-based damages might also be appropriate in such circumstances.

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[211] *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977). According to the Restatement:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

Id. *See* Agathos v. Starlite Motel, 977 F.2d 1500, 1508 (3d Cir. 1992) ("Under general principles of tort law, the elements of fraud are: (1) a material factual misrepresentation; (2) made with knowledge or belief of its falsity; (3) with the intention that the other party rely thereon; (4) resulting in justifiable reliance to [sic] that party to his detriment.").

In other cases, the actual loss may be more nebulous. A teacher foregoes using a work in class or chooses something different to use instead. A film society screens its second-choice movie or decides against screening anything at all. A website owner posts one set of materials instead of another set. A screenwriter decides against adapting a novel. In these instances, where there is detrimental reliance on a defendant's false copyright notice, an appropriate remedy might be some specific statutory award.

Requiring that the traditional elements of fraud be met before holding a publisher liable has the advantage of deterring frivolous litigation and limiting compensation to situations where someone has suffered an actual, demonstrable loss as a result of the publisher's deliberate conduct. However, a strong case exists for relaxing the elements of fraud and drawing a wider circle of liability in order to deal with copyfraud.

Because false copyrights have a constitutional dimension—interfering with creativity and free expression—they deserve a more vigorous enforcement approach than do other kinds of fraud. Copyfraud has broad effects beyond the injury to individual victims who can demonstrate detrimental reliance. Falsely marking a public domain work undermines expression even if the false marking was not made with any intent to trick somebody into making payment. Furthermore, many victims will have suffered, individually, only a small monetary loss—for example, paying out a few dollars in licensing fees—and might not readily recognize the expressive injuries that they have suffered.

For these reasons, it makes sense to impose liability for copyfraud without requiring plaintiffs to establish all of the elements of the traditional tort of fraud. A regime of strict liability—where any false use of a copyright notice, intentional or not, would trigger liability—would likely be too burdensome on publishers, so intent should be required; however, plaintiffs should be permitted to establish intent by inference. Furthermore, a cause of action in copyfraud should not require proof of detrimental reliance. Finally, as explored in greater detail below in the discussion of standing,[212] the cause of action should not be limited to individuals who have suffered an actual injury. Instead, any member of the public should be empowered to bring a copyfraud claim.

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[212] *See infra* Part II.A.2.

Here, the Patent Act is instructive.[213] The Patent Act prohibits falsely marking a good as patented by the use of the word "patent" or other words or numbers, or falsely marking the good as covered by a pending patent.[214] The false marking provision, which imposes a monetary fine, requires a showing that the defendant intended to deceive the public.[215] However, the statute does not require proof

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[213] This is a good place to note that care should be taken in extending patent rules to the copyright context. Patent litigation is circumscribed in a way that copyright litigation is not. Patent holders are inventors; patent infringers are other inventors and manufacturers. By contrast, anyone can own a copyright simply by creating an original work. An ordinary person can also easily infringe a copyright—and can easily become the victim of copyfraud. In designing rules for copyright and copyfraud it is important to keep in mind that the universe to which those rules will apply is potentially extremely large.

[214] 35 U.S.C. § 292(a) (2000). It states:

> Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word "patent" or any word or number importing that the same is patented for the purpose of deceiving the public; or
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> Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—
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> Shall be fined not more than $500 for every such offense.

Id. Courts have reasoned that a designation is not false if there is a foreign patent or foreign patent pending. *See, e.g.*, Keystone Mfg. Co. v. Jaccard Corp., 394 F. Supp. 2d 543, 566 (W.D.N.Y. 2005) (noting that section 292(a) "does not differentiate between U.S. and foreign patents"); Kor-CT, LLC v. Savvier, Inc., 344 F. Supp. 2d 847, 857 (D. Conn. 2004) (stating that section 292(a) "only prohibits the marking of articles that are not subject to either foreign or domestic patent protection").

[215] *See* Boyd v. Schildkraut Giftware Corp., 936 F.2d 76, 79 (2d Cir. 1991) (holding that cosmetic compact case manufacturer who misunderstood instructions to delete reference to patent number and shipped cases with that number was not estopped from asserting that he did not intend to deceive public); Mayview Corp. v. Rodstein, 620 F.2d 1347, 1359–60 (9th Cir. 1980) (stating that "four elements need to be established to sustain a finding of violation: (1) a marking importing that an object is patented (2) falsely affixed to (3) an unpatented article (4) with intent to deceive the public" and remanding for clarification where district court had considered fourth element under "knew or should have known" standard); FMC Corp. v. Control Solutions, Inc., 369 F. Supp. 2d 539, 584 (E.D. Pa. 2005) ("A claim for false marking fails absent evidence of an actual intent to deceive."); Laughlin Prods., Inc. v. ETS, Inc., 257 F. Supp. 2d 863, 871 (N.D. Tex. 2002) (granting summary judgment in defendant's favor where plaintiff had failed to present evidence that defendant acted with specific intent to deceive); Symbol Techs., Inc. v. Proxim Inc., No. Civ.A.01-801-SLR, 2002 WL 1459476, at *1 (D. Del. June 25, 2002) ("[A] finding of an intent to deceive the public is an essential element of the offense of mismarking."); Blank v. Pollack, 916 F. Supp. 165, 173 (N.D.N.Y. 1996) ("The statute requires intent to deceive, but, an intent to deceive the public will not be inferred if the facts show no more than that the erroneous patent marking was the result of mistake or inadvertence."); Johnston v. Textron, Inc., 579 F. Supp. 783, 795 (D.R.I. 1984) ("A prerequisite for a violation of [section 292(a)] is a finding of an intent to deceive."), *aff'd*, 758 F.2d 666 (Fed. Cir. 1984); Roman Research, Inc. v. Caflon Co., Inc., 210 U.S.P.Q. (BNA) 633, 634 (D. Mass. 1980) (stating that because statute "is penal in nature . . . it must be construed strictly" and "[a] requisite element of the statute is proof of an intent to deceive the public").

that anybody actually was deceived or detrimentally relied upon the deception.[216] Further, the statute permits "[a]ny person" to bring a qui tam action and retain half of the recovered penalty.[217]

Construing this provision of the Patent Act, the Federal Circuit recently explained that the statute did not impose "strict liability for mismarking."[218] Instead, the statute required an intent to deceive, which, the court said, is "a state of mind arising when a party acts with sufficient knowledge that what it is saying is not so and consequently that the recipient of its saying will be misled into thinking that the statement is true."[219] Such intent has both a subjective and an objective element: "Intent to deceive, while subjective in nature, is established in law by objective criteria. . . . Thus, objective standards control and the *fact* of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent."[220] Therefore, while a defendant's "mere assertion"[221] does not prevent liability, "in order to establish knowledge of falsity the plaintiff must show by a preponderance of the evidence that the party accused of false marking did not have a reasonable belief that the articles were properly marked."[222] Other courts have also recognized that intent can be established where notice has been provided that a marking is false and the defendant continues to mismark the product.[223]

These standards, which have parallels in other areas of the law,[224] should be extended to copyright. There should be liability for

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216 *See* 35 U.S.C. § 292(a) (2000).

217 *Id.* § 292(b); *Boyd*, 936 F.2d at 79 ("The statute is enforceable by a *qui tam* remedy, enabling any person to sue for the statutory penalty and retain one-half of the recovery.").

218 Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352 (Fed. Cir. 2005).

219 *Id.*

220 *Id.* (citation and quotation omitted).

221 *Id.*

222 *Id.* at 1352–53.

223 *See, e.g.*, Johnston v. Textron, Inc., 579 F. Supp. 783, 794–96 (D.R.I. 1984) (finding intent to deceive public by use of word "patented" in radio advertisement after being notified by patent holder of falsity of such use).

224 For example, under the federal False Claims Act (FCA), which prohibits "knowingly" making false or fraudulent claims for payment on the federal government, 31 U.S.C. § 3729(a) (2000), "no proof of specific intent to defraud is required" for liability to be imposed. *Id.* § 3729(b). Instead, the relevant state of mind is established where the defendant "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." *Id.* Further, the statute requires no showing that the government relied upon the false claim to its detriment. *See* United States v. Bd. of Educ., 697 F. Supp. 167, 179 (D.N.J. 1988) ("Actual reliance is not essential to the recovery of damages under the False Claims Act. Whether the government relied upon the false representations of the defendants or not, it should be able to recover the money disbursed on account of those representations."); James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False*

copyfraud where a defendant has marked a work with a false copyright notice in order to deceive the general public. As in the patent context, a further showing of detrimental reliance would not be necessary. Relaxing the traditional elements of the tort of fraud in these ways makes sense in light of the important public interest at stake in protecting the public domain. If Congress couples the relaxed liability scheme with careful specification of the damages and other penalties that are assessed when liability is established,[225] copyfraud can be deterred without unduly burdening publishers.

In many cases, the requisite intent would be readily established by inference. For example, because it is impossible to believe that a play by Shakespeare is copyrightable, a publisher who attaches a copyright notice to the play would easily be found to have acted with deceptive intent. While, therefore, liability would not be imposed on the basis of mere negligence, intent could be inferred. On the other hand, liability would not attach when a publisher has acted in good faith, for example on a representation by an author that she owned the copyright in a work she gave the publisher. Importantly, as in the patent context, deceptive intent could be found where a defendant received notice of a false copyright and continued to attach the copyright notice to the work.

In order to avoid liability, publishers would be required to specify clearly which portions of a book or other work are protected by copyright and which are not. The requirement is not especially onerous. Many reprints of older works, because they add nothing original, are not copyrightable: The reprint will therefore carry no copyright notice. Reprints or compilations that include a combination of public domain and copyrighted materials, such as a reproduction of *The Federalist* with a new introductory essay, would require only a simple

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Claims Act, 71 U. CIN. L. REV. 839, 859 (2003) ("Reliance is . . . not an element of a False Claims Act action."). Indeed, some courts have found that liability exists even when governmental officials have some knowledge of the fraud. *See, e.g.*, United States ex. rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1156 (2d Cir. 1993) ("[T]he statutory basis for an FCA claim is the defendant's knowledge of the falsity of its claim, . . . which is not automatically exonerated by any overlapping knowledge by government officials."). State consumer fraud statutes also often relax the traditional fraud elements and impose liability without proof of reliance. *See* Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2201–03 & n.104 (2004) (discussing state court decisions in which reliance has been relaxed in favor of showing of causal relationship between defendant's conduct and plaintiff's loss); Gary L. Wilson & Jason A. Gillmer, *Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance under Minnesota's Consumer Protection Statutes*, 25 WM. MITCHELL L. REV. 567, 595–608 (1999) (discussing state and federal consumer protection laws that relax traditional fraud requirement of reliance).

225 *See infra* Part II.A.4 (proposing such remedies).

explanatory statement setting out what is protected and what may be freely reproduced.

In most instances, the designation is easily made. Indeed, some scrupulous publishers already provide proper notices.[226] A notice should simply and clearly specify which materials—for instance, an introductory essay, editorial comments, or footnotes—are copyrighted, along with the relevant page numbers, and which parts of the work are public domain materials that can be freely reproduced by others. Publishers are already accustomed to providing notices to designate a licensed reproduction of copyrighted materials.[227] Requiring publishers to designate materials that are public domain works would be equally straightforward.

In some instances, original copyrighted materials might be so intermingled with a public domain work that there is no easy way to include a statement specifying what is protected and what is not. In such circumstances, some other kind of statement—perhaps one explaining that the publication is based on a specific public domain work, itself not copyrighted—would be appropriate. The point is that copyright notices should, as a general rule, make clear what is copyrighted and what is not.

2. *Private Standing*

In creating a civil liability scheme to deal with copyfraud, Congress should grant broad standing to bring legal claims. Clearly, private parties who have suffered injuries of the kinds discussed in the preceding section should have standing to seek relief. But limiting standing to parties who can demonstrate personal injury will likely be insufficient to respond to the broad problem of copyfraud. Individuals who suffer a specific copyfraud injury—for instance, unnecessarily purchasing a copy of a work rather than photocopying it—might not easily recognize they have been wronged and might lack sufficient incentive or resources to bring a legal claim. Copyfraud often entails a series of small, individualized injuries over a period of time rather than a large wrong against a single party on one occasion. Class action litigation might prove useful to remedy copyfraud where there

[226] Signet, a Penguin imprint, is notable. Its 1985 collection of Mark Twain's writings (all in the public domain) properly states "the texts in this book are reproduced from *The Writings of Mark Twain* . . . from an original edition in the collection of The New York University Libraries," but that the new introduction by Justin Kaplan is copyrighted. MARK TWAIN, THE SIGNET CLASSIC BOOK OF MARK TWAIN'S SHORT STORIES (Justin Kaplan ed., 1985) (notice on copyright page). Similarly, Signet's reprint of Frederick Douglass's work carries a copyright notice limited to a new introduction. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS (Signet 1997) (1845).

[227] *See supra* note 112 and accompanying text.

are large numbers of individuals who have suffered the same injury. At the same time, the harm of copyfraud is quite general: When public domain works are copyrighted, in addition to any particular individual who suffers a loss, the public as a whole is the victim. Accordingly, it makes sense to assign standing to a broad set of plaintiffs to bring copyfraud claims.

Congress should give standing to private attorneys general to enforce the law.[228] These private attorneys general would be entitled to act as plaintiffs and bring claims for copyfraud even if the claims did not correspond to any specific injury the plaintiffs themselves had suffered. In essence, private attorneys general would function as copyfraud bounty hunters: They would monitor publications for false claims to copyright and be entitled to collect a bounty for each instance of copyfraud uncovered.

Congress authorizes private attorney general litigation in other contexts. For example, since the 1970s, many federal environmental laws have authorized any individual to bring a lawsuit to enforce the law's provisions.[229] Similarly, many states permit individuals to bring lawsuits to enforce state environmental, consumer protection, and other laws—even though the plaintiff bringing the suit may not have suffered an individual injury.[230] Private attorney general litigation can promote enforcement of the laws when government is unable or unwilling to devote public resources to enforcement.[231]

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228 A private attorney general is "a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own." Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005).

229 *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619(a) (2000) (permitting "any person" to commence an action). The Supreme Court has viewed the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2000), and its civil action provision, § 1964(c), as creating a private attorney general mechanism. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 283 (1992) (O'Connor, J., concurring in part and concurring in judgment) (finding that Congress intended to allow private attorneys general to enforce RICO); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) ("[Civil RICO] bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate."). However, there are limits on who qualifies as a civil RICO plaintiff. *See* 18 U.S.C. § 1964(c) (providing that plaintiff must allege "injur[y] in his business or property by reason of" RICO violation).

230 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 214, §7A (West 2005) (permitting citizen lawsuits to enjoin activities causing environmental damage); MICH. COMP. LAWS ANN. § 324.1701(1) (West 2005) (permitting "any person" to bring environmental action); MINN. STAT. ANN. § 325D.45 (West 2004) (allowing "[a] person likely to be damaged by a deceptive trade practice" to seek relief).

231 *See Holmes*, 503 U.S. at 283 ("By including a private right of action in RICO, Congress intended to bring 'the pressure of private attorneys general on a serious national problem for which public prosecutorial resources [were] deemed inadequate.'") (quoting and altering *Agency Holding Corp.*, 483 U.S. at 151); Trafficante v. Metro. Life Ins. Co.,

Indeed, Congress has already recognized in the patent context the benefits of private attorney general enforcement. In addition to government prosecution for misuse of patent marks,[232] the Patent Act creates a private cause of action: "Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States."[233] Congress should create a similar mechanism for actions against those who use copyright notices to falsely mark a public domain work. Turning copyfraud enforcement over to private individuals would likely be more effective and less expensive than relying on government agents. Allowing any individual to seek a remedy would create stronger enforcement than waiting for a victim of copyfraud to bring an action.

At the same time, private attorney general litigation is not without its problems. Commentators have argued that private attorney general litigation can result in profit-seeking lawyers filing frivolous lawsuits and settling claims quickly and cheaply, resulting in poor enforcement of the laws and a diminishment of political accountability.[234] Much recent criticism about private attorney general litiga-

409 U.S. 205, 211 (1972) (explaining that because Attorney General has only two dozen lawyers to litigate fair housing cases, "the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority") (quotation omitted); S. Rep. No. 94-1011, at 3–4 (1976) *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911 (observing that private attorneys general allow for "vigorous enforcement of . . . legislation, while at the same time limiting the growth of the enforcement bureaucracy"); Morrison, *supra* note 228, at 609 (discussing how, in addition to seeking cost effective law enforcement, "a legislature might enlist private parties to enforce a statute out of a concern that if a government agency were granted exclusive enforcement authority, the agency might become unduly influenced by the entities it regulates" and not fully enforce law); Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 179 (1998) (discussing private attorneys general as "powerful engine[s] of public policy"); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 530 (2005) ("Private attorneys general provide a backup in situations in which government enforcement agencies fail to protect the public adequately.") (footnote omitted).

232 *See* 35 U.S.C. § 292(a) (2000).

233 *Id.* § 292(b).

234 *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 236–52 (1983) (discussing collusion between attorneys leading to inadequate settlements and attorneys free-riding on governmental investigations); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 396 (1988) ("Because of the system of economic incentives and the dependence on the government, plausible 'reforms' are not likely to make the private attorney general a real antidote to, or substitute for, a lack of governmental commitment to regulatory enforcement."); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 200 (arguing that private attorney general litigation emphasizes enforcement of laws over political accountability). *See also* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 19–30 (2004) (arguing—in con-

tion targeted California's unfair competition law, which, until limited by a ballot initiative in 2004, imposed liability for unfair business practices and "unfair, deceptive, untrue or misleading advertising,"[235] and permitted "any person acting for the interests of itself [sic], its members or the general public" to bring a claim.[236] Under the statute, no specific injury needed to be demonstrated, only that the public was "likely to be deceived" by the business practice or advertising.[237] The statute made available equitable remedies, including injunctive relief,[238] and in some cases disgorgement of profits.[239] The 2004 ballot initiative that resulted in the removal from the statute of the private attorney general provision[240] followed years of criticism about the burden of the law on businesses and its lack of effectiveness.[241]

Constructing a private attorney general scheme to deal with copyfraud requires, therefore, attention to these kinds of possible problems. For instance, like most rewards, the bounty should probably be payable only to the first private attorney general locating and collecting on a particular false copyright. Private attorneys general can be required to take a course of instruction—which can be web-based—on principles of copyright and mechanisms of enforcement.

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text of discussion of punitive damages—that democratic theory suggests public authority to enforce laws should not be turned over to private parties).

235 CAL. BUS. & PROF. CODE § 17200 (West 1997).

236 *Id.* § 17204. Proposition 64, passed in November 2004, amended the statute to prohibit unaffected plaintiffs from bringing suit on behalf of the general public. *See* CAL. BUS. & PROF. CODE § 17204, Historical & Statutory Notes (West Supp. 2006).

237 *See* Ariz. Cartridge Remfrs. Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 985 (9th Cir. 2005) ("To state a cause of action . . . requires a showing that members of the public are likely to be deceived, but does not call for a showing of actual deception.") (quotation omitted).

238 CAL. BUS. & PROF. CODE § 17203 (West 1997).

239 *See* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 949 (Cal. 2003) (holding that while "[a]ctual direct victims of unfair competition" could obtain restitution disgorgement, "nonrestitutionary disgorgement of profits . . . [was] not an available remedy" under statute). Attorneys' fees were also available "to a successful party . . . in any action which . . . resulted in the enforcement of an important right affecting the public interest . . . ." CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2006). *See also* Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1101 (Cal. 1998) (noting availability of attorneys' fees in certain unfair competition cases).

240 The ballot initiative amended the statute to require that a plaintiff have "suffered injury in fact and . . . lost money or property as a result of [the defendant's] unfair competition." CAL. BUS. & PROF. CODE § 17204 note (West Supp. 2006) (Historical and Statutory Notes).

241 *See, e.g.*, Tim W. Ferguson, *The Lawsuit Business*, FORBES, May 18, 1998, at 110–11 (deploring proliferation of § 17200 claims); Walter Olson, *The Shakedown State*, WALL ST. J., July 22, 2003, at A10 (describing § 17200 as "so bizarrely pro-plaintiff as to be a major disincentive for many companies to do business in the state"); John H. Sullivan, *Call It Gonzo Law: The Unfair Competition Statute Covers Any Claim, If It's Presented with a Straight Face*, CAL. L. BUS., Jan. 10, 2000, at 22 (discussing frivolous lawsuits under statute).

To discourage private attorneys general from making spurious reports, some penalty—for example, suspension of bounty hunting privileges for a specified period, or a reduced payment for the next successful capture—could be imposed if an allegation of copyfraud turns out to be wrong. Settlement might require court approval. The Attorney General might have standing to intervene in especially important cases to fully protect the public's interest. With a little imagination the benefits of private enforcement can be coupled with mechanisms to prevent abuses and undesirable results.

There is one important limitation on Congress's ability to allow private attorney general litigation in federal courts. The United States Supreme Court has held that because under Article III of the Constitution the federal judicial power is limited to "Cases" and "Controversies,"[242] in order to bring a lawsuit in federal court a plaintiff must allege an "injury in fact," caused by the defendant's conduct and redressable by a favorable court decision.[243] Applying this rule in *Lujan v. Defenders of Wildlife*,[244] the Court held that an environmental organization did not have Article III standing to bring a lawsuit in federal court to challenge a regulation issued under the Endangered Species Act, where the organization could not show that the regulation caused any injury in fact to it or its members.[245] The members of the organization were concerned about protecting endangered species and hoped to travel to see them in the future. The plaintiffs argued they had standing under the Act's "citizen-suit" provision;[246] however, the Court found that the Article III standing requirement was not met, explaining:

> A plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[247]

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242 U.S. CONST. art. III, § 2.

243 Kowalski v. Tesmer, 543 U.S. 125, 129 n.2 (2004) ("To satisfy Article III, a party must demonstrate an 'injury in fact'; a causal connection between the injury and the conduct of which the party complains; and that it is likely a favorable decision will provide redress.") (citation omitted); *see also* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (explaining that injury in fact "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical") (citations and quotations omitted).

244 504 U.S. 555 (1992).

245 *Id.* at 557–58, 563, 568, 573–74, 578.

246 *Id.* at 562–63, 571–72.

247 *Id.* at 573–74.

Although *Lujan* has generated criticism,[248] and the full reach of the decision is not clear,[249] the case does indicate limitations on Congress's ability to assign standing in federal court to otherwise disinterested parties.

Nonetheless, Congress can give plaintiffs standing to bring the lawsuits in state court, where the requirements of Article III do not apply.[250] In addition, even where *Lujan* specifies the injury required to have standing, a plaintiff with standing is not limited to a remedy that redresses only that plaintiff's particular injury.[251] For instance, a plaintiff who has been duped by a false copyright notice into paying out unnecessary licensing fees will have Article III standing. However, the plaintiff need not be limited to recovering the licensing fees the plaintiff paid. Congress can, for instance, authorize the plaintiff to recover a penalty set by statute, or to pursue a larger remedy based upon the degree to which the defendant has engaged in similar acts of copyfraud with respect to its other customers.

Perhaps most promising, while *Lujan* limited what will count as a private injury for purposes of Article III standing, Congress can still permit private parties to bring actions to remedy injuries to the government itself. Qui tam statutes have long authorized otherwise disinterested private individuals to bring claims on the government's behalf.[252] For example, the qui tam provision of the federal False Claims Act, the law that imposes civil liability on those who defraud the federal government, allows private individuals to sue on behalf of

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248 *See, e.g.*, *id.* at 606 (Blackmun, J., dissenting) (describing plurality as undertaking "slash-and-burn expedition through the law of environmental standing"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-15, at 397–98 (3d ed. 2000) (arguing that *Lujan* is inconsistent with earlier cases in which Article III, while understood to limit ability of courts to confer standing, did not prevent Congress from assigning standing to plaintiffs it believed were sufficiently aggrieved).

249 *See, e.g.*, Nike, Inc. v. Kasky, 539 U.S. 654, 667–68 (2003) (Breyer, J., dissenting) (finding plaintiff had Article III standing where effort to enforce California unfair competition law threatened to discourage plaintiff's speech). *See* Morrison, *supra* note 228, at 623 n.158 (discussing additional cases that suggest "the precise ramifications of *Lujan* remain unclear").

250 Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . ."). For a critique of *Asarco* and the argument that state courts should be required to abide by Article III limitations in applying federal law, see William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990).

251 *See* Morrison, *supra* note 228, at 604 ("Provided a citizen-suit plaintiff establishes injury, Congress may empower her to seek a broad range of relief having little or nothing to do with the remediation of her own injury.").

252 *See generally* Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768, 774–77 (2000) (discussing history of qui tam actions).

the government—representing the United States in the litigation and redressing the government's injury.[253] In order to encourage private enforcement of this nature, the Act allows private individuals who bring a successful claim to share in the assessed penalties and damages.[254] Reasoning that the government is entitled to assign its own injury in fact to a private plaintiff, the Supreme Court has held that qui tam statutes comport with Article III standing requirements;[255] the plaintiff is therefore not barred by the *Lujan* rule. It is not difficult to see that the perpetrators of copyfraud, by misusing the mark Congress has created to designate rights protected under copyright law, cause injury to the government. Congress should, therefore, be entitled to assign to a private party a claim to remedy that injury, enforceable in federal court.

3. Government Standing

Congress should also consider the benefits of governmental enforcement. Both federal and state agencies could be granted standing to seek civil relief and could prove useful in combating copyfraud.

The experience with section 506(c), the rarely enforced provision of the Copyright Act criminalizing fraudulent use of copyright notices, suggests that as a practical matter federal agencies might be reluctant to pursue remedies under the civil copyfraud law.[256] On the other hand, this history of nonenforcement in the criminal context may not be dispositive: Federal agents might be inclined to pursue civil remedies even if, given the burdens of criminal prosecutions (including the high standard of proof in criminal trials), these same agents do not readily bring criminal cases.[257] Accordingly, it makes sense for Con-

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253 31 U.S.C. § 3730(b) (2000).

254 *See id.* § 3730(d)(1)–(2) (providing private claimants with reasonable expenses and attorneys' fees, in addition to percentage of penalties and damages).

255 *Vt. Agency of Natural Res.*, 529 U.S. at 773–74 (holding that private party had Article III standing to bring action under False Claims Act).

256 Of course, section 506(c) need not be a dead letter. If the U.S. Attorneys were to decide—or if Congress were to insist—upon increased enforcement of the criminal prohibition on false assertions of copyright, the problem of copyfraud would diminish.

257 As the U.S. Attorneys' Manual states:

> In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations.

gress to authorize the U.S. Attorney General to seek civil remedies for copyfraud.[258]

Where federal enforcement efforts fail to achieve a statute's goals, state-level enforcement can be effective.[259] Congress has provided authority to state attorneys general to seek relief for violations of other federal laws, including antitrust laws.[260] On the assumption that federal agencies will not zealously or fully enforce a civil copyfraud scheme, Congress should grant standing under federal law to state agencies to bring civil claims on their citizens' behalf. Congress should also ensure that the available remedies are sufficient such that the state will devote its resources to bringing these kinds of claims. State agents would therefore be both empowered and encouraged to take up some of the enforcement slack.[261]

U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE MANUAL § 9-27.250 (1997). The Manual therefore instructs that criminal prosecution may be declined where the prosecutor determines that "[t]here exists an adequate non-criminal alternative to prosecution." *Id.* § 9-27.220.

258 There is perhaps a plausible argument that the Attorney General already has this authority under RICO. In addition to its criminal provisions and its provision authorizing private plaintiffs to bring actions, RICO provides for civil enforcement by the U.S. Attorney General. 18 U.S.C. § 1964(b)–(c) (2000). RICO allows the Attorney General to seek broad equitable relief including orders of divestiture, restrictions on future activities, and dissolution or reorganization of an enterprise. § 1964(a). Copyfraud might, at least in some instances, be construed as mail or wire fraud, and thereby a predicate RICO act. *See* § 1961(1) (defining predicate offenses); 18 U.S.C. § 1341 (2000) (prohibiting use of United States Postal Service or private interstate carrier in committing fraud); § 1343 (prohibiting use of wire, radio, or television in interstate fraud). *See generally* Ryan Y. Blumel, *Mail and Wire Fraud*, 42 AM. CRIM. L. REV. 677 (2005) (providing overview of mail and wire fraud under federal law). I am grateful to Tony Sebok for suggesting this argument to me, a full exploration of which must come another day.

259 One recent example is the enforcement of federal securities law by the New York Attorney General. *See* Steve Bailey, *Asleep at the Switch*, BOSTON GLOBE, Oct. 24, 2003, at D1 ("It has been left to New York Attorney General Eliot Spitzer to uncover one problem after another in the securities business and to show the SEC . . . what regulation is all about.").

260 The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in scattered sections of 15 U.S.C.), amended the Clayton Act, and authorized state attorneys general to sue on behalf of their citizens as parens patriae for violations of the federal antitrust laws. 15 U.S.C. § 15c(a)(1) (2000). *See generally* Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1426–31 (2003) (discussing history and effects of amendment).

261 However, Congress could not *require* them to do so. *See* Printz v. United States, 521 U.S. 898, 923–24, 933, 935 (1997) (invalidating provisions of Brady Handgun Violence Prevention Act because Constitution prohibits Congress from commandeering state executive officials to enforce federal law).

4. Remedies

In crafting remedies for copyfraud, attention needs to be given to two aspects of the offense. Copyfraud often inflicts small injuries on many individuals—for example, students who pay too much for course packets. Copyfraud also causes a more general injury to the public as a whole—the infringement of the public domain. Therefore, while individuals should be compensated for their losses, the remedial scheme should provide relief broader than any plaintiff's individual injury.

Determining the best form of remedies will require careful legislative attention. One possible approach is for Congress to create a system with specified statutory penalties. The system would tie the penalty to various aspects of the defendant's misconduct. For example, the penalty could take into account the number of publications a publisher has issued with the false copyright notice. Misuse of the copyright symbol on a single photograph displayed in a gallery would be penalized less severely than copyfraud in the print run of 100,000 books. The size of the penalty might also reflect a judgment about the egregiousness of the copyfraud. Copyrighting an important public document like the Constitution could generate a more serious sanction than copyrighting a forgotten poem. Repeat offenders could be subject to greater liability than the defendant in court for the first time. Disgorgement of profits would be a suitable remedy in many instances. The defendant who collected fifteen cents per page to copy *The Federalist* would lose the benefit of its sales. The vendor of digitized early newspapers would forfeit subscription earnings.

Not all of the spoils need go to the actual plaintiff who brings the lawsuit. In qui tam actions, the plaintiff could be entitled to receive some set percentage of the remedy, with the remaining amount payable to the treasury. An award of attorneys' fees might be necessary to encourage lawyers to take on copyfraud cases.

In addition to monetary damages, various forms of injunctive relief can be crafted. For instance, the publisher who commits copyfraud could be required to remove the offending publication from the market. A court could direct a losing defendant to issue a public statement retracting the prior claim to copyright or to engage in activities that promote the public domain. An offender might be required to secure court approval before attaching any copyright notice to a future publication.

B. Courts and Copyright Misuse

A second potentially important tool against copyfraud is the doctrine of copyright misuse. Analogizing to the well-accepted rule that patent misuse can prevent enforcement of patents,[262] some courts have denied copyright enforcement to copyright owners who have unclean hands because they have asserted ownership of public domain materials or otherwise used the copyright law to prevent lawful forms of creativity.

In 1990, the Fourth Circuit held, in a copyright infringement action brought by a software program developer, that the defendant could assert as a defense the developer's misuse of copyright in the form of anticompetitive clauses in its standard agreements.[263] The court reasoned that "a misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense is inherent in patent law."[264] This was true because "copyright and patent law serve parallel public interests . . . [namely] increas[ing] the store of human knowledge and arts by rewarding inventors and authors with the exclusive rights to their works for a limited time," while ensuring "the granted monopoly power does not extend to property not covered by the patent or copyright."[265] The misuse defense therefore applied as a principle of equity, if "the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright," including where the copyright owner has attempted to use the copyright in ways that would violate antitrust law.[266] Applying these standards, the Fourth Circuit ruled that the plaintiff's prior uses of standard licensing agreements containing broad anti-competitive clauses—including restrictions preventing licensors from indepen-

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262 The Supreme Court has explained:

> Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor in thwarting the public policy underlying the grant of the patent. Maintenance and enlargement of the attempted monopoly of the unpatented article are dependent to some extent upon persuading the public of the validity of the patent, which the infringement suit is intended to establish. Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated.

Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 493 (1942).

263 Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990).

264 *Id.* at 973.

265 *Id.* at 976.

266 *Id.* at 978.

dently developing any rival products—gave rise to a misuse defense.[267] As a result, the court declined to enforce the current copyright, even though the defendant in the litigation was not actually a party to the anti-competitive licensing agreements.[268] Other courts (though not all) have followed the Fourth Circuit's lead and recognized the copyright misuse defense.[269]

The doctrine of copyright misuse is potentially powerful for dealing with copyfraud. Many publishers would find it difficult to enforce their legitimate copyright interests if courts were to find that

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[267] *Id.* at 978–79.

[268] *Id.* at 979.

[269] *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 205–06 (3d Cir. 2003) (recognizing misuse defense may exist when copyright holder uses copyright to prevent criticism of work, but finding, on facts of case, that any such behavior by plaintiff was unlikely to have suppressed any criticism, so misuse defense was unavailable to defendant); Assessment Techs. of Wis., LLC v. WIREdata, Inc., 350 F.3d 640, 646–47 (7th Cir. 2003) (recognizing, in case involving software manufacturer's claim that municipalities could not release public data gathered using its copyrighted software, that "prevent[ing] the municipalities from revealing their own data . . . might constitute copyright misuse" and that "[t]he argument for applying copyright misuse beyond the bounds of antitrust . . . is that for a copyright owner to use an infringement suit to obtain property protection . . . that copyright law clearly does not confer . . . is an abuse of process"); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 793 (5th Cir. 1999) (finding copyright misuse where plaintiff's licensing agreement for copyrighted software included restriction on using software with equipment manufactured by other companies); Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 520–21 (9th Cir. 1999) (finding copyright misuse where plaintiff had included in licensing agreement requirement that licensee use plaintiff's copyrighted medical coding system exclusively); United Tel. Co. v. Johnson Publ'g Co., 855 F.2d 604, 611 (8th Cir. 1988) ("[C]ourts have noted that the misuse of a copyright, in violation of the antitrust laws, may bar a plaintiff from recovering damages for copyright infringement."); *In re* Napster, Inc., 191 F. Supp. 2d 1087, 1105 (N.D. Cal. 2002) (recognizing that misuse doctrine applies where "plaintiffs commit antitrust violations or enter unduly restrictive copyright licensing agreements"); qad. Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1267, 1270 (N.D. Ill. 1991) (holding in infringement action that copyright owner may not enforce copyright in computer software after having asserted copyright ownership in unprotected portions of software). *But see* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1169–70 (1st Cir. 1994) (declining to decide whether copyright law permits misuse defense); Microsoft Corp. v. Compusource Distribs., Inc., 115 F. Supp. 2d 800, 810–11 (E.D. Mich. 2000) (rejecting misuse defense and noting that Sixth Circuit has not decided whether defense exists); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1538 (S.D.N.Y. 1991) (rejecting misuse defense).

In a 2004 article, Judge Richard Posner reiterated the possibility, suggested in his opinion in the WIREdata case, of "deem[ing] copyright overclaiming a form of copyright misuse, which could result in forfeiture of the copyright." Richard A. Posner, Eldred *and Fair Use*, ECONOMISTS' VOICE, vol. 1, no. 1, at 5 (2004), http://www.bepress.com/ev/vol1/iss1/art3. Posner gives the example of a copyright notice that states "no part of the work can be reproduced without the publisher's . . . permission," a "flat denial of fair use." *Id.* at 4. Ironically, the downloaded version of Posner's own paper carries a copyright notice stating that "[n]o part of this publication may be reproduced . . . in any form or by any means . . . without the prior written permission of the publisher." *Id.* (notice on cover page).

their interference with legitimate reproductions of public domain works constituted copyright misuse. In addition, the copyright misuse doctrine has the virtue of providing a limited remedy without the risk of frivolous litigation against publishers. The doctrine can only be invoked at the point at which a copyright holder seeks to enforce the copyright. The court considers whether the plaintiff has engaged in copyfraud and, if so, allows the defendant to escape liability.

Still, the benefits of the doctrine should not be overstated. Copyright misuse exists only as a *defense*. The defendant has already been brought into court and is asking the court, in light of the plaintiff's own conduct, to excuse a demonstrated infringement. Therefore, the doctrine might not do much to relieve the chilling effect of copyfraud. The success of the copyright misuse defense in any single case is uncertain, and even if courts are very generous in recognizing the defense, the degree to which it will alter general publishing practices remains unclear.

In addition, in order to cabin the defense, courts generally insist upon a nexus between the plaintiff's unclean hands and the litigation in which the defense is asserted. In the patent context, therefore, the mere fact that a patentee has unclean hands as to an unrelated subject does not make the valid patent unenforceable: There must be a nexus between the defendant's conduct and the patent at issue.[270] While this does not mean that the plaintiff must have previously misused the patent at issue, some relationship between the misuse and the litigation must be present.[271] So far at least, the cases recognizing the copyright misuse defense have involved conduct related to the copyright a plaintiff is seeking to enforce.[272]

If courts follow this approach, the copyright misuse defense is unlikely to allow a defendant to avoid liability based on a plaintiff's behavior with respect to other publications that have no bearing on a case. For example, if a publisher seeks to enforce a copyright in its introduction to a reprint of *The Federalist*, the defendant can assert a misuse defense if the copyright notice does not limit the publisher's

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270 *See, e.g.*, Kolene Corp. v. Motor City Metal Treating, Inc., 440 F.2d 77, 84 (6th Cir. 1971) (stating that there is "no authority suggesting that there can be a defense to a patent infringement suit based on 'misuse in the air'" and that "[t]he misuse must be of the patent in suit").

271 *See, e.g.*, McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381, 406–07 (10th Cir. 1965) (misuse exists where patentee has used patent at issue to extract payment for unpatented articles).

272 *See, e.g.*, Lasercomb Am. Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990) (specifying that "successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement *of the misused copyright*") (emphasis added). *See also* cases cited *supra* note 269.

claim to the copyrightable introduction. Here, there is a nexus between the copyrighted work at issue and the plaintiff's unclean hands. By contrast, on the same logic, the defendant would likely not be able to assert that the same publisher had unclean hands because it issued an improperly marked edition of *Macbeth*.

This limit on the defendant's ability to assert the misuse defense will permit much copyfraud to survive. Given the important public interests at stake, courts should consider loosening the nexus requirement. Where a single plaintiff, seeking to enforce an otherwise valid copyright, has recently engaged in other clear acts of copyfraud—for example, by marking a series of Shakespeare's plays with false copyright notices—the defendant should be able to assert the misuse defense. It is not difficult for publishers to attach a proper copyright notice to a work; the prospect of the misuse defense will encourage them to do so.

C. Supplemental Remedies

1. Enhancing the Public Domain

Beyond establishing legal remedies to respond to specific occurrences of copyfraud, Congress should broadly and prospectively protect the public domain. One useful step would be to give the public domain a physical existence. There currently exists no centralized place to go to in order to find out which works are in the public domain and available for free use. Although it would require significant resources, Congress could help secure the public domain by creating a searchable online public domain registry that lists works that can be freely used and that adds new works once their copyrights expire. Just as the register of copyrighted works maintained by the U.S. Copyright Office provides information about copyrighted works,[273] the public domain registry would allow members of the public to determine which works are available for use. Given that the prevailing popular assumption is that "[u]nless [a work is] explicitly designated as public domain . . . it is copyrighted,"[274] public domain materials should be easily identifiable as such.

One easy way to generate an instant catalog of public domain works would be to require publishers, as a condition of enforcing future copyright claims, to furnish a list of all their publications that belong in part or in whole in the public domain. The public should

[273] The Copyright Office website allows for electronic searching of protected works recorded after 1977. U. S. Copyright Office, Search Records, http://www.copyright.gov/records (last visited July 27, 2005).

[274] Colo. State Univ., *supra* note 153.

also be encouraged to submit titles for inclusion in the registry. If it is not clear whether a work is in fact protected by copyright—a problem today with so-called orphan works, for which no copyright owner can be found[275]—the registry should post the work provisionally and allow it to fall into the public domain if no copyright claim is asserted within six months or some other reasonable time period.[276]

In order to designate a work as copyrighted, the Copyright Act requires use of the symbol © or the word Copyright (or Copr.), the year of publication, and the name of the copyright owner.[277] Congress should also create a symbol and proper form of notice to designate uses of public domain materials. A symbol such as ℗, or simply the label "Public Domain," could be specified for designating public domain works, perhaps followed with the statement, "May be freely copied." Publishers would be required to attach the notice to any use they make of public domain materials. Just as © is universally recognized as designating copyright ownership, a public domain symbol would indicate public ownership.

More generally, protecting copyright requires a presumption against its existence. Copyright is a special right, a privileged exception to free communication, given for a limited time to authors in recognition of their exertions.[278] A robust public domain requires doing away with the current presumption, which permeates the law and the culture, that every work is copyrighted unless proven otherwise. Copyright must be treated as the exception to a general rule favoring free exchange. Authors and publishers have strong incentives to protect their own interests. A presumption against copyright will help protect the interests of the public in its domain.

For instance, the Copyright Act should be modified to include a preamble and other recognitions that copyright is an exceptional privilege, granted for important public reasons for a limited period. Cur-

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[275] *See generally* Library of Cong., Copyright Office, Orphan Works, 70 Fed. Reg. 3739 (Jan. 26, 2005) (providing overview of problem of orphan works and inviting public commentary and suggestions on possible legislative or regulatory solutions); Letter from Larry Urbanski, Chairman, American Film Heritage Association, to Senator Strom Thurmond Opposing S. 505 (Mar. 31, 1997), *available at* http://www.public.asu.edu/~dkarjala/letters/AFH.html (estimating that 75% of films from 1920s are orphan works).

[276] This proposal would need to comply with the Berne Convention, which requires member nations (including the United States) to provide for a minimum copyright term of fifty years after the author's death for most works by individual authors, Berne Convention for the Protection of Literary and Artistic Works art. 7(1), Sept. 9, 1886, *as revised at Paris on* July 24, 1971, 1161 U.N.T.S. 30, and prohibits formalities that affect the "enjoyment and exercise" of copyright, *id.* art. 5(2).

[277] 17 U.S.C. § 401(b) (2000). The year is not required for reproductions of pictorial, graphic, or sculptural works in greeting cards and similar articles. *Id.* § 401(b)(2).

[278] *See supra* note 148.

rently, the Act is tilted overwhelmingly towards a presumption of copyright and protection of the rights of the copyright owner. The Act should instead make perfectly clear that the starting assumption is that works belong in the public domain, copyright exists only when a work falls within the parameters of the Act, and the rights that attach are limited and circumscribed. It is time for the law to recognize explicitly that copyright—like all monopolies—entails dangers and inefficiencies, and the right is therefore not granted lightly.

Government can also reduce the problem of copyfraud by giving citizens easy access to public domain works. Indeed, federal governmental agencies already do a great deal to allow citizens to see and even obtain copies of many government-owned works.[279] State government and its agencies also provide access to many public domain works.[280] The approach should be expanded upon to make even more public domain works easily accessible through the Internet and other sources.[281]

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279 For example, the American Memory Project, operated by the Library of Congress, provides online access to a huge collection of historical materials. Library of Cong., American Memory, http://memory.loc.gov (last visited Jan. 12, 2006). The Library of Congress will also, for a small fee, provide a reprint of works in its collection. Library of Cong., Photoduplication Service, http://www.loc.gov/preserv/pds/ (last visited Jan. 12, 2006). The NASA Image Exchange offers downloadable photographs. NASA Image Exchange, http://nix.nasa.gov (last visited Jan. 12, 2006). The National Archives and Records Administration (NARA) offers millions of public domain photographs, films, sound recordings, and other items. Nat'l Archives, Resources for the General Public, http://www.archives.gov/public (last visited Jan. 12, 2006). Visitors to NARA in Maryland can use on-site video equipment to make personal copies of archival film material; high quality reproductions can be obtained though the services of an approved video service. *See* Nat'l Archives, Research at the National Archives, Order Copies, www.archives.gov/research/order (last visited Jan. 12, 2006). The National Audiovisual Center also provides copies of informational films produced by the federal government. Nat'l Technical Info. Serv., National Audiovisual Center, http://www.ntis.gov/products/nac/index.asp?loc=4-4-1 (last visited Apr. 17, 2006). Through collaboration with Microsoft, the U.S. Geological Survey makes public domain maps available for downloading. *See* TerraServer-USA, http://terraserver.microsoft.com (last visited Jan. 12, 2006). Maps are also available through the Cartographic and Architectural Branch of the National Archives, Nat'l Archives, Cartographic and Architectural Records, http://www.archives.gov/research/formats/cartographic.html (last visited Feb. 5, 2006), and the Geography and Map Division of the Library of Congress, Library of Cong., Geography and Map Reading Room, http://lcweb.loc.gov/rr/geogmap/gmpage.html (last visited Jan. 12, 2006).

280 For example, the California Sheet Music Project at the University of California at Berkeley offers public sheet music online. *See* Cal. Sheet Music Project, 19th-Century California Sheet Music, http://www.sims.berkeley.edu/~mkduggan/neh.html (last visited Jan. 12, 2006).

281 The actual work does not have to be carried out by the government. The federal government, through the National Endowment for the Humanities, currently provides funding to a variety of libraries, archives, and other entities to digitize public domain works, including historical newspapers, presidential papers, the writings of Frederick Douglass and Henry David Thoreau, and historic maps. *See* Nat'l Endowment for the

One immediate action the government can take in this regard is to provide citizens who visit public libraries with greater information about the public domain. A simple step would be for every public library to provide basic information—on a notice board, in pamphlets, or on its website—about the contours of copyright protection and the uses that validly can be made of public domain works. Libraries could also provide more specific information about particular works. For instance, works in a library collection that are clearly in the public domain could be labeled as such—say with a green PD sticker on the spine. The library catalog could include, along with the usual information about authorship and publication, an annotation as to whether a work or part of the work falls in the public domain.

Government also has enormous purchasing power. Libraries and public schools should be required to purchase editions of public domain works that are clearly marked as such. A reproduction of *Macbeth* that contains a proper notice specifying that the play is in the public domain should be preferred over an edition with a notice that the play may not be copied. This step would both increase citizens' access to public domain works and give publishers an incentive to mark their titles correctly.

Several federal agencies protect and enforce copyrights. Congress should likewise consider delegating specific responsibility for protecting the public domain to a federal agency. Though it would require a commitment of considerable resources, one possibility is to create a Public Domain Bureau within the Department of Justice. It would be charged with monitoring improper claims to ownership over public domain materials and prosecuting offenders. The Bureau would also perform a variety of other functions designed to protect a robust public domain. These might include: providing guidance to schools and universities on lawful copying practices; preparing bulletins about legitimate and illegitimate forms of copying to be distributed in libraries, copy shops, and other locations; receiving and following up on e-mails and telephone calls from members of the public reporting false assertions of copyright; and conducting public relations programs to increase public awareness of copyright and accessibility of public domain works.

2. *State Law Causes of Action*

Ideally, Congress would statutorily specify liability for copyfraud, the available forms of relief, and standing to prosecute; however, in

Humanities, NEH Projects, http://www.neh.gov/projects/index.html (last visited Apr. 23, 2006).

the absence of a suitable congressional response, existing state laws might permit causes of action to deal with some forms of copyfraud.[282] The most obvious case is where a licensee pays a licensing fee to a licensor who falsely represents ownership of a copyright in some work that is in fact in the public domain. The aggrieved licensee might put forth a claim under state laws of contract for breach of an implied warranty of title, show that an absence of consideration renders the contract void, or make out a claim of unjust enrichment.[283] The licensee might also have a cause of action based on state law fraud,[284] as some courts have recognized.[285]

At the same time, the benefits of these causes of action should not be exaggerated. State law claims in contract and fraud might help the individual who has wrongly paid a licensing fee and seeks recovery of the fee. These state causes of action are, however, less helpful in remedying the more general problem of copyfraud deterring legitimate uses and reproductions.

Copyfraud might also be deemed a form of false advertising. Every state has its own consumer protection laws—modeled on the Uniform Deceptive Trade Practices Act or on the Federal Trade Commission Act—to protect consumers from false advertising.[286] State consumer protection laws provide for relief when the FTC is unable or

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[282] *See* Heald, *Payment Demands*, *supra* note 6 (discussing possible state law causes of action for spurious copyright claims).

[283] New York State courts have held that if a licensed work later turns out to be in the public domain, the licensee is entitled to recover payments made to the licensor. *See, e.g.*, Tams-Witmark Music Library v. New Opera Co., 81 N.E.2d 70, 74–75 (N.Y. 1948) (awarding opera company $50,000, amount company paid for license to perform "The Merry Widow," because work was in public domain and therefore licensor had breached implied warranty of title and agreement lacked consideration). *See also* Lewis Music Pub. Co. v. Shapiro, Bernstein & Co., 305 N.Y.S.2d 904, 905 (N.Y. App. Div. 1969) (per curiam) (noting that party cannot transfer copyright interest greater than that which party owns), *aff'd*, 262 N.E.2d 213 (N.Y. 1970); April Prods., Inc. v. G. Schirmer, Inc., 126 N.E.2d 283, 289 (N.Y. 1955) (construing license to publish music compositions to require payments only during period copyright exists with respect to compositions).

[284] *See generally* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (discussing fraudulent misrepresentation liability).

[285] *See, e.g.*, Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91, 98–102 (2d Cir. 1997) (recognizing availability of state law fraud claim arising out of license to works wrongly represented as copyrighted, but rejecting plaintiff's claim because, in view of information available to plaintiff at time of negotiating license, plaintiff's reliance on defendant's misrepresentations was not reasonable).

[286] *See, e.g.*, ALA. CODE §§ 8-19-1 to -15 (LexisNexis 2006); CAL. CODE BUS. & PROF. §§ 17200–17210 (West 2006); FLA. STAT. ANN. §§ 501.201–.213 (West 2005); MASS. GEN. LAWS ANN. ch. 93A, §§ 1–11 (West 2005). For a comprehensive summary of state laws, see JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (5th ed. 2001 & Supp. 2003), particularly appendix A, which provides a statute-by-statute analysis.

unwilling to bring a case,[287] and these laws allow private individuals to seek redress—rather than depend upon the government to prosecute offenders.[288] These state laws vary in terms of what kind of advertising is unlawful, the type and degree of injury necessary before a party can recover, and the available forms of relief.[289] In addition to civil remedies, some states impose criminal penalties for false advertising,[290] even if the advertising causes no actual injury.[291]

The possibility of using state false advertising laws to deal with false assertions of copyright remains untested.[292] By their terms, at

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[287] *See generally* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 729–30 (1972) (discussing how FTC, in view of its limited resources, encouraged enactment of state consumer protection statutes).

[288] *See generally* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1971).

[289] *See* SHELDON & CARTER, *supra* note 286, at app. A.

[290] *See, e.g.*, ALA. CODE § 13A-9-42(c) (LexisNexis 2005) (Class B misdemeanor); KY. REV. STAT. ANN. § 517.030(2) (1999) (Class A misdemeanor); MINN. STAT. ANN. § 325F.67 (West 2004); N.Y. PENAL LAW § 190.20 (McKinney 2006) (Class A misdemeanor).

[291] *See, e.g.*, MINN. STAT. ANN. § 325F.67 (West 2004) (making false advertising misdemeanor "whether or not pecuniary or other specific damage to any person occurs as a direct result thereof").

[292] As for federal law, section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2000). However, courts have held that there is no private right of action under this provision. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988–89, 997 (D.C. Cir. 1973). Section 43(a) of the federal Lanham Act allows people injured or likely to be injured by a deceptive or confusing advertisement to sue the offending business. *See* 15 U.S.C. § 1125(a) (2000). It states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –
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> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id. However, it is not clear the provision extends to false copyright designation. Two circuit courts have considered whether a false assertion of copyright gives rise to a section 43(a) claim under the Lanham Act. The U.S. Court of Appeals for the Second Circuit has held that a false use of a copyright mark by itself does not give rise to a cause of action under section 43(a). Lipton v. Nature Co., 71 F.3d 464, 473 (2d Cir. 1995) ("[A]s a matter of law, a false copyright notice alone cannot constitute a false designation of origin within the meaning of § 43(a) of the Lanham Act."). *See also* EFS Mktg. v. Russ Berrie & Co., 76 F.3d 487, 492 (2d Cir. 1996) (rejecting Lanham Act claim based on false copyright mark affixed to troll dolls). *But see* Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 37 (2d Cir. 1982) (upholding section 43(a) claim against defendant falsely affixing copy-

least, the statutes do not obviously foreclose such actions. In New York, for example, the Consumer Protection Act prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state."[293] Under the statute, "false advertising" exists where a statement is "misleading in a material respect."[294] The statute provides for the Attorney General to bring an action to recover a civil penalty of up to $500 per violation.[295] A private party who has been injured by a violation of the statute may also seek damages and injunctive relief.[296] New York courts have held that a person who is misled or deceived by a materially misleading advertisement has suffered an injury within the meaning of the statute.[297] Arguably, a publisher affixing a false copyright notice has, in the conduct of business, made a materially misleading statement about the product being sold. On this logic, an individual who has been injured as a result of the false copyright has a remedy against the publisher under the state's law.[298]

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right notice along with term "original" to shirts because designation could deceive consumers as to origin of product). The Eleventh Circuit, while registering disagreement with the Second Circuit's rule in *Lipton* (but without deciding specifically against the *Lipton* rule) has held that a false copyright claim coupled with a false claim of ownership to a computer program gives rise to a section 43(a) claim. Montgomery v. Noga, 168 F.3d 1282, 1298–1300 (11th Cir. 1999). Moreover, some courts have held that section 43(a) claims cannot be brought by ordinary consumers but only be brought by a commercial plaintiff whose competitive and business interests have been injured as a result of false or misleading advertising. *See, e.g.*, Made in the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 281 (4th Cir. 2004); Halicki v. United Artists Commcn's, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971); *cf.* Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 700 (7th Cir. 1989) (acknowledging plaintiffs' lack of commercial interest, but not explicitly adopting pure commercial interest test).

293 N.Y. GEN. BUS. LAW § 350 (McKinney 2004).

294 *Id.* § 350-a.

295 *Id.* § 350-d.

296 *Id.* § 350-e.

297 *See, e.g.*, Geismar v. Abraham & Strauss, 439 N.Y.S.2d 1005, 1008 (N.Y. Dist. Ct. 1981).

298 In turning to state law, there is an issue as to whether any particular cause of action is preempted by federal law. The Copyright Act contains a preemption clause. 17 U.S.C. § 301(a) (2000) (specifying that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title" and that "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State"). The Act also states that federal preemption does not apply to state law rights with respect to materials beyond the "subject matter" of copyright. § 301(b) ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . (1) subject matter that does not come within the subject matter of copyright . . . ."). In accordance with these provisions, courts have conducted a two-step preemption analysis, asking first whether the work at issue comes within the subject matter of copyright, and, if that condition is satisfied, whether the rights granted under state law are "equivalent to any of the exclusive

3. *Private Responses*

Finally, the efforts of a variety of private entities and individuals already help to counteract copyfraud by increasing information about and access to the public domain. If it does nothing else, government should support and encourage these kinds of private undertakings. For example, numerous privately operated websites collect and make available free of charge public domain books and other works in specific fields.[299] Many of these sites rely on volunteers to identify appro-

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rights within the general scope of copyright . . . ." Del Madera Props. v. Rhodes & Gardner, Inc., 820 F.2d 973, 976 (9th Cir. 1987), *rev'd on other grounds*, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

Some courts have recognized that the subject matter of copyright includes works within the *general* subject matter of sections 102 and 103, whether or not the particular works ultimately qualify for protection. *See, e.g.*, Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663, 676 (7th Cir. 1986) ("Congress contemplated that '[a]s long as a work fits within one of the general subject matter categories of section 102 and 103, . . . [section 301(a)] prevents the States from protecting it even if it fails to achieve Federal copyright because it is too minimal or lacking in originality to qualify.'") (quoting H.R. Rep. No. 94-1476, at 131 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5747), *cert. denied*, 480 U.S. 941 (1987). On this view, "[t]he reason that § 301(a) preempts rights claimed in works that lack sufficient creativity to be copyrightable is to prevent the states from granting protection to works which Congress has concluded should be in the public domain." *Baltimore Orioles*, 805 F.2d at 676 n.23.

In upholding contracts under state laws that allow parties to restrict uses of public domain materials, courts have invoked the second step of the preemption analysis, reasoning that even though the materials may fall within the general subject matter of copyright, the rights enforced through contract law are new rights, not equivalent to the rights under the Copyright Act. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) ("[A] simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced.").

There is a strong argument that a state law cause of action with respect to an assertion of copyright in a public domain work is not preempted. Even if public domain material were understood to fall within the general subject of the Copyright Act, the state cause of action would not be equivalent to enforcement of any rights under the Act. More significantly, the state cause of action would be consistent with the idea in the preemption analysis that state law should not allow parties to claim copyright-like protections to public domain materials. However, this specific area of law remains undeveloped.

[299] For instance, the Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/avalon.htm (last visited Mar. 31, 2006), makes available historical legal documents. Public domain books are available at Project Gutenberg, http://www.gutenberg.org (last visited Feb. 1, 2006), the On-line Books Page, http://onlinebooks.digital.library.upenn.edu (last visited Feb. 1, 2006), the Universal Library, http://www.ul.cs.cmu.edu/html (last visited Mar. 28, 2006), and the Eldritch Press, http://www.eldritchpress.org (last visited Feb. 1, 2006). Images are available at Public Domain Picture, http://www.princetonol.com/groups/iad/links/clipart.html (last visited Feb. 1, 2006), and Public Domain Photo, http://www.pdphoto.org (last visited Feb. 1, 2006). The Mutopia Project, http://www.mutopiaproject.org/ (last visited Feb. 1, 2006), offers classical music scores. A variety of websites provide access to public domain computer software. *See, e.g.*, Download.com, http://www.download.com (last visited Feb. 1, 2006). Seeking to deliver the public domain to the public, the Internet Archive operates an Internet Bookmobile. It travels around the country and, using a satellite, downloads and prints out public domain books for libraries, schools, and

priate works for inclusion and create electronic versions of them.[300] Different sources provide links to websites offering public domain works.[301] Physical libraries are also important repositories of public domain works, and some generously permit visitors to access and even make copies from their collections.[302] Different websites help to counteract the effects of copyfraud by allowing and encouraging authors to distribute their copyrighted works free of charge.[303] Some software developers have been especially generous in placing their creations in the public domain,[304] or otherwise making software available with few restrictions.[305] Other organizations provide more gen-

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retirement homes along its route. The Bookmobile, http://www.archive.org/texts/bookmobile.php (last visited Feb. 1, 2006). Perhaps most promising among Internet sources for public domain works is Google's recent partnership with major research libraries to scan millions of books into its searchable database. John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1. However, publishers have expressed opposition to the project because Google proposes to include both public domain and copyrighted books in the database—merely providing an "opt-out" for copyright owners to protect their interests. *See* Edward Wyatt, *Google Library Database is Delayed*, N.Y. TIMES, Aug. 13, 2005, at B9.

300 Project Gutenberg, for example, offers 17,000 e-books ranging from Victor Hugo's *Les Miserables*, http://www.gutenberg.org/etext/135, to various editions of the Bible, http://www.gutenberg.org/browse/authors/a#a216, all prepared, proofread, and distributed by hundreds of volunteers. *See* Project Gutenberg, http://www.gutenberg.org (last visited Mar. 31, 2006).

301 *See, e.g.*, Art History Res., Prints and Photography, http://witcombe.bcpw.sbc.edu/ARTHprints.html#photography (last visited Feb. 1, 2006).

302 The New York Public Library, for example, makes available thousands of public domain photographs in its collection. N.Y. Pub. Library, Photography Collection, http://www.nypl.org/research/chss/spe/art/photo/photo.html (last visited Feb. 1, 2006). The Music Department of the Free Library of Philadelphia allows patrons to make free copies of public domain sheet music. Free Library of Philadelphia, Sheet Music Collection, http://libwww.library.phila.gov/collections/collectionDetail.cfm?id=15 (last visited Feb. 1, 2006). The George Eastman House has an enormous collection of photographs and film that the public may view. George Eastman House, http://www.eastman.org (last visited Feb. 1, 2006).

303 For example, the Social Science Research Network (SSRN) is an enormous repository of academic writings that can be read and printed out in most instances without charge. Social Science Research Network, http://www.ssrn.com (last visited Feb. 1, 2006). While music downloading is typically in the news when conducted illegally, many recording artists also use websites to legally distribute their recordings free of charge because they recognize the benefits of dissemination. *See, e.g.*, Garage Band, http://www.garageband.com (last visited Feb. 1, 2006).

304 For example, RasMol, a popular program for creating three-dimensional models of molecules, was placed in the public domain at inception. *See* RasMol, http://www.umass.edu/microbio/rasmol (last visited Feb. 1, 2006).

305 Freeware is software available for the public to use, but the copyright owner retains the copyright and prohibits unauthorized modifications to the software and incorporation into other programs. *See* EDUCOM Consortium of Colls. & Info. Tech. Ass'n of Am., A Guide to the Ethical and Legal Use of Software for Members of the Academic Community (1993), http://www.uvm.edu/~uvmppg/cit/fairuse.htm (last visited Feb. 1, 2006). Shareware is software protected by copyright but made available for use for a trial period (after which

eral information about the limits of copyright law and support for protecting the public domain in order to facilitate permissible reproduction and use.[306] Still other entities provide mechanisms for authors to increase dissemination and use of their works while protecting the authors' own interests.[307]

Private efforts of this nature represent an important form of resistance to copyfraud, and they should be encouraged. For example, Congress could easily and cheaply enact a program making available Public Domain Development Grants to individuals and entities for gathering together and making available these works. The more people know about copyright law and the easier it is to identify and locate public domain works, the greater the likelihood of keeping copyright within its proper limits.[308]

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a fee is triggered). *See id.*; Shareware, http://www.shareware.com (last visited Feb. 1, 2006). Semi-free software is software available for a fee, and it is copyrighted, but it may be freely copied and modified for non-profit activity. *See* Free Software Foundation Home Page, http://www.fsf.org (last visited Feb. 1, 2006); The GNU Project, Categories of Free and Non-Free Software, http://www.gnu.org/philosophy/categories.html#semi-freeSoftware (last visited Feb. 4, 2006). Open source software is copyrighted, but it may be copied, modified, and distributed so long as all of that is done in accordance with a license that allows a subsequent recipient also to use, modify, and distribute the software freely. *See* Open Source Initiative, The Open Source Definition, http://www.opensource.org (last visited Feb. 1, 2006).

306 These include Chilling Effects Clearinghouse, http://www.chillingeffects.org (last visited Feb. 1, 2006), Electronic Commons, http://www.ecommons.ca (last visited Feb. 1, 2006), Electronic Frontier Foundation, http://www.eff.org (last visited Feb. 1, 2006), Public Knowledge, http://www.publicknowledge.org (last visited Feb. 1, 2006). There are also books devoted to teaching people how to locate public domain materials. *See, e.g.*, FISHMAN, *supra* note 6; KENYON DAVID POTTER, AN EDUCATOR'S GUIDE TO FINDING RESOURCES IN THE PUBLIC DOMAIN (1999); BARBARA ZIMMERMAN, THE MINI-ENCYCLOPEDIA OF PUBLIC DOMAIN SONGS (5th ed. 1997).

307 In particular, Creative Commons helps authors create various kinds of general licenses that make their works available with fewer restrictions than under traditional copyright protections—for example, free copying with attribution, copying except for commercial uses, and copying but not derivative works. Creative Commons, http://www.creativecommons.org (last visited Feb. 1, 2006).

308 In this respect, we should cautiously celebrate websites that offer public domain works (properly marked as such) for sale to individuals who pay a membership fee to access the site and websites selling individual copies (again properly marked) of public domain works. *See, e.g.*, Classical Archives, http://www.classicalarchives.com (offering five free downloads per day of classical music scores to non-subscribers, and thousands of downloads for payment of annual membership fee of $25) (last visited Feb. 1, 2006); Public Domain Information Project, http://www.pdinfo.com (offering for sale collections of public domain sheet music) (last visited Feb. 1, 2006). These sites offer the customer a plain benefit—the convenience of accessing work that might otherwise be unavailable or difficult to locate. So long as sites like these do not falsely attach copyright notices to public domain works, they do not present a copyfraud problem.

CONCLUSION

Copyfraud is pervasive. False copyright claims to public domain works impose economic costs and impede expression. At present, publishers have little material incentive to police themselves. Absent some new remedy, copyfraud will continue and likely expand.

This Article has argued that Congress should respond to copyfraud principally by creating a system of civil remedies that can be pursued by private parties. In addition, courts should extend the misuse defense to prevent enforcement of an otherwise valid copyright if the copyright holder has engaged in copyfraud. The Article has also identified some possible remedies under state law and through private efforts.

I share the concern, expressed by many other observers, that the public domain is increasingly under threat. So far, however, efforts to protect and enhance the public domain have focused mostly on reducing the duration and scope of copyright—a strategy that, in my view, is unlikely to succeed. If Congress were to decide to protect works for shorter periods or to confer fewer rights on creators, then the public domain would burgeon. Yet the chances of these changes happening are small: Congress's inclination has been to expand, rather than contract, copyright protections. There is little indication that this trend will reverse anytime soon.

This Article has therefore offered a different approach. Rather than lightening the copyright side of the balance, my proposal adds weight on the side of the public domain itself. Instead of changing copyright law by reducing the rights of creators, the focus is on creating the mechanisms to keep those rights within their designated limits. For the public domain to flourish, we need to enforce the copyright boundaries that Congress has already seen fit to adopt.