

COMMENTS

AFTER *BRIDGEMAN*: COPYRIGHT, MUSEUMS, AND PUBLIC DOMAIN WORKS OF ART

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INTRODUCTION

Posters of water lilies on dorm room walls. A calendar turned to December's picture—a Renaissance painting of the Holy Family. A box of note cards with scenes from seventeenth-century Japanese scrolls. Turn over any of these art-laden items, or look for the fine print in the corner, and the attentive art lover will find the ©, the symbol that indicates the work is protected by copyright. But look closely. The © is followed not by the artist's name, but by the name of the museum that owns or displays the work: “© The Metropolitan Museum of Art” or “© The Museum of Fine Arts, Boston” or “© The Philadelphia Museum of Art.” The works reproduced are in the public domain. The copyright monopoly has expired, or, in the case of many works of art, production predates any copyright scheme entirely.¹

So, how can a museum copyright a piece of art that is in the public domain? Copyright can come in layers, and peeling back these lay-

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¹ See generally Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 914 (2002) (addressing the historical origins of copyright law). The first copyright act was the Statute of Anne, adopted in England in 1710, which dealt solely with the printed word. *Id.* Protection for visual works came much later. In the United States, the *Trade-Mark Cases*, 100 U.S. 82, 94 (1879), extended protection to prints and engravings, and the 1976 Copyright Act protects “pictorial, graphic, and sculptural works.” 17 U.S.C. § 102(a)(5) (2000).

ers often reveals surprises. The copyright on the poster, the calendar, and the note cards is not claimed in the work of art itself, but in the museum's reproduction of that work. To transform a painting on the wall into a t-shirt or a notepad or a mug, a museum photographer takes a picture of the painting, and that photograph is then reproduced onto cloth or paper or ceramic.² For example, *The Annunciation*, by Jan van Eyck, exhibited at the Philadelphia Museum of Art, has never been protected by copyright—it predates copyright in the visual arts by more than four hundred years—but the photograph of the painting and the poster made from the photograph are copyrighted by the Museum.³

At least, the Museum *claims* the copyright. Art museums rely on the validity of their copyrights in reproductions of public domain works of art to educate the public and to generate income. As any visitor knows, the gift shop plays an important role in the modern museum. In addition to enriching scholarship and widening public access to works of art, sales of reproductions and derivative products are a major revenue stream for museums.⁴ Museums reproduce works from their collections in high-quality formats, making them suitable for inclusion in books and journals, and many museums also make their collections available to patrons online.⁵

Are museum claims of copyright in their reproductions of public domain works of art valid? In 1998 and 1999, this longstanding practice was called into question by a case in the Southern District of New York. The two decisions in *Bridgeman Art Library v. Corel Corp.*⁶ have significant implications for art museum practice and prompt major questions about copyright law and how intellectual property policies affect nonprofit cultural organizations. The question in *Bridgeman* was

² See Mitch Tuchman, *Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 287-88 (2001) (describing the importance of reproduction photography to museum missions).

³ Jan van Eyck, *The Annunciation* (1434-36) (Philadelphia Museum of Art).

⁴ See PHILADELPHIA MUSEUM OF ART, 2004 ANNUAL REPORT 26 (2004) [hereinafter PMA ANNUAL REPORT] (reporting more than five million dollars of revenue from retail and wholesale sales).

⁵ See, e.g., Fine Arts Museums of San Francisco, My Gallery, <http://www.thinker.org/gallery/index.asp> (allowing users to search, view, arrange, and save personal galleries from over 82,000 digitized images) (last visited Feb. 15, 2007).

⁶ *Bridgeman Art Library, Ltd. v. Corel Corp. (Bridgeman I)*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998); *Bridgeman Art Library, Ltd. v. Corel Corp. (Bridgeman II)*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

whether Corel, by selling a set of CD-ROMs containing digital images of public domain works of art, had infringed the Bridgeman Art Library's copyright in its library of high-quality color transparencies of the same works.⁷ The court found that not only had there been no infringement, there was no copyright *to* infringe.⁸ Because Bridgeman's library consisted of art reproduction photographs, the court decided that the work did not meet copyright law's minimum standards of originality. It held that no copyright was available when "the point of the exercise was to reproduce the underlying works with absolute fidelity."⁹

This Comment argues that *Bridgeman* was wrongly decided, both from a legal standpoint and from a policy perspective. In examining the cases most heavily relied on by the *Bridgeman* court, it appears that the court interpreted copyright law's originality requirement in a way that was both too broad (by including Bridgeman's photography under the "sweat of the brow" doctrine) and too narrow (by requiring an inappropriately high level of creativity).¹⁰ The *Bridgeman* court's analogy to a photocopier¹¹ was also overinclusive and inapt: that comparison would include any photography where the goal is to reproduce exactly what is in front of the camera. The *Bridgeman* court failed to distinguish between reproductions of two-dimensional and three-dimensional works of art and brushed aside the skill and experience required for fine art reproductive photography. This photography

⁷ *Bridgeman I*, 25 F. Supp. 2d at 424. Publishers use transparencies to reproduce works of art in print at a very high level of resolution. See Tuchman, *supra* note 2, at 305-06.

⁸ *Bridgeman II*, 36 F. Supp. 2d at 197.

⁹ *Id.*

¹⁰ 17 U.S.C. § 102(a) (2000) provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Works of authorship include "pictorial, graphic, and sculptural works," which are defined in § 101 as "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions." For more on the sweat of the brow doctrine, see *infra* note 90 and accompanying text.

¹¹ See *Bridgeman I*, 25 F. Supp. 2d at 427 ("[O]ne need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. . . . The more persuasive analogy is that of a photocopier."); *Bridgeman II*, 36 F. Supp. 2d at 198 ("[Bridgeman's] transparencies stand in the same relation to the original works of art as a photocopy stands to a page of typescript . . ."). But see Kevin Garnett, *Copyright in Photographs*, 22 EUR. INTELL. PROP. REV. 229, 234 (2000) (disputing the photocopier analogy as too simplistic).

should have fulfilled the “extremely low” level of creativity required by the Supreme Court of the United States in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹²

Some advocates of an expanded public domain heralded *Bridgeman* as a bulwark against an encroaching copyright.¹³ This Comment argues that in addition to providing needed revenue to museums and contributing to better-quality reproductions, a strong copyright on reproduced works of art actually encourages museums to distribute work more broadly, thus fulfilling museums’ federally mandated missions by encouraging more public viewing and consumption of art.¹⁴ Without copyright in their reproductions, museums are likely to turn to contracts and licensing agreements as a way to govern access to the works in their collections—who can see them, who can photograph them, and what the photographs can be used for.¹⁵ These contracts have no input from viewers and consumers and, unlike copyright law, no fair use exceptions.¹⁶ From a policy perspective, a copyright in art reproductions fulfills the public interest better than the contracts that museums will turn to in order to protect their works if copyrights in art reproductions are deemed invalid.

¹² 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.” (citation omitted)).

¹³ See Robert C. Matz, Note, *Bridgeman Art Library, Ltd. v. Corel Corp.*, 15 BERKELEY TECH. L.J. 3, 5 (2000) (suggesting that copyrights over reproductions “allow reproducers to harass competitors, stifle competition within the market for art reproductions, and impede access to and use of images of public domain works of art”); see also 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, 57-58 (1998) (contending that museum copyrights over public domain works “thwart[] the principle of the public domain by preventing the public from freely reproducing, adapting, and publicly displaying images that now belong to everyone” (footnote omitted)).

¹⁴ See Museum Services Act, 20 U.S.C. § 9171 (2000) (stating that the “public service role” of museums is to “connect[] the whole of society to the cultural, artistic, historical, natural, and scientific understandings that constitute our heritage”); see also *infra* note 115 (detailing museums’ educational missions).

¹⁵ See Butler, *supra* note 13, at 57 (describing restrictive museum photography policies).

¹⁶ See 17 U.S.C. § 107 (2000) (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [sections 106 and 106A], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

Part I of this Comment describes the *Bridgeman* decisions themselves. Part II examines the history of American copyright law and the idea of the public domain, and explores the historical roots of the originality requirement and the copyrightability of photographs. Part III addresses the *Bridgeman* court's interpretation of the originality requirement, its dismissal of Bridgeman's arguments, and the prospect of a post-*Bridgeman* world in which museums rely on contract remedies, rather than copyright, to the detriment of the public. This Comment suggests that the *Bridgeman* decision should not be a model for other courts: following this decision would foster an inaccurate analysis of the originality requirement, draw revenue away from museums, discourage the creation of high-quality reproductions, and, most importantly, diminish the rights of viewers through increasingly constrained contracts of adhesion. The law and the public would both suffer if the ideas in the *Bridgeman* decision were widely adopted.

I. THE *BRIDGEMAN* DECISIONS

This Comment focuses on the implications of the *Bridgeman* decisions for museums and the problematic scope of the tests for originality outlined in the opinions.¹⁷ There are a number of issues in the case, including choice of law, which this Comment will not address in detail.¹⁸ The presence of two decisions does require an explanation: the first *Bridgeman* decision, in November 1998, concluded that United Kingdom law governed the question of whether Bridgeman held a valid copyright in its reproductions¹⁹ and that United States law

¹⁷ *Bridgeman* is hardly the first case to address issues of originality in copyright. This Comment discusses at length several of the major copyright cases relied on by the *Bridgeman* court. Other cases that address similar issues, but that will not be discussed in detail, include: *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (distinguishing between aspects of a work that were original to its creator and those that were not); *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) (holding that plastic reproductions of Disney characters could be copyrighted if original aspects were more than trivial); *Simon v. Birraporetti's Rests., Inc.*, 720 F. Supp. 85, 87 (S.D. Tex. 1989) (requiring sufficient originality to qualify for an independent copyright).

¹⁸ See *Bridgeman I*, 25 F. Supp. 2d 421, 425 (S.D.N.Y. 1998) ("The Court . . . must determine which law governs copyrightability and the alleged infringements."). A thorough explication of choice of law in international copyright disputes would require another Comment (or an entire Symposium); because the *Bridgeman* court came to the same conclusion by applying British and American law, this Comment focuses on the reasoning behind the American law, rather than on the differences between British and American copyright doctrine.

¹⁹ *Id.* at 426. *Bridgeman*, a British company, claimed that the works were protected by U.K. copyrights, which the United States was bound to uphold by virtue of its

governed the question of whether an infringement had in fact occurred.²⁰ The court noted that U.S. law would have yielded the same result as U.K. law, and indeed, in the second decision, discussed below, the court reached the same conclusion under U.S. law.²¹

The Bridgeman Art Library, an English company, handled the licensing of images of works of art from a large number of museums, primarily in Europe, but also the Brooklyn Museum and the Museum of the City of New York.²² Bridgeman's collection of transparencies, made from photographs taken by museum photographers or freelance photographers hired by Bridgeman, included many well-known Old Master works, such as the Sistine Chapel Ceiling and the *Mona Lisa*.²³ Bridgeman stored these images in two formats. The high-resolution color transparencies were used for print publication of the reproductions.²⁴ The other format was a CD-ROM of low-resolution digital images, used as a catalogue for interested clients²⁵ who could review the available image database on disc before ordering specific reproductions.²⁶

The infringement issue arose when Corel, an American software company, produced a set of CD-ROMs called "Corel Professional Photos CD-ROM Masters I-VII," which contained digital reproductions of famous European paintings.²⁷ The Corel discs contained seven hundred works of art; 120 were works also featured on Bridgeman's catalogue disc.²⁸ Bridgeman alleged that the only way Corel could have acquired the reproductions was by copying Bridgeman's transparencies, because the owners of the works tightly controlled access to them

adherence to the Berne Convention. See *Bridgeman II*, 36 F. Supp. 2d 191, 193 (S.D.N.Y. 1999).

²⁰ *Bridgeman I*, 25 F. Supp. 2d at 426.

²¹ See *id.* at 427 nn.41, 47 (noting "substantial similarity" between the originality requirements under the copyright statutes of both nations). Because the court referenced U.S. law throughout both opinions, this Comment will cite to both decisions when discussing the originality requirement.

²² See Tuchman, *supra* note 2, at 305 (listing the Bridgeman Art Library's museum clients).

²³ See *id.*; see also *Bridgeman I*, 25 F. Supp. 2d at 423 (noting that the museum had made "transparencies of a substantial number of well known works").

²⁴ See Tuchman, *supra* note 2, at 305 & n.99 (describing the need for high-resolution formats for print publishing and the use of transparencies for the production of exhibition catalogues).

²⁵ See *id.* at 305 (listing the Bridgeman Art Library's licensing clients).

²⁶ *Bridgeman I*, 25 F. Supp. 2d at 424.

²⁷ *Id.*

²⁸ *Id.*

and Bridgeman had the only authorized reproductions.²⁹ Before settling the question of infringement, the court had to decide whether Bridgeman held valid copyrights in the transparencies. Holding that there was no such copyright because the reproductions lacked the requisite originality,³⁰ the court granted Corel's motion for summary judgment.³¹

After the decision, Bridgeman moved for reargument and reconsideration on the grounds that the court had overlooked certain pertinent elements of British law.³² The court agreed to rehear the case, but in *Bridgeman II* it applied U.S. law to the issue of the transparency copyrights' validity. The court cited the Berne Convention's rule that copyright cases are governed by the laws of the country where protection is claimed.³³ The court's discussion of the originality requirement was more complete in the second opinion,³⁴ but the result of the rehearing was the same: the court granted Corel's motion for summary judgment, writing that the plaintiff had "labored to create 'slavish copies' of public domain works of art," in which "there was no spark of originality."³⁵

The March 1999 decision was the end of the *Bridgeman* saga in the courts; there was no appeal.³⁶ Since the decisions are at the District Court level, they would be persuasive, rather than binding, authority

²⁹ *Id.*

³⁰ *Id.* at 427.

³¹ *Id.* at 431.

³² *Bridgeman II*, 36 F. Supp. 2d at 192. The plaintiffs argued that "the Court had ignored the Register of Copyright's issuance of a certificate of registration for one of [Bridgeman's] transparencies . . . and . . . failed to follow *Graves' Case*." *Id.* (citing *Graves' Case*, (1869) 4 L.R.Q.B. 715 (granting a copyright to a photograph of an engraving)).

³³ *Id.* at 194 (citing the Berne Convention's stipulation that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed" (citing Berne Convention (Paris text) art. 5(2), July 24, 1971, *reprinted in* 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 27-5 (2006) [hereinafter NIMMER])).

³⁴ *See Bridgeman II*, 36 F. Supp. 2d at 195 ("In view of the Court's conclusion here that U.S. law governs on this issue, it is appropriate to give a somewhat fuller statement of the Court's reasoning.").

³⁵ *Id.* at 197, 200.

³⁶ The Bridgeman Art Library, a small company founded by Lady Harriet Bridgeman in 1972, may not have had the financial wherewithal to pursue an appeal. *See generally* Bridgeman Art Library, History, <http://www.bridgeman.co.uk/about/history.asp> (last visited Feb. 15, 2007). It still operates as an image database, with a growing specialty in copyright clearances. *See* Bridgeman Art Library, Creator's Right, <http://www.bridgeman.co.uk/about/copyright.asp> (last visited Feb. 15, 2007).

on later cases. However, the issues discussed in the case require close examination, particularly since the Southern District of New York and the Court of Appeals for the Second Circuit are regarded as major sources of authority on issues of copyright and art law.³⁷ *Bridgeman* also represents the latest in a series of Southern District cases constraining the scope of copyright protection.³⁸ In addition, museums and art world professionals paid close attention to the case when it was decided and have used it to guide policy decisions.³⁹ *Bridgeman* warrants a deeper investigation into questions of copyright, originality, and what policies would really benefit the public.

II. COPYRIGHT, PHOTOGRAPHS, AND THE ORIGINALITY REQUIREMENT

Part II explores the roots of copyright law and the public domain in the United States, the originality requirement in its past and current incarnations, and the history of copyright in photographs. It concludes that the history and background of the originality requirement as it applies to photographs do not support the *Bridgeman* decision. The view of the originality requirement found in the *Bridgeman* decision is at once too narrow and too broad: it focuses on creativity rather than originality, as the requirement was initially conceived, and applies the sweat of the brow doctrine to a wide range of concepts beyond the original target (compilations of facts).⁴⁰ This view wrongfully excludes art reproduction photography like that of the Bridgeman Art Library from copyright protection.

A. *The Basis of American Copyright Law*

Copyright in the United States is a constitutional grant. Article I empowers Congress to enact laws “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and In-

³⁷ See Matz, *supra* note 13, at 6 n.21 (explaining the author’s reliance on New York case law “because other courts often look to this body of law to guide them in their evaluation of art reproductions and derivative works”).

³⁸ See *Hearn v. Meyer*, 664 F. Supp. 832, 840 (S.D.N.Y. 1987) (holding that reproductions of illustrations from one edition of *The Wizard of Oz* that appeared in another edition were not protectable); *Past Pluto Prods. Corp. v. Dana*, 627 F. Supp. 1435, 1444-45 (S.D.N.Y. 1986) (holding that a change in medium did not grant originality to a hat in the shape of the Statue of Liberty’s crown).

³⁹ See *infra* notes 109-111 and accompanying text (discussing museum reactions to the *Bridgeman* decision).

⁴⁰ See *Bridgeman II*, 36 F. Supp. 2d at 197 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), and applying the sweat of the brow doctrine).

ventors the exclusive Right to their respective Writings and Discoveries.”⁴¹ Congress built on that foundation, passing major copyright acts in 1790, 1909, and 1976.⁴² Over time, both the term lengths and the subject matter covered by copyright expanded.⁴³ The Copyright Act of 1790 stipulated a fourteen-year term, renewable once if the copyright holder was still alive, for “maps, charts, and books.”⁴⁴ The 1976 Act extended protection to “original works of authorship fixed in any tangible medium of expression” for a term of life of the author plus fifty years.⁴⁵

In drafting the Copyright and Patent Clause, the Framers aimed to balance the economic incentives for authors to create new works against the desire for the public to have free access to those works, in order to aid the progress of society.⁴⁶ One of the controversies in this narrative is the question of whether the Framers intended to use the Copyright and Patent Clause to replicate English attempts to rein in monopolies.⁴⁷ The argument is that since the Framers wanted to avoid the abuses associated with granting exclusive rights to particular interest groups, Congress should be constrained in its attempts to expand the scope of copyright, because this expansion does not “‘promote the Progress of Science’ in the way intended by the framers of the Constitution.”⁴⁸

⁴¹ U.S. CONST. art. I, § 8, cl. 8. This Clause is referred to as the Copyright and Patent Clause.

⁴² Copyright Act of 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124; Copyright Act of 1909, 35 Stat. 1075 (1909); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976). The copyright law is codified at title 17 of the *United States Code*.

⁴³ See generally Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 158-61 (1999), for a discussion of the statutes.

⁴⁴ Copyright Act of 1790, 1 Stat. at 125.

⁴⁵ Copyright Act of 1976, 90 Stat. at 2544-45; see also Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending the copyright term to life of the author plus seventy years).

⁴⁶ Cf. Appel, *supra* note 43, at 157 (quoting Samuel Johnson as saying “[n]o man but a blockhead ever wrote except for money” (citing 3 JAMES BOSWELL, BOSWELL’S LIFE OF JOHNSON 19 (Hill ed. 1934))).

⁴⁷ The Statute of Anne, adopted in England in 1710, replaced the publisher’s monopoly over printed works with rights vesting in the author. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1164 (“The framers . . . understood that one way to avoid the abuses that occurred under the Stationer’s monopoly was to constrain Congress’s choices as to who could receive statutory protection.”).

⁴⁸ *Id.* at 1169.

The question of antimonopoly motivation has contemporary resonance in discussions of copyright term length and the boundaries of the public domain, which lurk in the background of the *Bridgeman* decisions: were the Framers intent on voiding exclusive rights as quickly as possible? Antimonopoly arguments have long been used to challenge Congress's ability to pass laws that lengthen the copyright term.⁴⁹ However, recent scholarship has questioned the conventional wisdom that the Framers sought to curb monopolies, as England did through the Statute of Anne. Thomas Nachbar, for instance, argues that although the Copyright and Patent Clause is clearly linked to the Statute of Anne, neither rule addresses trade monopolies.⁵⁰ Questioning the Framers' supposed antimonopoly goals is useful in considering *Bridgeman*, not because of the *Bridgeman* court's legal arguments, which were not constitutional, but because of the emphasis some contemporary commentators place on the danger of monopolies and the public's interest in the limitation of copyright. *Bridgeman* should be applauded, these commentators assert, because copyrights in reproductive photographs unfairly limit access to public domain works of art, extending the private monopoly over works that have passed into the public domain.⁵¹ These arguments are addressed in Part III below.

B. Copyrightability of Photographs and the Originality Requirement

Under the Copyright Act of 1976, copyright can be held in "original works of authorship fixed in any tangible medium of expression."⁵² There has been much debate about the meaning of "original"

⁴⁹ See, e.g., *id.* at 1175-76 (protesting the extension of the copyright term to life of the author plus seventy years with the Sonny Bono Copyright Term Extension Act).

⁵⁰ Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 332 (2004) ("The two main innovations of the statute, limited duration and the vesting of copyright in authors, have nothing to do with preventing monopolies."). But see Ochoa & Rose, *supra* note 1, at 914-15 (arguing that these same features of the Statute of Anne—term limits and copyright vesting in authors rather than publishers—indicate the Statute's antimonopoly stance).

⁵¹ See, e.g., Appel, *supra* note 43, at 223-24 (lauding *Bridgeman* for its potential to open the art reproduction market to competition and greater public access); Matz, *supra* note 13, at 17 (claiming that *Bridgeman* "reinforces important policy considerations against impeding public access to public domain works of art").

⁵² 17 U.S.C. § 102(a) (2000).

in the statute. This debate has been intense, complicated, and long-lived—nowhere more so than over photography.⁵³

In 1865, Congress amended the Copyright Act to include photography, making photographers “Authors” deserving of protection under the constitutional guarantee to “Authors and Inventors.”⁵⁴ In the first major case after the amendment, *Burrow-Giles Lithographic Co. v. Sarony*, a photographer who had taken pictures of Oscar Wilde sued the company that made unauthorized reproductions of the photographs; the company responded that photographs could not constitutionally be considered writings and were therefore not protectable.⁵⁵ The United States Supreme Court disagreed, holding that photographs could be “representatives of original intellectual conceptions of [an] author.”⁵⁶ Even when the subjects were not posed, but rather taken from life, the Supreme Court upheld the validity of copyrights. In *Bleistein v. Donaldson Lithographing Co.*, the Court dismissed the argument that no copyright could be held in a photograph where the photograph’s subject was not composed by the photographer.⁵⁷ Judge Learned Hand, in *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, extended the idea of photographer as author, stating that “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”⁵⁸

From these historical opinions come modern interpretations of the originality required for copyright. Judge Hand’s approach from *Jewelers’ Circular*, and his understanding of the position of photography, has fallen out of favor. The authors of the major copyright treatise, Melville B. Nimmer and David Nimmer, have written that a lack of originality dooms the copyrightability of a photograph when “a photograph of a photograph or other printed matter is made that

⁵³ The question of the originality of photography has puzzled jurists on both sides of the Atlantic from the very beginnings of photography in the mid-nineteenth century. See, e.g., *Graves’ Case*, (1869) 4 L.R.Q.B. 715, 722 (“[I]t is difficult to say what can be meant by an original photograph. All photographs are copies of some object . . .”).

⁵⁴ See Act of March 3, 1865, ch. 126, 13 Stat. 540 (stating that the act’s provisions “shall extend to and include photographs and the negatives thereof . . . and shall enure to the benefit of authors . . . in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings”); U.S. CONST. art. 1, § 8, cl. 8.

⁵⁵ 111 U.S. 53, 56 (1884).

⁵⁶ *Id.* at 58.

⁵⁷ 188 U.S. 239, 249 (1903).

⁵⁸ 274 F. 932, 934 (S.D.N.Y. 1921), *aff’d*, 281 F. 83 (2d Cir. 1922).

amounts to nothing more than a slavish copying.”⁵⁹ And both Second Circuit and Supreme Court precedent say much the same thing: in *L. Batlin & Son, Inc. v. Snyder*, the Second Circuit held that the reproduction of art in a different medium does not by itself constitute originality, and in *Feist*, the Supreme Court required a “creative spark” for originality.⁶⁰

Mitch Tuchman observes that these recent decisions addressing the originality requirement have shifted the standard from true originality toward a melding of originality and creativity.⁶¹ This shift is an uncomfortable one for *all* photography, not just for art reproduction photography. Even the *Bridgeman* court acknowledged that “much, perhaps almost all, photography is sufficiently original to be subject to copyright.”⁶² Depending on a particular judge’s interpretation of what creativity means, the copyright protecting any unstaged photograph could be called into question. A photograph, at its most basic level, is a copy of its subject, as the court in the 1869 *Graves’ Case* observed.⁶³ Realistic or naturalistic photographs that seek to achieve mimesis, the mimicry of nature, would seem to fail a copyright test relying on creativity—or at least, it is difficult to explain how such a photograph could pass a test that reproductive photography fails. As Kevin Garnett writes, “what is the distinction between a photographer who by his skill portrays as realistically as possible a scene from nature and one who by his skill and labour reproduces a painting as realistically as possible?”⁶⁴ Requiring creativity, with its implication of imaginative interpretation of subject matter and authorial agency, instead

⁵⁹ 1 NIMMER, *supra* note 33, § 2.08[E][2], at 2-131 (citation omitted).

⁶⁰ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Both of these decisions are discussed more fully in Part III, *infra*.

⁶¹ Tuchman, *supra* note 2, at 302-05. Tuchman cites the infamous case of *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968), in which the parties litigated the validity of the copyright of the Zapruder film of the Kennedy assassination. Tuchman, *supra* note 2, at 303. The defendants alleged that the images could not be copyrighted because they lacked creativity, since Zapruder did nothing to set up the situation, but merely captured it on film. *Time*, 293 F. Supp. at 143. The court disagreed, citing the “many elements of creativity” that went into the film, including the choice of camera, lenses, and film. *Id.* This difference in the definition of creativity, from what Tuchman calls “mental conception and execution” to “journeyman’s choices” indicates a melding of the ideas of basic originality and creativity that appears in later decisions, but Tuchman describes as “creative” some of the same features of photography that the *Bridgeman* court dismissed. Tuchman, *supra* note 2, at 303.

⁶² *Bridgeman I*, 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998).

⁶³ *Graves’ Case*, (1869) 4 L.R.Q.B. 715.

⁶⁴ Garnett, *supra* note 11, at 237.

of or in addition to originality, which at its essence addresses the origins of the work with the author, muddles the copyright question. These are distinctions that judges should be loathe to make.

III. LEGAL AND POLICY ARGUMENTS

Part III.A addresses the major cases cited by the *Bridgeman* court and their conceptions of the originality requirement and the sweat of the brow doctrine. Part III.B examines the policy implications of the copyright regime envisioned in *Bridgeman* and the concern that, in the absence of copyright protection for reproductions, museums may rely on restrictive contract arrangements that limit public access to works of art.

A. *Bridgeman's Originality Analysis*

The *Bridgeman* court focused on two major copyright cases in its originality analysis, *L. Batlin & Son, Inc. v. Snyder*⁶⁵ and *Feist Publications, Inc. v. Rural Telephone Service Co.*⁶⁶ Both of these cases warrant a closer examination of originality and creativity. This Comment suggests that another case, *Alva Studios, Inc. v. Winninger*,⁶⁷ would have provided a better model for *Bridgeman*. Even with *Feist's* requirement of a "minimal degree" of creativity, the *Bridgeman* court went too far in refusing to recognize a copyright in the *Bridgeman* Art Library's reproductions of works of art.

Batlin was an infringement action brought by one manufacturer of Uncle Sam mechanical banks against another.⁶⁸ Both toy banks were based on a public domain model, but Snyder obtained a copyright on his version.⁶⁹ Batlin sued to declare Snyder's copyright void after Customs agents refused entry to Batlin's shipment of Uncle Sam banks.⁷⁰ The Second Circuit held Snyder's copyright invalid because his bank lacked any substantial variation from the public domain model.⁷¹

Batlin is a good example of the problem of joining the two concepts of originality and creativity. The Second Circuit, adopting the

⁶⁵ 536 F.2d 486 (2d Cir. 1976).

⁶⁶ 499 U.S. 340 (1991).

⁶⁷ 177 F. Supp. 265 (S.D.N.Y. 1959).

⁶⁸ 536 F.2d at 488.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 491.

Nimmers's suggestion, appended "a minimal element of creativity over and above the requirement of independent effort" to a definition of originality that required the work to be, simply, "the original product of the claimant."⁷² *Batlin* required a "substantial variation" to render a reproduction sufficiently original and held that such variation was not present in the bank.⁷³ The dissent in *Batlin* did not dispute the standard but found the majority's interpretation of "substantial variation" troubling, arguing that the author had clearly satisfied the standard because the two banks looked quite different from one another, were different sizes, and were made of different materials.⁷⁴ Citing the copyright statute and referring to its stated goal "to promote progress by encouraging individual effort," the dissent wrote that "[t]he relatively low standard of originality required for copyrightability is derived from this purpose. The objective is to progress first and, if necessary, litigate the question of infringement later."⁷⁵

Batlin illustrates the trouble courts have had in distinguishing between originality and creativity and deciding which concept copyright law requires. Under a pure originality standard, the answer would have been clear: each manufacturer had the public domain Uncle Sam bank as his basic model, and each realized an end product that was based substantially on that idea, but that had originated with him. The problem arises when creativity enters the equation. Neither manufacturer was particularly creative; each used a well-loved toy of an iconic figure as the model for his product. How could one be more creative than the other? Arguably, the *Batlin* decision draws dangerously close to the idea-expression dichotomy, one of copyright's most important principles: that only expressions may be copyrighted, not the underlying ideas.⁷⁶ If creativity is the de facto standard for originality, then was it not the underlying idea of the Uncle Sam bank that the *Batlin* court sought to protect, since only that underlying idea was creative? By adding creativity to originality, courts run the risk of stepping on one of copyright law's foundational precepts.

⁷² *Id.* at 490 (internal citation and quotation marks omitted).

⁷³ *Id.* at 491.

⁷⁴ *Id.* at 493 (Meskill, J., dissenting).

⁷⁵ *Id.* at 494.

⁷⁶ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates.").

A better gauge of originality can be found in the “skill, labor, and judgment” test of *Alva Studios, Inc. v. Winninger*.⁷⁷ The case, factually analogous to *Bridgeman*, dealt with two companies, each of which had produced scale reproductions of Rodin’s sculpture *The Hand of God*.⁷⁸ The plaintiff had authorization from various museums to produce replicas of works of art in museum collections; it alleged that the defendant had copied the plaintiff’s own reproduction.⁷⁹ The defendant responded that its replica was “its own original interpretation” of the Rodin work.⁸⁰ The court found that the plaintiff held a valid copyright in its reproductions of the sculpture, writing that reproductions of public domain works can be “sufficiently original to come within the copyright protection. However, to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another.”⁸¹ The court emphasized the amount of work and artistry that went into reproducing great works, referring to the plaintiff’s “great skill and originality” and its “delicacy” and “care.”⁸² Holding for the plaintiff on the infringement claim, the court concluded that the defendant’s sculpture was not a copy of Rodin’s *The Hand of God*, but rather a copy of the Alva Studios replica.⁸³ The *Alva Studios* “skill, labor and judgment” test is truer to the statutory requirement for originality than the *Batlin* test, which confuses the standard by demanding creativity.

The *Bridgeman* court frequently cited the most significant recent Supreme Court case addressing the originality requirement, *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁸⁴ which dealt with the copyrightability of compilations of facts—in that case, phone directories.⁸⁵ Although it was obviously appropriate for a district court to rely on a Supreme Court decision, the *Feist* facts were inapposite. The standard

⁷⁷ 177 F. Supp. 265, 267 (S.D.N.Y. 1959). Although *Alva Studios* has never been overruled, the *Bridgeman* court did not cite to it.

⁷⁸ *Id.* at 266-67. The sculpture was in the public domain at the time both reproductions were made. *Id.* at 267.

⁷⁹ *Id.* at 266-67.

⁸⁰ *Id.* at 267.

⁸¹ *Id.* (citation omitted).

⁸² *Id.*

⁸³ *Id.* at 268 (finding “convincing credible evidence” to establish actual copying).

⁸⁴ 499 U.S. 340 (1991).

⁸⁵ See, e.g., *Bridgeman I*, 25 F. Supp. 2d 421, 427 n.41 (S.D.N.Y. 1998) (citing *Feist* for the proposition that “[a] work is original if it owes its creation to the author and was not merely copied”).

laid out in *Feist* fits its own facts well, but it is not a clear match for the problems that arose in *Bridgeman*, and the *Bridgeman* court expanded *Feist*'s applicability inappropriately.

Justice O'Connor's analysis in *Feist* blended the meaning of the terms "creativity" and "originality." Her emphasis on creativity is understandable: the alphabetical arrangement of phone numbers is designed to prompt an additional requirement beyond origination with a particular author. A phone directory hardly meets the "creative spark" requirement she declared as the standard. It is harder to apply *Feist*, however, when dealing with the layering of originality inherent in art reproduction. Justice O'Connor wrote that originality "means only that the work was independently created by the author,"⁸⁶ but she drew on the *Trade-Mark Cases* to bolster the creativity element: "writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like."⁸⁷ That this phrase is the root of the demand for a "creative spark"⁸⁸ signals shaky ground for a creativity requirement. "Intellectual labor" is hardly an exclusive phrase; the design of databases and the arrangement of facts, which *Feist* specifically excludes from copyright protection, are certainly products of such work. Good art reproduction photography, too, requires significant knowledge, experience, and judgment—surely exercises of "intellectual labor."⁸⁹

If *Feist*'s creativity standard inspired the *Bridgeman* court to constrain the originality requirement, the other major *Feist* holding prompted the *Bridgeman* court to construe the sweat of the brow prohibition too broadly. *Feist* dealt a deathblow to the idea that copyright was a just reward for the hard work of compiling factual information—the sweat of the brow doctrine.⁹⁰ But the primary objection to the sweat of the brow doctrine in *Feist* had nothing to do with the amount or quality of the work put in to a project. Rather, the *Feist* court wrote, "[it] eschewed the most fundamental axiom of copyright

⁸⁶ *Feist*, 499 U.S. at 345.

⁸⁷ *Id.* at 346 (quoting the *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)). Although a contemporary reader may believe that "writings" is a narrow term, the inclusion of "prints, engravings, and the like" suggests that "writings" was a broad category, even in the late nineteenth century.

⁸⁸ *Id.* at 345.

⁸⁹ See generally Garnett, *supra* note 11, at 234 (discussing the "application of human skill and labour [required] to produce a good photograph").

⁹⁰ *Feist*, 499 U.S. at 352-53 (criticizing *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922), for adopting the sweat of the brow doctrine).

law—that no one may copyright facts or ideas,”⁹¹ the very idea-expression dichotomy discussed above.⁹² The *Bridgeman* court used *Feist* to support the idea that the “technical skill and effort” required for *Bridgeman* to make its transparencies were simply sweat of the brow and therefore that the work produced was not eligible for copyright protection.⁹³ However, the court’s application of the sweat of the brow doctrine to the *Bridgeman* Art Library’s work was overly broad: simply because a process is laborious and requires technical skill does not make it unoriginal and uncreative. Even Robert Matz, in his article applauding the *Bridgeman* decision, acknowledges that “it is often possible to point to distinguishable variations between the original work of art and an ‘exact’ reproduction; and it is also possible to point to distinguishable variations between two ‘exact’ copies of the same work.”⁹⁴ Matz attributes this, at least in part, to “a photographer’s ‘stylistic decisions.’”⁹⁵ A predictable compilation of phone numbers in alphabetical order by last name does not require the same creativity as art photography, where every decision of lighting and lens produces a different result. *Bridgeman*’s expansive sweat of the brow prohibition and very narrow melding of originality and creativity combine to inappropriately bar art reproductions from copyright protection.

An examination of the cases on which *Bridgeman* relied raises a line-drawing question that the court did not deal with, but which must be addressed for *Bridgeman*’s holding to apply predictably to museums: should photographic reproductions of two-dimensional and three-dimensional works be treated the same? *Alva Studios* dealt with three-dimensional reproductions of Rodin’s *The Hand of God*; *Bridgeman* dealt with two-dimensional reproductions of famous paintings. One of the reasons the *Bridgeman* decision might be intuitively appealing is that the reproductions really do look like the underlying works: flat paintings become flat photographs. But what if *Bridgeman* had a library full of photographs of public domain sculptures? Or what if the defendant in *Alva Studios* had photographed the plaintiff’s three-dimensional reproduction of *The Hand of God*? What happens when the reproduction does not match the dimensionality of the original?

⁹¹ *Id.* at 353.

⁹² See *supra* text accompanying note 76.

⁹³ *Bridgeman II*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

⁹⁴ See Matz, *supra* note 13, at 15.

⁹⁵ *Id.*

Such work would not be subject to the *Bridgeman* court's photocopier analogy, but the decisions that go into successfully photographing a sculpture—lighting, angle, film speed, etc.—are much the same as those that go into photographing a painting.

Surely photographs of sculptures are not “slavish copies” of the original work, which is the crux of the problem in *Bridgeman*. However, the court failed to draw a line between the two forms—and it may be impossible to draw one. Of course, a photograph cannot precisely duplicate a sculpture—the photograph captures only a portion of the work. But the same argument could be made of a photograph of a detail of a two-dimensional work. Does that mean that photographs of public domain sculptures should be protected by copyright, but photographs of public domain paintings should not? Should a reproduction of a painting detail receive protection, because the reproduction is not a “slavish copy”? What about paintings by artists like Jasper Johns and Anselm Kiefer, in which three-dimensional objects emerge from the canvas?⁹⁶ *Bridgeman* has no satisfactory answer to the question of where to draw the line between copyrightability of reproductions of two- and three-dimensional works.

So, why should the *Bridgeman* Art Library's public domain art reproductions have been protected by copyright? Even under the *Batlin* substantial variation test,⁹⁷ *Bridgeman*'s reproductions were a departure from the original works. The medium changed from paint to film, and eventually, to print;⁹⁸ a color correction strip was included so that someone converting the transparency to print use could make sure the same color tones and values appeared; and the photograph

⁹⁶ Jasper Johns, *Lands End*, (oil on canvas with stick, 1963) (San Francisco Museum of Modern Art); Anselm Kiefer, *Osiris und Isis*, (oil and acrylic emulsion with additional three-dimensional media, 1985-87) (San Francisco Museum of Modern Art). Reproductions of both works can be found at [http://collections.sfmoma.org/Prt103630*1\\$1](http://collections.sfmoma.org/Prt103630*1$1) (last visited Feb. 15, 2007).

⁹⁷ See *supra* Part III.A (discussing the substantial variation test, which requires the reproduction to vary substantially from the original to render the reproduction sufficiently original for copyright protection).

⁹⁸ It is widely acknowledged that a change in medium alone is not sufficient to fulfill the originality requirement. See, e.g., 1 NIMMER, *supra* note 33, § 2.08[C][2], at 2-110 (“[T]he 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.”); Garnett, *supra* note 11, at 234 (“[M]erely because there has been a change of medium it does not follow that the new work will be original. This must depend on the nature of the change involved and the relevant skill and labour deployed.”). Nonetheless, it should contribute to a finding of originality when combined with other factors.

of the work included not just the picture itself, but also the frame, to give the viewer a sense of how the painting looked on the wall of the museum.⁹⁹ The inclusion of the frame, referring as it does to the work's contemporary site, provides a temporal context that in itself is a "substantial variation."

The *Bridgeman* court emphasized the purely technical aspects of reproduction photography when it compared Bridgeman's work to that of a person standing over a photocopier: "[i]ts transparencies stand in the same relation to the original works of art as a photocopy stands to a page of typescript, a doodle, or a Michelangelo drawing."¹⁰⁰ Bridgeman's attorney argued that the court's photocopier analogy was inapposite because "what you put . . . into the camera, how you process it when it comes out, what light you apply, what lens to use . . . is a whole artistic process."¹⁰¹ Kevin Garnett makes a similar, more eloquent argument, rejecting the photocopier comparison for an alternative analogy: "[a] well-designed fountain pen may require much engineering talent to produce it, but this conclusion does not help when it comes to deciding whether a work produced using it is original: it depends on how it is used."¹⁰²

This is a sophisticated and delicate argument, and it was lost amid the muddle that has been made of the originality requirement. The *Bridgeman* court took various doctrines, including sweat of the brow and a definition of originality that relied on a vague creativity requirement, and applied them to the Bridgeman Art Library's transparencies, finding, in its own words, the "exception" to the idea that "almost all photography is original."¹⁰³ The court failed to appreciate the originality and skill that went into Bridgeman's transparencies. The court should have found that the transparencies were protected by copyright, and then proceeded through the issues of an infringement claim, as did the court in *Alva Studios*.¹⁰⁴ If direct infringement cannot be proved, the court looks to the defendant's access to the

⁹⁹ Record at 23-26, *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998) (No. 97 Civ. 6232), *quoted in* Tuchman, *supra* note 2, at 307-08.

¹⁰⁰ *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 198 (S.D.N.Y. 1999).

¹⁰¹ Record, *supra* note 99, at 23-26.

¹⁰² Garnett, *supra* note 11, at 234.

¹⁰³ Record, *supra* note 99, at 26.

¹⁰⁴ *See Alva Studios, Inc. v. Winninger*, 117 F. Supp. 265, 268 (S.D.N.Y. 1959) (evaluating whether the defendant's product was a copy of the public domain work of art, or of the plaintiff's own reproduction).

plaintiff's work, and whether there is substantial similarity between the allegedly infringing work and the original.¹⁰⁵ Did Corel have access to Bridgeman's work and the ability to copy it? Was there substantial similarity between Corel's images and Bridgeman's transparencies? Bridgeman would have had a heavy factual burden to prove its claim that Corel copied the 120 overlapping reproductions.¹⁰⁶ Bridgeman should have had to bear the burden of an infringement claim; it should not have lost copyright protection in its work because of a muddled approach to the originality requirement.

B. *Policy Concerns*

This Section argues that a narrowed scope of copyright for reproductions of public domain works of art hurts precisely those who are supposed to benefit from the increased volume of work available for consumption—the public. If museums are secure in their rights over reproductions, they are more willing to produce and distribute high-quality reproductions of a wide range of works for the public to buy, use, and experience via print media and the Web. When uncertainty looms over the copyright status of art reproductions, museums may resort to other methods of protecting the works in their collections—namely contracts, such as those that appear on the back of a ticket or on a museum website. These contracts may become more restrictive as copyright recedes as a viable doctrine for protecting art reproductions. In addition, an important consideration passed over by public domain proponents who cheered the *Bridgeman* decision is that contract law lacks copyright's statutory exceptions: no fair use doctrine; no allowances made for libraries or distance learning.¹⁰⁷ It seems highly unlikely that a court would find a contract that limited visitors' photography of a work of art unconscionable;¹⁰⁸ in contrast, the fair

¹⁰⁵ See *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946) (outlining the factual inquiry for infringement).

¹⁰⁶ See *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 424 (S.D.N.Y. 1998).

¹⁰⁷ See 17 U.S.C. § 107 (2000) (incorporating the doctrine of fair use—the idea that the use of a copyrighted work without permission for certain educational, critical, or reporting purposes may not be infringement—into the Copyright Act of 1976); 17 U.S.C. § 108 (2000) (providing copyright exemptions for libraries and archives); 17 U.S.C. § 110 (2000) (exempting educational broadcasting from some copyright requirements).

¹⁰⁸ Cf. *Matz*, *supra* note 13, at 23 (noting that the “full impact of the *Bridgeman* decision will be felt only if courts prevent image vendors from achieving through contract what they couldn't achieve . . . through copyright”).

use exception in copyright might allow that photograph to be used for personal, educational, or critical purposes. These policy concerns indicate that, from the perspective of maximizing value and minimizing harm to both museums and the public, copyright protection for art reproductions makes sense.

1. *Bridgeman* Matters to Museums

Museums all over the world, both those that had contracts with the Bridgeman Art Library and those that did not, anxiously awaited the outcome of the case.¹⁰⁹ The Southern District of New York is home to an astounding number of museums, many of which must have been concerned about the potential for persuasive authority in the Southern District and the possibility of binding Second Circuit precedent should the case be appealed. Even those beyond the reach of the Second Circuit look to New York as a bellwether for decisions in the areas of copyright and art law.¹¹⁰ *Bridgeman* was the only case cited in the introduction to an American Association of Museums guide for museums dealing with intellectual property issues, a testament to its impact on the field.¹¹¹

2. Museums, Art Reproductions, and the Public Domain

In considering the policy issues raised by the *Bridgeman* decision, a historical context is useful. As discussed in Part II.A, above, scholars disagree whether the Framers, in adopting the Copyright Clause, replicated English antimonopoly sentiment.¹¹² The idea that the Framers virulently opposed monopoly power has buttressed many calls for a

¹⁰⁹ See MICHAEL S. SHAPIRO & BRETT I. MILLER, *A MUSEUM GUIDE TO COPYRIGHT AND TRADEMARK* 16 (1999) (describing how museums “closely watched” the *Bridgeman* case); Tuchman, *supra* note 2, at 309 (“The parties were not alone in awaiting the judge’s decision. Many museums were aware of the case and eager for its outcome.”); see also Christine Steiner, *Introduction* to SHAPIRO & MILLER, *supra*, at 7 (anticipating that the *Bridgeman* decisions “might require a major policy shift in some museums”). But see Rachele V. Browne & Maria Pallante-Hyun, *To License or Not To License: A Look at Artists’ Rights, Museum Practices, and Institutional Risk*, SJ049 ALI-ABA 511 n.19 (2004) (noting that despite *Bridgeman*, “many museums routinely assert a copyright in transparencies and digital formats of public domain images”).

¹¹⁰ See generally Matz, *supra* note 13, at 6 n.21 (explaining that other courts look to New York case law for guidance on issues of copyright in works of art, reproductions, and derivative works); see also *supra* note 36 and accompanying text.

¹¹¹ See Steiner, *supra* note 109, at 7; see also SHAPIRO & MILLER, *supra* note 109, at 16.

¹¹² See *supra* text accompanying note 50.

stronger public domain, but some scholars question this view.¹¹³ These questions do not suggest that the idea of the public domain is invalid (far from it), but that the Framers, in writing the Copyright and Patent Clause into the Constitution, did not view copyright-holders as a necessary evil in need of constant constraint. This is important to keep in mind when considering *Bridgeman*, because museums are particular models of responsible copyright behavior when it comes to making work available to the public.

Museums, operating in the United States without significant state support, rely on the sale of art reproductions and derivative products as a major source of revenue: in 2004, the Philadelphia Museum of Art reported over five million dollars in sales from wholesale and retail operations, more than thirteen percent of the Museum's revenue that year.¹¹⁴ In part because of this reliance, museums are always attentive to the scope of copyright as it expands and contracts through judicial and legislative decisions.

Museums have an incentive to reproduce the works of art in their collections. In addition to the significant revenue generated by retail sales, art reproductions promote the institution and its collections by sparking public interest in seeing the original painting on the wall or seeking out more work by a particular artist. In addition, museums have an interest in producing high-quality reproductions because poor reproductive photography yields an unappealing image of the original work, thus hampering both promotional and educational goals.

Museums are the right institutions to make and distribute art reproductions because of their missions to bring art to the public and to preserve the works themselves,¹¹⁵ and their incentives to make high-

¹¹³ See, e.g., Nachbar, *supra* note 50, at 333 (questioning whether the Framers had an antimonopoly motivation in drafting the Copyright and Patent Clause, given the complete lack of an American publishing monopoly in the late eighteenth century).

¹¹⁴ PMA ANNUAL REPORT, *supra* note 4, at 26.

¹¹⁵ See PHILADELPHIA MUSEUM OF ART, *Mission Statement*, in LONG RANGE PLAN 2005: ABCS FOR THE FUTURE 3 (2005) ("The Philadelphia Museum of Art . . . seeks to preserve, enhance, interpret, and extend the reach of its great collections in particular, and the visual arts in general, to an increasing and increasingly diverse audience as a source of delight, illumination, and lifelong learning."); Metropolitan Museum of Art, *Mission Statement* (Sept. 12, 2000), http://www.metmuseum.org/visitor/faq_hist.htm#mission ("The mission of The Metropolitan Museum of Art is to collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards." (emphasis omitted)); Museum of Fine Arts, Boston,

quality reproductions of a variety of work from their collections. They have the staff, expertise, and resources to produce high-quality work, and they reproduce a broad range of material, not just the “greatest hits.” Because the works at issue in *Bridgeman* and in many museum copyright claims over art reproduction are in the public domain, the question arises: who else has the incentive to produce reproductions for mass public consumption? The artists themselves, or their estates, no longer stand to benefit, since whatever copyright might have existed has expired.¹¹⁶ In situations where an artist’s copyright in her work remains valid, the artist or her heirs often grant a license to a museum for reproduction of the work, since museums have the staff, equipment, and expertise that individuals lack. As far as private companies are concerned, those like the Bridgeman Art Library serve a very specialized market of print publishers and advertisers,¹¹⁷ and public dissemination of works of art is not their primary goal; rather, they are motivated (appropriately) by profit. Other organizations, such as Artists Rights Society (ARS), clear intellectual property rights but do not license images.¹¹⁸ Companies selling t-shirts or clip art deal mostly in relatively low-quality reproductions of very well-known images that they anticipate will be bestsellers (all water lilies, no Rajasthani miniatures). Museums, nonprofit entities whose missions *must* include public education and display,¹¹⁹ are the proper institutions to entrust with the public dissemination of high-quality reproductions of a broad range of works of art.

Mission Statement (Feb. 28, 1991) <http://www.mfa.org/about/index.asp?key=53> (“The Museum’s ultimate aim is to encourage inquiry and to heighten public understanding and appreciation of the visual world.”).

¹¹⁶ In many cases, the works predate any copyright laws that would protect works of visual art. See, e.g., *supra* note 3 and accompanying text.

¹¹⁷ See Tuchman, *supra* note 2, at 305 (describing Bridgeman’s licensees as “book and periodical publishers, stationers and other producers of illustrated products”).

¹¹⁸ ARS represents many prominent artists from the twentieth and twenty-first centuries whose copyrights are still valid, including Henri Matisse, Wassily Kandinsky, and Andy Warhol. See Artists Rights Society, Frequently Asked Questions, <http://www.arsny.com/faquers.html> (last visited Feb. 15, 2007) (explaining ARS’s work and how it differs from a photo-licensing agency).

¹¹⁹ See Museum Services Act, 20 U.S.C. § 9172 (2000) (defining museums as “public or private nonprofit . . . institution[s] organized . . . for essentially educational or aesthetic purposes” that “exhibit[] . . . tangible objects to the public on a regular basis”); see also Tuchman, *supra* note 2, at 313 (“The mission of the not-for-profit museum today is largely educational, with the broadest possible exposure of works implied.”).

3. Contract Restrictions and the Absence of Fair Use

Advocates of the public domain predict hoarding of art and policies that “thwart” public access to works of art if museums’ ability to claim copyright in reproductions of public domain works is confirmed.¹²⁰ But the dire scenarios they predict are more likely to happen if museums are denied copyright protection for these reproductions. Many museums protect themselves from liability through contracts and licensing agreements;¹²¹ this Comment is concerned with specific restrictions on the public’s access to original and reproduced works of art. Museums will protect the works in their collection from improper reproduction by methods that might hurt the art, like flash photography,¹²² or low-quality formats that do a disservice to the underlying works by rendering the reproductions fuzzy, grainy, or out of focus. If copyright is unavailable, museums are likely to turn toward evermore restrictive contract remedies that limit the public’s access to art and the ability to make reproductions for personal use.¹²³ Even *Bridgeman* supporters acknowledge that without copyright protection, “it becomes critical to the possessor of valuable images that they not be let loose upon the world without binding, contractual restrictions.”¹²⁴

This flexible method of protection involves applying contract doctrines to every interaction a member of the public has with a piece of

¹²⁰ See Appel, *supra* note 43, at 223-24 (describing Bridgeman’s claim of copyright in reproductions as a “barrier” to public access to digital images of art); Butler, *supra* note 13, at 77-78 (maintaining that copyrights in art reproductions “thwart the public-domain principle by blocking scholarly and popular access to valued and valuable public images and by restricting how public-domain images may be used”); Matz, *supra* note 13, at 17-18 (arguing that if Bridgeman’s copyrights had been found valid, the company could have used that right to prevent public reproduction of substantially similar images).

¹²¹ See Metropolitan Museum of Art, Terms and Conditions, <http://www.metmuseum.org/copyright.htm> (last visited Feb. 15, 2007) (“The text, images, and data on The Metropolitan Museum of Art . . . website . . . are protected by copyright and may be covered by other restrictions as well.”).

¹²² Exposure to light, including flash photography, can damage works of art, particularly works on paper. See, e.g., Detroit Institute of Art, Photography Policy, http://www.dia.org/museum_info/general_information/index.asp (last visited Feb. 15, 2007).

¹²³ Under a regime where copyright protects reproductions, a museum visitor could take her own photograph of a painting, print it, and hang it on her wall (and claim a copyright in the reproduction). Under a contract regime, nothing stops a museum from simply refusing to allow cameras into the galleries, effectively forestalling any personal reproduction beyond pencil and paper.

¹²⁴ Matz, *supra* note 13, at 23 (footnote omitted).

art: before stepping into the galleries, a museum patron's ticket may be a contract of adhesion spelling out terms and conditions of the visit; license agreements govern the interactions between the public and the art via the museum's website.¹²⁵ To be sure, many contracts governing visitor behavior already exist. Some of them are relatively permissive. The Metropolitan Museum of Art, for example, allows the use of the images available on its website for "limited non-commercial, educational, and personal use" including posting on personal websites (as long as the sites do not carry advertisements) and printing pictures for school reports (as long as the reports will not be published).¹²⁶ But this relaxed approach is predicated on the first clause of the Terms and Conditions: "The text, images, and data on The Metropolitan Museum of Art . . . website . . . are protected by copyright . . ." ¹²⁷ Without the basic level of protection from copyright, museums are unlikely to be as free with reproductions of their work—and in today's digital world, where more than six million people visit the Metropolitan Museum of Art's website every year,¹²⁸ more contractual limitations on works of art reproduced physically or online could have a significant impact.

It is true that while contract rights bind only the parties to the contract, copyright provides a right against the world. However, this does not make the prospect of a no-copyright, contract-governed museum world any brighter. First, the Internet has made contracts more global. Click-through license agreements or required registration govern some museum websites, meaning that every user must agree to the institution's terms.¹²⁹ Second, the fact that contracts bind only the parties who visit museums or their websites punishes those users least likely to be misusing images or reproducing works without permission. Third parties who might buy a museum reproduction at a poster shop and copy it without permission will not be touched by a museum's contract remedies; in contrast, with copyright, that form of misuse is actionable.

¹²⁵ See Metropolitan Museum of Art, Terms and Conditions, *supra* note 121.

¹²⁶ *Id.* For publication and other uses, users can order reproductions from the Museum for a small fee. *Id.*

¹²⁷ *Id.*

¹²⁸ Metropolitan Museum of Art, Frequently Asked Questions, http://www.metmuseum.org/visitor/faq_nav.htm (last visited Feb. 15, 2007).

¹²⁹ See Fine Arts Museums of San Francisco, The ImageBase, MyGallery, <http://www.thinker.org/fam/about/imagebase/subpage.asp?subpagekey=651> (last visited Feb. 15, 2007) (requiring registration for browsing the collection at the Legion of Honor and de Young museums).

Copyright also has guaranteed exceptions that are absent from contract law. Of primary concern to a museum visitor or art lover is the fair use exception, embodied in the Copyright Act at 17 U.S.C. § 107.¹³⁰ Fair use allows the use of a copyrighted work, without the copyright owner's permission, in some educational, critical, or reporting contexts.¹³¹ Courts consider four factors to determine whether a particular use is fair: (1) the purpose and character of the use, (2) the nature of the work under copyright, (3) the amount and substantiality of the portion of the work used in relation to the work as a whole, and (4) the effect on the value of the copyrighted work or its potential market.¹³² Creative works of art receive a high degree of protection, and art reproductions tend to copy the whole work, so factors two and three will often work against a fair use finding.¹³³ For the average member of the public, however, the first and fourth factors work toward a fair use determination. In the first factor, use for "nonprofit educational purposes" is favored; use of a "commercial nature" is not.¹³⁴ An individual posting an image from a museum on a personal website is unlikely to be convicted of infringement even though she makes a copy of the protected work because of the non-commercial nature of her use. Likewise, in the fourth factor, which considers potential market harms, the question is whether a user's activities "would result in a substantially adverse impact on the potential market for the original."¹³⁵ Again, personal, noncommercial uses¹³⁶ are unlikely to cause a "substantially adverse impact." The fair use doctrine serves an important purpose by providing flexibility in copy-

¹³⁰ 17 U.S.C. § 107 (2000).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See SHAPIRO & MILLER, *supra* note 109, at 53-54 (discussing the application of the fair use factors in a museum context).

¹³⁴ *Id.*

¹³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (internal citation and quotation marks omitted).

¹³⁶ Museums provide reproductions and licenses for many purposes, including commercial ones, every day. See Tuchman, *supra* note 2, at 288 ("Museums have stepped into the forefront of creating or licensing the creation of derivative works . . ."). Although fair use might not cover a particular commercial use, obtaining permission from a museum is usually simple and relatively inexpensive. See *supra* note 126 and accompanying text (outlining the Metropolitan Museum of Art's photo request procedures); Philadelphia Museum of Art, Rights and Reproductions Request, http://www.philamuseum.org/doc_downloads/rights/PMA_ImageRequest.pdf (last visited Feb. 15, 2007) (providing a form for publishers, authors, scholars, and the general public to request images of the museum's artwork).

right law, a flexibility that benefits members of the public who may want to make their own copies of works of art. Users who want to take a reproduction and make their own art with it are in an even better position; “transformative uses,” in which a protected work is altered using “new information, new aesthetics, new insights and understandings,” are the most favored.¹³⁷

Contract law has no such flexibility. Apart from unconscionability and major public policy considerations, there are few exceptions to what can be agreed upon in a binding contract.¹³⁸ And the doctrines of copyright and contract do not always mesh well together. In the first major recent decision on the intersection between the two, *ProCD, Inc. v. Zeidenberg*, the Court of Appeals for the Seventh Circuit held that a “shrinkwrap” license, a form contract attached to software, was valid even though it limited what a user could do with information in a database that was not protected by copyright.¹³⁹ Although section 301(a) of the Copyright Act forbids states from enacting laws that guarantee rights “equivalent to any of the exclusive rights within the general scope of copyright,”¹⁴⁰ the *ProCD* court found that the contract rights in the case were not “equivalent” to copyright, because they affected only the parties to the contract, not the public as a whole.¹⁴¹

Niva Elkin-Koren argues cogently that *ProCD* was decided wrongly, and that “contracts that attempt to expand federal copyright protection should not be enforceable.”¹⁴² However, with *ProCD* as powerful precedent, content providers, be they private companies or cultural institutions, are free to contract and license away users’ access when

¹³⁷ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

¹³⁸ There are many proposals for how contracts should be limited, but at this point they come from the academy and stand little chance of enactment. See, e.g., Thomas A. Mitchell, Note, *Undermining the Initial Allocation of Rights: Copyright Versus Contract and the Burden of Proof*, 27 HASTINGS COMM. & ENT. L.J. 525, 526-27 (2005) (proposing to solve the problem of “involuntary” contracts entered into by authors and publishers by shifting the burden of proof from the breaching to the nonbreaching party); Alicia Ryan, Note, *Contract, Copyright, and the Future of Digital Preservation*, 10 B.U. J. SCI. & TECH. L. 152, 153, 158 (2004) (advocating changes in the laws governing libraries and archives to ensure preservation of digital works in the face of contracts that limit libraries to access, rather than ownership).

¹³⁹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

¹⁴⁰ 17 U.S.C. § 301(a) (2000).

¹⁴¹ *ProCD*, 86 F.3d at 1454.

¹⁴² Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 94 (1997).

copyright in the work covered by the agreement does not exist or has been called into question. This suggests that if more courts followed *Bridgeman* and invalidated the copyrights that museums claim in the reproductions of public domain works of art in their collections, relatively permissive museum policies, such as those embodied by the Metropolitan Museum of Art's Terms and Conditions discussed above,¹⁴³ will turn into contracts that substantially limit viewer access and interaction, both physically and online.

CONCLUSION

Art museums today have greater responsibilities than simply acting as storehouses of art. They hold their works in the public trust, bound by law and by their own missions to preserve and display works of art and to educate and illuminate the public.¹⁴⁴ They are the physical caretakers and gatekeepers for our culture's most treasured objects.

Art reproduction photography is a sophisticated, technical process. The *Bridgeman* court's assertion that such photography does not meet the originality requirement of the copyright law does a disservice to the *Bridgeman* Art Library, to museums, and to the public as a whole. The court took *Feist's* narrow holding about compilations of facts (which can never be copyrighted) and transformed it into an originality requirement that requires an inappropriately high level of creativity. In so doing, the *Bridgeman* court narrowed the initially expansive interpretation of "original" and came dangerously close to the line between idea and expression, one of the most important boundaries in copyright law.¹⁴⁵ *Bridgeman* also expanded the sweat of the brow doctrine beyond its intended target—factual compilations in which the underlying facts are not copyrightable—and applied it inappropriately to art reproduction photography, which combines technical skill and artistic decision making.¹⁴⁶

An initial reading of *Bridgeman* suggests that the decision is a boon to the public—after all, who could object to more reproductions in the public domain? A closer examination of the policy issues, however, reveals that without museum stewardship, such reproductions

¹⁴³ Metropolitan Museum of Art, Terms and Conditions, *supra* note 121.

¹⁴⁴ See Museum Services Act, 20 U.S.C. § 9172 (2000); *supra* note 115 (citing several museum mission statements).

¹⁴⁵ See *supra* text accompanying note 76.

¹⁴⁶ See *supra* text accompanying notes 89-90.

would probably not be made at all. Museums are the proper institutions to entrust with the reproduction and distribution of public domain works of art. Museums have the staff and resources to make reproductions, and they have the incentive to produce high-quality reproductions of a wide range of work, in order to increase their retail revenue stream and to promote the institutions and the works themselves. Most importantly, they are sworn to educate and inspire the public.

If *Bridgeman's* holdings are widely adopted, museums, stripped of the copyrights in their reproductions of public domain works of art, will probably turn to restrictive contracts and licensing agreements as a way to protect both the underlying works and their revenue stream. With no statutory safeguards such as fair use, a contract regime could have significant negative effects on the public availability of a wide range of art reproductions. Public domain advocates should consider the implications of *Bridgeman* carefully before applauding it as a step in the right direction, just as courts should be wary before replicating *Bridgeman's* problematic originality analysis. Duplication of the *Bridgeman* decision would be a low-quality reproduction indeed.