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Corbis & Copyright?: Is Bill Gates Trying to Corner the Market on Public Domain Art?

TANYA ASIM COOPER*

> "To extend copyrightability to miniscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work."[1]

INTRODUCTION

> "[R]eproduced art should confer a new kind of power . . . to define our experiences more precisely in areas where words are inadequate . . ."[2]

Art has the power to stir our emotions, evoke a physical response, and transport us to a different world. Picture the art of the great masters: The Waterlily Pond by Claude Monet and The Mona Lisa by Leonardo Da Vinci; or more contemporary iconic images such as President John F. Kennedy's funeral and Princess Diana's wedding.[3] Famous artwork, especially renowned for its genius, has become ubiquitous.[4] It can inspire and transform us. For all of those precious qualities, the public relies upon knowing that once the artist's exclusive rights to the artwork elapse, the "art must ultimately belong to us all."[5] The notion that artwork eventually belongs to the public is paramount

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* Tanya Asim Cooper is a clinical law school teacher and alumna of the Glushko-Samuelson Intellectual Property Law Clinic at American University's Washington College of Law. With this article, I pay homage to professors Christine H. Farley, Peter A. Jaszi, Victoria F. Phillips, Joshua D. Sarnoff, and Ann Shalleck, who shared the profound importance of the public interest in intellectual property and the power of the public domain to transform us. Thank you to Stephen A. Cooper, Andrew Ferguson and the University of the District of Columbia David A. Clarke School of Law faculty writing group, the *American Business Law Journal*'s peer review, and especially to Therese Beaudreault for her excellent research, technical, and editorial assistance.

1. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976).

2. 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, 61 (1998). There is indeed a market for reproduced art captured in postcards, catalogs, magnets, and other such mementos. *See* Mitch Tuchman, *Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 287 (2001).

3. *See* Christine Haughney, *Photojournalists Balk at Sygma's Digital-Age Terms; Many Quit Agency to Keep Material Off the Internet*, WASH. POST, Oct. 12, 2000, at A14 (providing some examples from one Corbis acquisition: the Bettman Archive that contains over sixteen million famous photographs).

4. *See* Butler, *supra* note 2, at 57; Tuchman, *supra* note 2, at 287–88 (explaining why art has become ubiquitous, in part, because large art museums maintain photographic—or imaging—studios to reproduce the art in their collections).

5. Butler, *supra* note 2, at 61 (quoting art critic John Berger).

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because art, like books and music[6], represents a collective experience that helps define what it means to be human.[7] Thus, once the artist has enjoyed her exclusive rights to that art, it should belong to no one individual, but to everyone.[8]

Spurring creativity is one of the basic purposes of copyright law, with its roots in the United States Constitution: to promote the creation of art by balancing the rights of both the author and the public. This aim is rooted in Article I's Progress Clause, which "secur[es] for limited Times to Authors and Inventors the exclusive Right" to their work, and subsequently releasing this right to the public "to promote . . . Progress."[9] The Progress Clause was created with the intent to provide the artist with exclusive rights in the artwork for only a limited time period,[10] after which the artist loses the exclusive right to control the artwork and it passes into the public domain.[11]

> Public domain materials are essential to American creativity, innovation, and democratic participation. The public domain's range is enormous, comprising everything from philosophical texts to scientific discoveries; from sublime works of literature,

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6. Copyright, and its ultimate intended benefit to the public, extends to all literary and artistic works, as discussed *infra* Part II.A.

7. *See* Butler, *supra* note 2, at 61 (describing how reproduced art represents the "essential historical experience of our relation to the past").

8. *See* Christine Haight Farley, Peter Jaszi, Victoria Phillips, Joshua Sarnoff & Ann Shalleck, *Clinic Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735, 747–48 (2008) (discussing how access and regulation of information is "emerging as a central-and highly complex-human rights issue"). "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." *Id.* (quoting from the Universal Declaration of Human Rights, G.A. Res. 217A, art. 27, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948)).

9. U.S. CONST. art. I, § 8, cl. 8 (balancing interests in the dual goal "[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"); *see* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490–92 (2d Cir. 1976) *cert. denied*, 429 U.S. 857 (1976); *see also* Butler, *supra* note 2, at 61–62 (citing Nimmer & Nimmer who describe the balance between protecting the artists' interest in their work and granting the public the "free access to materials essential to the development of society").

10. When Congress codified the copyright clause of the Constitution, it initially granted the author/artist exclusive dominion over his or her creation for an initial term of fourteen years from the date of publication, with the option to review for another fourteen-year period. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802). Congress has since extended copyright protection to a period today of seventy years after the author's death. *See* Copyright Term Extension Act of 1998, Pub. L. No 105–298, 112 Stat. 2827 (applying to works created on or after January 1, 1978) (codified at 17 U.S.C. §§ 302, 304 (2006)). For a history of the Framers' intent underlying the Copyright Clause, Congress's subsequent amendments to the Copyright Act, as well as the debate surrounding the copyright term extensions, see Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1063 (2001) ("the life of the author plus seventy years—which means, for example, in the case of an author such as Irving Berlin, a term that exceeds 140 years"); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1027–28 (2006) (surveying the scholarly literature).

11. *See* U.S. CONST. art. I, § 8, cl. 8; Butler, *supra* note 2, at 62–63; Jennifer Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990) ("[T]he public domain is the law's primary safeguard of the raw material that makes authorship possible."). The public domain is "a commons that includes those aspects of copyrighted works which copyright does not protect." *Id.* at 968. Some describe the three-stage life cycle of creativity embodied in the Constitution's grant of Congressional power to create copyrights for limited times as expression, protection, and public use. *See* Brief for Information Society Project at Yale as Amici Curiae Supporting Petitioners, Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/10-545-tsac-Amici-Cuirae-Information-Society-Project.pdf, *cert. granted*, 131 S. Ct. 1600 (U.S. Mar. 7, 2011) (No. 10-545).

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> music, and art, to diaries of mundane daily activity; and from high art to the commercial ad copy of bygone days.[12]

Once in the public domain, anyone is free to reproduce, adapt, distribute, and display the art.[13] Public domain works, moreover, inspire new works: "[t]he public domain is the cultural commons from which artists draw the raw material for new creative works."[14] The richer and more robust the cultural commons, the greater the scope for our individual and collective imagination;[15] and indeed, our creativity and speech depends on what we can draw upon, freely and liberally, from the public domain.[16] Limiting the public domain,

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12. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-545_petitioneramcupublicdomaininterest.authcheckdam.pdf, *cert. granted*, 131 S. Ct. 1600 (U.S. Mar. 7, 2011) (No. 10-545). For a handy reference of what categories of works are in the public domain in the United States, see Mazzone, *supra* note 10, at 1040 (culling relevant sources).

13. *See* Butler, *supra* note 2, at 62; Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33–34 (2003) ("The rights of a . . . copyright holder are part of a 'carefully crafted bargain,' . . . under which, once the . . . copyright monopoly has expired, the public may use the invention or work at will and without attribution.") (quoting Bonito Boats, Inc., v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1989)).

14. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 8, 15. Much of what is new is based on something old. *Id.*

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436). Shakespeare's plays, Monet's Water Lilies, Jane Austen's novels, and stories from the Bible are part of our cultural commons, and their existence in our public domain allows these great works to be reframed in different ways. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 12–13 ("But it is the repeat players – the oft-rendered classics – that fully demonstrate the vitality of the public domain materials in studio films. . . Jane Eyre has been recast into film at least eighteen times . . . Shakespeare's plays alone have served as the basis for more than 1000 films."). *See also*, Litman, *supra* note 11, at 968 ("The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.").

15. *See* Litman, *supra* note 11, at 975 ("The contents of the public domain may be mined by any member of the public."); Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 6 ("A robust and stable public domain is fundamental to copyright's essential purpose: to encourage the making and dissemination of creative works."). The "most important public interests advanced by copyright law" include: "a vibrant, reliable public domain . . . essential to the production of creative expression"; "a stable, clearly demarcated public domain . . . [for] innovation and commercial enterprise"; and "the unrestricted availability of cultural materials, along with the right to use those materials freely for individual inquiry, debate, and expression." *Id.* at 7.

16. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 4 ("public domain [is] the primary resource that fuels new cycles of speech"); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999) ("[T]he First Amendment requires a robust public domain."). *But see* Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). In his dissent, Justice Brennan, however, eschewed the majority's notion that copyright serves as the "engine of free expression" and noted that "[t]o ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right." *Id.* at 589–90. For a summary of the arguments that copyright protection will enhance free speech, see Benkler, *supra* note 16, at 396–405 (relaying the economic argument).

The notion that public domain works are free to use is also paramount. *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 17 (noting how public domain works spark creativity and knowledge [b]ecause no royalty is owed and individual uses need not be

conversely, stifles creativity and inhibits expression.[17] Protecting the public domain, therefore, is both timely[18] and timeless.[19]

But with the advent of new technology, and particularly the Internet, defining where and what the public domain is has become increasingly difficult.[20] Despite the accessibility of public-domain art online[21] as well as the

analyzed, so transaction costs are low and those amateurs or persons on small budgets "can seed new expression").

17. As a society, we tolerate limitation on the public domain that intellectual property laws impose because that limitation is, in theory, for a limited time. But even the limited time comes at great cost to society. *See* Benkler, *supra* note 16, at 354–55 (describing how society has come to value information as not "free as the air to common use" but instead a commodity that should be "owned and exclusively controlled by someone[]", a perception that has fueled the notion of "intellectual property").

> Expecting information to be owned, and to be controlled by its owner, blinds us to the cost that this property system imposes on our freedom to speak. . . . Copyright and related laws regulate society's information production and exchange process. They tell some people how they can use information, and other people how they cannot.

Id. at 356–57. *See also* Mazzone, *supra* note 10, at 1059 ("By granting monopolistic rights to authors, copyright has always had an uneasy relationship with the First Amendment").

18. On October 5, 2011, the United States Supreme Court considered the case of Golan v. Holder, a landmark case that tested the power of copyright and Congress's plenary power to restore copyright to works already in the public domain. *See* Marc Parry, *Supreme Court Takes Up Scholars' Rights*, CHRON. OF HIGHER EDUC., May 29, 2011, http://chronicle.com/article/A-Professors-Fight-Over/127700/?sid=at&utm_source=at&utm_medium=en (recounting the ten-year legal campaign that one music professor, Lawrence Golan, has waged to freely play and teach orchestra music once in the public domain).

> The dispute that led to *Golan v. Holder* dates to 1994, when Congress passed a law that moved vast amounts of material from the public domain back behind the firewall of copyright protection. For conductors like Mr. Golan, that step limited access to canonical 20th-century Russian pieces that had been freely played for years.

Id. (explaining how the impact means Mr. Golan's school orchestra has to pay exorbitant fees for sheet music they had before played for free, and thus restricting the amount to music they can afford to play and share with students and future musicians). For the merits and amicus briefs, see the Supreme Court of the United States blog, *Golan v. Holder*, SCOTUSBLOG (NOV. 10 2011, 10:34 PM), http://www.scotusblog.com/case-files/cases/golan-v-holder.

19. Protecting the public domain is paramount because, according to Professor Mazzone, one "basic defect of modern copyright law is that strong statutory protections for copyright are not balanced with equally strong protections for the public domain." Mazzone, *supra* note 10, at 1032 (pointing out no federally-supported Public Domain Office exists akin to the federal Copyright Office). The public domain comes under threat with each copyright extension. *See* Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970) (arguing in 1970 against the then-proposed copyright extension); Lessig, *supra* note 10, at 1066–68 (arguing that copyright extensions conflict with the Framers' values of vesting copyright protection "for limited Times" to "promote . . . Progress"); Lessig, *supra* note 10, at 1070 (quoting Melville Nimmer, "[Therefore] I can but conclude that a serious question exists as to the constitutional validity of the proposed extension, given the countervailing interest in free speech."). However, besides copyright term extensions, some scholars argue that the "more persuasive and serious threat to a robust public domain" is "copyfraud." *See infra* note 26 and accompanying text.

20. *See* Lessig, *supra* note 10, at 1072 (remarking how the Framers did not envision the reach that copyright would have on the delicate balance of power between the author and public in the Internet age).

> The Framers' view was balance. Limited protections, a vibrant public domain. And a public domain not filled just with facts, or elements of copyrighted works; rather, a public domain filled with the stories themselves. That vision is threatened. As we move into the Internet Age—as ordinary people can become publishers, as more and more want to use the material around us to make new and derivative work, as we use the technology to share content, or enable others to get access—there is a countermovement. Though the initial code of cyberspace constructed a space where control was difficult, technologies for perfect control of content in cyberspace are being deployed; and law to back up those technologies of control has already been passed. Just as the moment when the creative potential of artists and innovators is greatest, the technologies that control the

relative ease for people to publish their own creations, the general public still lacks the power that modern-day publishers wield and sometimes abuse, as this article highlights. Besides museums, some for-profit companies like Corbis Corporation, control much of the use of the online art already in the public domain.[22] Through a process called digitization, Corbis provides access to the art of the great masters and others in the public domain. Corbis claims that the digitized art is worthy of copyright protection.[23] But the problem with Corbis's claim to copyright for its digital reproductions is that the underlying art is already in the public domain, unencumbered.

The main copyright issue is whether reproductions, including digital copies or photographs, of public domain paintings are themselves entitled to copyright protection.[24] By asserting copyright in its digital copies, Corbis has recaptured those works from the public domain. Corbis charges for use of the public domain image it digitized, something that should be free for all to use, and then threatens litigation for unauthorized use.[25] Not only is Corbis's copyright claim in its digital reproductions of public-domain art spurious,[26] but

resources of that creativity are also at their peak. As this struggle plays out, there are two visions of the future. One in which the most significant aspects of our culture remain perpetually in the control of a relatively small number of corporations—the publishers of our day. And the other, where these elements of our culture, after "a short period" fall outside of exclusive control, free for anyone to take and use as they see fit.

Id. *See also* Benkler, *supra* note 16, at 358 (arguing how intellectual property rights encourage production only "by a relatively small number of large commercial organization[]", which "conflicts with the First Amendment commitment to attain a diverse, decentralized 'marketplace of ideas.'").

21. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 17–18 (discussing the enhanced benefit that digital platforms provide the public by distributing, reproducing, and recombining public domain materials on a vast scale).

22. This article focuses solely on Corbis's copyright claims in its digital reproductions of artwork already in the public domain. Corbis's copyright claims to digital images of art still subject to copyright protection are beyond the scope of this article.

23. *See* Lee Rosenbaum, *Leonardo in D-drive*, ART IN AM., Dec. 1996, at 25 (explaining how Corbis is claiming copyright for their digital reproductions not the underlying work from which the digital images were created).

24. *See* R. Anthony Reese, *Photographs of Public Domain Paintings: How, if at All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1033–34 n.1 (2009) (framing the issue as "whether the photograph of the public domain painting is itself entitled to copyright protection" and including his analysis to other unique two-dimensional works of art).

25. *See* Mazzone, *supra* note 10, at 1028 (noting how some falsely claim copyright in public domain works, threaten litigation for reproducing the work, and insist that subsequent users of the work enter into license agreements and pay fees for something that is free for all to use).

26. Others have questioned Corbis's copyright claims specifically and its practice generally. *See, e.g.*, STEPHEN FISHMAN, *The Internet and the Public Domain*, *in* THE PUBLIC DOMAIN: HOW TO FIND AND USE COPYRIGHT—FREE WRITINGS, MUSIC, ART & MORE 313, 323 (5th ed. 2010) (discussing Corbis's claims of copyright in its digital copies and practice of putting copyright notices on those digital copies, which "is almost certainly not legally enforceable"); Mazzone, *supra* note 10, at 1029–38 (arguing publishers have an incentive to bring spurious claims of copyright because of weak enforcement under the Copyright Act).

Corbis is not the only entity to bring claims of false copyrights in its digital reproductions of public domain art. "Copyfraud" or "claiming falsely a copyright in a public domain work", according to Professor Mazzone is everywhere. *Id*. at 1028–29. "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." *Id*. at 1026. Museums, school-book publishers, and corporate websites all tack blanket copyright statements on materials they publish that include the Declaration of Independence, the Gettysburg Address, and other works most certainly in the public domain. *Id*. at 1029, 1040. No explanation to the everyday user is provided that the copyright does not and cannot apply to those public domain works. *Id*. One publisher of public domain clip

the average person also lacks the power to challenge these abuses, thus restricting access to art that belongs to the public by requiring payment of unnecessary fees and stifling the proliferation of new, creative expression, of "Progress" that the Constitution guarantees.[27]

This article argues that Corbis's copyright claim in its digitized reproductions of public domain art is suspect. Part I of this article provides the history and background on Corbis's inception, purpose, and digitization process. Part II discusses copyright and public domain art reproductions, and highlights how Corbis's public domain replica cannot meet the copyright standard of originality under existing law. Corbis's compilations, on the other hand, do merit protection and have potential public-interest benefit consistent with Corbis's original mission. Finally, this article concludes in Part III by discussing the ramifications for the public domain when Corbis asserts copyright protection for its public domain digital copies. Given the power and influence that Bill Gates and his company Corbis have on the market for public domain art, it behooves the public to be aware of this issue.[28]

art, Dover Publications according to Professor Mazzone, prints its collections of clip art and tells consumers that they may use the images freely and without special permission but then limits the number of images a consumer may use at one time as well as the ways in which the images are used. *Id.* at 1026 n.82. *See also*, Tuchman, *supra* note 2, at 309–10 (describing how for years, "perhaps disingenuously," museums in Europe and the United States have insisted that they "possessed or at least controlled copyrights on every object in their collections."). Their reproductions, replete with copyright notices "both spurious (claiming copyright where none exists) and erroneous (claiming protection from the date of reproduction rather than creation), are ubiquitous." *Id.* at 310. *See also* Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 61 (2006) ("Today, art libraries and museums alike assert copyright in photographic reproductions in defiance of the standard legal interpretation of copyrightability. Copyright has become a tool . . . to restrict public access to public domain works over which the owners of collections have no rightful control."); Reese, *supra* note 24, at 1037 (noting how museums and the photographers they employ routinely claim copyright in their high-quality photographs of public domain paintings "to prevent others from using the photographs without their permission or without payment.").

27. *See* Mazzone, *supra* note 10, at 1030.

> These publishers . . . 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.

Id. *See also* Cameron, *supra* note 26, at 57–58 (preventing others from creating new derivative works of public domain paintings through false copyright claims and restricted physical access constitute abuses and "does a disservice to the system of copyright, which was created to promote the progress of art and to encourage the creation of new works"). "Museums and art libraries actively stifle the creation of new works, rather than fostering a policy that promotes new art." *Id.* at 58.

28. *See* Litman, *supra* note 11, at 969 ("When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship."); Mazzone, *supra* note 10, at 1037 (noting that the government bears the responsibility of protecting the public domain, "but no one in government is specially charged with the task.").

I. CORBIS CORPORATION

A. CORPORATE HISTORY AND PURPOSE

> "Corbis® is the definitive destination for photography and fine art in the digital age."[29]

In 1989, Bill Gates[30] decided to bring art to the people, for a profit.[31] He envisioned a plan to buy famous paintings and photographs, electronically scan the artwork into a computer through a process called digitization,[32] and license

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29. *Corbis CEO Develops Vision for Expanded Digital Image Markets: From Cell Phones to Home Galleries*, BUSINESS WIRE, May 20, 2002, http://findarticles.com/p/articles/mi_m0EIN/is_2002_May_20/ai_94389963.

30. William Henry Gates III is many things to many people. "Gates 'is to software what Edison was to the light bulb – part innovator, part entrepreneur, part salesman, and full-time genius.'" Janet Lowe, BILL GATES SPEAKS: INSIGHT FROM THE WORLD'S GREATEST ENTREPRENEUR, xi (John Wiley and Sons, 1998). Considered a cultural icon, Bill Gates is controversial. *Id.* at xii, 208 (relating widely diverse poll results of *PC World Online* asking readers how they felt about Gates and his computer company, Microsoft). For his capitalism, web sites have been created just to defame him, calling him the "devil in disguise." *Id.* at xii.

But Bill Gates is also a renowned philanthropist. *Id.* at 174 (noting Bill Gates's charity to historically black colleges) (citing The Associated Press, *He's No Cheapskate: Bill Gates Gives Colleges $1.2 Million in Computers*, NEWSDAY, June 3, 1997, at A37). *See also* Michelle Nichols, *Bill Gates's Philanthropy Costs Him Richest-Man Title,* REUTERS, Mar. 8, 2011, http://www.reuters.com/article/2011/03/08/us-wealth-gates-philanthropy-idUSTRE72668V20110308 (reporting how Gates started the philanthropic campaign, The Giving Pledge, which has encouraged other billionaires to give away at least half of their wealth); *Letter from Bill and Melinda Gates*, THE BILL AND MELINDA GATES FOUNDATION, http://www.gatesfoundation.org/about/Pages/bill-melinda-gates-letter.aspx (last visited Aug. 3, 2011) (aiming, in part, to tackle extreme poverty and poor health in developing countries). Whatever your feelings about Bill Gates, "the impact Gates has had on the world in terms of technology, economics, and social direction" must be acknowledged. Lowe, *supra* at xvii.

31. Reporters were quick to divine Gates's many purposes. *See, e.g.*, Paul Andrews, *'Watermark' May Be a Watershed Development for Protection of Electronic Art*, SEATTLE TIMES, Sept. 24, 1995, http://community.seattletimes.nwsource.com/archive/?date=19950924&slug=2143255 (to "procure electronic rights for display of fine art on digital screens at [Gates's] Lake Washington estate"); Michele Matassa Flores, *Artistic Soul, Digital Machines—The Ansel Adams Project Takes Aim at the Critics of Computerizing the World's Treasured Images*, SEATTLE TIMES, Jan. 5, 1997, http://community.seattletimes.nwsource.com/archive/?date=19970105&slug=2517092 (to "document the whole of humanity through time"); Steve Homer, *Out of the Gallery into the Living Room*, THE INDEP. (London), Aug. 14, 1995, http://www.independent.co.uk/life-style/out-of-the-gallery-into-the-living-room-1596228.html (to "exploit high-quality creative images"). *See also* Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 220 (1999) ("Created by Bill Gates . . . [Corbis's] self-described purpose is to 'capture the entire human experience throughout history' and to then collect royalties for each use of a digitized image."); David Teather, *The Software Billionaire's $170m Sideline*, THE GUARDIAN (London), Feb. 8, 2005, http://www.guardian.co.uk/technology/2005/feb/08/newmedia.microsoft ("Mr. Gates also thought that homes would have huge television screens hanging on their walls that could be used to display art or other images when not in use.").

32. Digitization is the process in which a work of art is transcribed to a computer screen in a complex process that is later described in greater detail. *See* discussion *infra*, Part II.C; *Corbis Corporation—Company History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/Corbis-Corporation-Company-History.html (last visited Aug. 22, 2011) ("Gates envisioned a system that could deliver the great art works of human history into consumers' homes, and he formed Interactive Home Systems as the company that eventually would beam the paintings of famous artists via technology that had yet to be developed.").

the newly digitized images online.[33] Internet users could then use, distribute, manage, and create new visual content.[34] Hence, Corbis Corporation was born.[35]

Corbis's "original plan was to create a digital library of the world's art collections. The company experimented with direct-to-consumer businesses such as an online poster store, museum kiosks and CD-roms on the Barnes Collection" and the Leonardo da Vinci Leister Codex.[36] Corbis intended to provide "one-stop shopping" for anyone in the market for images[37] resulting in a huge potential market in commercial images.[38]

"The first five years of Corbis . . . were 'very experimental[,]'" but by the mid-1990s, Corbis turned its attention to professional image markets, like advertising and marketing sectors, where Corbis could turn a profit.[39] Corbis focused disproportionately on the editorial business and focused on new business streams that included commissioning photography and rights clearance services.[40] The company also began representing rights' owners, like Andy Warhol's estate and Marvel Entertainment, where Corbis was "licensing images of super-heroes such as Spider-Man, the X-Men and the Fantastic Four for commercial use."[41] Corbis reports millions of dollars in revenues itself each year.[42]

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33. *See* Appel, *supra* note 31, at 220–21 ("Corbis has been buying paintings, prints, drawings, and other works of art, including the copyrights to such works, buying the copyrights to other works that it does not ultimately purchase, and entering into licensing agreements that permit specified uses of other works."); *see also* Flores, *supra* note 31 (relaying how Corbis has bought the right to archive and resell the electronic version of many photographs and works of art in CD-ROMS, Internet sites, etc.).

34. *See* CORBIS COMPANY FACT SHEET, (Apr. 2011), *available at*, http://www.corbis.com/corporate/PressRoom/PDF/Corbis_Holdings_Fact_Sheet_April_2011_Final.pdf.

35. *See* Flores, *supra* note 31 ("Corbis" is Latin for woven basket or container); Teather, *supra* note 31 ("Corbis was born in 1989 out of [Gates's] twin fascinations with art and the impact that digital technology would one day have on the delivery and use of images."). For the history of Corbis Corporation, see *Corbis Corporation—Company History*, *supra* note 32 (detailing Corbis's origins and public interest mission through it change to a more profit-driven enterprise).

36. Teather, *supra* note 31; *infra* note 65 (describing Corbis's CD-ROMs); *See* Appel, *supra* note 31, at 221 ("[I]ts self-described purpose is to 'capture the entire human experience throughout history' and to then collect royalties for each use of a digitized image." (quoting then-Corbis's CEO Doug Rowan)).

37. Appel, *supra* note 31, at 221–22.

38. *See Corbis Sees Asia Digital Business Booming*, THE STAR (Malaysia), Mar. 26, 2011, at 1 (estimating globally in 2001 that the entire digital industry was worth between at least three and five billion dollars).

39. Teather, *supra* note 31.

40. *Id.*

41. Teather, *supra* note 31; Chris Ferrone, *Corbis Reports 2005 Financial Performance*, ABOUT THE IMAGE, Mar. 20, 2006, *available at* http://www.abouttheimage.com/2355/corbis_reports_on_2005_financial_performance/author3 (defining the rights clearance service as fees for "doing the leg-work to clear and secure rights for images, footage, and music").

42. *See* Teather, *supra* note 31 (reporting Corbis revenues in 2004 at $170 million, up from 2003 by twenty-two percent).

Interestingly, in 2005, Corbis reported that since its inception in 1989, it was not yet profitable. *See id.* (reporting on 2004 revenues and profitability and that Corbis aimed to achieve profitability in 2005). "Broadening the ownership, potentially with an initial public offering, would be a 'typical part of the evolution of a successful company . . . . We need to prove how profitable the business

B. CORBIS'S BUSINESS METHOD

1. CORBIS'S LICENSING SCHEMES

Corbis actively targets different markets that include customary buyers of stock photography (such as publishers, advertising agencies, magazines, etc), business people who need images for presentations, and the everyday consumer.[43] Corbis provides its consumers with many options to efficiently search, download, and license the perfect image[44] from two main categories of images: creative (commercial photography and illustrations, for example) and editorial (including fine art, documentary, news, and celebrity images).[45] Corbis's marketing scheme makes images available to consumers through Corbis Content License Agreements.[46] The license types that Corbis grants are either

can be.'" *Id.* (quoting Mr. Gates at a press conference and presentation of its annual results). In 2006, Corbis reported revenue that totaled $228 million, but it was still not profitable, and that goal had been delayed. *See* Ferrone, *supra* note 41. Again, reporters commented whether Corbis intends to take the company public and thus generate publicity through annual meetings called to announce the company's performance over the past year and its goals for the future, to "compete more aggressively in the commercial market place . . . ." *Id.* In 2007, Corbis had yet to post a profit based on 2006 revenues but reported that it was on verge of profitability. *See* Ritsuko Ando and Michele Gershberg, *Corbis on Verge of Profitability: CEO*, REUTERS, Nov. 27, 2007, http://www.reuters.com/article/2007/11/27/us-media-summit-corbis-idUSN2751805620071127 (last visited Nov. 11, 2011). In the last five years, Corbis has downsized because the print industry that it had served has shrunk and has moved into the market of entertainment photography (candid celebrity photographs) by acquiring Splash News. *See* Melissa Allison, *Corbis Buys L.A. Firm that Specializes in Celebrity Photos*, SEATTLE TIMES, July 20, 2011, http://seattletimes.nwsource.com/html/businesstechnology/2015668923_corbis21.html (last visited Aug. 22, 2011). "Corbis . . . hasn't disclosed finances since 2007 when it named Gary Shenk as CEO in an effort to bring in more revenue from licensing rights. At that time, Corbis had about $250 million in annual revenue." Michael Liedtke, *AP, Corbis Team Up in Bid to Profit from Pictures*, THE WASH. TIMES, Aug. 23, 2011, http://www.washingtontimes.com/news/2011/aug/23/ap-corbis-team-up-in-bid-to-profit-from-pictures/ (last visited Oct. 7, 2011).

Corbis's rival, Getty Images, Inc., does not disclose its finances either. *Id.* ("[Getty] had nearly $858 million in revenue in 2007, the last year it reported financial results before being bought for $2 billion in a deal led by buyout specialists Hellman & Friedman."). Corbis believes its 2011 merger with AP will help it corner the market.

> The AP and Corbis formed their alliance in hopes of mining new markets. By combining their portfolios, they hope to feed off each other's strengths and lure business away from top photo licensing rival Getty Images and a host of others. . . . "Now the AP and Corbis are able to provide an alternative to Getty that we feel is superior" across every key category, Corbis CEO Gary Shenk said in an interview.

Id.

43. *See* CORBIS COMPANY FACT SHEET, (Apr. 2011), *supra* note 34. Corbis customers include advertising agencies, publishers and media companies, as well as the average consumer of digital images. *See id. See generally* Butler, *supra* note 2, at 127 n.37.

44. *See generally*, *Search and Shopping Tips*, CORBIS IMAGES, http://www.corbisimages.com/content/searchtips/ (last visited Aug. 20, 2011).

45. *See generally,* CORBIS IMAGES, http://www.corbisimages.com/ (last visited Aug. 20, 2011) (click on pull down menus for each main category).

46. *See* CORBIS CONTENT LICENSE AGREEMENT, VERSION 1.0, JUNE 2005 (2005), *available at* http://www.corbisimages.com/Content/LicenseInfo/Certified_EULA_US.pdf (specifying that failure to comply with the terms and conditions of its Agreement entitles Corbis to pursue all remedies available under copyright and other laws). Over the years, not surprisingly, Corbis has updated its site and it warns users that "Corbis reserves the right to change this Agreement from time to time at its sole discretion, and your use of the Site will be subject to the most current version posted on the Site at the time of your use." *Site Usage Agreement*, CORBIS IMAGES, http://www.corbisimages.com/ (scroll down to "Our Policies", click on Site Usage Agreement, read pop-up window) (last visited Nov. 11, 2011).

for: (1) "Rights Managed Content", (2) "Royalty-Free Content", or (3) "Comps."[47]

The "Rights Managed Content" license, or a traditional license, is available to the consumer who has specific predefined usages that have been disclosed and negotiated with Corbis in advance.[48] The fee is determined by the consumer's intended use of the image.[49] Corbis typically grants a limited (one-year), non-exclusive right to use the image.[50] The consumer can even request exclusive rights to an image, thereby prohibiting its simultaneous usage by competitors.[51] The "Royalty-Free Content" license, on the other hand, offers non-exclusive, unlimited use of the image for a fixed fee.[52] This agreement permits licensees to alter the image to suit their needs.[53] The limited license for

The Site Usage Agreement explains and details permitted uses of the site and "Content" (i.e., digital images); standard disclaimers and limitations of its liability; choice of law, jurisdiction, and attorney's fee provisions. "This Agreement (along with Corbis' Privacy Policy, the terms for the Community Pages (if separately agreed to), and the Corbis Content License Agreement, if applicable) constitutes the entire agreement between the parties . . . ." *Id.* (under Miscellaneous). *See also*, Mark Perry, *Digital Propertization of the New Artifacts: The Application of Technologies for "Soft" Representations of the Physical and Metaphysical*, 11 CARDOZO J. INT'L & COMP. L. 671, 683 (2003) (depending on the source of the supply, Corbis arranges for users to license images, with or without a royalty fee).

47. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46; Perry, *supra* note 46, at 683 n. 58, 60 (noting in 2002, the two categories of licenses included the "traditional licensing" and "royalty-free licensing").

48. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46, at 2 ("Rights Managed Content" means Content licensed for a fee on a per-use basis and expressly designated as "Rights Managed" or "RM" by Corbis.") *See also* Flores, *supra* note 31 (reporting that Corbis typically gave 40-50% royalties to the owner of the copyright for use of the image by Corbis licensed consumers); Perry, *supra* note 46, at 683 n.60.

49. *See* Perry, *supra* note 46, at 683 n.60. For example, under the Editorial section, Fine Arts subsection, a user can click on a thumbnail digitized image of the beautiful nineteenth century painting of a young girl with her quite-contented cat on her lap, Julie Manet with Cat by Pierre-Auguste Renoir, to learn that Renoir created it in 1887 (so it is now in the public domain), and it currently is at Musee d'Orsay, Paris, France. *See Julie Manet with Cat*, CORBIS IMAGES, (Nov. 11, 2011, 10:49 PM) http://www.corbisimages.com/stock-photo/rights-managed/42-28276901/julie-manet-with-cat-by-pierreauguste-renoir. This image is part of The Gallery Collection, Fine Arts/Editorial category, with a Rights Managed License type available to consumers. *See id.* By clicking on "Price Image" the user discovers that there are two sub-types of license: the Quick License (depending on whether the use is advertising, online, or publishing), ranging in price from $45.00 to $2,250.00 for use of the image; or the Custom License, which allows users to specify their use of the image from a series of drop-down menus that will then determine the price.

50. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 (allowing users of Rights Managed Context license to use the image "for one year from the date the applicable Invoice is issued. Except where specifically permitted on the Invoice for the applicable Content, You may not distribute, publish, display or otherwise use in any way, the Rights Managed Content, including without limitation the End Use after the Term.").

51. *See* Perry, *supra* note 46, at 683 n.60. In browsing *Julie Manet with Cat supra* note 49, the "Price Image" link also asks whether the user "Need[s] exclusivity or multi-use?" *Id.* If so, the user is prompted to click on Corbis's link: Contact Us. *Id.*

52. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 ("Royalty-Free Content" means Content licensed for an unlimited number of uses for a one-time flat fee and expressly designated as "Royalty-Free" or "RF" by Corbis."). *See also Royalty-Free*, CORBIS IMAGES (Nov. 11, 2011, 11:21 PM), http://www.corbisimages.com/Browse/RoyaltyFree.aspx (providing "[d]istinctive images for unlimited commercial and editorial use"); Perry, *supra* note 46, at 683 n.60.

53. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 ("Corbis grants You a limited, nonexclusive, perpetual and worldwide right (except as may otherwise be specified in the applicable Specific Content Web Pages and/or Invoice) to create and exploit the End Use for any purpose authorized under this Agreement."); Perry, *supra* note 46, at 683 n.60.

comp usage ("Comps") license[54] grants the user "a limited license to download Content consisting of images solely for evaluating whether to purchase a license to the image."[55] The Comps license is granted for sixty days from the date the image is downloaded, after which time, if no "Rights Managed" or "Royalty-Free" license is purchased, the image must be destroyed.[56] Failure to comply with any license term granted to the user can result in Corbis terminating the license, in which case the user must "immediately (i) stop using this Site and the Content and (ii) delete all Content and all copies from all magnetic media and destroy all other copies, or, at Corbis's request, return all such copies to Corbis."[57]

Customary commercial buyers of stock photography, like museums, are Corbis's main targets for professional licensing agreements.[58] Reports indicate some professional publishers are willing to pay thousands of dollars per image.[59]

2. DIGITIZATION TECHNIQUE

> "[M]any reproductions of copyrighted art are the result of the elaborate and
> painstaking process of many hands and eyes setting up the right equipment, making subjective decisions as to technical settings such as color and lighting calibrations, dodging and burning the resulting digital image electronically and performing many other difficult functions to create the best possible digital reproduction."[60]

Consumer's alterations of the image implicate a potential moral rights problem that many are concerned about. *See* Barbara Hoffman, *From Virtual Gallery to the Legal Web*, N.Y. L.J., May 3, 1996, at 34 (discussing the impact on the Visual Artists' Rights Act of 1990 by taking only a portion of the original artwork); Barbara Hoffman, *From Virtual Gallery to the Legal Web*, N.Y. L.J., Mar. 15, 1996, at 6 (explaining that moral rights include an artist's personal, non-economic interest in receiving attribution for a work and in maintaining the integrity of the work even after the work has been transferred by sale or lease). *But see* Reese, *supra* note 24, at 1046 (arguing that once a copyright in a work expires, the artist's concerns how a derivative work would affect the integrity of the work are irrelevant because "[t]he work's public domain status . . . means that the audience gets to see the [work] and decide for itself.").

54. *See* CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 ("'Comps' means Content licensed without a fee solely for Your internal evaluation to determine whether the Content is appropriate for Your intended use as either Rights Managed Content or Royalty-Free Content.").

55. *Site Usage Agreement*, *supra* note 46 (allowing only registered users to download Content with both visible and invisible watermark); CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 (prohibiting use other than internal evaluation "to determine whether You wish to apply for a license for Rights Managed Content or Royalty-Free Content.").

I was able to download a "comping image" of *Julie Manet with Cat*, *supra* note 48 to my computer.

56. *See Site Usage Agreement*, *supra* note 46; CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46 ("You may not copy, distribute, publish, display or otherwise use in any way the Comps after the Term without obtaining an appropriate Rights Managed Content license or Royalty-Free Content license for that Content. If You do not obtain such a license, upon expiration of the Term, You must destroy all copies of the Comps Content.").

57. *Site Usage Agreement*, *supra* note 46; CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46.

58. *See* Rosenbaum, *supra* note 23, at 25 (stating that Corbis "did have the grace not to charge [a] museum" who used its images in their exhibition and related merchandise).

59. *See* Flores, *supra* note 31 (suggesting also that electronic Ansel Adams pictures are in high demand).

60. Thomas K. Landry, *Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Rights*, 20 COLUM.-VLA J.L. & ARTS 605, 640 (1996).

The process by which Corbis digitizes its images is quite complex. The physical image is first converted by the computer into a series of numbers in order to reproduce the object on the computer screen.[61] "A scanner or electronic camera takes an image of the painting and breaks it down into discrete data points."[62] After the image is scanned, professionals perfect the colors so as to reflect "the image's actual appearance to the human eye."[63] The computer then translates the numbers back into colors in their original pattern that resembles the original artwork on the computer screen.[64] "If the colors are accurately recorded, the image can be reproduced with a high degree of accuracy."[65]

To accomplish the final product, Corbis employs a staff of engineers, photography specialists, copyright lawyers, art historians, etc. to ensure the integrity of the original artwork is preserved.[66] It is a painstaking process: for example, while working on an original Ansel Adams print, a Corbis lab technician uses gloves to handle the original print while adjusting the tone and contrast on the computerized version.[67] Seated next to the lab technician is another Corbis employee, a former picture editor and a former art historian at the Metropolitan Museum of Art in New York, who approves every scan and every subsequent use of the image.[68] "For some of the images, Corbis employees will add 'metadata' to the digital image, such as key words describing the image, photographer, and subject. Corbis employees will also add visual enhancements to the image."[69]

Following digitization, the image can be fed to other computers globally via the downloading process.[70] "Every week, Corbis places the images it has

61. *See* Butler, *supra* note 2, at 127 n.34.

62. Butler, *supra* note 2, at 127 n.34; *see also* Flores, *supra* note 31 ("Each picture takes about 30 minutes to scan in a $55,000 machine that translates its blacks, whites and infinite shades of gray into the digital language of computers.").

63. Butler, *supra* note 2, at 127 n.34.

64. *See* Butler, *supra* note 2, at 127 n.34.

65. Butler, *supra* note 2, at 127 n.34. *See also* James Coates & Michael Kilian, *Visionary Visuals, Computers, And Art World Come Together in Technospace*, CHI. TRIB., July 2, 1995, http://articles.chicagotribune.com/1995-07-02/entertainment/9507020150_1_major-museums-paul-cezanne-art-institute (quoting artist Jerry Kearns, who said that the quality is "incredible" due to the range of colors, subtleties of variation, and diversity of texture); Homer, *supra* note 31 ("The images are stored in very high resolution. An image on an office computer will normally take up less than a quarter of a megabyte; Corbis stores a picture as a 20Mb file. The storage system has more than five terabytes (5 million Mb) of total disk space.").

66. Flores, *supra* note 31. *But see Site Usage Agreement*, *supra* note 46 ("Despite our efforts to provide accurate information, this Site may contain technical or other mistakes, inaccuracies or typographical errors."); Landry, *supra* note 60, at 639 (arguing that the lack of screen standardization, affecting color and overall image quality, creates digital images that are of a mediocre quality).

67. Flores, *supra* note 31.

68. Flores, *supra* note 31 (describing the process as tricky compared to developing darkroom prints and tedious, often taking 40 hours to complete four pictures). Additionally, to ensure that another CD-ROM accurately portrayed a sequence of Leonardo da Vinci's images, university scientists conducted and videotaped an actual experiment. *Id.*

69. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1096 (W.D. Wash. 2004).

70. *See* Coates & Kilian, *supra* note 65 (explaining that downloading is a process whereby "the image is beamed into a computer via telephone links"); *see also* Hoffman, Mar. 15, 1996, *supra* note 53, at 6 ("Once an image is digitalized and reduced to 'pixels' or picture elements, which are binary computer information, it can be placed in a computer's memory and transmitted instantly . . .").

received on a computer generated CD-ROM."[71] Replicating the image for "infinite perfect reproductions" costs little.[72] Furthermore, the image can be used in a number of diverse ways.[73] For example, the image can be re-created on a giant-size wall screen akin to the dimensions of the original artwork so consumers can essentially portray the life-like painting in their home.[74] Corbis realizes that a digitized version of the original may not evoke the same feeling in its beholder, but the computer images do have benefits—they can be manipulated, browsed at any desired pace, etc., all at the click of a mouse.[75]

Some hail the digitization process as revolutionary and the primary means of reproducing art in the future.[76] "[D]igital images can be copied without losing resolution, printed without being exposed to chemicals, and stored archivally without risking deterioration."[77] Furthermore, unlike the original from which it was created, digital images "last forever," significantly increasing their value (especially for historical images).[78] Following Corbis's lead, many other software companies are pursuing the digital rights to paintings, sculptures, and other artistic media so as to incorporate the digital images into CD-ROMS, electronic bulletin boards, and other multimedia products.[79] Not to be left behind, museums also digitize the artwork in their collections for website posting.[80]

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71. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1096 (W.D. Wash. 2004).

72. Hoffman, Mar. 15, 1996, *supra* note 53, at 6.

73. *See* Coates & Kilian, *supra* note 65 (including glossy magazine images and decorating one's individual computer screen); *see also* Homer, *supra* note 31 (explaining that the stored electronic images can be distributed all over the globe and each image is comprehensively indexed making detailed electronic searches easier); Butler, *supra* note 2, at 76 ("[D]igital technology is a highly versatile medium that offers instructors limitless new possibilities, such as superimposing analytic diagrams on an original work, morphing from one image to another to illustrate a relationship, and providing instant global access to copies of an art image without the encumbrance of slides."). *See generally* Flores, *supra* note 31.

74. *See* Coates & Kilian, *supra* note 65 ("Should you want Da Vinci's Mona Lisa or Bellini's 'Feast of the Gods' gracing your dining room, a few keystrokes could put it there."); *see also* Flores, *supra* note 31 (stating that Ansel Adams' estate manager wants Adams' work "digitized and duplicated into computerized files that can be displayed anywhere anytime, from a computer in the den to a wall-sized screen in the dining room to a gallery in a world-class museum").

75. *See* Flores, *supra* note 31 ("Beautiful works of art seen on a 12- by 15-inch, flat reflective screen just don't pack the emotional punch of the real thing, hung on a museum wall that seems to climb endlessly toward the ceiling . . . . [b]ut if you accept that they serve a separate purpose, they become a real thing of their own."). *See also* Butler, *supra* note 2, at 127 n.35 (quoting a Museum News editor on his experience of viewing digital images for the first time).

Of course I was looking at a reproduction, but for the first time I realized that a digitized reproduction on a high-quality, color computer screen is far more satisfying and revealing than anything on the printed page. Combine this with the interactive options, and I felt that I had discovered a new realm of appreciation, somewhere well beyond viewing a reproduction in an exhibition catalogue.

Id.

76. *See* Butler, *supra* note 2, at 75–76 (predicting the role of digital images in the future).

77. Butler, *supra* note 2, at 76.

78. *See Corbis Sees Asia Digital Business Booming*, *supra* note 38, at 1 (internal quotations omitted) (quoting Corbis's president Leslie Hughes and discussing the value both in terms of significance and importance relative to the market). Digital images can be stored indefinitely without losing their quality. *Id.*

79. *See* Hoffman, Mar. 15, 1996, *supra* note 53, at 6 (explaining the digital arena is "one of the hottest art markets today").

80. *See* Hoffman, Mar. 15, 1996 *supra* note 53, at 6 (including the Warhol, the Dallas Art

C. HOW CORBIS PROTECTS ITS DIGITAL IMAGES

The immense value of digital images subjects Corbis to the world's pirates and those seeking to gain from the hard work of others. Pirates accomplish digital plagiarism by scanning the artwork themselves from museum catalogs.[81] Concerned with protecting its intellectual property rights in the digital age,[82] Corbis protects its investment in digital images from unauthorized use[83] by employing a number of strategies: licensing and contract agreements, encryption technology, and copyright protection.[84]

Licensing strategies are an effective means of protection because licensees may be less likely to make pirated copies especially if the terms of the license are limited as in "Rights Managed" or traditional licensing agreements.[85] Additionally, contracts with publishers stipulating certain terms, such as one-time use, allow owners to effectively control the use of their images.[86] In the

Museum, the Smithsonian, and the Whitney to name a few); *see also*, Bill Broadway, *The Hand of Technology Brings Gutenberg Bible to the Masses*, WASH. POST, July 12, 2003, at B9 (explaining how digitization has now made it possible for everyone to access the 548-year old work on the Library of Congress website).

81. *See* Hoffman, Mar. 15, 1996, *supra* note 53, at 6 (relating a case which settled out of court where a Newsday illustrator digitally scanned and electronically manipulated a photograph belonging to a stock-photography agency). Another example of piracy included a software company that digitally scanned images from stock photography catalogs to include in their CD-ROM. *See id.*

82. *Press Releases: Digimarc Technology to Be Implemented by Corbis*, DIGIMARC, (Nov. 12, 2011, 11:36 AM) [hereinafter Digimarc] http://www.digimarc.com/media/release.asp?newsID=119 (quoting Corbis's director of technology Dave Remy); *see* Andrews, *supra* note 31 ("With security and protection of intellectual property being chief concerns for online transmissions, the Corbis technology may prove a model for handling high-quality images on the Internet. . . . Protecting its own work, as well as images licensed from artists, is key to Corbis' marketing strategy.").

83. *See Corbis Sees Asia Digital Business Booming*, *supra* note 38, at 1 (stating that in the year 2000, Corbis "managed to collect US $ 500,000 from several cases of unauthorised use").

84. *See A Copycat Copyright? Bill Gates's Corbis says Digital Files Meet Copyright's Creativity Hurdle*, INFO L. ALERT, Nov. 17, 1995, at 1, (on file with author) [hereinafter Copycat Copyright] (describing all the tools in Corbis's belt to utilize against infringement). *See Corbis Sees Asia Digital Business Booming*, *supra* note 38, at 1 (quoting Corbis' President as saying, "We incorporate extensive Internet technology to allow customers to conveniently access and purchase images online, while using the latest protection technology to ensure the pictures are not used without being authorised."). *See generally* Barbara Hoffman, *The Legal Web and the Virtual Gallery*, N.Y. L.J., Mar. 22, 1996, at 29 ("Corbis now uses a non-exclusive license agreement which provides museums with approval and control over use of images licensed to third parties, and is in the process of developing such devices as watermarks and encryption technology to prevent unlawful downloading and replication of images.").

85. *See* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (stating that licensees may also be less inclined to seek other distribution channels); *see also The Next Copyright Debate DOES HE OR DOESN'T HE?*, INFO. LAW ALERT: A VORHEES REPORT, Nov. 3, 1995, at 1, [hereinafter Copyright Debate] *available at* 1995 WL 2400014 (asserting that watermarks hinder copying the image).

86. *See* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (including limitations on photography and "restrictions on the resolution of digital images made available on the internet or compact discs"); *Corbis Sees Asia Digital Business Booming*, *supra* note 38, at 1 (noting that contracts state the terms of usage). Museums likewise condition reproduction of *their* reproductions on accompanying credit and copyright notices, and decide whether to grant permission to the licensee of their images depending on the licensee's disclosed use. *See* Landry, *supra* note 60, at 618 (quoting Corbis's then-Vice President, Stephen B. Davis, "The stewards of certain creative properties do not want their Matisse painting complemented by a 2LiveCrew tune."). "[G]iving museums the ability to exercise that kind of control over the use of the image of a work of art seems entirely inappropriate in the case of public domain works." *See generally id.*(debating whether museums should exercise control at all for works in the public domain). Museums, anyway, "may simply be

event that a licensee distributes copies and violates the license, enforcement technologies will find the digital copies, track them, and permit companies to enforce their rights.[87]

Watermarks, a form of encryption technology, are designed to thwart piracy of high-resolution art images.[88] Corbis relies on this method to identify and track digital images.[89] As digital images are delivered to licensees or prospective customers, the images are watermarked.[90] Corbis employs two different types of watermarks: an overlay watermark and an invisible watermark.

The overlay watermark is apparent to browsers of Corbis's online images. Overlay watermarks were created in response to the recognition that "personal computer software makes it easy to copy images off the Internet."[91] When one "clicks" on a thumbnail image online, the larger shot appears with the Corbis name overlaying the image.[92] Because the overlay watermark can be permanently removed fairly easily, Corbis developed the invisible watermark.[93]

The invisible watermark, also known as covert image marking, has a unique code whereby a Corbis employee can authenticate the work even when

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motivated by their own views as to what uses are and are not appropriate." *Id.* at n.51. Corbis also seeks to condition use of its images, *see infra*.

87. *See* Landry, *supra* note 60, at 640.

88. Andrews, *supra* note 31.

89. *See* Digimarc, *supra* note 82 (stating that Corbis licensed Digimarc's technology to incorporate into their digital images). Corbis's Site Usage Agreement provides the following warning:

FOR THE PROTECTION OF CORBIS AND ITS IMAGE SOURCES AND OTHER LICENSORS, CONTENT MAY BE VISIBLY, INVISIBLY, OR ELECTRONICALLY WATERMARKED AND MAY INCLUDE THE USE OF DIGITAL RIGHTS MANAGEMENT SYSTEM TECHNOLOGY WITHIN CONTENT. SUCH TECHNOLOGY MAY PERMIT ONLINE CRAWLING OR TRACKING OF CONTENT OBTAINED FROM CORBIS AND/OR OTHER METHODS OF PROTECTING, MONITORING, OR TRACKING THE UNAUTHORIZED USE OF THE CONTENT ("RIGHTS MANAGEMENT SYSTEMS (RMS)"). If you do not consent to Corbis's use of RMS, do not use the Site or any Content found therein. You shall not knowingly disable any such technology or tool. You may not remove any copyright or other proprietary notices contained in the Content, caption information, or any other material on this Site.

Site Usage Agreement, *supra* note 46 (emphasis in original).

90. *See* Digimarc, *supra* note 82 ("[C]ommunicating the intellectual property rights of Corbis as well as its visual content creators."); *see also* Geanne Rosenberg, *Museums Seek to Protect Art Images on Internet*, N.Y. TIMES ON THE WEB, Aug. 11, 1997, http://partners.nytimes.com/library/cyber/week/081197museums.html ("Copyright holders are increasingly requiring watermarking before they grant permission for digital reproductions, said Janice Sorkow, director of rights and licensing at the Museum of Fine Arts in Boston. To do otherwise, she said, is like sending 'your dog out on the street without a collar.'").

91. Andrews, *supra* note 31.

92. *See* Miguel Llanos, *When it Comes to Images, Corbis Site is Quite a Sight*, SEATTLE TIMES, June 23, 1996, http://community.seattletimes.nwsource.com/archive/?date=19960623&slug=2335894 (explaining how the "free Corbis viewer" allows the large image to be seen); *see also* Andrews, *supra* note 31 (explaining that a keystroke of the computer will temporarily remove the watermark for a viewer's brief inspection). *But see* Homer, *supra* note 31 (explaining that in the event the digital file is illegally copied, the watermark would become permanent).

93. *See* Andrews, *supra* note 31 (relating Corbis's attempts to protect its work); *see also* Homer, *supra* note 31 ("If someone gets around the watermarking or purchases an image legally, Corbis can still keep track because every image contains invisible coding giving details of its origin.").

the image is altered or combined with other material not watermarked, or placed in an unusual context.[94] This watermark is imperceptible to the human eye, but current technology can track use of a watermarked image when it is posted on the web.[95] Some view the incorporation of watermarks as a "comprehensive digital copyright solution."[96]

Finally, as a last means of protection from unauthorized use, and explored *infra*, Corbis claims a copyright in the images they digitize.[97] In its Site Usage Agreement, Corbis declares all its images or Content are owned by Corbis and protected by United States and international copyright laws.[98]

> Unauthorized use of Content constitutes infringement of copyright and other applicable rights and shall entitle Corbis to exercise all rights and remedies under applicable copyright and other laws, including monetary damages against all users and beneficiaries of the use of such Content. Corbis in its sole discretion reserves the right to bill You (and You hereby agree to pay) ten (10) times the license fee for any unauthorized use, in addition to any other fees, damages and penalties Corbis may be entitled to under this Agreement, any applicable Corbis Content License Agreement and applicable law.[99]

Corbis also requires consumers to include a copyright notice (e.g., © photographer's name/Corbis or as specified on the Specific Content Web Page) next to each Corbis image used for editorial or commercial purpose.[100] Whether Corbis's claims are legally sound first requires an examination of copyright law.

II. COPYRIGHT LAW

A. SPIRIT AND PURPOSE OF COPYRIGHT LAW

> "[A]t the same time that digital technologies provide significant opportunity to artists, museums, galleries and archives to explore innovative ways to create, display, and store visual images on-line and in CD-ROM, they pose a challenge to the application of intellectual property law—copyright . . . ."[101]

94. *But see* Andrews, *supra* note 31 (stating, however, that the invisible watermark does not prevent piracy). *Cf.* Butler, *supra* note 2, at 72 ("Even the strongest advocates of digital technology concur that opportunities for piracy are inherent in the technology and that security measures within systems can be overcome with the right skill and equipment.").

95. *See* Digimarc, *supra* note 82 (explaining that the tracking and licensing methods provides linkage to rights management and licensing facilities); *see also* Copyright Debate, *supra* note 85, at 1 (stating that the process allows Corbis to "digitally sign images in order to trace them back to their source.").

96. *See generally* Digimarc, *supra* note 82.

97. *See* Landry, *supra* note 60, at 649 (quoting Corbis's vice-president in 1996 that "Corbis relies heavily on traditional applications of the present copyright regime").

98. *See Site Usage Agreement*, *supra* note 46; CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46, at 1 ("Corbis and its Content sources retain all right, title, and interest in and to all of the copyrights, patent rights, trademarks, trade secrets, and all other proprietary rights in the Content.").

99. *Site Usage Agreement*, *supra* note 46.

100. CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46, at 2 (stipulating fines up to two to three times the license cost for failing to provide proper credit and copyright notice).

101. Hoffman, Mar. 15, 1996, *supra* note 53, at 6.

Copyright law's purpose, as discussed briefly, is to stimulate the creation of art, literature, and other "works of authorship" that ultimately benefit the public.[102] The public interest in encouraging the creation and dissemination of more works is of paramount concern.[103] Thus, as the copyright is not an absolute and natural right, the protection it vests to the author lasts only during the author's life plus seventy years.[104] During this period, others are not permitted to use the work.[105] After the protection period has elapsed, the work of authorship passes to the public for use, enjoyment, and as a model on which to create new and original works. Thus, copyright law achieves a fine balance between granting protection to the author thereby encouraging creativity on the one hand, and yet fostering a competitive marketplace by giving free access to works and their ideas on the other hand.[106]

B. STANDARD AND SCOPE OF COPYRIGHT PROTECTION

Specifically, the standard for protection of an artwork requires: (1) a modicum of originality;[107] (2) authorship;[108] and (3) fixation in a tangible medium of expression.[109] Once these elements are met, copyright law affords

102. *See* U.S. CONST. art. I, § 8, cl. 8; ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *Introduction*, *in* INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 23–24 (Richard A. Epstein et al. eds., 2000) ("Copyright law covers the broad range of literary and artistic expression – including books, poetry, song, dance, dramatic works, computer programs, movies, sculpture, and paintings."). *See also supra* notes 9–17, and accompanying text (emphasizing the purpose of the Progress Clause to benefit the public ultimately).

103. *See, e.g.*, Butler, *supra* note 2, at 126 ("Copyright law is interested in a meaningful return of images to the public, but it furthers that interest by ending copyright protection at some point, not by extending it through protection to art reproductions.").

104. 17 U.S.C. § 302(a) (1998).

105. 17 U.S.C. § 107 (1998). *But see* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (explaining the limitation of the fair use doctrine on an author's rights). "Fair use is an affirmative defense to an action for copyright infringement. It is potentially available with respect to all manners of unauthorized use of all types of works in all media. When it exists, the user is not required to seek permission from the copyright owner or to pay a license fee for the use." *Id.*

106. *See* Barbara Hoffman, *From Virtual Gallery to the Legal Web*, N.Y. L.J., Apr. 26, 1996, at 30 (lauding the genius of copyright law in achieving the balance between authors and society). Therefore, works already in the public domain will not in and of themselves grant rights to authors and this practice will upset the balance copyright attempts to achieve.

107. *See* Alfred Bell v. Catalda Fine Arts, 191 F.2d 99, 100–03 (2d Cir. 1951) (requiring only that author contribute something more than trivial that is recognizably his own). Originality means no more than no copying. *Id.* at 103. *See also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) (originality is "the sine qua non of copyright" or, in other words, copyright protection requires a minimal degree of creativity and independent creation); Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986):

It is important to distinguish among three separate concepts—originality, creativity, and novelty. A work is original if it is the independent creation of its author. A work is creative if it embodies some modest amount of intellectual labor. A work is novel if it differs from existing works in some relevant aspect. For a work to be copyrightable, it must be original and creative, but need not be novel.

Id. at 668 n.6.

108. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) (authorship requires that the work was independently created by the author as opposed to merely being copied from other works); *see also* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489–90 (2d Cir. 1976) (stating that originality is a constitutional requirement inherent in the Copyright's idea of "authorship").

109. *See* 17 U.S.C. § 102(a) (1990) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which

protection to a wide variety of subject matter: literary, musical, choreographic, audiovisual, etc.[110] No protection exists, however, for the ideas, systems, methods, or facts.[111] Once a photograph or artwork receives copyright protection, the scope of protection grants the author certain rights,[112] namely, the rights of performance, display, reproduction, adaptation, and the right to distribution.[113]

Three types of copyrightable works exist: (1) creative or predominantly original works; (2) derivative works or art reproductions; and (3) compilations.[114] Copyright law affords the most protection to works that encompass greater creativity or predominantly original works.[115]

Derivative works or art reproductions, [116] on the other hand, have a limited scope of copyright protection.[117] "Reproductions of works of art are copyrightable as derivative works or as separately copyrightable subject matter."[118] Derivative works may receive copyright protection as long as they contain the following elements: (1) they substantially or wholly copy the expressive elements of the original work; (2) contain an original element unique to the reproduction; and (3) are made with the consent of the copyright owner; or they are copied from works already in the public domain.[119] Thus, only the elements that are different from the original are copyrightable and only to the extent that they differ from the original.[120] Derivative works are based on the

they can be perceived, reproduced, or otherwise communicated . . . .").

110. *See* 17 U.S.C. § 102(a) (1990).

111. *See* 17 U.S.C. § 102(b) (2008); *see also* Baker v. Selden, 101 U.S. 99 (1879) (holding that when use of an idea requires copying of another author's expression, then that expression will not be protected by copyright).

112. *See* 17 U.S.C. § 106 (2002); *see also* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (explaining that this "bundle of rights" can be sold, licensed or transferred).

113. *See also* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (providing an example that a purchaser of a Corbis CD-ROM is free to sell it but cannot copy the images on the disk).

114. *Compare* 17 U.S.C. § 102 (2008) (describing categories of predominantly original works) *with* 17 U.S.C. § 103 (1976) (extending protection of copyright to derivative works and compilations "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"); *see also* Hoffman, May 3, 1996, *supra* note 53, at 34 (discussing the three types of copyrightable works as contemplated by the fair use analysis of 17 U.S.C. § 103).

115. *See* Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 586 (1994); (recognizing that "some works are closer to the core of intended copyright protection than others"); Hoffman, May 3, 1996, *supra* note 53, at 34 ("The more creative a work is, the greater it is protected.").

116. *See* 17 U.S.C. § 101 (2010) (defining a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.").

117. *See* Butler, *supra* note 2, at 78–79 (arguing that originality in an art reproduction is oxymoronic).

118. Robert C. Matz, *Bridgeman Art Library, Ltd. v. Corel Corp.*, 15 BERKELEY TECH. L.J. 3, 5 (2000).

119. *See* Matz, *supra* note 118, at 5–6 (citing 17 U.S.C. § 103(a)); *see also* 17 U.S.C. § 103(b) (2006) ("The copyright in a . . . derivative work extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material."); Butler, *supra* note 2, at 79 ("The unprotected, copied elements, after all, 'owe their origin to' the artist whose work has been reproduced.").

120. *See* 17 U.S.C. § 103(b) (2006); *see also* Matz, *supra* note 118, at 6 (stating that as separately copyrightable subject matter, "art reproductions must (1) be based on a prior work of art that satisfies the originality and creativity requirements, and (2) contain an original contribution

original but contain original and uncopied element(s).[121]

> To determine whether the photographic or digital reproduction is just a copy of another work or is a privileged and protectable re-creation, an art reproduction that contains some sufficiently original contribution not present in the underlying work, courts generally require a copyright claimant to demonstrate a substantial, distinguishable variation between the reproduction and the original artwork.[122]

Thus, by limiting the protection given to derivative works, the Copyright Act ensures that no one can misappropriate the underlying public domain artwork by asserting a copyright in the derivative work created therein.[123]

The Copyright Act, however, does protect compilations as original works of authorship.[124] But controversy exists around whether the "sweat of the brow" theory[125] should apply to compilations. Those for protection argue compilations are necessary and efficient, and unless rewarded, there is no incentive to compile or create factual works.[126] Protecting compilations, moreover, is a matter of fairness because "it is unjust to permit one person to steal the hard work of another."[127] Those against the sweat of the brow approach believe it is "at odds with the rationale of intellectual property protection" because no creativity is involved.[128] If no one is able to duplicate the efforts of the compiler, moreover, the lack of competition will drive up prices.[129]

C. ARE CORBIS'S DIGITAL REPRODUCTIONS COPYRIGHTABLE?

"Are digital representations of public domain works protected?"[130]

Corbis says yes. Corbis believes it deserves a copyright in its digital images by virtue of the toil, labor, and highly technical decisions that go into creating

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not present in the underlying work of art (i.e., it must be more than a mere copy)."); Cameron, *supra* note 26, at 37 (arguing that "a higher standard of the originality requirement" is often applied to derivative works).

121. *See* Butler, *supra* note 2, at 79 (stating that the standard to be applied to the original elements in a derivative work is different than the standard applied to predominantly creative works).

122. Butler, *supra* note 2, at 79 (citing Melville B. Nimmer & David Nimmer, Nimmer on Copyright, [C][2], 2.08 (1997).

123. *See* Butler, *supra* note 2, at 79 (citing 17 U.S.C. § 103(b)).

124. 17 U.S.C. § 101 (1994) (defining a compilation as a "work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship").

125. In 1991, the Supreme Court in Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., made clear that the "sweat of the brow" theory was not an acceptable justification for copyright protection. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991). The "sweat of the brow" theory originated with John Locke, who proposed, "labor over a previously unowned piece of property (intellectual or physical) can vest ownership rights in the laborer." ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *Copyright Law*, *in* INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 345, 355–56 (Richard A. Epstein et al. eds., 2000).

126. *See* MERGES, ET AL., *supra* note 125, at 355–56.

127. *Id.*

128. *See id.*

129. *See id.*

130. Copyright Debate, *supra* note 85, at 1.

them.[131] Patterns, grain density, dots per inch, brightness, and contrast are some of the decisions that Corbis argues are not merely mechanical[132] but also require a "fair degree of creativity."[133] Top executives at Corbis liken the process to taking a photograph at a museum, an act for which the photographer could receive copyright protection.[134]

Practically speaking, Corbis also claims a copyright in its digital representations of works with extant copyright terms.[135] Without such a claim, Corbis would have no standing to sue for infringement on behalf of the original artist, author, or photographer from which the scanned image is created.[136] "Unless we have a copyright interest, we don't have standing to assist a copyright infringement claim."[137] To this end, Corbis created a program to help photographers register their unpublished works with the Copyright Office, in turn helping the company build relationships with photographers.[138]

Some argue that copyright protection is an important strategy for Corbis to pursue in order to become the sole distributor of a particular image in the future.[139] However, Corbis's copyright claims have also stirred controversy and anger.[140] The controversy started when "[Corbis] began aggressively acquiring exclusive rights to computerized images from the world's leading museums and photographers."[141] Corbis bought the original artwork in some instances or it

131. *See* Copycat Copyright, *supra* note 84, at 1 (claiming the work involved in building a digital file is sufficient to qualify for protection). *See* Flores, *supra* note 31, and accompanying text (describing the laborious process involved in digitization).

132. *See* Copyright Debate, *supra* note 85, at 1 (positing the views of some copyright scholars who argue that "without some protection for these works, they may never be produced at all"). *But see* Copycat Copyright, *supra* note 84, at 1 (questioning whether these technical decisions pass the originality test of copyright).

133. *See* Copycat Copyright, *supra* note 84, at 1 (quoting Corbis's then Vice-President).

134. *See* Copycat Copyright, *supra* note 84, at 1 (arguing that if pictures from an analog camera deserve copyright status then images from a digital camera should also).

135. *Id.*

136. *See* Copycat Copyright, *supra* note 84, at 1 (describing works that have not yet entered into the public domain). As mentioned, *supra* note 22, Corbis's claim to copyright in its digital images that have not yet entered the public domain is beyond the scope of this article.

137. Copycat Copyright, *supra* note 84, at 1 (quoting Corbis's then Vice-President, Steve Davis).

138. *See* Andrews, *supra* note 31 (describing how photographers were at first wary of "Gates' savviness with licensing and contracts. . . . [But that] [d]igitization of photographers' work makes it [much] easier to fulfill the requirements for copyrighting."). Of course, Corbis stands to gain as well in the protection their digital images may enjoy.

139. *See* Coates & Kilian, *supra* note 65 (suggesting that self-interest is the motivating force driving Corbis).

140. *See* Flores, *supra* note 31 ("Corbis also has stirred anger by creating digital versions of prized Library of Congress and National Archives photos, such as a famous picture of Hindenburg exploding, and stamping its copyright on them."); *see also* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 ("Mr. Gates initially attempted to purchase exclusive digital rights from museums and was quickly rebuffed by the museum world.").

141. *See* Flores, *supra* note 31 ("Gates' team began asking museums around the world for exclusive rights to their works, under contracts that would last decades and grant permission to re-license the works to anyone who paid."); Perry, *supra* note 46, at 683 n. 58:

Corbis is wholly owned by Bill Gates who has purchased a number of collections and is "aggressively pursuing licensing agreements for the electronic rights for images including artworks from the National Gallery of London, the Hermitage museum in Russia and the Kimbell Museum in Texas". Corbis acquisitions have continued unabated . . . .

Id. (quoting Kristi Heim, *Gates and Getty Battle for Control of World's Images*, SAN JOSE MERCURY

bought the underlying copyright[142] or license[143] to the artwork.[144] Much of the art world scoffed at this endeavor believing Corbis's intent was to control the artwork in the public domain.[145] Some in this group argue that Corbis's digital images are not worthy of copyright protection because they do not meet the requirements set forth by the Copyright Act.[146]

Before examining Corbis's claim to copyright against existing case law, it is important to note that although the U.S. Copyright Office has previously granted Corbis a copyright in some of their digital reproductions[147] "the mere fact that a copyright was granted does not establish [its] validity."[148] In order

NEWS, Mar. 4, 2000, at 1C). *Cf.* Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (stating that now Corbis uses non-exclusive licensing agreements with museums and provides them with the approval and control over the images licensed to third parties). "[M]useums now normally seek to retain copyrights in museum-supplied digitized images, documentation and related text particularly where they are a major contributor to the CD ROM project and when the museum's name is used in connection with the marketing of the project."); Flores, *supra* note 31 (stating that Corbis's non-exclusive deals with museums and photographers are more limited, typically lasting 20 years).

142. *See* Landry, *supra* note 60, at 613.

To authors, publishers who insist on buying what they ought to rent (usually for the same price) are using their market clout to toss out the part of copyright that inconveniences them. The law says the property is the author's to license, but the market—or a segment of the market—is trying to say that the author, to realize a dime from the property, must cede ownership to the first publisher to use it, thereby accepting demotion from landlord of his intellectual property to migrant worker. The hypocrisy of publishers who would do this while otherwise preaching loudly and piously about the need to protect intellectual property does not go unnoticed.

Id.

143. *See* Landry, *supra* note 60, at 622–630 (stating that new, unknown authors/artists with little bargaining power are prey to publishers with stronger positions who insist on longer terms or secondary uses of the art in question).

To generate a return. . . the publisher often needs a commitment from the property owner of several years. The inherent tensions between the long-term nature of digital media investments and content-based digital businesses, and the short term restrictions on property exploitation and expectations of financial return, create a volley of intensive bargaining over license terms within the multimedia publishing industry.

Id.

144. *See* Coates & Kilian, *supra* note 65 (quoting Gates as saying, "We are building tremendous value with this product. We not only have acquired the actual images of the artwork or other subjects, we have the needed licenses and other permissions to market it.").

145. *See* Copyright Debate, *supra* note 85, at 1 (noticing that when Bill Gates purchased the Bettman archives, many began to worry about his motives); Flores, *supra* note 31 (stating museum's fears that Gates was trying to put a price tag on art considered priceless); GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 6.04(Aspen Publishers, Inc. 2011), *available at* Westlaw LOTIN s 6.04 ("Initially, the Corbis business model contemplated obtaining exclusive rights for all digital uses of the licensed material. That approach encountered stiff resistance from copyright owners given the rapid rate of change in digital imaging technology and use and the substantial potential scope of use for digital images.").

146. *See* Perry, *supra* note 46, at 683 ("It must be understood that even companies such as Corbis and Getty Images do not necessarily possess all the rights to the images."). *But see* Copyright Debate, *supra* note 85, at 11 (stating the view of some copyright scholars who argue that "art reproductions are in the class of pictorial, graphic, and sculptural works mentioned in copyright law"). "Authority is mixed on how much protection reproductions deserve and when they deserve it." *Id. But cf.* Butler, *supra* note 2, at 78 (citing 17 U.S.C. § 101, § 102(a)(5) (1994)). "Although the prohibitions against copyrights for copied works seems to disqualify the museum photograph of a Rembrandt or a Turner, the Copyright Act does recognize 'art reproductions' . . . ." *Id.*; Hoffman, Mar. 22, 1996, *supra* note 84, at 29 (arguing that digital image files are equivalents to paintings, photographs, etc. and enjoy the same copyright protections in cyberspace as in other media). The distinction here is between exact digital reproductions and original digital images. The latter receives protection, while the former should not.

147. *See* Butler, *supra* note 2, at 75 (stating that this decision is significant).

148. *See* Butler, *supra* note 2, at 75 n.78 (quoting relevant legal authority which states that

to receive copyright protection, as discussed *supra*, Corbis's digital reproductions must amount to original works of authorship fixed in any tangible medium of expression.[149] Although digital reproductions are indeed fixed in a tangible medium of expression, the following sections will demonstrate that Corbis's digital images are neither predominantly original works of authorship nor derivative works, which include a substantial distinguishable variation.[150] Corbis, however, does deserve a copyright in its CD-ROM compilations.

1.Original Works of Authorship

Corbis's digital images cannot constitute wholly original works of authorship. Despite the laborious and subjective process inherent in the digitization process,[151] Corbis is not adding original content. Corbis intentionally strives to create an exact digital reproduction of the original,[152] and its digitization process is based on the preexisting, underlying art that it seeks to replicate—accomplishing what the Copyright Act defines as a derivative work. Indeed, in its digital reproductions, Corbis does not even claim to have created original works, but merely derivative works.[153] Thus, the greatest protection copyright offers to creative, original works is not available to Corbis.[154]

the validity of the copyright is by no means certain).

> The Copyright Office, by accepting material as copyrightable, does not thereby determine [the applicant's] rights under copyright laws . . . . It is clear . . . that a certificate of registration creates no irrebuttable presumption of copyright validity. [W]hile the Register of Copyrights may (subject to judicial review) refuse to issue a registration for a purported work of art on the grounds of lack of creativity, denial of copyright for lack of originality represents an issue of fact that should be determined exclusively by the courts.

Id.(citations omitted).

149. *See* 17 U.S.C. § 102(a) (2006).

150. 17 U.S.C. § 103 (2006); *see also* Hoffman, May 3, 1996, *supra* note 53, at 34.

151. Landry, *supra* note 60, at 640 (arguing the digitization process requires subjective decisions as to the technical settings involved). *See also supra* notes 134–137, and accompanying text.

152. *See* Flores, *supra* note 31 and accompanying text.

153. *See, e.g.*, Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1097 n.3 (W.D. Wash. 2004) ("Corbis asserts a derivative copyright interest in all images to which it has added digital enhancements, metadata, or keywords."). In that case, Corbis digitized the images of celebrity-stock photographers with whom Corbis had contracted and on whose behalf, in part, Corbis alleged Amazon had infringed. *See id.* at 1096–97. That case did not involve photographs in the public domain, but ones still under copyright, which Corbis and the photographer who took the picture shared, by contract.

154. *See* Hoffman, May 3, 1996, *supra* note 53, at 34 (pointing out that "Copyright law affords greater protection to certain classes of works that embody more creativity, such as fiction, photographs, and art images, compared with more factual materials.").

2. Derivative Works

The digital reproductions Corbis creates are not derivative works either because, under the distinguishable variation test[155] Corbis cannot pass muster. Caselaw illustrates.[156]

First, in *Alfred Bell v. Catalda Fine Arts*,[157] the plaintiff copyrighted engravings of famous public domain paintings.[158] Defendant was in the business of producing lithographs and copied plaintiff's engravings, arguing that this was permissible because plaintiff could not copyright his reproductions of someone else's work. [159] In *Alfred Bell*,the court held that nothing in the Constitution or federal statutes commands that copyrighted material be unique or novel; the author is only required to contribute something more than trivial that is recognizably his own.

The judge "observed that the [plaintiff's engravings] 'attempted faithfully to reproduce . . . the basic idea, arrangement, and color scheme' of the paintings; these elements originated with the painters and not with the engravers."[160] However, the judge noted that realistic artwork reproductions do not necessarily preclude a finding of originality as the artistic reproductions contain original elements not found in the original work.[161] Those original elements, moreover, may be protected.[162] The trial court concluded that the plaintiff intended to reproduce the original artist's expression in a different medium and this difference was distinguishable.[163] The appeals court affirmed this finding and found that the subjective decisions inherent in the

155. *See* Butler, *supra* note 2, at 83–4 (relating the elements of the distinguishable variation test). The distinguishable variation test is comprised of two requirements: 1) the elements added to the reproduction must be original; and 2) the elements must be distinguishable, more than trivial. *Id*.

156. Case law from the Southern District of New York and the Court of Appeals for the Second Circuit is particularly instructive and "regarded as major sources of authority on issues of copyright and art law." Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 968 (2007); Matz, *supra* note 118, at 6 n.21 ("[O]ther courts often look to this body of law to guide them in their evaluation of art reproductions and derivative works."). In its *Site Usage Agreement*, Corbis has indeed declared its preference for New York laws to govern any legal disputes. *See Site Usage Agreement*, *supra* note 46.

Any dispute regarding this Agreement shall be governed by the laws of the State of New York and applicable U.S. Federal law, including Title 17 of the U.S. Code, as amended. The parties agree to accept the exclusive jurisdiction of the state and federal courts located in New York, USA, regardless of conflicts of laws.

Id.

157. Alfred Bell v. Catalda Fine Arts, 74 F. Supp. 973 (S.D.N.Y. 1947), *aff'd*, 191 F.2d 99 (2d Cir. 1951).

158. *See Alfred Bell*, 74 F. Supp. at 979.

159. *See Alfred Bell*, 74 F. Supp. at 973 (arguing that the engravings were not entitled to copyright protection because as reproductions they lacked sufficient originality).

160. Butler, *supra* note 2, at 81 (quoting Alfred Bell v. Catalda Fine Arts, 74 F. Supp. 973, 975 (S.D.N.Y. 1947)).

161. *See Alfred Bell*, 74 F. Supp. at 976.

162. *See id*.

163. *See id*.

reproductions contained "substantial departures" from the original work.[164]

Copyright scholars argue that allowances made in the distinguishable-variations test provided the rationale for finding that engravings were copyrightable.[165] The test accounts for the possibility that "the public has gained more than an opportunity for wider distribution and use of the content of the original; sometimes the public has gained distinct, new contributions of sufficient value to merit copyright protection."[166]

L. Batlin & Son, Inc. v. Snyder was the next case to discuss this issue.[167] In that case, a New-York based company claimed a copyright in its plastic reproductions of an Uncle Sam mechanical cast-iron coin bank that sold for many years prior and had since passed into the public domain.[168] The plastic reproductions contained different elements from the original public domain work, but "[m]any of these differences are not perceptible to the casual observer."[169] The court, accordingly, ordered the company to cancel its copyright registration and to stop enforcement thereof on the grounds that its reproductions were not sufficiently original, but merely trivial additions.[170] Only a "distinguishable variation," something beyond technical skill, will render the reproduction original.[171] Thus, a change in the medium of the reproduction alone does not constitute a distinguishable variation.[172]

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164. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 104 n.22 (2d Cir. 1951) ("The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of different lines or dots for himself, and on his choice depends the success of his print."). *See* Butler, *supra* note 2, at 91.

A significant flaw in testing the originality of art reproductions by a skill, labor, and judgment standard is that most art reproductions, unless made by a photocopy machine, do require skill, labor and judgment, and so the standard is not a meaningful way to distinguish art reproductions that deserve protection from those that do not.

Id. See generally Butler, *supra* note 2, at 82–87 (discussing the alternate standard for evaluating the originality in artistic reproductions: the skill, labor, and judgment test, which is not addressed in this article as critics find this test vague and unclear in its guidelines and criteria).

165. *See* Butler, *supra* note 2, at 83 (arguing that the test recognizes that reproductions may be more than mere copies).

166. Butler, *supra* note 2, at 83.

167. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976).

168. *See L. Batlin & Son*, 536 F.2d at 487–88; *See* Cameron, *supra* note 26, at 37 (noting that the standard had shifted since *Alfred Bell*).

169. *L. Batlin & Son*, 536 F.2d at 489 ("In other words, there were no elements of difference that amounted to significant alteration or that had any purpose other than the functional one of making a more suitable (and probably less expensive) figure in the plastic medium.").

170. *See id.* (concluding that although the elements were distinct, they were merely functional rather than artistic differences). *See also* Butler, *supra* note 2, at 84.

Changes in color and changes motivated by greater ease in mass production have been found too trivial to merit protection. In addition, changes that result from the necessities and inevitabilities of the method of reproduction will also be treated as trivial, because they do not owe their origin to the reproducer but to the method. Only the truly new contributions, that also owe their origin to the reproducing artist and are not an inevitable result of the medium of the reproduction, can be copyrighted.

Id.

171. *L. Batlin & Son*, 536 F.2d at 490 (quoting Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927)).

172. *See id.* at 491; *see also* Butler, *supra* note 2, at 97 (relating Judge Oakes's reasoning that "any time a work is translated into another medium, trivial variation will necessarily occur, and that such necessary variation cannot be attributed to the reproducer who did not independently

This case signifies a turning point in the law examining originality in reproductions.[173] A change of medium alone will not constitute originality in and of itself,[174] because if a medium change was sufficient, the result would be "ludicrous[;]" it would grant the reproducer a monopoly in the changed-medium public domain artwork.[175] The *L. Batlin & Son* court similarly rejected the argument that sheer "physical skill" or "special training" can satisfy the originality requirement: "A considerably *higher* degree of skill is required, true artistic skill, to make the reproduction copyrightable."[176]

Finally, in *Bridgeman Art Library, Ltd. v. Corel Corp.*,[177] the court held that exact photographic reproductions of public domain works were not copyrightable because they were not original.[178] In this case, Bridgeman Art Library, the plaintiff, was "in the business of acquiring rights to market reproductions of public domain works of art owned by museums and other collections."[179] Bridgeman then licensed the use of the reproductions they created.[180] Bridgeman created two formats for their reproductions: color transparencies of the artwork and CD-ROMs.[181] To ensure the accuracy of its reproductions, Bridgeman used a color correction strip.[182]

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evolve the medium").

173. *See* Butler, *supra* note 2, at 95 (arguing that subsequent case law relying on *L. Batlin & Son* set a higher standard for examining reproductions).

174. *See L. Batlin & Son*, 536 F.2d at 491; Butler, *supra* note 2, at 97.

175. *See L. Batlin & Son*, 536 F.2d at 491 (quoting preeminent copyright scholar Professor Nimmer):

> [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 claim to have independently evolved any particular medium . . . . the ludicrous result that the first person to execute a public domain work of art in a different medium thereafter obtains a monopoly on such work in such medium, at least to those persons aware of the first such effort.

Id. *See also* Butler, *supra* note 2, at 97.

176. *L. Batlin & Son*, 536 F.2d at 491 (emphasis in original). *But see* Butler, *supra* note 2, at 97–98.

> Without explicitly rejecting *Alva Studios*, the court held that if there was a point in the copyright law of reproduction at which sheer artistic skill and effort could be substituted for the requirement of substantial variation, it had not been reached because the reproduction lacked the complexity and exactitude involved in *Alva Studios*.

Id. The dicta in this case, the *L. Batlin* court's discussion of *Alva Studios* leaves room for Corbis to argue that its digital images, given the "complexity and exactitude there involved" deserve copyright protection.

177. Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *aff'd on reh'g*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

178. *See Bridgeman*, 25 F. Supp. 2d 421, 427 (holding that plaintiff's transparencies were not copyrightable under UK law but stating that it would have reached the same result under US law).

179. *Bridgeman*, 25 F. Supp. 2d at 423; Tuchman, *supra* note 2, at 305 (explaining at issue in *Bridgeman* were photographic reproductions of some of the world's most famous art: DaVinci's Mona Lisa and Michelangelo's Sistine Chapel).

180. *Bridgeman*, 25 F. Supp. 2d at 423–24; *see also* Matz, *supra* note 118, at 9 (explaining that *Bridgeman* obtained its photographs, underlying works from which the transparencies were created, by "securing permission to photograph the works of art themselves or by purchasing existing photographs from freelance photographers").

181. *Bridgeman*, 25 F. Supp. 2d at 424; *see also* Matz, *supra* note 118, at 9 (stating that *Bridgeman's* marketing scheme in the US was "to provide potential customers with the CD-ROM version of its photographic images as a catalog of its available images and then license use of its high-resolution color transparencies").

182. *Bridgeman*, 25 F. Supp. 2d at 423; *see also* Matz, *supra* note 118, at 9.

Bridgeman sued Corel Corporation,[183] the defendant, which was also in the business of digitizing well-known paintings of the European masters, for infringing its copyrights in its reproductions.[184] Bridgeman conceded that its reproductions were of works squarely in the public domain, and that it sought to "duplicate exactly the images of the underlying works."[185] Corel moved for summary judgment on the grounds that Bridgeman did not have a valid copyright in its reproductions of public domain works.[186] The court agreed, finding that the Bridgeman's images lacked originality and granted Corel's motion for summary judgment.[187]

Upon reconsideration, the court affirmed its ruling under the Copyright Act.[188] First, the court distinguished between works containing an element of originality and those that amounted to slavish copying;[189] the former deserves copyright protection while the latter does not.[190] The court noted that the possibility existed that the Bridgeman's transparencies may be protected as a "reproduction of a work of art," but that result would be inconsistent with previous case law.[191] "[R]equisite 'distinguishable variation,' moreover, is not supplied by a change of medium, as 'production of a work of art in a different medium cannot by itself constitute the originality required for copyright protection.'"[192]

Originality, as the *Bridgeman* court explained, arises in three circumstances when creating a photograph.[193] First, originality may arise by the angle, exposure, and other special effects achieved by various developing techniques.[194] Second, the creation of a scene or subject to be photographed

183. *See* Tuchman, *supra* note 2, at 305 (noting that Corel Corp. was also the Canadian manufacturer of WordPerfect and other computer software, likening Corel Corp. to Bill Gates's Corbis).

184. *Bridgeman*, 25 F. Supp. 2d at 424 (stating that defendant company sold CD-ROMs containing photographs of public domain paintings such as paintings by the Masters).

185. *Id.* at 427.

186. *See Bridgeman*, 25 F. Supp. 2d at 423.

187. *See id.* at 426 (applying UK law).

188. *See* Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (applying U.S. law).

189. *See id.* at 197 (citing Hearn v. Meyer, 664 F. Supp. 832 (S.D.N.Y. 1987) for the proposition that while slavish copying requires technical skill and effort, it does not qualify as an element of originality: "As the Supreme Court indicated in Feist, "sweat of the brow" alone is not the "creative spark" which is the sine qua non of originality.").

190. *See id.* at 196 (citing MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08[E][2] (1998)).

191. *See id.* (quoting Nimmer, who pointed out the discrepancy between that suggestion and *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976)); *see also* Matz, *supra* note 118, at 12 n.79 (discussing Nimmer's proposition that "a photograph of a photograph should not be protectable since a) it does not constitute a distinguishable variation, and b) because the first photograph might not be regarded as a work of art since there are separate classifications for 'works of art' and photographs under the Copyright Act.").

192. *Id.* (quoting Past Pluto Prods. v. Dana, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986) (internal citations omitted)).

193. *See Bridgeman*, 36 F. Supp. 2d at 198 ("Originality presupposes the exercise of substantial independent skill, labor, judgment and so forth.").

194. *See id.* (stating that this type of originality does not depend on creation of the scene or anything remarkable in its capture).

may be original.[195] Third, a person can capture an original scene, by virtue of being at the right place at the right time.[196] The court found that Bridgeman's problem was the fact that it was seeking protection for the exception to the rule: "photographs of existing two-dimensional articles (in this case works of art), each of which reproduces the article in the photographic medium as precisely as technology permits."[197]

Moreover, the court stated that Bridgeman, "by its own admission has labored to create "slavish copies" of public domain works of art."[198] The court found that when the purpose of the recreation of public domain works was to reproduce them "with absolute fidelity" no spark of originality was required, even though great skill and labor may be involved in the endeavor.[199] Therefore, the court held that in the absence of an identifiable original contribution, Bridgeman's transparencies were not copyrightable.[200]

Critics argue this result was correct for several reasons.[201] Bridgeman's technical skill did not evince "true artistic skill,"[202] and Bridgeman admitted that the transparency reproductions were direct copies of the underlying works.[203] This case is significant for its policy considerations, which "serve to promote fair competition between producers of art reproductions."[204] If a copyright is granted for slight, trivial, distinguishable variations, reproducers would be able to block competitors from creating reproductions in the original.[205]

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195. *See id.* (explaining the instance including posing or arranging the subject).

196. *See id.* (suggesting that the merit lies in the ability to capture a scene that is unlikely to recur).

197. *Id.* ("[Plaintiff's] 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.").

198. *Bridgeman*, 36 F. Supp. 2d at 197 (discussing when copyright is not available).

199. *Id.*

200. *See id.*

201. *See* Matz, *supra* note 118, at 14 (arguing that this decision comes as no surprise to the copyright scholars); Guy Pessach, *Museums, Digitization and Copyright Law: Taking Stock and Looking Ahead*, 1 J. INT'L MEDIA & ENT. L. 253, 279 (2007).

> Although the *Bridgeman Art Library* decision limits and undermines the copyrights that museums may obtain regarding their digital images collections, the decision seems to level copyright protection in a manner that secures museums' commitment to the value of broad public access to cultural works. The decision's outcome simplifies and provides incentives for the proliferation of digital cultural preservation projects. It does so by enabling others to rely and build upon existing digital images collections of originating works that, for some reason (such as copyright duration), are not eligible for copyright protection. In fact, when taking into account the growing centrality of commercial digital images agencies such as Corbis and Getty Images, there are some chances that, overall, the museums' community benefits from the *Bridgeman Art Library* decision will far outweigh the disadvantages of losing copyright protection over their own particular digital images collections.

Id. Others disagree and believe *Bridgeman* was wrongly decided. *See generally*, Allan, *supra* note 156.

202. *See* Matz, *supra* note 118, at 14 (citing *Batlin,* 536 F.2d at 491).

203. *See* Matz, *supra* note 118, at 13–15 (arguing that the court correctly denied copyright based on these salient facts). *But see* Tuchman, *supra* note 2, at 311 (lamenting, perhaps, that "[w]hen a photographer's artfulness is so accomplished that it appears completely artless, the mechanics of the photocopier and the talents of the photo copyist merge. The better the copy, the less likely the copyright.").

204. Matz, *supra* note 118, at 15.

205. *See* Matz, *supra* note 118, at 16–17.

Yet, despite *Bridgeman's* holding, many museums flout it.[206] Proponents of copyright protection for exact digital reproductions of public domain art fear *Bridgeman* will have potentially severe consequences for museums and art libraries, whose revenues depends on licensing their reproductions of public domain art, and who supposedly need and depend on copyright law to protect that revenue.[207] Still other critics of *Bridgeman* would limit its authority over other federal courts,[208] "but the principle remains the same throughout the United States. Photographs that precisely reproduce public domain paintings are not copyrightable."[209]

"The Bridgeman Art Library and most museums seem to be wholly ignoring the fact that this holding invalidated Bridgeman's claims of copyright in exact photographic reproductions of public domain images."[210] *Bridgeman* has not been influential on Corbis either.[211] Post *Bridgeman*, Corbis continues to

Because [plaintiff's] high-resolution color transparencies were as true to the original works of art as possible, [defendant's] images (if they too were true to the original) would have been necessarily substantially similar to [plaintiff's]. If [plaintiff] had established access, [defendant] would have had the burden of proving that their images were copied from another source. If courts were to place such a burden on defendants in copyright infringement suits, 'mischievous' image vendors could use their copyrights to harass competitors, thereby stifling fair competition in the market for art reproductions.

Id.

206. *See also*, Reese, *supra* note 24, at 1040 ("Many museums essentially reject the Bridgeman decision and attempt to minimize its impact on their photography and their reproduction permissions practices."); Tuchman, *supra* note 2, at 289 (noting how *Bridgeman* has undercut museum's reliance on false copyright claims). *See generally* Cameron, *supra* note 26, at 32 ("*Bridgeman* has subsequently been ignored. Museums and art libraries alike persist in claiming copyright in uncopyrightable photographic reproductions of public domain works."). "[*Bridgeman's*] ruling is . . . ignored today by . . . Bridgeman Art Library itself." *Id.* at 43.

207. *See* Allan, *supra* note 156, at 982 (arguing 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 the work more broadly. . . ."); Cameron, *supra* note 26, at 50–51 (quoting the Museums Copyright Group's position that reproduction fees and licenses allow museums to support their public interest missions and "protect their collections from inaccurate reproduction and captioning"); Reese, *supra* note 24, at 1040 (quoting Kevin Garnett, *Copyright in Photographs*, 22 EUR. INTELL. PROP. REV. 229, 229 (2000)).

208. Cameron, *supra* note 26, at 50 (noting how the Museums Copyright Group declared *Bridgeman* not binding on British courts and disparaged its authority in U.S. courts, which "seems . . . sinister").

209. Cameron, *supra* note 26, at 47–48 ("Because the authors of these photographs contribute nothing original to the public domain image, these photographs are simply not copyrightable, despite claims otherwise.").

210. Cameron, *supra* note 26, at 48–49 (noting that since *Bridgeman* "the internet has supplanted CD-ROMs" but almost all museums and libraries post statements claiming copyright in the digital reproductions found on their websites). The Metropolitan Museum of Art in New York and the J. Paul Getty Museum in Los Angeles also claim that all the images on their respective websites are protected by copyright, the museums retain all rights, and consumers are limited in how they may use the images. *Id.* at 51–52 (acknowledging how individual museums refuse to acknowledge *Bridgeman*'s authority).

211. *See* Cameron, *supra* note 26, at 49–50 (noting the minimal impact on all art libraries, and Corbis in particular).

Corbis has not ignored *Bridgeman* altogether. Corbis, interestingly, maintains a webpage with general information about copyright law, CORBIS ON COPYRIGHT, http://www.corbis.com/professional/copyright/uslaw.asp (last visited Sept. 13, 2011). The way in which Corbis explains copyright law appears geared towards the photographers with whom it contracts to digitize their photographs still under copyright protection, and not to the public about underlying art in the public domain. *See* Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1096 (W.D. Wash. 2004). "As part of its business, Corbis enters into contracts with photographers who take celebrity photos. . . .Corbis maintains a copyright registration program for itself and the

assert copyright in its images as its *Site User Agreement* and *Corbis Content License Agreement (Licensing Terms & Conditions)*.[212]

Corbis asserting a copyright is decidedly similar to *Bridgeman*. Corbis is in the business of acquiring public domain artwork and licensing the use of the digital reproductions they create. Corbis also attempts to ensure the accuracy of its reproductions through its highly technical and laborious digitization process. By its own admission, moreover, Corbis's digitization process is one designed to capture every detail of the original "with absolute fidelity," albeit in a different medium.[213] Finally, similar to *Bridgeman,* Corbis seeks protection for the exception to the rule: digital images for existing two-dimensional articles.[214]

Corbis's digital reproductions are not original works of authorship. While it may be true that technical skill, labor, and judgment is involved in Corbis's digitization process, this effort does not in and of itself constitute originality in

photographers it represents." *Id*. *See also* Cameron, *supra* note 26, at 49–50 (remarking on "Corbis's author-friendly copyright page provides only general information copyright law. . . a program to register photographs on behalf of photographers and information on protecting copyrights from infringement, with links to statutes and the *Bridgeman* decision.").

Here is what Corbis says, again supposedly directed to photographer-authors, about its digital images and whether those merit copyright:

Photographers become understandably concerned when their pictures are scanned and combined with these other elements to create a digital file. Some fear that a digital copy of a photograph may yield a separate copyright, and that agencies claiming ownership of a "digital copyright" are, in effect, claiming ownership of the photograph in digital form. *This is not true.* There is only one copyright in a photograph and the photographer owns it regardless of its format (analog or digital). There is no additional or derivative "digital copyright" created simply by scanning a photograph into digital form, and no one who scans these photographs obtains any additional rights in the digital form of the photograph. (*See Bridgeman v. Corel)*.

CORBIS ON COPYRIGHT, *supra* (emphasis in original). Corbis's statement that no additional or derivative "digital copyright" attaches to a digital image seems to conflict with its general claims to copyright of all of its images. *See Site Usage Agreement* and CORBIS CONTENT LICENSE AGREEMENT, *supra* note 46.

In court, ironically, Corbis has taken a different position. *See* Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1097 n.3 (W.D. Wash. 2004) ("Corbis asserts a derivative copyright interest in all images to which it has added digital enhancements, metadata, or keywords."). In that case, Corbis sued Amazon for allegedly infringing its digital photographs and one claim Corbis asserted was a "derivative copyright interest in all images to which it has added digital enhancements, metadata, or keywords." *Id.* at 1097. Another claim in that case was for the unique compilation of photographs in its CD-ROM filings, over which Corbis also asserted copyright interest. *Id*. Thus, Corbis's statement that no derivative "digital copyright" in digitizing a photograph on its copyright statement is not what Corbis asserts in court, namely that it has a derivative copyright interest that it deems worthy of protection even by means of litigation. The way that Corbis may reconcile those seemingly-contradictory statements to its contracting photographers is with this question and answer, also found on its website CORBIS ON COPYRIGHT:

How does the "compilation copyright" covering the agency-added digital elements impact the photographer's copyright in their photographs? *It has no impact.* It only protects the elements contributed by the agency, and does not give the agency any rights to the photograph—just as a copyright in a catalog compilation does not give any rights to the catalog owner. No one can use a "compilation copyright" to obtain any rights to use the underlying photograph.

CORBIS ON COPYRIGHT, *supra* (emphasis in original). Just what Corbis is claiming copyright over is not clear, ultimately. Corbis's blanket statement to copyright in its digital images, without any distinction for public domain works, is suspect. *See also* Cameron, *supra* note 26, at 50 (noting that "the relatively neutral view Corbis presents via its website [copyright explanation] may be indicative of a corporation ducking the issue rather than strictly complying with the *Bridgeman* decision.").

212. *See Site Usage Agreement* and CORBIS CONTENT LICENSE AGREEMENT, *supra* note 45.

213. *See supra* notes 152–54 and accompanying text.

214. See *Bridgeman*, 36 F. Supp. 2d at 198.

the newly-created digital images.[215] "Originality presupposes the exercise of substantial independent skill, labor, judgment and so forth."[216] But where is the requisite modicum of creativity? Reproducing art in digital media is akin to taking a photograph of a photograph, which lacks distinguishable variation.[217] Corbis's digital images amount to slavish copying of the underlying work because they lack any identifiable original contribution.[218] Corbis goes to great lengths to replicate the original.[219] The change of medium from the underlying work to a digital image does not supply the requisite distinguishable variation.[220] Hence, Corbis's digital images are devoid of the "spark of originality."[221]

Legal precedent prior to *Bridgeman* cannot help Corbis either. *L. Batlin & Son*[222] requires that any elements added to a reproduction are sufficiently original, and not merely trivial additions, to merit a copyright.[223] Furthermore, "[o]nly a 'distinguishable variation,'—something beyond technical skill—will render the reproduction original."[224] Corbis is not claiming to add any elements to the underlying work (apart from its digital signatures and tracking technology) but instead tries to reproduce the original artwork in exact detail.

Even if Corbis claimed to have added an element to its reproductions, it would have to argue something beyond technical skill in order for the added element to constitute a distinguishable variation. The *L. Batlin & Son* court rejected the claim that "physical skill or special training" was involved in the

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215 *Id.* at 197 (citing Hearn v. Meyer, 664 F. Supp. 832 (S.D.N.Y. 1987). *See* Mazzone, *supra* note 10, at 1046–47 (quoting the Policy Decision on Copyrightability of Digitized Typefaces, 53 Fed. Reg. 38,110, 38,113 (Sept. 29, 1988). The U.S. Copyright Office does not recognize digitized representations of typeface designs. *See id.* (deeming digitization of "typeface" or "a set of letters, numbers, or other symbolic characters" as not an original work of authorship).

216. *Bridgeman*, 36 F. Supp. 2d at 198.

217. *See*, Matz, *supra* note 118, at 12 n.79 (discussing Nimmer's proposition that "a photograph of a photograph should not be protectable since it does not constitute a distinguishable variation."); Reese, *supra* note 24, at 1049 (questioning whether photographs of public domain paintings are entitled to copyright protection and concluding they are not but sketching out a sui generis system of protection for art reproductions, not to suggest that as the most desirable way to address the issue, but merely to suggest that rights and limitations in these copies would both provide incentives to invest in the labor of their creation while not impeding access to and use of public domain works through an exclusive rights scheme). For a history of photography's evolution within copyright law, see Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004); Tuchman, *supra* note 2; Cameron, *supra* note 26, at 38 ("photography has proven itself a problematic medium for copyright law").

218. *See Bridgeman*, 36 F. Supp. 2d at 198.

220. *See id.* at 196. (quoting Past Pluto Prods. v. Dana, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986)). *See* Mazzone, *supra* note 10, at 1044–45.

Microfilming or scanning an old newspaper or broadside is not an act of creation. It is copying pure and simple—no different from making a photocopy. 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.
Id.

221. *Id* at 197.

222. *See L. Batlin & Son*, 536 F.2d 486 (2d. Cir. 1976); *cert. denied*, 429 U.S. 857 (1976).

223. *See id.* at 490.

224. *Id.* (quoting Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927)).

reproductions and required a higher standard of "true artistic skill."[225] However, the court did leave open the possibility that at some point the sheer artistic skill and effort could substitute the substantial variation requirement.[226] The court declined to decide that issue in *Batlin* because the reproduction at issue did not rise to the complexity and exactitude of the reproduction in *Alva Studios v. Winneger*.[227] However, Corbis cannot argue that its "sheer artistic skill and effort" should overcome the substantial variation requirement because its digital reproductions are identical to the original, just like copy photography. [228] Trade literature consistently reports that copy photography requires technical skill, not artistic talent.[229] Furthermore, others argue that the "sheer artistic skill and effort" standard is not appropriate for reproductions of visual arts.[230]

Finally, Corbis cannot rely on *Alfred Bell* to support its contention for copyright protection. Even though Corbis "attempted faithfully to reproduce . . . the basic idea, arrangement, and color scheme" of the underlying works, these elements originated with the artists and not Corbis.[231] Moreover, because Corbis intends to reproduce the work exactly, their digital reproductions fail to produce original elements distinct from those found in the underlying work.[232]

Even though the foregoing analysis demonstrates that Corbis's digital reproductions do not deserve copyright protection under law, it should be noted that some believe there is no social policy problem in granting Corbis a copyright in their digital reproductions, so long as their protection is very limited, governing only "direct, electronic methods of copying."[233]

D. CORBIS'S COMPILATIONS DESERVE COPYRIGHT PROTECTION AND SERVE A WORTHY PURPOSE

Despite the controversy over Corbis's claims of its digital copies, Corbis deserves a copyright for its CD compilations[234] of public domain art. [235] Corbis

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225. *L. Batlin & Son*, 536 F.2d at 491.

226. *See* Butler, *supra* note 2, at 97–98 (discussing the *Batlin* court's application of the skill, labor, and judgment test of Alva Studios v. Winneger, 177 F. Supp. 265 (S.D.N.Y. 1959)). The possibility exists that sheer artistic skill and effort will suffice in the absence of a substantial variation. *Id.*

227. *Alva Studios*, 177 F. Supp. 265 (S.D.N.Y. 1959) (establishing the skill, labor, and judgment test to establish the originality of reproductions); *see also* Butler, *supra* note 2, at 115 (arguing that this test is unsuited to art reproductions because it fails to recognize and accommodate the copyright principle of protecting only the non-copied aspects of art reproductions and its potential for permitting reproducers to monopolize public domain images).

228. *See* Butler, *supra* note 2, at 122–23 (stating that digitizers will assert that digital reproductions involve a higher level of skill than copy photography). However, "the scanning process itself "generally resembles photography or photocopying." *Id.*

229. Matz, *supra* note 118, at 14.

230. *See* Butler, *supra* note 2, at 97.

231. *See* Alfred Bell v. Catalda Fine Arts, 74 F. Supp. 973, 975 (S.D.N.Y. 1947), *aff'd*, 191 F.2d 99 (2d Cir. 1951).

232. *See id.* at 976.

233. *See* Copyright Debate, *supra* note 85, at 1 (arguing that the scope of any copyright Corbis receives would be "thin").

234. *See* 17 U.S.C. § 101 (1994) (defining a compilation as a "work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in

once provided general consumers with a separate shopping gallery that included interactive CD-ROMs.[236] A virtual educational experience, those CD-ROMS featured a feast for the eyes as users click through galleries of famous paintings and ears with music "in the right place[.]"[237] Users were offered "an almost seamless experience."[238] Corbis's first CD-ROM featured artwork from the Barnes Collection[239] entitled, "A Passion for Art" with works from the masters like Renoir, Cezanne, Picasso, Degas, van Gogh, and Monet.[240] On the CD-ROM, users can zoom in and out for a closer view of the image, as well as command the computer to "sweep the eye across a canvas as one would in an actual museum."[241] Despite its highly informative and entertaining nature, the

such a way that the resulting work as a whole constitutes an original work of authorship").

235. *See* Copyright Debate, *supra* note 85, at 1 (stating that Corbis could likely receive a copyright in the compilation of images from its archives).

236. *See* Landry, *supra* note 60, at 610 n.8 (relating that Corbis's consumer group distributes their archives directly to consumers through interactive CD-ROMs). It appears that Corbis no longer sells its interactive CD-ROMs of public domain art on its website. *See generally*, CORBIS IMAGES, http://www.corbisimages.com/ (last visited Aug. 20, 2011). One of those interactive CD-ROMs, A Passion for Art, is available for sale on Amazon.com for $10.00. *See* Search Results for 'a Passion for art', AMAZON.COM, http://www.amazon.com/s/?ie=UTF8&keywords=a+passion+for+art&tag=googhydr-20&index=aps&hvadid=4031493701&ref=pd_sl_5n5ccciws9_e (last visited Aug. 20, 2011).

Corbis now has Royalty-Free CDs under Creative Images Category. Corbis's Royalty Free Collections provide consumers with "a full range of current, relevant subject matter" images. *See* BROWSE ROYALTY FREE CDS, http://www.corbisimages.com/Browse/RoyaltyFree.aspx?RFCDs#RFCDs (last visited Aug. 20, 2011).

237. Homer, *supra* note 31 (explaining that sound is placed in relation to where images are stored). "There is almost no waiting for music to start or for one image to replace another, and there are no glitches on the sound as the images change." *Id*. *See also* Coates & Kilian, *supra* note 65 (relating that the music reflects the period of the paintings being viewed).

238. *See* Homer, *supra* note 31.

239. *See* Coates & Kilian, *supra* note 65 (stating that the Barnes Collection has been heralded as the greatest collection of post-Impressionist art in the world).

240. *See* Coates & Kilian, *supra* note 65 (explaining that the CD-ROM re-creates the twenty-four galleries of the Barnes exhibition on the computer screen). "When the program begins running, a view of the museum appears on the screen. By clicking a mouse, a user 'moves' through doors and 'looks' in different directions to see the art inside the galleries." *Id. See also* Homer, *supra* note 31 (stating that the disk's three-guided tours are written and narrated by Carter Brown, art expert from the U.S. National Gallery of Art).

Another controversial CD-ROM Corbis created was of Leonardo da Vinci's surviving notebooks and manuscripts, the Codex Leister. Lowe, *supra* note 30, at 215–16; Rosenbaum, *supra* note 23, at 25. For $30.8 million, Gates purchased the Codex Leister, recognizing that Leonardo da Vinci's notebook "is part of the intellectual and cultural heritage of the entire world. It should be shared with the world." Lowe, *supra* note 30, at 216; Rosenbaum, *supra* note 23, at 25; Flores, *supra* note 31 (Corbis enlisted the expertise of prominent Leonardo scholars to translate the manuscript and some Corbis employees even traveled to Florence to study Leonardo and "get a feel for his life"). Although, Gates vowed not to exploit the Codex commercially and instead to lend to museums around the world, Lowe, *supra* note 30, at 216; Rosenbaum, *supra* note 23, at 25, critics were nonetheless quick to point out that "Gates's company standards ready to profit from others who might be inspired to license the codex images for their own commercial use." Rosenbaum, *supra* note 23, at 25. Indeed, the Corbis copyright symbol appears on the codex-inspired merchandise (refrigerator magnets, ties, tee-shirts, and mouse pads) that museum gift shops sold. *Id.* (noting that the copyright pertains not to the public domain manuscript, but the Corbis-owned photographs of it).

241. Coates & Kilian, *supra* note 64. Moreover, the Barnes collection CD-ROM has an encyclopedic listing of the paintings in the collection together with information on the artists and an opportunity to learn the interpretations of many of the works. *Id. See also* Rosenbaum, *supra* note 23, at 25 ("The CD-ROM is a comprehensive cyber-biography of Leonardo, accompanied by the bells and whistles now expected of multimedia: an interactive illustrated timeline and several

CD-ROMs that once sold for approximately fifty dollars (now ten dollars) did not generate enough profit to meet operational costs.[242] Corbis, it appears, has abandoned its scheme for these CD-ROMs despite receiving critical acclaim.[243]

The Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*[244] held that compilations are entitled to copyright protection because of the subjective decisions involved in the selection, order, arrangement, etc. of the collected data.[245] "These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."[246]

Corbis's selection, arrangement, and coordination of public domain art scored to music in its CD-ROM medium, Leonardo da Vinci's Leister Codex for example, is sufficiently original as contemplated by the Copyright Act.[247] Protecting original compilations of public domain works makes good policy.[248] Compilations, first off, do not affect the public's access to works in the public domain because the copyright extends only to the selection, arrangement, and presentation of the images as a whole in the CD-ROM.[249] Second, protected

image-laden "tours" of Leonardo's life, times and ideas, lullingly accompanied by music and somnolently narrated by rock singer/songwriter John Cale.").

242. *Compare* Coates & Kilian, *supra* note 65 (stating that in 1995 the CD-ROM was selling at software stores, bookstores, museum shops, mail-order catalogs, etc.) *and* Andrews, *supra* note 31 (stating that the CD-ROM topped CD-ROM sales at retail stores) *with* Rosenbaum, *supra* note 23, at 25 (quoting then-president of Corbis to have said that only one CD-ROM has "done better than break even") *and* Flores, *supra* note 31 (voicing concern that the "multimedia software is not selling as quickly as once projected"); Lowe, *supra* note 30, at 216–17 (CD-ROM of Codex Leister was not a commercial success); *See* Landry, *supra* note 60, at 632 (quoting Corbis vice-president that the "cost structure of CD-ROM production . . . [is] extremely high compared to anticipated returns).

243. *Corbis Corporation—Company History*, *supra* note 32.

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

245. *See Feist*, 499 U.S. at 348.

> 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.

Id. at 349–50 (alteration in original) (quoting U.S. Cont. art. I, § 8).

246. *Id.* at 348.

247. *See* Rosenbaum, *supra* note 23, at 1:

> [T]he portions of the CD devoted to the codex itself are a felicitous marriage of medium to content. The randomly arranged ideas in Leonardo's working notebook are organized by the CD into six subjects. On the overview screen showing thumbnails of the 72 pages, you can point to a topic such as "Dynamics of Water" and light up all the relevant portions of the manuscript. Each page can be selected, translated and magnified (although at a width inconveniently larger than the screen). Pages are accompanied by summaries and, in some cases, audio commentaries by Oxford University professor Martin Kemp . . . Science buffs should enjoy the "Exhibits" portion of the disk, which reproduces (and sometimes animates) several of the more than 300 drawings from the codex, describes the situations they portray, and shows video clips of the actual experiments, recently reenacted in the hydrology lab of the University of Washington, Seattle.

Id.

248. *See* Mazzone, *supra* note 10, at 1056–57 n.142 (explaining how licensing of compilations like CD-ROMs of public domain works increase availability and circulation of such works as well as convenience to the consumer); Matz, *supra* note 118, at 21 (discussing the advantages to granting Bridgeman a copyright in its compilation).

249. *See* Matz, *supra* note 118, at 21 (citing Feist, 499 U.S. at 348).

compilations provide museums and other digital reproduction companies added incentives to create the work, such as financial gain or critical acclaim.[250] Protecting compilations, third, serves the purpose of Copyright Act to spur creative genius because people are more likely to invest the labor and energy involved to select and arrange the compilation.[251] Fourth, compilations are necessary and efficient, and without adequate rewards, providers will have no incentive to compile or create them.[252] Finally, compilations should receive protection for equity reasons—not allowing one to benefit from the hard work of another.[253]

III. IMPLICATIONS OF CORBIS'S COPYRIGHT CLAIMS TO IMAGES IN THE PUBLIC DOMAIN

A. CORBIS IS RESTRICTING ACCESS TO IMAGES IN THE PUBLIC DOMAIN

Art in the public domain can be used in a myriad of ways: scholars might use it in lectures or to accompany articles; website owners might display their favorite art; artists might incorporate elements of art in the public domain in new creations; and, a merchandiser might use such art on their goods for sale.[254] High-quality digital images of artwork in the public domain serve the public interest by spurring the creation of new and original works.[255] Although gaining access to high-quality reproducible images of artwork may be difficult, once a user obtains access, copyright law and the *Bridgeman* decision allows the user to exploit the work.[256] Many worry about the fate of public domain works if Corbis succeeds with its claim to copyright in its digital images because those

250. *See* Matz, *supra* note 118, at 21 (stating further that the compilation may effectively be used by the pubic). "For commercial documentaries, novels, and other creative works that incorporate public domain materials within broader works, the availability of public domain works lowers the transaction costs that accompany licensing by obviating the need to negotiate deals for some materials, and lowers the overall cost of royalty payments." Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 19.

251. *See* Matz, *supra* note 118, at 21 (arguing this purpose is achieved by protecting compilations).

252. *Id. See also* MERGES, et al, *supra note* 125, at 355–56.

253. Conversely, there may be a downside to protecting Corbis's compilations. Protecting them may be inherently dangerous because it could result in a monopoly if no one is able to duplicate Corbis's efforts. The lack of competition will increase prices for the consumer. *See infra* note 257.

254. Reese, *supra* note 24, at 1035 (providing those examples of uses of public domain paintings). "Indeed, copyright law encourages those uses—one rational for the public domain is to let anyone use an unprotected work in the hope that doing so will increase the work's availability, decrease its costs, and allow it to serve as the basis for further authorial creation." *Id.*

255. *See* Butler, *supra* note 2, at 126 ("The principle of the public domain stimulates the production of copies of artworks").

256. *See* Reese, *supra* note 24, at 1039.

pieces of artwork will be lost to the public.[257]

In fact, public domain paintings already are particularly hard to access because they are unique, often valuable, objects typically under stringent control of the museum where they hang.[258] Corbis believes that tightly controlled access is important to maintain the intrinsic value of the work.[259] Others, however, believe that "public domain works of art ought to remain accessible to the public and that granting copyright privileges to public domain works of art inevitably creates unwarranted, unjustifiable barriers to access."[260] By continuing to assert copyright in its digital reproductions, art libraries like Corbis and Getty, as well as museums stymie the purpose of the Copyright Clause's goal of creating a public domain.[261] "Corbis could radically reduce access to images in the public domain by creating digital photographs of such works, and claiming copyright in the digital photographs."[262] Corbis could use its copyright in the digital image "to prevent the public from reproducing or distributing any image that was substantially similar."[263] If the future of art reproduction is digital reproduction, and if the digitizers own the most usable copies of public domain art, the result is that the digitizers will own the images

257. Copyright Debate, *supra* note 85, at 1 ("Many are worrying that Corbis actually plans a copyright end run . . ."); *see also* Appel, *supra* note 31, at 218 ("Restricted access to creative works will inevitably limit artists in their ability to create new art."); Reese, *supra* note 24, at 1040 ("[A]llowing copyright in art reproduction photographs of public domain paintings 'has serious implications for the fidelity of the copyright term, and opens the door to undermining the vitality and significance of the public domain.'").

258. Reese, *supra* note 24, at 1033–36.

> And because museums even without copyright protection, control access to the paintings themselves, as well as to the high-quality reproducible transparencies of any of the museum's own photographs of the paintings, the court's ruling [in *Bridgeman*] does not necessarily mean that making, or getting access to, a usable quality photograph of a public domain painting is significantly easier or cheaper today.

Id. "[M]ost major museums do in fact restrict photography in ways that prevent visitors from making the kind of photos needed to reproduce a painting at high quality." *Id.* at 1037.

259. Landry, *supra* note 60, at 632 (quoting in 1996 Corbis's then-Vice President, Stephen Davis, "For some fine art and photography and rare books, mass distribution can result in diminution of the intrinsic value of the work. This is primarily due to the economic value generated by tightly controlling access and distribution.").

260. Matz, *supra* note 118, at 22; Reese, *supra* note 24, at 1047 ("[W]e might be more concerned than in the ordinary copyright context about giving a museum exclusive rights over its art reproduction photographs. Those rights will not only limit access to the museum's photograph, but . . . will also limit access to, and reduce use of, the underlying public domain work depicted in the photo.").

261. *See supra* notes 9–11, 257 (discussing the purpose of the Progress Clause, which spurious copyright claims undermine); Cameron, *supra* note 26, at 61 (While ostensibly acting on behalf of the public to safeguard cultural heritage, art libraries and museums misuse copyright to restrict access to works that should be available to all."); Llanos, *supra* note 92 (stating that "[i]mages can spark the imagination" and there are several thousand of them on Corbis's Web site); *see also* Copycat Copyright, *supra* note 84, at 1 (stating that some believe that Corbis is "trying to privatize public works").

262. Appel, *supra* note 31, at 222–223.

263. *See* Matz, *supra* note 118, at 17–18 (discussing the impact on the public domain if Bridgeman received a copyright).

> [W]hile Justice Holmes once defended the copyrightability of art reproductions by pointing out that the public would always be free to copy the original, it is plain to see how an exclusive right to photograph the original work of art, coupled with a copyright in the only authorized photograph would render such a promise illusory.

Id.

completely.[264]

Critics of Corbis's copyright claims have other concerns, which appear justified: enriching publishers of public domain art at the expense of legitimate users, threatening copyright law itself, and limiting free speech.[265] People are paying unnecessarily for images they could use for free.[266] "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."[267]

Bill Gates has the potential to bring art to the people through Corbis. Corbis's digital reproductions could, in theory, democratize art in the sense that Corbis would make that art more accessible to the public.[268] In the past, "the public had little opportunity to view works of art in any number, because the

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264. Butler, *supra* note 2, at 124; *see also One Year Ago in Information Law Alert: Corbis Corp.*, INFO. LAW ALERT, Nov. 8, 1996, at 1(voicing the concern that a copyright in a scanned image whose original copyright had elapsed raises the possibility that certain works might never enter the public domain); Reese, *supra* note 24, at 1036.

The practical necessity of copying (directly or indirectly) from the museum's original painting will usually make it difficult to copy (and make further use of) even a public domain painting. Three factors combine to impede copying such public domain artworks: the museum's ownership of the original painting, the museum's claim to copyright in any photographic reproduction it makes of the painting, and the museum's control over access to the negatives, or transparencies of any such photograph.

Id.

265. *See supra* note 26, and accompanying text (highlighting critics concerns that Corbis's copyright claims in public domain reproductions are suspect); Mazzone, *supra* note 10, at 1030 (noting how "copyfraud upsets the constitutional balance and undermines First Amendment values"); *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 23 ("The public domain, as repository of information freely available for unfettered access and use, safeguards the citizenry's First Amendment right to receive information, and its concordant right to express opinion."); Reese, *supra* note 24, at 1040; Cameron, *supra* note 26, at 50 ("[T]he degree of control Corbis or the Bridgeman Art Library are able to exercise over their images has tremendous financial ramifications. Whether either company can use copyright, legitimate or not, to enhance that control remains an imperative issue.").

In a perhaps inadvertent end-run around copyright law as construed in *Bridgeman*, owners of collections now commonly assert what appear to be invalid copyright claims on uncopyrightable photographic reproductions of public domain paintings. By simply asserting copyright without taking further action, museums and art libraries have found a way to allow access to reproductions while still maintaining extensive control and deterring potential authors from actually using the uncopyrightable images. In doing so they manage to avoid both the ramifications of the *Bridgeman* decision and charges of copyright misuse. Indeed, they manage to maintain the rights of a copyright owner without having a valid copyright, without having to pursue litigation, and without having to pursue alternate theories of ownership.

Cameron, *supra* note 26, at 59.

266. *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 27 (underscoring the importance that the public "must also be free to make unfettered use of works after they enter the public domain"); Litman, *supra* note 11; Mazzone, *supra* note 10, at 1043–44 (estimating that consumers like public-school music-education programs and church congregations, for example, pay millions of dollars for public domain sheet music unnecessarily).

267. Mazzone, *supra* note 10, at 1059. "Citizens should be encouraged to reproduce and make use of public domain materials, not treated as though they are breaking the law." *Id.* at 1060.

268. *See L. Batlin & Son*, 536 F.2d 486, 492 (2d. Cir. 1976); *cert. denied*, 429 U.S. 857 (1976) (describing a public service in making available to the public an artwork whose original may never be seen); *see also* Broadway, *supra* note 80, at B9 (reporting that digitizing the Gutenberg Bible served to bring the first book printed in the West to the masses); Butler, *supra* note 2, at 59; Reese, *supra* note 24, at 1041 ("looking at a photographic copy is better than nothing" when it comes to viewing public domain paintings in the museums where the originals resides).

works were inaccessible—isolated in museums, churches, palaces, and private collections spread around the world."[269] With the advent of the Internet and the technology to create CD-ROMs today, the public has access to museums they would otherwise never visit.[270] Viewing Corbis's digital copies might increase public interest in viewing the originals.[271]

Increasing access and democratizing public domain art, however, are not explicit Corbis purposes.[272] Corbis's for-profit mission creates the most concern.[273] When museums digitize the art in their collections, use those reproduced images to create magnets, coffee mugs, calendars and the like, then falsely claim copyright in those digital reproductions, their non-profit and pro-public stature[274] seems to excuse their actions.[275] The revenues those non-profit

269. Butler, *supra* note 2, at 59; *see also* Broadway, *supra* note 80, at B9; Cameron, *supra* note 26, at 52 (The Getty's website has received 10.5 million visitors each year).

270. Butler, *supra* note 2, at 64; *see also* Broadway, *supra* note 80, at B9 (relating that the Library of Congress has digitized more than eight million books, films, baseball cards, photographs, audio recordings, letters, posters and other objects that are available on the Web Site "making it possible for anyone in the world to see materials they once had to visit the library to see or hear"); Landry, *supra* note 60, at 630 (stating that online publishing promises more direct access by a broad audience).

271. *See* Coates & Kilian, *supra* note 65 (quoting a Corbis CD-ROM narrator, "This will never approach the experience of the original, and shouldn't. . . . The glory is, in my own view, that it will send people flocking to the originals, as a result of their heightened interest and understanding."). *See also, e.g.*, CORBIS' FILM PRESERVATION FACILITY AND THE BETTMAN ARCHIVE, FREQUENTLY ASKED QUESTIONS, MARCH 2009 (2009), *available at* http://www.corbis.com/corporate/PressRoom/PDF/FPF-Bettman-FAQ.pdf (stating that the Bettman Archive has never been open to the public, but used by its owners as moneymaking assets, and now "[i]n reality, the large digital archive that Corbis has created enables a much larger audience to view the images than before.").

272. *See* Coates & Kilian, *supra* note 65 (quoting Bill Gates, "I do have a love of art . . . but this is also very much a business opportunity.").

273. *See* Appel, *supra* note 31, at 220 ("Another piece of the discussion about control concerns who will actually digitize the image—a for-profit corporation or a non-profit entity.").

274. *See* Tuchman, *supra* note 2, at 288 n. 6 (relating museums obligations and "fundamental duties to preserve and document the works, to conserve and display them, to interpret and contextualize them, and to publish the results").

Museums mostly have tax-exempt status as 501(c)(3) corporations and "are privately endowed and charitable trusts, charitable corporations, or non-profit organizations." *See* John Henry Merryman & Albert E. Elsen, *Museums*, *in* LAW, ETHICS, AND THE VISUAL ARTS, 640, 650 (2d ed. 1987). The theory of museums' tax treatment is because museums provide a service, direct or indirect, to the public. *Id.* "The mission of the not-for-profit museum today is largely educational . . . ." Tuchman, *supra* note 2, at 313; Allan, *supra* note 156, at 964 n.14; Museum Services Act, 20 U.S.C. § 9171 (2000) (denoting a "public service role" of museums to expose "the whole of society to the cultural, artistic, historical, natural, and scientific understandings that constitute our heritage"). *But see* Mazzone, *supra* note 10, at 1041–42 (calling museum gift shops some of the worst offenders of copyfraud).

Modern publishers hawk greeting card versions of Monet's water lilies, van Gogh's sunflowers, and Cezanne's apples—each bear a copyright mark. There is no basis for claiming copyright in mere copies of these public domain works. 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. . . . Postcards of works in [museum gift shop] collections often carry copyright notices even though physical possession of art does not equal copyright ownership.

Id.

On a recent day trip to NYC, I recreated Professor Mazzone's field trip to the Metropolitan Museum of Art, where I visited the Impressionist Gallery that houses many great pieces from the masters, including van Gogh and Monet. Then I went to the Met's gift shop, where sure enough, I found postcards of those masterpieces that bear the following: (c) symbol 2001 MMA. Even though the works were produced in the late 1800s and could not possibly be under copyright protection, the

entities generate from their reproduced-art novelties moreover, often go to support educational programs as well as overhead and operating costs.[276] While museums are claiming copyright in their digital art replica and memorabilia,[277] it appears that most are not actively protecting their digitized images through copyright infringement suits against the everyday consumer.[278]

Regardless of an entity's status as non-profit or for-profit,[279] owning a public domain work does not a copyright confer.[280] "[M]any archives claim to hold a copyright in a work merely because they possess a physical copy of the work."[281] Many archives of public domain images make digital copies of those works and attach false copyright claims to try to maintain "a kind of quasi-copyright-like control over the further use of materials in their holdings,

Met nevertheless stamps a copyright symbol on their postcards.

275. *See* Colin T. Cameron, *In Defiance of Bridgeman Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L. J. 31, 51 (2006) ("Most art lovers support museums and are willing to tolerate gift shops filled with art reproductions on mugs, posters, and magnets. This by no means implies that museums should be able to further restrict use of public domain images through copyright."); Tuchman, *supra* note 2, at 288 (reproducing art, for museums, has become integral to the execution of its obligations, prerogatives, and public mission).

276. *See* Tuchman, *supra* note 2, at 288 (creating and licensing ephemeral products, based on artwork in museums own collections provide funds for the balance of the institution's programs). "Licensing, while is has long existed in the form of printed souvenirs, has expanded recently in museums as it has in other areas of education, entertainment, and sports. Accordingly, the search is on within institutions to discover the most marketable images to photograph and exploit through printed reproductions." Tuchman, *supra* note 2, at 288. *See also* Cameron, *supra* note 26, at 50.

277. *See* Butler, *supra* note 2, at 74 ("The 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"); Mazzone, *supra* note 10, at 1042 n.81; Tuchman, *supra* note 2, at 312–313 (questioning what museums hope to gain with copyright claims in digital reproductions and concluding that museums want to evoke a "kind of generalized warning, not unlike the posting of a sign that says, 'beware of the dog'"). Museums, according to Tuchman, want to impede unauthorized copying and overprinting of images without proper credit to the named donors. *Id.* "In sum the core issue for museums has always been access and aesthetic control, not copyright, except as an instrumentality of that access and control." *Id.* at 313.

278. Cameron, *supra* note 26, at 52 (commenting that the Met and Getty museums appear not to be actively enforcing their false copyright claims in courts and not filing infringement suits). But there are exceptions. *See* Mazzone, *supra* note 10, at 1055 n.141 (relating how the Berkeley Historical Society demanded that Richard Schwartz, a photographer, take down the public domain photographs from the Society's collection that Schwartz used in his book).

It might also not be necessary for museums to actively litigate what they perceive their legitimate interests, the assertion alone "could create a tremendous chilling effect, regardless of whether actual litigation ensues." Cameron, *supra* note 26, at 52; Butler, *supra* note 2, at 76 ("Museums have relied on the in terrorem value of declarations of copyright rather than pursuing violations and incurring the costs of litigation and running the risk of establishing precedent that holds the copyrights to be invalid."). "One cannot measure the deterrent effect these copyright claims have on potential authors who would use the uncopyrightable reproductions to create new works." Cameron, *supra* note 26, at 52.

279. *See* Cameron, *supra* note 26, at 61 ("Defiance of the *Bridgeman* decision reveals the fine line between an art library or museum legitimately furthering its mission of cultural preservation and one misusing copyright to dominate a market."); Tuchman, *supra* note 2, at 288 ("Regardless of their administrative, educative, or pecuniary motivations for making reproductions, museums seek some rationale that will permit them to accomplish the seemingly contradictory goals of limitless public access (largely through the Internet) and commercial control. They seek to play . . . both sides of the intellectual property game.").

280. *See* 17 U.S.C. § 202 (2006) ("Ownership . . . does not of itself convey a copyright . . . in any material object."); Mazzone, *supra* note 10, at 1052 (citing 17 U.S.C. § 202 (2006)).

281. Mazzone, *supra* note 10, at 1052–53 (providing the example of the American Antiquarian Society, which contains one of the largest archives of early American materials, most of which are in the public domain).

comparable to the monopoly granted to the copyright owner . . . ."[282] While any owner of a public domain work may control and even deny access to it as well as limit copying of that work or impose conditions on how copies of that work are used,[283] "[i]t is wrong for archives to use their control over access to a work to assert a copyright in the work."[284]

On the other hand, the public wants high-quality reproductions of public domain paintings.[285] But to create digital versions of these masterpieces requires the investment of time, resources, and labor.[286] Without some incentives to help recoup costs, some entities might not recover their investment in creating the reproduction. [287] While this tension between the need for incentives to the publisher and the need for access to the public is interesting, ultimately, given the rarity of public domain originals, and the importance of access to them, it is paramount that no one copier corners the market on their reproductions.[288]

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282. Mazzone, *supra* note 10, at 1053–54 (quoting the President of the Society of American Archivists).

283. Mazzone, *supra* note 10, at 1056–57 n.142 (explaining that licenses of public domain works and enforcement of those licenses under state law should not presumptively be preempted by federal copyright because licenses serve a useful purpose: providing with "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." *Id. See also*, Tuchman, *supra* note 2, at 315 (quoting counsel for Corel Corp., defendant in *Bridgeman*: "'There are many things in the universe not protected by copyright, but there remains economic value in those things. Ease of access to high-quality images in the public domain guarantees that services such as Bridgeman's will endure.'").

284. Mazzone, *supra* note 10, at 1054–57. (providing "a refreshing exception: The Library of Congress appropriately makes clear it does not own copyrights in the materials in its collections.").

285. *See* Reese, *supra* note 24, at 1041–43 (emphasizing the importance of incentives to create high-quality reproducible images of public domain works, without which producers would never invest the time and resources in their production).

286. *See* Pessach, *supra* note 201, at 262 (comparing museums to organizations like Corbis and Getty Images).

> Overall, digitization of museums' collections is both an expensive and a technically complex process, especially for institutions which are not vested with considerable financial resources. Commercial digital images agencies, which are well aware of the economic potential that digital images of art works embrace, are willing to invest large amounts of money in producing and managing digital databases of museums' images.

Id.

287. *See* Reese, *supra* note 24, at 1047 (quoting scholars that "without a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used"); Pessach, *supra* note 201, at 278–79 (calling for a balance between the need to provide incentives to invest resources in the production of digital images versus the need to secure public access to cultural works that are already in the public domain).

288. *See* Butler, *supra* note 2, at 125 (citing Hearn v. Meyer, 664 F. Supp. 832, 840 (S.D.N.Y. 1987). *But see* Flores, *supra* note 31 (quoting the head of the Ansel Adams Publishing Rights Trust, claiming monopoly is not possible) "There are so many billions, or trillions, of photographs out there that nobody, not even Methuselah or Bill Gates, could corner the market." *Id.*

Teaching children about fine art and helping them access famous art to study is one reason why public domain works should not reside under the sole control of one or few entities. Providing vital information is one purpose of the International Child Art Foundation. This past June 2011, the 4th Annual World Children's Festival (WCF) convened on the National Mall. *World Children's Festival 2011*, INT'L CHILD ART FOUND., http://www.icaf.org/whatwedo/wcf.php (last visited Nov. 13, 2011). "Held every four years since 1999 as 'Olympics' of children's creativity and co-creation, the WCF has evolved into the largest international children's celebration and a permanent quadrennial event in our nation's capital." *Welcome to Washington! Welcome to the World Children's Festival*, CHILD ART, Apr.–June 2011, at 2. This festival has "important national and international

B. CREATING THE CORBIS MONOPOLY

Besides Getty Images, no other commercial entity, it appears, can compete with Corbis in the digital imaging business.[289] Many worry that Corbis (and Gates) will wield their power to block competition.[290] Copyright protection of art reproductions could "exert a de facto perpetual monopoly over the commercial reproduction of publicly owned works of art."[291] The copyright claim

> coming from a company owned by someone as powerful and perceived to be as ruthless as Gates is bound to be controversial—almost akin to West Publishing's belief that it can lay private claim to public court decisions by binding documents into volumes and stopping competitors from citing the page numbers on which decisions appear.[292]

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implications" as children from around the world "help produce a complete synthetic experience—a total work of art on The National Mall—by their dazzling performances, amazing art creations and displays, and their own workshops on issues they are most passionate about." *Id.* at 2–3.

289. *See* Appel, *supra* note 31, at 220 (remarking in 1999 that was the world's largest player in the realm of digitizing images."); Brad Holland, *First Things about Secondary Rights*, 29 COLUM. J.L. & ARTS 295, 305 (2006) (describing some grassroots artists' sentiments of "a hostile takeover of the illustration business"). "What had been a dowdy business has become a battleground between Corbis and Getty, companies controlled by two of the richest families on earth. Over the past several years, the two firms have been gobbling up smaller stock companies and now control at least 135 million images." *Id.* (quoting David Carr, *U.S. Eyes Bill Gates' Photo Collection*, THE INDUS. STANDARD, July 28, 2000); Teather, *supra* note 31 (reporting in 2005 that Corbis was second largest image library in the business, second only to Getty Images, founded by oil tycoon Mark Getty and his partner Jonathan Klein). *See also* Perry, *supra* note 46, at 682 n.58 (citing Kristi Heim, *Gates and Getty Battle for Control of World's Images*, SAN JOSE MERCURY NEWS, Mar. 4, 2000, at 1C). Reporters estimated in 2000, that Corbis and Getty Images owned the same number of digital images, at around seventy million. *Id.*

290. *See* Appel, *supra* note 31, at 222–224 ("In the meantime, although theoretically there are at least some alternative creators of digital images, it does not appear that any commercial entity is ready to enter the market to compete vigorously with Corbis.").

291. Reese, *supra* note 24, at 1044 (quoting Ronan Deazley, *Photographing Paintings in the Public Domain: A Response to Garnett*, 23 EUR. INTELL. PROP. REV. 179, 183 (2001)).

292. Copyright Debate, *supra* note 85, at 1. Indeed, federal courts disagree over whether West has a legitimate copyright (as a compilation or derivative work) in its arrangement and star pagination of judicial decisions, which are not in and of themselves copyrightable under the Copyright Act, 17 U.S.C. § 105. *Compare* West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1226–27 (8th Cir. 1986) (finding West's case arrangement and star pagination in its publication of judicial opinions the result of considerable labor, talent, and judgment to meet the originality requirement and warrant copyright protection) *and* Oasis Publ'g Co. v. West Publ'g Co., 924 F. Supp. 918, 924 (D. Minn. 1996) ("West's arrangement of cases in the *Southern Reporter* possesses the requisite creativity for copyright protection. Pagination of that arrangement is an integral part of the arrangement and shares in any copyright protection in the arrangement itself.") *with* Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 674, 677 (2d Cir. 1998) (declaring West's selection and arrangement of factual enhancements (parallel citations, attorney information, and subsequent history) were "obvious, typical, and lacking even minimal creativity" so no copyright) *and* Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 693, 708 (2d Cir. 1998) (declining to follow the Eighth Circuit's reasoning that West's arrangement and star pagination warranted copyright protection because that decision rested on a now-defunct "sweat of the brow theory") *and*

The lack of competition in the market for digital images means increased prices.[293] Although some worried that Corbis could be as successful in digital imaging market as Microsoft has been in the PC software business,[294] their fears are only partly justified—Corbis has never been profitable.[295] Nonetheless, Corbis reports revenues of millions of dollars each year.[296] How much of that is for public domain works that should be free for all to use?

With respect to its public-domain digitized reproductions, Corbis would better serve the public and improve its own image by employing a more philanthropic practice like Google Inc. or Yahoo!'s Flickr.[297] Those entities

United States v. Thomson Corp., 949 F. Supp. 907, 925–26 (D.D.C. 1996) (hailing West's claim to copyright in its star pagination as controversial and questioning the Eighth Circuit's reasoning in *West Publ'g Co. v. Mead Data Cent., Inc.*,799 F.2d 1219 (8th Cir. 1986) post *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)).

293. *See* Copyright Debate, *supra* note 85, at 1 ("Customers who want a particular image for a particular purpose will likely pay Corbis's price, if Corbis is the only seller in town, as it will invariably be for many of the images in its collection."); Mazzone, *supra* note 10, at 1060 ("Copyfraud affects pocketbooks by increasing the price people have to pay to obtain reproductions."); Reese, *supra* note 24, at 1044 (restricting others from making high-quality photos means that museums can charge higher prices than in a competitive market, which means "in at least some cases, the potential use will not be made. Some teachers will forego showing a slide of the painting in their classes . . . .").

294. *See* Homer, *supra* note 31 (predicting that Bill Gates could be on his way to a second fortune). *See also* Appel, *supra* note 31, at 222.

> To the extent that Microsoft has shown a striking ability to dominate parts of the computer markets, such as those for computer operating software, some museums and others have expressed concern that a similar pattern of dominance could develop in the emerging market for commercially exploitable digital image databases, in light of the involvement of Bill Gates in both Microsoft and Corbis.

Id. For a discussion of the antitrust dispute that surrounded Microsoft in the 1990's, from Gates's perspective, see Janet Lowe, *Computer Wars*, *in* BILL GATES SPEAKS: INSIGHT FROM THE WORLD'S GREATEST ENTREPRENEUR, 86–118 (John Wiley and Sons, 1998).

295. Daryl Lang, *Hard Times for Stock Continue: Corbis to Cut Royalty Rate*, PHOTODISTRICTNEWS, Oct. 25, 2008 ("Corbis, which is owned by Bill Gates, has never turned a profit, though executives said the company's financial shape is improving."). *See also supra* notes 41–42.

296. Corbis itself provides clarification for this disparity between generating millions of dollars of revenues each year but never attaining profitability. *See* Press Release, *Corbis Unveils Vision for the Future*, CORPORATE.CORBIS.COM (Mar. 14, 2006), http://corporate.corbis.com/news/press-releases/2006/corbis-unveils-vision-for-the-future/ (last visited Oct. 7, 2011) ("Corbis reported 2005 revenue in excess of $228 million, a 34% increase over the $170 million in 2004. While these numbers and activities are significant the investments Corbis chose to make and shortfalls in expected revenues forced them to push out their profitability goal."). *See also supra* notes 41–42.

297. Because Corbis is not necessarily profitable, mostly breaking even financially, returning to a public interest model for its public domain works would help Corbis's image. *See* Teather, *supra* note 31 (reporting in 2005 that because Corbis had yet to "turn a profit" that it was attempting "to raise its profile as Mr. Gates grooms it for a possible stock market flotation."). Indeed, employing such a strategy for Corbis's public domain reproductions would be more consistent with Mr. Gates's personal philanthropic practices and goals. *See supra* note 30 (recounting some of Gates's philanthropy); Lowe, *supra* note 30, at 176–77 (relating Gates's hope in the Gates Library Foundation to "bridge the gap between those who have access to vital information and those who do not.").

Corbis already has a philanthropic spirit. *See also* CORBIS IMAGE DONATION PROGRAM, http://www.corbis.com/bettmann100/ImageDonation/ImageDonation.asp (last visited Aug. 22, 2011) (describing Corbis Image Donation Program).

> Started in 2003, the Corbis Image Donation Program allows non-profit organizations or agencies doing pro bono work on behalf of a non-profit organization to license Bettmann Collection images free of charge (up to 20 per year per organization) to tell their stories and promote their causes. Images may be used for brochures, invitations, exhibits, documentary films, and many other

have provided a significant public benefit: Google Inc. has digitized and made available at least two million public domain books,[298] and Yahoo!'s Flickr has invested in Flickr Commons service, where individual members can take public domain photographs to create new works for personal *and* commercial uses.[299] Finally, another example of benevolence comes from the Prelinger Archives, whose films document historical and pivotal moments in U.S. history, and whose films "are widely used in elementary, secondary, college, and university teaching and by homeschooling families who may be unable to purchase commercial educational materials; are shown regularly as part of museum exhibits; and are played on radio and television."[300] "All of these commercial actors invest time and money with the expectation that public domain materials will remain free of copyright encumbrances."[301]

CONCLUSION

projects.

Id.

298. *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 20 (citing Competition and Commerce in Digital Books: Hearing before the H. Comm. on the Judiciary, 110th Cong. 3 (2009)).

299. *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 21.

Created in 2008, Flickr and the Library of Congress partnered with a two-fold mission: "1. To **increase access** to publicly-held photography collections, and 2. To provide a way for the general public to **contribute information and knowledge**. (Then watch what happens when they do!)." *More About the Commons*, FLICKR.COM, http://www.flickr.com/commons#faq (emphasis in original) (last visited Aug. 18, 2011). In its Rights Statement, Flickr explains its use of the disclaimer "no known copyright restrictions":

The copyright is in the public domain because it has expired;

The copyright was injected into the public domain for other reasons, such as failure to adhere to required formalities or conditions;

The institution owns the copyright but is not interested in exercising control; or

The institution has legal rights sufficient to authorize others to use the work without restrictions.

About the Rights Statement, FLICKR.COM, http://www.flickr.com/commons/usage/ (last visited Aug. 18, 2011). Flickr further explains:

Photographs can be difficult to analyze under copyright law, not only because laws around the world differ with respect to scope and duration of protection, but because the photographs themselves often lack credit lines, dates and other identifying information. Libraries, museums and other cultural institutions have a great deal of experience with photographs because they frequently collect, preserve, document and study them in accordance with their nonprofit missions. However, in many instances, a cultural institution will not be the rights holder under copyright law. Therefore, it can neither grant permission to others who wish to use a photograph nor provide a guarantee that the photograph is in the public domain.

BY ASSERTING "NO KNOWN COPYRIGHT RESTRICTIONS," PARTICIPATING INSTITUTIONS ARE SHARING THE BENEFIT OF THEIR RESEARCH WITHOUT PROVIDING AN EXPRESSED OR IMPLIED WARRANTY TO OTHERS WHO WOULD LIKE TO USE OR REPRODUCE THE PHOTOGRAPH. IF YOU MAKE USE OF A PHOTO FROM THE COMMONS, YOU ARE REMINDED TO CONDUCT AN INDEPENDENT ANALYSIS OF APPLICABLE LAW BEFORE PROCEEDING WITH A PARTICULAR NEW USE.

Id. (emphasis in original).

300. *See* Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 23–25 (denoting Prelinger Archives's purpose, in part, "to acquaint younger generations with the experiences of their parents, grandparents, and great-grandparents.").

301. Brief for Public Domain Interests as Amici Curiae Supporting Petitioners, *supra* note 12, at 21.

Corbis cannot and should not claim copyright in its digital reproductions of works in the public domain. The digitized images are not original, nor do they contain a distinguishable variation. Asserting copyright in those digitized images destroys the public's right of access to public-domain works, chills expression, and grants Corbis a monopoly in what belongs to us all. Instead, Corbis should enhance the public domain with its mighty collection of significant works[302], which have the power to educate and stimulate the people and foster a free marketplace of ideas. The public should be aware, in the meantime: the purpose of copyright is to protect against the seemingly mischievous copier intent on cornering the market of public domain works.[303]

302. *See* Pessach, *supra* note 201, at 263 ("*Corbis* and *Getty Images*, also manage digital collections with significant cultural values that museums could benefit from.").

303. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976) ("To extend copyrightability to miniscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.").