The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain

Mary Campbell Wojcik
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*by*

MARY CAMPBELL WOJCIK

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1. Introduction

The Bridgeman Art Library bills itself as "the world’s richest, most reliable and most prestigious source of fine art images covering every media, period, movement and style throughout the history of art."¹ A British company with offices in New York, London, Paris, and Berlin, Bridgeman has amassed a vast library of high-quality photographic reproductions of famous paintings and photographs.² For a fee, Bridgeman

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² Bridgeman Art Library, Ltd. v. Corel Corp., 25 F.Supp.2d 421, 423 (S.D.N.Y. 1998). Bridgeman obtains its reproductions of these images—in the form of either large format color transparencies or digital files—directly from the owners of the original works or by assignment from freelance photographers that it hires specifically for this purpose. *Id.* at 423-24.
will both provide you with one of these copy images and license you to reproduce it. If, for example, you are an art historian publishing a book about the nineteenth-century American painter Thomas Eakins, you will undoubtedly need numerous reproductions of Eakins’ paintings to accompany your text, as well as works by other artists to serve as points of comparison. Critically, these reproductions will constitute an integral part of your writing. Far from merely aestheticizing the reading experience, images form the very basis of an art historian’s argument. The ability to juxtapose reproductions—and specifically good reproductions—of Eakins’ paintings with your writing will not simply enable your academic publication to do double duty as a coffee table book. To the contrary, the combination of image and text will determine both the clarity and the nuance of the positions you are able to stake. Without pictures, in other words, the full force of art historical argument fails. One should be thankful, then, that for approximately $240 a picture, Bridgeman is willing to provide scholars with the images and licenses they need.3

Or should we? Eakins, after all, was born in 1844, died in 1916, and the first catalog raisonné of his work was published in 1933.4 Even in the Byzantine morass that constitutes the American copyright system—a system where the 1978 shift from a publication to a creation standard can lead to photographs taken in 1855 enjoying copyrights that do not expire until 20475—this should place Eakins’ oeuvre squarely within the public domain. Under the explicit terms of both the Copyright Act and the Constitution, therefore, everyone—scholars and laypeople alike—should be free to “reproduce, prepare derivative works from, [or] distribute”

3. When I inquired about the fees Bridgeman would charge me as an art history graduate student to provide and license copies of several Jacques-Louis David (1748-1825) paintings, the Picture Research/Rights department informed me that their lowest—or academic—rate was $150 or $300 per image, depending upon whether the picture was to be reproduced inside or on the cover of the text, respectively. Presumably this rate does not include the non-refundable service fee (minimum $40) that Bridgeman adds to every order, nor the non-refundable $50 delivery fee that Bridgeman levies if one decides to have one’s images delivered electronically. See The Bridgeman Art Library – Terms and Conditions of Submission and Reproduction of Photographs, cl. 2, 3, http://www.bridgeman.co.uk/register/usterns.htm (last visited Jan. 16, 2008) [hereinafter Terms and Conditions]. To qualify for the company’s academic discount, I would need to use the images for either my dissertation or a scholarly journal article. For the record, Bridgeman still has not gotten back to me about how much it charges for the Mona Lisa.

4. LLOYD GOODRICH, THOMAS EAKINS: HIS LIFE AND WORK 1 (William Edwin Rudge, Inc. 1933); see generally id.

5. As is the case with Charles Dodgson, a.k.a. Lewis Carroll, who today is (in)famous for his photographs of little girls. For a discussion of the Dodgson example, see SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 12-31 (University of Chicago Press 2006). Bielstein is the Executive Acquiring Editor for Art, Architecture, Classics, and Film at the University of Chicago Press, and her book provides a blessedly clear discussion of the American publication/creation maze.
copies of Eakins paintings. How, then, can Bridgeman legally require its image users to agree that, “any reproduction or use of the Photographs or Reproductions” contrary to the terms of its licensing agreements, “will be an infringement of copyright”? Moreover, how can it maintain this position when a district court in the Southern District of New York has twice held that Bridgeman possesses no copyright interest in its exact photographic reproductions of two-dimensional public domain images? 

Finally, why does Bridgeman have a market for its services at all? If the public domain truly is public, why the need for the middle man? In this age of digital cameras, home scanners and Photoshop, why do art historians who work on public domain material still typically spend thousands of out-of-pocket dollars in image fees and copyrights in order to get a single book published?

This article seeks to provide answers to these questions. Beginning with an analysis of the Southern District’s holding in the two Bridgeman opinions, this article examines the reaction that the decisions have incited among various art image licensors, specifically the Bridgeman Art Library itself and various major museums. Focusing on the way in which these entities have fallen back on evasion, denial, and, importantly, contract to shore up questionable copyrights, this article argues that the art historical and legal communities need to act now if they want to preserve meaningful, productive access to public domain artworks. In the absence of such action, Bridgeman’s response, or more accurately, lack of response to the Southern District’s ruling could very well represent the future of public domain imagery.

6. U.S. CONST. art. I, § 8, cl. 8, authorizing Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” (emphasis added); 17 U.S.C. §§ 106, 501(b) (2000).

7. Terms and Conditions, supra note 3, at cl.12.


9. Hilary Ballon, an art history professor at Columbia, and Mariët Westermann, an art history professor at the Institute of Fine Arts, NYU, observe, “[a] monograph with 100 illustrations might well cost its authors $5,000.00 or more in permissions costs after the images are purchased. For books on modern and contemporary art, that number is likely to be considerably higher.” Scholars in the field are expected to shoulder this financial burden themselves, although subvention grants are sometimes available to mitigate the expense. See Hillary Ballon & Mariët Westermann, Art History and Its Publications in the Electronic Age, Permissions and Fees (Rice University Press 2006), available at http://cnx.org/content/m13940/latest/.
II. Development of the Bridgeman Doctrine

A. Bridgeman Art Library, Ltd. v. Corel Corporation.

In 1997, a dispute arose between Bridgeman and Corel, a Canadian computer software company. At issue was Corel's seven-CD-ROM set containing hundreds of digital reproductions of famous paintings by European masters. Approximately one hundred and twenty of these reproductions were of paintings of which Bridgeman also held photographic copies, copies that it licensed its clients to use pursuant to very specific contractual requirements. Bridgeman eventually brought suit against Corel, claiming that it held copyrights in these reproductions and that Corel's digital images violated them. Despite the complexity surrounding the choice of law issue, the key element that Bridgeman needed to prove under either British or U.S. law was originality. In order to succeed on the merits, Bridgeman was required to establish that its reproductions were sufficiently original to qualify for copyright protection. Moreover, the district court found that U.K. and U.S. law defined "originality" in a virtually synonymous fashion, with both obligating Bridgeman to demonstrate that its photographic reproductions "owed [their] creation to the author and [were] not merely copied.

Bridgeman never contested that the paintings that it reproduced and licensed—which included the Mona Lisa—lay squarely in the public domain. It maintained, however, that these copies possessed sufficient originality, in and of themselves, to qualify for copyright protection. In other words, Bridgeman asserted its right to brand its exact reproduction of Leonardo's masterpiece, painted sometime between 1503 and 1507, with a late twentieth-century copyright.

10. See Bridgeman, 25 F.Supp.2d at 424.
11. Id. at 423-24.
12. Id.
13. Id. at 425 ("[t]o establish copyright infringement under the Copyright Act of 1976, the plaintiff must establish ownership of a valid copyright and copying.").
14. See id. at 427 n.41 ("As does the U.K. Act, the Copyright Act extends protection only to 'original works of authorship.'"") (citing 17 U.S.C. § 102(a) (1998)).
15. Id. (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)). See also, id. at 426 ("[t]o be original, a work 'need not be original or novel in form, but it must originate with the author and not be copied from another work.'") (citing The Copyright, Designs and Patents Act, 1988, ch. 1, § 1(1) (UK)). As the Feist Court held, "The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author." Feist, 499 U.S. at 345.
17. Id. at 424.
In support of this position, Bridgeman advanced several distinct arguments. As a primary matter, Bridgeman asserted that the change in medium from painting to photograph that necessarily occurred as it copied the Old Masters rendered the resultant reproductions sufficiently original to qualify for copyright protection. Alternatively, it asserted that the color correction bars that it included with its reproductions were enough to lend its copy images the requisite originality. Bridgeman further insisted that the court should construe the fact that the British Register of Copyrights had issued a certificate of registration for one of Bridgeman’s reproductions as conclusive proof that its images were copyrightable. Finally, Bridgeman argued that photography itself constituted an inherently original practice, presumably implying that any photograph fell or would fall within the legitimate domain of copyright.

The court rightly rejected all of these arguments, granting summary judgment in favor of Corel. In fact, it did so twice, once pursuant to British law and then again pursuant to American copyright doctrine. In both of its opinions, the court explicitly held that a change in medium alone would not confer sufficient originality to entitle a work to copyright protection. In the words of the court, “the change of medium is immaterial.” As the court elaborated, “a copy in a new medium is

18. id. at 426 (“Bridgeman nevertheless, claims that its works are original. It argues first that the variation in medium establishes sufficient variation from the underlying works to support originality.”).
19. id. at 427 (“Plaintiff next argues that its images are original because of the attached color correction bars.”). Such bars appear as a multicolored strip attached to an image. Because the colors in the strip are standardized, they allow one to determine whether any distortion has occurred in an image’s own color and to adjust accordingly. As such, color correction bars constitute an added technology rather than any sort of meaningful alteration of an image itself.
21. See Bridgeman, 25 F.Supp. 2d at 427 (“Finally, plaintiff argues that photography requires artistic talent and originality and therefore would have the Court conclude that its transparencies—photographs of underlying works of art—are original.”). Additionally, on reconsideration, Plaintiff argued that the district court had misconstrued British copyright law by failing to follow the Graves’ Case, (1869) LR 4 QB 715, which stated “All photographs are copies of some object, such as a painting or statute. And it seems to me that to copy it is an infringement of the statute.” Id. at 722. Judge Kaplan dismissed this argument, noting that Bridgeman had failed to consider “the antiquity of the Graves’ Case and the subsequent development of the law of originality in the United Kingdom.” 36 F.Supp.2d at 199.
22. Id. at 430; Bridgeman, 36 F.Supp.2d at 200.
23. Judge Kaplan initially ruled that British law governed the issue at hand, stating, however, that the court would have reached the same conclusions under U.S. law. Bridgeman, 25 F.Supp.2d at 426-427, n.47. Pursuant to Bridgeman’s motion for reconsideration, the court found that U.S. law properly governed, using its second opinion “to give a somewhat fuller statement of the Court’s reasoning.” Bridgeman, 36 F.Supp.2d at 195.
24. Bridgeman, 36 F.Supp.2d at 199. See also, Bridgeman, 25 F.Supp. at 427 (“The mere reproduction of a work of art in a different medium should not constitute the required originality..."
In striving to provide its clients with absolutely accurate reproductions of public domain paintings, Bridgeman not only failed to make such a contribution but actively took great pains to avoid it. At trial, Lady Bridgeman, the plaintiff's principal, had testified "that the goal of the transparencies is to be as true to the original work as possible," and in its memo in opposition to summary judgment, Bridgeman had argued "that in creating the transparencies..., Bridgeman strives to make the transparency look as identical to the underlying work of art as possible..." In refusing to attribute originality to these laborious efforts at absolute accuracy, the court simply declined to allow Bridgeman to play both sides of the coin.

Although the court found it unnecessary to reach the issue of the originality of Bridgeman's inclusion of color correction bars in its reproductions, it suggested that it would have rejected this argument on similar grounds. As Judge Kaplan found, "[t]he color bars... are employed to make sure that the transparency is a genuine reflection of the colors of the original work of art." As for Bridgeman's argument concerning its British certification of copyright registration, the court deemed this position "misguided," holding that the presumption of copyright validity that such registration conferred had here been rebutted. Finally, the court declined to adopt Bridgeman's sweeping declaration that all photographs are innately original and therefore inherently copyrightable. "To be sure," the court observed, "much, perhaps almost all, photography is sufficiently original to be subject to copyright..." But one need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. That is not to say such a

for the reason that no one can claim to have independently evolved any particular medium. As discussed above, the law requires "some element of material alteration or embellishment" to the totality of the work. At bottom, the totality of the work is the image itself, and Bridgeman admittedly seeks to duplicate exactly the images of the underlying works.

26. Id. Indeed, this only makes sense. One can only imagine the quick drop off in client satisfaction that Bridgeman would experience if its copy photographers took to introducing their own, original elements into their reproductions of various El Grecos and Vermeers.
27. "The Court, however, need not decide whether Bridgeman's images are copyrightable to the extent of this feature. As indicated below, even if the images with color bars attached are copyrightable, they may be infringed only by reproduction of Bridgeman's unique variation, the color bars. As Corel's images do not include correction strips, their significance for copyrightability is academic in this case." Bridgeman, 25 F.Supp.2d at 428.
28. Bridgeman, 36 F.Supp.2d at 199 (internal quotation omitted).
29. Id. at 200.
feat is trivial, simply not original. The more persuasive analogy is that of a photocopier."

B. *Bridgeman* in Other Courts.

Confronted with this unambiguous double ruling that it held absolutely no copyright interest in the public domain images it licensed, Bridgeman chose not to appeal. Instead, the company allowed Judge Kaplan's two opinions to stand uncontested at the district court level, the reasoning of a single trial judge that other courts can either adopt or reject as they see fit. As this article discusses below, this has proved to be exceptionally sound strategy, both for Bridgeman and for other image licensors. Despite the solidity of Judge Kaplan's logic, neither of the *Bridgeman* opinions has been cited extensively outside of New York, nor have they been affirmed at the appellate level. Although no current case calls either *Bridgeman* into question on the issue of originality and copyrightability, the two rulings have only been cited three times in published opinions on the relevant issue, in each instance by the Southern District of New York. In *Mannion v. Coors Brewing Co.*, the court relied on both *Bridgeman* opinions for the principle that no copyright inheres in images that seek to accurately reproduce paintings that have passed into the public domain. In *Eastern America Trio Products, Inv. v. Tang Electronic Corp.*, the court used the 1999 *Bridgeman* ruling to support the uncontroversial doctrine that the law grants "a very broad scope for copyright in photographs, encompassing almost any photograph that reflects more than 'slavish copying.'" And in *Diamond Direct, LLC v. Star Diamond Group, Inc.*, the Southern District again cited the 1999 *Bridgeman* opinion as precedent for both the originality requirement imposed by copyright law and the rebuttability of the *prima facie* presumption of validity conferred by copyright registration. Unfortunately, the other extant case that endorses *Bridgeman*'s treatment of originality, copyrightability, and the public domain was issued as unpublished opinion and therefore provides an uncertain measure of precedent for future legal proceedings.

31. Perhaps it is a bit ungenerous to observe here that it is always, in fact, Judge Kaplan who cites *Bridgeman*.
35. In *Schiffer Publ'g., Ltd. v. Chronicle Books, LLC*, 2004 WL 2583817 (E.D.Pa. Nov. 12, 2004), a district court in the Eastern District of Pennsylvania was confronted with the question of originality in the context of photographs of textiles. According to the plaintiffs, the defendants,
Despite the paucity of explicit affirmation, several cases throughout the country do implicitly adopt *Bridgeman*'s logic. The most authoritative of these is the Sixth Circuit's decision in *ATC Distribution Group v. Whatever It Takes Transmissions & Parts.* In this case, ATC, a seller of automobile transmission parts sued its competitor Whatever It Takes Transmission & Parts and an employee for copyright infringement and various state law torts. The district court granted summary judgment for the defendants on almost all of ATC's claims, and ATC appealed. The Sixth Circuit affirmed the district court's judgment in its entirety. Most importantly, the appellate court ruled that ATC lacked a valid copyright in

Chronicle Books, infringed plaintiffs' copyrights in photographs of fabric swatches when they copied these images in their book, *1000 Patterns,* without permission or compensation. *Id.* at *1.* In its defense, Chronicle Books invoked *Bridgeman I,* arguing that, like Bridgeman, plaintiffs sought "simply to create accurate facsimiles of the fabric designs," a form of slavish copying not entitled to copyright protection under the law. *Id.* at *8.* The court disagreed. Critically, however, in so doing it did not question the logic of *Bridgeman* but rather distinguished the facts of Schiffer's case. As the court held:

> Bridgeman's stated purpose was to reproduce precisely the underlying works of art. Indeed, the goal of reproducing a famous work of art is an accurate replication that is faithful to the original artwork. There is no ulterior creative purpose--indeed, creativity is anathema to that goal. Plaintiffs, by contrast, did not attempt to replicate fabric swatches as precisely as possible. Rather, Plaintiffs' books were focused mainly on patterns, and Plaintiffs' photographers strove to create images that were visually interesting. In fact, several photographers clearly stated that they never compared the fabric swatches to their photographs, precisely because such a comparison was unimportant to their goals.

*Id.* (internal citations omitted). (The court also distinguished the two cases on the basis of the first *Bridgeman*’s reliance on English law, see *id. *, a distinction that lacks force in light of both Judge Kaplan’s statements that his judgment would have been the same under American law and his eventual decision to that effect in the second *Bridgeman* opinion). As such *Schiffer* affirms the first *Bridgeman* decision, albeit implicitly. The court’s careful articulation of the factual reasons why Plaintiffs’ images fell outside *Bridgeman*’s exception to copyrightability stands as a tacit acceptance of precisely this exception. This is particularly true in light of the court’s subsequent holding in the Schiffer matter. See *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC,* 2005 WL 1244923 (E.D.Pa. May 24, 2005). Pursuant to its finding that Chronicle Books did, in fact, infringe Schiffer’s copyrights in its fabric photos, the court awarded Schiffer $150,000 in statutory damages and permanently enjoined Chronicle Books from selling their book *1000 Patterns* within the United States. *Id.* at *1.* Schiffer subsequently moved for costs and attorneys’ fees, arguing, *inter alia,* that “Defendants advanced an objectively unreasonable legal argument by asserting that the so-called ‘flat photography’ employed by Plaintiffs was not copyrightable.” *Id.* at *5.* The court rejected this argument, explaining that “photographs are not per se copyrightable” and that “the *Bridgeman* decision gave Defendants some legal basis for their position . . . . Although the attempt failed, it served to clarify the extent of the Copyright Act’s protections, which furthered the development of Copyright law.” *Id.* In other words, *Bridgeman* might not have applied to the facts of the *Schiffer* case, but it stood as good law.

37. *Id.* at 702-03.
38. *Id.*
the illustrations of transmission parts that it included in its catalog. As the court held:

The illustrations in the catalog are hand-drawn sketches of transmission parts, copied from photographs cut out of competitors’ catalogs . . . . The illustrations in ATC’s catalog fall far short of the ‘substantial variation’ required to justify copyright protection. The illustrations were intended to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality.\(^\text{39}\)

Although the ATC court did not cite either Bridgeman opinion, its holding is completely consonant with Judge Kaplan’s reasoning. As in both Bridgeman decisions, the court denied copyright protection to reproductions that sought to faithfully and transparently convey an underlying, uncopyrighted picture; as in Bridgeman, the court found that no originality inhered in such slavish reproductions. Critically, ATC is a Sixth Circuit decision. It therefore provides strong appellate precedent for the position that one holds no copyright interest in substantially exact copies of public domain images.

Additionally, as of this writing, two district court cases have cited ATC on the issue of copyrightability. In Decker Inc. v. G & N Equipment Co., a district court for the Eastern District of Michigan refused to grant the defendant’s motion for summary judgment on the issue of copyright infringement. The court ruled that, unlike the illustrations at issue in ATC, the photographs in the instant matter potentially involved a measure of

\(^{39}\) Id. at 713 (citing J.Thomas Distribs., Inc. v. Greenline Distribs., Inc., No. 95-2100, slip op., 1996 WL 636138 at *2 (C.A.6 (Mich.) Oct. 31, 1996). Like ATC, J. Thomas is a Sixth Circuit opinion that supports Judge Kaplan’s reasoning in Bridgeman. Unfortunately, like Schiffer, J. Thomas is an unpublished slip opinion. In J. Thomas, the Sixth Circuit affirmed the district court’s grant of summary judgment of no copyright infringement. A distributor of replacement parts for power landscaping equipment, J. Thomas sued another such distributor, Greenline, for copyright infringement. According to J. Thomas, Greenline’s mail-order catalog infringed J. Thomas’s copyrights in its own catalog, specifically J. Thomas’s rights in the section listing lawn mower replacement belts and a particular drawing of a spindle. See, J. Thomas, No. 95-2100, slip op. at *1. In affirming summary judgment in Greenline’s favor, the Sixth Circuit held:

The drawing of the spindle bearing . . . fails to meet the minimum level of originality and creativity required for copyright protection. Although reproductions are generally entitled to copyright protection, the initial reproduction still requires a minimum level of originality and creativity which plaintiff did not meet. Plaintiff’s spindle bearing was drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing. Its reproduction involved absolutely no creative spark whatsoever. Furthermore, cut-away drawings like plaintiff’s drawing of the spindle bearing are common in mail-order catalogs in the industry. Plaintiff’s inclusion of the drawing in its catalog is entirely unoriginal. In essence, the drawing is neither original nor creative. Therefore, copyright law provides it no protection.

Id. at *2 (internal citation omitted).
originality sufficient to invoke copyright protection. In distinguishing the facts from those in ATC, however, the court appears to have affirmed the latter's holding that slavish reproductions are not copyrightable.

Similarly, in Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., a district court for the District of Utah held that copyright law did not protect three-dimensional digital models of Toyota cars when those models were intended to resemble the commercial product as closely as possible. Relying on ATC, the court held that because plaintiff's images were intended to be "production-accurate representation[s]" that did not involve "the introduction of new creative elements" they lacked the originality requisite for copyright protection. This amounts to an implicit affirmation of Judge Kaplan's reasoning in Bridgeman. After all, what are straight photographs of public domain art works if not "accurate representation[s]" of underlying images that intentionally avoid "the introduction of new creative elements"?

It is important here to observe that as Bridgeman's logic is developed in the jurisprudence of heavy machinery, a reproduction's originality—and therefore its copyrightability—ceases to depend upon whether the underlying work exists in two or three dimensions. In denying copyright protection to Bridgeman, Judge Kaplan held, "Plaintiff's problem here is that it seeks protection for the exception that proves the rule [that the majority of photographs are copyrightable]: 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." Elsewhere in his 1999 opinion, Judge Kaplan stated, "[i]here is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. 'Elements of originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.'" Such statements have led commentators to read Bridgeman as inapplicable to public domain sculpture.

42. Id. at *4.
43. Bridgeman, 36 F.Supp.2d at 199 (emphasis added). See also, id. at 196 n.31 ("[a]s the Nimmers have written, there 'appear to be at least two situations in which a photograph should be denied copyright for lack of originality,' one of which is directly relevant here: 'where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying.'") (emphasis added).
44. Id. at 196 (citing Rogers v. Koons, 960 F.2d 301, 307 (2d Cir.), cert. denied, 506 U.S. 934 (1992)).
In relying so heavily on the underlying work's flatness, Judge Kaplan unfortunately implied that reproductions of three-dimensional artworks—which necessarily require choices of lighting and angle to cope with the object's volume in space—possess sufficient originality to qualify for copyright protection. In this respect, the machinery cases do not simply affirm Bridgeman's logic but rather extend it. By basing their originality analysis on the alleged copyright holder's intent to accurately convey an underlying work through reproduction rather than on questions of dimension, these cases actually provide stronger precedent for the uncopyrightability of reproductions of public domain sculpture than Bridgeman itself.

In summary, the law is becoming increasingly clear: one possesses no copyright interest in reproductions of public domain works when these reproductions do nothing more than accurately convey the underlying image. This is not to say that such accurate conveyance requires no skill or effort; it simply means that such skill and effort does not suffice to invoke the highly advantageous legal monopoly granted under the Copyright Act. In the words of the Supreme Court, "copyright rewards originality, not effort. As this Court noted more than a century ago, 'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'"46 Clearly, the law does not contemplate Bridgeman and similarly situated image licensors being rewarded in this way, either.47 Unfortunately, however, neither could the law have contemplated the audacity and disregard with which Bridgeman has met the Southern District's ruling its case. And, as this article argues below, in the absence of such legal contemplation, entities like Bridgeman and certain major museums find themselves free to both demand exorbitant "copyright" fees from image users and, in the process, constrict the public domain.

45. "Plaintiff's spindle bearing was drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing," J.Thomas Distribs., Inc. v. Greentline Distribs., Inc., No. 95-2100, slip op., 1996 WL 636138 at *2 (C.A.6 (Mich.) Oct. 31, 1996); "Meshwerks's intent was to replicate, as exactly as possible, the image of certain Toyota vehicles," Meshwerks, 2006 WL 2623935 at *4; "[t]he illustrations were intended to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality," ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 713 (6th Cir. 2005)(emphasis added).


47. Such entities include Art Resource, Scala, Corbis, and Getty Images.
III. Responses to Bridgeman

A. The Bridgeman Art Library.

In parsing the conditions that Bridgeman incorporates into all of its American image licenses, one gets no sense that any question exists as to Bridgeman’s intellectual property rights in its copy images, much less that a federal district court has twice held that Bridgeman holds no such legal interest in its reproductions of public domain works. Or maybe one does get some small hint that something is amiss. Because, upon closer examination, the interest that Bridgeman asserts in its reproductions is deeply ambiguous. In Clause 19, for example, Bridgeman emphatically disavows any warranty that it holds copyrights in these reproductions. As it declares:

[Bridgeman] does not make or give either expressly or impliedly any warranties that any rights to reproduce the paintings depicted in the photographs have been granted nor does it warrant that no third parties own rights in the paintings therein depicted. The copyright holder concerned must be approached and their permission must be sought by the client. The supplier charges a fee only for providing access to the photographs.

Bridgeman here claims to charge its customers solely for the privilege of physical access, for the right, presumably, to receive and use the company’s high-quality, publication-suitable reproductions. Such a claim appears to be both consistent with the Southern District’s holding in Bridgeman and the legitimate subject of contract.

What, though, should one make of Clause 21 of Bridgeman’s Terms and Conditions? Here Bridgeman states that any breach of its licensing

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48. Bridgeman lists these at the bottom of its website, www.bridgeman.co.uk, under the heading “terms and conditions americas.” The company clearly intends these conditions to function as binding contractual provisions, to the extent that it provides that when one consents to the reproduction of any of Bridgeman’s copy images “such consent shall be subject to the terms and conditions set out in the invoice and any specific agreement in respect thereof and the provisions set out in these terms and conditions.” Terms and Conditions, clause 12 (emphasis added). Interestingly, all first-time Bridgeman customers are assumed to automatically assent to all of Bridgeman’s terms and conditions if they fail to return its copy images within a five- to seven-day window. See Terms and Conditions, supra note 3, at p.1. Moreover, any returning customer is presumed to have automatically consented by force of his or her repeat business. See id.

49. Bridgeman could, technically, possess valid rights in certain of its images. The owner of the copyright in the underlying work, for example, could assign that copyright to Bridgeman. Moreover, it could exclusively license Bridgeman to make copies of its work. No such right could outlast the original copyright, however, leaving all reproductions of public domain images free and clear.

50. Terms and Conditions, supra note 3, at cl. 19 (all caps in original, emphasis added).
agreements “will be an infringement of copyright . . .” Whose copyright? On what ground? Is Bridgeman honestly claiming that, in the absence of any valid U.S. copyright in its reproductions, it can create its own copyright regime via contracts distributed in the United States? Such claims clearly lack legal basis. As this article discusses in more detail below, the Copyright Act stands as the exclusive source of protection “for all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . .” As section 301(a) of Title 17 explicitly provides, “no person is entitled to any such right or equivalent right . . . under the common law or statutes of any State.” There is no way, in other words, that Bridgeman can legitimately use the common law of contract to effectively bypass the Southern District’s ruling.

Unfortunately, the key term here appears to be “legitimately.” Because one could argue that such a contractual bypass is precisely what Bridgeman constructs with its Terms and Conditions.

Laying out specific parameters of its image licenses, Bridgeman emphatically states, “THE COPYING OR REPRODUCTION BY WHATEVER MEANS OF THE PHOTOGRAPHS IS STRICTLY FORBIDDEN WITHOUT THE SPECIFIC WRITTEN CONSENT OF [BRIDGEMAN].” Critically, Bridgeman defines “reproduction” in a way that essentially recreates the fundamental rights granted by the Copyright Act. Under 17 U.S.C. § 106, “the owner of [a] copyright . . . has the exclusive rights” to, among other things: (1) “reproduce the copyrighted work”; (2) “prepare derivative rights based upon the copyrighted work”; (3) “distribute copies . . . of the copyrighted work to the public”; and (4) “display the copyrighted work publicly . . . .” Section 106 further provides that the owner of the copyright may also authorize, i.e., license, others to do the same. Under Bridegman’s Terms and Conditions, forbidden “REPRODUCTION includes any form of publication or copying

51. Id. at cl. 21.
53. Id.
54. Throughout its Terms and Conditions, Bridgeman insists on referring to its copy images as “Photographs.” See, Terms and Conditions, supra note 3, at p. 1, “Definitions”: “PHOTOGRAPH means Transparencies, computer generated facsimiles, digital (i.e. binary) format images, negatives, prints, designs, plates or other representations, records of copies of a Painting, or any other item which may be offered for the purposes of Reproduction, but for the avoidance of doubt does not include the actual work of art depicted in any of the above or in any Painting . . . .” By subtly placing itself in the ring with Weston, Cartier-Bresson and the like—and, just as importantly, by leaving the utilitarian term “reproduction” to the licensees—Bridgeman perhaps seeks to endow its copies with the sheen of art and therefore the protections of copyright.
55. Terms and Conditions, supra note 3, at cl. 11.
of the whole or part of any Painting [i.e., underlying work of art] whether altered or not, and derived from any [of Bridgeman’s reproductions] whether by printing, photography, slide projection, whether or not to any audience [,] xerography, artist’s reference, artist’s illustration, layout or presentation, electronic or mechanical reproduction or storage by any other means . . . . "57 Bridgeman obligates its customers, in short, to agree that the company enjoys the exclusive right to reproduce, distribute, display, or prepare derivative works from its copy photographs, as well as the exclusive right to license others to do the same.58 In other words, it forces its clients to agree that it possess precisely those rights that that the Southern District ruled Bridgeman does not possess under the Copyright Act. (Perhaps this is why Bridgeman also requires its clients to agree that “[t]hese Terms and Conditions shall be governed by the laws of England,” that they “submit to the jurisdiction of the English courts,” and that any dispute arising out of their agreement with Bridgeman “shall be settled by arbitration in New York City”?)59 Given that “no person is entitled to any such right or equivalent right . . . under the common law or statutes of any State,”60 it appears that Bridgeman has chosen to simply ignore the Southern District’s ruling.

B. Bridgeman in the Museum Community.

As Susan Bielstein has noted, “Judge Kaplan’s decision sent shock waves through museum communities on both sides of the Atlantic.”61 Unfortunately, these shocks waves were not necessarily accompanied by acquiescence to the Southern District’s holding. Although certain museums responded to Bridgeman with a change in their rights and reproductions

57. Terms and Conditions, supra note 3, at p.1, “Definitions” (capitalization in original). Express examples of prohibited copying include “printing, photography, slide projection, whether or not to any audience [,] xerography, artist’s reference, artist’s illustration, layout or presentation, electronic or mechanical reproduction or storage by any other means . . . .” Id.

58. It is interesting to observe here how the clause “and derived from any [of Bridgeman’s reproduction]” essentially recreates the second prong of a copyright infringement claim, specifically that the alleged infringer copied original elements from copyrighted work at issue. See ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 705 (6th Cir. 2005): “A claim of copyright infringement requires proof of (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” (citing Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). The first prong, of course, is conspicuously absent.

59. See Terms and Conditions, supra note 3, at cl. 29. For good measure, Bridgeman also provides that “[t]he Client agrees to pay the Supplier any and all costs [,] expenses and reasonable attorneys fees paid or incurred by the Supplier in enforcing or endeavoring to enforce this agreement.” Id. at cl. 30.

60. Id.

61. BIELSTEIN, supra note 5, at 43.
policies, others took a different route, namely denial and evasion. 62 Like Bridgeman, many museums have decided to simply ignore the law, relying on contract and social pressure to maintain their tenuous hold on intellectual property rights to which they enjoy questionable legal claim.

The Art Institute of Chicago provides a clear example of a museum asserting intellectual property rights that flatly contravene Bridgeman. In 2004, the Art Institute licensed a copy of one of its paintings to an author publishing a scholarly text. Pursuant to the terms and conditions of the Art Institute’s licensing agreement, the museum required the author to accompany the image with the credit line “Photography © The Art Institute of Chicago.” 63 To be clear, the painting itself lay squarely within the public domain. The “photography” in which the Art Institute claimed copyright, then, was its exact photographic reproduction of a public domain image. In other words, five years after Bridgeman, the Art Institute persisted in requiring its licensee to assent to an agreement that directly contradicted the Copyright Act as construed by a federal district judge. 64 Moreover, to the extent that the Institute’s terms and conditions appear to have been a form contract, the museum likely compelled other image users to agree to this provision as well.

The Art Institute is certainly not alone in such practices. As Bielstein discusses in her book, the Met has required similarly questionable credit lines. 65 In exchange for a one-time reproduction right to Petrus Christus’s public domain painting, A Goldsmith in His Smith, Possibly Saint Eligius (1449), for example, the Met required Bielstein “to prominently place on all copies of the reproductions that are distributed to the public a notice of the Museum’s copyright ownership, which notice with respect to each separate reproduction shall read as follows: ‘All rights reserved, The Metropolitan Museum of Art.’” 66 In this instance, which presumably took place six or so years after Bridgeman, the Met did not even publicly reveal which rights it was claiming, much less that the rights ostensibly reserved very likely exceeded those granted by law. 67 Instead the museum chose to bury its tenuous copyright claim in the fine print of a private contract.

62. See id. at 45 n.19 (“A number of museums chose to ignore Bridgeman altogether ....”).
65. BIELSTEIN, supra note 5, at 48-49.
66. Id. The Met has since outsourced all of its rights and reproductions work to the image archive Art Resource.
67. Id. at 48. In Bielstein’s words, “[o]ne would presume that ‘all rights reserved’ means all legal rights in the photograph, right?”
These two examples represent only a few among many. But perhaps they present us with nothing untoward at all. The Art Institute could perhaps join the ranks of those who argue that Bridgeman only applies in New York and that Judge Kaplan’s holdings therefore do not affect the licensing arrangements of museums located elsewhere. (The Met would obviously get little traction out of this argument). The Art Institute, though, could insist that Bridgeman has no binding force in Illinois and that the museum therefore did nothing questionable in relying on contractual provisions that failed to heed the Southern District. Could it really, though? Certainly Bridgeman remains unaffirmed at the appellate level. And, regrettably, it has not been cited in a published opinion outside of New York.

Any museum seeking to disregard Bridgeman, however, would be well served to remember that the truly relevant question is not whether the decision itself has been affirmed or cited, but rather whether the logic Judge Kaplan employed has been rejected or adopted by other courts. The real issue is where the law stands on the originality—and therefore the copyrightability—of accurate copies of public domain images and objects. As this article discussed earlier, courts throughout the country are developing a robust and seemingly unanimous jurisprudence that such copies lack the originality to qualify for copyright protection. As the Sixth Circuit held in ATC, “[t]he illustrations were intended to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality.” The fact that the parts at issue may have been an auto part or a lawn mower spindle rather than, say, The Venus of Urbino, is irrelevant. Any museum that argues the inapplicability of Judge Kaplan’s rulings should trade its myopic focus on Bridgeman for a clear view of the larger copyright landscape. Because in this landscape one holds no copyright in faithful copies of works that have passed into the public domain, in it, Bridgeman is only a single instance among many.

68. See id. at 45 n.19. “A number of museums chose to ignore Bridgeman altogether . . . .”
69. See id. at 45-46, n19.
IV. Potential Courses of Action

A. Copyright Imbalance.

At this point, one might be wondering how image licensors like Bridgeman and various museums can get away with the sort of copyright misuse discussed above. How can these institutions successfully assert rights that the law seems to indicate they simply do not have? Why are they not being forced to comply with the law? How can Bridgeman persist in ignoring, of all things, Bridgeman? Unfortunately, the answer is all too easy: because they can. As a primary matter, museums possess a form of social power in relation to universities, scholarly presses, and other potential image licensees that allows them to circumvent all but the brightest legal lines. Bielstein provides a stark example of this in her book. As she explains, she at one point acquired the translation rights to a French book that included a minor eighteenth-century print. The print certainly lay in the public domain and, moreover, it existed in numerous versions all over the world. As such, both Bielstein and the University of Chicago Press naturally assumed the Press’s right to publish it without seeking any permissions. In doing so, they were most likely correct about their legal rights. They erred, however, in calculating their social position. Because soon thereafter, a major museum that owned a version of the print at issue came upon the copy that Bielstein and the Press had published. Outraged at what it claimed to be a copyright violation, the museum sent Bielstein a letter demanding compensatory payment. More importantly, it informed her in no uncertain terms that if she refused to pay, the museum would cease to do business not simply with her and not just with the Press, but with the entire University of Chicago: “the faculty wouldn’t be able to order slides from the museum or do research in the archives. In fact, any doings the museum was having with the university system would be suspended immediately if we didn’t cough up—what was it?—a hundred dollars.” Needless to say, Bielstein paid. And so, in the process, did we. Another part of the public domain was chipped off and sold (extremely cheaply) down the river. Terribly, this scenario plays out again and again as academics and publishers protect their access to the images they need.

If you happen to be wondering why Bielstein and the Press did not sue the museum for copyright misuse, the answer is that they couldn’t have.

71. See Bielstein, supra note 5.
72. Id.
73. Id.
74. See id. at 55.
75. Id. at 56.
Even if the economics of the situation had not so obviously disfavored suit, they lacked a cause of action and standing to sue. As other scholars have noted, a fundamental imbalance characterizes the copyright protection scheme. Most importantly, individual citizens harmed by copyright abuses possess no standing to seek any form of remedy under the Copyright Act as it now stands. Despite the exacting legal consequences imposed on those who violate valid copyrights, no equivalent punishments exist for the copyright misuser, even if such misuse is blatant, willful, and repeated. The effective absence of any legal deterrent to copyright misuse that results encourages image licensors to claim spurious copyrights in, essentially, everything. The massive profits to be reaped from such copyright overassertion only fuel this race to slap the familiar “©” on any available surface. These two factors go a long way towards explaining Bridgeman and certain museums’ response to Judge Kaplan’s twin decisions.

B. Charting a Course.

So what is to be done? Faced with image licensors who ignore the law because they can, who demand high fees for “copyrights” they lack and make up for this lack through carefully drafted contracts, who exert an often-crippling social pressure to effectively prevent the constitutionally mandated flow of artworks into the public domain—faced with all of this, what can one do? Should one simply acquiesce? Should art historians

76. By my calculation, Bielstein’s $100 would have gotten her roughly forty-five minutes of work by a first-year associate at a big Chicago law firm. Not exactly enough to get the job done.

77. “Copyright law suffers from a basic defect: The law’s strong protections for copyrights are not balanced by explicit protections for the public domain. Accordingly, copyright law itself creates strong incentives for copyfraud.” Jason Mazzone, COPYFRAUD, 81 N.Y.U.L. REV. 1026, 1029 (2006). Mazzone here uses the term “copyfraud” to refer to any sort of false copyright claim in a work that has already passed into the public domain. Id. at 1028.

While two provisions of 17 U.S.C. § 506 do provide for the criminal prosecution of copyright misuse, they are rarely, if ever, enforced. Section 506(c) makes it a criminal violation to place a fraudulent copyright notice on any article or to publicly distribute or import for public distribution any article marked with such a notice. 17 U.S.C. § 506(c) (2000). Additionally, section 506(e) criminalizes “the making of false representations of material fact in the application for copyright registration . . . .” Id. § 506(e). Moreover, both of these provisions require a showing of intent that arguably guts the majority of otherwise successful actions brought under section 506. See id. § 506(c), requiring a showing of “fraudulent intent”; id. § 506(e), necessitating proof that the alleged copyright abuser “knowingly made a false representation of a material fact in the application for copyright registration . . . .” (emphasis added).

78. Pursuant to a finding that a defendant is a copyright infringer as defined in 17 U.S.C. § 501(a), a court may: (1) “order the destruction or other reasonable disposition” of all of defendant’s infringing material; or (2) order the defendant to pay the copyright owner either: (a) the owner’s actual damages plus any additional profits that the defendant earned through infringement, 17 U.S.C. §§ 504(a), 504(b), or (b) statutory damages up to $150,000 per work, depending upon the defendant’s intent. 17 U.S.C. §§ 503 (b), 504(a)-(c) (2000).

79. Mazzone, supra note 77, at 1029.
simply pay the $300 for a copy of the Mona Lisa and not make trouble? Get the books out there as best they can? Use fewer images, maybe, drop the points of comparison and the subtle apexes of arguments that simply refuse to gel without the pictures themselves next to the words . . . lose the epiphanic moment where idea straddles the very line between image and text? Clearly not.

1. Civil Action.

As a primary matter, the College Art Association ("CAA") should initiate a program of sustained lobbying to have Congress amend the Copyright Act to allow for civil actions against museums and other image licensors who assert fraudulent copyrights in public domain images. As the primary professional organization for art historians, CAA already engages in lobbying on various intellectual property issues, including developments in the fair use doctrine and the question of orphan works. CAA should extend its lobbying efforts to secure a private cause of action against copyright misusers. In his excellent article on copyright misuse, Jason Mazzone argues that standing to sue should inhere in various classes of plaintiffs, including those who rely to their detriment on false copyright notices and those who have their speech effectively chilled by assertions of such fraudulent rights. He also draws a compelling case for why the elements of traditional fraud suits should be relaxed in the case of copyright abuse. As he writes:

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

Additionally, any legislative action needs to account for the complicated web of social pressures at play. In a world where a museum can inform an editor at a scholarly press that it will simply refuse to do business with anyone at that editor's home institution unless she pays $100 in spurious "copyrights," straightforward legal action is not always possible. Even if the copyright being asserted is transparently false, it is simply not worth the

81. See Mazzone, supra note 77, at 1073-75.
82. Id. at 1074.
editor’s time, money, and social risk to do anything other than pay. For this reason, one should take Mazzone’s call for broad standing in copyright misuse cases very seriously. Additionally, the academic and legal communities need to lobby for civil fines—including substantial fines for retaliation against those who contest copyright fraud—and attorney’s fees provisions sufficient to embolden not only scholars but also the institutionally conservative universities who stand behind them to actually consider suit.

Until the burdens and promises of the law are set in such a way that it makes financial sense to challenge copyright abuse, museums and companies like Bridgeman will continue to operate in a sort of legal vacuum, capable of wielding a corrosive social pressure that prevents the development of a robust common law.83 In a similar vein, art historians and lawyers need to work together to see the holding in Bridgeman explicitly adopted in other circuits and, ideally, affirmed on appeal. Until this occurs, image licensors will persist in using the precedential ambiguity surrounding Judge Kaplan’s decision to intimidate image users into submission.


Any strategic action to strengthen Bridgeman should be designed to address a disturbing way in which museums and other image licensors have responded, and are likely to continue to respond, to the questioning of their asserted copyright interests. In short, any attempts to develop Bridgeman must confront the extent to which contract law is being called upon to substitute for copyright. We have seen clear examples of this in Bridgeman’s Terms and Conditions, the Art Institute’s reproduction license, and the Met’s dubious credit line. Incapable or uncertain of legally vindicating their “copyright” in accurate reproductions of public domain images, these image licensors effectively create their own system of intellectual property rights through carefully drafted contracts.

83. For this reason, I disagree with Mazzone’s proposal that a successful copyright misuse action require a showing of intent. See, Mazzone, supra note 77, at 1074. I would favor a negligence standard, thereby obligating those who stand to profit from the assertion of a potentially questionable copyright to consider whether such claims are in fact reasonable. Such questionable cases would include certain copyrights asserted in works created but not published before January 1, 1978, the date the United States shifted from a publication to a creation standard. 17 U.S.C. § 302(a) (2006). In such instances, the copyright term depends upon whether the work was subsequently published before January 1, 2003. Id. If it was not, the copyright term runs for the artist’s life plus seventy years or through December 31, 2002, whichever is longer. Id. If it was published during the interim, however, copyright persists through 2047. Id. To the extent that this determination hinges upon the question of “publication,” it can often be difficult to make, especially for non-lawyers.
Bridgeman provides the most blatant example of this with its contractual provisions obligating its customers not to reproduce, publish, distribute, or make derivative works based on its images. As Bridgeman’s Terms and Conditions emphatically state, “THE COPYING OR REPRODUCTION BY WHATEVER MEANS OF [Bridgeman’s copy photographs] IS STRICTLY FORBIDDEN . . . .” As discussed earlier, Bridgeman defines “reproduction” to “inclu[de] any form of publication or copying of the whole or part of any [of the underlying paintings it reproduces] whether altered or not, and derived from” any of Bridgeman’s images. To the extent that anyone who uses one of Bridgeman’s images is presumed to have assented to these Terms and Conditions, Bridgeman has clearly employed the law of contract to guarantee itself precisely that privileged monopoly that the Copyright Act denies it. In this sense, the company’s subsequent assertion that any violation of its Terms and Conditions “will be an infringement of copyright” does no more than offer an explicit statement of the logic that runs throughout the document: whatever rights Bridgeman cannot procure via copyright law, it intends to take by contract.

This is a legally unfounded, deeply harmful logic, to say the least. It is also, however, one that certain museums already appear to employ. In addition to licensing agreements and credit lines, this logic often dictates the level of visitor access that many museums permit to their collections. As one museum guide to copyright succinctly put it:

There is no reason why such images of even public domain objects cannot be licensed—the real problem is not the copyright laws but the fact that there are many competing originals . . . . What can the museum do? The museum must secure the exclusivity [of its own reproductions of the works in its collection]; it must require that no person who has access to its collections either on site, or taken away for research purposes, or loaned elsewhere, can be permitted to take photographs, recordings, copies or other reproductions except on specific terms agreed [to] in advance with the museum.

Just like Bridgeman, this guide advocates using the law of contract to lock down those rights previously provided by copyright. The rights and reproductions department at the savvy museum must structure any

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84. See Terms and Conditions, supra note 3, at “Definitions.”
85. Id. at cl. 11.
86. Id. at “Definitions.”
87. See Terms and Conditions, supra note 3.
88. See supra Part III(A).
89. Terms and Conditions, supra note 3, at cl. 21.
90. PETER WIENDAND, ANNA BOOY & ROBIN FRY, A GUIDE TO COPYRIGHT FOR MUSEUMS AND GALLERIES 53 (Routledge 2000).
reproduction of the collection according to "specific terms" that will allow the institution to maintain a profitable intellectual property interest in its works, regardless of whether those works are protected by copyright or belong to the public domain.

It is striking to note how many museums appear to have adopted this tack: "Still photography for personal use is permitted in collection galleries only. No flash or tripods allowed;"91 "Photography is not permitted in the galleries. Flash photography is permitted only with a handheld camera in the Atrium;"92 "Still photography is permitted for private, noncommercial use only in the Museum’s galleries devoted to the permanent collection. Photographs cannot be published, sold, reproduced, transferred, distributed, or otherwise commercially exploited in any manner whatsoever . . . . The use of a flash is prohibited."93 Again and again, these museums assert that no visitor may photographically copy any of the works in their collections, drawing no distinction between works under copyright and those in the public domain. "[T]he real problem," after all, "is not the copyright laws but the fact that there are many competing originals . . . ."94 The separate prohibition against flashes in each instance further suggests that the harm to be avoided with the general photography ban lies in the realm of intellectual property, rather than, for example, archival concerns. In fact, what one is looking at here is not a general photography ban at all but rather a proscription against photographs taken for commercial use. It is a prohibition, in other words, against visitors interfering with the museum’s monopoly in reproductions of its images—a monopoly to which, in the context of public domain images, the museum has no lawful claim.

Critically, what one is looking at here might also be a contract. In so carefully delineating the photographic practices not permitted in the galleries,95 these museums might be trying to establish a set of contractual provisions to which visitors could be argued to assent by the very act of purchasing a ticket and walking through the door. In this way, the museums might be positioning themselves to threaten anyone who dares to publish a picture he or she takes there with a breach of contract suit.

94. WIENAND, supra note 90.
95. The Met, MoMA, and SFMoMA all post these notices both on their websites and throughout the galleries. See supra notes 91-93.
It is important here to note that the efficacy of such a claim would not necessarily hinge upon its eventual legal success on the merits. As Justice Marshall wrote so eloquently in the context of the First Amendment, “the value of a sword of Damocles is that it hangs—not that it drops.”96 One could argue that by prohibiting commercial photography in such a visible and repeated fashion, museums effectively position a contractual sword of Damocles over all their patrons’ heads. In so doing, they leverage their control over the physical art object into a form of copyright in perpetuity. After all, if museums are free to use the grant of access to their art as contractual consideration, they are arguably free to set the terms under which that art is accessed, including the terms under which it is reproduced, published, and used in derivative works. Under these circumstances, it matters little that the Copyright Act itself specifies that “[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”97 Under these circumstances, “the real problem” truly “is not the copyright laws” but rather the way in which the museums, like Bridgeman, effectively stage a contractual end run around them.98

Art historians and lawyers need to structure any development of Bridgeman with this contractual end run in mind. Specifically, efforts to bolster Judge Kaplan’s opinions should simultaneously strive to shut down the secondary contractual avenues that image licensors can be expected to fall back on as they lose copyright footing. At least two viable positions exist in response to such contractual arguments. Both of these positions could be asserted either as independent actions for declaratory judgment or as defenses to allegations of contractual breach.


A compelling argument exists that both the sort of contract epitomized by Bridgeman’s Terms and Conditions and museums’ aggressive “no commercial photography in the gallery” policies constitute unenforceable contracts of adhesion. The Supreme Court has characterized adhesion contracts as “form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker bargaining power.”99 Admittedly,

98. See WIENAND, supra note 90.
99. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991). See also, JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d. Cir. 2004) (“a contract of adhesion is a contract formed as a product of a gross inequality of bargaining power between parties. A court will find adhesion only when the party seeking to rescind the contract establishes that the other party used high pressure tactics, or deceptive language, or that the contract is unconscionable. Typical contracts of adhesion are standard-form contracts offered by large, economically powerful
courts are reticent to brand agreements between parties as unenforceable contracts of adhesion. As the Second Circuit has stated so evocatively, "[t]he concept of adhesion contracts introduces the serpent of uncertainty into the Eden of contract enforcement. At the very least, it represents a serious challenge to orthodox contract law that a contract is to be interpreted in accordance with the objective manifestation of the parties' intent."\textsuperscript{100} As such, "it is very difficult to establish that an agreement is an unenforceable adhesion contract."\textsuperscript{101}

Not only must the party challenging a contract's enforceability demonstrate adhesion, he or she must also show that the contested contract is unconscionable. Adhesion contracts are, on their own, enforceable; only unconscionable adhesion contracts provoke judicial invalidation.\textsuperscript{102} At base, a finding of unconscionability hinges on the court's determination that the contract is untenably unfair. In deciding whether a contract rises (or sinks) to this singular level, a court will look to factors such as the parties' relative bargaining power; whether the terms of the contract were actually open to negotiation and change; whether, if the contract was presented on a take-it-or-leave-it basis, the accepting party had actual, viable alternatives; the level of economic pressure, fraud, or surprise involved in the bargaining process; and, critically, whether the contract, if enforced, would function contrary to public policy.\textsuperscript{103} When one considers these factors, museum-

\textsuperscript{100} Klos v. Lotnicze, 133 F.3d 164, 168 (2d. Cir. 1997).
\textsuperscript{102} See Smith, Bucklin & Assocs., Inc. v. Sonntag, 83 F.3d 476, 480 (D.C. Cir. 1996) (contract of adhesion is enforceable unless it is unconscionable); see also Kristian v. Comcast Corp., 446 F.3d 25, 42 (1st Cir. 2006) ("under Massachusetts law, contracts of adhesion ... are generally enforceable absent a separate finding that such contracts are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances.") (internal quotation omitted); Am. Gen. Life and Acc. Ins. Co. v. Wood, 429 F.3d 83, 88 (4th Cir. 2005) ("[r]ather than adopting a per se rule, West Virginia courts aim at distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.") (internal quotation omitted); Cooper v. MRM Inv. Co., 367 F.3d 493, 503 (adhesion contracts enforceable under Tennessee law unless shown to be unconscionable).
\textsuperscript{103} See, e.g., JLM Indus., Inc., 387 F.3d at 169 ("a contract of adhesion is a contract formed as a product of a gross inequality of bargaining power between parties. A court will find adhesion only when the party seeking to rescind the contract establishes that the other party used high pressure tactics, or deceptive language, or that the contract is unconscionable. Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change the contract's terms."); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 207 (2d. Cir. 1999) ("[a] contract or clause is unconscionable when there is an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 997 (10th Cir. 2005) ("[s]ubstantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair.") (internal citations omitted); DeJohn., 245
goers and those who purchase reproductions of public domain images possess a strong argument that they are captive parties to various image licensors’ unconscionable contracts of adhesion. As a primary matter, the actual bargaining involved in these contracts is de minimus. In the case of Bridgeman, the company states that it automatically incorporates its online Terms and Conditions into its licensing agreements. Moreover, Bridgeman presumes any first-time licensee to have assented to these conditions as soon as he or she uses one of its images. Repeat customers are presumed to have assented by the simple fact of their return. Under these circumstances, there is little room for meaningful negotiation. Indeed, it is likely that many of Bridgeman’s clients have no idea that they have assented to the online provisions, much less that they’ve explicitly “agreed” that any violation thereof “will be an infringement of copyright” in direct defiance of federal caselaw. The museum visitor enjoys even less room to negotiate. Flatly informed by numerous signs that “[s]till photography is permitted for private, noncommercial use only,” the art lover essentially has three options: assent and go in, assent but protest by going home, or refuse and, in the wonderful formulation of Susan Bielstein, “go shutterbugging through the galleries flashing away, a posse of guards on [his] tail.” These courses of action might share something with those of obedient school children, insolent teenagers, and Evel Knievel, respectively. They bear little resemblance, however, to what the law recognizes as binding offer and acceptance.

Second, the situation currently created by various image licensors is marked by a paucity of viable alternatives. In the case of the museums, the reasons for this are obvious. Most art objects are, by definition, unique. Indeed to put it bluntly, art takes its value—both cultural and financial—from the very fact of this uniqueness. One tends to understand this intuitively: it is the rare individual who thrills to a poster of Manet’s Goldfish, even rarer is he will pay hundreds of thousands of dollars for it. When the Met blocks full photographic access to Eakins’ Max Schmitt in a

F.Supp.2d at 919 (“[a] contract is significantly unfair only if its terms are oppressive, unconscionable, contrary to public policy or not within the reasonable expectations of the weaker party.”).
104. See Terms and Conditions, supra note 3.
105. Id.
106. Id.
107. Id. at cl. 21.
108. BIELSTEIN, supra note 5, at 50.
109. Photographs, prints, and cast sculpture obviously all challenge this notion of the art object’s unique status. Critically, however, in order to be accepted as high art, all of these media have adopted production conventions that limit the possibility of fungibility. Examples of such conventions include printing in limited series and destroying molds after a run.
Single Scull (1871), then, no alternative remains; there is no replacement painting to photograph.

Critics might argue with this, asserting that meaningful alternatives abound. If all one wants, after all, is to make a publishable copy photograph of the Eakins, why not simply license a copy from the Museum? Or, if one is an academic affiliated with a college or university, why not obtain it for free off of ARTstor through the Met’s new Scholar’s License Program? Such arguments miss the point. Museums are able to prolong valuable but unlawful intellectual property interests in public domain art only because they succeed in guarding the physical art object so closely. As institutions, they only bolster this guard when they appease the academic community by making “gifts” of images that everyone already shares. The answer to the chorus of “why nots,” therefore, is extremely simple: because we all have the right not to.

As for the lack of viable alternatives in Bridgeman’s situation, the company essentially conceded this point at trial. In order to succeed on its claim, Bridgeman was required to show both that it possessed a valid copyright in its images and that Corel literally copied those images. In order to prove the second—or actual copying—prong, Bridgeman argued that “the owners of the underlying works of art... strictly limit access to those works,” and that it “had the only images of the works in question and that the works themselves could not have been photographed anew.” Bridgeman grounded its copyright infringement claim, in other words, on

110. Or, since the Met currently outsources its rights and reproductions, from Art Resource? See BIELSTEIN, supra note 5.
111. See ARTstor, New Service: Images for Academic Publishing (IAP), http://www.artstor.org/news/n-html/an-070321-iap.shtml (last visited Jan. 17, 2008). “In a new initiative designed to assist scholars with teaching, study, and the publication of academic works, The Metropolitan Museum of Art will distribute, free of charge, high-resolution digital images from an expanding array of works in its renowned collection for use in academic publications. This new service, which is effective immediately, is available through ARTstor, a non-profit organization that makes art images available for educational use.” The Metropolitan Museum of Art – Press Room – Curren Press Releases, Metropolitan Museum and ARTstor Announce Pioneering Initiative to Provide Digital Images to Scholars at No Charge, March 12, 2007, http://www.metmuseum.org/press_room/full_release.asp?prid=%7BA113E0AD-AA4E-471B-8F04-736A21F1A70A%7D (last visited Jan. 17, 2008). It is worth noting here, that despite the Met’s generosity, only scholars—and specifically those affiliated with an institution capable of paying ARTstor’s subscription fees—are eligible to receive these images. Moreover, the press release makes no mention of the public domain, styling the partnership between the Met and ARTstor as an advancement in digital imaging instead. For these reasons, I view this program as a sort of safety valve, decided to placate academics and prevent them from jockeying for their full rights.
113. Id. at 428 n.50.
the lack of viable alternatives.\textsuperscript{114} Moreover, any similarly situated image licensor would need to ensure a similar lack of alternatives in order to successfully survive. The existence of meaningful options would, quite simply, mean that evaporation of a licensable intellectual property interest. As the museum copyright guide noted, “the real problem is . . . the fact that there are many competing originals.”\textsuperscript{115}

Finally, in staging an adhesive contractual end run around the Copyright Act, image licensors like Bridgeman and various museums violate constitutionally grounded public policy. As the Fourth Circuit held in \textit{Lasercomb America, Inc. v. Reynolds}:

The grant to the author of the special privilege of a copyright carries out a public policy adopted by the Constitution and laws of the United States, “to promote the Progress of Science and useful arts, by securing for limited Times to [Authors] . . . the exclusive Right . . .” to their “original” work. But the public policy which includes original works within the granted monopoly excludes from it all that is not embraced in the original expression.\textsuperscript{116}

With its Terms and Conditions, Bridgeman sweeps its uncopyrightable reproductions of public domain works into the monopoly of copyright.\textsuperscript{117} Similarly, by proscribing commercial photography in the galleries, museums extend this monopoly to works that have already passed out of it. Both of these actions violate the public policy motivating the Copyright Act itself. “The ‘ultimate aim’ of copyright law, after all, is “to stimulate artistic creativity for the general public good.”\textsuperscript{118} The use of adhesion contracts to impede the free flow of ideas, scholarship and the sort of cultural bricolage by which our society creates and defines itself frustrates this “ultimate aim” with shocking success. Such contracts should be invalidated as unconscionable.\textsuperscript{119}

\begin{itemize}
\item[114.] A lack of viable alternatives, interestingly, that stemmed from a museum prohibition on photography.
\item[115.] \textit{Wiendand}, supra note 90, at 53.
\item[116.] \textit{Lasercomb Am., Inc. v. Reynolds}, 911 F.2d 970, 977 (4th Cir. 1990) (quoting U.S \textsc{Const}. art. I, § 8, cl. 8; 17 U.S.C. § 102 (2006)).
\item[117.] Terms and Conditions, supra note 3.
\item[118.] Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 204 (3d. Cir. 2004) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984)).
\item[119.] One could argue that intellectual property that has passed into the public domain has fallen outside of the purview of the Copyright Act and its strictures and is therefore open to any sort of private contracting. Such an argument, however, ignores both the constitutionally mandated policy driving the Copyright Act and the legal monopoly that the copyright owner has already enjoyed. Having previously benefited from this monopoly, the prior copyright owner simply is not free to say that his or her intellectual property is now, in effect, neutral, not subject to the requirement that it be turned over to the public domain “to Promote the progress of Science and the useful art . . . .” Justice Ginsburg’s majority opinion in \textit{Eldred v. Ashcroft} may, destructively, have “de[mu][red]” to the petitioners’ seemingly commonsense argument that “the
4. **Preemption Under 17 U.S.C. § 301.**

A strong argument also exists that contracts such as Bridgeman’s Terms and Conditions and museums’ photography policies are preempted by the Copyright Act itself. 17 U.S.C. section 301(a) states, “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright” are preempted by federal law.\(^{120}\) Under the statute, “no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”\(^{121}\)

In order to be preempted in this fashion, “(1) the work at issue must come within the subject matter of copyright; and (2) the state law [i.e., contractual] rights must be equivalent to the exclusive rights of copyright.”\(^{122}\) Satisfying the first requirement is straightforward: sections 102 and 103 of Title 17 elaborate the classes of works protected under the Copyright Act. These include literary, musical, pictorial, and sculptural creations, as well as compilations and derivations.\(^{123}\) In practice, it is the second hurdle, that of “equivalence,” that proves difficult to meet. One seeking a ruling of preemption bears the burden of proving that the contract at issue contains no “extra element, beyond mere copying, preparation of derivative works, performance, distribution or display . . .”\(^{124}\) If the contract contains such an “extra element,” “then the stated cause of action is qualitatively different from, and therefore not subsumed within, a copyright infringement claim. In such cases, federal law will not preempt the state action.”\(^{125}\)

The courts remain frustratingly vague as to what actually constitutes such an “extra element.” It appears that an agreement to purchase

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Copyright Clause “imbeds a quid pro quo.”’’ 537 U.S. 186, 214 (2002). It strikes me, however, that even this poorly reasoned demurrer cannot change the fact that the Copyright Clause grants its beneficiaries an advantage that they otherwise never would have possessed under the American legal system in exchange for the public good. In light of the boon that has already inhered, the owner of an expired copyright has no ground to argue that his or her intellectual property now exists free and clear of the copyright scheme, that it is, effectively, not beholden to the public good. See id. at 245 (Breyer J., dissenting) (“The Constitution itself describes the basic Clause objective as one of ‘promot[ing] the Progress of Science,’ i.e., knowledge and learning. The Clause exists not to ‘provide a special private benefit,’ but ‘to stimulate artistic creativity for the general public good.’ It does so by ‘motivat[ing] the creative activity of authors’ through ‘the provision of a special reward.’ The ‘reward’ is a means, not an end. And that is why the copyright term is limited. It is limited so that its beneficiaries—the public—‘will not be permanently deprived of the fruits of an artist’s labors.’”) (internal citations omitted).

120. 17 U.S.C. § 301(a).
121. Id.
122. Grosso v. Miramax Film Corp., 383 F.3d 965, 968 (9th Cir. 2004).
123. See 17 U.S.C. §§ 102, 103.
125. Id.
something or to pay someone qualifies, as does a duty of confidentiality. That said, "[n]ot every ‘extra element’ of a state claim will establish a qualitative variance between the rights protected by federal copyright law and those protected by state law."¹²⁶ As a result, the stronger one’s evidence that a party relied on contract law strictly to prevent others from copying, adapting, publicly performing or publicly displaying a particular work, the better one’s chances of preemption.

Bridgeman’s assertion that any violation of its contractual Terms and Conditions, for example, seems to provide a clear case of a “legal or equitable righ[t]” that is both “equivalent to . . . the exclusive rights within the general scope of copyright” and lacking in any meaningful extra element. Moreover, the Seventh Circuit and the Eastern District of California have both suggested that courts will also look to the breadth of a particular contract’s effect in making their preemption determination. As the Meridian court stated, “[a] copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create exclusive rights.”¹²⁷ This suggests that the more “strangers” the contract implicates—and the more exclusive the right thereby created—the more probable it is that a court will preempt. This rationale might prove particularly robust in the case of museums, where the ban on commercial photography automatically implicates everyone who passes through the galleries. It might also interlock effectively with the public policy arguments involved in contracts of adhesion. The stronger one’s argument that image licensors impede “the Progress of Science and the useful arts” by using contracts to effectively staunch the flow of images into the public domain, the stronger one’s argument for preemption under section 301.

V. Conclusion

Image licensors like Bridgeman and certain museums currently take advantage of underdeveloped case law, social pressure, and the inadequacies of the Copyright Act itself to force the public to pay for a right they already possess: the right to meaningfully engage with artwork that has passed into the public domain. The harms that flow from this are real and serious, not simply for art history graduate students like myself looking down the barrel of thousands of dollars in permissions fees, but also for our culture as a whole. As Lawrence Lessig so accurately argues, “[c]reators here and everywhere are always and at all times building upon

¹²⁶. Id.
the creativity that went before and that surrounds them now. That building is always and everywhere at least partially done without permission and without compensating the original creator."128 By demanding that scholars pay $300 for a single reproduction of the Mona Lisa or that no tourist publicly display a picture of an Old Masters painting that he or she took on vacation, image licensors not only defy the law, they undermine the very process of dialogue and bricolage by which our culture evolves. This simply cannot be.

In addition to the steps that I have discussed here, the art and legal communities need to take an active role in educating their constituencies as to the state of the law on these issues. This is particularly true in the case of art historians. Often individuals have no idea that anything is amiss when an image licensor demands hundreds of dollars in “copyright” fees for a reproduction of a painting made in the sixteenth century. Nor do many art historians realize that their rights have been violated when that same licensor demands that they mark said reproduction with the notice “© 2007” (copyright inhering in the licensor, of course). In an environment where the pressures to simply put one’s head down and work—to publish on one’s selected corner of the world and not cause trouble—are immense, inciting any change often takes massive effort. Hopefully this article will succeed in contributing to that effort in some small part.

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128. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 29 (Penguin Press 2004). As Lessig writes, “[f]ree cultures are cultures that leave a great deal open for others to build upon; unfree, or permission, cultures leave much less.” Id. at 30. See also LAWRENCE LESSIG, THE FUTURE OF IDEAS, THE FATE OF THE COMMONS IN A CONNECTED WORLD 20 (Random House 2002).