

REIMAGINING THE PUBLIC DOMAIN

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In a paper included among this collection of works from the Duke Law School's Conference on the Public Domain, James Boyle kindly credits an early essay of mine, *Recognizing the Public Domain*,¹ with having contributed initially to the contemporary study of the subject.² Boyle quotes a passage from that essay in which I suggested that “recognition of new intellectual property interests should be offset today by equally deliberate recognition of individual rights in the public domain . . . Each [intellectual property] right ought to be marked off clearly against the public domain.”³

“But what does this *mean*?” Boyle asks. “What is the nature of these ‘individual rights in the public domain?’ Who holds them? Indeed, what *is* the public domain?”

These are fair questions. I cannot respond to them fully, for the fact is that I have never tried to define the public domain, not even for myself.⁴ Boyle's paper gains a portion of its power and its appeal from his own contemplation of these questions, but in the end I think he would agree that even he has succeeded only in approaching a number of definitions.

In its usage to date, the term “public domain” is elastic and inexact. A definition can be but one of many definitions, each surely a function of perspective and agenda, more or less as Boyle suggests. His own perspective, one in which he sees the expansion of intellectual property rights as “a second enclosure movement” reminiscent of the English land enclosure movement of the Nineteenth Century, is intriguing. From this perspective, the public domain is perhaps most usefully seen as a commons, set off against the fences that delimit the interests of individual rights holders. I have no important quarrel with this perspective, and indeed think it enormously useful for many purposes—among

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1. David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (Autumn 1981) [hereinafter Lange, *Recognizing the Public Domain*].

2. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 59 (Winter/Spring 2003). Jamie also kindly acknowledges me as a friend and colleague, an acknowledgment I warmly reciprocate.

3. Lange, *Recognizing the Public Domain*, *supra* note 1, at 147-50.

4. A more comprehensive effort at definition will be reflected in a book by Jennifer Anderson and me (*Reading the Public Domain*), now under contract with The Stanford University Press and due for delivery in 2004. The copyright in that book will be held by The Stanford Press.

them, for the purposes of imagining a “politics of the commons” while addressing common interests in cyberspace, two important areas of inquiry in which Boyle’s own scholarly agenda particularly lies.⁵

But this public domain is not my public domain. More precisely, it is not the public domain that matters to me most. And I have thought that perhaps it would be appropriate to say a bit more fully what I had in mind when I wrote my essay some twenty years ago. This is, I think, only the second occasion when I have attempted to do so publicly,⁶ and it will certainly be the first in which I try in addition to bring my thinking from that time into some degree of harmony with my thinking today. Not that such an exercise will matter to posterity. But Boyle does raise the question of meaning in general, and I suppose that I, like others, am free to respond to the question in particular.

I

Sometime late in the middle nineteen-seventies a graduate of the Duke Law School, Edward Rubin⁷, then a distinguished practitioner in Los Angeles specializing in motion picture transaction law, invited me to join him and a number of others in organizing what became the American Bar Association’s Forum Committee on the Entertainment and Sports Industries. In 1979, the Forum Committee gave its inaugural symposium on issues affecting entertainment law. The symposium was held in Beverly Hills, and to me fell the task of preparing a lecture on the then still new (or new-ish) subject of publicity rights. Two cases were pending in the California court system at the time: one brought by heirs of Bela Lugosi⁸, the other by the heirs of Rudolph Guglielmi⁹, better known to the public as Rudolph Valentino, whose fevered kisses in *The Sheik* had quickened the pulse of more than one otherwise suitably composed young woman of the nineteen-twenties. I had just begun to teach at the Law School when these cases first appeared in 1971 or so; the subject matter interested me from the perspective of both intellectual property and tort law. I looked forward to the Beverly Hills lecture as an opportunity to think aloud about the several questions then still at large in the publicity field, among them, most importantly (or so I thought at the time), the question of post-death succession.¹⁰

5. See Boyle, *supra* note 2. Jamie’s work is always more textured and sophisticated than a brief account of it can accommodate. But as I intend neither a critical response to, nor an adequate appreciation of, this excellent essay I shall count upon the reader to be forewarned, and Jamie to be forgiving, of such lapses as I may be guilty of in my attempt to summarize it here.

6. The first (and, at most, partial) occasion was my Donald Brace Memorial Lecture to the Copyright Society of America in 1992. That lecture was subsequently published as David Lange, *Copyright and the Constitution in the Age of Intellectual Property*, 1 J. INTELL. PROP. L. 119 (1993). The narrative in this part of my present essay draws upon events partially recalled and described in the Brace Lecture, though I did not truly attempt there what I intend to try here.

7. Class of 1936.

8. *Lugosi v. Universal Pictures*, 172 U.S.P.Q. 541 (Cal. App. Super. 1972), *rev’d*, 70 Cal. App. 3d 552 (1977), *aff’d*, 25 Cal. 3d 813 (1979).

9. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979).

10. I shall not detail the underlying issues in these cases. They were finally resolved at the end of 1979 when the California Supreme Court held that publicity rights did not descend as such in Califor-

But when the hour for my lecture at last arrived, and I had scarcely begun to speak, I was confronted by a barrage of challenging questions, angry and distressed in tone and nature, the gist of which was that this new right of publicity threatened the questioners' ability to create new works. I could see why. Among the members of my audience, in addition to the lawyers whose presence I had expected, were screenwriters from the Hollywood community, to whom publicity was not just an intriguing new interest the law might or might not appropriately choose to recognize in one fashion or another, but rather an expansion of private rights in intellectual property that would correspondingly diminish the writers' ability to borrow freely from lives whose dramatic value could mean the difference between a salable script and just another bootless Pitch From Hell. In effect, or so it seemed, the law of publicity was dispossessing individual creators in order to benefit the interests of celebrities, or, even more remarkable, their estates and heirs, since many of the celebrities themselves were long since dead.

I confronted an epiphany in the course of that lecture, one whose dimensions were not clear to me, but whose power to grip my imagination and to excite my passions I could neither deny nor resist. Though it would take another two years to translate these emotions and the resulting insights into a published essay, I knew that I would never again confront intellectual property without thinking about its capacity to encroach upon the public domain—and about the costs to the creative imagination of that encroachment—in a new and far darker way than I had done before.

I say “the public domain,” and here I must acknowledge the first transformation in my thinking as I confronted what had happened in LA:

Like others at the time I suppose I had thought of the public domain mainly as whatever was left over after intellectual property had finished satisfying its appetite.¹¹ Now I saw that the public domain demanded recognition as an affirmative entity, conferring its own protection (which I imagined as in the

nia. That holding has since been supplanted by statute. For an article summarizing the publicity rights questions at the time (and particularly the question of descendibility), see Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979). For a more recent (and approving) appraisal of publicity rights, see Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997).

11. I am uncertain as to the origins of the “feeding” metaphor. I believe it to be in rather common use today, but was it then? I do not think so. At the time, I noted that:

Remarkably little direct attention has been paid to the public domain in recent years; there seem to have been no extended treatments of the subject in its own terms The prevailing view probably was expressed by the writer who observed that “as the phrase ‘in the public domain’ has generally been used in the cases, it is much less an empirical datum than simply the reflection of an ultimate legal conclusion.” Stern, *A Reexamination of Preemption of State Trade Secret Law After Kewanee*, 42 GEO. WASH. L. REV. 927, 967 n.184 (1974). Compare Krasilovsky, *Observations on Public Domain*, 14 BULL. CR. SOC. 205, 205 (1967) (“Public domain in the fields of literature, drama, music and art is the other side of the coin of copyright. It is best defined in negative terms. It lacks the private property element granted under copyright in that there is no legal right to exclude others from enjoying it and is ‘free as the air to common use.’”).

Lange, *Recognizing the Public Domain*, *supra* note 1, at 150-53 n.20.

nature of rights) upon individual creators; this would be necessary if creativity itself was to survive the tendency toward expansionism that seemed to be burgeoning everywhere among the intellectual property doctrines. In that sense, my perspective was the perspective of creative artists (in Hollywood and elsewhere), to whom intellectual property was not necessarily an incentive or an inducement or an encouragement to create, but rather always a potential impediment to creativity, and on occasion a real and powerful disincentive to the very activity intellectual property was meant to bring about. An opposing concept was required, a concept to be set in affirmative opposition to intellectual property. Of course one might invent a term to fit that need, but it seemed to me that existing terminology would do nicely. As I envisioned my project, the public domain would be pressed into service beyond its accustomed role. No longer a lesser neighborhood on the wrong side of the tracks, it would serve as a recognizable place of refuge for creative endeavor in its own right.

An atavistic restlessness was companion to my thoughts. I remember particularly that scenes from *Singin' in the Rain* flooded my imagination as I reflected on what it means to be creative—a meaning I thought perfectly captured in Gene Kelly and Cyd Charisse's transcendent production number from that film, *Gotta Dance!* And here was a subtle point: I was concerned not merely with the very public, formal, organized creativity of Hollywood (though certainly that had brought me to this work); what moved me no less was a concern for those who, like the character Kelly portrayed in that sequence, might be driven by pure need toward transient episodes of creative expression neither intended nor likely to find any public outlet.

I would say then, first, in response to Boyle's inquiry after meaning, that for me recognizing the public domain began as a rather straightforward appropriation of perfectly ordinary terminology as part of a larger exercise in iconoclasm intended to transform that terminology in the course of a new service. I was interested at the outset in gaining recognition for a different sort of public domain. The public domain I had in mind would become a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against the forces of private appropriation that threatened such expression. Recognition for that sanctuary was the challenge. Meaning would follow. I supposed that definitions could wait.

II

The work I hoped for in those early days was not quite the work I produced in the end. Something of the passion survived in what I finally published, perhaps: Boyle suggests that my essay reflected indignation, and “eloquently sarcastic ridicule” of the widespread expansionism of that time. But the particular concerns for creativity that prompted me to write in the first place were actually somewhat muted by the structure I ultimately settled upon for the work. Where

Jessica Litman¹² later wrote directly about the relationship between creativity and the public domain, for example, my own concerns for that relationship I left mainly to others to express, in quoted passages dispersed among a number of other issues I decided to address as part of my strategy for encouraging the wider recognition of the public domain I sought.

Thanks to the heartfelt eloquence of these additional voices, creativity remained a central concern in the essay. One such *cri de coeur* (written by California practitioner Anthony Liebig, and prompted by litigation between Nancy Sinatra and the Fifth Dimension) was powerful then and remains so now, not merely as an observation on the issues raised in a long-forgotten case, but more generally as a living commentary upon the impediments to creativity engendered by encroachments upon the public domain:

From the standpoint of performers . . . the right to perform in the popular genre or style is essential. Freedom of a performer to earn a living by adopting—either consciously or because he is “influenced” or simply “with it”—current modes and styles which may be widely or even uniformly demanded is, indeed, imperative. How else can he support himself and develop? *Any* limitation upon absolute freedom of performance—while it might result in short-lived bonanzas for one or two performers—would self-evidently be stultifying to performers as a class.

Just how stultifying becomes clear when one considers the predictable volume of litigation and threatened litigation which would follow from any such limitation coupled with the equally predictable inconsistency of result. After several hundred years copyright infringement, which involves only comparison of dimensional self-described works, is still a mystery We could hardly expect the courts to set parameters and fashion workable, understandable standards of comparison in “imitation” cases in this century! In the meantime, what about the performers and artists and their disseminators who wish to go about their business unhindered?

. . . .

From the standpoint of the audience, society at large, and cultural growth, encroachment on the freedom of performance would be destructive both qualitatively and quantitatively. Consider any artist, musician, or performer of any era and ponder what his *oeuvre* would have amounted to had he been precluded from utilizing the brush techniques, color principles, scales, meters, cadences, sounds, moods and methods—in short, the styles—of those who had gone before. Would the classical periods of music and painting have been limited to but one producer each? Would Presley have been foreclosed as an imitator or would he have had the right to foreclose those who came after him? Would the lost generation of American writers have wasted itself in litigation to determine who “got with it” first? Indeed, could there have been a Renaissance? Would we have had a Brahms, a Rubens, a Steinbeck? Or, for that matter, a Sinatra or Fifth Dimension?¹³

Here, indeed, was passion in the service of indignation.

For my own part, I began the essay with some attention to a central problem in intellectual property, namely, the problem of defining the boundaries of a property interest embodied in an intangible *res*. I turned then to what I had begun to see as a kind of metastasis in the law, particularly in the developing law of publicity, but no less so in the laws of trademark dilution and unfair

12. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

13. Anthony Liebig, *Style and Performance*, 17 BULL. COPR. SOC'Y 40, 46-7 (1969).

competition (of the misappropriation variety), both of which latter doctrines had troubled me before. I passed over lightly both copyright and patent law on the (then plausible but now quite clearly erroneous) assumption that these well-established areas of intellectual property law were essentially stabilized in their relationship to the public domain by internal doctrinal mechanisms designed to avoid undue encroachments. I turned finally to a section of the essay in which I offered some suggestions meant to secure greater functional recognition for the public domain, suggestions aimed mainly at courts, though as it turned out within a year or so after publication, susceptible to adoption by Congress as well.¹⁴ Along the way I invited comparison between the public domains in intellectual property and in public lands. And I concluded with an allusion to the buffalo now vanished from the American prairie, an allusion that, frankly, I have sometimes wished since I could alter or withdraw.

It is of course idle to dwell upon such second thoughts as the ones I have hinted at here. Motivation and strategy often diverge, in the work of a scholar no less than in the work of an artist. I will acknowledge, however, that my motivation for writing now is in part to readdress, more directly, the concerns for creativity that drove me then, and to suggest in passing at least a partial, personal answer to the questions Boyle raises.

Not that I had neglected these questions altogether: the twentieth footnote to *Recognizing the Public Domain* reveals how quickly I succumbed to an examination of the public domain considerably less sanguine than I initially had in mind. Indeed, as I began to research the issues, and then to write, I found myself asking questions of the very sort that Boyle has asked: What was the public domain? How had it been understood? Was there a theory worthy of the name? Could abiding definitions be sensed in the cases or in the literature? And so on.¹⁵ I shall spare the reader an extended exegesis of the numerous and diverse works considered in this very long note; they are faded now, as is my essay.¹⁶ Definitions I left for others. But as for theory—theory as I understand theory; that is, an exercise in intellectual accounting that ordinarily precedes definitions—I did record that, in the course of my passage through the insights I had gathered from among these works and from my own reflections, a tentative theory actually had begun to suggest itself. It was unnecessary to my purpose to pursue the theory at length in that essay, though, and potentially a dis-

14. See Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground*, 70 MINN. L. REV. 417, 440-42 (1985) (acknowledging “the Lange test” as a benchmark for new legislation). Of course, that was then, and only briefly: *sic transit gloria mundi*.

15. Compare Lange, *Recognizing the Public Domain*, *supra* note 1, at 150-53 n.20 and accompanying text, with Boyle, *supra* note 2, at 59.

16. Lange, *Recognizing the Public Domain*, *supra* note 1, at 150-53 n.20. It is worth noting, though, that even a cursory glance at the materials cited in this note and in the remainder of the article reveals how many of the issues we discuss today, as if new, had been anticipated then. See, e.g., Kenneth E. Kulzick & Amy D. Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A. L. REV. 57, 77-78 (1980) (suggesting that the burden of proof be shifted from defendant to plaintiff in cases involving fair use).

traction. My ambition was affirmative recognition for the public domain *simpliciter*, and my medium a polemic in the guise of a scholarly essay. Constrained by that goal and that form, I was candid in not attending to the nicer questions of definition and theory. These matters I consigned to a few glancing passages in the text and to another footnote toward the end of the piece. In truth, questions of this sort have begun to be attended to quite widely in the decades since. Boyle's paper and the Conference on the Public Domain itself are testament enough to that.

But what was the theory I laid to one side? Essentially this: that an adequate comprehension of the public domain might actually have to begin with a considerably more radical and dramatic reimagining of intellectual property than I professed to see as necessary earlier in the essay, a reimagining that would marry concepts in unfair competition after *Sears*¹⁷ and *Compco*¹⁸ with intimate moral rights, so as ultimately to make room for the sanctuary I had initially envisioned. I had begun by supposing that rights in proprietors and rights in the public domain could stand more or less on equal footing as parties *inter pares* to a property-based regime. But as I worked my way through the piece I began to doubt whether this was so. By the time I reached the last of the half dozen suggestions I offered for action, I had come to think that the problem with intellectual property was in the nature of property itself—not merely in the boundary-fixing difficulties with which I had begun the piece, but rather in the far more central ability of proprietors to exclude others from their works in plenary fashion, and to demand compensation for trespass where no damage necessarily might follow.

I do not mean to claim too much in the way of insight through hindsight. Certainly I did not piece my thoughts together in quite the way I mean to do here. This is representative of what I did say:

I have meant to convey two principal objections to the new thrust of the law. One is that it tends to reward a species of claim which almost always lacks definition and frequently lacks either a substantial showing of entitlement or any realistic evidence of a taking. The other is that the very momentum of these expanding claims tends to blur, and then displace, important individual and collective rights in the public domain . . . [C]ourts ought to indulge at least a presumption against new claims. . . . [I]n cases in which it appears sensible to recognize new (or doubtful) intellectual property claims, it will be appropriate for the court to explain what is not covered by the grant as well. An explicit reservation of the public domain in these circumstances must be seen as a part of the court's obligation to be clear about the holding Inevitably, the work of defining the public domain . . . will follow and, we can hope, a more appropriate balance will be restored to the field of intellectual property¹⁹ It may be that the key to defining the scope of the public domain in a satisfactory way is to be found in a comparison of the natural law (or "moral") basis of intellectual property with the more specific, occasional need to define and provide for certain economic or commercial interests not necessarily limited to authors and not necessarily the products of authorship [A]s often as possible, courts ought to divert claims away from intellectual property theory and into such adjacent areas of law as the original form of

17. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964).

18. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964)

19. Lange, *Recognizing the Public Domain*, *supra* note 1, at 171-177 (citations omitted).

unfair competition, contracts or, perhaps, some species of moral rights. There can be little damage to the public domain in requiring precautions designed to prevent genuine deception or confusion; *Sears* and *Compco* would have permitted as much. Nor does there seem to be any legitimate objection to moral rights requirements such as attribution of authorship, although rights against distortion, truncation, mutilation and the like are obviously another matter²⁰ Meanwhile, courts must be sensitive to the taking too trivial to be actionable as well as the taking which produces apportionable profits. In doubtful cases . . . the defendant ought always to prevail.²¹

A shift in proprietary rights away from property to what today would no doubt be termed a “liability” regime²² (and by implication a corresponding withdrawal from the ready availability of injunctive relief, and perhaps a move toward compulsory licenses on a much wider basis²³); a presumption against new proprietary interests, with doubtful cases always to be resolved in favor of the doubt; an increased concern for classic unfair competition concepts (confusion as opposed to misappropriation), with corresponding reliance upon disclaimers and the like as alternatives to exclusion; a frank embrace of the intimate aspects of moral rights, including the rights to acknowledgment and attribution, but with no provision at all for concerns grounded in appropriation; with a diminution in damage awards in trivial cases, accompanied by an equitable apportionment of profits—and meanwhile, beyond and above all these radical re-configurations of the proprietary rights regimes, a corresponding re-conceptualization of the public domain itself, but now a public domain enlarged in standing so as to render presumptively paramount the rights it would confer as against the reduced proprietary rights it would constrain: These were the essay’s implicit strategies for realizing the creative sanctuary I envisioned. In this way the public domain itself could become a place of refuge for creative expression, a place of individual no less than collective entitlement, dimensioned both physically and conceptually, and sanctioned by law. In short, the public domain would be a place like home, where, when you go there, they have to take you in and let you dance.

This is close to what I might have said in answer to Boyle’s questions on the basis of what I wrote twenty years ago, had I thought to say more than I did.

III

But it is not quite what I would say today.

20. *Id.* at 177 n.137.

21. *Id.* at 174.

22. *Cf.* Boyle, *supra* note 2, at 62-69. This term has come into vogue—when, how and why, exactly, I do not know. I distrust it intensely in that it seems to imply a compensable “wrong” in appropriation, a notion that I reject entirely.

23. I suggested as much (albeit with reservations and some hedging) in testimony before Congress in 1984, in connection with hearings on the Record Rental Amendment. *See* Audio and Video First Sale Doctrine: Hearings on H.R. 1027, H.R. 1029, and S. 32 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. of the Judiciary, 98th Congress, 1st & 2d Sess. 2 (1983-1984), at 723 (statement of Professor Lange, *cited in* Kastenmeier & Remington, *supra* note 14, at 440. Today I might choose another way to express the thought, for this reason: compulsory licensing may appear to perpetuate the primacy of intellectual property in a scheme of things where I would rather see the public domain at the epicenter and intellectual property as an exception.

In the first place, I am more skeptical about the utility in efforts to reform intellectual property doctrines than I was when I wrote that essay. Note that I do not say “skeptical of the prospects for reform.” Unlikely though I know some students of the field believe it to be, I actually suppose that intellectual property is susceptible to reform, not merely through action by courts, as seemed sensible twenty years ago, but through direct political action in the Congress and legislatures of the states. Consider copyright, for example.

The Copyright Society’s FACE Initiative,²⁴ which proposes a direct appeal by copyright proprietors and their representatives to primary and secondary school students across the country, suggests to me that the agendas of the principal copyright industries (the recording and motion picture industries foremost among them, in company with publishers) are more imperiled than they are generally understood to be by outsiders. Houston’s Raymond Nimmer has said that copyright cannot survive unless it is accorded widespread acquiescence by the citizenry.²⁵ I think his insight is acutely perceptive and absolutely correct, for a reason that I also understand him to endorse: Never before has copyright so directly confronted individuals in their private lives. Copyright is omnipresent. But what has to be understood as well is that copyright is also correspondingly over-extended. Absent a wide and no less individual acquiescence, copyright simply may not survive its encounter with the populace at large. It is in part this insight, I suppose, that animates the Copyright Society in its FACE Initiative.

I confess to reservations about this initiative for reasons beyond the parochial concerns of copyright. I think it fundamentally wrong to insist that children internalize the proprietary and moral values of the copyright system. I fear the encroachment upon the formation and growth of creativity that these values represent when they are not suitably constrained—as we cannot count upon them to be in our time. We should be haunted, for example, by the familiar story of Helen Keller, a child (her world so unimaginably circumscribed) whose early efforts at creative self-expression were damaged irreparably by harsh accusations of plagiarism, accusations leveled against her by a mentor from whom she had reason to expect more in the way of empathy and judgment than he proved capable of mustering.²⁶ He proved, indeed, to be a

24. See Friends of Active Copyright Education Web Site, at <http://www.face-copyright.org/> (last visited February 10, 2003). The initiative is aimed directly and primarily at children and is meant to teach them about copyright values, especially as an antidote to peer-to-peer file sharing.

25. Cf. David L. Lange, *The Intellectual Property Clause in Contemporary Trademark Law: An Appreciation of Two Recent Essays and Some Thoughts About Why We Ought to Care*, 59 LAW & CONTEMP. PROBS. 213, 224 n.53 (Spring 1996).

26. Keller wrote a story (*The Frost King*) which she gave to her mentor, a man named Michael Anagnos, the director of the Perkins Institution for the Blind in Boston which Keller attended. Anagnos published the story as evidence of Keller’s accomplishments, only to discover later that it appeared to have been taken, nearly verbatim, from an earlier story published by a woman named Margaret Canby. Anagnos brought charges of plagiarism against Keller. She was formally exonerated after a hearing, essentially on the ground that whatever she had done was unconscious or unknowing. But the accusation and inquiry scarred her; she said later that she never wrote comfortably again. This episode (something of a *cause célèbre* a century ago, and one addressed in Keller’s autobiography as well as in

monster, not a mentor, and his assaults proved destructive to the creative efforts of his imprisoned ward for the balance of her life. But then, apart from the extremity of his appalling judgment and consequent cruelty, how was he unlike any other man or woman who believes in the moral or intellectual or legal sanctity of exclusive rights in expression?²⁷ The case is extreme, to be sure. But the lesson within it should be central to us all. Children do not come naturally to understand that it is wrong to appropriate creative expression—for the good and sufficient reason, I would argue, that it is not naturally wrong. Creativity and appropriation are inseparable, as inseparable as creativity and memory, and in my judgment they should remain so, at whatever cost may follow to whatever other belief systems (including copyright) may thus be obliged to stand aside.

But let us lay these broader issues to one side. I know the members of the Copyright Society to be well-intentioned. There are no monsters among them—only decent and honorable professionals, as committed to their views as I am to mine.²⁸ The point remains: Copyright is vulnerable. The FACE Initiative may backfire.

A contest for the hearts and minds of a public is always in doubt unless whatever is at issue makes common sense. And here I think is copyright's dilemma in the matter of the FACE Initiative: Copyright probably does not make common sense in the private lives of individuals.²⁹ Imagine the member-

standard biographies of her life) is usefully discussed in Jim Swan, *Touching Words: Helen Keller, Plagiarism, Authorship*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 57 (Martha Woodmansee & Peter Jaszi, eds., 1994). Swan's account of the incident is textured and intriguing, but even he does not appear to see the accusations against Keller as the straightforward assault upon her creativity that I do. In my view, it simply does not matter that she may have "known" the earlier work: if she considered the work she "created" to be hers, then I would say it was, never mind its provenance. This is what I understand to be implicit in the perfectly ordinary concept of creativity called "making a find." See Richard Schiff, *Making a Find: An Argument for Creativity, Not Originality*, *STRUCTURALIST REV.*, Spring 1984, at 59.

27. Keller's tormentors were moved by concerns for academic integrity, not copyright. I do acknowledge this difference, but it does not alter my point here. Protests to the contrary notwithstanding, plagiarism charges in the academy typically spring from, and are driven by, the same misguided sense of ownership of expression that in copyright leads to claims of proprietary rights. When that is not so—when, in other words, the academy's investment in protection is grounded in genuine concerns for provenance, rather than entitlement on the part of the putative "author" and a concomitant concern for enhancement of the author's reputation—the charges should be muted and the remedy essentially one of attribution or acknowledgment. Appropriation is then a matter of legitimate concern only to the extent that these markers of provenance are deliberately withheld, and only when the withholding is essentially in furtherance of a genuine purpose to defraud or mislead. That can happen, but usually the fault, if there is one, is in ignorance, haste, carelessness, misjudgment or indifference—and even these are appropriately judged as venial, not mortal, sins. Cf. Judith Hughes, *The Fuzzy Side of Intellectual Dishonesty: Placing Academic Honesty in an Epistemological Context* (2002), at <http://www.cade-aced.ca/icdepapers/hughes.htm> (last visited Feb. 10, 2003). Meanwhile, it is perfectly clear that Keller had no idea she had done anything wrong at all.

28. This is not a pro forma disclaimer. I only recently completed a term as a member of the Board of Trustees of the Society. I number many members of the Society among my closest and most valued professional acquaintances and personal friends.

29. I am sometimes asked whether I think there is any place for copyright at all in the general system of freedom for creativity I favor. The short answer is that I do. In commercial settings, for example, copyright can play a perfectly appropriate role if suitably constrained. Under the 1909 Act, copyright was essentially so constrained; as Boyle points out, one had to work hard to infringe. See Boyle, *supra* note 2, at 40. Advances in technology make the restraint of the 1909 Act a matter for nos-

ship of the Parent-Teacher Associations of all the schools on the FACE Initiative hit list suddenly encouraged and even obliged to pay close and heretofore unaccustomed attention to copyright. What then? Now fully aware for the first time of the potential for present limitations on their children's education that copyright actually presupposes,³⁰ are millions of parents and thousands of teachers likely to smile politely and join hands in support of the motion picture and recording and publishing industries' agenda? I think not. Not merely because the copyright industries say their agendas are fair and just; not merely because economists promise that things will work out for the better, one fine tomorrow; not even if "it's the law"—not, in short, if it means that kids today do without access to information and materials presently at hand and readily available but for copyright. The agenda is politics, not property, not fairness, not justice, not economics or law. The potential for a present backlash at the ballot box is obvious and inescapable, perhaps unanswerable. If that backlash happens, copyright reform will follow.

In the end, I am simply not persuaded that reform will suffice. Not if the goal is my goal, which is still to secure maximum freedom for the creative imagination. There is some slippage in terminology here, to be sure. Perhaps what I have in mind today can fairly be thought of as reform. But I think it may come closer to revolution. And if that revolution is to happen I suspect it will have to happen on the public domain's watch.

And let me speak here, again briefly in passing, to what I think of as one of the least useful or persuasive notions to have sprung up in response to the growing recognition of the public domain. Professor Samuels and some others have suggested that no matter how we may struggle, in the end the public domain is whatever intellectual property is not.³¹ Conceptually, this can be so only if one cannot envision the public domain as having an affirmative existence of its own. But that exercise does not require much, whether in the way of conceptual thinking or envisioning. Imagine an African veldt where lions and jack-

talgia today; that regime probably could not be reinstated as such. To be suitably constrained today, copyright ideally would have to be converted into some version of an "opt-in" system—perhaps like the Writers' and Producers' Guilds in the motion picture industry; or perhaps like the commons of the General Public License described in Boyle's article, which, as he quite correctly observes, is an alternative system of protection. *See id.* at 44-45. While copyright remains as it is under the 1976 Act, however, the best protection against its encroachments into private lives is a separate and paramount public domain, from within which creativity can be promoted and defended.

30. What limitations? Take these as commonplace examples of a considerably wider field: (1) limits on photocopying, resulting in limits on "coursepaks"; (2) limits on the availability of musical compositions, sound recordings, motion pictures and audiovisual aids in the classroom and beyond; and (3) limits on internet access resulting from encoded content protected by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860. These limits remain substantial even after the passage of the TEACH Act, which was meant to address some issues affecting education. Technology, Education and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758, 1910-13. All of these limitations adversely affect the ability of students to engage in the fullest use of copyrighted works for educational purposes. Not one of them has ever been vetted widely among the parents or teachers of school-age children.

31. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPR. SOC'Y U.S.A. 137 (1993); *see Boyle, supra* note 2, at 71-73.

als and gazelles dwell in uneasy symbiosis while the merciless sun shines down dispassionately upon them. There is symbiosis among them, yes, yet it requires only this much (read: “a small pinch of”) imagination to understand these inhabitants of the veldt as separate animals. Indeed, the function of taxonomy is to enable us to draw these singularly useful, but also elementary, distinctions. You have to be a lion- or jackal-lover of truly limited imagination or unlimited commitment to argue that gazelles are to be understood as no more than whatever is left over after their adversaries have finished feeding. For my own part, I am not much interested in reforming the predators and scavengers among us. My project is to recognize gazelles as gazelles—and not merely to recognize them, but to give them the means with which to defend themselves against their natural enemies.

Intellectual property can go on being intellectual property, reformed or otherwise. Meanwhile, the public domain certainly can and should be envisioned as a thing apart, and strengthened accordingly.

What is needed then, in my view, is an additional reimagining of the public domain we have come to recognize. As James Boyle observes, the recurring metaphor for the public domain today is mainly that of place: a wilderness, a commons, a sanctuary, a home. These metaphors appear to follow from the term “public domain” itself. In some settings, this is undoubtedly a useful way to think. But from the perspective of creativity I think it no longer quite suffices, if it ever did.

A better metaphor than place, I think, is status. Imagine the public domain as a status that arises from the exercise of the creative imagination, thus to confer entitlements, privileges and immunities in the service of that exercise; a status independently and affirmatively recognized in law, sometimes collective in nature and sometimes individual, but omnipresent, portable and defining; and a status meanwhile paramount to whatever inconsistent status may be conferred upon a work of authorship (or its author) from time to time, whether that work is protected as intellectual property, or is included within a so-called liability regime, or is otherwise provided for. One could imagine this sort of public domain more particularly still, so as to include tenets peculiar to setting or need, while suggesting the sources from which such a public domain might derive.³² But in this essay I will merely suggest its nature, and even that somewhat indirectly—first, briefly, by way of simile supported by example; then, at slightly greater length, through an analogy drawn from an appealing article in

32. Of course, one must eventually state plainly how such a public domain might be made a reality. The ultimate sources of law, as I suppose them to be, are essentially four in number: a happy but unlikely evolution in the main tenets of the relevant positive law; the First Amendment; the Intellectual Property Clause; and an international convention, perhaps grounded in human rights. None of these is to play any real role in this essay. But I am at work (with my Duke colleague Jeff Powell) on a book on the First Amendment in which we do address these issues somewhat directly. That book, *No Law: Intellectual Property in the Absolute Image of the First Amendment*, is under contract with the Stanford University Press, and is scheduled for completion within the coming year.

the contemporary literature, and finally, through an example of how a public domain so configured might actually work in practice.

Let us envision the public domain as if it were a status like citizenship, but a “citizenship” arising from the exercise of creative imagination rather than as a concomitant of birth.³³ It is surely no challenge to identify creativity and imagination with citizenship in a more conventional sense. This is indeed consistent with a perfectly ordinary understanding of citizenship, now well established in American life and by no means original with us. The Roman historian Tacitus, writing of the reigns of the Emperor Nerva and Trajan, observed: “Such was the happiness of the times that men could think as they pleased and speak as they thought.”³⁴ Justice Brandeis appropriated that insight (without attribution) in *Whitney v. California*, in which he identified thinking and speaking as principal objects of First Amendment protection.³⁵ Here, then, is an idea powerful enough to transcend its origins: happiness as a function of thinking and speaking freely, and each of these as an attribute of desirable citizenship. I suggest in turn that thinking of the public domain as conferring a status akin to citizenship—but now a citizenship of the creative imagination—is little more than a step away from civic republicanism toward a clearer understanding of the recognition and protection that exercises of creativity require and should beget.

For make no mistake: It is protection, not merely recognition or definition, that we need. A concept like citizenship can serve usefully here, as it has for thousands of years.

Consider, for example, the Apostle Paul’s claim upon citizenship in this account drawn from the Book of Acts. Paul, born Saul of Tarsus in Silesia, a Jew but also a Roman and now an apostate, is preaching the Gospel of Christ in Jerusalem Temple, to the intense displeasure of the devout, and the resulting discomfort of Claudius Lysias, Chief Captain of the Roman Guard, whose task it is to maintain order in this important but beleaguered outpost of the Empire:

And as they cried out, and cast off their clothes, and threw dust into the air,

The chief captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him.

33. Though I am unaware of any suggestion quite like this, I mean to make no claim of originality here, and will cheerfully accept the representations of anyone who does claim it. In some part I imagine the idea occurred to me as a result of John Perry Barlow’s interesting suggestions for a “citizenship of the net,” a notion now very commonly expressed in the term “netizens” – though in truth I am actually not much interested in the net as a special province of concern. And I may have been influenced by the concepts developed in Jed Rubenfeld’s recent essay, *The Freedom of Imagination: Copyright’s Constitutionality*, which was published last year in the *YALE LAW JOURNAL*, and which I had the pleasure of reading while it was still in manuscript. See *infra* note 37, and accompanying text. In any event, whatever the genesis of the idea may be, I do think it apt, and have merely tried to develop it here as an alternative to place.

34. 1 TACITUS, *THE HISTORIES*, § 1 (A.D. 109). I have employed this cite in a number of earlier essays.

35. 274 U.S. 357, 375 (1927).

And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned?

When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest: for this man is a Roman.

Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea.

And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was free born.

Then straightway they departed from him which should have examined him: and the chief captain also was afraid, after he knew that he was a Roman, and because he had bound him.³⁶

Civis Romanus Sum: As in this example, and like the model originally proposed above, citizenship is a status independently and affirmatively recognized in law. It confers entitlements, privileges and immunities, sometimes collective in nature and sometimes individual. It is omnipresent, portable and defining. Above all, it is capable of achieving paramountcy vis-à-vis rights, obligations or constraints otherwise imposed by law. I do not say that the public domain is exactly equivalent to citizenship. I do say that it might profitably take on these attributes of citizenship in securing protection for exercises of the creative imagination against the claims otherwise to be made under rights now sounding in intellectual property or its successors.

A similar suggestion can be seen in a recent essay by Jed Rubenfeld,³⁷ who argues that the First Amendment should be read to protect what he calls “the freedom of imagination.” The analogy is plain. I envision a public domain configured so as to offer attributes akin to the status of citizenship in the service of creative imagination. Rubenfeld envisions attributes of citizenship itself in that service, particularly in the form of the First Amendment. One must not go too far. These are not quite the same thoughts. I am interested in the public domain as an affirmative source of entitlements capable of deployment, as, when and where required, against the encroachments upon the creative imagination threatened by intellectual property. He is interested in the First Amendment, but supposes that, were it read as it ought to be, some such encroachments would necessarily be curtailed.³⁸ He is not primarily interested in developing his ideas as an exercise in fashioning public policy for intellectual property.³⁹ (For that matter, properly understood, neither am I.) His project is the First Amendment. Mine is the public domain. Taking these differences fully into account, however, I am still much drawn to the parallels his argument affords.

36. Acts 22:23-29 (King James).

37. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

38. *Cf. id.* at 13.

39. *Id.* at 58.

To begin with, he relies upon an exercise of the imagination to invoke First Amendment protection. I would rely on a similar exercise to invoke the protection of the public domain.

Rubinfeld's explicit inclusion of the imagination as the central focus of his essay offers a neat resolution to a troublesome problem in envisioning the reach and scope of the public domain. This problem has been to bring within reach of the public domain and its protection those kinds of appropriations that are creative but do not necessarily result in any form of public expression, or that may result in no expression of any kind. Reading is a classic example; Rubinfeld treats reading as an exercise of the imagination and thus a central object of protection within the First Amendment.⁴⁰ I suppose that Justice Brandeis' inclusion of "thinking" as a First Amendment value is close to the "imagination" that Rubinfeld includes, and for some purposes may even be slightly the better (more capacious) term, but there appears to be something useful in the more focused connotations of "imagination" in this setting, where "creativity" and "expression" already take on the color of terms of art.

To be sure, there is never any certainty in this term or that. Imagination is distinct from action in Rubinfeld's view: "The freedom of imagination demands that people be free to exercise their imagination. It is not a freedom to do what one imagines."⁴¹ Violence, intentional misrepresentation ("knowingly denying that an exercise of imagination is an exercise of imagination"⁴²), misinformation—these are among the arguable exercises of the imagination that are not within the freedom Rubinfeld envisions. And piracy: "When copyright law bars simple piracy, it does not punish infringers for exercising their imagination. It punishes them for failing to exercise their imagination—for failing to add any new imaginative content to the copied material."⁴³

I suppose that peer-to-peer file sharing (à la Napster, for example) would not qualify as an exercise of imagination under the test Rubinfeld himself has in mind here. And what about appropriation artists like Damian Loeb,⁴⁴ or Negativland,⁴⁵ or Sherrie Levine?⁴⁶ Would they be protected? Rubinfeld's analysis is additionally complex at this point because he would actually approach the First Amendment question in cases like these from within the matrix of copyright principles that have evolved from the derivative works right.⁴⁷ Thus, "not just any change in the original work should suffice to evade the copyright holder's reproduction right. Trivial or obvious modifications, or changes that involve no substantially new act of imagination, especially if intro-

40. *See id.* at 34-35.

41. *Id.* at 42.

42. *Id.* at 45.

43. *Id.* at 48.

44. *See* <http://www.damianloeb.com/> (last visited Feb. 10, 2003).

45. *See* <http://www.negativland.com/> (last visited Feb. 10, 2003); Negativland, *Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROBS. 239 (Winter/Spring 2003).

46. *See* <http://www.crownpoint.com/html/levine.html> (last visited Feb. 10, 2003).

47. Rubinfeld, *supra* note 37, at 49-60.

duced to evade the reproduction right, should not qualify. At bottom, the judge is called on to decide whether the old has been reimagined—whether the allegedly infringing new work is in fact new.”⁴⁸ Appropriation artists might or might not make the grade if this is to be the approach. Negativland probably would, its madcap thefts surely creative and imaginative under the strictest scrutiny.⁴⁹ Loeb might, since in his work appropriation is mixed with elements of substantial originality.⁵⁰ Levine is another matter. As I understand Rubinfeld, he would not extend the freedom of imagination to appropriation artists whose art appears objectively to consist of appropriation *simpliciter*, unmediated by additional affirmative acts of imagination.⁵¹ If Levine is that kind of artist (a question Rubinfeld does not consider and one I need not resolve here), then she is beyond the reach of the freedom of imagination.⁵²

I expect I would apply Rubinfeld’s standard less restrictively than he. I think file-sharing involves substantial exercises of the imagination: the kids who do it are producing music for themselves. And Levine’s art (as I understand it) appeals to me no less than the collage work of Negativland and Loeb. But then, should Rubinfeld and I differ, so what? He can hardly be faulted for interpreting his own project in a way I do not entirely agree with. The great value in his work is the vision itself, a vision which places imagination at the center of First Amendment protection. In this vision I can and do concur entirely—though in the end I continue to think that the public domain, configured as suggested here, may offer the advantage of a somewhat more specific and reliable protection.⁵³ I shall conclude this essay with an elaboration upon how that public domain might work in practice.

Consider copyright’s fair use doctrine. Under the proposal I have advanced here, that doctrine should now be seen as an affirmative aspect of the public domain at large, rather than as a mere affirmative defense to an allegation of

48. *Id.* at 55.

49. See Negativland, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2 (1995).

50. See *supra* note 44.

51. See Rubinfeld, *supra* note 37, at 48.

52. The reader can judge: see *supra* note 46.

53. The real difficulty with the First Amendment as a source for an expansive vision of the public domain is that the Amendment has been so closely circumscribed by Supreme Court cases since the early 1970s as to rob it of vitality, a constraining circumstance with which even the best scholars can contend only up to a point. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001). In these and many other articles first rate scholars are obliged to pick their way among doctrines that are fundamentally at odds with a decent concern for creativity. Of course, this is in no sense a failing on their part; to the contrary, their scholarship may appear to be the more elegant and heroic for their efforts. Rubinfeld’s article deals with this problem no less elegantly or heroically than have others, but in the end he cannot altogether escape the confining matrix of the Court’s cases either. If the First Amendment is to serve, then it too will have to be addressed in terms of its baseline deficiencies in interpretation, an undertaking primary among the tasks my colleague Jeff Powell and I have taken up in drafting the manuscript for our book. See *supra* note 32.

copyright infringement.⁵⁴ So viewed, fair use would not be limited in the protection it confers merely to those instances in which copyright infringement is alleged. It would extend as well, and as fully, to species of infringement recognized under other doctrines, including the right of publicity, trademarks, misappropriation in unfair competition, trade secrets, ideas, and even patents. An agenda of this sort would require years to realize, of course, and more space and time than I have to describe it now. But limited even to a setting in which the adversary is copyright, one can reimagine fair use as an aspect of the public domain rather than of copyright itself, and envision a role for fair use well beyond the one it now plays in that field.

In a work-in-progress Jennifer Anderson and I offered at the Law School's Public Domain Conference last year, we sketched in a vision of fair use for what we called "transformative appropriations."⁵⁵ We have decided to continue working on our model rather than publish it among the collection of papers in this symposium. But for the sake of example I will offer excerpts from our working draft, edited to reflect the reconfigured public domain I have suggested here in action. Transformation, in the fashion proposed by Judge Leval,⁵⁶ is no longer at the center of our model. Instead, fair use is invoked by any creative act, including (thanks to Rubinfeld's suggestion) an exercise of the creative imagination. The consequence of that invocation is an investiture of rights conceptually akin to the rights invoked by a claim of citizenship:

Creative appropriation would be presumptively privileged in every instance, without primary concern either for exploitation adversely affecting the economic value of an antecedent work or for the reputation or sensibilities of its author or proprietor – though in appropriate cases an equitable provision for sharing the proceeds of such exploitations would follow, as would suitable provisions for disclaimers, acknowledgments, attribution and the like. The exclusive rights of authors under copyright,

54. In the text, notes, and citations immediately following, I will cut blindly across vast swaths of prior writing by scholars, some whose works I know, and no doubt others whose publications have escaped my notice. I particularly acknowledge Professor Patterson (whose many writings in the field have set an example for anyone who ventures into this area of the law), as well as his occasional writing partner Professor Joyce; Professor Gordon (whose seminal essay on fair use as market failure has helped shape all following debate in the field); Judge Leval (whose proposal with respect to transformative works has had great effect in the field); Professor Fisher (whose own much longer work on fair use in some sense set the stage for Judge Leval's later work); Professor Weinreb (whose vision of fair use as "fair" I have thought especially attractive); Professor Netanel (whose work I always read with great respect and interest); Judge Birch (whose opinion in *SunTrust Bank v. Houghton-Mifflin Co.* reflects a deeper appreciation of fair use than is common among judges); Judge Kosinski (whose views on appropriation and apportionment I think interesting, if not entirely persuasive); and David Nimmer (whose writing on fair use, as on everything else, is truly remarkable). In a different sort of essay I would feel constrained to gather additional representative citations, so that the intellectual provenance of the things said by me here would be both manifest and thorough. On this occasion, however, when my purpose frankly is to present a straightforward polemic rather than conventional scholarship, I shall beg the reader's indulgence, and content myself with acknowledging that most of what I propose has probably been anticipated elsewhere, whether or not it has been assembled in quite the same way.

55. See David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation* (2001), available at <http://www.law.duke.edu/pd/papers/langeand.pdf> (last visited Feb. 10, 2003). The introduction included here has been added since the work was posted. This work remains a work in progress, and is accordingly incomplete.

56. See Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997).

including rights in derivative works, would be subordinated accordingly, but would remain otherwise unaffected.⁵⁷

No revision to the Copyright Act would be required, in our view. Section 107 already supports (we would say commands) a reading that makes its provisions superior to the provisions of section 106.⁵⁸

And how far would this carry us toward our goal of affirmative protection for creative appropriation?

If we presuppose the necessary creative exercise in connection with the appropriation, then rarely, if ever, should fair use be withheld merely on account of either functional or aesthetic equivalency between the two works. It may be that a secondary work appears to add nothing at all to the creative offices already reflected in an antecedent work; and in that case perhaps it would be appropriate to inquire further into the justification for fair use. While such a scenario can be envisioned in theory, it is exceedingly unlikely to be encountered in practice, absent the boldest forms of appropriation through the simplest forms of copying, followed by publication to persons already identically addressed by the proprietor of the antecedent work. And even in that case, an identical creative exercise in the second work, fairly judged to have prompted that appropriation (whether or not independently), would justify the claim of fair use nonetheless. Should Lauren Greenfield take up painting, for example, the fact that she may produce works of the sort that Damian Loeb produces does not mean that Loeb's independent conceptions would not continue to be privileged. Indeed, it is entirely possible, under the analysis we propose, that Loeb and Greenfield might each identically counter-appropriate the other's expression, so as to produce works indistinguishable from each other, each claiming fair use in his or her respective appropriation. Weird as this may seem in the imagining, it is but a corollary to Hand's own contemplation as to the unobjectionable replicability of Keats' "Ode To A Grecian Urn": copyright always presupposes the possibility of works identical in expression, yet independently conceived.

From the perspective of mere identity or functional equivalency, then, fair use would be withheld only when no creative exercise could be discerned in the second work at all. Straightforward piracy would continue to be forbidden, of course, and might even be regulated more closely in the absence of any lingering concern for fair use. But piracy could not effectively be urged in a transaction merely because the second work, if licensed, would amount to a derivative work. Under this analysis, to the contrary, the question of derivative work status is of no greater consequence than would follow

57. Lange & Anderson, *supra* note 55. The idea of apportionment of profits is by no means new, and it has seemed just, as opposed to a kind of winner-take-all outcome in fair use. It is a useful way to accommodate the fourth factor under Section 107 of the Copyright Act. 17 U.S.C. § 107(4) (2000) ("the effect of the use upon the potential market for or value of the copyrighted work"). I contemplated apportionment in passing in *Recognizing the Public Domain*, *supra* note 1, at 174, although there I considered it primarily in conceptual terms, rather than in the immediate context of fair use. Among its recent proponents are Professors Netanel and Rubinfeld, as well as Judge Kosinski, who suggested it in the course of his Brace Memorial Lecture. But I have had some second thoughts about whether this idea is in fact as useful or as fair as it seems. Specifically, I wonder whether it does not unwisely entangle the legitimacy of creative appropriation with the wholly separate (and essentially adventitious) question of profits and revenue streams. I shall not try to work this out in a footnote, but do want to record my reservation about the issue. (It is one of the reasons Jennifer Anderson and I have temporarily withdrawn our fair use essay from publication.)

58. The texts of the two sections suggest as much on their face: 17 U.S.C. § 106 is "subject to sections 107 through 122"; 17 U.S.C. § 107 applies "notwithstanding the provisions of sections 106 and 106A." In *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001), Judge Birch suggested that fair use, properly understood, is an affirmative right, not an affirmative defense. See also Kulzick & Hogue, *supra* note 16.

were the second work a simple copy. If an exercise of the creative imagination invokes fair use, then the exclusive rights must gracefully step aside *pro tanto*.⁵⁹

Ah, but then: “straightforward piracy?” I can hear James Boyle asking, “What does *that* mean?”

It means an appropriation unmotivated by any creative exercise, including an exercise of the creative imagination. And how do we know when we are in the presence of such an exercise? There is no escaping: we must decide. In Rubinfeld’s approach to this issue, he establishes what seem to me to be categories of conduct leading one to conclude that imagination is at work or not.⁶⁰ The bright lines that result I have already suggested may be more restrictive than the fair use model I have just outlined is meant to be. In my view, the decision ought to be grounded in fact-finding affected by law: The decision of a trial judge should be reviewable in plenary fashion by a court of appeal. The presumption should be fair use.⁶¹

And what of the most extreme cases? In private correspondence, initiated by David Nimmer and joined in by Neil Netanel, Jed Rubinfeld and me, we have asked that question of each other, having Rubinfeld’s article in mind. Consider, as we have, a hypothetical (somewhat distorted from the original put by Jorge Borges) in which Cervantes’ *Don Quixote* is “recreated” word for word by a later “author” to the pleasurable reception of those who have not read it before because, until its recreation, it had seemed merely an antique.⁶² Is this an exercise of the imagination? I think it fair to say the members of our ad hoc discussion group are of mixed minds about the matter. But I would say it all depends on what the putative junior creator has in mind. Appropriation is creative, I think, and therefore qualifies as an exercise of the creative imagination, when we see in it the qualities or attributes we recognize in conceptual art of any kind.⁶³ And if the answer to the question is debatable or in doubt, then the junior creator should prevail as against all efforts by a senior party to forbid the appropriation, for the cardinal rule of good citizenship under the protective

59. Lange & Anderson, *supra* note 55, at 151.

60. See Rubinfeld, *supra* note 37, at 48-49.

61. In my view the availability of such a presumption is a necessary prerequisite to any adequate theory of the public domain. Indeed, that is essentially where this essay begins. See text accompanying *supra* notes 1 & 2.

62. Cf. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 41 n.154 (2001). This article is a masterwork, nothing less, and cannot be adequately acknowledged in less extravagant terms. But do note, gentle reader, that Nimmer is addressing conceptual subtleties and nuances well beyond the single issue—imagining protection for creativity as a function of the public domain—that mainly engages me here. Read Nimmer for the sheer pleasure of the experience; and then see whether you can ever feel quite the same about the plausibility in Learned Hand’s spin (in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (1936)) on Keats’ “Ode on a Grecian Urn.” If you can, you may be ready for a conservator, as Nimmer suggests, but you are also probably ready for creativity as I see it. The two propositions are in no part inconsistent.

63. See Schiff, *supra* note 26. Even this splendidly satisfying conception of creativity may not go as far as one might like. “Making a find” is creative, as Schiff says; I would argue that even the “find” may be creative, if motivated in play. See David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (Spring 1992) [hereinafter Lange, *At Play*].

reach of the public domain is that doubtful cases ought always to be resolved in favor of appropriation.

Certainly, appropriation of a very ordinary sort can amount to an exercise of the creative imagination. In his provocative essay on fair use included among the papers in this symposium,⁶⁴ David Nimmer publishes for the first time the contents of a poem written by Anne Frank in 1940 to a friend whose birthday party in Amsterdam young Anne attended, perhaps for the last time. “Dear Henny,” Anne Frank wrote on that occasion, “Pluck roses on earth, and forget me not.”⁶⁵ The words are haunting now, poignant, simple, terribly sweet and sad. They call to us from across the years with a power they surely could not have possessed when first they were penned. Yet I would have said they were unmistakably creative then. Who today would deny that they are imagination exemplified?

But I am obliged to report—on the authority of David Nimmer himself, who discovered what I am about to relate after his own article had gone to press—that these words also appear to have been appropriated verbatim from an anthology of poems widely available in The Netherlands at the time. The poet who wrote them was named Snelders. His work appears to have been composed in 1895, and might plausibly have remained under copyright in 1940.⁶⁶

Was Anne Frank a creator on the occasion when she wrote her note to Henny? I have said I think so, and my opinion remains unchanged.

But was she an author? Perhaps not, in the conventional understanding of that term in copyright. Was she a plagiarist, a pirate, a thief? No decent person would lay such a charge against her memory. She was just a young girl, barely ten years old, a friend writing to a friend on the occasion of a celebration. Pre-supposing copyright, was this fair use? Yes, surely then—and even now, under the tedious and inexact standards of our time. But I submit that these are the wrong questions, and not merely for obvious reasons of decency. The questions are wrong because, coming as they do from within the matrix of copyright, they are motivated by the wrong priorities and the wrong concerns.

It is wrong to challenge school children with responsibility for copyright. Wrong for copyright to intrude into private lives. Wrong to measure creativity by the standards of copyright. Wrong to lay impediments (moral, intellectual, legal) before exercises of the imagination, whether great or small. Wrong, in short, to rob us of this vital aspect of our citizenship: the right to think as we please and to speak as we think.

We must learn to reimagine the public domain. We must learn to ask questions from within the province of that new status, a status like citizenship, measured by creativity and the imagination, and invoked by an exercise of

64. David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263 (Winter/Spring 2003).

65. *Id.* at 284-85.

66. E-mail from David Nimmer (Nov. 21, 2002) (on file with author).

either. For then Anne Frank's answer to the question of entitlement will be our common answer: *Civis musarum sum*.

James Boyle is right, of course. There are many public domains. Perhaps we must recognize them all. But for myself and others like me, I want the public domain, however it may be defined, to secure these elemental aspirations which I believe innate in human kind: to think and to imagine, to remember and appropriate, to play and to create.⁶⁷ It will be enough if recognizing the public domain brings us to that end.

67. See Lange, *At Play*, *supra* note 63.