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Copyright Versus the Right to Copy: The Civic Danger of Allowing Intellectual Property Law to Override State Freedom of Information Law

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Copyright Versus the Right to Copy: The Civic Danger of Allowing Intellectual Property Law to Override State Freedom of Information Law

Frank D. LoMonte*

Journalists, researchers, and activists rely on freedom-of-information laws for access to the essential data and documents they need. But the ability to copy and republish public documents exists in the chilling shadow of copyright law. This Article looks at the growing tension between two bodies of law—federal copyright law and state public-records law—and how the aggressive use of copyright law to “paywall” inspecting and redistributing government documents can inhibit effective public oversight. The Article identifies the knotty jurisdictional problems that arise when a dispute over government records requires interpreting both copyright law (the exclusive province of federal courts) and state freedom-of-information law (the exclusive province of state courts), with the practical result that the delay and expense of parallel litigation will be tantamount to denial of access for all but the most stubborn requester. Because the public needs government data and documents to discharge its civic watchdog role, the Article concludes that copyright should not be understood to impede inspecting and copying public records, because narrower exemptions for “trade secrets” fully protect rights-holders’ legitimate economic interests.

I. INTRODUCTION	160
II. THE STARTING POINT: THE PUBLIC’S RIGHT TO COPY	162
A. <i>What’s a Public Record?</i>	162
B. <i>The Challenge of Holding Government Accountable for Disclosure</i>	165
III. WHAT’S PROTECTED BY COPYRIGHT: (ALMOST) EVERYTHING	169

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A. <i>Little Dab of Originality and Creativity Will Do</i>	169
B. <i>The Fair-Use Workaround</i>	172
C. <i>Copyright as a Statutory FOI Exemption</i>	173
D. <i>The Status of the Statutes: Who “Owns” the Law?</i>	175
IV. WHEN WORLDS COLLIDE: INTELLECTUAL PROPERTY VS. PUBLIC PROPERTY	177
A. <i>It’s On the Syllabus . . . If You Can Find It</i>	177
B. <i>Clear Photos, Murky Law: Pictometry and the Uncertain Right to Duplicate Copyright-Protected Records</i>	179
1. Copyright Permits Both Viewing and Duplicating	180
2. Copyright Forbids Duplicating	181
3. Copyright Permits Duplicating Only with Restrictions	181
C. <i>Stopping the Presses: Copyright as Obstruction to News Coverage</i>	182
V. THIRD-PARTY COPYRIGHT INTERESTS AND FOI	183
VI. THE JURISDICTIONAL PUZZLE.....	189
VII. CONCLUSION AND RECOMMENDATIONS.....	193
A. <i>Copyright and FOI: A Marriage That Can’t Be Saved?</i> ..	194
B. <i>The (Incomplete) Fair-Use Workaround</i>	197
C. <i>Liberating the Public’s Information</i>	202

I. INTRODUCTION

Freedom-of-information (FOI) law facilitates duplicating and distributing other people’s work. Copyright law restricts duplicating and distributing other people’s work. Plainly, these two bodies of law coexist uneasily. What is to be done when they collide?

On occasion, they have. Take the case of an inquisitive citizen who wants to see a copy of the syllabus for a course taught at a public university. Under state public-records statutes, producing the document is an easy call; the state agency has it, and the public is entitled to see it. But a syllabus may also qualify as a piece of original creative work, entitling its creator to copyright protection, which confers the right to control how the work is reproduced and redistributed. For the university presented with a request to produce the syllabus as a public record, the dilemma becomes, to copy, or not to copy? To show how knotty the problem is, two courts in different states, presented by the same plaintiff with this very question, reached different outcomes.¹

1. See Nat’l Council [on] Tch. Quality, Inc. v. Curators of Univ. of Mo., 446 S.W.3d 723, 724

While the collision between copyright law and public-records law has seldom resulted in litigation, the potential for the former to swallow the latter is ominous. Because the bar for a document to qualify as copyright protected is low,² a secretive government agency could manipulatively use copyright protection to conceal studies, reports, and other documents of undeniable public interest if copyright is understood to operate as a trump card overriding the public's right of access.

A reckoning in the not-distant future is likely, as government agencies become repositories for more and more data and documents of commercial value.³ While the demand for an in-house memo from a state bureaucrat may be minimal, government agencies increasingly create or accumulate commercially exploitable works, including databases and GIS maps.⁴ As the stakes rise, the question of whether a government agency can, or should, deny a public-records request because the requested material qualifies for copyright protection will become less of an academic question and more of a pressing practical one.⁵

Complicating the scenario, a case like the college syllabus request presents thorny jurisdictional issues. Interpreting state freedom-of-information law is a matter of exclusive state-court jurisdiction,⁶ while interpreting copyright law is committed to federal courts.⁷ When the two issues coincide in one case—first, whether the requested document qualifies as a public record subject to production under state law and

(Mo. Ct. App. 2014) (finding no obligation to produce copies of requested syllabi); Nat'l Council on Tch. Quality, Inc. v. Minn. State Colls. & Univs., 837 N.W.2d 314, 316 (Minn. Ct. App. 2013) (finding that copyright did not excuse duty to produce requested syllabi). These cases are discussed in detail in Section IV, *infra*.

2. See Lisa P. Wang, *The Copyrightability of Legal Complaints*, 45 B.C. L. REV. 705, 713 (2004) (stating that “[t]he level of creativity demanded by the originality requirement is extremely low” for a work to qualify for copyright protection).

3. See Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1006 (1995) (“The case for unrestricted public use of public data in the hands of government must be set out clearly now because the stakes are higher than they were when information existed primarily on paper. . . . Government bureaucracies have always displayed a tendency to control the information of their agencies, and the temptation increases as the value and the uses of the information expand.”).

4. See Shubha Ghosh, *Informing and Reforming the Marketplace of Ideas: The Public-Private Model for Data Production and the First Amendment*, 2012 UTAH L. REV. 653, 655 (recognizing that “corporate culture of commodification” that views data as an asset to be commercialized can cause tension with socially desirable interests in maximizing public access to data).

5. See Barbara A. Petersen, *Copyright and State Government: An Analysis of Section 119.083, Florida's Software Copyright Provision*, 20 FLA. ST. U. L. REV. 441, 474 (1992) (criticizing decision to protect state-produced software under copyright law as “a dangerous precedent for copyrighting and marketing other public records with potential commercial value . . .”).

6. See *Chi. Trib. Co. v. Bd. of Trs. of Univ. of Ill.*, 680 F.3d 1001, 1006 (7th Cir. 2012) (finding no federal jurisdiction to adjudicate newspaper's Illinois Freedom of Information Act claim).

7. See *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232 (4th Cir. 1993) (recognizing district courts' exclusive original jurisdiction under 28 U.S.C. § 1338(a)).

second, whether the document is eligible for copyright protection, limiting the ability to reproduce and redistribute it—there may be no single court appropriate to adjudicate both questions.

This Article proposes a way out: copyright law has no legitimate place in the freedom-of-information discussion, because narrower alternatives already exist to protect the relatively few records maintained by government agencies for which copyright protection is arguably proper. Section II explains the mechanics of state open-records law and the strong presumption that the public is entitled to see (and copy) anything in the government's possession that memorializes information relating to the conduct of public business. The section briefly describes how journalists, researchers, and others who regularly need access to government documents find public agencies resistant to disclosure, and why it would be perilous to equip those agencies with a "get out of accountability free card" by recognizing copyright as a categorical override of the duty to disclose.

Section III then explains the well-established principle, under the federal Copyright Act, that original works of creativity may not be reproduced or redistributed without the consent of the creator and how the "fair-use" doctrine occasionally makes reuse defensible. In Section IV, the Article describes the first generation of cases in which courts have been asked whether copyright law forecloses sharing a copy of a document that would otherwise be subject to production as a public record. Section V focuses on an especially tricky subset of copyright versus FOIA cases, in which the government agency is not the creator of work but merely the custodian of work created by commercial third parties, whose interests in confidentiality may be more compelling than the government's.

In Section VI, the Article examines the jurisdictional puzzle presented by a case in which areas of exclusive state jurisdiction and federal jurisdiction intersect, and the practical problems presented by asking state courts to adjudicate disputes that require construing copyright law. Finally, Section VII recommends a path to reconcile the two bodies of law in a way that gives effect to the principle, deeply ingrained in the public-records law of every state, that the law should be interpreted to maximize transparency.

II. THE STARTING POINT: THE PUBLIC'S RIGHT TO COPY

A. What's a Public Record?

Every state and the federal government maintain statutes entitling the public to inspect records that memorialize government agencies'

activities.⁸ Many state statutes take their inspiration from the federal Freedom of Information Act (FOIA), enacted under the Johnson administration in 1966.⁹

The federal FOIA statute enables the public to demand access to records of any executive branch agency, including independent regulatory agencies or government-controlled corporations.¹⁰ Agencies must provide responsive records to requesters unless they fall within one of nine enumerated exemptions.¹¹ Commonly encountered exemptions include those enabling agencies to withhold confidential information in medical and personnel files, sensitive law enforcement information that could imperil safety or compromise a fair trial, and internal “deliberative” materials prior to a final agency decision.¹² The Supreme Court has read the statute to require that courts “narrowly construe FOIA’s exemptions and resolve any ambiguity in favor of disclosure.”¹³

As with the federal law, state statutes are construed liberally toward access, and exemptions are to be read narrowly to give broad effect to the statutory purpose of maximizing public disclosure.¹⁴ As one court tartly observed, “[A] person does not come—like a serf—hat in hand, seeking permission of the lord to have access to public records. Access to public records is a matter of right.”¹⁵ Several states explicitly codify the policy objectives that animate freedom-of-information law. The Arkansas Freedom of Information Act begins, “It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy.”¹⁶ The Texas Public Information Act explains in a preface,

8. See Linda B. Samuels, *Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets from State Open Records Laws*, 27 AM. BUS. L. J. 467, 472 (1989) (“Every state now has on its books some type of freedom of information act or ‘open records’ law.”). This Article will refer to state access laws as “FOI laws” or “FOI statutes” for short, although not all use the “freedom of information” nomenclature.

9. See *id.* (observing that many states modeled their open records statutes after federal FOIA).

10. 5 U.S.C. § 552(a)(3)(A).

11. 5 U.S.C. § 552(b).

12. See Tyler Prime & Joseph Russomanno, *The Future of FOIA: Course Corrections for the Digital Age*, 23 COMM’N L. & POL’Y 267, 288 (2018) (characterizing these exemptions as the most frequently cited, comprising seventy-seven percent of all cases studied in which documents were withheld or redacted on the grounds of exemptions).

13. John C. Brinkerhoff Jr., *FOIA’s Common Law*, 36 YALE J. ON REGUL. 575, 577 (2019).

14. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 66 (1996). See also *S. Illinoisan v. Ill. Dep’t of Pub. Health*, 844 N.E.2d 1, 21 (Ill. 2006) (“[T]he FOIA is to be interpreted liberally, and the exemptions to disclosure are to be interpreted narrowly . . .”).

15. *State ex rel. Athens Cnty. Prop. Owners Ass’n v. City of Athens*, 619 N.E.2d 437, 439 (Ohio Ct. App. 1992).

16. ARK. CODE ANN. § 25-19-102 (2021).

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.¹⁷

Every state's freedom-of-information statute provides that the right to inspect a record includes the right of access to copies. This right is increasingly important now that the understanding of what constitutes a public record includes voluminous databases,¹⁸ which would hardly be amenable to on-site inspection at the agency's premises. It is increasingly common for journalists and researchers to use their own computing expertise to analyze thousands of data points obtained from government agencies.¹⁹ It would be impossible to do such in-depth analysis without a copy of the records. Because the ability to analyze and display data is so valuable, statutes and judicial interpretations increasingly recognize that the right to obtain data includes the ability to insist on receiving it in its native form (i.e., a database, even one stored within third-party software), rather than as a static document (such as a printout) that would be far less amenable to analysis.²⁰ Additionally, the ability to republish all or part of

17. TEX. GOV'T CODE ANN. § 552.001(a) (West 2013).

18. See, e.g., *Sierra Club v. Superior Ct.*, 302 P.3d 1026, 1039 (Cal. 2013) (finding that county's database of land tracts maintained in GIS format is a public record subject to disclosure under California law); *Comm'n on Peace Officer Standards & Training v. Superior Ct.*, 165 P.3d 462, 465 (Cal. 2007) (concluding that database of officers hired and terminated by California law enforcement agencies qualifies under state law as a public record and is not categorically exempt from disclosure).

19. See, e.g., Derek Willis, Eric Umansky & Moiz Syed, *The NYPD Files*, PROPUBLICA (July 26, 2020), <https://projects.propublica.org/nypd-cerb/> [<https://perma.cc/NQ4W-P6DH>] (analyzing thirty-five years' worth of complaints lodged against New York police officers based on data obtained from civilian review board); Craig McCarthy & Stephen Stirling, *How We Built the Most Comprehensive Statewide Database of Police Force in the United States*, NJ (Feb. 28, 2019), https://www.nj.com/news/2018/11/how_we_built_the_most_comprehensive_statewide_database_of_police_force_in_the_us.html [<https://perma.cc/4DFN-N4EB>] (explaining how journalists gathered 72,677 use-of-force forms from police departments across New Jersey through more than 500 FOI requests, enabling them to build a searchable database of every reported use of force by officers over a five-year period); see also Drew Armstrong, *Data Heroes of Covid Tracking Project Are Still Filling U.S. Government Void*, BLOOMBERG BUSINESSWEEK (Nov. 20, 2020, 3:00 AM), <https://www.bloomberg.com/news/features/2020-11-20/covid-tracking-project-volunteers-step-up-as-u-s-fails-during-pandemic> [<https://perma.cc/LB2S-XE4L>] (describing how project launched by three journalists and a data scientist became a source of daily COVID-19 updates more trusted than U.S. government sites, by aggregating data obtained from agencies and healthcare facilities throughout the country and verifying it).

20. See, e.g., *State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 669 (Ohio 1992) (holding that researcher was entitled to computer tapes on which police data was stored, because the manner of storage was an essential part of the database and putting it into a different format constituted an alteration of the record). As the court said there, "[A] public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to

a record contributes to credibility; a news account or research paper based on handwritten notes from a visual inspection will lack the trustworthiness of a report accompanied by the actual documents.²¹ And journalists are not the only beneficiaries of the ability to duplicate records and remove them from the government's premises; people with visual impairment or limited English proficiency might take copies off-site to be adapted for their use or read aloud to them. The ability to make and share copies of records obtained from government agencies thus carries self-evident societal benefits.

B. The Challenge of Holding Government Accountable for Disclosure

Public records are behind a significant share of the journalism that holds government agencies accountable and brings about reforms. Scratch beneath the surface of any investigative reporting project and you will almost certainly find a public-records request. In South Florida, reporters with the *Sun-Sentinel* won the 2013 Pulitzer Prize for local reporting by using transponder readings from highway toll plazas to document reckless speeding by police officers.²² The *Baltimore Sun* used contracts, purchase orders, and other public records to document a web of corruption within city government and the local university hospital system, resulting in the federal criminal prosecution of the sitting mayor and a housecleaning at the University of Maryland Medical System.²³

Effective public oversight of law enforcement agencies is especially dependent on access to government records, because so much of the work of police, prosecutors, and courts takes place beyond public view. Access to public records enabled reporters to discover that Derek Chauvin, the Minneapolis police officer who was convicted of the May 2020 murder of an unarmed forty-six-year-old Black man, George Floyd, had been the subject of eighteen misconduct complaints before the lethal encounter,

replicate the value added to the public records through the creation and storage on tape of a data base containing such records." *Id.*

21. See Craig Silverman, *The Best Ways for Publishers to Build Credibility Through Transparency*, AM. PRESS INST. (Sept. 24, 2014), <https://www.americanpressinstitute.org/publications/reports/strategy-studies/transparency-credibility/single-page/> [<https://perma.cc/H9HM-HTLP>] (explaining how investigative news organizations such as ProPublica are strengthening credibility by embedding links to original source documents so readers can inspect underlying data for themselves).

22. See Sally Kestin & John Maines, *Above the Law: Off-Duty Police Caught Driving from 90 to 130 MPH*, IRE J., Spring 2012, at 16, 18 (explaining methodology reporters used to calculate speed of police cruisers by obtaining readouts from automated toll-payment transponders using Florida's Public Records Act, and resistance that agencies presented before complying with requests).

23. Jean Marbella, *Baltimore Sun Wins Pulitzer Prize for Coverage of Mayor Catherine Pugh's 'Healthy Holly' Book Scandal*, BALT. SUN (May 4, 2020), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-sun-pulitzer-win-20200504-krx2g2jx35bdfjr7mzwantwlm-story.html> [<https://perma.cc/57PZ-N3M4>].

almost all of which were dismissed without disciplinary consequences.²⁴ Elsewhere, reporters have used public records to call attention to racial disparities in criminal sentencing,²⁵ police with checkered histories of domestic violence,²⁶ and ineffective prosecutors who allow rapes to go unpunished.²⁷ And academic researchers as well as journalists rely on well-enforced public-records laws as a primary data source. Stanford University researchers analyzed more than 100 million reports of traffic stops by law enforcement agencies across the country and concluded that “the bar for searching [B]lack and Hispanic drivers [is] lower than that for searching white drivers.”²⁸ Law professors from Duke University and the University of Chicago obtained the personnel files of 98,000 certified officers from more than 500 agencies across Florida to document the phenomenon of the “wandering officer,” who gets fired from one law enforcement agency but turns up working at another.²⁹ Attorney James Naughton has demonstrated how records obtained through FOIA requests can expose racial inequities in the imposition of school discipline, which disproportionately affects young people of color.³⁰

Journalists, activists, researchers, and others who depend on access to public records often find government agencies uncooperative with their disclosure obligations, exploiting unclear statutory exemptions for purposes of concealment. Across California, for instance, police departments greeted the enactment of a new statute opening up police

24. Scottie Andrew, *Derek Chauvin: What We Know About the Former Officer Convicted in George Floyd's Death*, CNN (Apr. 20, 2021, 10:52 PM), <https://www.cnn.com/2020/06/01/us/derek-chauvin-what-we-know-trnd/index.html> [https://perma.cc/V9RN-BE43].

25. Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida's Broken Sentencing System*, SARASOTA HERALD TRIB., (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/sentencing/> [https://perma.cc/R4PT-5EWE].

26. Kyle Hopkins, *We Found 14 Villages That Hired Criminals as Cops. Here's What the State is Doing to Change That*, ANCHORAGE DAILY NEWS (Dec. 21, 2019), <https://www.adn.com/lawless/2019/12/21/we-found-14-villages-that-hired-criminals-as-cops-heres-what-the-state-is-doing-to-change-that/> [https://perma.cc/CB3Y-TD6S].

27. Brandon Stahl, Jennifer Bjorhus & MaryJo Webster, *When Rape Is Reported and Nothing Happens*, STAR TRIB. (July 22, 2018), <https://www.startribune.com/when-rape-is-reported-in-minnesota-and-nothing-happens-denied-justice-special-report-part-one/487130861/> [https://perma.cc/3JSG-BL95].

28. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736, 739 (2020); see also Jason Buch & Joy Borkholder, *Report: Washington State Patrol Singles Out Native American Drivers*, THE SPOKESMAN-REV. (Jan. 2, 2020), <https://www.spokesman.com/stories/2020/jan/02/report-washington-state-patrol-singles-out-native-/> [https://perma.cc/7UT7-GZRY] (quoting Stanford study).

29. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1682 (2020).

30. James Naughton, *The School FOIA Project: Uncovering Racial Disparities in School Discipline and How to Respond*, 52 LOY. U. CHI. L.J. 1045 (2021).

officers' disciplinary files for public inspection by shredding their files to avoid disclosure.³¹ Agencies bent on inflicting delay and financial hardship have adopted the tactic of preemptively filing man-bites-dog lawsuits against FOI requesters, with the effect of denying the requesters "prevailing plaintiff" status for purposes of an attorney fee award.³² On occasion, the zeal to conceal rises to criminality. In Atlanta, a former mayoral aide was convicted of a misdemeanor after she was caught texting other city officials to intentionally slow-walk requests for financial records embarrassing to the mayor and to produce the documents in an unusable format.³³

More commonly, agencies aggressively interpret statutory exemptions to FOI laws or interpose barriers in the form of delays or prohibitive fees in ways that may technically be legal but strain the statutory presumption of openness.³⁴ In one notable case, the State of Connecticut tried to charge the *Hartford Courant* newspaper a fee of twenty-five dollars per entry for access to the state's database of criminal "rap sheets"; the potential \$20.3 million bill forced the newspaper to sue for access.³⁵ Agencies are increasingly assessing not just nominal copying fees for access to their records, but onerous hourly search and retrieval fees that, as a practical matter, are tantamount to a denial.³⁶ Even where statutes ostensibly establish deadlines for producing responsive documents, those

31. See Annie Gilbertson, *California Cops Are Withholding Public Records Despite New Law Saying They Can't*, LAIST (June 30, 2019, 5:00 AM), https://laist.com/2019/06/30/california_police_agencies_withhold_public_records_transparency_law.php [<https://perma.cc/9JVC-ATQ4>] ("Some law enforcement organizations are charging high fees for records, destroying documents and even ignoring court orders to produce the files.").

32. Jonathan Peters, *When Governments Sue Public-Records Requesters*, COLUM. J. REV. (June 30, 2015), https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php [<https://perma.cc/9FVY-G7XM>].

33. J. Scott Trubey, *Ex-Reed Aide First Official Convicted of Public Records Violations*, ATLANTA J. CONST. (Dec. 19, 2019), <https://www.ajc.com/news/reed-aide-first-official-convicted-public-records-violations/ImqPLWZLh9aMU89t6vcwtI/> [<https://perma.cc/G4FX-PXYD>].

34. See *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front> [<https://perma.cc/YBC7-PJNK>] ("Local, state and federal agencies alike routinely blow through deadlines laid out in law or bend them to ludicrous degrees, stretching out even the simplest requests for years."). In the article, journalists with the ProPublica investigative reporting collaborative share their worst experiences trying to obtain records from uncooperative government agencies. *Id.* One reporter recounted fighting the Defense Department for three and one-half years just to be summarily denied, and another caught a New York state agency lying about the existence of records. *Id.*

35. *Hartford Courant Co. v. Freedom of Info. Comm'n*, 801 A.2d 759, 762–63 (Conn. 2002).

36. See Tae Ho Lee, *Public Records Fees Hidden in the Law: A Study of Conflicting Judicial Approaches to the Determination of the Scope of Imposable Public Records Fees*, 21 COMM'C'N L. & POL'Y 251, 252 (2016) ("Despite the growing concern over high public records fees, several state governments have attempted to recoup more expenses under the executory authority, charging hourly fees for the labor costs incurred for tasks involving research, redaction or review . . .").

deadlines are widely ignored without consequence for the agency; it is not unheard of for a federal FOIA request to sit unfulfilled for as long as twenty years.³⁷ Compliance went from “sluggish” to “nonexistent” at many agencies when the COVID-19 pandemic struck the United States in 2020, causing some government officials to suspend fulfillment of information requests entirely—at a time when hunger for reliable public-health data was at its highest.³⁸ Because resolving disputes can require both exhausting internal agency appeals and multiple rounds of litigation, FOI law ends up favoring the hidebound agency over the requester as a practical matter.³⁹

News reporting and other government watchdog activity often require access to reports, studies, and other records that would readily pass the test of being sufficiently original and creative to qualify for copyright protection. Journalists regularly refer to and publish excerpts from audit reports or inspector general reports that reflect originality and creative investment by their authors.⁴⁰ The ability to obtain, copy, and republish government documents and data is foundational to journalism, documentary filmmaking, academic research, and nonprofit advocacy. If copyright were allowed to override access to and use of government

37. See Joe Regalia, *The Common Law Right to Information*, 18 RICH. J. L. & PUB. INT. 89, 92 (2015) (“[A]gency backlogs and procedural hurdles have substantially reduced [FOI laws’] efficacy.”).

38. See Colin Lecher, *States Are Suspending Public Records Access Due to COVID-19*, THE MARKUP (May 1, 2020, 10:00 AM), <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19> [<https://perma.cc/WY3H-N3WT>] (stating that in response to the pandemic, several jurisdictions have reduced or suspended access to public records).

39. See Regalia, *supra* note 37, at 119 (“For agencies applying a ‘deny first’ approach to document requests . . . , FOIA may create costs and hurdles by dissuading individuals from combating the agency machine.”).

40. See Andrea Eger, ‘Epic Owes Oklahoma \$8.9 Million’: *Improper Transfers, Chronic Misreporting Found by State Auditor’s Investigation*, TULSA WORLD (Nov. 8, 2020), https://tulsaworld.com/news/local/education/epic-owes-oklahoma-8-9-million-improper-transfers-chronic-misreporting-found-by-state-auditors-investigation/article_f8a41072-01e2-11eb-9691-976475d9051b.html [<https://perma.cc/PR79-8Z4Z>] (reporting on investigative state audit report disclosing that a failure in oversight by local school boards enabled operators of a controversial Oklahoma charter school to enrich themselves at taxpayer expense); Mark Bowes, *Inspector General: Va. Parole Board Violated Law, Policies in Releasing Killer of Richmond Officer*, RICH. TIMES-DISPATCH (Aug. 6, 2020), https://richmond.com/news/local/crime/inspector-general-va-parole-board-violated-law-policies-in-releasing-killer-of-richmond-officer/article_c23bb495-e44c-588a-a021-652dd69ab3f4.html [<https://perma.cc/SRL4-UL8R>] (quoting state investigator’s report that found irregularities in state parole board’s handling of murder case, including failure to make diligent efforts to notify victim’s family or elicit victim impact statements); Russ McQuaid, *Audit: Marion County Inmates Being Held Hours, Sometimes Days After Posting Bond*, FOX59.COM (Nov. 27, 2017, 7:32 PM), <https://fox59.com/news/audit-marion-county-inmates-being-held-hours-sometimes-days-after-posting-bond/> [<https://perma.cc/W26K-M3MS>] (reporting contents of internal audit of Indiana county jail, which found detainees needlessly “languishing” for hours or even days after release ordered, contributing to jail overcrowding).

records, the losses to these fields would be incalculable.

Because of agencies' well-documented history of manipulating FOI laws to obstruct public oversight, any effort to exempt categories of documents should be viewed skeptically. If copyright becomes widely recognized as trumping the public's right to inspect or copy government records, the question is not whether the exemption will be abused, but how badly it will be abused.⁴¹

III. WHAT'S PROTECTED BY COPYRIGHT: (ALMOST) EVERYTHING

A. *Little Dab of Originality and Creativity Will Do*

The Constitution gives Congress the power to provide authors with exclusive right to their creative work “[t]o promote the Progress of Science and useful Arts”⁴² The paramount purpose of copyright is to promote greater access to knowledge.⁴³ Although creative artists benefit financially from the ability to redistribute and adapt their work, the primary intended beneficiary of copyright is the public.⁴⁴ There is a recognized civic component to copyright, as Professor Neil Netanel has written: “[C]opyright aims to increase and make widely available the store of knowledge required for effective citizenship and civic association. . . . [I]t enhances civil society’s participatory character. Through economic incentives and a careful balance between exclusivity and access, copyright seeks to foster widespread citizen participation in public deliberation.”⁴⁵

The scope of what qualifies for copyright protection is purposefully broad. Federal courts have read the constitutional term “writings” to include any physical rendering of the fruits of creative labor, so long as they have been reduced to tangible form.⁴⁶ The requirement of “fixation” simply has come to mean that an inchoate idea or concept alone cannot

41. See Gellman, *supra* note 3, at 1009–10 (observing that, if copyright is understood to apply to government documents, governments could be selective in their enforcement activities, targeting those requesters with whose viewpoints they disagree).

42. U.S. CONST. art. I, § 8, cl. 2.

43. See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 842 (2010) (“ . . . [T]he goals of copyright, as stated in the preamble to Article I, § 8 [are] . . . promoting the creation and dissemination of more and better creative works.”).

44. See *id.* at 840 (“Although the vehicle for achieving this goal was to be the conferral of certain exclusive rights, for a limited duration, on the creators of copyrightable material or their assignees or heirs, the intended beneficiaries of this system were the members of the public.”).

45. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 363–64 (1996).

46. See *Goldstein v. California*, 412 U.S. 546, 561 (1973) (“[A]lthough the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”).

be the subject of an infringement claim.⁴⁷

As of 1989, when the United States Congress ratified the terms of the international Berne Convention for the Protection of Literary and Artistic Works, copyright has become automatically effective as soon as a creative work is committed to a tangible medium.⁴⁸ Registration with the U.S. Copyright Office within the Library of Congress, long required before a work could be regarded as copyright-protected, is today necessary only as a prerequisite to suing to enforce a copyright.⁴⁹

The Copyright Act extends copyright protection only to works of authorship that are “original.”⁵⁰ The Supreme Court gave its authoritative word on what is required for a work to qualify for copyright in *Feist Publications v. Rural Telephone Service*.⁵¹ While the Court denied copyrightability to a white pages telephone directory because an alphabetical list of names and addresses is purely factual and lacks creativity, the Court set a minimal bar for copyrightability in future cases: “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”⁵² Thus, two conditions must be satisfied for the work to be original and copyrightable. First, the work must be independently originated by the author rather than copied from other sources. Second, the work must display a minimal degree of creativity, meaning that a purely factual work would not qualify.

Although a short string of commonplace words (“Have a nice day”) could never cross the threshold of sufficient originality and creativity to be protected by copyright, courts have recognized infringement claims involving rather short passages.⁵³ Personal letters, even unpublished

47. See *Andrien v. S. Ocean City Chamber of Com.*, 927 F.2d 132, 134 (3d Cir. 1991) (“Copyright is available only for the expression of a work of authorship, not for a mere idea.”).

48. Tom James, *Copyright Enforcement: Time to Abolish the Pre-Litigation Registration Requirement*, 2019 U. ILL. L. REV. ONLINE 100, 104.

49. Tarla S. Atwell, Note, *Timing Means Everything!*, 12 J. MARSHALL L.J. 59, 61, 64 (2018–19); see also 17 U.S.C. § 411(a) (“[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”).

50. See 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship . . .”).

51. See generally *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

52. *Id.* at 345. See also *id.* at 361–62 (holding that a white pages telephone directory cannot receive copyright protection because “names, towns, and telephone numbers of [utility’s] subscribers” were “uncopyrightable facts,” and the contents of white pages were not arranged in an original way).

53. For instance, in a 2003 ruling, a federal appeals court affirmed a copyright infringement claim against an advertising agency that was found to have reused a portion of an artist’s copyright-protected phrase—“Most people don’t know that there are angels whose only job is to make sure you don’t get too comfortable & fall asleep & miss your life”—in an advertisement for Audi automobiles. *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 791 (8th Cir. 2003).

ones, can satisfy the prerequisites to be protected by copyright.⁵⁴ In an especially memorable case, the Second Circuit decided that reclusive novelist J.D. Salinger had a protectable copyright interest in personal letters sent to friends that were incorporated into a book about Salinger's life without his consent.⁵⁵ "Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use . . . ," the court stated. "Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright, save for such special circumstances as might fall within the 'narrower' scope of fair use available for unpublished works."⁵⁶

Copyright's heightened deference to creators' control over work that has not yet been published could have a significant impact on the accessibility of government data and documents that must be extracted from agencies by way of FOI request—the records that government actors would most strongly prefer to keep secret. Even a piece of correspondence as informal and seemingly ephemeral as an email can qualify for copyright protection.⁵⁷ So, it is not a stretch to imagine that a substantial share of the documents produced each day in response to FOI requests could qualify for copyright protection, if state law allows it and if the creator decides to assert it.

Ordinarily, any legal constraint on publishing lawfully obtained material would run afoul of the First Amendment, which is understood to disfavor the use of the courts to restrain speech before it can be read or heard.⁵⁸ But federal courts have concluded that the Copyright Act fully accommodates First Amendment interests, without the need for an independent constitutional inquiry, for two reasons. First, copyright does not prevent the use of facts or ideas derived from the works of others.⁵⁹

54. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 94 (2d Cir. 1987) ("The author of letters is entitled to a copyright in the letters, as with any other work of literary authorship."); see also William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79, 79 (1992) (stating that unpublished works including letters diaries, journals, and reports are "surely copyrightable").

55. See *Salinger*, 811 F.2d at 92–94 (describing facts of the case).

56. *Id.* at 100.

57. See Edina Harbinja, *Legal Nature of Emails: A Comparative Perspective*, 14 DUKE L. & TECH. REV. 227, 233–35 (2016) (explaining that a typical email would satisfy the threshold preconditions under U.S. law of being fixed in a tangible medium, original, and creative).

58. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (recognizing the First Amendment offers "special protection" against government directives that operate as prior restraints on distributing speech).

59. See *United Video, Inc. v. F.C.C.*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.").

Second, fair use facilitates free speech by enabling speakers to comment on, and republish parts of, the works of others.⁶⁰ For those reasons, courts typically do not apply traditional First Amendment principles to a request for copyright remedies; once it is established that a record is protected by copyright, courts do not independently analyze whether restraining its redistribution would unduly curtail free speech.⁶¹

The Copyright Act explicitly states that works created by the U.S. government are not eligible for copyright protection.⁶² However, Section 105 of the Act allows the federal government to hold copyrights assigned by others and does not address the work of third-party contractors hired by the government. The Act does not similarly preclude state or local government entities from obtaining copyright protection for work their employees create.⁶³ State laws vary considerably as to whether, and under what circumstances, a state or local agency may obtain copyright protection for government-created works.⁶⁴

B. *The Fair-Use Workaround*

Essentially as long as copyright has existed, courts have recognized that the law's exclusivity cannot entirely forbid one creator from referencing the creative work of another without stifling the evolution of knowledge and culture.⁶⁵ Congress codified the long-recognized common law doctrine of fair use in 1976, creating a statutory workaround that allows for reusing copyright-protected work for certain socially beneficial purposes that do not devalue the original work.⁶⁶ The doctrine

60. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (observing that fair-use defense accommodates First Amendment concerns by providing accommodation for scholarship and commentary).

61. See *id.* at 221 (concluding that, beyond analyzing whether Copyright Act applies, “further First Amendment scrutiny is unnecessary”); see also Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM’NS & ENT. L.J. 587, 589 (2001) (“Having found that copyright law embodies First Amendment interests, courts find it unnecessary, if not redundant, to entertain any additional First Amendment arguments made by litigants.”).

62. “Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.” 17 U.S.C. § 105(a).

63. See *Bldg. Offs. & Code Adm’rs Int’l, Inc. v. Code Tech., Inc.*, 628 F.2d 730, 735–36 (1st Cir. 1980) (“Works of state governments are . . . left available for copyright protection by the state or the individual author, . . .”).

64. See Ashley Messenger & Dennis Pitman, *Can States Use Copyright to Restrict the Use of Public Records?*, COMM’NS LAW., Spring 2013, at 4, 7 (“The status of copyright protection for government records and publications at the state level is wildly variable among jurisdictions.”).

65. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose [of stimulating progress in science and the arts].”).

66. See James Hall, Comment, *Bare-Faced Mess: Fair Use and the First Amendment*, 70 OR. L. REV. 211, 217 (1991) (explaining that between two cases, decided in 1967 and 1978, Congress

of “fair use” provides that an otherwise-infringing reuse of copyright-protected work can be defensible, based on a balancing test that assesses how the republisher used the work and how the reuse affected its value.⁶⁷ Fair use is an affirmative defense that arises once the prima facie elements of infringement have been established.⁶⁸

In assessing whether a republication of protected work qualifies as “fair,” a court will apply a four-factor analysis codified in Section 107 of the Copyright Act:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁹

The Copyright Act recognizes certain categories of reuse as uniquely societally valuable and therefore entitled to an extra measure of leeway in the fair-use analysis: criticism, commentary, news reporting, teaching, scholarship, and research.⁷⁰ However, this does not mean any use meeting one of the six statutorily recognized categories will automatically qualify as “fair.”⁷¹ Rather, fair use is an intensely fact- and context-specific inquiry, which makes the outcome difficult to predict with assurance.⁷²

C. Copyright as a Statutory FOI Exemption

Only a handful of state FOI laws expressly refer to copyright. Statutes in Kansas, Nebraska, and South Dakota explicitly identify copyright as a limit on a requester’s ability to obtain duplicates of records.⁷³ The

codified the fair-use doctrine, intending courts to apply it flexibly and weigh the public utility of copyright-protected works above other factors).

67. See Frank J. Lukes, Comment, *The Public Good v. A Monetary Profit: The News Organizations’ Utilization of the Fair Use Doctrine*, 11 J. MARSHALL REV. INTELL. PROP. L. 841, 846 (2012) (explaining application of fair-use factors).

68. See *Campbell*, 510 U.S. at 590 (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”).

69. 17 U.S.C. § 107.

70. See *id.* (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

71. See Bauer, *supra* note 43, at 852 (“[I]t does not follow that all instances of these six forms of conduct will be deemed ‘fair use.’”).

72. See *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (“[T]he determination of fair use is an open-ended and context-sensitive inquiry.”).

73. See KAN. STAT. ANN. § 45-219(a) (2010) (“A public agency shall not be required to provide

Wisconsin and Utah FOI statutes arguably go even farther. Wisconsin excludes from the threshold definition of a public record any document “to which access is limited by copyright, patent, or bequest,”⁷⁴ while Utah defines public records to exclude “material to which access is limited by the laws of copyright or patent unless the copyright or patent is owned by a governmental entity or political subdivision”⁷⁵ By defining public records to exclude records to which copyright limits access, the Wisconsin and Utah laws can be read to suggest that copyright is a barrier not just to duplicating records but even to viewing them; once a document ceases to be a public record at all, citizens cannot invoke the state FOI statute to insist on seeing it.

By contrast, other references to copyright in the context of FOI statutes are more benign. Nevada refers to copyright only for the purpose of emphasizing that a third party’s copyright-protected interests are unimpaired by sharing a document with a state agency; the statute does not indicate that copyright overrides the state-guaranteed right of access.⁷⁶

Colorado and Indiana are outliers in specifically addressing the interaction of copyright and FOI law by statute. Indiana’s Access to Public Records Law states that the public’s right of access should not be compromised by the obligation to pay licensing fees to inspect public documents that might qualify for copyright protection.⁷⁷ The Colorado Open Records Act recognizes that government agencies can obtain copyright protection of records that qualify as open records but specifies that the government’s copyright interests “shall not restrict public access to or fair use of copyrighted materials”⁷⁸ Outside of this handful of statutes, state law is generally ambiguous about whether the copyright status of records interferes with the ability to inspect or duplicate them.⁷⁹

As states became increasingly sophisticated in developing their own

[such items or devices] . . . which are copyrighted by a person other than the public agency.”); NEB. REV. STAT. § 84-712(1) (2013) (providing that requesters are entitled to receive a copy of public records “except if federal copyright law otherwise provides”); S.D. Codified Laws § 1-27-1 (2009) (assuring requesters of the right to copy public records “unless federal copyright law otherwise provides”).

74. WIS. STAT. § 19.32(2) (2020).

75. UTAH CODE ANN. § 63G-2-103(22)(b)(iv) (West 2021).

76. See NEV. REV. STAT. § 239.010(1) (2020) (“This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.”).

77. See IND. CODE § 5-14-3-3(g)(2) (2019) (stating that agencies may not enter into contracts conditioning the public’s right to inspect and copy documents on the payment of royalties or licensing fees, except where expressly authorized by statute).

78. COLO. REV. STAT. § 24-72-203(4) (2016).

79. Messenger & Pitman, *supra* note 64, at 5.

computer programs, the possibility of being forced to produce duplicates of commercially valuable software became a matter of special concern. Several states have dealt with this concern by narrow carve-outs in their FOI laws that exclude software from the definition of a publicly accessible record.⁸⁰

The relative dearth of references to copyright in state FOI statutes may indicate, by silence, that legislatures do not widely consider copyright to be an excuse for defying the statutory duty to furnish public records. Alternatively, it may indicate that lawmakers believe copyright law is already subsumed within the catch-all exemptions in many states that withhold access to public records where federal law affirmatively forbids disclosure. Or the silence may simply indicate a failure to detect and grapple with the tension between the two bodies of law, leaving the task to courts and attorneys general—which, as we shall see, have reached diverging resolutions.

D. The Status of the Statutes: Who “Owns” the Law?

Compilations of statutes are an especially salient example of a state-created record that the government has an interest in “paywalling,” and the public has an interest in obtaining without charge. It is difficult to think of any government record to which public access is more essential. Ordinarily, access to government records is not regarded as a constitutionally based entitlement; requesters normally must look to the statute books as the source of their right.⁸¹ But if those statute books are *themselves* the subject of the dispute, significant due process interests are implicated. Where the law is viewable only by those who can pay for access, it raises fundamental constitutional and public-policy questions to hold people responsible for complying with laws they cannot afford to see.⁸² For that reason, the Supreme Court has long held that “the law” is

80. See, e.g., ARK. CODE ANN. § 25-19-103(7)(B) (2015) (“‘Public records’ does not mean software acquired by purchase, lease, or license.”); CAL. GOV’T CODE § 6254.9(a) (1988) (“Computer software developed by a state or local agency is not itself a public record under this chapter.”); COLO. REV. STAT. § 24-72-203(3.5)(a)(III)(b)(I) (2018) (providing that agencies are not required to produce records in their native digital format if doing so “would violate the terms of any copyright or licensing agreement between the custodian and a third party . . .”); MICH. COMP. LAWS § 15.232(i) (2018) (“Public record does not include computer software.”); N.D. CENT. CODE § 44-04-18.4(2) (2019) (defining “proprietary information” exempt from production to include “[a] computer software program and components of a computer software program which are subject to a copyright or a patent . . .” and “trade secrets” to mean “information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process” with inherent economic value and reasonably requires secrecy).

81. See *McBurney v. Young*, 569 U.S. 221, 232 (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”).

82. See Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23

not protectable by copyright.⁸³ But, until recently, the Court left open the possibility that a compilation of laws with some additional creative content might qualify for copyright protection.

This dispute reached the United States Supreme Court in the case of *Georgia v. Public.Resource.Org.*⁸⁴ In *Public.Resource.Org*, the State of Georgia tried to assert copyright ownership over the Official Code of Georgia Annotated (O.C.G.A.), contending that the compilation of annotations reflected the original creative decisions of a committee of legislators and their staff.⁸⁵ The state's Code Revision Commission, a body of legislators responsible for the annotations, sued the operators of the website Public.Resource.Org after the organization scanned all 186 printed volumes and supplements of the annotated code and posted them on a publicly accessible website, undercutting the state's exclusive publishing contract with LexisNexis.⁸⁶

The district court, relying on a string of case law dating back to the nineteenth century, as well as a reference within the Copyright Act to "annotations" as eligible for protection, found the O.C.G.A. to be copyright protected.⁸⁷ The judge then analyzed whether Public.Resource.Org might be entitled to a fair-use defense but concluded that the use was not defensible; the entirety of the code was copied and republished, and the availability of a free version online would drastically reduce demand for the state's own version.⁸⁸ On appeal, the Eleventh Circuit reversed, invoking the broad principle that statutes inherently belong to the public, not to individual government employees: "[T]he constructive authors of those official legal promulgations of government that represent an exercise of sovereign authority. And because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain material and, therefore, uncopyrightable."⁸⁹ But the Supreme Court decided the case on relatively narrow and fact-specific grounds: that legislators are, categorically,

HASTINGS COMM'N & ENT. L.J. 81, 89 (2000) (explaining that courts have long disfavored copyright protection for compilations of statutes or judicial opinions, based on public policy principles that value access).

83. See *Banks v. Manchester*, 128 U.S. 244, 252–54 (1888) (holding that, due to public policy concerns, there is a judicial consensus that official works of judicial officers cannot be copyrighted).

84. *Georgia v. Public.Resource.Org., Inc.*, 140 S. Ct. 1498 (2020).

85. *Id.* at 1504–05.

86. *Code Revision Comm'n v. Public.Resource.Org., Inc.*, 244 F. Supp. 3d 1350, 1354 (N.D. Ga. 2017), *rev'd*, 906 F.3d 1229 (11th Cir. 2018).

87. *Id.* at 1356.

88. See *id.* at 1358–61 (concluding defendant was unable to meet the burden of proving fair use because "wholesale copying of the copyrighted annotations . . . would hinder the economic viability of creating and maintaining the O.C.G.A.>").

89. *Code Revision Comm'n v. Public.Resource.Org., Inc.*, 906 F.3d 1229, 1232 (11th Cir. 2018), *aff'd*, 140 S. Ct. 1498 (2020).

unable to be the “authors” of work they create in the course of their legislative duties.⁹⁰

Because of the posture in which it arose and the narrowness of its ultimate holding, *Public.Resource.Org* does not settle the question of how to resolve a case in which a public-records requester asserts a statutory right to receive a copy of records that could qualify for copyright protection. Answering that question requires looking, first, at the handful of times in which state courts have been asked to referee which legal right is superior when there is a seemingly direct conflict between the right to obtain government records and the right to withhold them to protect copyright interests.

IV. WHEN WORLDS COLLIDE: INTELLECTUAL PROPERTY VS. PUBLIC PROPERTY

A. It's On the Syllabus . . . If You Can Find It

Two fraternal (but not identical) twin cases at the intersection of copyright and FOI law arose from researchers' attempt to gain access to the course syllabi used in college teacher-education classes. The outcome of these cases demonstrates how challenging it is to harmonize the creator's interest in retaining control of a work with the public's interest in seeing the contents of that work when the “work” is a government document.

The National Council on Teacher Quality (NCTQ) is a nonprofit think tank that began its life as an outgrowth of the conservative Fordham Institute, although it self-identifies as nonpartisan and non-ideological.⁹¹ Since 2013, the NCTQ has published an annual report of its assessment of the adequacy of teacher-education programs at postsecondary institutions around the country, drawing on freedom-of-information requests as one tool to obtain information about how future teachers are educated.⁹² In pursuit of records about teacher-training programs, the NCTQ filed public-records requests with, among others, state universities in Minnesota and Missouri, meeting resistance in each instance. The organization sued to assert its right of access to records from public

90. *Public.Resource.Org.*, 140 S. Ct. at 1506.

91. See generally Diane Ravitch, *What Is NCTQ? (And Why You Should Know)*, WASH. POST (May 24, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/ravitch-what-is-nctq-and-why-you-should-know/2012/05/23/gJQAg7CrIU_blog.html [https://perma.cc/U2SM-7S9G] (describing history of NCTQ); see NAT'L COUNCIL ON TCHR. QUALITY, *Our Approach*, <https://www.nctq.org/about/approach> [https://perma.cc/5CP4-KP4G] (last visited Sept. 17, 2021) (“The National Council on Teacher Quality (NCTQ) is a nonpartisan, not-for-profit research and policy organization that is committed to modernizing the teaching profession.”).

92. NAT'L COUNCIL ON TCHR. QUALITY, *Teacher Prep Review*, <https://www.nctq.org/review> [https://perma.cc/48JB-HL2M] (last visited Sept. 17, 2021).

institutions, and that is where the two cases began their divergent paths.

In Minnesota, the state Court of Appeals ruled in favor of the requester, finding that the state's Data Practices Act entitled the NCTQ to copy the requested syllabi.⁹³ The court agreed with the university system's position that "the data practices act cannot be construed so as to require an agency or state actor to violate the copyright act."⁹⁴ But the court found no direct conflict between the state's legal obligations under federal and state law, because the requester's contemplated use of the syllabi—for research and critique—was a fair use.⁹⁵ The court noted that, although Minnesota law forbids compelling a requester to justify the reason for making the request, the NCTQ voluntarily disclosed its plans for using the documents.⁹⁶ Additionally, the court questioned the assertion that the rightsholder could pursue an infringement action against the university system if NCTQ exceeded the bounds of fair use; in that event, the court said, the full range of Copyright Act remedies would be available against NCTQ as the infringer, not the university.⁹⁷

In Missouri, however, an appellate court considering a dispute over an identical records request by NCTQ reached a different result. There, the Missouri Court of Appeals determined that NCTQ was not entitled to copies of syllabi from the University of Missouri, because making a copy would compromise the exclusive ownership rights of the faculty creators, placing the university in violation of the Copyright Act.⁹⁸ The court relied on a 1987 Missouri attorney general's advisory opinion, which concluded that the Missouri Sunshine Law's exception for records "protected from disclosure by law" extends to records protected by the Copyright Act.⁹⁹ While copyright did not foreclose inspecting the syllabi, the NCTQ would be satisfied only with copies, and the Missouri court refused to follow the Minnesota ruling of a year earlier that furnishing a copy would

93. Nat'l Council on Tchr. Quality v. Minn. State Colls. & Univs., 837 N.W.2d 314, 320 (Minn. Ct. App. 2013) [hereinafter referred to as *NCTQ Minnesota*, for clarity].

94. *Id.* at 318.

95. *See id.* at 319 ("[The court found that there is] a nonconflicting interpretation and application of federal and state law: although state law prohibits a data-practices respondent from demanding a fair-use justification, it does not prohibit it from recognizing that one exists.").

96. *See id.* at 318–19 ("Although MnSCU did not request a fair-use justification, the NCTQ volunteered one anyway when it replied to MnSCU's stated copyright-infringement concerns.").

97. *See id.* at 319 ("[T]he district court observed . . . [that all] of the author's rights and remedies under the FCA are unimpeded.").

98. *See* Nat'l Council [on] Tchr. Quality, Inc. v. Curators of Univ. of Mo., 446 S.W.3d 723, 728 (Mo. Ct. App. 2014) [hereinafter referred to as *NCTQ Missouri*, for clarity] ("Disclosing the syllabi to the NCTQ—through reproduction and distribution—would constitute a violation of the Federal Copyright Act."). The official caption of the case slightly misstates the name of the requesting organization, which is the National Council on Teacher Quality.

99. *Id.*, citing Mo. A.G. Op. No. 138-87 (1987).

be a non-infringing fair use.¹⁰⁰ The court concluded that fair use has no place in the analysis of whether a record is subject to disclosure under state open-records law, for two reasons. First, a state court cannot adjudicate whether a use is fair, because the Copyright Act assigns that determination exclusively to the federal courts. Second, an agency will be in no position to evaluate the “fairness” of the document’s ultimate use, since the record must first be produced before the requester can use it.¹⁰¹ Simply put, the court decided “the fair use doctrine does not work in the context of Sunshine Law requests.”¹⁰²

B. Clear Photos, Murky Law: Pictometry and the Uncertain Right to Duplicate Copyright-Protected Records

The struggle to reconcile copyright law with freedom-of-information law epitomized by these parallel cases has played out a handful of other times in judicial rulings and interpretations by state attorneys general. The disparate results of these analyses reflect differing ideas about how copyright and fair-use principles play out in the context of records created or obtained by a public entity—and how intensely fact-specific these judgments can be. The handful of published interpretations reflects a close split over whether copyright protection impairs the public’s right to copy records under FOI law.

In a case that forebodes peril for the accessibility of public records with commercial value, *Pictometry International v. Freedom of Information Commission*, Connecticut courts decided that, once a document qualifies for copyright protection, it ceases to be a “public record” at all.¹⁰³ In *Pictometry*, a corporate vendor of high-resolution aerial photography services contracted with the Connecticut Department of Environmental Protection (DEP), granting the state agency a license to use its images, software, and metadata.¹⁰⁴ The agreement gave the state agency the right to reproduce the images for use by individuals not covered by the agreement for twenty-five dollars per image.¹⁰⁵

The court examined whether Connecticut’s Freedom of Information Act is preempted by the Copyright Act to the extent that FOIA permits copying and distributing copyright-protected materials without the permission of the rightsholder. Even if preemption applies, the requester argued that the fair-use doctrine may permit copying and disseminating

100. *Id.* at 729–30.

101. *Id.*

102. *Id.* at 730.

103. *Pictometry Int’l Corp. v. Freedom of Info. Comm’n.*, 59 A.3d 172, 187 (Conn. 2013).

104. *Id.* at 176–77.

105. *Id.*

public documents without the creator's consent.¹⁰⁶

The DEP took the position that the images were not public records at all, because they fell into an exemption in Connecticut's public-records statute for records whose release is governed by a conflicting federal law. The court agreed with the state's position, holding that the Copyright Act would override any portion of Connecticut's FOI law compelling the provision of copies.¹⁰⁷ The case does not address whether a demand to simply inspect copyright-protected maps, rather than to make copies, would have produced a different outcome. If (as the decision suggests) a record ceases to qualify as "public" if it is protected by copyright, a requester would have no statutory entitlement to copy *or* view it—an especially great threat to transparency and accountability.¹⁰⁸

In addition to the Connecticut courts in *Pictometry*, courts and attorneys general in at least a dozen other states have grappled with the interplay of copyright and FOI law, with varying results.

1. Copyright Permits Both Viewing and Duplicating

In addition to the Minnesota court's decision in the *NCTQ* syllabus case, courts in California, New York, Ohio, and Washington have held that the right to inspect and copy records includes records that qualify for copyright protection.¹⁰⁹ The state attorneys general in Hawaii and Michigan have reached the same conclusion.¹¹⁰ In some instances, the decision is based on the conclusion that FOI law simply does not contemplate restricting public access on copyright grounds,¹¹¹ but in other instances, the decision is based on the conclusion that the

106. *Id.* at 187.

107. *Id.*

108. For a similar view, see the Ohio Supreme Court's ruling in *State ex rel. Gambill v. Opperman*, 986 N.E.2d 931, 936 (Ohio 2013), in which the majority held that a Public Records Act requester was not entitled to a county property appraiser's database in its native digital form because the data was embedded within copyright-protected third-party software licensed to the county, and that the requester's only option was to pay \$2,000 to have the data extracted from the software, in a format less useful to the requester.

109. See *Cnty. of Santa Clara v. Superior Ct.*, 170 Cal. App. 4th 1301, 1308 (Cal. Ct. App. 2009) (holding "unrestricted disclosure" of public records required even for documents protected by copyright law); *Pennington v. Clark*, 791 N.Y.S.2d 774, 776 (N.Y. App. Div. 2005) (holding no copyright violation for subjecting a videotape, which is public record, to disclosure); *State ex rel. Rea v. Ohio Dep't of Educ.*, 692 N.E.2d 596, 602 (Ohio 1998) (holding intellectual property record exception prevents public-record disclosure for private gain but not to further state's educational goals); see *Lindberg v. Cnty. of Kitsap*, 948 P.2d 805, 814 (Wash. 1997) (en banc) (holding that "fair use" constitutes exception to copyright laws).

110. Copyrighted Ins. Bureau Filings Subject to Disclosure, Op. Mich. Att'y Gen. No. 6965, 1998 WL 15038, at *3 (Jan. 16, 1998); Pub. Inspection and Duplication of Bldg. Plans and Permit Applications, Haw. Att'y Gen. OIP Op. Ltr. No. 90-20, 1990 WL 482368, at *1 (June 12, 1990).

111. See *Cnty. of Santa Clara*, 170 Cal. App. 4th at 1335 ("[The California Public Records Act] would be undercut by permitting the County to place extra-statutory restrictions on the records that it must produce . . .").

requester's planned use would qualify as a nonactionable fair use under copyright law. In the latter category, Washington's Supreme Court decided citizen requesters were entitled to inspect and duplicate engineering drawings created by a developer and filed with a county permitting authority, because the requesters' planned use—to inform themselves for purposes of commenting on the development—qualified as a fair use.¹¹² When courts decide freedom-of-information cases based on fair use, they are implicitly recognizing that copyright *can* prevent inspection or copying of records, depending on how a requester intends to use the records.

2. Copyright Forbids Duplicating

In addition to the Missouri court's conclusion in the *NCTQ* syllabus case and the Connecticut court's *Pictometry* decision, opinions in Illinois, Kansas, and Pennsylvania have denied requesters the ability to make copies of public records on copyright grounds.¹¹³ In Kansas, the attorney general—applying that state's uncommonly explicit FOI exemption for records that qualify for copyright protection—opined that state insurance regulators were not obligated to provide copies of manuals filed with the state by insurance companies explaining how they calculate their rates; however, the opinion declined to address whether merely making the same documents available for viewing (rather than copying) on a public-access terminal would qualify as infringement or be defensible as a fair use.¹¹⁴

3. Copyright Permits Duplicating Only with Restrictions

Once a requester obtains a record from a government agency, the requester ordinarily is free to adapt, redistribute, or otherwise use the document. Indeed, attempting to dictate how a requester uses a public record could run afoul of First Amendment prohibitions against the “prior restraint” of speech.¹¹⁵ Still, several rulings have reached a split-the-baby result that enables requesters to inspect copyright-protected records, but to have only limited ability to duplicate or republish them.

For instance, the South Carolina Supreme Court decided agencies can condition the ability to duplicate copyright-protected records on an

112. *Lindberg*, 948 P.2d at 814.

113. *Garlick v. Naperville Twp.*, 84 N.E.3d 607, 622 (Ill. App. Ct. 2017); *City of Lenexa v. Puhr*, No. 90410, 2004 WL 2160709, at *2 (Kan. Ct. App. Sept. 24, 2004) (per curiam); *Ali v. Phila. City Plan. Comm'n*, 125 A.3d 92, 106 (Pa. Commw. Ct. 2015).

114. Op. Kan. Att'y Gen. No. 2010-17, 4 (July 1, 2010) (citing KAN. STAT. ANN. § 45-219(a)).

115. See Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155, 1159 (2019) (explaining the First Amendment prohibits government actors from restraining distribution of speech, even if speech is subject to criminal or civil action).

agreement that limits commercially redistributing the records.¹¹⁶ The court decided a county could obtain copyright protection for digitally created maps and could enforce that copyright by forbidding resale of the maps, as long as a noncommercial requester would be able to see and copy the maps: “The ability to copyright specially-created data, as long as the public is given access to the public data, does not frustrate the purpose of FOIA.”¹¹⁷

Attorneys general in Nevada and Texas, meanwhile, have reached a unique resolution that enables requesters to inspect and copy records that qualify for copyright, but with a twist: they must make the copies themselves, to take the government agency off the hook for a potential infringement suit by the third-party rightsholder.¹¹⁸ While perhaps inventive, this decades-old accommodation does not account for the growing number of situations in which public data is embedded within proprietary databases, accessible only to those sitting at government agencies’ computers and not readily amenable to self-service copying.

C. Stopping the Presses: Copyright as Obstruction to News Coverage

On occasion, wrongdoers have tried to invoke copyright to prevent or extract damages for unfavorable news coverage. While journalists have thus far prevailed, even tying up a news organization in court can be a “victory,” inflicting costs and delay.

A Wisconsin schoolteacher who was fired for viewing pornography at work attempted to suppress news reporting on the case by claiming copyright law forbade furnishing journalists with duplicates of the pornographic images harvested from his office computer.¹¹⁹ The dispute went all the way to the Wisconsin Supreme Court, which decided the statutory exception foreclosing access to public records “to which access is limited by copyright” did not apply, since the newspaper’s coverage constituted a “fair use” of the images.¹²⁰ In Minnesota, a weekly

116. *Seago v. Horry Cnty.*, 663 S.E.2d 38, 46 (S.C. 2008).

117. *Id.* at 44. *See also* *Cnty. of Suffolk v. First Am. Real Est. Sols.*, 261 F.3d 179, 195 (2d Cir. 2001) (holding that a statutorily guaranteed right to inspect and copy a record does not necessarily include right to redistribute record in derogation of government agency’s copyright, and that agency could pursue infringement remedies against a commercial reseller).

118. Copyright; Pub. Recs.; Env’t Recs., *Op. Nev. Att’y Gen. No. 96-09* (Apr. 9, 1996); *Whether the R.R. Comm’n Must Provide Copies of Copyrighted Maps Requested Under the Open Records Act*, *Op. Tex. Att’y Gen. No. MW-307* (Mar. 18, 1981). In a subsequent 1999 interpretation, the Texas attorney general reiterated that a public agency could not refuse a requester the opportunity to review and copy digital maps on the grounds of the agency’s copyright interests, but that the agency could impose (unspecified) “reasonable restrictions” on the use of the work “consistent with the rights of a copyright owner . . .” *Open Recs. Decision*, *Op. Tex. Att’y Gen. ORD No. 660* (Aug. 13, 1999).

119. *Zellner v. Cedarburg Sch. Dist.*, 731 N.W.2d 240, 246 (Wis. 2007).

120. *Id.* at 247–48.

newspaper prevailed in a copyright infringement lawsuit after republishing a column from a Minneapolis police union newsletter to accompany the newspaper's commentary criticizing the author's racially offensive sentiments.¹²¹ There, too, the court concluded that the republication qualified as a defensible "fair use."¹²²

As these cases illustrate, copyright can be weaponized to conceal or minimize wrongdoing, where the plaintiff's motive has nothing to do with protecting creative investment in commercially valuable work.¹²³ It is important, then, for the law to unmistakably protect the right to obtain, copy, and republish newsworthy documents without the chill of a costly infringement claim.

V. THIRD-PARTY COPYRIGHT INTERESTS AND FOI

Public-records law applies not just to records created by government agencies, but also to records acquired by government agencies in the course of official business. For example, when a developer files a permit application with a county zoning agency, that application becomes a public document, even though it was created by a private party.¹²⁴ Access to documents submitted to the government by outside third parties is critical to the public's oversight interests. Reports mandated by state and federal law alert the public and press when a major employer is planning mass layoffs,¹²⁵ and investors and business journalists rely on a panoply of federally mandated reports filed with the Securities and Exchange Commission to understand the workings of publicly traded companies.¹²⁶

Secret-keeping is difficult to reconcile with effective public oversight

121. *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 680 (D. Minn. 1995).

122. *Id.* at 679–80.

123. See Netanel, *supra* note 45, at 294 (“[O]n too many occasions, copyright owners have sought to use their proprietary entitlements blatantly to suppress political, social, or personal criticism.”). Netanel cites *Belmore* and the *Salinger* case discussed *supra* Section III.A, as well as cases brought by the Church of Scientology, Howard Hughes, and Walt Disney Productions, all motivated to suppress public criticism rather than protect commercial value of their works. *Id.* at 294–95.

124. See generally Jeff Poole, *New Life for Old VFW: Rezoning Public Hearing Open*, DAILY PROGRESS (Feb. 11, 2021), https://dailyprogress.com/community/orangenews/news/new-life-for-old-vfw-rezoning-public-hearing-open/article_7f2878f6-6be0-11eb-b75f-6f9c83ed62dc.html [<https://perma.cc/EA72-GFEM>] (using records filed with county zoning office to report on private developer's plans).

125. See John-Ethan Gionis, *The Liquidating Fiduciary: A Hidden Exception to Warn Act Liability*, 31 HOFSTRA LAB. & EMP. L.J. 273, 273–74 (2013) (explaining workings of so-called WARN Acts, on the books federally and in seven states, which require large employers to give advance notice, typically sixty days, before mass reductions in force).

126. See Chris Roush, *How to Use SEC Filings to Cover Companies*, JOURNALIST'S RES. (Mar. 17, 2011), <https://journalistsresource.org/tip-sheets/reporting/sec-filings-cover-companies/> [<https://perma.cc/8TAJ-9GGB>] (“[K]nowing how to read an SEC filing is an important tool for anyone looking to report about companies.”).

of government, and the daily minutiae of government agencies—how much each employee is paid, what is being spent on office overhead, and so on—are a matter of public record. But private industry is a different story; with rare exceptions, nothing compels a private business to disclose its compensation structure, business strategies, or other inner workings. FOI law recognizes this distinction by enabling government agencies to withhold records that would, if disclosed, compromise valuable “trade secrets” that business entities have shared with the government, but which could be harmful in the hands of competitors.¹²⁷

Private parties, no less than government entities, have been criticized for interpreting FOI exemptions manipulatively to insulate themselves against public scrutiny, even if no strategically valuable information is at risk. In an especially high-profile example, the Supreme Court sided with the grocery industry in a dispute with a South Dakota newspaper that attempted to use federal FOIA to obtain store-by-store readouts of the volume of food stamps redeemed to look for patterns of fraud.¹²⁸ The resulting decision lessened the burden on businesses to qualify for the “trade secret” exemption to federal FOIA, which open-government advocates criticized as an invitation to concealment.¹²⁹ As more and more core governmental functions are offloaded onto private contractors, the stakes increase for the public’s ability to see documents created and “owned” by private entities.¹³⁰

Federal copyright law has long recognized a distinction between the protection of records *created by* the government versus records merely

127. See Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 12 (2019) (explaining that federal FOIA and “nearly all” state FOI statutes contain an exemption enabling agencies to withhold or redact records that would give away third parties’ economically valuable trade secrets if disclosed).

128. Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2360–61 (2019).

129. See Jonathan Ellis & Richard Wolf, *Supreme Court Limits Access to Government Records in Loss for Argus Leader*, a USA TODAY Network Affiliate, ARGUS LEADER (June 24, 2019, 12:42 PM), <https://www.argusleader.com/story/news/2019/06/24/us-supreme-court-ruling-food-stamp-case-freedom-of-information-act-usda/1304385001/> [<https://perma.cc/7DDT-8AF9>] (quoting critique of Supreme Court ruling as “a step backward for openness,” effectively giving businesses a veto over public access to information about how tax dollars are spent); see also Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Development Secrecy*, 2 J. CIVIC INFO. 1, 11 (2020) (“The temptation to categorize anything about a private entity’s finances as a ‘trade secret’ is likely only to worsen . . .”); Bernard Bell, *Food Marketing Institute: A Preliminary Assessment (Part I)*, YALE J. ON REGUL. (July 1, 2019), <https://www.yalejreg.com/nc/food-marketing-institute-a-preliminary-assessment-part-i/> [<https://perma.cc/V857-M5H9>] (“The decision may lead lower courts to question the long-standing interpretive principle that FOIA exemptions are to be construed narrowly, as well as augur a change in the Supreme Court’s approach.”).

130. See Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 20–21 (2013) (discussing the overlooked effect of privatization on the guaranteed right of the public’s access to information).

acquired by the government. In the latter instance, copyright protection can still adhere, even when a document passes into federal custody.¹³¹ But even concluding that copyright is not forfeited when a document is provided to a government agency does not answer the FOI question: does a document's copyright status override the public's statutory entitlement to inspect and copy it?

The question is being put to the test in an ongoing dispute in Utah over the operating standards for county jails. In May 2018, the American Civil Liberties Union (ACLU) and the nonprofit Disability Law Center filed suit under Utah's Government Records Management Act (GRMA), seeking access to inspection reports of the Davis County Jail in Salt Lake City, as well as the uniform statewide standards by which conditions are assessed.¹³² The county, asserting the ownership interests of the private vendor who sells the proprietary standards, contends that the records are protected against disclosure by copyright law.¹³³ In a narrow ruling that did not reach the copyright question, a state adjudicatory board decided that the Utah Jail Standards, written for the Utah Sheriffs' Association by a private contractor, do not meet the threshold statutory definition of records that Davis County is obligated to surrender, because they are not the county's documents.¹³⁴ The State Records Committee thus did not squarely confront the copyright status of the documents. But copyright emerged as the potentially decisive issue on appeal. When challenging the Records Committee's decision in court, the county asserted the vendor's copyright interests as a justification for withholding access to the jail standards.¹³⁵ Nearly three years after the initial public-records request, the requesters finally prevailed when a state trial court rejected the copyright argument and ordered the documents released.¹³⁶ The court concluded that the GRMA contemplated release of copyright-protected

131. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J. L. & PUB. POL'Y 131, 155 (2013) (observing that federal agencies can be held liable for failing to protect interests of third-party copyright holders when relying on private industry standard-setting bodies, which may motivate agencies to merely incorporate industry standards by reference rather than reproducing them); *but see* St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 829–30 (N.D. Ga. 1980) (refusing to block production under FOIA of third-party documents in Federal Centers for Disease Control's custody, even though creator claimed copyright interest, because FOIA does not explicitly exempt copyrighted materials).

132. Mark Shenefelt, *Copyright Questions Sidetrack Effort to Open Utah's Secret Jail Standards*, STANDARD-EXAM'R (Nov. 24, 2019), https://www.standard.net/police-fire/copyright-questions-sidetrack-effort-to-open-utah-s-secret-jail/article_ca9c0e0c-d005-5dc3-a8eb-503eec1af1cc.html [<https://perma.cc/L2D8-MTTN>].

133. *Id.*

134. ACLU of Utah v. Davis Cnty., No. 18-15 (State Recs. Comm. Utah, Apr. 23, 2018), <https://archives.utah.gov/src/srcappeal-2018-15.html> [<https://perma.cc/P2GD-8CM9>].

135. Shenefelt, *supra* note 132.

136. ACLU of Utah v. Davis Cnty., No. 180700511, 2021 WL 1215891, at *13–14 (Utah Dist. Ct. Mar. 25, 2021) [hereinafter *Davis Cnty.*].

material when consistent with the copyright doctrine of fair use, and found that the requesters' planned use of the materials for nonprofit educational purposes qualified as a fair use.¹³⁷ Significantly, however, a factor in the court's assessment was that the requested standards were already becoming outdated by the vendor's continual updates, so that release of the soon-to-be-outdated standards would not interfere with the marketability of succeeding versions.¹³⁸ This is foreboding for public access to other government-held documents that do not as readily lose their potential market value with the passage of time.

The mischief that could result from recognizing third-party copyright interests as a barrier to disclosure of records held and used by government agencies is self-evident in the Utah jail case. The welfare of people held in county jails is a core public concern. It would frustrate the purpose of FOI law if government entities could evade public oversight of essential health and safety functions simply by purchasing their regulations from private vendors and then invoking copyright when questioned. But the Davis County jail case is by no means isolated. The public's ability to see and copy standards set by professional associations has often brought transparency concerns into tension with private contractors' proprietary interests.

Government agencies regularly rely on private standard-setting bodies from specialized fields to establish the expectations for those fields, incorporating privately created standards into statutes and regulations. At times, these rules are downloaded wholesale into statutes or regulations, where they are fully visible, but at other times, they are merely incorporated by reference, leaving anyone who needs access to seek the text from its private authors.¹³⁹

Whether the public is entitled to inspect, copy, and redistribute privately developed standards is an especially contentious strain of "copyright versus FOI" jurisprudence.¹⁴⁰ In one prominent case, a closely split Fifth Circuit determined that a private vendor of model building codes could not assert copyright to constrain the redistribution of those

137. *Id.* at *6, *10; see also Paighen Harkins, *Years After a Spate of Questionable Utah In-Custody Deaths, Utah Jail Operating Standards Are Now Public Records*, SALT LAKE TRIB. (Apr. 2, 2021, 5:06 PM), <https://www.sltrib.com/news/2021/04/02/years-after-spate/> [https://perma.cc/WN3U-CDU8].

138. *Davis Cnty.*, 2021 WL 1215891, at *9–10.

139. See Bremer, *supra* note 131, at 136 ("The greatest challenge of incorporation by reference is that it can erect a barrier impeding access to the law, sometimes even requiring one to pay a private party to see the full text of a final or proposed regulation.").

140. See Jessica C. Tones, *Copyright Monopoly vs. Public Access—Why the Law Should Not Be in Private Hands*, 55 SYRACUSE L. REV. 371, 378 (2005) (observing that courts generally have declined to extend the principle that "law" cannot be copyright protected to also include model codes developed by private authors).

model codes once they became incorporated into municipal ordinances.¹⁴¹ The case, *Veeck v. Southern Building Code Congress International*, was brought by a nonprofit professional association that offered its model codes at no cost to local governments and encouraged their adoption, earning money by selling copies of the code to private entities.¹⁴² A Texas blogger purchased the association's model code and posted the salient portions online, correctly identified not as a model construction code but as the actual code enacted by two local towns, and the association sued for copyright infringement.¹⁴³

The en banc Fifth Circuit majority decided that, once the privately drafted Standard Building Code took on legally binding force, the codes became free to republish because their contents were then non-copyright-protected "facts." In other words, it was a fact that the City of Savoy, Texas, enforced certain requirements for the soundness of construction, and listing those requirements amounted to nothing more than a recitation of facts.¹⁴⁴ The publisher accused of infringement could not, the majority wrote, express these "facts" in any other way; to do so would misstate what local regulations require and mislead the reader.¹⁴⁵

Other courts have been more receptive to the copyright arguments of standard-setting entities. Their decisions sometimes turn on the nature of the relationship—or lack of one—between the government agency and the professional organization. If a government body simply refers to a preexisting set of externally developed standards, as opposed to actually importing their text into a regulation or hiring the outside entity to develop the standards, then it is less likely that others will be entitled to copy and use the standards.¹⁴⁶

Of course, it is not necessary to conclude that copyright is waived or forfeited for a document to qualify as a public record. When an engineering firm files a drawing of a proposed skyscraper with a county zoning board for purposes of securing a permit, the public indisputably has a right to inspect the drawing—but the engineering firm still retains

141. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 806 (5th Cir. 2002) (en banc).

142. *Id.* at 793–94.

143. *Id.* at 793.

144. *Id.* at 801.

145. *Id.* at 802.

146. *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 73–74 (2d Cir. 1994) (finding state's act of incorporating automobile valuation manual into insurance statutes did not place manual into public domain where a competitor could duplicate and commercially exploit it); *see also* *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 520 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998) (holding AMA coding system for medical procedures remained eligible for copyright protection even after being incorporated by reference into federal Medicare and Medicaid regulations, so that publishing company was not free to re-sell the codes commercially).

the bundle of rights associated with copyright, including the right to sell the drawing, to exhibit or display it, or to create works derivative from it.¹⁴⁷

If the government acts as the enforcer of privately developed standards that are inaccessible on the basis of copyright, regulated entities could be subject to legally enforceable requirements that they cannot freely see. This would seem to run afoul—in spirit, if not in letter—of the Supreme Court’s well-established jurisprudence that legally binding standards cannot be copyright protected, because those expected to conform to them must be given fair notice.¹⁴⁸ As Professor Pamela Samuelson has observed, requiring regulated entities to pay a royalty premium to see the government-enforced standards they are expected to obey would have “perverse incentives . . . making public employees into a kind of free sales force” for the standard-setting organizations.¹⁴⁹

One reason that courts have been willing to indulge copyright as an impediment to FOI requests for privatized standards is that the standards usually *are* accessible to some extent, including to the entities that must comply with them. For instance, in *Practice Management*, the Ninth Circuit observed that anyone who needed to use the AMA’s proprietary set of medical terminology could get access to the work, so the case was not about withholding information from the public, but simply preventing an interloper from re-selling it.¹⁵⁰ This decisive fact distinguishes the “industry standard” cases from the far more worrisome scenario in which an agency might invoke copyright to keep government secrets from ever being seen.

Even the relatively pro-disclosure outcome in the Fifth Circuit’s *Veeck* case, involving model building codes, arguably provides insufficient public access for this reason: if the public must wait until standards are enacted into law to see them, then the public cannot fully participate in the enactment process. One of the core purposes of freedom-of-information law is to enable citizens to provide informed input into

147. See 17 U.S.C. § 106 (enumerating creator’s rights in copyright-protected works).

148. See *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (holding that court opinions are not works of “authorship” for copyright purposes, because they are created by judicial officers in the course of their public duties, and interests of justice require that the public has access to statutes and authoritative interpretations of those statutes); see also Shellea Diane Crochet, Comment, *Official Code, Locked Down: An Analysis of Copyright as It Applies to Annotations of State Official Codes*, 24 J. INTELL. PROP. L. 131, 152 (2016) (“As a black letter rule, the law itself is in the public domain and is not protected under copyright.” (internal quotations omitted)).

149. Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 223 (2007).

150. See *Prac. Mgmt. Info. Corp.*, 121 F.3d at 519 (concluding that recognizing creator’s copyright posed no realistic threat to public access to the standards).

policymaking.¹⁵¹ A person attending a city council meeting where new construction regulations are under consideration should be entitled, copyright notwithstanding, to review the proposed regulations in advance. A contrary rule would give industries a prohibitive “write your own regulations” advantage in working with policymakers behind the backs of the citizens who are supposed to be the beneficiaries of the regulations.¹⁵²

VI. THE JURISDICTIONAL PUZZLE

When a public-records dispute requires construing federal copyright law, where is the proper place to litigate the case? The scope of federal jurisdiction over copyright cases has been called “among the knottiest problems in copyright jurisprudence.”¹⁵³ A dispute over records sought from a Florida property tax agency illustrates how difficult it can be to find a court appropriate to adjudicate all issues in a case implicating both federal copyright law and state open-records law.

In *Microdecisions v. Skinner*, a requester sued a county property appraiser who refused to provide copies of maps that qualified as public records under Florida law.¹⁵⁴ The requester initiated the case in state court, but the judge concluded the copyright issue belonged in federal court.¹⁵⁵ The case was removed to federal court, but the district court judge remanded it to state court, concluding the case was based on rights arising under state law.¹⁵⁶ A state appeals court ultimately agreed the case belonged in state court, but on the merits, it decided there really was no copyright issue, because state law did not authorize the county to obtain a copyright for the maps.¹⁵⁷

It is widely accepted that, when a case otherwise properly before a state court requires construing copyright law, state courts do have competency to decide the issue. Although Congress has vested the U.S. district courts with exclusive jurisdiction to adjudicate cases “arising under” the

151. See Angela M. Evans & Adriana Campos, *Open Government Initiatives: Challenges of Citizen Participation*, 32 J. POL’Y ANALYSIS & MGMT. 172, 173 (2013) (“[T]he primary goal of open government . . . is to ensure that the American public has access to objective, relevant, and reliable information to help them arrive at informed judgments about issues and the government’s role in tackling these problems.”).

152. See Bremer, *supra* note 131, at 153–54 (calling it “intolerable” that citizens interested in a rulemaking process might have to go to an agency reading room to review the standards that a government body is planning to adopt and concluding that agencies that incorporate such material by reference should make it available electronically).

153. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 347 (2d Cir. 2000) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01[A] at 12–4 (1999)).

154. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 873 (Fla. Dist. Ct. App. 2004).

155. *Id.*

156. *Id.* at 874.

157. *Id.* at 876.

Copyright Act,¹⁵⁸ federal courts have taken a relatively narrow view of what it means for a dispute to arise under copyright law. In particular, breach of contract disputes involving the royalties from copyright-protected work are regularly adjudicated in state court, even if copyright ownership is the central issue.¹⁵⁹ As Judge Friendly explained in a much-cited 1964 decision, the dispositive question is whether the dispute requires actually interpreting the Copyright Act; if so, then it is a case “arising under” the act for purposes of federal jurisdiction.¹⁶⁰

Even if a state court *can* rule on the copyright status of a disputed record, there is obvious potential for conflict and confusion. What force does a state court’s declaration of the rights of the parties in a public-records dispute carry, if the copyright status of the record is subsequently disputed in federal court? Using the college syllabus case for illustrative purposes, suppose that a public university obtains a judgment in state court that a syllabus need not be surrendered to an FOI requester, because the syllabus is the copyright-protected property of the university. Would that state-court ruling preclude the professor who created the syllabus from later contesting the university’s copyright ownership in a federal proceeding? Would the state-court ruling settle the ownership of the document, so the professor would lack standing to bring an infringement action in federal court if a third party commercially exploits the syllabus?¹⁶¹ To extend the hypothetical further, could a New York publishing company rely on a Minnesota state court’s ruling that a syllabus is not protected by copyright so as to begin duplicating and reselling the syllabus, or would the publisher be at risk of an infringement claim in a New York federal court? Putting state courts in the business of adjudicating copyright disputes risks creating a fragmented body of irreconcilable interpretations of the Copyright Act of uncertain precedential value.¹⁶² And because the underlying claim will have arisen

158. 28 U.S.C. § 1338(a).

159. See, e.g., *Durgom v. Janowiak*, 74 Cal. App. 4th 178, 183, 186–87 (Cal. Ct. App. 1999) (holding state court has jurisdiction to decide dispute over unpaid royalties from copyrighted song); *Olcott Int’l & Co., Inc. v. Micro Data Base Sys.*, No. IP99-1780-C-B/S, 2000 WL 892874, at *4–5 (S.D. Ind. June 29, 2000) (concluding that state court can resolve validity of disputed copyright when claim is intertwined with state-law contract claim).

160. *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964); see also *Outcault v. Lamar*, 119 N.Y.S. 930, 931 (N.Y. App. Div. 1909) (“[U]nless it appears [from the complaint] that the plaintiff seeks to enforce a right based upon the copyright laws of the United States, the federal court would have no jurisdiction . . .”).

161. See *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013) (observing that only the owner of a work has standing to sue for copyright infringement (citing 17 U.S.C. § 501(b))).

162. See *Ali v. Phila. City Plan. Comm’n*, 125 A.3d 92, 104 (Pa. Commw. Ct. 2015) (observing that a state court’s ruling that making copies of a public record constitutes a fair use “would not preclude a copyright owner from pursuing an infringement lawsuit in federal court, and the district court would not be bound by [the state court’s] ‘fair-use’ decision”).

under state FOI law, the Supreme Court will be in no position to reconcile state courts' potentially contradictory interpretations.¹⁶³ For this reason, at least one state court adjudicating a public-records case has concluded that state courts do not have jurisdiction to decide whether the act of furnishing a requester with a copy of a public record qualifies under the Copyright Act as a fair use.¹⁶⁴

Something close to this “jurisdictional death spiral nightmare” occurred in the Illinois case of *Garlick v. Naperville Township*.¹⁶⁵ There, a requester seeking access to the county property tax office’s entire database of parcels was denied access to the database in its native form, because the county argued production would violate the copyright of the vendor that furnished the software in which the data was stored.¹⁶⁶ The requester sued in state court, seeking a declaratory judgment that the records were subject to production, and after losing at the trial court, took the case to the Court of Appeals.¹⁶⁷ The appellate court found that the requester’s challenge was, functionally, a challenge to the validity of the software company’s copyright, and that a state court was “not the proper forum in which to challenge a copyright claim.”¹⁶⁸ Without passing on the merits of the copyrightability of the software, the court upheld the decision that production could be denied.¹⁶⁹

As the *Garlick* cases exemplifies, as long as copyright is understood to present an impediment to FOI access, resolving a dispute may require parallel state and federal proceedings. The Illinois statutory exemption at issue provides that records can be withheld both from inspection and copying if they are “specifically prohibited from disclosure” by federal law.¹⁷⁰ For a state court to determine whether the FOI exemption extends to a record on the grounds of copyright requires resolving, potentially,

163. Federal courts may exercise jurisdiction over, principally, claims “arising under” federal law, meaning federal law creates the right being asserted. *Gunn v. Minton*, 568 U.S. 251, 257 (2013). As the *Gunn* Court explained, a narrow (and somewhat ill-defined) second category of cases may be adjudicated in federal court “if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Id.* at 258. However, in the *Gunn* case itself, the Court declined to find that a state-law legal malpractice claim was subject to federal jurisdiction, even though the case required applying federal patent law to decide whether the malpractice defendant had mishandled a patent case. *Id.*

164. *See Ali*, 125 A.3d at 104–05 (stating that, because a state court lacks jurisdiction to decide whether disclosure of copyrighted material constitutes infringement, the only question a state court can answer in the context of an FOIA case is whether the case presents a copyright infringement issue, at which point the issue must be resolved in federal court).

165. *Garlick v. Naperville Twp.*, 84 N.E.3d 607, 622 (Ill. App. Ct. 2017).

166. *Id.* at 611–12.

167. *Id.* at 616–17.

168. *Id.* at 621.

169. *Id.* at 622.

170. 5 ILL. COMP. STAT. 140/7(1)(a) (2016).

two different federal copyright issues: first, whether the record even qualifies for copyright protection at all (the issue raised but not addressed in *Garlick*), and second, whether the record's copyright status actually *prohibits* inspection or copying. The latter decision may implicate fair use, an analysis state courts struggle with.

The *NCTQ* cases from Missouri and Minnesota illustrate starkly how state-court judges unaccustomed to applying copyright law can mangle the fair-use determination. Although the sister appellate courts reached different outcomes about the accessibility of the syllabi requested in those cases, they agreed on one principle: that the question of whether a state agency may lawfully furnish a copy of a copyright-protected document to a third-party requester requires considering what the requester plans to do with the document. This is a fundamental misunderstanding of how copyright works. If a rightsholder (in these cases, the professors who wrote the syllabi) were aggrieved by the way that the NCTQ used the document, its remedy would be against the NCTQ.

Imagine that the state agency is a bookstore, and the bookstore sells a copy of a bestseller to a purchaser who intends to make photocopies of the book and sell them at prices undercutting the publisher. The publisher's recourse would be against the pirate competitor and not against the bookstore. In other words, assuming copyright law applies at all, the transaction in the *NCTQ* cases that required analysis was the transaction in which the university fulfills its state-mandated legal duty by furnishing a single copy of a syllabus to the NCTQ at nominal charge. What the NCTQ ultimately planned to do with the syllabi was a different transaction from the initial fulfillment of the FOI request, and that transaction would be analyzed separately under copyright law, if and when the owners sought to enforce their rights. It seems unlikely that a federal court experienced in adjudicating copyright claims could have made such a fundamental analytical mistake.¹⁷¹

Because public-records disputes do not belong in federal court, and copyright disputes do not belong in state court, it is essential to disentangle the two bodies of law. The current understanding of the law leaves two comparably distasteful options: either state courts adjudicate complex copyright issues beyond their primary realm of expertise, producing results that may not carry any force in federal court, or the parties to a dispute split their claims and pursue parallel state and federal

171. The Washington Supreme Court made the same analytical error in *Lindberg v. Cnty. of Kitsap*, 948 P.2d 805, 814 (Wash. 1997) (en banc), basing a county's obligation to provide access to and copies of records on the requester's intended use of the records. Because a county cannot control how citizens use government records—and, indeed, cannot demand to know what they plan to do with them—the proper analysis is to treat the government agency's production and the recipient's use of the documents as two legally distinct transactions.

actions, exhausting the resources of all but the most determined FOI requesters.

VII. CONCLUSION AND RECOMMENDATIONS

Official government memos are unlike J.D. Salinger's letters. Government records memorialize how decisions of great public consequence are reached by people hired and paid to do the public's business.¹⁷² Government agencies' insistence that otherwise-public records can be withheld on the grounds of copyright protection imperils effective oversight of, and participation in, state and local civic affairs.¹⁷³

It is not fanciful to fear that government agencies armed with a "copyright exemption" will use the exemption in bad faith to withhold records even where the true motive is concealing scandal, not protecting any purported creative investment in the work. Even where there is no concealment motive, cash-strapped government agencies or profit-motivated individuals might seek to use copyright law to extract licensing fees for documents that, by all rights, should be accessible as public records.¹⁷⁴ As one judge colorfully observed in dissenting from the view that a requester could be required to pay a \$2,000 premium to obtain county tax data because the data was stored within copyright-protected third-party software:

A person seeking public records should expect to pay the price for copying the records, but not the price for a public entity's mistake in purchasing inefficient software. . . . The holding in this

172. See *Detroit Free Press, Inc. v. Dep't of Consumer & Indus. Servs.*, 631 N.W.2d 769, 772 (Mich. Ct. App. 2001) ("By mandating the disclosure of information relating to the affairs of government and the official acts of public officials and employees, the FOIA facilitates the public's understanding of the operations and activities of government.").

173. See Eric E. Johnson, *The Misadventure of Copyrighting State Law*, 107 KY. L.J. 593, 627 (2018) ("[I]f you put something [in this case, statutory compilations] behind a paywall, you are going to stifle productive thinking about it. And that is going to decrease debate and democratic participation.").

174. In an enlightening example outside the public records realm, the heirs of Dr. Martin Luther King, Jr., have secured copyright protection for his classic speeches, including the iconic 1963 "I Have a Dream" address in Washington, D.C., so that the speech may not be republished in whole or in substantial portion without payment. Valerie Strauss, *53 Years Later, You Still Have to Pay to Use Martin Luther King Jr.'s Famous 'I Have a Dream' Speech*, WASH. POST (Jan. 15, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/15/54-years-later-you-still-have-to-pay-to-use-martin-luther-king-jr-s-famous-i-have-a-dream-speech/> [<https://perma.cc/HP82-6YYQ>]. One could readily imagine a state governor who dislikes media criticism insisting that every gubernatorial speech is a copyright-protected work of creativity that news organizations may not republish without payment. Further, at least some states have taken the position that unenacted legislation may be protected by copyright. See Dmitrieva, *supra* note 82, at 101 (noting that states posting legislation to websites have statutorily disclaimed any relinquishment of copyright in doing so). If that claim were enforced, a citizen who wished to obtain a proposed bill for purposes of formulating comments to elected officials, or redistribute copies of the bill to allies, might face a prohibitive "paywall" barrier.

case encourages public entities desiring secrecy to hide public records within a software lockbox and require individual citizens to provide the golden key to unlock it.¹⁷⁵

Simply put, public access to documents reflecting the operations of state and local governments is too essential to be left vulnerable to claims, as in the Missouri syllabus case, that the government's copyright overrides the public's right to know.

There is every reason to be concerned that, with *Pictometry* as a precedent, copyright law will be used more aggressively in the future to withhold access to entire categories of documents that have long been publicly accessible. For instance, one legal scholar has suggested asserting copyright protection over jail mugshots, which news organizations routinely use in their coverage, as a way of denying copies of booking photos to exploitative websites that republish embarrassing photos for profit.¹⁷⁶ Should such an approach take hold, government agencies would be empowered to invoke copyright to reject requests for documents on the grounds that they disapprove of how the requester intends to use them. Plainly, such power could be abused to frustrate journalists' watchdog reporting.

A. Copyright and FOI: A Marriage That Can't Be Saved?

In concept, copyright and FOI law should be able to cohabit harmoniously. Access to information is recognized as an essential prerequisite for citizens in a democratic society to participate effectively in self-governance and to keep watch for abuse of power by their elected officials.¹⁷⁷ Copyright law is intended primarily to promote the dissemination of knowledge for the benefit of the public.¹⁷⁸ The objectives of the two bodies of law might seem well aligned. But their routes to achieve those objectives head in opposite directions.

Copyright law is understood as necessary to create an incentive for creators to invest time and talent in writing novels and composing

175. State *ex rel.* Gambill v. Opperman, 986 N.E.2d 931, 939 (Ohio 2013) (Pfeifer, J., dissenting).

176. Jason Tashea, *Use Copyright Law to Battle Mugshot Extortion*, ABA JOURNAL (Mar. 27, 2018, 9:23 AM), https://www.abajournal.com/lawscribbler/article/use_copyright_law_to_battle_against_mugshot_extortion [<https://perma.cc/VB5S-XYFH>].

177. See Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 97 (2003) ("[T]he concept of the public domain helps to establish a legal restraint against government overreaching by ensuring the public's access to materials that are essential for self-governance and a learned citizenry.").

178. See *Golan v. Holder*, 565 U.S. 302, 326 (2012) (rejecting argument that Copyright Act was intended to provide incentives only for creation of works and stating that copyright exists to promote dissemination, not just creation).

songs.¹⁷⁹ But government agencies and their employees do not ordinarily need any added incentive, beyond their publicly supplied funding, to write memos, draw maps, or compile databases.¹⁸⁰ Certainly, they do not need several *lifetimes*' worth of incentives.

Federal copyright protection extends for the author's lifetime plus seventy years or, in the case of a "work made for hire," ninety-five years from its first publication or 120 years from the time of creation, whichever elapses first.¹⁸¹ This duration guarantees that no one who makes a request for public records and is denied on the basis of copyright will live to see the records become accessible. The longevity of copyright protection sharply contrasts with the far more limited protection afforded to even the most fiercely protected federal records. The Presidential Records Act makes White House papers presumptively available for inspection five years after the president's term ends, with the possibility of an additional seven-year extension for especially sensitive documents.¹⁸² Even classified national security documents are presumptively accessible to the public within ten years of the initial classification decision, which the custodian agency can extend to no more than twenty-five years.¹⁸³ Plainly, it makes no sense to say that a White House memo implicating matters of national security can harmlessly be released to the public after twenty-five years, while a college professor's syllabus needs to be locked away for 100 years. Government agencies themselves do not routinely handle documents in the way that valuable pieces of copyright-protected property would be handled. Every state maintains a "records retention" regime under which documents typically become eligible for disposal within several years (or sometimes even days) after creation,¹⁸⁴ indicating that agencies do not treat their records as marketable intellectual property with a century's worth of value.

179. See Elissa D. Hecker, *Comment: Understand and Respect the Copyright Law: Keep the Incentive to Create*, 53 CASE W. RES. L. REV. 741, 741–42 (2003) (explaining the incentives in U.S. copyright law).

180. See Petersen, *supra* note 5, at 463 (“[O]ne must seriously question the *need* to offer copyright protection for government-created works.”). This observation was made in the context of government employees’ compensation to produce work to benefit the general welfare; courts have long made the same point regarding opinions written by publicly salaried judges. See Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 295 (2005) (“[J]udges need no incentives to generate written legal opinions because this production function is an essential component of their work assignment . . .”).

181. 17 U.S.C. § 302.

182. 44 U.S.C. § 2204.

183. Exec. Order No. 13526, 3 C.F.R. EO13526, § 1.5 (2010).

184. See Daxton R. Stewart, *Killer Apps: Vanishing Messages, Encrypted Communications, and Challenges to Freedom of Information Laws When Public Officials “Go Dark”*, 10 CASE W. RES. J. L. TECH. & INTERNET 1, 16 (2019) (describing varying range of state-records retention practices, which can include routine deletion of emails after as little as five days).

Simply put, while copyright normally is understood to encourage the dissemination of information and ideas,¹⁸⁵ a copyright exemption to FOI law *impedes* the dissemination of information and ideas.¹⁸⁶ When a government agency invokes an FOI exemption, it is almost never because the agency intends to share the records; it is because the agency wants no one to see them.¹⁸⁷

Copyright and FOI law cannot easily coexist for another reason: freedom-of-information law is built to provide relatively speedy disposition of time-sensitive cases and to allow successful requesters thwarted by government foot-dragging to recoup their legal fees.¹⁸⁸ Copyright law is not.

To illustrate, consider the case of a frustrated records requester in Wisconsin, dragged into federal court on what the court ultimately concluded was a meritless copyright claim.¹⁸⁹ WIREdata, Inc., which furnishes data to real estate sales agents, asked several Wisconsin municipalities to produce data showing the assessed value of residential properties. But the municipalities refused, citing the risk of copyright liability to Assessment Technologies (AT), from whom they licensed their software.¹⁹⁰ WIREdata sued the custodians in state court under the Wisconsin Open Records Statute, and AT responded by suing WIREdata in federal court, alleging copyright infringement.¹⁹¹ The Seventh Circuit held in favor of WIREdata and concluded that the request did not compromise any of AT's copyright-protected interests, because the request sought only the underlying assessment data, not the software itself.¹⁹² Writing for the court, Judge Richard Posner called the software vendor's attempt to monopolize access to government data "appalling," speculating that AT's real motive was to extract a licensing fee from

185. See Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 415–16 (2008) ("By enacting copyright law, the government grants exclusive rights to authors in order to increase the number of works available to the public.").

186. See Crochet, *supra* note 148, at 151 ("When protection is given to the state for its annotated code, innovative and novel approaches to the law are arguably hindered in the courtroom.").

187. See Liu, *supra* note 185, at 419 (observing that copyright law accommodates First Amendment concerns by enabling members of the public to "borrow the ideas contained in the copyrighted work," which would not happen if government agencies use an exemption to withhold access).

188. See Jessica L. Farley, Note, *Wisconsin Open Records Law After WIREdata: Still Viable to Protect Public Access to Information?*, 93 MARQ. L. REV. 1189, 1196–97 (2010) (explaining that, under Wisconsin law, requesters can file a petition for mandamus to compel uncooperative agencies to release records or enlist the local district attorney to bring an enforcement action, and that successful requesters presumptively are entitled to recoup attorney's fees).

189. *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 641–42 (7th Cir. 2003).

190. *Id.* at 642.

191. *Id.* at 641–42.

192. *Id.* at 645.

WIREData for using its software.¹⁹³

Ultimately, the Wisconsin Supreme Court decided that, while WIREData was entitled to receive the property valuation data, it was sufficient for the agencies to provide copies in PDF document form rather than, as WIREData sought, in the proprietary electronic database format in which the data was stored.¹⁹⁴ Because of the multiplicitious legal proceedings, it took more than seven years to resolve WIREData's request.¹⁹⁵ Plainly, copyright disputes can prolong requests for public records to the point where the records become irrelevant, unaffordable, and practically worthless.¹⁹⁶ While WIREData was the rare requester with the money and determination to litigate for eight years, few civic organizations or journalists will be willing or able to do so,¹⁹⁷ which means copyright can become a backdoor means of denial.

B. *The (Incomplete) Fair-Use Workaround*

It has been argued that, even if records produced in the course of government business are recognized as copyright protected, the fair-use doctrine could legitimize providing access to those documents for societally valuable purposes, such as academic research or news reporting.¹⁹⁸ News reporting and commentary are statutorily recognized categories entitled to some degree of leeway in applying the fair-use defense.¹⁹⁹ However, the protection is not absolute, and it is still possible for the journalistic republication of protected work to constitute

193. *Id.* at 642, 645.

194. *WIREData, Inc. v. Vill. of Sussex*, 751 N.W.2d 736, 762–63 (Wis. 2008).

195. *See id.* at 746–47 (recounting timeline of litigation from its 2001 origin).

196. *See* Daxton R. “Chip” Stewart & Charles N. Davis, *Bringing Full Disclosure Back: A Call for Dismantling FOIA*, 21 *COMMUN. & POL’Y* 515, 535 (2016) (“[W]hen it comes to government transparency, often access delayed is access denied.”).

197. *See* Jonathan Peters, *Survey: Editors See Media Losing Ground as Legal Advocate for 1st Amendment*, *COLUM. JOURNALISM REV.* (Apr. 21, 2016), https://www.cjr.org/united_states_project/knight_survey_editors_first_amendment.php [<https://perma.cc/6YHF-5LTX>] (“[E]conomic trends have put pressure on the capacity of news organizations to litigate and otherwise to take stands to advance free speech and press rights.”).

198. *See, e.g., Nat’l Council on Tchr. Quality v. Minn. State Colls. & Univs.*, 837 N.W.2d 314, 318–19 (Minn. Ct. App. 2013) (applying fair use to permit copying of university documents for purposes of research and critique). *See also* Renee G. Rabinowitz, *Applicability of the Freedom of Information Act’s Disclosure Requirements to Intellectual Property*, 57 *NOTRE DAME L. REV.* 561, 573–74 (1982) (“[T]he ‘fair use’ doctrine, developed as a defense to copyright infringement claims, appears to provide an appropriate standard for reaching an equitable result in . . . disputes over copyrighted materials [in the context of federal FOIA law].”).

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

actionable infringement,²⁰⁰ as the Supreme Court held in a 1985 case against *The Nation* magazine.²⁰¹ In that case, the Court declined to find that the unauthorized republication of a portion of former President Gerald Ford's not-yet-published autobiography was a fair use, even though the passage shed light on the biggest national news story of 1974: the resignation of President Richard Nixon and his subsequent pardon.²⁰² Fair use is an intensely fact-specific inquiry, and it generally arises as a defense only after a court reaches the threshold decision that an infringement took place. A journalist or researcher cannot be expected to go through an intense judicial fact-finding exercise every time a government record is needed.

The signature fair-use case of *New Era Publications International v. Henry Holt & Co.*, involving an unauthorized biography of Scientology founder L. Ron Hubbard, illustrates how copyright can chill reporting on matters of public controversy.²⁰³ In *New Era*, the rightsholder to the late Hubbard's writings sought to enjoin publication of the unflattering book, claiming the author quoted excessively from Hubbard's unpublished letters, which the author maintained were necessary to illustrate Hubbard's character flaws. The federal Second Circuit found that the balance of fair-use factors tilted in favor of the Hubbard estate, as the biographer's excerpts were more than what was needed to convey his point.²⁰⁴ The court declined on equitable grounds to issue the requested injunction, believing that the rightsholder had needlessly delayed asserting its rights, but left open the opportunity to recover infringement damages.²⁰⁵ Nevertheless, the court recognized that even a small amount of unauthorized borrowing from unpublished correspondence is normally grounds for an injunction.²⁰⁶ That conclusion—from the court that adjudicates disputes at the epicenter of the nation's book and news publishing industries—could be an extraordinarily chilling one for reporting on the contents of unpublished government documents.²⁰⁷

Ordinarily, it is nearly impossible to enjoin the publication of news, as

200. See Lukes, *supra* note 67, at 849 (“The Supreme Court has held that just because a use falls into a category outlined in the statute does not make it a *per se* fair use.”).

201. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 539–40 (1985).

202. *Id.* at 568–69.

203. *New Era Publ'ns Int'l, ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576, 580–81 (2d Cir. 1989).

204. *Id.* at 583–84.

205. *Id.* at 584–85.

206. *Id.* at 584.

207. See Hall, *supra* note 66, at 248–50 (observing that *New Era* and other unfavorable fair-use decisions encourage plaintiffs to copyright important materials they wish to conceal and that unpublished writings can be important in understanding the thought process of influential public figures).

courts ardently disfavor “prior restraints” of speech on First Amendment grounds.²⁰⁸ If reprinting large excerpts from previously unpublished state government documents becomes recognized as grounds for an injunction against publication, then copyright law is on a headlong collision course with nearly a century’s worth of First Amendment doctrine.²⁰⁹

The *NCTQ Missouri* court pinpointed precisely why fair use, in the court’s vivid phrasing, “does not work” in the context of FOI law.²¹⁰ Fair use is backward looking, analyzing how the republisher used the creator’s work.²¹¹ But there will be no republication unless the government agency allows inspection and duplication of the document. So, the argument quickly becomes circular: the agency will not release the copy unless it is convinced that the republication will be “fair,” and the republisher cannot demonstrate “fairness” without access to the copy.

Take the dispute that arose between the University of Iowa and a documentary filmmaker over footage of a disastrous 2008 flood that was filmed by a university employee.²¹² The university insisted that the footage was copyright-protected state property, and that copyright overrode the filmmaker’s right of access under the Iowa Open Records Act.²¹³ The university’s refusal to surrender the footage foreclosed any attempt at fair use. Ultimately, the filmmaker dismissed his complaint against the university and settled the dispute, so the case did nothing to clarify the state of the law.²¹⁴ However, the disagreement made vividly

208. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718 (1931) (“The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right.”); see also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (concluding that government did not meet heavy burden of justifying judicial remedy of prior restraint in dispute over newspaper’s intended publication of leaked national security documents).

209. See Tiffany D. Trunko, Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1940–41 (1989) (“When a copyright holder sues to prevent publication of a book or article, injunctive relief may look suspiciously like a prior restraint, potentially violating the defendant’s first amendment freedoms.”); see also *id.* at 1956 (“[C]ourts tend to grant injunctive relief as a matter of course [in copyright infringement cases].”).

210. Nat’l Council [on] Tchr. Quality, Inc. v. Curators of Univ. of Mo., 446 S.W.3d 723, 730 (Mo. Ct. App. 2014).

211. See *Coll. Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 565 (N.D.N.Y. 1995) (noting that, as an affirmative defense, fair use does not arise until the copyright owner first establishes a prima facie case of infringement).

212. Erin Jordan, *University of Iowa Broke Public Records Law, State Board Staff Say*, THE (CEDAR RAPIDS) GAZETTE (Jan. 18, 2017, 7:07 PM), <https://www.thegazette.com/higher-education/university-of-iowa-broke-public-records-law-state-board-staff-say/> [https://perma.cc/HAG4-R4QH].

213. *Id.*

214. Erin Jordan, *Filmmaker, UI Settle Over Flood Photos and Video*, THE (CEDAR RAPIDS) GAZETTE (May 16, 2017, 5:19 PM), <https://www.thegazette.com/government-politics/filmmaker-ui-settle-over-flood-photos-and-video/> [https://perma.cc/3QGA-CMXF].

real the concern that agencies can invoke copyright to foreclose any attempt at making a fair use of government-created work, even for a statutorily recognized fair-use purpose such as journalism or commentary.²¹⁵

There is a strong argument that, when a government agency responds to an FOI request, and again when a news organization quotes or republishes the document, the document has been “recontextualized” so as to make its use fair.²¹⁶ Take the hypothetical case of a memo that a city manager (“Abel”) circulates to members of the city council analyzing the job performance of the city’s police chief (“Baker”). The original purpose of the document is to convey Abel’s assessment of how Baker is performing. But when the document is produced to a journalist in response to an FOI request, the purpose of the document is transformed; the purpose is to say, “This is the public record, meeting the description of your request, that was distributed to the city council.” (One might analogize to the evidentiary principle that a document is not hearsay if it is offered into evidence for reasons other than for the truth of the matter asserted.²¹⁷) When a journalist republishes some or all of the record, the republication likewise recontextualizes the document; the news report does not exist for the purpose of notifying the city council what the city manager thinks of the police chief, but to notify the public of the information that has been communicated to the city council.

Relying on fair use, however, is an inadequate assurance of public access. The critical issue is whether a government agency will turn over a copy of a document or database when required to do so under state FOI law. Fair use depends on the manner in which the work is reused.²¹⁸ But FOI law generally does not entitle an agency to ask how the requester intends to use the document, or to condition access on a promise to use the document for limited purposes.²¹⁹ Indeed, most news organizations

215. See Walter G. Lehmann, *Wake of the Flood: Public Records, Copyright and Fair Use in Documentary Film*, LANDSLIDE, July 2017, at 24, 28–27 (explaining that documentary filmmakers rely on the ability to reproduce and redistribute, not just inspect, copies of government records such as video footage).

216. See Marie-Alexis Valente, *Transformativeness in the Age of Mass Digitization*, 90 ST. JOHN’S L. REV. 233, 238 (2016) (“[A] transformative purpose exists when a copyrighted work is copied verbatim but is put to a new purpose. Physical changes are not necessary to find a transformative purpose; where the work is put into a new context, given new insights, or serves a different function than the original, courts may find in favor of transformativeness.”).

217. FED. R. EVID. 801(c).

218. See 17 U.S.C. § 107 (enumerating “the purpose and character of the use” as one of four statutory considerations in determining whether a use is defensibly fair).

219. See Open Records Decision, Op. Tex. Att’y Gen. No. ORD-180, 4 (Oct. 20, 1977) (recognizing conundrum that agency cannot determine whether requester’s use qualifies as fair without inquiring how requester intends to use the documents—an inquiry forbidden by state FOI

would balk at being required to commit to reusing a public record “fairly” as a prerequisite for obtaining a copy of it.

News outlets increasingly use their vast online bandwidth to build audience credibility by sharing their original source documents for public inspection. For example, when the fabled football program at Penn State University was rocked by a scandal over the coverup of a former assistant coach’s serial child molestation, news organizations obtained and posted the entire 267-page investigative report commissioned by the university, enabling the public to see what led to the removal of a legendary head coach and criminal charges against the university’s president.²²⁰ In a more recent instance with echoes of Penn State, news organizations republished the entire 150-page findings of a law firm’s investigation of Title IX compliance at Louisiana State University (LSU), disclosing significant failings in LSU’s response to complaints of sexual harassment.²²¹ As the Supreme Court’s cautionary *Harper & Row* case counsels, even republishing a small percentage of an original work can constitute an indefensible infringement if the republished excerpt is the “most powerful” portion of the original.²²² A hidebound government agency could persuasively argue that republishing the entirety of a 150-page-plus document is more than the amount necessary for a journalist to effectively convey the story, thus exceeding the bounds of fair use.

News organizations need categorical assurance that documents like the Penn State and LSU reports can be republished without fear of copyright liability, not the fact-specific, case-by-case weighing that fair use entails.²²³ They need that assurance *before* they publish—not after years of judicial fact-finding—or else they will not publish at all.

Moreover, access under state FOI law is in no way limited to

law). *See also* News-Press Publ’g Co. v. Gadd, 388 So.2d 276, 278 (Fla. Dist. Ct. App. 1980) (holding that agency faced with request for records under Florida law may not inquire into requester’s motive for request).

220. *See generally* FREEH, SPORKIN & SULLIVAN LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATING TO THE CHILD ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), <https://www.documentcloud.org/documents/396512-report-final-071212.html> [<https://perma.cc/2MQ3-2UPL>]; *see also* Jeffrey Toobin, *Former Penn State President Graham Spanier Speaks*, NEW YORKER (Aug. 21, 2012) (detailing timeline of case and criminal charges against former Penn State president), <https://www.newyorker.com/news/news-desk/former-penn-state-president-graham-spanier-speaks> [<https://perma.cc/F759-XQH4>].

221. *Read the Full Husch Blackwell Report on LSU’s Mishandling of Sexual Misconduct Cases*, THE (BATON ROUGE) ADVOC. (Mar. 5, 2021, 11:05 AM), https://www.theadvocate.com/baton_rouge/sports/lsu/article_0f178d48-7dd5-11eb-9ec9-3733426e4ee0.html [<https://perma.cc/7DP9-TDTB>].

222. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985).

223. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (observing that fair-use defense “defies codification” and that line-drawing questions “cannot be answered precisely”).

journalists, nor is there authority to ration the production of copies. If one reporter is entitled to make one copy with no intention of republishing it—which seems well within the uses that copyright law would recognize as “fair”—then 10,000 members of the public must equally be entitled to make copies, should they all file public-records requests. Copyright law plainly would not allow for such unfettered duplication and reuse of a commercially valuable book, movie, or photograph. This is where treating government records as copyright-protected property becomes irreconcilable with notions of transparency and good governance.

C. *Liberating the Public’s Information*

In 2018, in response to public concerns about the unjustified use of force by officers, California enacted reform legislation directing every local police department to publish its “training, policies, practices, and operating procedures” on a centralized website.²²⁴ But when a watchdog organization, the Electronic Frontier Foundation (EFF), went looking for records reflecting how California police are trained to use facial recognition technology or automated license plate readers, the response was that the training curriculum was unavailable, because the instructor was asserting copyright protection.²²⁵ Months after its initial request for access went unfulfilled, the EFF was forced to file suit under the California Public Records Act to compel disclosure.²²⁶ There is no more salient public issue in contemporary American life than the behavior of police officers, and for copyright to obstruct the public’s ability to know whether police are being correctly and adequately trained—in derogation of the express intent of California’s legislature and governor—is a flashing red signal that rigorous enforcement of copyright is incompatible with public accountability.²²⁷

224. See CAL. PENAL CODE § 13650 (2020); see also Jessie Gomez, *Law Enforcement Agencies in California Will Soon be Legally Obligated to Post Their Guidelines Online*, MUCKROCK (Oct. 5, 2018), <https://www.muckrock.com/news/archives/2018/oct/05/ca-police-update-ii/> [<https://perma.cc/KY6C-DU7T>] (explaining that legislation would require posting training materials online by January 2020).

225. Dave Maass & Naomi Gilens, *California Agency Blocks Release of Police Use of Force and Surveillance Training, Claiming Copyright*, EFF (June 25, 2020), <https://www.eff.org/deeplinks/2020/06/california-agency-blocks-release-police-use-force-and-surveillance-training> [<https://perma.cc/48GF-V99Y>].

226. Press Release, Electronic Frontier Foundation, EFF Sues Police Standards Agency to Obtain Use of Force Training Materials (May 21, 2021), <https://www.eff.org/press/releases/eff-sues-police-standards-agency-obtain-use-force-training-materials> [<https://perma.cc/QUX7-QXD7>].

227. See Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 893 (2018) (describing how more than three thousand U.S. law enforcement organizations contract with private vendors to supply policies and training materials, with the consequence that public cannot access underlying work papers showing how standards are formulated).

The interaction between FOI law and copyright law should be clarified by statute—ideally in a uniform nationwide way, to avoid the conundrum that, as in the *NCTQ* syllabus cases, the very same document might be deemed off-limits in one state on copyright grounds, yet accessible in another. Clarification would also relieve government agencies from being whipsawed between a requester who claims a violation of state FOI law and a third-party rightsholder who claims a violation of federally protected intellectual property rights.²²⁸

Categorically, the government's own purported copyright interests in government-created works should never override open-records law. Otherwise, FOI law could be easily manipulated by asserting copyright protection for every memo, report, or study that an agency prefers to keep hidden.²²⁹ The fact that unpublished work receives heightened deference in a copyright infringement analysis would undermine the foundational purpose of investigative reporting if widely applied to government documents and data. One need only recall that one of the most acclaimed feats of investigative journalism of all time, the publication of a leaked Defense Department history of U.S. strategic failings in Vietnam (the "Pentagon Papers"), involved unpublished work that the agency had no intention of ever sharing with the public.²³⁰

If government agencies were permitted to paywall their most valuable documents and data behind copyright law, records could be made inaccessible as a practical matter by way of extractive fees. Cost can already be a prohibitive barrier to the accessibility of government records even under existing FOI laws, which are supposed to limit what an agency can charge for search, retrieval, and duplication.²³¹ If the

228. On this point, the case of *Weisberg v. U.S. Dep't of Just.*, 631 F.2d 824 (D.C. Cir. 1980), is instructive. In *Weisberg*, the D.C. Circuit held that the rightsholder to photographs held by a federal agency should be joined as a necessary party in a FOIA dispute over the photos, to avoid subjecting the agency to inconsistent obligations if the photos were produced and the rightsholder then sued for infringement. *Id.* at 831.

229. Petersen has even suggested that there may be First Amendment implications if a government agency, under no compulsion to do so, discretionarily chooses to make its records inaccessible by way of copyright protection in a way that frustrates citizens' ability to speak on political issues and petition the government for redress of grievances. See Petersen, *supra* note 5, at 464 ("[T]he potential for conflict between copyright law and the First Amendment increases significantly when government seeks to protect its own work through copyright.").

230. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (declining on First Amendment grounds to sanction government's attempt to restrain publication of leaked national security documents); see also Peter Kihss, *The Times Wins a Pulitzer For the Pentagon Papers*, N.Y. TIMES, May 2, 1972, at A1 (reporting that the *Times*' publication of previously unpublished Defense Department study was recognized with the Pulitzer Prize for meritorious public service).

231. See John Bender, *Solid Gold Photocopies: A Review of Fees for Copies of Public Records Established Under State Open Records Laws*, 29 URB. LAW. 81, 88 (1997) ("Different jurisdictions and different agencies have wildly varying ideas of what constitutes a reasonable fee or what may contribute to the direct cost of copying a public record.").

government is free to set a “market rate” for its documents and data—and there *is* no “market,” because the government is the only supplier—licensing fees could become a backdoor means of denying access.

Copyright law has always recognized that works created by federal employees in the course of their employment are public property that may be freely used, adapted, and shared. There is no indication after two and one-half centuries of experience that federal agencies are less creative or innovative than state, county, or city agencies because the latter can assert copyright ownership of employees’ work. None of the core objectives of copyright law is advanced by extending it to cover works produced in the ordinary course of government business. A state auditor needs no “creativity protection” as an incentive to produce an audit.²³²

A government agency is under no compulsion to assert copyright when faced with a demand to produce public records. The agency is, in effect, manufacturing the impediment if it insists on withholding a government-produced document on copyright grounds. In the analogous context of contractual settlement agreements, courts have overwhelmingly held that an agency cannot enter into an agreement to contract away the public’s right to see the outcome of a lawsuit, especially one where public money changes hands.²³³ By the same logic, a government agency cannot rely on its discretionary choice to insist on copyright protection to excuse compliance with a legally valid FOI request.

States are fully capable of crafting workarounds for narrow subsets of government-created material, such as software, that can be legitimately protected by copyright without doing violence to the public’s entitlement to essential civic information. Florida law provides an instructive roadmap: copyright is not an impediment to the public’s right of access, because agencies are not allowed to secure copyright protection for their

232. See Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 6 (2008) (“The law grants protection for copyrighted works in order to achieve a goal—the advancement of knowledge and learning. It is believed that without the marketable right of the copyright there would be insufficient incentives for the creation and distribution of creative works.”). See also Bender, *supra* note 231, at 120 (“No county, for instance, is likely to stop keeping real estate assessment records simply because no one buys copies of them. Governments collect this information for public purposes, which are already fully paid for through taxes.”).

233. See, e.g., *Bradley v. Ackal*, 954 F.3d 216, 233 (5th Cir. 2020) (holding that press and public had a right of access to settlement agreement in a lawsuit brought by survivors of a detainee who died in back of a police car, even though court sealed settlement terms by parties’ mutual agreement); *Trib.-Rev. Publ’g Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112, 116 (Pa. 2003) (“[A] settlement document involving a public body that has acted within its official capacity contains information relating to the conduct of the public’s business [and is subject to disclosure notwithstanding a negotiated confidentiality agreement.]”); *State ex rel. Findlay Publ’g Co. v. Hancock Cnty. Bd. of Comm’rs*, 684 N.E.2d 1222, 1224 (Ohio 1997) (“In general, a settlement agreement of a lawsuit in which a public office is a party is a public record subject to disclosure . . .”).

records unless expressly authorized by statute.²³⁴

But the public's need for records from government agencies does not stop with those created by public employees. As in the Utah jails case, the public needs records obtained by government from the private sector when those records are central to the policymaking process—or when those records *become* government policy. And as in Washington's *Lindberg* case, the public needs access to records created by regulated entities for purposes of commenting effectively on how those regulations are being applied and enforced.²³⁵ Lacking the ability to copy and redistribute private entities' records in the custody of government agencies, news coverage and citizen activism would be hampered. Imagine, for instance, an environmental group trying to generate grassroots opposition to a massive development project by telling each of its members to travel to City Hall to ask to see drawings of the development. Allowing rightsholders to dictate how public records are shared by asserting (or waiving) their copyright interests selectively raises the real risk of enlisting the government custodian in acts of forbidden viewpoint discrimination—for instance, if the developer in the *Lindberg* case insisted that critics of the planned housing development could not make copies of its drawings on file with the county, but that supporters of the project could freely do so.²³⁶

While the equities may be different for material created by third parties and maintained in government custody,²³⁷ narrower and less information-restrictive alternatives to copyright exist. Trade secret exemptions to FOI law adequately address the competitive needs of private industry without the need to recognize a new and different “copyright exemption.”²³⁸ When a document is recognized as containing protected trade secrets, it

234. See Recs., License Agreements for Cnty. Maps, Op. Fla. Att'y Gen. No. 2003-42 (Sept. 3, 2003) (opining that GIS maps and data compiled by county government were subject to production as public records, because no statute expressly authorized county to obtain copyright protection); see also Fla. Dep't of Health & Rehab. Servs. v. Southpointe Pharm., 636 So. 2d 1377, 1383 (Fla. Dist. Ct. App. 1994) (rejecting copyright argument as to transcript of administrative hearing maintained on file with state agency and ordering production under Florida Open Records Act).

235. *Lindberg v. Cnty. of Kitsap*, 948 P.2d 805, 814 (Wash. 1997) (en banc).

236. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).

237. See Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 233 (2019) (recognizing unique copyright concerns when government agencies merely use works belonging to others, as opposed to hiring private contractors to create work especially for government use).

238. See, e.g., Advisory Opinion, N.Y. Comm. on Open Gov't No. F11109 (Oct. 19, 1998), an advisory opinion stating that a copyright analysis need not be applied to a requester's demand for access to medical protocols obtained by the City of Buffalo from a private vendor, because the state's FOI exemption for commercially valuable trade secrets would fully address the vendor's concerns.

is treated as exempt from government disclosure indefinitely, with no need for any registration formalities or renewals.²³⁹ But unlike copyright, trade-secret protection requires a showing both that the information is not widely shared and that disclosure would be economically harmful.²⁴⁰ Thus, the set of protected works is narrowed to works of provable commercial value. For example, when a requester sought to use the Ohio Public Records Act to obtain copies of standardized tests administered to ninth-graders, the Ohio Supreme Court concluded it was unnecessary to decide whether copyright applied to the exams, because the documents could be withheld under Ohio's statutory exemption for trade secrets.²⁴¹ Requiring that a third party take affirmative steps to protect filings made with government agencies as trade-secret documents ameliorates the concern that government agencies might disingenuously invoke the copyright interests of third parties for purposes of concealment, even where the third parties may be indifferent to disclosure and have no intention of pursuing legal remedies if disclosure is made.²⁴² At least one federal court has already recognized this danger and rejected an agency's position that the copyright interests of private rightsholders should foreclose producing their documents when the documents are being held and used by federal agencies: "[I]nterpreting FOIA as the Government urges would allow an agency to mask its processes or functions from public scrutiny simply by asserting a third party's copyright."²⁴³

Whether the document was created by the government or merely obtained by the government from an outside third party, the proper time to debate the copyright status of the work is not when a requester asks to

239. See Samuels, *supra* note 8, at 469 ("[Trade secret protection] is potentially unlimited in terms, and does not require public disclosure or governmental registration or examination of the information that is protected [As such, it] is preferable to, and can be more effective and efficient than, patent or copyright protection.").

240. See *id.* at 470 (describing prevailing test for trade secret designation under open records law, derived from Uniform Trade Secrets Act, which requires showing that information derives economic value from not being generally known or ascertainable by competitors, and that its holder has taken reasonable measures to secure its confidentiality).

241. State *ex rel* Perrea v. Cincinnati Pub. Schs., 916 N.E.2d 1049, 1054–55 (Ohio 2009).

242. The Pennsylvania court's ruling in *Ali v. Phila. City Plan. Comm'n*, 125 A.3d 92 (Pa. Commw. Ct. 2015) opens the door to exactly such manipulation of copyright law as an artifice to evade disclosure. There, the court held that "where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication . . . should be *presumed*." *Id.* at 105 (emphasis added). If *Ali* were to become the common understanding of how copyright law interacts with FOI law, then the normal presumptions in favor of disclosure would be inverted. It would become the burden of the records requester to prove that duplicating a public record does *not* harm the interests of the (absent) rightsholder—a burden that could be carried only by asking a state court to pass on the application of the fair-use doctrine, a fraught proposition.

243. Weisberg v. U.S. Dep't of Just., 631 F.2d 824, 828 (D.C. Cir. 1980) (internal quotations omitted).

inspect or copy it, but when it is redistributed.²⁴⁴ At that point, if the rightsholder believes the redistribution exceeds the bounds of a defensible fair use, then a garden-variety infringement suit can be brought in federal court, where judges are well-equipped to calibrate fair-use judgments. This is a much narrower remedy than denying *everyone* the opportunity to review or duplicate a record based on the concern that a subset of users might monetize it without compensating the rightsholder. Government data should be understood as a public good no less than a street or a park, and if data becomes available only to elites who can pay licensing fees, we risk creating a society of “information haves” and “information have-nots”—exactly the concern that animated the Supreme Court to rule in favor of the publisher in *Public.Resource.org*.²⁴⁵

The case of *County of Suffolk v. First American Real Estate Solutions* is instructive as a roadmap.²⁴⁶ There, a county government brought a copyright infringement suit against a company accused of improperly profiteering from reselling county-produced real estate maps.²⁴⁷ The defendant argued that New York’s Freedom of Information Law (FOIL) precluded the county from securing and enforcing a copyright to frustrate the disclosure imperatives of FOIL.²⁴⁸ The Second Circuit declined to interpret FOIL as a blanket abrogation of a local government’s ability to protect its copyright ownership rights:

[T]he extent of the state agency’s obligation is to make its records available for public inspection and copying. It is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute.²⁴⁹

Thus, the court recognized that an agency could not invoke copyright to prevent a requester from reviewing and copying records—or even to prevent a journalist from making a fair use of records obtained by way of

244. See Virginia Freedom of Information Act: Topographic Maps Required to Be Open to Inspection and Copying, Op. Va. Att’y. Gen. No. 443, 1982 WL 175878, at *1 (Mar. 25, 1982) (opining that Virginia FOI law gives requesters the ability to inspect and copy topographic maps made by a county property tax office, but that copyright remedies might apply if the maps were subsequently reproduced without the county’s consent).

245. See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1512 (2020) (describing a hypothetical scenario in which readers with access only to the “economy-class” version of the Georgia statutes might be misinformed about their rights, while purchasers who could afford the “first-class” version would know which statutes are and are not judicially enforced).

246. *Cnty. of Suffolk v. First Am. Real Est. Sols.*, 261 F. 3d 179 (2d Cir. 2001).

247. *Id.* at 183.

248. *Id.* at 188.

249. *Id.* at 189.

FOIL²⁵⁰—but that an infringement action could lie against a user who commercially exploited the records beyond the boundaries of fair use.

Returning to the Utah jail scenario, if a competing organization attempted to sell a knockoff version of the copyright-protected Utah Jail Standards after seeing the standards on a news blog, then the rightsholder would have recourse against the competitor. This is the scenario in the Ninth Circuit's *Practice Management* case; the issue was not whether a citizen could inspect and copy privately developed standards for purposes of political or civic participation, but whether a for-profit publisher could republish and sell privately developed standards in ways arguably competing with their creator.²⁵¹

The answer to reconciling nongovernmental copyright interests with FOI law is in plain sight. Because the Supreme Court recognizes that fair use is a necessary accommodation to make copyright law constitutional in accordance with the First Amendment,²⁵² copyright law cannot be applied in a way that forecloses attempting a fair use.²⁵³ The ability to make a fair use of a record for a statutory purpose such as critique or commentary—or to use the facts and ideas in the record, as opposed to its protected expressive qualities²⁵⁴—is what makes it constitutional for copyright to act as a prior restraint on infringement.²⁵⁵ If a requester would otherwise have a statutorily guaranteed right to inspect and copy a record, copyright cannot constitutionally defeat that right. This is especially so because it is the agency, not the requester, that is making the copy, so there is no infringing “wrong” to hold the requester

250. *See id.* (“First American ignores the fact that the free press or an individual seeking to use the state agency records to educate others or to criticize the state or the state agency may be protected by the Copyright Act’s fair use doctrine.”).

251. *Prac. Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 518 (9th Cir. 1997).

252. *See* sources cited *supra* notes 56–57 and accompanying text.

253. *See* Lehmann, *supra* note 215, at 27 (“If the materials had already been ‘published’—that is, were already available publicly in a tangible form—there would likely be no dispute because the filmmaker would be able to use the materials in his documentary so long as their use is considered fair use. . . . Put another way, the practical effect of the University’s copyright preemption argument is to effectively curtail the filmmaker’s First Amendment right to freedom of expression.”).

254. The court in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), relies on this ideas/expression dichotomy, noting at several points that, while the biographer/defendant may not republish large portions of Salinger’s letters, he is free to draw on their ideas. *See id.* at 96 (“The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material.”).

255. The court in *New Era Publ’ns Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), recognized this tension in refusing to enjoin even an infringing use of material by a biographer writing about a newsworthy public figure: “[T]o make [copyright] inevitably prevail over all competing considerations would lead to absurd results that are almost incompatible with First Amendment interests. By registering a copyright, public figures who are the expected focus of public interest could use this supposed commercial protection as an aggressive weapon to prevent the publication of embarrassing revelations and to obstruct criticism.” *Id.* at 1502.

responsible for.²⁵⁶ This clean solution avoids the intractable problem of putting inexperienced employees of city, county and state agencies into the business of determining whether records—which can attain copyright protection without registration or other formalities²⁵⁷—do or do not qualify for a copyright exemption to FOI law.²⁵⁸ This understanding also spares agencies from a landmine of liability for the judgments of nonlawyer clerks and secretaries who, many thousands of times a day, furnish copies of documents that might theoretically qualify for copyright protection if the creator insisted on enforcing it.

To critics who would argue that, without copyright protection, private industry will hesitate to do business with government, the response is threefold. First, open-government laws are purposefully strong medicine, and they do not yield to convenience. All manner of records that might be embarrassing or unflattering (such as arrest records) are subject to mandatory disclosure, even if those mentioned in them would prefer otherwise, because the public's interest in oversight of governance is so overriding.

Second, the risk that proprietary records might become publicly accessible and thus suffer diminished value is a risk that can be priced into an arrangement with government clientele. The risk that doing business with one client will result in losing a prospective sale to another client is routinely baked into the price of goods and services. For instance, the architects who agree to build a signature home in a luxury subdivision know that the same design they have just used for 123 Walnut Drive cannot be resold to the neighbor at 125 Walnut Drive, and they price their services accordingly. It is perhaps unfortunate that a government agency

256. For this reason, the workaround once suggested by the Texas and Nevada attorneys general—that requesters make their own copies and assume the risk of copyright liability for doing so (*see supra* note 118 and accompanying text)—is something of a “coward’s way out” of the dilemma. The agency has a statutory duty to furnish copies. The agency cannot discretionarily choose to ignore its statutory duty unless federal law *forbids* doing so, and copyright law does not—or at least does not always clearly do so, since many courts have found the provision of a duplicate to constitute a fair use.

257. *See* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 333 (2010) (explaining that 1976 revisions to Copyright Act made fixation in tangible form, rather than publication with notice, the starting point for copyright protection).

258. For example, a purely “factual” document that a third party files with the government, such as a blank form or a table of numbers, might not contain the requisite originality and creativity to qualify for copyright protection. *See, e.g., CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996) (concluding that advertising brochure with short, standard phrases lacked sufficient creativity to qualify for copyright protection). But that is not a determination that a clerk in a county property tax office is normally equipped to make. As noted FOI authority Barbara A. Petersen has observed, even the existence of a registration with the U.S. Copyright Office does not resolve whether a document is in fact copyright protected, as that is ultimately a judgment for the courts. *See* Petersen, *supra* note 5, at 448.

might pay a premium price to compensate a standard-setting body for the market risk of future lost sales, but we require government agencies to absorb all manner of costs—publishing public notice of rulemakings, conducting public hearings for ordinances, and so on—as the accepted price of an informed, participatory citizenry.²⁵⁹

Third and finally, the rightsholder retains the full benefit of Copyright Act remedies against the ultimate end user of a government document if that document is exploited beyond the bounds of a defensible fair use.²⁶⁰ Here, one might analogize productively to the example of public libraries. Each public library contains thousands of volumes of copyright-protected material that is freely available for public inspection—and almost every one of them also contains a self-service copy machine. A public-policy decision has been universally made to offer copying services, even knowing that some subset of users might decide to redistribute what they copy in infringing ways (*e.g.*, duplicating an entire edition of a magazine and uploading it to the web in a way that undermines sales), because there are societally beneficial purposes in enabling people to make copies for research—and because there are effective legal remedies against the infringing outlaw user (and not, it must be emphasized, the library). An agency's repository of public records is the community's "civic library." It is the storehouse of knowledge that copyright cannot padlock, if the public and press are to effectively discharge their civic oversight roles.²⁶¹

259. See Tones, *supra* note 140, at 393 ("[I]t is the government who is in the better position to pay this price for essentially 'outsourcing' their legislative work."). Tones also suggests that uncertainty over the status of standards prepared by private third parties could be clarified simply by contractually designating any standards supplied to government agencies as "works made for hire." *Id.* at 392. This, she acknowledges, might result in states having to pay more for a service they have obtained for little to no cost, but added expense does not make the solution unworthy of consideration. See also Street & Hansen, *supra* note 237, at 243 ("Governments that seek to simplify their work by 'adopting' or 'incorporating by reference' standards produced by private organizations should compensate the private organizations for their work, and then make any adopted legal standard freely available to the public.").

260. As far back as 1989, before the widespread digitization of documents, Professor John A. Kidwell recognized the growing tension between FOI and copyright law and proposed such an accommodation: "Just as open records statutes should not forfeit copyright, neither should the fact that a work is copyrighted be allowed to defeat the right to access [] the work if it has become a public record." John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1028.

261. See Regalia, *supra* note 37, at 90 ("The public's right to information is a cornerstone of any democratic legal system[]). Indeed, a democratic government operating in secrecy is no democracy at all."); see also Netanel, *supra* note 45, at 352 ("A regime in which government administrators exert broad control over the content and dissemination of tangible expression will be unlikely to maintain viable civil institutions.").