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CLASS ACTION LAWYERS AS LAWMAKERS

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ABSTRACT

Private lawyers are significant participants in legislative and judicial lawmaking. However, since law is a public good, lawyers face a significant free-rider problem in investing time and other resources in law-creation other than to the extent necessary to win the case for their client. This Article focuses on the lawmaking incentive problem inherent in class actions, and specifically on class action complaints. Because a class action lawyer prepares a complaint without knowing whether a court ultimately will select her as counsel for the class, the lawyer may have less incentive to put effort into the complaint than if she had been hired prior to drafting the complaint. This Article discusses ways such lawyers can be given adequate incentives to maximize the law-creation value of their complaints. It shows that direct protection, as through intellectual property rights, is not legally available, primarily because of due process concerns for public access to the law. We suggest that protection is best provided by the institutions for choosing the lead plaintiffs and lead counsel in class actions.

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While law nominally gets made by judges and legislators, private lawyers provide significant inputs as participants in both legislative and judicial lawmaking. These inputs are important. Judges and legislators alone may lack adequate incentives to engage in efficient lawmaking. Private lawyers, on the other hand, are the primary consumers of law, and accordingly have a significant stake in the content of legal rules. The problem is that law is a public good, so that lawyers face a significant free-rider problem in investing time and other resources in law-creation.

The nature of and solutions to the incentive problem depend on the type of lawmaking. One of us has written about lawyers' participation in state statutory lawmaking, where incentives to produce law can be created by a combination of licensing laws and choice-of-law rules that bind lawyers to the law of particular states.¹ Participation in federal statutory lawmaking might similarly be encouraged by licensing practice specialties, such as bankruptcy or patent law.²

Neither of these approaches directly addresses the lawmaking that is done through litigation. To a significant extent, of course, lawmaking in litigation is done by judges when they write opinions in cases. Judges have incentives to consider not only the resolution of the particular case before them, but also the *stare decisis* effect of their opinion. Private parties and their lawyers also participate significantly in lawmaking through litigation by developing the factual record and legal theories in the case. However, these parties lack the incentives that judges have to consider the effect of their efforts on the precedential value of the case. One aspect of this is that too many disputes may be settled or arbitrated³ in the sense that such resolutions produce a suboptimal amount of legal precedents. Another aspect, on which this Article focuses, is that lawyers in private disputes may have a socially suboptimal incentive to develop the law or factual record in the case in a way that contributes to the case's value as a legal precedent.

In order to understand this point, it is necessary to distinguish traditional and public law models of litigation. Under the traditional model, litigation is a private matter between the immediate parties.⁴ On this view, judgments and the documents filed in support of obtaining it are of little public interest, and there would be little concern that private ownership of such material would interfere with the public's right to due process.

¹ Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, __MO. L. REV. __ (2004).

² See *id.* at __.

³ See, e.g., William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 238-9 (1979) (discussing the incentives of arbitrators to produce precedents); Kenneth S. Abraham and J. W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L. J. 355, 366-7 (2002/2003) (discussing the adverse effects on legal development that result from the confidentiality and non-precedent-setting features of arbitration).

⁴ See Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

Under the alternative public law model,⁵ litigation has external effects extending beyond the parties to the current lawsuit as a result of, for example, *stare decisis*⁶ or collateral estoppel.⁷ It follows that private rights to litigation documents trigger due process concerns for third parties affected by the results of litigation. In the U.S. adversary system, it is up to the adversaries in the case, and particularly their lawyers, to develop the facts and legal arguments that lead not only to the resolution of the particular case, but also the judge's opinion establishing a legal rule to guide future cases. Since courts have only limited resources, they must rely almost completely on the parties and their lawyers. Indeed, courts may be precluded from raising legal theories *sua sponte* or basing their judgments on facts that are outside the record.

In the typical private case, apart from the settlement/arbitration problem referred to above, lawyers can be assumed to have adequate incentives to develop the record in their case based on their compensation arrangements with their clients. Even to the extent that the rules governing litigation do not themselves provide adequate incentives, some marginal incentive may be provided by the same state licensing and choice-of-law rules that encourage participation in state statutory lawmaking.

The problem arises in class actions, and specifically with respect to class action complaints, where the lawyer prepares a complaint in effect "on spec," without knowing whether a court ultimately will select the lawyer as counsel for the class. This uncertainty dilutes the lawyer's incentives in preparing the complaint compared to a lawyer who, prior to drafting the complaint, has negotiated with the client to be rewarded for his efforts. In particular, the lawyer may reasonably conclude that, even to the extent the quality of the complaint significantly determines the court's selection of counsel, other lawyers may simply copy the complaint once it is filed.

To be sure, the complaint may contribute marginally to the creation of law, which may slightly benefit the lawyer in later cases. But this benefit confers little competitive advantage in securing clients, particularly where it concerns federal law rather than the law of a particular state. Nor can the lawyer even reap reputational gains if another lawyer prosecutes the case. And any small competitive advantage is likely to be swamped by the significant costs involved in preparing the complaint.

A logical approach to solving this problem would be to give class action lawyers an intellectual property right in their complaints. A complaint can be viewed as containing original expression that, if published rather than filed, would be entitled to intellectual property right protection against copying. The creation of such original written works and

⁵ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁶ See, e.g., Richard A. Posner, *The Economic Analysis of Law*, 554-5 (2003)

⁷ See *id.* at 593-5.

compilations of facts are an essential part of a lawyer's job. If lawyers cannot protect these works from appropriation by others, including competing lawyers, they would produce fewer and lower quality works.

On the other hand, intellectual property protection for complaints and other litigation documents raise the standard use-creation tradeoff that is central to the economic analysis of intellectual property.⁸ As noted above, legal complaints can be regarded as lawmaking documents, and there are strong due process arguments supporting public access to the law. From a practical standpoint, litigation costs would rise as claimants making related claims would have to incur redundant search costs. Also, intellectual property rights would constrain competition among lawyers for the right to represent a particular class, potentially raising the costs and lowering the quality of such representation.

This issue has been highlighted by the recent assertion of copyright, misappropriation, and unfair competition protection for complaints filed by William Lerach. The following notice has appeared in recent complaints written and filed by Lerach and his firm, Milberg Weiss Bershad Hynes & Lerach LLP:

This writing/publication is a creative work fully protected by all applicable copyright laws, as well as by misappropriation, trade secret, unfair competition, and other applicable laws. The authors of this work have added value to the underlying factual materials herein through one or more of the following: unique and original selection, coordination, expression, arrangement, and classification of the information.

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Copyright © 2002 by William S. Lerach and Milberg Weiss Bershad Hynes & Lerach LLP. William S. Lerach and Milberg Weiss Bershad Hynes & Lerach LLP will vigorously defend all of their rights to this writing/publication.⁹

⁸ See e.g., William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, at 11, 20-22. (2003).

⁹ See, e.g., Consolidated Complaint for Violation of the Securities Laws, In *re Enron Securities Litigation, Civil Action*. Action H-01-3634 (consolidated), United States District Court, Southern District of Texas, Houston Division ("Enron complaint"). A search of the U.S. Copyright office's database of registered copyrights yielded 24 complaints registered by Lerach between September 2001 and May 2003. The search was conducted on January 8, 2004 at <http://www.copyright.gov/records/cohm.html>, and used the search term "Lerach, William". The copyright notices have appeared only on Lerach's filings, and not on filings made by other Milberg-Weiss lawyers. Lerach uses the notices selectively in cases where he feels the complaints "truly reflect substantive creative work and significant investigative investment." See *Litigator Copyrights his Court Filings*, THE INTELLECTUAL PROPERTY STRATEGIST, December 2001, available at http://securities.stanford.edu/news-archive/2001/20011200_Headline10_Staff.htm. A recent check of the Milberg-Weiss web site suggests the practice has continued. See, e.g., Class Action Complaint for Violation of the Securities Laws, United States District Court, Southern District of New York, in

Lerach's assertion of an intellectual property right to legal complaints was prompted by the alleged copying of these complaints by other attorneys competing with Milberg-Weiss to be lead counsel in large class actions.¹⁰ These cases involve the potential for large fee awards. Appointment as lead counsel in a class action can be worth millions of dollars, as the lead counsel effectively controls the fees through allocations of the workload in the case.¹¹ An attorney producing an original complaint must make a considerable investment in order to win this appointment. Particularly because complaints filed by attorneys competing to be lead counsel in fraud cases are subject to heightened pleading requirements, they can be quite long and can represent significant expenditures of time and resources.¹² These expenditures will not be recoverable when there is a poor litigation outcome or if another attorney is appointed lead counsel.

The assertion of intellectual property claims to protect publicly filed legal complaints suggests two primary inquiries. First, there is the positive question of the extent to which existing intellectual property or other laws protect such works from free riding by competitors. Second, there is the normative question of whether such protection is desirable.¹³

This Article examines the existence and desirability of intellectual property right protection as a way to protect lawyers' investments in the production of information during and in anticipation of litigation. We show that there are significant gaps in, and questions concerning the desirability of, the protection of publicly filed complaints under intellectual property laws and laws protecting information in litigation.

We suggest that protection is best provided by the institutions for choosing the lead plaintiffs and lead counsel in class actions. Relevant decision makers include institutions and others applying to be the lead plaintiff under the Private Securities Litigation Reform Act (PSLRA)¹⁴, or

Southern Alaska Carpenters Pension Fund, On Behalf of Itself and All Other Similarly Situated, v. Bonlat Financing Corp. et al., available at <http://www.milberg.com/cases/parmalat/complaint.pdf> (visited January 16, 2004).

¹⁰ See Molly McDonough, *Hey! They Copied My Complaint*, 4 ABA J. E-REPORT 2 (December 6, 2002); Janet L. Couley, *Milberg Weiss Tries to Nail Class Action Imitators*, FULTON COUNT DISPATCH, (November 20, 2002), available at www.law.com.

¹¹ See Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 654-5 (2002).

¹² Generally, the Federal Rules require only notice pleading, requiring only that the plaintiff include a "short and plain statement of the claim showing that the pleader is entitled to relief." FRCP Rule 8(a)(2). However, the rules contain a heightened pleading requirement in fraud cases, requiring that "the circumstances constituting fraud or mistake shall be stated with particularity." FRCP Rule 9(b). As a result, the complaints in securities fraud cases are often contain lengthy and detailed descriptions of the circumstances that lead to the alleged fraud. For example, the consolidated complaint in the Enron case is over 500 pages long.

¹³ See, e.g., David M. Young, *Can the Lawsuit Industry Copyright Its Class Action Complaints?* 18 LEGAL BACKGROUNDER, WASHINGTON LEGAL FOUNDATION (April 11, 2003) (discussing case law and public policy arguments against copyrightability).

¹⁴ PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, Pub. L. No. 104-67 (1995)

judges under the new provisions of Rule 23(g).¹⁵ These class action procedural mechanisms may provide the appropriate level of protection for this specific context. The class action complaint is part of the process through which the attorney is attempting to attract clients or otherwise be appointed counsel for the class. The court's appointment of the lead class lawyer in effect substitutes for the negotiations that would occur outside the class context between the lawyer and the client in providing the appropriate incentives to produce the complaint. This process, rather than general intellectual property rights, is best suited to resolving the tension between production and dissemination of class action complaints.

More broadly, our analysis is important as a further step in providing an optimal legal framework for the creation of law. Neither courts nor legislatures have the incentives or the resources on their own to create the increasingly complex body of law our society demands. This is particularly true given the rapid expansion of federal statutory law, and the litigation based on that law. Accordingly, it is important to deal with the issues involved in giving property rights to lawyers in their law-creation efforts, while efficiently balancing the public's due process right of access to legal works.

The Article proceeds as follows. Part I discusses the role of private lawmaking in both legislation and judicial processes. This part points out the potential need for intellectual property rights in law. Part II discusses the problems of copyrighting statutory law. Although this article focuses on the judicial process, it is important to begin by discussing the private production of statutory law because the cases on this issue bear on lawmaking in the litigation process. Part III applies the analysis of property rights in statutory law to copyrighting class action complaints. Part IV discusses ways to protect information in litigation, including complaints, other than through intellectual property laws. Part V discusses potential protection through class action procedures for choosing lead class counsel. Part VI presents concluding remarks.

I. PRIVATE LAWMAKING

While public laws ultimately are produced by individuals or groups of government employees, it does not follow that government employees should be viewed as the primary "authors" of laws. Both courts and legislators have and continue to rely on external groups, particularly including lawyers,¹⁶ for the provision of laws. Subpart A discusses legislation, while subpart B discusses judicially created law.

¹⁵ FEDERAL RULES OF CIVIL PROCEDURE, RULE 23(g).

¹⁶ See Ribstein, *supra* note 1; Larry E. Ribstein, *Delaware, Lawyers and Choice of Law*, 19 DEL. J. CORP. L. 999 (1994).

A. Legislation

Although statutory law is nominally produced by state and federal legislators, there are serious problems with relying entirely on these lawmakers. These problems include the standard public choice concerns about interest group influence,¹⁷ to concerns that dominant state laws will be “locked in” by “network externalities.”¹⁸

Most importantly for present purposes, legislators arguably do not gain enough from making their state's law competitive to justify their engaging in extensive law reform efforts.¹⁹ Among other problems, legislators in other jurisdictions can copy successful innovations,²⁰ making it difficult for lawmakers to capitalize on gains from lawmaking difficult. To be sure, the state's residents may gain if the state's law makes the state an attractive business climate, but individual residents usually do not gain enough to justify the costs of organizing to secure an attractive business climate.²¹

Public legislators' efforts therefore need to be supplemented by private lawmaking. Some private lawmaking efforts are provided through organized “private legislatures” such as the National Conference of Commissioners for Uniform State Laws (NCCUSL) and the American Law Institute (ALI) as sources of law.²² NCCUSL is a quasi-public body appointed by state governors and funded in part by the states. NCCUSL has drafted and promulgated over 100 uniform acts, which are then sent state legislatures for possible adoption.²³ The ALI, which is a private organization whose new members are chosen by existing members, jointly produced the Uniform Commercial Code with NCCUSL.

¹⁷ See, e.g., Robert E. McCormick & Robert D. Tollison, *POLITICIANS, LEGISLATION AND THE ECONOMY* (1981); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 361-62 (1988).

¹⁸ See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). But see Larry E. Ribstein and Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WILLIAM & MARY L. REV. 79 (2001); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B. U. L. REV. 813 (1998); Mark A. Lemley and David McGowan, *Legal Implications of Network Effects*, 86 CAL. L. REV. 479 (1998).

¹⁹ See Douglas J. Cumming & Jeffrey G. MacIntosh, *The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law*, 20 INT. REV. L. & ECON. 141, 144-46 (2000).

²⁰ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?* 9 J. LEGAL STUD. 593 (1980).

²¹ An exception is Delaware's incentive to compete for corporate franchise fees, which comprise a significant portion of this small state's revenues. See Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

²² See, e.g., Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Larry E. Ribstein and Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LOUISIANA L. REV. 1147 (2002); David V. Snyder, *Private Lawmaking*, 64 OH. ST. L. J. 371 (2003).

²³ See Ribstein and Kobayashi, *supra* note 22.

Model laws also can be drafted by bar associations, private firms, or individuals. Lawmakers often adopt or copy privately produced and copyrighted model codes, reference works or standards.²⁴ The use of privately produced legislative materials has a long history. Roscoe Pound noted the common production in England of private texts in the code form and private restatements that put the law in a form for codification during the late 19th and early 20th century.²⁵

Laws produced by private groups organized for purposes other than lawmaking often may be superior to those produced by private legislatures because the latter often have objectives that interfere with efficient lawmaking.²⁶ For example, NCCUSL's pursuit of uniformity and desire to maximize adoptions may require it to make compromises to ensure that powerful interest groups do not block adoption by state legislatures. This compromise process can magnify the power of dominant interest groups, and can lead to vague and contradictory provisions in uniform laws.²⁷ In contrast, privately produced laws are less likely to reflect such compromises. Also, individuals, especially those motivated by profit, will not reflect the status-quo bias faced by reformers attracted to NCCUSL or the ALI.²⁸ Thus, such privately produced laws are likely to be preferable to those produced by the NCCUSL or the ALI in areas where uniformity is not necessary or desirable.²⁹

Although privately produced laws may be valuable, they also may be under-produced because private parties lack the requisite incentives to engage in lawmaking. As Pound details in his article, individuals attempted to codify the common law, but these attempts were often unsuccessful, often because of lack of resources.³⁰ As discussed below in Part II, this problem can be addressed, among other ways, by providing for intellectual property rights in law.

B. Judicially created law

Judges not only decide the individual cases before them but also create law.³¹ Judicial opinions can have general stare decisis effects.³²

²⁴ See *infra* subpart II.B.

²⁵ See Roscoe Pound, *Sources and Forms of Law*, 22 N. D. LAWYER 1, 70-1 (1946) (also citing Wigmore's Pocket Code of Evidence, 2d ed. as an American example).

²⁶ See Larry E. Ribstein and Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV 949 (1995) (discussing difference between uniform and model Limited Liability Company statutes.). See also Ribstein and Kobayashi, *supra* note 22 at 181-2.

²⁷ Ribstein and Kobayashi, *supra* note 22, at 182. See also Schwartz and Scott, *supra* note 22 (discussing similar problems with ALI restatements).

²⁸ See *id.*

²⁹ See Bruce H. Kobayashi and Larry E. Ribstein, *Uniformity, Choice of Law, and Software Sales*, 8 GEO. MASON L. REV. 261, 270-1 (1999); Ribstein & Kobayashi, *supra* note 22; Schwartz *supra* note 22 at 1147.

³⁰ See Pound, *supra* note 25 at _.

³¹ See, e.g., Posner, *supra* note 6, at 554; Richard A. Posner, *What Do Judges and Justices Maximize?*

Also, judgments may have preclusive effects on related cases.³³

As with legislation, privately produced law is also important in the judicial process. In an adversary system, judges are significantly assisted by the litigants' lawyers in creating law.³⁴ The importance of these private resources is increased by the caseload demands placed on appellate judges.³⁵ High caseloads have led appellate courts to look for ways to economize on court resources, including by disposing of more appellate cases without publication in the Federal Reporter.³⁶ Designating a large volume of cases as unpublished opinions allows the courts to significantly reduce the time spend on drafting these opinions. This frees up judicial time to work those opinions designated for publication.³⁷ The tradeoff is that this reduces the number of opinions that can serve as precedents.³⁸

Given these caseload demands and the compromises they entail, heavily burdened courts can be expected to rely more on the legal documents produced by the parties than on independent research conducted by court personnel. Legal documents produced during the course of private litigation can be not only critical to the outcome of a particular case but also a potentially important source of general law. Complaints can state facts that contribute to the creation of precedent, formulate new common

(*The Same Thing Everyone Else Does*) 3 SUP. CT. ECON. REV. 1 (1993).

³² See William M. Landes and Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249 (1976). See *Hart v. Massanari*, 266 F. 3d 1155 (9th Cir. 2001) (reviewing the history of stare decisis and concluding that the constitution does not require that all holdings of the federal appeals courts be binding precedent within the respective circuit); *Anastasoff v. U.S.*, 223 F. 3d. 898 (8th Cir. 2000); *vacated as moot* 235 F. 3d. 1054 (8th Cir. 2000) (en banc) (concluding the opposite).

³³ See Posner, *supra* note 6 at 594-5.

³⁴ See generally, Landes and Posner, *supra* note 3, at 259-63 (discussing literature on the private determination of public judicial outcomes).

³⁵ See, e.g., Jeffrey O. Cooper and Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685 (2001) (discussing 25 fold increase in the caseload of the federal appeals courts.) See also Alex Kozinski and Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. (June 2000) at 43-4 (noting that average 9th Circuit judge wrote 20 binding precedent opinions and participating in 60 such opinions as a panel member). According to Kozinski and Reinhardt, *id.*, this is akin to "writing a law review article every two and a half weeks ... [and] commenting extensively once a week or so on articles written by others." These demands would be on top of the other duties of the appellate judges, which includes disposing of numerous cases (on average, one case per panel per day) that were not selected for publication.

³⁶ See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, forthcoming 5 J. APP. PRAC. & PROC., No. 2 (2003), UC Berkeley Public Law Research Paper No. 143, available at http://papers.ssrn.com/paper.taf?abstract_id=485823 (discussing state and proposed federal rules); William T Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 649-70 (2002); Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995).

³⁷ *Id.* at 650. Kozinski and Reinhardt suggest that the non-binding decisions are "correct . . . but are not written for the ages, or calculated to lay down principles for all cases." See Kozinski and Reinhardt, *supra* note 35 at _.

³⁸ Hangley, *supra* note 36 at 651-2 (noting trend of circuits to discourage and even prohibit citation to unpublished opinions and holdings).

law causes of action, and help clarify statutes. Thus, judicial opinions reflect inputs from complaints and other pleadings.

An example of the lawmaking benefits of legal complaints is provided by William Lerach's Enron complaint.³⁹ This 500-page long complaint included a detailed recitation of alleged frauds at Enron. This effort was artfully designed to construct a theory of liability of collateral participants in the Enron fiasco, including lawyers, accountants and banks, with the view of avoiding the significant limitation on liability of such parties in the *Central Bank* case.⁴⁰ The creative effort involved was comparable to that involved in creating a work of fiction. Indeed, a lawyer's presentation of a case in court has been compared to a work of narrative comparable to that of a novel or film.⁴¹ The relevance of this creative work to lawmaking is indicated by the fact many elements of the Enron complaint found their way into the federal district court's opinion on defendants' motion to dismiss.⁴²

The creative effort and lawmaking benefit involved in litigation documents, however, often inure to the benefit of parties other than the party that produces the information. Information produced by one litigant can be appropriated by an adversary, by a co-defendant and their attorneys, or by subsequent litigants and other third parties, including through reliance on legal holdings or facts generated by prior litigants.⁴³ As is generally the case when free-rider dissipates the rents from productive effort, the incentives to produce may be reduced.⁴⁴ Thus, unless litigants or their attorneys can reap the benefits of their efforts, they may under-produce such private lawmaking inputs.⁴⁵ Copying complaints can be particularly

³⁹ See *supra* note 9 and accompanying text.

⁴⁰ See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (holding that there was no civil liability for aiding and abetting under the general antifraud provisions of the Securities and Exchange Act of 1934).

⁴¹ See Philip N. Meyer, "Desperate for Love" *Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994). For examples of direct analogies in the arts, see Theodore Dreiser, *An American Tragedy* (1925) (counsel's construction of a narrative concerning the guilt or innocence of Clyde Griffiths); *The Verdict* (1982) (counsel's preparation of testimony of malpractice defendant). See also Richard A. Posner, *Law and Literature Revisited*, in *OVERCOMING LAW* (1995) (comparing and discussing examples of law and legal reasoning implicitly contained in literature, and examples of law in popular literature).

⁴² See *Newby v. Enron Corporation*, 2002 WL 31854963 (S. D. Tex. December 20, 2002).

⁴³ See Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in David A. Anderson, ed. *DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP*, JAI Press (1996).

⁴⁴ See Mark F. Grady and Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305 (1992); Mark F. Grady, *A Positive Theory of the Right to Publicity*, 1 UCLA ENT. L. REV. 97 (1994).

⁴⁵ See, e.g., Landes and Posner, *supra* note 3 at 238. This does not necessarily mean that too few resources will be allocated to litigation, since litigants' efforts also are aimed at prevailing in the current case, and some litigation expenditures effect wealth redistribution from one litigant to another. If the private benefits from these wealth transfers exceed the social benefits (including the expected external benefits from the creation of precedent), then a socially excessive amount of litigation will be produced. See, e.g., Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309 (1981). But even if excessive resources are allocated to litigation generally, too few resources may be allocated to the joint production of

significant in the case of lawyers competing to be appointed lead counsel in class action cases.⁴⁶ Permitting counsel freely to appropriate legal documents in this situation may dissipate informational rents and reduce lawmaking efforts.

This problem is analogous to that involving the holdings, findings of fact, and other information contained in judgments, much of which is produced through the efforts of litigants and their attorneys. Unless sealed, these documents are generally not protected from appropriation by third parties.⁴⁷ Accordingly, the parties' ability to limit third party use of judgments and holdings largely depends on whether they can avoid judgment through settlement.⁴⁸ While settlement may facilitate the low cost resolution of private disputes,⁴⁹ it also may limit the production of valuable legal precedents or require duplicative fact-finding efforts in later cases.⁵⁰ Similarly, arbitration, while it reduces dispute-resolution costs, may also keep valuable information off the public record or result in the underproduction of legal precedents.⁵¹

Parties also have attempted to avoid judgments and holdings ex post through *vacatur* of the judgment conditioned on settlement.⁵² This procedure is often used by an intellectual property right holder attempting to avoid the future application of defensive non-mutual collateral estoppel.⁵³ But the courts have limited use of this mechanism. Under *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership* ("Bonner Mall"),⁵⁴ federal courts can grant *vacatur* of an existing judgment only under exceptional circumstances.⁵⁵ There are also conflicting holdings with

precedents and findings of facts that would be useful to third parties.

⁴⁶ See Couley, *supra* note 10 (citing copycat complaints as playing role in appointment of firm other than Milberg-Weiss as lead counsel in shareholder suits against Baker Hughes, Broadvision, Critical Path, and Network Sensors).

⁴⁷ See *infra* text accompanying note 163.

⁴⁸ See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements*, 75 NOTRE DAME L. REV. 221 (1999).

⁴⁹ Thus, cases going to trial can be seen as inefficient "failures." See S. R. Gross and K. D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Kobayashi, *supra* note 43.

⁵⁰ See Hope V. Samborn, *The Vanishing Trial* 88 ABA JOURNAL 24 (2002) (noting falling trial rates and its effect on precedent). See also Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1085-6 (1984). But see Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663 (1995).

⁵¹ See Abraham and Montgomery, *supra* note 3. See generally, Christopher R. Drahozal and Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEG. STUD. 549 (2003) (discussing factors relevant to choice between arbitration and litigation).

⁵² See FRCP 60(b). See, generally, Judith Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1990).

⁵³ See Resnick, *supra* note 52 at _.

⁵⁴ 513 U.S. 18 (1994) (vacatur is now therefore an "extraordinary remedy" to be granted only in "exceptional circumstances").

⁵⁵ See *Major League Baseball Properties v. Pacific Trading Cards, Inc.*, 150 F.3d 149 (2d. Cir 1998)

respect to whether *vacatur* prevents the precedential or preclusive use of the decision.⁵⁶

The underproduction of precedents and judgments resulting from settlement, arbitration or *vacatur* is a predictable result of the lack of property rights to judgments and holdings. If a settlement or arbitration resolves the dispute between the current litigants at a lower cost than litigating the case to judgment or prevents disclosure of proprietary information, litigants have little incentive to invest in litigation merely because a judgment would generate precedent or otherwise assist parties to other cases. Similarly, if the parties choose to or are otherwise constrained to litigate to judgment, the losing party will have an incentive to seek *vacatur* through settlement to avoid the effects of collateral estoppel or other external effects. While repeat litigants may be able internalize some of the effects of precedent, such litigants also have extra incentives to settle or arbitrate in order to protect against precedential use of the judgment in later cases.⁵⁷

Just as parties lack incentives to invest in litigation solely to benefit third parties, so class action lawyers will avoid investing in complaints if their efforts will be appropriated by free-riding competing lawyers. This will result in suboptimal quality of lawsuits, just as the lack of protection for judgments may result in suboptimal development of precedents. This suggests that the courts must balance the need to provide public access to complaints and other litigation documents against the need to protect the efforts of class action counsel. We will return to this problem in Part III. In the meantime, it is necessary to discuss legal rules that bear on this issue that have arisen regarding private production of statutory law.

II. COPYRIGHTING PRIVATE LAWS

This Part discusses the creation of intellectual property rights in statutory law. We show that, despite theoretical arguments favoring strong intellectual property protection, courts have held that it is not available either for privately produced statutes or, more importantly for purposes of

(exceptional circumstances existed because vulnerability to future litigation if appeal was not pursued would prevent settlement); *Keller v. Mobil Corp.*, 55 F.3d 94 (2d Cir. 1995) (exceptional circumstances existed because presence of sanction prevented settlement). *Cf.* *Aqua Marine Supply v. Aim Machinery, Inc.* 247 F.3d 1216 (2001) (*vacatur* to prevent estoppel of future litigation on validity of patent not extraordinary circumstances); Resnick, *supra* note 52 (citing cases).

⁵⁶ Most analyses implicitly assume that vacated judgments cannot be used as the basis for issue preclusion. See Elizabeth L. Anstaett, *Is Settlement Conditioned on Vacatur an Option? Should it Be?*, 1991 J. DISP. RESOL. 87, 93-4 (1991), citing MOORE'S FEDERAL PRACTICE 60.30(2) at ¶ 0.416[2] (2d ed. 1987). *But see* *Chemetron Corp. v. Business Funds Inc.*, 682 F.2d 1149 (5th Cir. 1982), *rev. on other grounds*, 460 U.S. 1007 (1983) (issue preclusion applied despite *vacatur*).

⁵⁷ See Kobayashi, *supra* note 43 at 39 (noting the increased settlement range created by non-mutual collateral estoppel rules); Lederman, *supra* note 48 at 241-47 (describing the incentives of the NAACP to settle a discrimination case on the eve of Oral Arguments to avoid the likely precedent that would have been generated by a Supreme Court decision in the case).

the present analysis, for private works referenced by or adopted as law. This discussion provides a legal and theoretical framework for analysis of the intellectual property protection of pleadings.

Intellectual property protection for state statutes could be a valuable way to promote state competition.⁵⁸ The quality of a state's laws can help make it attractive as a location for businesses and as a forum for litigation. However, states' efforts in this regard may depend on whether other jurisdictions can copy innovative laws. Thus, several states claim copyrights to compilations of their statutes and judicial opinions as works for hire,⁵⁹ and Virginia claims copyright in the text of its statutes.⁶⁰

Despite the potential benefits of copyrighting law, states' broad claims of copyright protection to compilations or statutory texts are unlikely to survive court challenges. To begin with, Section 105 of the Copyright Act precludes copyright protection for any work of the United States Government, defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."⁶¹ Under this definition, court opinions written by federal judges, Congressional bills and statutes, and federal regulations are ineligible for copyright protection.

Similar rules apply to state laws. The Supreme Court held in *Banks v. Manchester*⁶² that state judicial opinions cannot be copyrighted, reasoning that such protection would interfere with due process of the law, since the content of judicial opinions is "the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."⁶³ For the same reasons, it is generally accepted that copyright also does not protect state statutes⁶⁴ or regulations.⁶⁵

The preclusion of copyright for government works does not necessarily apply to privately produced works that are subsequently

⁵⁸ See Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 YALE J. ON REG. 139 (2003) (advocating use of *sui generis* intellectual property protection for statutes).

⁵⁹ See Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HAST. COMM. & ENT. L. J. 81 (2000).

⁶⁰ *Id.* at 97 (citing VA CODE ANN. § 9-77.8(A) (1998)).

⁶¹ 17 U.S.C. §101. See also *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁶² See *Banks v. Manchester*, 128 U.S. 244 (1888).

⁶³ *Id.* at 253.

⁶⁴ See *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (holding that copyright protection would interfere with the basic proposition that "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book ... "); *Georgia v. Harrison*, 548 F. Supp. 110 (N.D. Ga. 1982), *vacated on unanimous agreement of the parties*, 559 F. Supp. 37 (N.D. Ga. 1983) (holding that due process required that the basic texts of state laws were in the public domain); L. Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

⁶⁵ See Robert A. Gorman and Jane C. Ginsburg, COPYRIGHT: CASES AND MATERIALS, 247-48 (6th Ed. 2001). But see *County of Suffolk, N.Y. v. First American Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (holding that tax maps produced by local government were not unprotectable public documents).

adopted as law by the state or federal government.⁶⁶ For example, codes that identified medical procedures produced by the American Medical Association were not converted into an unprotected government work when adopted by the Federal Health Care Financing Administration.⁶⁷ The court held that *Banks* had denied copyright protection to judicial opinions on the ground that public funding for judges substituted for the economic incentives of the copyright law, and that there was no such subsidy for privately produced laws.⁶⁸ Similarly, a publication containing valuation information for used vehicles did not lose its protection when referenced by state insurance statutes or regulations.⁶⁹ These courts recognized that loss of copyright for private materials adopted into law would eliminate the economic incentive for creation of such materials, and that this consideration could outweigh the due process need for access to the law articulated in *Banks*.⁷⁰

Other courts, however, have given less weight to the need to provide incentives to create private laws. Thus, *Building Officials & Code Adm., v. Code Technology, Inc.*⁷¹ reversed summary judgment for the plaintiff/copyright holder on his claim based on including most of a privately developed model building code in official state regulations. Although the court recognized the importance of private groups in “seeing that complex yet essential regulations are drafted, kept up to date and made available”⁷² the court presumed that legislative adoption of the code caused forfeiture of the plaintiff’s copyright.

More recently, *Veeck v. Southern Building Code Cong. Int’l.*⁷³ held that *Banks* requires denial of copyright protection to privately produced building codes when they are adopted as law. Veeck had bought a copy of Southern Building Code Congress International’s (SBCCI) model building codes, which included a license agreement that prohibited Veeck from copying or distributing the work. Veeck then copied portions of the licensed work and posted them on a website identifying them (inaccurately)

⁶⁶ The general issue of intellectual property rights for privately produced laws and model codes are examples of how such rights should be applied to standards generally. For an analysis of how private standard setting organizations treat intellectual property, see Mark Lemley, *Intellectual Property Rights and Standard Setting Organizations*, 90 CAL L. REV. 1889 (2002) (analyzing intellectual property rights for private standard setting organizations).

⁶⁷ See *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516 (9th Cir. 1997).

⁶⁸ *Id.* at 518.

⁶⁹ *CCC Information Services v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2nd Cir. 1994).

⁷⁰ See *Practice Management*, 121 F.3d at 518 (noting that “[t]o vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,” a matter of particular significance in this context because of “the increasing trend toward state and federal adoptions of model codes,” citing 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 5.06[C], at 5-92 (1996)). See also *CCC*, 44 F. 3d at 74.

⁷¹ 628 F.2d 730 (1980).

⁷² *Id.* at 736.

⁷³ 293 F.3d 791 (5th Cir. 2002) (en banc).

as the building codes of Anna, Texas and Savoy, Texas. SBCCI sued Veeck for copyright violations and breach of contract. The 5th Circuit held en banc that, while SBCCI retained copyrights to its model code, the code text entered the public domain when adopted as law. Because Veeck identified the copied portions of the SBCCI model code as the codes of Anna and Savoy Texas, rather than as portions of SBCCI's model codes, there was no copyright infringement. The court reasoned that due process concerns over public access to the law take precedence over providing economic incentives to produce model codes.⁷⁴ The court distinguished prior cases involving works that were merely referenced by, rather than constituting the body of, the statute, and that were created for reasons other than incorporation into law.⁷⁵

Although *Veeck* would effectively eliminate copyright protection for privately produced model laws that have been adopted as law, producers can still use contract and licensing to control the behavior of individuals like Veeck.⁷⁶ But contractual protection only binds the contracting parties.⁷⁷ The court suggests that SBCCI adopt a value-added approach of bundling its product with other useful products and marketing.⁷⁸ Such an approach does not, however, protect the model code itself from appropriation by competing commercial publishers. Nor does it prevent jurisdictions from simply foregoing a license and copying a licensing jurisdiction's codes, thereby suppressing the market for direct licenses.

It is unclear why the use considerations embodied in the due process would outweigh the creation benefits of allowing property rights in law. *Local* law does not "bind[] every citizen," in the words of *Banks*, but only those subject to the local government's jurisdiction. Due process and copyright concerns could be balanced by granting a broad fair use privilege to those subject to local laws, but protecting such laws from copying by competing commercial interests or even from other competing jurisdictions. Indeed, Nimmer argues that, while adopting a private work into law might justify a fair use defense for personal use, it should not immunize a competitive commercial publisher from liability since this would "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions

⁷⁴ *Id.*

⁷⁵ This line of reasoning does allow some balancing of copyright and due process concerns by putting the public in a position similar to that of a patent holder that can control non-staple, but not staple, products as within the scope of their patent. See *Dawson Chemical v. Rohm & Haas*, 448 U.S. 176 (1980); 35 U.S.C. § 271d. See also *Sony v. Universal Studios*, 464 U.S. 417 (1984) (applying rule to copyright case); *A&M Records v. Napster*, 239 F. 3d 1004 (9th Cir. 2001) (same).

⁷⁶ The instant case focused only upon the intellectual property claims, and did not address the outstanding breach of contract claims. For a discussion of licensing in this context, see Kobayashi and Ribstein, *supra* note 29 at 266-70.

⁷⁷ See *ProCD v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (discussing differences between contract and copyright).

⁷⁸ See *Veeck*, 293 F. 3d at 806.

of model codes."⁷⁹

Despite the theoretical considerations justifying intellectual property protection of privately produced law, the above discussion demonstrates that such protection is incomplete. Informal mechanisms may fill some of this gap. One of us has argued that state licensing of lawyers may be justified in part as a way of giving lawyers incentives to participate in state lawmaking by protecting their lawmaking efforts from free-riding by lawyers in other states.⁸⁰ This article shows how procedural rules might provide an analogous type of informal protection in the absence of formal intellectual property rights.⁸¹

III. COPYRIGHTING LITIGATION DOCUMENTS

Copyrighting complaints and other litigation documents raises issues similar to those involved in copyrighting private law. In both contexts, the general economic issue is the provision of optimal incentives for production of information in litigation. Here, too, intellectual property laws arguably address potential underproduction and rent dissipation inherent in judicially created law⁸² by allowing litigants or their lawyers to appropriate some of the external benefits produced by litigation documents. However, this can give rise to the sort of due process concerns about access to law that underlie denying intellectual property protection to privately produced laws. Moreover, allowing litigants or their lawyers to control the subsequent use of litigation documents forces duplicative investments in production of information.

Even if due process and other use concerns generally outweigh the value of creation incentives, complaints and other publicly filed litigation documents in class actions may merit specific protection from free-riding by lawyers who compete with those who drafted the complaint. Class action complaints are uniquely subject to free riding because the lawyer drafts the complaint prior to entering into a contract with a client, and therefore without any assurance even that a client will pay for the work. Indeed, the complaint is partly a way for the lawyer to attract clients, either directly or by being appointed lead counsel. Permitting competing class action lawyers to copy complaints would let them free-ride on the considerable investments made by the drafting attorney, thereby reducing the return on investments in producing complaints. This can reduce the incentive to engage in such activity. It can also lower the quality of class action complaints, thereby increasing litigation costs or reducing class recoveries. This effect would be most pronounced in cases where the court

⁷⁹ See Nimmer, *supra* note 70, § 5.06[C] at 5-60.

⁸⁰ See Ribstein, *Lawyers as Lawmakers*, *supra* note 1

⁸¹ See *infra* Part VI.

⁸² See *supra* subpart I.B.

auctions the right to be lead counsel to the lowest bidder,⁸³ or where the appointment of lead counsel otherwise turns on the fee. Moreover, allowing free-riding may permit inferior lawyers to “pass off” other lawyers’ work as their own and thereby compete to be appointed class counsel.

This raises the question whether copyright protection is available for pleadings, motions, and other litigation related papers, particularly after these documents become part of the official court record through the act of public filing. There is no reported case in which copyright protection for litigation documents has been asserted. As discussed above,⁸⁴ a public law model views litigation as having significant effects beyond the immediate lawsuit.⁸⁵ External effects in this situation are apparent, among other things, from conflicts among class action lawyers and classes.⁸⁶

Litigation documents are, however, arguably less like law than the model codes in *Veeck*. Prior to the issuance of the court’s opinion, the content of underlying litigation documents have not been adopted as law, and even after the opinion, the legal theories contained in many complaints are never adopted as law. Indeed, lawyers filing suits solely for their settlement value⁸⁷ may not even have intended the substance of the complaint to become law. *Veeck* would remove copyright protection for privately produced law only when a jurisdiction adopts the model code as the body of a statute. Applying this reasoning, copyright protection for publicly filed litigation documents may exist unless or until the complaint is adopted in a legal opinion, although merely referencing or citing the documents may not cause a loss of protection.

Survival of the copyright for a limited time until adoption in a public record would address potential free-riding on the complaint by other lawyers competing to be lead counsel. In order to prevent this type of free riding, intellectual property right protection need only survive until the court appoints lead counsel or, under the PSLRA, the lead plaintiff. A time-limited copyright would not, however, prevent appropriation in other cases of pleadings that may be useful because, for example, they elucidate precedents or provide a basis for a collateral estoppel claim, or where the pleading was quoted in a court opinion.

Moreover, no matter how long the copyright lasts, it does not cover

⁸³ See *infra* note 191 and accompanying text.

⁸⁴ See *supra* text accompanying note 4.

⁸⁵ One potential standard for copyright would be to distinguish cases based on the existence of such external effects. See Resnick, *supra* note 52 (arguing that courts have implicitly followed such a standard in cases involving vacatur). See also Bruce H. Kobayashi, *Vacatur in Intellectual Property Cases Before and After Bonner Mall: An Empirical Analysis* (2003).

⁸⁶ See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 278, 295-97, 335-37 (2003); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000).

⁸⁷ See generally, Lucian A. Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT’L REV. L. & ECON. 3 (1990); David Rosenberg & Steven A. Shavell, *A Model in Which Suits Are Brought for their Nuisance Value*, 5 INT’L REV. L. & ECON. 3 (1985).

important elements of the lawyer's work on the complaint. Legal materials may be classified as compilations of existing facts and ideas. Copyright protection would then extend only to "unique and original selection, coordination, expression, arrangement, and classification of the information,"⁸⁸ and not to compilations of facts and other "sweat of the brow" investments.⁸⁹ It is not clear how effectively this protects lawyers who prepare complaints from free-riding by competing lawyers on unprotected facts, statutes and reports in complaints. Although time constraints may inhibit lawyers competing to be lead counsel from copying complaints,⁹⁰ this does not prevent lawyers from using the complaint in subsequent litigation.

Copyright protection is further limited by the doctrine of merger.⁹¹ Copyright protects only original expression, and not ideas or facts,⁹² thereby permitting the creation of new expressive works based on existing ideas.⁹³ The en banc panel in *Veeck* held that statutory adoption of the BCCCI's model building code made the model code an unprotectable fact within the meaning of the merger doctrine.⁹⁴ Applying this principle to a complaint, although the complaint may initially be a creative expression, a

⁸⁸ See excerpt from Enron complaint, *supra* text accompanying note 9.

⁸⁹ 17 U.S.C. §103. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (rejecting the "sweat of the brow doctrine in holding that alphabetical telephone listings lacked the requisite originality and thus were not protected by copyright); Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992). See also *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing*, 999 F.2d 1436 (11th Cir. en banc 1993) (business listings); *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 674 (2d Cir. 1998) (arrangement and selection of cases and related information contained in legal reporter); *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 693 (2d Cir 1998) (page numbers contained in hard copy versions of legal reporter). However, copyright protection does extend to the original selection and coordination of data. See, e.g., *CCC Information Services v. Maclean Hunter Market Reports*, *supra* note 69; *American Dental Assn. v. Delta Dental Plans*, 126 F.3d 977 (7th Cir 1997) (taxonomy of dental insurance billing codes was original and copyrightable).

⁹⁰ Under the PSLRA, the plaintiff that files the initial complaint is required, within 20 days, to publish a notice advising prospective class members of the pendency of the action, the claims asserted therein, and the purported class period. See 15 U.S.C.A. § 78 u – (a)(3)(A)(i). Members of the purported class have 60 days from the publication of the notice to file a motion to serve as lead plaintiff. Within 90 days of the publication of the notice, the Court must appoint a lead plaintiff. Milberg, Weiss has used technological limitations to prevent low cost copying by competitors. The Milberg, Weiss complaints can be accessed and downloaded, but the text cannot be copied, and the complaint cannot be printed and subsequently scanned. However, this has not slowed the production of copycat complaints. See Blake A. Bell, *The Evolving Use of the Internet in Connection with Securities Litigation*, 1315 PLI Corp. 501, 521-3 (2002).

⁹¹ See *Baker v. Selden*, 101 U.S. 99 (1879); *Morrissey v. Procter & Gamble*, 379 F.2d 675 (1st Cir 1967).

⁹² See 17 U.S.C. §102b ("[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ["[t]he idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression").

⁹³ See Landes and Posner, *supra* note 8 at 91-97.

⁹⁴ See *Veeck*, 293 F.3d at ___.

court's interpretation of the complaint makes it a non-copyrightable fact by giving the complaint's wording precedential effect. Thus, even if expression in the complaint is copyrightable *ex ante*, at the time when the complaint is written, this expression merges *ex post* into the noncopyrightable court ruling.⁹⁵

Contract may be available to protect investments in information even without copyright, as with the content of commercial databases.⁹⁶ But contract is not available to protect publicly filed legal documents since parties who are not bound by the contract, including competing lawyers, can obtain unrestricted access to the complaint when it is filed with the court.

IV. NON-COPYRIGHT PROTECTION OF COMPLAINTS

Parts I-III show that copyright protection may not adequately protect investments in legal documents. While application of the federal copyright laws would mitigate the costs of free riding, such protection may raise significant due process concerns absent broad fair use rights. Moreover, copyright law may not adequately protect from free-riding complaints that are costly to produce yet lack sufficient originality. These parts, together with Part IV concerning other ways of protecting litigation information, show the potential perverse effects of such a lack of protection on the creation of litigation materials.

This Part discusses intellectual property protection of complaints apart from copyright. Notably, Lerach's notice warns competitors that the complaint is protected "as well as by misappropriation, trade secret, unfair competition, and other applicable laws." Misappropriation law protection is imposed only on direct competitors and only for a limited time. Accordingly, it presents fewer due process concerns than copyright protection. Moreover, misappropriation remedies could cover "sweat of the brow" investments in lawmaking not covered by copyright.

Applying unfair competition protection against "reverse passing off" under Section 43(a) of the Lanham Act would require attribution of authorship by those who copy complaints. A class action complaint has not only the traditional legal purpose of allowing the cause of action to survive a motion to dismiss, but also, like other commercial activity, serves as a part of lawyer's "bid" to attract as clients individuals or groups that would qualify as a lead plaintiff. Attribution facilitates dissemination of accurate information about the true source of the complaint, and thereby allows

⁹⁵ See Michelle M. Burtis and Bruce H. Kobayashi, *Intellectual Property and Antitrust Limitations on Contract* in J. Ellig, ed. DYNAMIC COMPETITION AND PUBLIC POLICY at 239-40 (criticizing this "ex post" merger doctrine).

⁹⁶ See, e.g., *ProCD*, *supra* note 77, Kobayashi and Ribstein, *supra* note __, Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 86 U. CIN. L. REV. 151 (1997).

those choosing between competing lawyers to make a more informed decision.

These rules accordingly provide protection that is tailored for the specific problems presented by class action complaints – that is, free riding by competitors and confusion regarding the source of the complaint. However, the courts have limited the availability of these forms of relief for intellectual property-type claims. Accordingly, some alternative means will have to be found to provide the appropriate incentives, such as the procedures for choosing lead counsel discussed below in Part VI.

A. Misappropriation

The common law misappropriation doctrine derives from the Supreme Court's decision in *INS v. AP*.⁹⁷ The case arose as a result of INS's appropriation of AP's stories during World War I.⁹⁸ The INS obtained AP news stories by bribing AP employees, inducing AP member newspapers to violate the AP bylaws, and copying AP stories posted on public bulletin boards in large cities. The Court addressed only the third mechanism. Because the AP stories contained non-copyrightable facts, the AP could not prevent the INS from free-riding though the copyright laws. However, the Court created a quasi-property right in "hot news" that would apply to direct competitors for a limited time.

INS had only limited impact in the federal courts. Not only did the federal courts following *INS* construe the decision narrowly,⁹⁹ but the federal common law ground of the decision was removed by *Erie R. Co. v. Tompkins*.¹⁰⁰ While many states recognize a cause of action for misappropriation,¹⁰¹ the grounds for such an action are limited.¹⁰² Also,

⁹⁷ 248 U.S. 215 (1918).

⁹⁸ The INS lifting activities apparently were confined to stories reporting on the war in Europe. See Richard Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992). INS was owned by Hearst. Because of Hearst's pro-Kaiser stance, its newspapers were barred by France and England from reporting from the battlefield, and from using the trans-Atlantic cables. Epstein argues that the lifting activities represented a limited departure from the norm of independent news collection in the face of extraordinary circumstances.

⁹⁹ See *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir 1929); *Millinery Creators' Guild, Inc. v. Federal Trade Commission*, 109 F.2d 175 (2d Cir.1940), aff'd, 312 U.S. 469, 61 S.Ct. 708, 85 L.Ed. 955 (1941); *RCA Manufacturing Co. v. Whiteman*, 114 F.2d 86 (2d Cir.), cert. denied, 311 U.S. 712 (1940). See also Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 418-20 (1983) (describing cases decided after *INS*).

¹⁰⁰ 304 U.S. 64 (1938).

¹⁰¹ See, e.g., *Board of Trade v. Dow Jones & Co.*, 456 N.E. 2d 84 (Ill. 1983) (successful action under misappropriation cause of action under Illinois common law); *National Broadcasting Co., Inc., v. Nance*, 506 S.W. 2d 483, 484 (Mo 1974) (cause of action exists under Missouri law and is broader than set out in *INS*); *Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.*, 134 N.J. Super. 368, 341 A.2d 348 (App.Div.1975) (New Jersey); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 483, 492 (1950) (New York); *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 20 S.E.2d 59 (1942) (North Carolina); *Gilmore v. Sammons*, 269 S.W. 861, 863 (Tex.) (cause of

some states have not recognized the cause of action,¹⁰³ and courts often hold that the cause of action fails as a matter of fact.¹⁰⁴

One principal reason for the failure of misappropriation claims is federal preemption. Under the federal copyright law's field preemption statute, states can protect only rights that are not "equivalent to any of the exclusive rights within the general scope of copyright."¹⁰⁵ In order to survive copyright preemption, a state law must require an "extra element" instead of, or in addition to, the acts of reproduction, performance, distribution, or display for a state-created cause of action. Under the Second Circuit's decision in *National Basketball Assn. v. Sports Team Analysis and Tracking Systems*¹⁰⁶ state misappropriation law survives preemption only when: (1) the plaintiff generates or gathers information at a cost; (2) the information is time-sensitive; (3) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (4) the defendant directly competes with a product or service offered by the plaintiffs; and (5) other parties' ability to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product that its existence or quality would be substantially threatened.¹⁰⁷ These five "extra elements" sufficiently differentiate the misappropriation cause of action from a copyright claim to allow the misappropriation cause of action to survive copyright preemption.¹⁰⁸

A state misappropriation claim for the copying of a complaint by a lawyer competing to be appointed lead counsel might survive preemption

action exists under Texas common law).

¹⁰² See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38, comment b (1995).

¹⁰³ See *Nagle Industries, Inc. v. Ford Motor Co.* 173 F.R.D. 448 (E.D.Mich.,1997) (unclear that cause of action exists in Michigan, but in any case specific claim preempted by patent law); *Triangle Publications v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass.1942) (cause of action does not exist under Massachusetts law). See also Heather Richtarsik, *Misappropriation in Massachusetts and Around the Country: How Technology will Utilize this Tort*, 35 NEW ENG. L. REV. 717 (2001) (noting that the Massachusetts courts have not adopted tort). The lack of an explicit cause of action for misappropriation in any given state may not be a significant constraint to a misappropriation claim given the class action lawyer's ability to choose the applicable state law in nationwide class action by choosing to file in a jurisdiction with favorable law. See *Sun Oil v. Wortman* 108 S. Ct. 2117, 2126-8 (forum states misconstruction of other states' statutes not a violation of full faith and credit or due process clause unless it contradicts law that is clearly established and has been brought to the court's attention). See also, Bruce H. Kobayashi and Larry E. Ribstein, *Contract and Jurisdiction*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT*, F. H. Buckley, ed. (1999) (discussing role choice of jurisdiction in ability to contract for underlying law).

¹⁰⁴ See, e.g., Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 629, 632-34 (2003). See also Raymond A. Be, *Dead or Alive? The Misappropriation Doctrine Resurrected in Texas*, 33 HOUS. L. REV. 447 (1996) (analyzing cases under Texas law); *U.S. Golf Ass'n v. St Andrews Systems, Data-Max, Inc.*, 749 F.2d 1028 (1984) (misappropriation claim fails due absence of direct competition).

¹⁰⁵ 17 U.S.C. § 301(a).

¹⁰⁶ 105 F.3d 841 (2d. Cir. 1997). See also Posner, *supra* note 104 at 631-2, 641 (discussing extra element test).

¹⁰⁷ *Id.* at 845.

¹⁰⁸ *Id.* at 845. See also, *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F.Supp.2d 1044, 1050 (E. D. Mo. 1999) (applying test and rejecting misappropriation claim).

under the “extra element” test. As discussed above, producing the original complaint is costly, and allowing copying reduces the incentive to produce complaints, and therefore should reduce the quality of complaints.¹⁰⁹ In this respect, the extra element test would favor laws that directly protect the complaint’s contributions to the creation of law. Finally, the information is time-sensitive because of the time periods for appointment of lead counsel.¹¹⁰

On the other hand, a state misappropriation claim for the copying of a complaint might fail under the “extra element” test. Some courts have interpreted the fifth factor as literally requiring a threat to the existence of the product, rather than using a more nuanced economic analysis based on the elasticity of supply.¹¹¹ A court applying the former interpretation of the test might deny relief on the ground that Milberg Weiss would produce complaints because of its dominance of the field even without protection from misappropriation, whether or not such protection would result in more or higher-quality complaints.¹¹²

Assuming some action for misappropriation would be viable notwithstanding preemption, it is not clear how much protection such an action would provide to the complaint authors. On the one hand, misappropriation protection is broader than that provided by copyright in covering uncopyrightable facts, and non-original arrangement, selection, and coordination from copying by direct competitors.¹¹³ Thus, misappropriation law addresses free riding by competing counsel on these and other “sweat of the brow” investments. On the other hand, applying the factors in the extra element test, a complaint based on competing lawyers’ independent investigation of the facts underlying allegations contained in the original complaint would not likely be classified as free riding, and such uses would not threaten the existence or quality of the product.¹¹⁴ Moreover, once the lead counsel has been appointed, there is no longer a potential for free riding by direct competitors. The misappropriation claim

¹⁰⁹ See *supra* text accompanying notes 43-46.

¹¹⁰ See *supra* text accompanying note 90 (noting 20 day maximum time period for motion to be appointed lead plaintiff, and 90 day maximum time period for the court to appoint lead plaintiff).

¹¹¹ See Posner, *supra* note 104 at 636-7.

¹¹² See Mukesh Bajaj, Sumon C. Mazumdar, and Atulya Sarin, *Securities Class Action Settlements: An Empirical Analysis*, (Nov 16, 2000), available at http://securities.stanford.edu/research/studies/20001116_SSRN_bajaj.pdf (showing Milberg-Weiss with 31 percent of all class actions from 1988 to 1999, the most of any firm, and a 61% increase in the median settlement in cases when Milberg-Weiss was the class counsel). See also *In re Cavanaugh*, 306 F.3d 726, 734-5 (9th Cir. 2002) (noting Bajaj, et al. study and concluding that the court could not “agree that a presumptive lead plaintiff becomes inadequate to represent the class because he chooses to hire the most experienced firm in the field”).

¹¹³ Indeed, recent legislative proposals to provide federal protection for databases are based upon a misappropriation model. See, e.g., Database and Collections of Information Misappropriation Act, HR 3261, October 8, 2003.

¹¹⁴ See Epstein, *supra* note 98 at 98 (noting that in the *INS* case, the use of news stories by direct competitors as leads to obtain news by its own independent investigation was not challenged).

therefore would not reach the subsequent use of the complaint by lawyers in other cases. This resembles the fair use rule Nimmer suggests as an alternative to across-the-board denial of copyright for privately produced laws.¹¹⁵ Thus, the scope of the misappropriation cause of action that would survive the extra elements test would not directly cover some of the complaint's contributions to lawmaking.¹¹⁶

B. Lanham Act protection against misattribution

The misappropriation action addresses lawyers' appropriation of the content of Milberg's complaints in order to cheaply and easily compete for lead plaintiff status. A related but separate problem is the lawyers' passing off complaints drafted by Milberg as their own – that is, “reverse passing off.”¹¹⁷ Any legal protection against these harms would be provided by unfair competition law protecting against confusion of the source, rather than by the misappropriation doctrine.¹¹⁸

To see the difference between the two types of legal protection, consider the facts in *INS*. Justice Holmes, dissenting in this case, characterized the actions of INS as passing off AP news as its own, and suggested the use of attribution as the appropriate remedy.¹¹⁹ But attribution would only have exacerbated the harm to AP resulting from the free riding by INS, where consumers cared only about content, and would have valued the content even more if it had been labeled as “AP news.” At the same time, AP would have been denied the benefit of its brand name. Thus, Justice Pitney's ad hoc solution, a quasi-property right based on a misappropriation theory, better addressed the harm from free-riding.

In contrast to the AP situation, end users of legal complaints may differentiate between a lawyer who has filed an original complaint and one who files a verbatim copycat complaint. A class action complaint serves not only to survive a motion to dismiss, but also to advertise lawyer quality and thereby make a case for appointment as lead counsel. The class, and the court as its surrogate, would prefer, *ceteris paribus*, to hire the lawyer that has engaged factual and legal research in the process of drafting the complaint over the lawyer that has merely copied the complaint produced by someone else and passed it off as his own. Allowing this form of

¹¹⁵ See *supra* text accompanying note 70.

¹¹⁶ Posner, *supra* note 104, criticizes the misappropriation doctrine as lacking clear boundaries or any reliable mechanism to place boundaries on its application. Similar concerns underlay Justice Brandeis' dissent in the *INS* case (arguing that this problem is best left to the legislature). See *INS*, 248 U.S. at ___. But see Posner, *supra* note 104 at 640-1 (noting public choice problems with recent federal intellectual property legislation).

¹¹⁷ See Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 1003, Lori H. Freedman, *Reverse Passing Off: A Great Deal of Confusion*, 83 TRADEMARK REP. 305 (1993).

¹¹⁸ See Posner, *supra* note 104.

¹¹⁹ See *INS*, 248 U.S. at 247-48 (Holmes dissenting).

misattribution could lead to lower-quality lawyers as class counsel based on Milberg's work product. Requiring attribution in this context directly addresses lack of information or confusion on the part of the consumers without requiring courts to engage in the difficult task of defining the bounds of the misappropriation doctrine.¹²⁰ At the same time, ensuring attribution encourages lawyers to invest in high-quality complaints in order to be selected as lead counsel.

Misattribution is particularly a problem in public markets where it is costly to get the message about authorship out to the consumers. In the class action market for lawyers in non-securities cases, judicial appointment of lead counsel means that there is really only a single "buyer" – the court – whom lawyers readily can inform about the authorship of complaints, under penalty of perjury and disbarment.¹²¹ However, to the extent that the lead counsel designation has been delegated to lead plaintiffs under the PSLRA, the relevant "market" has been expanded beyond the court. Lerach and his firm accordingly need to prevent other lawyers from jockeying for position with potential lead plaintiffs by using his complaint. Requiring attribution would prevent competing lawyers from passing Milberg, Weiss' original complaints off as their own, and therefore would facilitate an informed choice of counsel by potential lead plaintiff candidates.

Despite the arguable need for state unfair competition protection against reverse passing off, any state law protection from copying would be preempted by federal law. Such preemption could come under the Supreme Court's general analysis prohibiting states from extending protection beyond what is permitted in the federal intellectual property laws.¹²² State law also could be preempted by the field preemption provision of the copyright statute.¹²³

Thus, the only viable misattribution claim may be one under federal law.¹²⁴ Section 43(a) of the Lanham Act arguably addresses the misattribution problem by providing a federal cause of action for "false designation of origin."¹²⁵ This provision was intended to codify existing

¹²⁰ See the discussion in note 116 *supra*.

¹²¹ This procedure is discussed in *infra* Section VI.B.

¹²² See *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964); *Compco v. Day-Brite Lighting*, 376 U.S. 234 (1964), (state unfair competition laws prohibiting copying of goods not protected by federal statutory protection is preempted); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (Florida law prohibiting use of direct molding process to copy boat hull design preempted).

¹²³ See *supra* text accompanying note 105. For cases preempting reverse passing off claims under state common law, see *FASA Corp. v. Playmates Tools, Inc.*, 869 F. Supp. 1334 (N.D. Ill. 1994); *Waldman Publishing Corp. v. Landoll, Inc.*, 848 F. Supp. 498 (S.D.N.Y. 1994). *But see Tracy v. State Key*, 697 F. Supp. 748 (S.D.N.Y. 1988) (holding against preemption).

¹²⁴ See 17 U.S.C. §301(b)(3) ("noting contained in [Title 17] annuls or limits any rights or remedies under any Federal law. See also, *Waldman Publishing Corp. v. Landoll, Inc.* 43 F.3d. 775 (2d. Cir 1994) (differentiating between equivalent state law and Lanham Act claims for preemption purposes).

¹²⁵ 15 U.S.C. §1125(a).

common law, which historically did not include protection for “reverse passing-off.” However, the federal courts have expanded Section 43(a) to include causes of action for express and implicit reverse passing off.¹²⁶ In both cases, the good is resold by someone other than the trademark owner after the original trademark has been removed or obliterated. Express reverse passing off occurs when the seller rebrands the good as its own. Implicit reverse passing off occurs when the good is resold as an unbranded product. Moreover, some federal courts have applied Section 43(a) to the wholesale copying of copyrighted works,¹²⁷ or where the “copied” work is substantially similar to the original work.¹²⁸ Preventing the unaccredited copying of complaints serves the traditional functions of the Lanham Act by “reducing the customer’s costs of shopping and making purchasing decisions” and by helping “assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”¹²⁹

Copyright law does not provide an adequate right of attribution.¹³⁰ Thus, reverse passing remedies under the Lanham Act would seem not to duplicate the function of the federal copyright laws of rewarding invention or discovery. Nevertheless, it has been held that Lanham Act protection against reverse passing off does conflict with copyright law.¹³¹ Some courts have applied a test analogous to the copyright preemption test to determine whether a Section 43(a) violation for reverse passing off can be sustained.¹³² However, these cases do not directly apply the copyright preemption provision, since this section does not apply to federal laws such as the Lanham Act.¹³³

¹²⁶ See *Datstar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2046 (2003) (noting that “every Circuit to consider the issue found § 43(a) broad enough to encompass reverse passing off”). See also RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 5 (1995) (providing for cause of action for reverse passing off).

¹²⁷ See *Smith v. Montoro*, 648 F.2d 602 (9th Cir 1981).

¹²⁸ See *Waldman Publishing Corp. v. Landoll, Inc.*, *supra* note 124.

¹²⁹ See *Datstar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003), citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159- 163-4 (1995). See also William M. Landes and Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 270 (1987) (general economic analysis of trademark law).

¹³⁰ The author’s right of attribution is not enumerated in 17 U.S.C. § 106, and has not been enforced by the courts. See *Stepdesign Inc., v Research Media, Inc.*, 442 F. Supp. 23, 33 (S.D.N.Y. 1977); *Wolfe v. United Artists Corp.*, 583 F. Supp. 52, 55-56 (E.D. Pa. 1983); Robert L. Gordon, *Giving the Devil its Due: Actors and Performers’ Right to Receive Attribution for Cinematic Roles*, 4 CARDOZO ENT. & ARTS J. 299 (1985); Kwall, *supra* note 117 at 995-1003.

¹³¹ See *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir 1990) (declining to expand the scope of the Lanham Act to cover cases in which the Federal Copyright Act provides an adequate remedy). See also Kwall, *supra* note 117, at 1014-19 (discussing relationship between Lanham Act and copyright claims).

¹³² See *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458 (S.D.N.Y. 1999) (holding that author must show more than a violation of author’s copyright protected right to credit and profit from a creation); *LaCour v. Time Warner, Inc.*, 2000 WL 688946 (N.D. Ill. 2000) (holding that plaintiff did not show extra element of affirmative misrepresentation about the origin of the work). See also Kwall, *supra* note 117, at 1017-19.

¹³³ See *supra* note 124.

The Supreme Court recently clarified the preemption of Lanham Act claims in *Datstar Corp. v. Twentieth Century Fox Film Corp.*,¹³⁴ holding that Section 43(a) of the Lanham Act did not prevent the unaccredited copying of an expressive but non-copyrighted work. While the Court observed that the identity of person or entity that came up with the product may matter to the consumer of communicative productions such as videos, books and other expressive works, the Court refused to define “origin of goods” in the Lanham Act to include the creator of the work as well as the producer of the physical item.¹³⁵ The Court reasoned that such an interpretation would cause the Lanham Act to “conflict with the law of copyright, which addresses that subject specifically.”¹³⁶ Because *Datstar* copied a creative work in the public domain (from videotapes of the *original* version of the series that was allowed to fall into the public domain),¹³⁷ it, and not the original creator, was the “origin” of “goods” in question.¹³⁸ The Court restated its longstanding position that “[i]n general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying,”¹³⁹ and held that the Lanham Act “does not exist to reward manufacturers for their innovation in creating a particular device . . .”¹⁴⁰ Thus, while the court did not reject a cause of action for “reverse passing off” under Section 43(a) of the Lanham Act, it limited its application in cases where the misattribution involves expressive material.¹⁴¹

Datstar creates obvious problems for Milberg’s potential Lanham Act claim. Under the Court’s analysis, Milberg must seek relief for the unattributed copying of a complaint through the copyright laws, and not through the Lanham Act. If publicly filed complaints are not protected by

¹³⁴ 123 S. Ct. 2041 (2003).

¹³⁵ The Court’s analysis in *Dastar* would also seem to prevent the cause of action suggested by Justice Holmes in *INS*, in which the consumer interest was in the product and not the producer of the product. The *Dastar* Court noted that “the consumer that buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product, and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.” *Dastar*, 123 S. Ct. at 2047.

¹³⁶ *Id.*

¹³⁷ The series in question was based on a book written by Dwight D. Eisenhower, and published by Doubleday in 1948. Respondent Fox was the original copyright holder of the television series when produced and aired in the late 1940s. Although Doubleday renewed the copyright on the book in 1975, the copyright on the television series was not renewed, and was allowed to expire in 1977, leaving the series in the public domain. Fox reacquired the television rights in Eisenhower’s book in 1988, including the exclusive right to distribute the Crusade television series. *Id.* at 2044.

¹³⁸ *Id.* at 2046-7. Indeed, the Court notes that if *Datstar* has copied one of the videotapes produced under Fox’s reacquired television rights, the Lanham Act claim would “undoubtedly be sustained.” *Id.* at 2046.

¹³⁹ *Id.* at 2048 (citing *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001)).

¹⁴⁰ *Id.*

¹⁴¹ See Posner, *supra* note 104 at 639. Thus, if Milberg-Weiss wanted to prevent the copying of its complaints, either attributed or not, it must do so through the copyright laws and not the Lanham Act.

copyright,¹⁴² the lawyer who copies Milberg's publicly filed complaint, and not Milberg, is the origin of the copycat complaint. As the origin of the copycat complaint, the copycat lawyer is free, under *Datstar*, to use it without attribution.

C. Protection through litigation rules

This subpart shows that the legal system provides limited protection to information produced in litigation other than through intellectual property laws. The work product rule protects against appropriation of information by the adversary. The attorney-client privilege protects lawyer-client communications from disclosure to anyone else, while protective orders and confidentiality agreements protect litigation documents from use by non-parties. These rules illustrate that courts have recognized the importance of providing incentives for the production of litigation information. However, none of these rules can be extended to the protection of class action complaints from appropriation by *competing lawyers*. As discussed below in Part V, some other mechanism – that is, rules regarding the selection of lead counsel – must be found to fill this gap.

1. The work product privilege

Litigators expect liberal discovery rules to force them to disclose to adversaries much of the information they produce in the litigation.¹⁴³ Thus, property rights to information are weak in the litigation setting. Defenses of compelled disclosure assume that litigation elicits disclosure of known facts that can be revealed at little or no cost.¹⁴⁴ But if the production or revelation of information is costly, such a system can be expected to result in the over-disclosure of existing information,¹⁴⁵ and to the under-production of new information.¹⁴⁶

¹⁴² Even if copyright law prevented the lifting of complaints from Milberg-Weiss' website, a lawyer may be able to avoid this problem simply by copying the publicly filed copy of complaint. Moreover, under the analysis in *Veeck*, *supra* note 73, copyright law would not even protect copying from the Milberg-Weiss website, and by the Court's reasoning in *Datstar*, neither would the Lanham Act.

¹⁴³ Such litigation rules are analogous to a requirement for royalty-free compulsory licenses, which normally are disfavored in intellectual property law. *See, e.g.*, Robert P. Merges, PATENT LAW AND POLICY, 2d. ed. (1997) 1004-6 (noting the predominance of property rule treatment of patents); Robert P. Merges, et al., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 3d ed. (2003) 521-3 (discussing operation of copyright law as property rule with limited liability rule exceptions).

¹⁴⁴ *See, e.g.*, William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Louis Kaplow and Steven Shavell, *Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989).

¹⁴⁵ *See* Robert D. Cooter and Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEG. STUD. 435 (1994).

¹⁴⁶ *See generally*, Luke M. Froeb & Bruce H. Kobayashi, *Naïve, Biased, yet Bayesian: Can Juries*

This potential for under-production of some types of information has led to legal development of limited intellectual property-like protections against compelled disclosure under the attorney-client privilege and work product doctrine.¹⁴⁷ Thus, the Court in *Hickman v. Taylor*¹⁴⁸ summarized the problem that litigants would face in the absence of the work product privilege:

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a lawsuit developed into “a battle of wits” between counsel. But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or wits borrowed from the adversary.

Two primary economic analyses have applied an intellectual property framework to the work product doctrine. The first analogizes work product protection to copyright protection.¹⁴⁹ Under this theory, the mental impressions and theories of the lawyer are protected, but mere facts are not.¹⁵⁰ The second theory applies a joint production theory to the scope of work product protection, permitting protection of both facts and the lawyer’s mental impressions.¹⁵¹ The joint production problem results from the fact that any investigation is likely to jointly produce both positive that supports the advocate’s case and negative information that hurts it. Because an investigator who must disclose negative information might rationally choose to forgo the investigation, protecting negative information encourages investigation. However, this theory does not support protecting the purely positive information disclosed in a complaint.

A lawyer preparing a class action complaint requires protection that differs from both theories of the work product privilege. With respect to the first theory, the complaint-drafter needs to protect all of the work that went into the complaint, including both expression and research on facts. With respect to the second theory, limiting the protection to negative information

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¹⁴⁷ See Easterbrook, *supra* note 45 at __; Ronald J. Allen, Mark F. Grady, Daniel D. Polsby, and Michael S. Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEG. STUD. 359 (1990).

¹⁴⁸ 329 U.S. 495, 516 (1947).

¹⁴⁹ See Allen, et al., *supra* note 147 at __; Easterbrook, *supra* note 45 (criticizing the protection of facts in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and *Hickman*).

¹⁵⁰ See Easterbrook, *supra* note 45 at __. See also *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d. Cir. 1984) (compelling discovery of work product in antitrust case with redaction of mental impressions). Any disclosure of a compilation of facts may also disclose the mental impressions and theories of the lawyer seeking protection of his work product. This would make it difficult to protect mental impressions and facts, forcing a choice between protecting both or neither. Copyright protection of litigation documents such as complaints is discussed in *supra* Part III.

¹⁵¹ Allen, et al., *supra* note 147, at 385.

does not protect the complaint-drafter from free riding by competing lawyers, as distinguished from adversaries.

Despite these differences, the general principle underlying the work product privilege – to provide appropriate ex ante incentives to litigants and their lawyers – relates to the present context. Accordingly, the privilege provides at least indirect theoretical support for protecting complaints.

2. The attorney-client privilege

The attorney client privilege broadly protects legal communications between a client and his attorney from forced disclosure.¹⁵² The privilege is intended to promote the “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”¹⁵³ Attorney-client communication promotes the administration of justice because attorneys can efficiently process clients’ legal information, including information that is adverse to the client’s interests.¹⁵⁴ The privilege also reduces perjury by channeling clients to affirmative defenses instead of false denials.¹⁵⁵

The costs of the privilege include those borne by the adversary and the courts in discovering and reproducing information the attorney already has,¹⁵⁶ and those from successful suppression of the information.¹⁵⁷ Nevertheless, courts have broadly protected attorney-client communications, including against disclosure to third parties.¹⁵⁸ Thus, courts have emphasized the benefits of promoting full and frank communication over the costs of protecting the information.¹⁵⁹

The attorney-client privilege does not directly protect complaints, which do not arise out of a lawyer-client relationship. Like the work product privilege, however, the attorney-client privilege does relate to the basic principle involved in the present issue of preventing the use of information in order to increase the amount of relevant information available to the court. Just as courts have protected attorney-client communications despite potential negative effects of such protection on the litigation process in order to encourage client disclosures, courts may provide for at least limited protection against adversaries’ use of class action complaints in order to encourage their creation ex ante.

¹⁵² See, e.g., Allen, et al., *supra* note 145 at _.

¹⁵³ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹⁵⁴ See Allen, et al., *supra* note 147 at 366-7.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 360.

¹⁵⁷ See, e.g., Kaplow and Shavell, *supra* note 144.

¹⁵⁸ See generally, Allen, et al., *supra* note 147 (describing positive theory of attorney-client privilege).

¹⁵⁹ See, e.g., *Swidler & Berlin v. U.S. 118 S. Ct. 2081* (1998) (upholding privilege where the client had killed himself).

3. Protective and confidentiality orders

Litigation information, including complaints, can be protected from third parties through protective orders and confidentiality agreements.¹⁶⁰ Just as the attorney-client privilege improves the litigation process by encouraging lawyer-client communications, protective orders can encourage the flow of information between litigants.¹⁶¹ This can promote settlement of the current case, increase the accuracy of the litigation process and reduce legal error.¹⁶² Unlike the work product doctrine and the attorney client privilege, the protection may extend to information such as trade secrets even if it supports the position of the disclosing party.

As with the other rules discussed above, these orders can increase the cost and reduce the accuracy of future litigation. In contrast to the attorney-client setting, these concerns have led courts to rule that litigation documents are part of the public's right of access to the courts, and thus are presumptively open to the public.¹⁶³ Thus, the courts have found that, without a compelling reason to keep a document private, third parties' right of access outweighs the litigants' private interests in keeping such documents private.¹⁶⁴ Unprotected private interests specifically include those of third party litigants and their attorneys who wish to use these litigation documents in subsequent actions. For example, *Wilson v. American Motors*¹⁶⁵ held that litigants' desire to prevent use of pleadings, docket entries, orders, affidavits, depositions and transcripts for collateral estoppel purposes did not justify the closure of the trial record.¹⁶⁶ Two states have enacted statutes or promulgated rules that severely restrict the use of protective orders, and many others have considered similar legislation.¹⁶⁷

¹⁶⁰ FRCP 26(c). See generally, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

¹⁶¹ Miller, *supra* note 160.

¹⁶² See *supra* text accompanying notes 156-157.

¹⁶³ See *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014 (11th Cir.1992) (vacating district court's order sealing court record, including pleadings and motions); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (same). But see Miller, *supra* note 160 (criticizing limitations on protective orders in the context of liberal discovery).

¹⁶⁴ See, e.g., *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (1984) (newspapers entitled to special litigation committee report prepared under attorney client privilege when report admitted into evidence).

¹⁶⁵ 759 F.2d 1568 (11 Cir. 1985).

¹⁶⁶ Collateral estoppel requires judgment, so the positive reason for the right of access in this case normally would not attach until judgment. But this is not necessarily the case. See *Brown v. Advantage Engineering*, 960 F.2d 1013 (11th Cir. 1992) (upon motion of third party intervenor seeking to obtain admissions for use in unrelated case, court found sealing of court record in settled case without showing of extraordinary circumstances was abuse of discretion by district court). Similarly, the Court has restricted use of vacatur conditioned upon settlement as a way to avoid the effects of collateral estoppel. See *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994). See generally, Resnick, *supra* note 52.

¹⁶⁷ See Miller, *supra* note 160 at 443 (listing enacted and proposed state statutes and rules). In 1990,

Protective orders would not, in any event, be a viable way to protect against disclosure a *publicly filed* complaint in a federal securities class action. But the cases on protective orders are relevant in demonstrating the courts' hesitance in protecting litigation documents primarily to keep them from litigants in other cases. This suggests a need to find some way to protect the complaint-drafter's intellectual property right in the complaint from *adversaries* in the same case while preserving third-party access.

In short, class action complaints are unprotected. Copyright falls short, yet it is just relevant enough to preempt appropriate relief under state law. Any mechanism for encouraging high-quality law-creation by class action lawyers will have to come other than from the intellectual property laws. The next Part discusses a possible avenue of relief through the law governing class actions.

V. CLASS ACTION REFORM AND PROTECTION OF COMPLAINTS

The above analysis shows that class action lawyers cannot get strong copyright or misappropriation protection for their complaints, despite the fact that this may discourage socially beneficial effort, because of the need to ensure public access to class action complaints. Nor can complaint-authors get even the weaker protection entailed in correct attribution of authorship. This Part shows that efficient incentives to prepare complaints are best provided, not by general intellectual property or trade rules, but by rules designed specifically for this situation – the rules for selecting lead class counsel. Subpart A makes this general point by analyzing the nature of competition to be class counsel. Subpart B applies this analysis to securities class actions under the PSLRA lead plaintiff provisions. Subpart C examines non-PSLRA actions and new Rule 23(g).

A. An analysis of lead counsel selection

The correct analysis of the selection of lead counsel requires viewing the problem from two perspectives. From the perspective of choosing the best lawyer for a particular case, the court, as a surrogate for the plaintiff class, is looking for what every client would want in this situation – the lawyer who can most efficiently prosecute the action taking into account both price and quality. Authorship of the best complaint, though relevant, is not determinative, since the lawyer who can prepare the best complaint is not necessarily the one who can best prosecute the case.

This situation resembles the literature concerning takeover auctions

Florida enacted the Sunshine in Litigation Act, Fla. Stat. Ann. § 69.081. Under this statute, courts are prohibited from entering orders that conceal information relating to “public hazards”. The same year, the Texas Supreme Court promulgated Rule 76a, which creates a presumption that court records, including unfiled discovery materials and settlement agreements, are open to the public. See Tex R. Civ. Proc. 76a. See also Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991) (discussing rule).

and defensive tactics. It has been argued that hostile bidders may be of two different types – those who specialize in identifying appropriate targets, such as those that would benefit from better management, and those who are best able to complete the takeover by, for example, obtaining funding. The efficient searcher is often the first bidder for a company, while the efficient “closer” may be the “white knight.”

Because an auction raises the price of the first bidder’s “stake” in the target, it may increase the likelihood of takeover bids *ex ante* by rewarding those who specialize in identifying targets. On the other hand, the auction may deter takeovers to the extent that it raises the price for the “closer.” Thus, the efficiency of takeover auctions depends on the extent to which they encourage search, on the one hand, and discourage entry of bidders who can actually complete the takeover, on the other.¹⁶⁸ This, in turn, may depend on whether searchers can benefit from their information-gathering by selling their information directly to bidders who specialize in acquiring targets, or whether the acquirer can cheaply sell to a higher-value user.

In the context of the competition to be class counsel, the analog to the efficient searcher in a takeover auction is the attorney who can assemble facts and theories into a coherent and persuasive legal narrative.¹⁶⁹ This might be done by a lawyer and some law clerks who never leave the office, using such sources as securities filings and news reports. By contrast, the trial of a major securities case involves not only a different set of skills – examining witnesses rather than legal drafting – but also the manpower to be able to handle discovery and trial involving thousands or millions of pages of documents and examining numerous witnesses.

In the choice of class counsel as in a takeover auction, given the different talents and resources involved in complaint-drafting and trial, the efficient outcome may depend on the complaint-drafter being able to capitalize on its search by selling its work product to the lawyer selected as counsel. This sort of market transaction may, however, be infeasible in the class action context. One potential impediment is state regulation of referral fees.¹⁷⁰ Fee-splitting between lawyers in different firms once was strictly regulated, or even prohibited.¹⁷¹ Limiting cross-firm payments would have the effect of inhibiting such specialization. On the other hand, the

¹⁶⁸ See generally, Lucien Arye Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Ronald Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); Frank Easterbrook & Daniel Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982); Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEG. STUD. 165 (1988).

¹⁶⁹ See *supra* text accompanying note 41 (discussing analogy between legal complaint and literary narrative).

¹⁷⁰ See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5(e).

¹⁷¹ See Alistair B. Dawson and Mo Taherzadeh, *Regulating Referral Fees: An Evolutionary Process*, 66 TX. BAR. J. 982 (2003) (listing 3 states, Colorado, Hawaii, and Wyoming, as having effectively banned referral fees). See also CAL. PROF. COND. RULE 2-200 (allowing fee splitting between lawyers in different firms, but prohibiting pure referral fees).

regulation of such cross firm payments has been relaxed in recent years.¹⁷²

A more important impediment is the absence of intellectual property rights in the complaint. The class representative or lead plaintiff may not value the long-term effects of suppressing lawmaking enough to prevent them from choosing to hire the firm that would better litigate the case or do so at a lower price, even if this is not the firm that prepared the complaint.¹⁷³ Even courts may be short-sighted in this respect.¹⁷⁴ It follows that a strong intellectual property right in complaints akin to copyright could effectively compel courts to appoint complaint-authors as lead counsel in order to be able to use their complaints. This would be inefficient to the extent that the best complaint-drafters are not necessarily the best prosecutors of the claim. At the same time, rules that deny any authorship rights, while perhaps picking the right winner in a particular auction, could have perverse effects from the broader social perspective because they would not provide adequate ex ante incentives to prepare efficient complaints.¹⁷⁵

The problem arguably may be avoided by the formation of large integrated law firms that combine complaint-drafting and litigation talents and resources. Indeed, Milberg, Weiss is such a firm, and therefore is in a position to take cases from pleading through trial. If that is the case, the main costs of the absence of property rights in complaints would be those associated with forcing firms to be bigger than they would be if lawyers could have property rights in complaints. There may be diseconomies of scale in law firms that could make such large firms inefficient apart from legal rules on appointing class counsel that dictate such structure. For example, large law firms comprising multiple specialties may incur higher agency costs. Moreover, forcing firms to be large and integrated could reduce competition for lead counsel status because lead plaintiffs must choose from only a few large integrated firms. This could raise fees and reduce quality compared to the deeper market that would exist if boutique firms could specialize in complaint-drafting.

The appropriate solution would be for the court, in appointing lead

¹⁷² See MODEL RULE 1.5(e), 2002 amendments. See also Dawson and Taherzadeh, *supra* note 171 (discussing evolution from early pronouncements by the ABA that referral fees were generally unethical to the adoption of the Model rules, in which a referral fee is permitted if (i) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (ii) the client is advised of and does not object to the participation of all the lawyers involved; and (iii) the total fee is reasonable).

¹⁷³ But see Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 646 (2003) (suggesting use of an ex-post bid mechanism that would facilitate the replacement of initial counsel while maintaining ex-post incentives for initial firm that prepared the complaint).

¹⁷⁴ See *In re Cavanaugh*, discussed in *supra* note 112 (criticizing District Court for choosing low fee attorney over Milberg-Weiss).

¹⁷⁵ John Coffee has made a similar point almost 20 years ago in noting the problem of inter-plaintiff competition in class actions, and in rejecting class counsel auctions and sale of lawsuits to lawyers. See John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 51, 78 (No. 3, 1985).

counsel, to take into account not only which lawyer would be the most efficient prosecutor, but also the authorship of the complaint. In the latter regard, the court could simply rely on the lawyers' self-identification as authors rather than on any statutory or common law right of attribution. This would accommodate the dual needs for efficient prosecution of the immediate case, and to provide adequate incentives for law-creation. The following sections discuss the extent to which such a result is feasible under the current federal class action rules.

B. Lead plaintiffs and lead counsel under the PSLRA.

The PSLRA created a formal mechanism for appointment of a lead plaintiff.¹⁷⁶ The Act requires that the "primary focus must always be, not on the selection of counsel, but on the selection of lead plaintiff in a shareholders class action."¹⁷⁷ One of the principal legislative purposes of the lead plaintiff provisions of the PSLRA was to replace a lawyer-driven and lawyer-controlled process with litigation controlled by a lead plaintiff, frequently an institutional or other large investor, motivated to act like a real client.¹⁷⁸

More specifically, the act provides that the court appoint as lead plaintiff the "most adequate plaintiff," which the court rebuttably presumes to be

the person or group of persons that--(aa) has either filed a complaint or made a motion in response to [the initial class] notice. . . ; (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."¹⁷⁹

The court-appointed lead plaintiff would then, "subject to the approval of the court, select and retain counsel to represent the class."¹⁸⁰

Contrary to its initial intent, the appointment of the lead plaintiff has been transformed into a lawyer-driven process. However, unlike the race to the courthouse under the pre-PSLRA system, competition between lawyers under the PSLRA has become one to represent the "most adequate plaintiff." Lawyers filing complaints often secure agreements with large plaintiffs regarding their choice of counsel if they are appointed as lead plaintiff. Lawyers also have attempted to assemble plaintiff groups that have the largest aggregate financial interest in the relief sought by the

¹⁷⁶ 15 U.S.C. § 78u-4(a)(3).

¹⁷⁷ See *In re Razorfish, Inc., Securities Litigation*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (citing Securities Exchange Act of 1934, § 21D(a)(3), as amended, 15 U.S.C.A. § 78u-4(a)(3)).

¹⁷⁸ *Id.* at 308-09.

¹⁷⁹ 15 U.S.C.A. § 78u-4(a)(3)(B).

¹⁸⁰ *Id.*

class.¹⁸¹ In either case, lawyers can use well-pleaded complaints to demonstrate their skill to potential lead plaintiffs. However, the competition may be adversely affected if lawyers can copy complaints from other lawyers, and thereby enter the competition at low cost, while indicating that they have more skill or have put in more effort than they actually have.

These issues are clearly illustrated by the process that resulted in the appointment of Milberg-Weiss as lead counsel in *In re Razorfish Securities Litigation*.¹⁸² The original complaint was filed by Milberg-Weiss on behalf of plaintiff Andrew J. Powers.¹⁸³ “Within days” this was followed by “numerous” other complaints that copied the original complaint “essentially verbatim.”¹⁸⁴ The filed complaints led to the following lead counsel motions under the PSLRA:

(1) Appointment of the Azimut Group as lead plaintiff, Milberg Weiss and Schiffrin & Barrows as co-lead counsel, and Bernstein Liebhard & Lifshiz, and Scott & Scott and Cohen, Milstein, Hausfield & Toll as the executive committee. The Azimut Group consisted of a large financial institution, Fahnstock Asset Management, and two day-trading firms, Azimut SGR and Bridgeport DPM.

(2) Appointment of an individual with a relatively large estimated loss, Beth Cowan Pressel, as lead plaintiff with Wolf Haldenstein as lead counsel.

(3) The law firm of Beatie & Osborn sought appointment of an individual with relative small estimated losses, Dominick Pigno, as lead plaintiff, and an auction to select lead counsel.

The court declined to grant any of the motions, and instead appointed one of the members of the Azimut Group, Fahnstock, as lead plaintiff¹⁸⁵ and Milberg-Weiss and Schiffrin & Barroway as lead counsel.¹⁸⁶ Fahnstock fit the profile of the lead plaintiff described by Congress as the institution with the largest loss not otherwise disqualified from acting as lead plaintiff.¹⁸⁷ Although the largest member of the Azimut group and two of the law firms proposed as lead counsel were appointed as lead plaintiff and lead counsel respectively, the court explicitly rejected the aggregation used to create the Azimut group. Noting the ad hoc composition of the

¹⁸¹ See Jill E. Fisch, *Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 L. & CONTEMP. PROB. 53 (2001).

¹⁸² 143 F. Supp. 2d. 304 (S.D.N.Y. 2001).

¹⁸³ *Id.* at 306.

¹⁸⁴ *Id.* The court obviously took a somewhat dim view of the copycat complaints, noting that “One can only wonder whether the edicts of Rule 11, Fed. R. Civ. P. were followed in the investigation and drafting of these complaints.”

¹⁸⁵ *Id.* at 306.

¹⁸⁶ *Id.*

¹⁸⁷ The court disqualified Beth Cowan Pressel, who had a large putative loss of \$4.9 million, based on doubts about the accuracy of this figure and Pressel’s failure to meet the typicality or other requirements for appointment as lead plaintiff. See *id.* at 308.

Azimut Group, the court reasoned that allowing such aggregation would defeat the purpose of the lead counsel provisions of the PSLRA by creating the same kind of collective action problems these provisions were designed to overcome. The court also rejected the auction called for by the third motion, reasoning that this would be inconsistent with the PSLRA's call for the lead plaintiff, "subject to the approval of the court, [to] select and retain counsel to represent the class."¹⁸⁸

Razorfish's procedure for appointment of lead plaintiff is at least partly consistent with the analysis above in subpart A. In appointing Milberg-Weiss as co-lead counsel, the court focused on the fact that Milberg-Weiss had "drafted the initial complaint in this case, itself arguably a relevant factor in the selection of lead counsel," as well as playing the primary role in organizing the case for all members of the Azimut Group.¹⁸⁹ Thus, despite the appearance of numerous copycat complaints and the absence of formal intellectual property protection in the complaint, the court provided some compensation for Milberg's role in drafting what the copying itself suggests was a meritorious complaint. Schiffrin & Barroway, a relatively small firm, was appointed as the other co-lead counsel based on Fahnestock's wishes and initial selection. This arguably reflects Schiffrin & Barroway's likely ability and incentives to vigorously prosecute the case based on the statutory criterion for making this decision – that is, the wishes of the lead plaintiff.

On the other hand, the case suggests a potential problem for this Article's theory. Suppose, arguendo, that Schiffrin & Barroway's ability to attract Fahnestock as a client was at least partly attributable to that firm's appropriation of Milberg-Weiss' complaint.¹⁹⁰ Even if Fahnestock ultimately learned the real author, the appropriation might have helped the firm get its foot in the door with this plaintiff. Even worse, it is theoretically possible that a plaintiff in Fahnestock's position might prefer the copying firm as sole lead counsel, on the basis that that firm is the best prosecutor. The plaintiff would have no reason to care whether this decision provided appropriate ex ante incentives for preparing the complaint. The court might accept the lead plaintiff's choice, whatever its views on the need to create ex ante incentives, because it deems itself bound by the PSLRA's presumption.

By contrast, intellectual property protection in this hypothetical scenario would provide the necessary incentives. A right of attribution under Section 43(a) of the Lanham Act also would help the complaint drafter by alerting prospective lead plaintiffs to the true source of the

¹⁸⁸ 143 F. Supp. 2d at 311.

¹⁸⁹ 143 F. Supp. 2d at 311-12 (noting this information emerged at oral argument).

¹⁹⁰ Schiffrin and Barroway was one of the firms that was reported to have received a cease and desist letter from Milberg Weiss relating to the copying of Lerach's complaints. See McDonough, *supra* note 10.

complaint before the copying firm has an opportunity to use the complaint to argue that it is best suited to handle the trial.

Finally, the complaint's author is in an even weaker position in courts that have not rejected the use of aggregation¹⁹¹ or the use of auctions¹⁹² as inconsistent with the PSLRA. In such cases, authorship may count for even less than under *Razorfish*. The complaint drafter accordingly would need strong intellectual property rights to prevent appropriation of its investment of resources in the drafting of the complaint.

It is important to emphasize that the PSLRA lead plaintiff provisions may present a problem for this article's lawmaking-incentive argument even if courts are sympathetic with the approach in *Razorfish*. The PSLRA may *require* the court to respect the lead plaintiff's choice of a copycat lawyer,¹⁹³ or his selection of lead counsel through an auction. In other words, the fact of authorship may not be a circumstance that permits the court to reject the lead plaintiff's choice.

C. Lead counsel appointment under new Rule 23(g).

Problems of appropriation similar to those under the PSLRA may

¹⁹¹ See Fisch, *supra* note 181 at 69-79 (discussing cases on aggregation under the PSLRA). Whether or not aggregation is allowed under the PSLRA not been settled. Compare *In re Gemstar-TV Guide Int., Inc. Sec. Litig.*, 209 F.R.D. 447 (C.D. Cal 2002) (rejecting use of aggregation); with *Newman, et al., v. Eagle Bldg Tech., et al.*, 209 FRD 499 (S.D. Fla 2002) (allowing aggregation).

¹⁹² See Fisch, *supra* note 181 at 91-95 (discussing use of auctions under the PSLRA). See also *In re Cendant Corp. Litig.*, 264 F.3d 201, 276 (3d Cir. 2001) (holding that the PSLRA precludes court use of auction to select class counsel). For pre-PSLRA securities cases allowing auctions, see *In re Oracle Securities Litigation*, 132 F.R.D. 538 (N.D. Cal. 1990); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467 (N.D. Cal 1994); *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996). Post-PSLRA auction cases include: *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998); *In re Network Assocs. Inc., Sec. Litig.*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999); *Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 688 (S.D. Fla. 1999); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577 (N.D. Cal. 1999); *In re Lucent Technologies, Inc., Securities Litigation*, 194 F.R. D. 137 (D.N.J. 2000); *In re Bank One Shareholders Class Action*, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re Quintus Sec. Litig.*, No. 00-C-4264 & 00-C-3894, 2001 WL 709204 (N.D. Cal., 2001); *In re Commtouch Software Ltd. Sec. Litig.*, No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. 2001); *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d. 951 (N.D. Ill. 2001). For a critical discussion of such auctions, see Fisch, *supra* note 11; Lucian Arye Bebhuck, *The Questionable Case for Using Auctions to Select Lead Counsel*, 80 WASH U. L. Q. 889 (2002) (noting that auctions may result in inadequate incentives). See also 3rd Circuit Task Force Report on Selection of Class Counsel, 74 TEMPLE L. REV. 689 (2001). But see James L Tuxbury, *A Case for Competitive Bidding or Lead Counsel in Securities Class Actions*, 2003 COLUM. BUS. L. REV. 295 (2003) (suggesting that auctions be used in some cases); Charles H. Gray, *An Economic Analysis of the Private Securities Litigation Reform Act: Auctions as an Efficient Alternative to Judicial Intervention*, 44 WILLIAM & MARY L. REV. 829 (2002) (arguing that bidding is consistent with economic efficiency, but not considering the suppression of incentives for gathering and producing information contained in initial complaint).

¹⁹³ See, e.g., *In Re Cavanaugh*, 306 F.3d 726, 732-3 (9th Cir. 2002) ("the district court has no authority to select for the class what it considers to be the best possible lawyer or the lawyer offering the best possible fee schedule. Indeed, the district court does not select class counsel at all. Rather, such information is relevant only to determine whether the presumptive lead plaintiff's choice of counsel is so irrational, or so tainted by self-dealing or conflict of interest, as to cast genuine and serious doubt on that plaintiff's willingness or ability to perform the functions of lead plaintiff.")

arise in non-securities class action cases. Prior to December 2003, Rule 23 did not explicitly address the selection or responsibilities of class counsel. Rather, selection of class counsel in non-securities class actions were addressed as part of the determination under Rule 23(a)(4), which directs the court to determine whether the named class representatives will fairly and adequately protect the interests of the class.¹⁹⁴ Thus, appointment of class counsel in non-securities cases were not conducted under a provision similar to the lead plaintiff provisions of the PSLRA, or any other provision that explicitly attempted to introduce a measure of client control into the process of appointing lead counsel.

The 2003 revisions to the Federal Rules of Civil Procedure, which became effective on December 1, 2003,¹⁹⁵ contain a new Rule 23(g) that explicitly addresses the appointment of class counsel in non-securities class actions. The 2003 amendments to Rule 23, and new Rule 23(g) in particular, were part of an effort to codify and explain current practice.¹⁹⁶ New Rule 23(g), provides specific criteria that courts must consider in the appointment of class counsel. Section 1(C) requires that the court consider the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit to the representation. The court also may consider additional information including the proposed terms of the fee award.¹⁹⁷ The Rule also differentiates between cases where single versus multiple applicants seek appointment as class counsel, requiring that "the court must appoint the applicant best able to represent the interests of the class."¹⁹⁸

Rule 23(g) at least leaves courts free to consider the importance of authorship in appointing lead counsel as a way of providing lawmaking incentives. However, the proposed rule takes no position on the use of court ordered auctions or the wisdom of judicial efforts to engender competition.¹⁹⁹ Thus, in the case where there are multiple applicants for the position of class counsel, Rule 23(g) also leaves to court free to appoint the copycat lawyer, and can make such an appointment through the use of an auction mechanism.

¹⁹⁴ See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Member of the Judicial Conference of the United States, 215 F.R.D. 158 (2003).

¹⁹⁵ FRCP 23(g), effective December 1, 2003.

¹⁹⁶ See Gregory P. Joseph, *Class Action Developments*, SH063 ALI-ABA 893 (2003). See also *Report of the Civil Advisory Committee* (May 20, 2002) available at <http://www.fjc.gov>.

¹⁹⁷ Thus, in contrast to the 9th Circuit's holding in *Cavanaugh*, *supra* note 193, in which the court held that consideration of the fee structure was not proper under the lead plaintiff provisions of the PSLRA except to show that lead plaintiff's choice was irrational or tainted by self-interest.

¹⁹⁸ FRCP 23(g)(2)(B).

¹⁹⁹ See *Report of the Judicial Conference*, *supra* note 194. Cases in which auctions have been used to appoint the lead counsel in non-securities cases include: *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2001).

VI. CONCLUDING REMARKS

Our analysis shows that the appropriate balance of law-creation incentives and the public's need for access to legal materials can be achieved through the rules governing appointment of lead counsel in class actions. Specifically, courts should be instructed to ensure that authors of meritorious complaints are rewarded for their efforts by being given at least co-lead-counsel status. The precise nature of the complaint-drafter's ultimate role in the case would depend on the court's judgment as to whether the complaint-drafter is also likely to most efficiently prosecute the claim. This determination might be based, as under the PSLRA, on the decision of the party selected as lead plaintiff. The important point is that the court should base its lead counsel decision not just on considerations relating to the future prosecution of the specific claim, but also on the need to create incentives for lawyers to draft pleadings prior to the formation of a client relationship.

More generally, our paper shows the need to create property rights in law in consideration of the role of private parties, particularly including private lawyers, in law creation. Our legal system does not, and cannot, rely solely on public servants to create the law, particularly given the demands placed on law creation on ever-expanding private remedies.