

CLASS ACTION LAWYERS AS LAWMAKERS

Bruce H. Kobayashi & Larry E. Ribstein*

I. PRIVATE LAWMAKING.....	739
A. Legislation.....	740
B. Judicially Created Law.....	742
II. COPYRIGHTING PRIVATE LAWS.....	748
III. COPYRIGHTING LITIGATION DOCUMENTS.....	752
IV. NON-COPYRIGHT PROTECTION OF COMPLAINTS.....	755
A. Misappropriation.....	756
B. Lanham Act Protection Against Misattribution.....	760
C. Protection Through Litigation Rules.....	764
1. The Work Product Privilege.....	764
2. The Attorney-Client Privilege.....	766
3. Protective and Confidentiality Orders.....	766
V. CLASS ACTION REFORM AND PROTECTION OF COMPLAINTS....	768
A. An Analysis of Lead Counsel Selection.....	768
B. Lead Plaintiffs and Lead Counsel Under the PSLRA.....	771
C. Lead Counsel Appointment Under New Rule 23(g).....	776
D. A Proposed Solution.....	777
VI. CONCLUSIONS AND IMPLICATIONS.....	780

* Associate Dean for Academic Affairs and Professor of Law, George Mason University School of Law and Richard W. and Marie L. Corman Professor of Law, University of Illinois College of Law. Ryan Gwillim provided valuable research assistance. Valuable comments were provided by Ron Allen, Jill Fisch, Tom Ginsburg, Leandra Lederman, Peter Maggs, Geoff Miller, Richard Painter and participants at workshops at the University of Wisconsin School of Law and Robert A. Levy Workshop in Law and Liberty at George Mason University School of Law. Kobayashi acknowledges financial support from the Law and Economics Center at George Mason University School of Law.

While judges and legislators nominally make the law, private lawyers provide significant input 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.

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.² 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 arbitrated 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.³ 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.

Under the alternative public law model,⁴ litigation has external effects extending beyond the parties to the current lawsuit because of, for example, stare

1. Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing* (2004) (manuscript on file with Authors).

2. See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

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

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

decisis⁵ or collateral estoppel.⁶ 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. adversarial system, it is up to the parties, and particularly their lawyers, to develop the facts and legal arguments that lead not only to the resolution of the particular case, but also to the judge's opinion establishing a legal rule to guide future cases. Since courts have 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, one can assume that lawyers have 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, state licensing and choice-of-law rules may encourage participation in lawmaking through litigation just as they do with regard to state statutory lawmaking. Moreover, it has been shown that lawyer or other litigant-based interest groups have been instrumental in creating law.⁷

The problem arises in class actions, and specifically in class action complaints. These complaints are often prepared in highly complex litigation, requiring extensive development of facts and legal theories. Pleadings, therefore, can play an important role in setting the stage both for the trial and for any ultimate appeal. Since class actions involve high stakes and require investment of significant resources, they are more likely to generate judicial opinions than cases in which the parties' stakes are lower, holding other factors constant. And even if such cases settle quickly,⁸ these complaints can develop facts and legal theories that can be used in subsequent cases. In short, class actions have significant lawmaking potential.

One might expect significant investments in the preparation of class action complaints, since 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.⁹ Moreover, meeting the heightened pleading requirements in fraud cases,¹⁰ and particularly in securities fraud cases,¹¹ can require significant expenditures of time and resources.

5. See, e.g., RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 554–55 (6th ed. 2002).

6. See *id.* at 593–95.

7. See Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994).

8. See *infra* text accompanying note 45 (discussing tendency of class actions to settle quickly).

9. See Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 654–55 (2002).

10. 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.” FED. R. CIV. P. 8(a)(2). However, the rules contain a heightened pleading

Despite the stakes in class actions, lawyers creating class action complaints may invest a socially suboptimal amount of resources because they do not internalize all of the pleadings' potential lawmaking benefits. As in other cases, litigants and their lawyers cannot internalize all of the lawmaking benefits generated for future litigants, who are free to use any publicly disclosed facts, litigation documents or precedents.

In a class action, the complaint-drafter may be unable to capitalize on his efforts even in the *current* case. Plaintiffs' lawyers often prepare class action complaints in effect "on spec," without knowing who the court will ultimately select as counsel for the class. Once an initial or early complaint has been filed, other lawyers might copy and file it on behalf of other plaintiffs. This problem is exacerbated in federal securities fraud class actions governed by the Private Securities Litigation Reform Act ("PSLRA"), which requires filing a public notice upon the initial filing of a claim.¹² One of these copycat lawyers might then be appointed lead counsel.¹³ This potential for appropriation of work product further dilutes the lawyer's incentives in preparing the complaint when compared to a lawyer who, prior to drafting the complaint, has negotiated with the client to receive compensation.

To be sure, the complaint's marginal contribution to the creation of law may slightly benefit the lawyer in later cases. But better law confers little competitive advantage in securing clients, particularly where it concerns federal law rather than the law of the particular state where the lawyer is licensed. 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.

The effect of this incentive problem may be underdevelopment of legal theories through case law as compared to a system in which the parties fully internalized the lawmaking benefits of class action pleadings. For example, the cases may provide less guidance than they otherwise would as to the precise

requirement in fraud cases, requiring that "the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. Civ. P. 9(b).

11. To deter frivolous lawsuits, the Private Securities Litigation Reform Act of 1995 added special pleading rules for private actions alleging fraud under the 1934 Act, including under § 10(b) of that Act and Rule 10b-5. Under these rules, the complaint must "state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind." Securities Exchange Act of 1934, § 21D(B)(2), 15 U.S.C. § 78uD(b)(2). As a result, the complaints in securities fraud cases 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.

12. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3)(A). See HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES AND FEDERAL CORPORATE LAW* § 16.104 (2d ed. 2003) (discussing content and mechanisms of filing notice). Lawyers have used this filing as a means of advertising for plaintiffs, including with copycat complaints. See *id.* § 16.106.

13. The procedure under which lead counsel is appointed under the PSLRA is discussed in Part V.B.

meaning of complex causes of action or pleading standards. Moreover, it is potentially significant that there is an asymmetry between plaintiffs and defendants in class actions, since defendants' lawyers can internalize costs through fee agreements with their clients, while plaintiffs' lawyers may initially lack assurance of receiving compensation for their work. It may be that more legal outcomes favoring defendants as a class would be socially beneficial because, for example, current law induces defendants to take excessive precautionary measures. However, this result is more appropriately effectuated by a direct legislative or judicial policy judgment than as a byproduct of incentives in litigation.

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

On the other hand, intellectual property protection for complaints and other litigation documents involves the standard use-creation tradeoff that is central to the economic analysis of intellectual property.¹⁴ To the extent legal complaints can be regarded as lawmaking documents, this implicates 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 at the time, Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss"):¹⁵

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.

No copyright is claimed in the text of the statutes, regulations, and any excerpts from analysts' reports quoted within this work.

14. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11, 20–22 (2003).

15. Lerach recently left Milberg Weiss to start a separate firm named Lerach, Coughlin, Stoa & Robbins. See Timothy L. O'Brien, *Behind the Breakup of the Kings of Tort*, N.Y. TIMES (July 11, 2004), available at <http://www.nytimes.com/2004/07/11/business/yourmoney/11tort.html>.

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.¹⁶

Lerach's assertion of an intellectual property right to legal complaints was prompted by the alleged copying of his complaints by other attorneys competing with Milberg Weiss to be lead counsel in large class actions.¹⁷ Milberg Weiss reportedly sent about ten cease-and-desist letters to firms it says copied its complaints and threatened litigation on account of losing lead counsel status to copycat firms.¹⁸

Notwithstanding Lerach's claims, this Article shows 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. Nevertheless, Lerach's desperate attempt to assert rights suggests that he and others may be discouraged from producing information if they are unable to prevent competitors from free-riding on their efforts. Even if one rejects broad intellectual property right protection for complaints,¹⁹ some type of protection against free-riding by competing lawyers may be socially desirable for complaints that reflect originality or significant investigative investment.

While it may not be feasible to protect original expression in complaints and other litigation documents as intellectual property, narrower protection against

16. See, e.g., Consol. Comp. for Violation of the Sec. Laws, *In re Enron Securities Litig.*, Civil Action, United States District Court, Southern District of Texas, Houston Division (Action H-01-3634 (consolidated)) ("Enron complaint"). A search of the United States Copyright office's database of registered copyrights yielded twenty-four 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 INTELL. PROP. STRATEGIST, Dec., 2001, at http://securities.stanford.edu/news-archive/2001/20011200_Headline10_Staff.htm. A check of the Milberg Weiss website in January, 2004 and a recent check of the Lerach, Coughlin website suggests the practice has continued. See, e.g., Class Action Complaint for Violations of the Fed. Sec. Laws, United States District Court, Southern District of New York, in *S. Alaska Carpenters Pension Fund v. Bonlat Financing Corp.*, <http://www.milberg.com/cases/parmalat/complaint.pdf> (visited Jan. 16, 2004); Class Action Complaint for Violation of the Sec. Laws, United States District Court, Southern District of New York, *Roxwell Holdings, Ltd v. Yukos Oil Co.*, <http://www.lcsr.com/cases/yukos/complaint.pdf> (last visited July 30, 2004).

17. See Molly McDonough, *Hey! They Copied My Complaint*, 1 No.46 ABA J. E-REPORT 2, Dec. 6, 2002; Janet L. Conley, *Milberg Weiss Tries to Nail Class Action Imitators*, FULTON COUNTY DAILY REP. (Ga.), Nov. 20, 2002, <http://www.law.com>.

18. See Conley, *supra* note 17 (stating that Milberg Weiss lost lead counsel role in four shareholder suits).

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

free-riding by competing lawyers is feasible. Such narrower protection would allow lawyers to appropriate some of the returns from the creation of original complaints without the due process concerns associated with broader restrictions on their use. This protection is best provided by the procedures established for choosing and compensating lead counsel in class actions governed by the PSLRA and new Rule 23(g) of the Federal Rules of Civil Procedure.²⁰ 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 part of the determination of the 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, while this Article only proposes a solution to the narrow problem of free-riding by competing lawyers, we also want to stress the importance of considering the more general 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, and proposes a statutory provision to deal with the issues discussed in the Article. Part VI presents concluding remarks and implications of our analysis.

I. PRIVATE LAWMAKING

While individuals or groups of government employees ultimately produce public laws, it does not follow that government employees should be viewed as the primary "authors" of laws. Both courts and legislators rely on external groups, particularly lawyers,²¹ for the development and clarification of laws. Subpart A discusses legislation, while Subpart B discusses judicially created law.

20. FED. R. CIV. P. 23(g).

21. 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 concerns about the influence of interest groups,²² and that dominant state laws will be “locked in” by “network externalities.”²³

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.²⁴ Among other problems, legislators in other jurisdictions can copy successful innovations,²⁵ making it difficult for lawmakers to capitalize on gains from lawmaking. To be sure, the state’s residents may gain if their law creates an attractive business climate. But individual residents usually do not gain enough to justify the costs of organizing to secure an attractive business climate.²⁶

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.²⁷ NCCUSL is a quasi-public body appointed by state governors and funded in part by the states. NCCUSL has drafted and promulgated over 100

22. 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).

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

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

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

26. 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).

27. See, e.g., A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645 (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); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147 (2002); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); David V. Snyder, *Private Lawmaking*, 64 OHIO. ST. L. J. 371 (2003).

uniform acts, which are then sent to state legislatures for possible adoption.²⁸ The ALI, which is a private organization whose new members are chosen by existing members, jointly produced the Uniform Commercial Code with NCCUSL.

Bar associations, private firms, or individuals can also draft model laws. Lawmakers often adopt or copy privately produced and copyrighted model codes, reference works, or standards.²⁹ 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 nineteenth and early twentieth century.³⁰

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.³¹ 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.³² 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.³³ 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.³⁴

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's article explains, individuals attempted to codify the common law, but these attempts were usually unsuccessful, often because of lack of resources.³⁵ As discussed below in Part II, this problem can be addressed, among other ways, by providing for intellectual property rights in law.

28. See Ribstein & Kobayashi, *supra* note 27.

29. See *infra* Part II.

30. See Roscoe Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAWYER 1, 70-71 (1946) (also citing Wigmore's Pocket Code of Evidence, 2d ed., as an American example.).

31. See Larry E. Ribstein & 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 & Kobayashi, *supra* note 27, at 181-82.

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

33. See Ribstein & Kobayashi, *supra* note 27, at 182.

34. See Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261, 270-71 (1999); Ribstein & Kobayashi, *supra* note 27; Schwartz *supra* note 27, at 1147.

35. See Pound, *supra* note 30, at 64-69.

B. Judicially Created Law

Judges not only decide the individual cases before them but also create law.³⁶ Judicial opinions have precedential value,³⁷ and judgments may have preclusive effects on related cases.³⁸

As with legislation, privately produced law is important in the judicial process. In an adversarial system, litigants' lawyers significantly assist judges in creating law.³⁹ The importance of these private resources is increased by the caseload demands placed on appellate judges.⁴⁰ High caseloads have led appellate courts to economize court resources, which includes, for example, disposing of more appellate cases without publication in the Federal Reporter.⁴¹ Designating a large volume of cases as unpublished opinions allows the courts to reduce significantly the time spent on drafting these opinions. This frees up judicial time

36. See, e.g., POSNER, *supra* note 5, at 554; Posner, *supra* note 2.

37. See William M. Landes & 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. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc) (concluding the opposite).

38. See POSNER, *supra* note 5, at 594–95.

39. See generally Landes & Posner, *supra* note 37, at 259–63 (discussing literature on the private determination of public judicial outcomes).

40. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 693 (2001) (discussing dramatic increase in the caseload of the federal appeals courts). See also Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June, 2000, at 43–44 (noting that average Ninth Circuit judge wrote twenty binding precedent opinions and participated in sixty such opinions as a panel member). According to Kozinski and Reinhardt, 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." *Id.* 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.

41. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROC. 473 (2003) (discussing state and proposed federal rules); William T. Hangle, *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). Trial as well as appellate courts may attempt to economize in other ways. See *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004) (reversing dismissal by district court judge who adopted nearly verbatim a proposed opinion and order of the court written by appellees' attorney, and remanding with instruction that the district court engage in an independent judicial review of the appellant's claims).

to work on those opinions designated for publication.⁴² The tradeoff is that this reduces the number of opinions that can serve as precedent.⁴³

Given these caseload demands and the compromises they require, 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.⁴⁴ Legal documents produced during the course of private litigation can not only be critical to the outcome of a particular case but also are a potentially important source of general law. Complaints can state facts that contribute to the creation of precedent, formulate new common law causes of action and help clarify statutes. Thus, judicial opinions reflect input from complaints and other pleadings.

Cases are developed in pleadings other than the complaint, including answers, motions and briefs. However, the complaint has special importance, particularly in class actions. First, the complaint is the first document to fully set forth the basic facts and legal theories upon which the case is based, and show the relationship between these facts and theories. Other court documents may develop specific procedural and substantive aspects of the case, but the complaint is the document where lawyers first and most thoroughly lay out the whole case. This is especially important in complex cases involving many parties and legal theories, such as securities class actions.

Second, the complaint is significant precisely because it is the first document in the case. Because many certified class actions settle quickly,⁴⁵ the original complaint may be one of few publicly filed documents. Indeed, one important function of an elaborate and persuasive complaint is to induce the defendant to settle. Thus, a decrease in the amount of information contained in the original complaint can result in a significant decrease in the total amount of public information generated during a class action. Even if settlement precludes the creation of a binding legal precedent, the complaint survives as notice of feasible legal claims and theories.

42. Hangle, *supra* note 41, at 673 (noting argument that non-binding decisions are "correct . . . but are not written for the ages, or calculated to lay down principles for all cases."). See also Kozinski & Reinhardt, *supra* note 40, at 43–44; Hart, 266 F.3d at 1178–89.

43. Hangle, *supra* note 41, at 651–52 (noting trend of circuits to discourage and even prohibit citation to unpublished opinions and holdings).

44. Indeed, time-strapped courts often hear expert testimony on United States law by law professors despite the general rule against such testimony. See Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 325 (1992) (discussing prevalence of practice but concluding that, "with apologies to my moonlighting colleagues, is that this practice cannot be squared with sound federal judicial procedure"); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984) (noting blanket prohibition and arguing for exceptions).

45. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 200–01 (1987) (noting overincentives for settlement in class action and other cases in which lawyers are compensated on a contingent basis); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997) (noting near zero trial rate for certified mass tort class actions).

Third, the complaint's lawmaking function may arise from its role in the process of selecting lead plaintiffs and lead counsel in class actions. As indicated in the discussion of the copying of Lerach's complaints,⁴⁶ lawyers competing to be lead counsel may use the complaint to attract potential lead plaintiffs. Complaints may persuade potential lead plaintiffs that the case is a winner, that the lawyer or firm proffering the complaint is likely to be an effective litigator, or both.

The lawmaking benefits of legal complaints are exemplified in William Lerach's Enron complaint.⁴⁷ This 500-page complaint, which reportedly took "hundreds of hours" to prepare,⁴⁸ included a detailed recitation of alleged frauds at Enron. The complaint was designed in part to meet the challenge of strict pleading rules under the Private Securities Litigation Reform Act.⁴⁹ It was also artfully constructed to present 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.⁵⁰ The creative effort involved was comparable to that involved in drafting a work of fiction.⁵¹ The relevance of this creative work to lawmaking is indicated by the fact that many elements of the Enron complaint appeared in the federal district court's opinion denying most of defendants' motions to dismiss.⁵² Quotations from and detailed paraphrasing of the complaint comprised almost half of the court's 120-page opinion.⁵³ Even if this opinion ultimately is reversed or the case settles, this initial attempt to apply the securities laws to the Enron fraud is likely to have significant legal repercussions.

The creative effort and lawmaking benefit involved in litigation documents, however, often inure to the benefit of parties other than the one that produces the information. Information produced by one litigant can be appropriated by an adversary, by a co-defendant, or by subsequent litigants and other third parties, including through reliance on legal holdings or facts generated

46. See *supra* text accompanying note 17.

47. See *supra* note 16 and accompanying text.

48. See McDonough, *supra* note 17 (quoting lawyer representing Milberg Weiss in intellectual property litigation).

49. See *supra* note 11.

50. 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).

51. See Philip N. Meyer, "Desperate for Love": *Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721, 722 (1994) (comparing lawyer's presentation of a case in court to a work of narrative comparable to that of a novel or film). 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* (20th Century Fox 1982) (counsel's preparation of testimony of malpractice defendant). See also RICHARD A. POSNER, *Law and Literature Revisited*, in *OVERCOMING LAW* (1995) at 471-92 (discussing examples of law and legal reasoning contained in novels and films).

52. See *In re Enron Corp Secs., Derivative, and ERISA Litig.*, 235 F. Supp. 2d 549 (S. D. Tex. 2002).

53. *Id.*

by prior litigants.⁵⁴ As is generally the case when free-riders dissipate the rents from productive effort, the incentives to produce may be reduced.⁵⁵ Thus, unless litigants or their attorneys can reap the benefits of their efforts, they may under-produce such private lawmaking input.⁵⁶

Copying complaints can be particularly significant in the case of lawyers competing to be appointed lead counsel in class action cases.⁵⁷ Permitting counsel to freely appropriate legal documents in this situation may dissipate informational rents and reduce lawmaking efforts. Documents like Lerach's Enron complaint may be less likely in the future, unless lawyers can find some way to protect their work product.

Intellectual property rights in complaints should depend on what function complaints serve. First, assume that complaints are primarily important as litigation documents. Here, the importance of intellectual property rights turns on the probability of settlement. If a quick settlement is unlikely, it may not matter whether lawyers have a disincentive to elaborate their theories in the initial complaint. Class action lawyers could produce a minimally sufficient complaint at the outset, when the complaint can still be copied by lawyers competing to be lead counsel, and then flesh out the complaint after they are appointed lead counsel in order to survive a motion to dismiss or obtain class certification.⁵⁸ However, because the prospect of a quick settlement is often high, there is potential value in encouraging disclosure of facts and theories in the complaint.

54. See Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (David A. Anderson ed.) (1996). See also Xinya Hua & Kathryn Spier, *Information and Externalities in Sequential Litigation*, WORKING PAPER, NORTHWESTERN UNIVERSITY KELLOGG SCHOOL OF MANAGEMENT (2004) (presenting model of informational spillover effects in litigation), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556163.

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

56. See, e.g., LANDES & POSNER, *supra* note 14, 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 Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309, 359-64 (1981). But even if excessive resources are allocated to litigation generally, too few resources may be allocated to the joint production of precedents and findings of facts that would be useful to third parties.

57. See Conley, *supra* note 17 (citing copycat complaints as playing role in appointment of firm other than Milberg Weiss as lead counsel in shareholder suits against Baker Hughes, Inc, BroadVision, Critical Path, and Pilot Network Services Inc.).

58. See LANDES & POSNER, *supra* note 14, at 254-55 (noting similar incentive in the context of inventions to use secrecy, and the features of patent law designed to counter this incentive).

Second, assume the complaint is mainly a sales document. To the extent that the complaint sells the claim, intellectual property rights in complaints may encourage production of higher quality class actions. To the extent that the complaint sells the individual lawyer or firm, competing lawyers' ability to copy complaints may perversely affect the quality of representation, and therefore the prosecution of the claim.⁵⁹ Indeed, Milberg Weiss's intellectual property lawyer asserted that copycat firms were posting Milberg Weiss's complaints on their own websites in order to "defraud potential class members into thinking this is their work product and that they have the legal expertise to handle these kinds of cases."⁶⁰

The lack of intellectual property rights in complaints may produce an asymmetry between class action plaintiffs, where the absence of property rights is a potential problem prior to selection of lead counsel, and class action defendants, who can internalize costs and benefits by contracting with counsel from the outset. This may not affect the quantity of claims filed, but it may affect their quality, or the possibility that good claims are dismissed because they are poorly pleaded.⁶¹

The potential for underdeveloped complaints is related to the analogous problem concerning the underproduction of holdings, findings of fact, and other information contained in judgments. Unless sealed, these documents are generally not protected from appropriation by third parties.⁶² Accordingly, the parties' ability to limit third party use of judgments and holdings largely depends on whether they can avoid judgment through settlement.⁶³ While settlement may facilitate the low cost resolution of private disputes,⁶⁴ it also may limit the production of valuable legal precedents or require duplicative fact-finding efforts in later cases.⁶⁵ Similarly, arbitration, while reducing dispute-resolution costs, may also keep

59. See *supra* text accompanying note 17 (discussing this problem) and *infra* Part IV.B (discussing legal protection for reverse passing off).

60. See McDonough, *supra* note 17.

61. On the other hand, this potential asymmetry may serve to counterbalance the opposite asymmetry created by plaintiffs' greater ability than defendants to coordinate on litigation strategy outside the class action context. See Rubin & Bailey, *supra* note 7, and *infra* note 72.

62. See *infra* text accompanying note 183.

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

64. Thus, cases going to trial can be seen as inefficient "failures." See S. R. Gross & 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 54.

65. See Gillian K. Hadfield, *Where Have all the Trials Gone? Settlements, Non-Trial Adjudication and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, USC CLEO RES. PAPER No. C04-12 (2004) (presenting empirical evidence on falling trial rates); Hope V. Samborn, *The Vanishing Trial*, ABA J., Oct., 2002, at 24 (noting falling trial rate and its effect on precedent). See also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-86 (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).

valuable information off the public record or result in the underproduction of legal precedents.⁶⁶

Parties also have attempted to avoid judgments and holdings *ex post* through vacatur of the judgment conditioned on settlement.⁶⁷ Intellectual property right holders have used this procedure in order to avoid the future application of defensive non-mutual collateral estoppel.⁶⁸ But the courts have limited use of this mechanism. Under *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* (“*Bonner Mall*”),⁶⁹ federal courts can grant vacatur of an existing judgment only under exceptional circumstances.⁷⁰ There are also conflicting holdings with respect to whether vacatur prevents the precedential or preclusive use of the decision.⁷¹

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

66. See Kenneth S. Abraham & J. W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 366–67 (2002/2003) (discussing the adverse effects on legal development of the confidentiality and non-precedent-setting features of arbitration). See generally, Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558–62 (2003) (discussing factors relevant to choice between arbitration and litigation); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) (discussing arbitrators’ incentives to produce precedents).

67. See FED. R. CIV. P. 60(b). See generally Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Judith Resnik, *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).

68. See Resnik, *supra* note 67, at 1481 (noting that “[p]atent and copyright infringement have been the context for major developments in preclusion law”).

69. 513 U.S. 18, 29 (1994) (vacatur is now therefore an extraordinary remedy to be granted only in “exceptional circumstances”).

70. See *Aqua Marine Supply v. Aim Machining, Inc.*, 247 F.3d 1216, 1221 (Fed. Cir. 2001) (vacatur to prevent estoppel of future litigation on validity of patent not extraordinary circumstances); *Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 152 (2d Cir. 1998) (exceptional circumstances existed because vulnerability to future litigation if appeal was not pursued would prevent settlement); *Keller v. Mobil Corp.*, 55 F.3d 94, 100 (2d Cir. 1995) (exceptional circumstances existed because presence of sanction prevented settlement).

71. 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, 93–94 (1991) (citing J. MOORE & J. LUCAS, *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’d on other grounds*, 460 U.S. 1007 (1983) (issue preclusion applied despite vacatur).

incentive to seek vacatur through settlement to avoid the effects of collateral estoppel or other external effects. While repeat litigants may be able to internalize some of the effects of precedent,⁷² such litigants also have extra incentives to settle or arbitrate in order to protect against precedential use of the judgment in later cases.⁷³

The foregoing discussion 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

Part II 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 this protection is unavailable either for privately produced statutes or, more importantly for present purposes, for private works 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.⁷⁴ 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

72. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Paul H. Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977) (containing model of litigation in which private litigants' internalization of the future effects of a legal rule determines litigation decisions and the evolution of the law). The ability to internalize the external effects from a given case can be expanded through the involvement of interest groups. See, e.g., Rubin & Bailey, *supra* note 7, at 814-17 (discussing the Association of Trial Lawyers of America's influence on the evolution of tort law reflecting the long run interest of lawyers). However, the direct influence of interest groups on litigation outcomes is limited by standing and intervention rules. See, e.g., Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (interpreting restrictions on interest group standing as procedural device to prevent path manipulation of precedent). Similar limits apply to intervention. See, e.g., *U.S. Phillips v. Windmere Corp.* 971 F.2d 728 (Fed. Cir. 1992) (denying motion to intervene), *writ of cert. dismissed in Izumi v. U.S. Phillips, Corp.* 510 U.S. 27 (1993).

73. See Kobayashi, *supra* note 54, at 39 (noting the increased settlement range created by non-mutual collateral estoppel rules); Lederman, *supra* note 63, 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).

74. See Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 YALE J. ON REG. 139, 194-200 (2003) (advocating use of sui generis intellectual property protection for statutes).

statutes and judicial opinions as works for hire,⁷⁵ and Virginia claims copyright in the text of its statutes.⁷⁶

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."⁷⁷ 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*⁷⁸ that state judicial opinions cannot be copyrighted, reasoning that such protection would interfere with due process of 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."⁷⁹ For the same reasons, it is generally accepted that copyright also does not protect state statutes⁸⁰ or regulations.⁸¹

The preclusion of copyright for government works does not necessarily apply to privately produced works that are subsequently adopted as law by the state or federal government.⁸² 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

75. See Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81, 97-105 (2000).

76. *Id.* at 99 (citing VA. CODE ANN. § 9-77.8(A) (1998)).

77. 17 U.S.C. § 101. See also *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

78. 128 U.S. 244 (1888).

79. *Id.* at 253.

80. 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 & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

81. See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS, 247-48 (6th ed. 2001). *But see* *County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (holding that tax maps produced by local government were not unprotectable public documents).

82. 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. 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).

Financing Administration.⁸³ The court held that *Banks* 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.⁸⁴ Similarly, a publication containing valuation information for used vehicles did not lose its protection when referenced by state insurance statutes or regulations.⁸⁵ 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*.⁸⁶

Other courts, however, have given less weight to the need to provide incentives to create private laws. Thus, *Building Officials & Code Administration, v. Code Technology, Inc.*⁸⁷ 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,”⁸⁸ the court presumed that legislative adoption of the code caused forfeiture of the plaintiff’s copyright.

More recently, *Veeck v. Southern Building Code Congress International*⁸⁹ 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 as the building codes of Anna, Texas and Savoy, Texas.⁹⁰ SBCCI sued Veeck for copyright violations and breach of contract. The Fifth Circuit held en banc that, while SBCCI retained copyrights to its model code, the code text entered the public domain when adopted as law.

83. See *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997).

84. *Id.* at 518.

85. *CCC Info. Servs. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

86. See *Practice Mgmt.*, 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 Info. Servs.*, 44 F.3d at 74.

87. 628 F.2d 730 (1st Cir. 1980).

88. *Id.* at 736.

89. 293 F.3d 791 (5th Cir. 2002) (en banc).

90. Veeck copied the building codes from a copyrighted edition of SBCCI’s model code rather than posting copies of the actual codes obtained from public sources. See *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 241 F.3d 398, 401 (5th Cir. 2001). While in some towns the enacted codes differed from the one posted on Veeck’s website, a review of the record showed that “both Anna and Savoy adopted the precise version of the ‘model code’ posted by Veeck.” *Id.* at 412.

Because *Veck* 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.⁹¹ 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.⁹²

Although *Veck* 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 *Veck*.⁹³ But contractual protection only binds the contracting parties.⁹⁴ The court suggests that SBCCI adopt a value-added approach of bundling its product with other useful products and marketing.⁹⁵ 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 due process concerns 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 of model codes."⁹⁶

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

91. *Id.*

92. 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 Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980); 35 U.S.C. § 271d. *See also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (applying rule to copyright case); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (same).

93. 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 & Ribstein, *supra* note 34, at 266–70.

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

95. *See Veck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F. 3d 791, 806 (5th Cir 2002).

96. *See NIMMER & NIMMER, supra* note 86, § 5.06[C] at 5–60.

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.⁹⁷ This Article shows how procedural rules might provide an analogous type of informal protection in the absence of formal intellectual property rights.⁹⁸

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 law⁹⁹ 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.¹⁰⁰ 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 auctions the right to be lead counsel

97. See Ribstein, *Lawyers as Lawmakers*, *supra* note 1.

98. See *infra* Part V.

99. See *supra* Part I.B.

100. See, e.g., Young, *supra* note 19, at 2 (arguing intellectual property protection of class action complaints is inconsistent with the statutory scheme of the PSLRA). Copyright protection for complaints may be precluded if such protection is held to interfere with the statutory scheme of another federal law such as the PSLRA. See, e.g., *SmithKline Beecham Consumer Healthcare v. Watson Pharm., Inc.*, 211 F.3d 21, 27–28 (2d Cir. 2000) (noting that “where two laws are in conflict, courts should adopt the interpretation that preserves the principal purposes of each,” and holding that enforcement of copyright against generic drug manufacturer that copied copyrighted drug label would interfere with the statutory scheme set out in the Drug Price Competition and Patent Term Restoration Act of 1984 Section 101 (“Hatch-Waxman Amendments”) while not allowing enforcement of copyright in this instance would not undermine the federal copyright laws).

to the lowest bidder,¹⁰¹ 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,¹⁰² a public law model views litigation as having significant effects beyond the immediate lawsuit.¹⁰³ External effects in this situation are apparent, among other things, from conflicts among class action lawyers and classes.¹⁰⁴

Litigation documents are, however, arguably less like law than the model codes in *Veeck*.¹⁰⁵ 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 value¹⁰⁶ 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 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 of pleadings in other cases where they may be useful, as where they elucidate precedents or provide a basis for a collateral estoppel claim, or where the pleading was quoted in a court opinion.

101. See *infra* note 216 and accompanying text.

102. See *supra* text accompanying note 3.

103. One potential standard for copyright would be to distinguish cases based on the existence of such external effects. See Resnik, *supra* note 67, at 1476, 1487–1501 (examining the role of third party effects in cases involving vacatur).

104. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 295–97, 335–37 (2003); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000).

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

106. 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).

Moreover, no matter how long the copyright lasts, it does not cover 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,"¹⁰⁷ and not to compilations of facts and other "sweat of the brow" investments.¹⁰⁸ It is not clear how effectively this protects lawyers who prepare complaints from free-riding by competing lawyers on unprotected ideas, facts, statutes, and reports in complaints. Although lawyers competing to be lead counsel may face time constraints if prevented from copying complaints verbatim,¹⁰⁹ such constraints are unlikely to exist for lawyers who want to use these elements of the complaint in subsequent litigation.

The doctrine of merger further limits copyright protection.¹¹⁰ Copyright protects only original expression, and not ideas or facts,¹¹¹ thereby permitting the

107. See excerpt from Enron complaint, *supra* text accompanying note 16.

108. 17 U.S.C. § 103. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (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 *Matthew Bender & Co. v. West Publ'g 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 Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998) (page numbers contained in hard copy versions of legal reporter); *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g*, 999 F.2d 1436 (11th Cir. 1993) (en banc) (business listings). However, copyright protection does extend to the original selection and coordination of data. See, e.g., *Am. Dental Ass'n. v. Delta Dental Plans, Ass'n.* 126 F.3d 977 (7th Cir. 1997) (taxonomy of dental insurance billing codes was original and copyrightable); *CCC Info. Servs. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61 (2d Cir. 1994).

109. Under the PSLRA, the plaintiff that files the initial complaint is required, within twenty 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. § 78 u-(a)(3)(A)(i). Members of the purported class have sixty days from the publication of the notice to file a motion to serve as lead plaintiff. Within ninety 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. While a lawyer wishing to produce a verbatim copycat complaint would likely be able to manually retype the complaint within the time period allowed under the PSLRA, the additional time required will allow the original lawyer to extend his first mover advantage. However, it is not clear that use of these technological copy protection measures have 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, 521–23 (2002). If some elements of the complaint were protectable under copyright, the copycat lawyer could only strip out the unprotectable facts and ideas from the original complaint and then use these in the production of their own original complaint. This would make it more likely that any time constraints under the PSLRA would be binding, and would further lengthen any first mover advantage.

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

creation of new expressive works based on existing ideas.¹¹² The en banc panel in *Veck* held that statutory adoption of the SBCCI's model building code made the model code an unprotectable fact within the meaning of the merger doctrine.¹¹³ Applying this principle to a complaint, although the complaint may initially be a creative expression, a 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 can be copyrighted *ex ante*, at the time when the complaint is written, this expression merges *ex post* into the unprotected court ruling.¹¹⁴

Contract may be available to protect investments in information even without copyright, as with the content of commercial databases.¹¹⁵ 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 complaints that are costly to produce yet lack sufficient originality from free-riding.

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.

111. See 17 U.S.C. § 102(b) ("In 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) ("[The] 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.") (internal citation omitted).

112. See LANDES & POSNER, *supra* note 14, at 91–97.

113. See *Veck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 800–808 (5th Cir. 2002) (en banc).

114. See Michelle M. Burtis & Bruce H. Kobayashi, *Intellectual Property and Antitrust Limitations on Contract*, in DYNAMIC COMPETITION AND PUBLIC POLICY 239–40 (Jerry Ellig ed., 2001) (criticizing this *ex post* merger doctrine).

115. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); 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).

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

These rules accordingly provide protection 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, as Subparts A and B of this Part show, courts have limited the availability of these forms of relief for intellectual property-type claims.

In addition, this Part considers the protection of information through litigation rules such as the work product doctrine, the attorney client privilege, and the use of protective and confidentiality orders. While these rules serve to encourage litigants and their lawyers to produce legal information and theories, the first two generally encourage the production of negative information, and would not protect the content of complaints. Confidentiality and protective orders in theory could be used to protect the content of complaints, but the ability to use such devices has been limited by the courts. These Subparts, together with Parts I–III, show the potential perverse effects of such a lack of protection on the creation of litigation materials. 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 V.

A. Misappropriation

The common law misappropriation doctrine derives from the Supreme Court's decision in *International News Service v. Associated Press*.¹¹⁶ The case arose as a result of the International News Service's ("INS") appropriation of Associated Press' ("AP") stories during World War I.¹¹⁷ 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-copyrighable facts, AP could not prevent INS from free-riding through the

116. 248 U.S. 215 (1918).

117. The INS lifting activities apparently were confined to stories reporting on the war in Europe. See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 105 (1992). INS was owned by the Hearsts. Because of the Hearsts' 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. *Id.* at 105–06.

copyright laws. However, the Court created a quasi-property right in “hot news” that would apply to direct competitors for a limited time.

International News Service had only limited impact in the federal courts. Not only did the federal courts following *International News Service* construe the decision narrowly,¹¹⁸ but the federal common law ground of the decision was removed by *Erie Railroad Co. v. Tompkins*.¹¹⁹ While many states recognize a cause of action for misappropriation,¹²⁰ the grounds for such an action are limited.¹²¹ In addition, some states do not recognize the misappropriation cause of action,¹²² and courts in those jurisdictions often hold that the cause of action fails as a matter of fact.¹²³

118. See *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *Millinery Creators' Guild, Inc. v. FTC*, 109 F.2d 175 (2d Cir.1940), *aff'd*, 312 U.S. 469 (1941); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929). ; 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 *International News Service*).

119. 304 U.S. 64 (1938).

120. See *Bd. of Trade v. Dow Jones & Co.*, 456 N.E. 2d 84 (Ill. 1983) (successful action under misappropriation cause of action under Illinois common law); *Nat'l Broad. Co. v. Nance*, 506 S.W.2d 483, 484 (Mo. Ct. App. 1974) (cause of action exists under Missouri law and is broader than set out in *International News Service*); *Columbia Broad. Sys., Inc. v. Melody Recordings, Inc.*, 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975); *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 492 (1950); *Carolina Aniline & Extract Co. v. Ray*, 20 S.E.2d 59 (N.C. 1942); *Gilmore v. Sammons*, 269 S.W. 861, 863 (Tex. Civ. App. 1925) (cause of action exists under Texas common law).

121. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38, comment b (1995) (noting that “[t]he better approach, and the one most likely to achieve an appropriate balance between the competing interests, does not recognize a residual common law tort of misappropriation”).

122. See *Nagle Induss., 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 Publ'ns v. New Eng. Newspaper Publ'g 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, 739–40 (2001) (noting that the Massachusetts courts have not adopted the 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 Co. v. Wortman*, 486 U.S. 717, 730–34 (1988) (forum state's misconstruction of other states' statutes not a violation of full faith and credit or due process clauses unless it contradicts law that is clearly established and has been brought to the court's attention). See also Bruce H. Kobayashi & Larry E. Ribstein, *Contract and Jurisdiction, in THE FALL AND RISE OF FREEDOM OF CONTRACT* 329–31 (F. H. Buckley ed., 1999) (discussing role of choice of jurisdiction in ability to contract for underlying law).

123. See 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, 452–61 (1996) (analyzing cases under

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."¹²⁴ 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 Ass'n. v. Motorola*,¹²⁵ 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.¹²⁶ 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.¹²⁷

A state misappropriation claim for the copying of a complaint by a lawyer competing to be appointed lead counsel might survive preemption 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.¹²⁸ 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.¹²⁹

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.¹³⁰ A court applying the former interpretation of the test might deny relief to a firm that reached the level of dominance achieved by Milberg Weiss on the ground that such a firm would produce complaints even without protection from

Texas law); *United States Golf Ass'n v. St. Andrews Syss., Data-Max, Inc.*, 749 F.2d 1028 (3d Cir. 1984) (misappropriation claim fails due to absence of direct competition).

124. 17 U.S.C. § 301(a).

125. 105 F.3d 841 (2d Cir. 1997). *See also* Posner, *supra* note 123, at 631-32, 641 (discussing extra element test).

126. *Nat'l Basketball Ass'n*, 105 F.3d at 845.

127. *Id.* *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).

128. *See supra* text accompanying notes 54-57.

129. *See supra* note 109 and accompanying text. (noting twenty day maximum time period for motion to be appointed lead plaintiff, and ninety day maximum time period for the court to appoint lead plaintiff).

130. *See* Posner, *supra* note 123, at 636-37.

misappropriation, whether or not such protection would result in more or higher-quality complaints.¹³¹

Assuming some action for misappropriation would be viable notwithstanding preemption,¹³² 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.¹³³ 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.¹³⁴ Moreover, once lead counsel has been appointed, there is no longer a potential for free-riding by direct competitors. The misappropriation claim 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.¹³⁵ 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.¹³⁶

131. See Mukesh Bajaj, et al., *Securities Class Action Settlements: An Empirical Analysis* (showing Milberg Weiss with thirty-one percent of all class actions from 1988 to 1999, the most of any firm, and a sixty-one percent increase in the median settlement in cases when Milberg Weiss was the class counsel), at http://securities.stanford.edu/research/studies/20001116_SSRN_bajaj.pdf. See also *In re Cavanaugh*, 306 F.3d 726, 734–35 (9th Cir. 2002) (noting Bajaj 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”). As noted above, Milberg Weiss recently split into two firms. See O’Brien, *supra* note 15. It remains to be seen if either of the two entities that emerged from the breakup will achieve the level of dominance Milberg Weiss achieved prior to the breakup.

132. State protection under misappropriation law can also be subject to preemption under the Supremacy Clause to the extent it is held to conflict with the statutory scheme of the PSLRA. See *supra* text accompanying note 97 and *infra* text accompanying notes 206–19.

133. 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, H.R. 3261, 108th Cong. (2003).

134. See Epstein, *supra* note 117, at 98 (noting that in the *International News Service* case, the use of news stories by direct competitors as leads to obtain news by its own independent investigation was not challenged).

135. See *supra* text accompanying note 86.

136. Posner, *supra* note 123, 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 *International News Service* case arguing that this problem is best left to the legislature. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 263–67 (1918) (Brandeis, J., dissenting).

B. Lanham Act Protection Against Misattribution

The misappropriation action addresses appropriation of the content of Lerach's complaints, which enables lawyers to cheaply and easily participate in the competition for lead plaintiff status. A related but separate problem is the lawyers' passing off complaints drafted by Lerach as their own—that is, "reverse passing off."¹³⁷ 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.¹³⁸

To see the difference between the two types of legal protection, consider the facts in *International News Service*. 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.¹³⁹ 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 who has engaged in factual and legal research in the process of drafting the complaint over the lawyer who has merely copied the complaint and passed it off as his own. Allowing this form of misattribution could lead to lower-quality lawyers as class counsel. 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.¹⁴⁰ 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

137. See Lori H. Freedman, *Reverse Passing Off: A Great Deal of Confusion*, 83 TRADEMARK REP. 305 (1993); 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 (2002).

138. See Posner, *supra* note 123.

139. See *Int'l News Serv.*, 248 U.S. at 247–48 (Holmes, J., dissenting).

140. See the discussion *supra* in note 136.

disbarment.¹⁴¹ 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 Lerach’s original complaints off as their own, and therefore would facilitate an informed choice of counsel by lead plaintiff candidates.¹⁴²

Despite the arguable need for state unfair competition protection against reverse passing off, federal law would preempt any state law protection from copying. Such preemption could come under the Supreme Court’s general analysis prohibiting states from extending protection beyond what the federal intellectual property laws permit.¹⁴³ State law also could be preempted by the field-preemption provision of the copyright statute.¹⁴⁴

Thus, the only viable misattribution claim may be one under federal law.¹⁴⁵ Section 43(a) of the Lanham Act arguably addresses the misattribution problem by providing a federal cause of action for “false designation of origin.”¹⁴⁶ Congress intended this provision to codify existing 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.¹⁴⁷ In both cases, the good is resold by someone other than the trademark owner after the original trademark has been removed or

141. This procedure is discussed in *infra* Part V.A.

142. The case for attribution may be overstated under the procedures for appointment of lead plaintiff under the PSLRA. The PSLRA favors appointment of the person or group of persons with the largest financial interest in the relief sought by the class. In many cases, this will be a large financial institution or a large institutional investor. Thus, the “consumers” in such cases are likely to be repeat players, and reputational mechanisms may mitigate the informational problems that would otherwise be solved by a right of attribution.

143. See *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); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compcorp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (state unfair competition laws prohibiting copying of goods not protected by federal statutory protection preempted).

144. See *supra* text accompanying note 124. For cases preempting reverse passing off claims under state common law, see *FASA Corp. v. Playmates Toys, Inc.*, 869 F. Supp. 1334 (N.D. Ill. 1994); *Waldman Publ’g Corp. v. Landoll, Inc.*, 848 F. Supp. 498 (S.D.N.Y. 1994). *But see Tracy v. Skate Key*, 697 F. Supp. 748 (S.D.N.Y. 1988) (holding against preemption).

145. See 17 U.S.C. § 301(b)(3) (“nothing contained in [Title 17] annuls or limits any rights or remedies under any Federal law.”). See also *Waldman Publ’g Corp. v. Landoll, Inc.* 43 F.3d 775 (2d Cir. 1994) (differentiating between equivalent state law and Lanham Act claims for preemption purposes).

146. 15 U.S.C. § 1125(a).

147. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 30 (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).

obliterated. Express reverse passing off occurs when the seller re-brands 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,¹⁴⁸ or where the “copied” work is substantially similar to the original work.¹⁴⁹ Preventing the unaccredited copying of complaints serves the traditional functions of the Lanham Act by “reduc[ing] 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.”¹⁵⁰

Copyright law does not provide an adequate right of attribution.¹⁵¹ Thus, reverse passing off 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴

The Supreme Court recently clarified the preemption of Lanham Act claims in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,¹⁵⁵ 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 the 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

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

149. See *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775.

150. See *Dastar*, 539 U.S. at 34 (citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163–64 (1995)). See also William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 270 (1987) (general economic analysis of trademark law).

151. The author’s right of attribution is not enumerated in 17 U.S.C. § 106, and has not been enforced by the courts. See *Wolfe v. United Artists Corp.*, 583 F. Supp. 52, 55–56 (E.D. Pa. 1983); *Stepdesign Inc. v. Research Media, Inc.*, 442 F. Supp. 32, 33 (S.D.N.Y. 1977); Robert L. Gordon, *Giving the Devil its Due: Actors’ and Performers’ Right to Receive Attribution for Cinematic Roles*, 4 CARDOZO ARTS & ENT. J. 299, 306–07 (1985); Kwall, *supra* note 137, at 995–1003.

152. 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 137, at 1014–19 (discussing relationship between Lanham Act and copyright claims).

153. 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.*, No. 99 C 7105, 2000 WL 688946 (N.D. Ill. May 24, 2000) (holding that plaintiff did not show extra element of affirmative misrepresentation about the origin of the work). See also Kwall, *supra* note 137, at 1017–19.

154. See *supra* note 145.

155. 539 U.S. 23 (2003).

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.¹⁵⁶ The Court reasoned that such an interpretation would cause the Lanham Act to “conflict with the law of copyright, which addresses that subject specifically.”¹⁵⁷ Because Dastar 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),¹⁵⁸ it, and not the original creator, was the “origin” of the “goods” in question.¹⁵⁹ 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,”¹⁶⁰ and held that the Lanham Act “does not exist to reward manufacturers for their innovation in creating a particular device”¹⁶¹ 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.¹⁶²

Dastar creates obvious problems for Lerach’s potential Lanham Act claim. Under the Court’s analysis, Lerach 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 copyright,¹⁶³ the lawyer who

156. The Court’s analysis in *Dastar* would also seem to prevent the cause of action suggested by Justice Holmes in *International News Service*, in which the consumer interest was in the product and not the producer of the product. The *Dastar* Court noted that:

[T]he consumer who 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, 539 U.S. at 32–33.

157. *Id.*

158. 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 25–27.

159. *Id.* at 31–32. Indeed, the Court notes that if Dastar has copied one of the videotapes produced under Fox’s reacquired television rights, the Lanham Act claim would “undoubtedly be sustained.” *Id.* at 31.

160. *Id.* at 33 (quoting *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001)).

161. *Id.*

162. See Posner, *supra* note 123, at 639. Thus, if Milberg Weiss wanted to prevent the copying of its complaints, whether or not attributed, it must do so through the copyright laws and not the Lanham Act.

163. Even if copyright law prevented the lifting of complaints from Milberg Weiss’s 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*, copyright law would not even protect copying from the Milberg Weiss website, and by the Court’s reasoning in

copies Lerach's publicly filed complaint, and not Lerach, is the origin of the copycat complaint. As the origin of the copycat complaint, the copycat lawyer is free, under *Dastar*, 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 doctrine 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 and theories. However, none of these rules can be extended to the protection of class action complaints from appropriation by *competing lawyers*. Thus, existing rules "orphan" one category of information that arguably deserves intellectual property protection. Part V shows that another mechanism—rules regarding the selection of lead counsel—can help 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.¹⁶⁴ 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.¹⁶⁵ 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,¹⁶⁶ and to the under-production of new information.¹⁶⁷

Dastar, neither would the Lanham Act. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc).

164. 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* 1004–06 (2d. ed. 1997) (noting the predominance of property rule treatment of patents); ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 521–23 (3d ed. 2003) (discussing operation of copyright law as property rule with limited liability rule exceptions).

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

166. *See* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 *J. LEGAL STUD.* 435 (1994).

167. *See generally* Luke M. Froeb & Bruce H. Kobayashi, *Naïve, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 *J.L. ECON. & ORG.* 257 (1996).

This potential for under-production of some types of information led to legal development of limited intellectual property-like protections against compelled disclosure under the attorney-client privilege and work product doctrine.¹⁶⁸ Thus, the Court in *Hickman v. Taylor* 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 law suit 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 on wits borrowed from the adversary.¹⁶⁹

Two primary economic analyses apply an intellectual property framework to the work product doctrine. The first analogizes work product protection to copyright protection.¹⁷⁰ Under this theory, the mental impressions and theories of the lawyer are protected, but mere facts are not.¹⁷¹ 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.¹⁷² The joint production problem results from the fact that any investigation is likely to jointly produce both positive information 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 of facts. With respect to the second theory, limiting the protection to negative information does not protect the complaint-drafter from free-riding by competing lawyers, as distinguished from adversaries.

168. See Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990); Easterbrook, *supra* note 56.

169. 329 U.S. 495, 516 (1947).

170. See Allen et al., *supra* note 168, at 387-88; Easterbrook, *supra* note 56, at 356-64 (criticizing the protection of facts in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *Hickman*, 329 U.S. 495).

171. See *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.

172. Allen et al., *supra* note 168, at 385.

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. 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 administration of justice.”¹⁷³ 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.¹⁷⁴ The privilege also reduces perjury by channeling clients to affirmative defenses instead of false denials.¹⁷⁵

The costs of the privilege include those borne by the adversary and the courts in discovering and reproducing information the attorney already has,¹⁷⁶ and those from successful suppression of the information.¹⁷⁷ Nevertheless, courts have broadly protected attorney-client communications,¹⁷⁸ and have emphasized the benefits of promoting full and frank communication over the costs of protecting the information.¹⁷⁹

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 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 in order to encourage client disclosures, courts may provide for at least limited protection against competitors’ use of class action complaints in order to encourage their creation *ex ante*.

3. *Protective and Confidentiality Orders*

Litigation information, including complaints, can be protected from third parties through protective orders and confidentiality agreements.¹⁸⁰ Just as the attorney-client privilege improves the litigation process by encouraging lawyer-

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

174. *See* Allen et al., *supra* note 168, at 366–67.

175. *Id.*

176. *Id.* at 360.

177. *See* Kaplow & Shavell, *supra* note 165.

178. *See generally* Allen et al., *supra* note 168, at 363–69 (describing positive theory of attorney-client privilege).

179. *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (upholding privilege where the client had killed himself).

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

client communications, protective orders can encourage the flow of information between litigants.¹⁸¹ This can promote settlement of the current case, increase the accuracy of the litigation process, and reduce legal error.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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*¹⁸⁵ 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.¹⁸⁶ Two states have enacted statutes or promulgated rules that severely restrict the use of protective orders, and many others have considered similar legislation.¹⁸⁷

181. Miller, *supra* note 180.

182. See *supra* text accompanying notes 176-177.

183. 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. Am. Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (same). *But see* Miller, *supra* note 180, at 431-32 (criticizing limitations on protective orders in the context of liberal discovery).

184. See *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984) (newspapers entitled to special litigation committee report prepared under attorney client privilege when report admitted into evidence).

185. 759 F.2d 1568 (11th Cir. 1985).

186. 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*, 960 F.2d 1013 (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 Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). See generally Resnik, *supra* note 67.

187. See Miller, *supra* note 180, at 443 (listing enacted and proposed state statutes and rules). In 1990, 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. P. 76a. See also Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991) (discussing rule).

Protective orders would not, in any event, be a viable way to protect a *publicly filed* complaint in a federal securities class action against disclosure. 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 law 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 from outside 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 and compensating lead class counsel. Until recently, courts and commentators provided little guidance on this issue.¹⁸⁸ Subpart A provides a theoretical perspective by analyzing the nature of competition to be class counsel. Subpart B applies this analysis to the provisions under the Private Securities Litigation Reform Act for lead plaintiff control of the appointment of counsel in securities class actions. Subpart C examines non-PSLRA actions and new guidelines under Rule 23(g) of the Federal Rules of Civil Procedure. Subpart D proposes a statutory mechanism for solving the problem of property rights in class action complaints.

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 takeover auctions 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

188. See Fisch, *supra* note 9, at 656 (stating that most courts appointed the first firm to file).

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.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ Fee-splitting between lawyers in different firms once was strictly regulated, or even prohibited.¹⁹² Limiting cross-

189. See generally Lucian Arye Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Peter Cramton & Alan Schwartz, *Using Auction Theory to Inform Takeover Regulation*, 7 J.L. ECON. & ORG. 27 (1991); 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. LEGAL STUD. 165 (1988).

190. See *supra* text accompanying note 51 (discussing analogy between legal complaint and literary narrative).

191. See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2002).

192. See Alistair B. Dawson & Mo Taherzadeh, *Regulating Referral Fees: An Evolutionary Process*, 66 TEX. B.J. 982, 982–83 (2003) (listing three states, Colorado, Hawaii, and Wyoming, as having effectively banned referral fees). See also CALIF. RULES OF PROF'L CONDUCT R. 2-200 (1992) (allowing fee splitting between lawyers in different firms, but prohibiting pure referral fees).

firm payments would have the effect of inhibiting such specialization. On the other hand, the regulation of such cross firm payments has relaxed in recent years.¹⁹³

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 him 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.¹⁹⁴ Even courts may be shortsighted in this respect.¹⁹⁵

A strong intellectual property right in complaints akin to copyright could encourage courts to appoint complaint-authors as lead counsel in order to be able to use their complaints. To be sure, the best complaint-drafters are not necessarily the best prosecutors of the claim. But rules that deny authorship rights, while perhaps picking the best prosecutor for the particular case, could have perverse effects from the broader social perspective because they would not provide adequate *ex ante* incentives to prepare efficient complaints.¹⁹⁶ The absence of such incentives may have helped produce a decline in both meritorious and non-meritorious complaints after the PSLRA raised the costs of filing securities class action complaints.¹⁹⁷

193. See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2002). See also Dawson & Taherzadeh, *supra* note 192, at 982–83 (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).

194. *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).

195. See *In re Cavanaugh*, 306 F.3d 726, 734–35 (9th Cir. 2002) (criticizing district court for choosing low fee attorney over Milberg Weiss).

196. John Coffee has made a similar point almost twenty 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 (1985). See also Guy Halftack, *The Class Action as a Financial Call Option*, HARVARD JOHN M. OLIN DISCUSSION PAPER SERIES No. 466 (Mar. 2004) (distinguishing incentives facing class action lawyers prior to and after appointment of lead counsel), at http://www.law.harvard.edu/programs/olin_center.

197. See Stephen J. Choi, *The Evidence on Securities Class Actions*, U.C. BERKELEY PUBLIC LAW RESEARCH PAPER No. 528145 at 40 (Apr. 7, 2004) (reviewing evidence of the effect of the PSLRA and noting that after the PSLRA plaintiffs' attorneys face higher costs and risks from investigating where there is no earnings restatement or other hard indicia of fraud prior to suit), at http://papers.ssrn.com/paper.taf?abstract_id=528145.

The problem arguably may be avoided by the formation of law firms that combine complaint-drafting and litigation talents and resources.¹⁹⁸ 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.¹⁹⁹ 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 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 need for efficient prosecution of the immediate case, and for adequate law-creation incentives. The following Parts 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.²⁰⁰ 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."²⁰¹ One of the principal legislative purposes of the lead plaintiff provisions

198. Firms also may associate in various forms in connection with specific cases or groups of cases. See *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 284 F. Supp. 2d 204 (D. Mass. 2003) (holding that consortium of law firms formed to jointly undertake prosecution and financing of tobacco litigation was not a partnership for purposes of jurisdiction).

199. Indeed, Milberg Weiss has recently split into two separate law firms in part because the firm had become "too large to administer." Sue Reisinger, *Milberg Weiss Breakup Delayed*, N.Y. LAW., Dec. 15, 2003, (reporting on breakup of the firm), <http://www.nylawyer.com/news/03/12/121503c.html>; see also O'Brien, *supra* note 15 (same, noting other reasons for breakup). Lerach's new firm, Lerach, Coughlin recently merged with a fifteen attorney New York firm. See Michael Kinsman, *San Diego-Based Securities Fraud Law Practice to Merge with New York Firm*, SAN JOSE MERCURY NEWS, June 11, 2004 (reporting on merger and expressing doubt that breakup was about firm size). Prior to the breakup, Milberg Weiss had 225 attorneys. The breakup and subsequent merger resulted in Lerach's new firm having 140 attorneys. *Id.*

200. 15 U.S.C. § 78u-4(a)(3). See also Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 186-96 (2001) (discussing how recent changes in the regulation of securities class actions have led to the success of large firms such as Milberg Weiss).

201. See *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (citing 15 U.S.C. § 78u-4(a)(3)).

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.²⁰²

More specifically, the Act provides that the court appoint as lead plaintiff the “most adequate plaintiff,” which the court rebuttably presumes to be:

[T]he 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.²⁰³

The court-appointed lead plaintiff would then, “subject to the approval of the court, select and retain counsel to represent the class.”²⁰⁴

Contrary to its initial intent, the appointment of the lead plaintiff has 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 class.²⁰⁵ 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, Inc.*²⁰⁶ The original complaint was filed by Milberg Weiss on behalf of plaintiff Andrew J. Powers.²⁰⁷ “Within days” this was followed by “numerous” other complaints that copied the original complaint “essentially verbatim.”²⁰⁸ 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 & Barroway as co-lead counsel, and Bernstein, Liebhard & Lifshiz, and Scott & Scott and Cohen, Milstein,

202. *Razorfish*, 143 F. Supp. 2d at 308–09.

203. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

204. *Id.* U.S.C. § 78u-4(a)(3)(B)(v).

205. See Jill E. Fisch, *Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROB. 53 at 65–79 (2001).

206. 143 F. Supp. 2d. 304 (S.D.N.Y. 2001).

207. *Id.* at 306 n.1.

208. *Id.* at 306. The court obviously took a somewhat dim view of the copycat complaints, noting that “[o]ne can only wonder whether the edicts of Rule 11, Fed. R. Civ. P. were followed in the investigation and drafting of these complaints.” *Id.*

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 relatively 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 plaintiff²⁰⁹ and Milberg Weiss and Schiffrin & Barroway as lead counsel.²¹⁰ 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.²¹¹ 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 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.²¹²

Razorfish's procedure for appointment of lead plaintiff is at least partially 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—itsself 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.²¹³ 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 Fahnstock'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.

209. *Id.*

210. *Id.*

211. 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. *Id.* at 308.

212. *Id.* at 311.

213. *Id.* at 311–12 (noting this information emerged at oral argument).

On the other hand, the case suggests a potential problem in light of 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's complaint.²¹⁴ Even if Fahnestock ultimately discovered the identity of 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.²¹⁵ 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 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 aggregation²¹⁶ or the use of auctions²¹⁷ as inconsistent

214. Schiffrin & Barroway was one of the firms reported to have received a cease and desist letter from Milberg Weiss relating to the copying of Lerach's complaints. See Conley, *supra* note 17; McDonough, *supra* note 17.

215. See generally Miller, *supra* note 45 (discussing *ex post* conflicts between lawyer and client).

216. See Fisch, *supra* note 205, at 69–79 (discussing cases on aggregation under the PSLRA). Whether or not aggregation is allowed under the PSLRA has 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 v. Eagle Bldg Tech.*, 209 F.R.D. 499 (S.D. Fla. 2002) (allowing aggregation).

217. See Fisch, *supra* note 205, at 91–95 (discussing use of auctions under the PSLRA and arguing their use is not consistent with 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 California Micro Devices Securities Litigation*, 168 F.R.D. 257 (N.D. Cal. 1996); *In re Wells Fargo Securities Litigation*, 157 F.R.D. 467 (N.D. Cal. 1994); *In re Oracle Securities Litigation*, 132 F.R.D. 538 (N.D. Cal. 1990). Post-PSLRA auction cases include: *In re Quintus Securities Litigation*, 201 F.R.D. 475 (N.D. Cal. 2001); *In re Commtouch Software Ltd. Securities Litigation*, No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. 2001); *In re Comdisco Securities Litigation*, 141 F. Supp. 2d 951 (N.D. Ill. 2001); *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 Network Assocs. Inc. Securities Litigation*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999); *Sherleigh Associates 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 Cendant Corp. Litigation*, 182 F.R.D. 144 (D. N.J. 1998). For critical discussions of such auctions, see Lucian Arye Bebchuk, *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); Fisch, *supra* note 9; Randall S. Thomas & Robert G. Hansen, *Auctioning Class*

with the PSLRA. In such cases, authorship may count for even less than under *Razorfish*. In particular, permitting aggregation may encourage copycat lawyers to use the notice requirement for securities class actions to, in effect, advertise for plaintiffs with copycat complaints.²¹⁸ 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.²¹⁹ In other words, the fact of authorship may not be a circumstance that permits the court to reject the lead plaintiff's choice. To be sure, rejecting aggregation would eliminate a means of using copycat complaints to solicit plaintiffs. Institutional shareholders are more likely to use quality-based selection procedures, and therefore to care who wrote the complaint.²²⁰ However, a copycat lawyer may be able to solicit a large individual shareholder as lead plaintiff. Courts might reduce that likelihood by allowing an institutional investor to rebut the presumption that the person or entity who has the largest financial interest should serve as lead plaintiff.²²¹ But even preferring institutional shareholders is not a panacea, since such a plaintiff may not be available, and an institutional shareholder may choose a copycat lawyer based on cost or other considerations.

Action and Derivative Lawsuits: A Critical Analysis, 87 NW. U. L. REV. 423 (1993) (same). See also *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689 (2001). But see Charles H. Gray, *An Economic Analysis of the Private Securities Litigation Reform Act: Auctions as an Efficient Alternative to Judicial Intervention*, 44 WM. & 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); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (analyzing and recommending use of auctions); James L. Tuxbury, *A Case for Competitive Bidding for Lead Counsel in Securities Class Actions*, 2003 COLUM. BUS. L. REV. 285 (2003) (suggesting that auctions be used in some cases).

218. See *supra* note 12.

219. See *In re Cavanaugh*, 306 F.3d 726, 732–33 (9th Cir. 2002) (“[T]he 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.”).

220. Thus, Milberg Weiss was able to recruit the University of California as a lead plaintiff in the Enron litigation, despite charging higher fees, by touting its resources and sophistication. See BLOOMENTHAL & WOLFF, *supra* note 12, § 16.109.20.

221. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa) (allowing rebuttal where presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class”).

C. Lead Counsel Appointment Under New Rule 23(g).

Problems of appropriation similar to those under the PSLRA may arise in non-securities class action cases. Prior to December 2003, Rule 23 of the Federal Rules of Civil Procedure did not explicitly address the selection or responsibilities of class counsel. Rather, the selection of class counsel in non-securities class actions was 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.²²² Thus, the appointment of class counsel in non-securities cases was 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.

Jill Fisch suggests that the lead plaintiff model can usefully extend to some non-securities cases.²²³ For example, in antitrust-based price-fixing class actions involving direct purchasers or other sophisticated repeat buyers, an appropriate lead plaintiff with a large financial interest in the relief sought by the class and an ability to exercise effective oversight over class counsel is likely to exist. The model may also be applicable to shareholder derivative litigation under state law.²²⁴ However, an appropriate lead plaintiff may not exist in other cases, such as consumer antitrust class actions, mass torts, or consumer fraud cases. Thus, the optimal approach to appointment of lead counsel can depend upon the nature of the claims and relief sought, and upon the attributes of the members of the class.

The 2003 revisions to the Federal Rules of Civil Procedure²²⁵ 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.²²⁶ The process through which class counsel was selected prior to the 2003 amendments evolved over time. Firms that filed the initial complaints along with firms having specific relationships with individual plaintiffs would attempt to cooperatively select lead-counsel and allocate workload and fees.²²⁷ However, this system led to disputes over the allocation of workload and fees, which in turn led to the active supervision of this process by the district courts. Under district court supervision,

222. 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).

223. See Fisch, *supra* note 9, at 721–27 (presenting arguments for extending the lead plaintiff model to non-securities cases).

224. *Id.* See also Elliott J. Weiss and Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, VAND. L. REV. (forthcoming 2004) (suggesting use of lead plaintiff model in shareholder class actions under state law), available at http://papers.ssrn.com/paper.taf?abstract_id=554761.

225. FED. R. CIV. P. 23(g), effective December 1, 2003.

226. 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>.

227. See Fisch, *supra* note 9, at 654.

appointment of class counsel in non-securities cases varied according to the nature of the case, with the courts appointing smaller groups of lawyers or even single firms in common fund cases, and larger groups in mass tort cases.²²⁸

In an attempt to codify and follow the collective practices of the district courts, 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 rule 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."²²⁹ The court also "may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs."²³⁰

Rule 23(g) at least frees courts to consider the importance of authorship in appointing lead counsel and in the fee structure 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.²³¹ Thus, where there are multiple applicants for the position of class counsel, Rule 23(g) leaves the court free to appoint the copycat lawyer, and to make such an appointment through the use of an auction.

D. A Proposed Solution

This Article has shown that, in order to encourage investment in the production of class action complaints, courts should take authorship of the complaint into account when appointing lead counsel. This approach is best effectuated by a new rule clarifying the rights of the complaint author rather than by leaving it to the discretion of the court, as under existing Rule 23(g), or to the lead plaintiff, as under the PSLRA. Such a rule is necessary to clarify statutory intent to create incentives for complaint authorship rather than simply to let the court decide who can best manage the litigation. The rule can be promulgated as an amendment to Rule 23 that would apply to all class actions, as part of a statute amending the procedures for appointment of class counsel under the PSLRA, or both.²³²

228. *Id.* at 655.

229. FED. R. CIV. P. 23(g)(2)(B).

230. *See* FED. R. CIV. P. 23(g)(1)(C)(iii). Contrast the Ninth Circuit's holding in *Cavanaugh*, 306 F.3d 726, 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.

231. *See Report of the Judicial Conference, supra* note 222. Cases in which auctions have been used to appoint the lead counsel in non-securities cases include: *In re Amino Acid Lysine Antitrust Litigation*, 918 F. Supp. 1190 (N.D. Ill. 1996), and *In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71 (S.D.N.Y. 2000).

232. A similar rule can be applied to the consolidation of federal class actions under the multidistrict litigation statute, 28 U.S.C. § 1407(a). *See* Richard L. Marcus,

Instead of requiring or presuming that the complaint author be appointed lead or co-lead counsel, the new rule could reward complaint authorship through allocation of the fee. The rule should specify that the court “shall” order that the attorney or firm who has authored a substantial portion of the complaint be entitled to receive up to a stated amount of the fee ultimately awarded in the case. This maximum amount could be set as a straight percentage of the total recovery, perhaps ten to fifteen percent. Alternatively, the amount could be determined by the lodestar method, where the fee is determined by multiplying reasonable hours worked by a reasonable rate, possibly also adjusted by a multiplier to reflect risk or extraordinary effort by the attorney. This method may be superior to a percentage fee when the marginal value of the complaint correlates with hours worked on, for example, investigation. Where the value of the complaint is not highly correlated with hours worked, as where the value lies in an original legal theory, a straight percentage may be preferable.²³³

The proposed rule would permit unbundling of expertise and resources for complaint-writing from the ability to try the case. This, in turn, would reduce the need for large, internalized firms such as Lerach’s that are capable of both tasks. Instead, boutique firms could specialize in complaint writing. Opening the door to smaller firms has the potential of significantly enlarging the market for complaints and bringing more ideas concerning legal claims into the market. This greater selection would not, however, necessarily increase the quantity of litigation. Rather, more competition hopefully would increase the quality of lawsuits by giving plaintiffs more potential claims from which to choose.

In selecting the “winning” complaint, the court would have to determine authorship where multiple firms use the same complaint. The law could require complaints to disclose the original source, subject to ethical sanction for misleading the court. Complaint authors could ease proof problems as well as publicize their theories by promptly posting their complaints on their websites, on a general third party website such as Findlaw,²³⁴ or on a website specializing in class action complaints.

In contested cases, the most difficult issue for the court may be determining whether a particular firm or lawyer is “substantially” the author of a

Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 YALE L.J. 677 (1984). The consolidation of competing state or state/federal class actions may present more problems. See Rhonda Wasserman, *Dueling Class Actions*, 80 B. U. L. REV. 461, 524–40 (2000) (discussing solutions to competing state and federal class actions). However, courts are free to disparage copycat actions, as the court did in *Razorfish*. Courts would seek to do so in part to deter socially wasteful duplicative litigation and forum-shopping. See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 521–22, 528–29 (1996).

233. See Macey & Miller, *supra* note 217, at 48–61 (discussing the relative advantages of lodestar and percentage fee methods). The tradeoffs between lodestar and percentage fees are similar to those applying to contingent fees generally. See Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259 (1997).

234. See <http://www.Findlaw.com>.

complaint filed by a competing attorney. An objective standard—say, fifty percent overlap in words—would invite copycat lawyers to skirt the edges of the rule. Thus, resolution of this issue may require the court to apply a more discretionary standard. The statute might adopt a standard similar to that used to prove unlawful appropriation under copyright law, where similar problems exist.²³⁵ Under copyright law, copying is actionable only if, first, the defendant copied from plaintiff's copyrighted work, and, second, the copying constituted improper appropriation.²³⁶ The first element requires a showing that the infringing work was copied and not independently created.²³⁷ Copying may be inferred when the alleged copier has access to the original, as would be the case for a publicly filed complaint, and when probative similarities exist between the original and the alleged copy.²³⁸ Once copying is established, the fact-finder must determine whether proof of "substantial similarity" exists between the infringing work and protectable elements of the infringed work.²³⁹

Applying the first element of the copyright test to protection of class action complaints would be relatively straightforward. However, the improper appropriation prong of the copyright test will have to be modified for use in determining fees for authors of class action complaints. The elements protected under our proposed rule may not be limited to those protectable under copyright law because it may be desirable to protect a lawyer's investment in factual research.²⁴⁰ Thus, the rule should specify factors such as originality, extent of

235. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (noting that "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression'. Decisions must therefore inevitably be ad hoc.").

236. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

237. Establishing copying creates a presumption, which can be rebutted by evidence of independent creation. See, e.g., *Benson v. Coca-Cola Co.*, 795 F.2d 973 (11th Cir. 1986).

238. See Alan Latman, *Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990). For purposes of inferring copying, such similarities need not be substantial. For example, proof of copying can be inferred by repetition of errors contained in the original and repeated in the allegedly infringing work. See, e.g., *Callaghan v. Myers*, 128 U.S. 617, 662 (1888) (appearance of common errors "one of the most significant evidences of infringement"); *Hassenfeld Bros. v. Mego Corp.*, 150 U.S.P.Q. 786 (S.D.N.Y. 1966) (copying established by the existence of a small anatomical error on both the original and allegedly infringing action figure).

239. See *Arnstein*, 154 F.2d 464 (jury must determine whether two works were "substantially similar" from the perspective of the audience that constitutes the commercial market for the work). The relevant audience may be specialists. See *Dawson v. Hinshaw Music, Inc.*, 905 F. 2d 731 (4th Cir. 1990). This suggests that the trier of fact would analyze the similarity issue regarding class action complaints from a lawyer's perspective. Substantial similarities may include paraphrasing. See *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970).

240. For a discussion of protection of factual compilations, see *supra* text accompanying notes 107 and 109.

factual research, and quality of legal theories, in determining the percentage of the final fee that should be awarded the author.

It is important to emphasize that this proposed procedure would not be a conventional property right equivalent to a copyright or patent. It would therefore not be subject to objections based on due process rights or the more general use-creation tradeoff. Aside from being appropriated by competing lawyers prior to selection of the lead plaintiff or class counsel, the complaint could be freely used by anyone connected with the case in which it was written and in any subsequent case. In that sense, it is like a complaint in any other kind of case. Our proposal intends solely to address the particular property right problem that arises during the lead counsel competition in class actions.

VI. CONCLUSIONS AND IMPLICATIONS

Class action complaints serve important functions in producing facts and constructing legal theories that assist in the development of the law. However, the lawyers who prepare these complaints may have socially suboptimal incentives to devote resources to the complaints because the complaints are subject to appropriation by competing attorneys. Giving the lawyers strong intellectual property rights in their complaints would defeat the public's need for access to legal materials.

Our analysis shows that the appropriate balance of law-creation incentives and the public's need for access 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 Article 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. Thus, our approach may have implications for all aspects of both class and non-class litigation, including settlement, publication of judicial opinions, and the scope of privileges. Similar considerations also apply outside the litigation setting to lobbying for legislation or regulation and creation of new legal devices.²⁴¹

241. For example, law firms should be able to enforce their property rights in such devices through non-competition agreements. See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1738 (1998).