

## Copyrights, Privacy, and the Blockchain

Tom W. Bell

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**Copyrights, Privacy, and the Blockchain**

TOM W. BELL\*

*The law of the United States forces authors to choose between copyrights and privacy rights. Federal lawmakers have noticed and tried to remedy that problem. The Copyright Act makes express provisions for anonymous and pseudonymous works. The Copyright Office has tried to remedy that tension, too; copyright registration forms do not outwardly require authors to reveal their real world identities. Nonetheless, authors still face a choice between protecting their privacy and enjoying one of copyright's most powerful incentives: the prospect of transferring to another the exclusive right to use a copyrighted work. That power proves useful, to say the least, when it comes to making money off of copyrights. Run-of-the-mill authors can invoke it by licensing or assigning their unregistered copyrights or by registering their works themselves. But what about anonymous or pseudonymous authors? Despite a good faith effort to respect authorial privacy, current copyright registration practices fall short of ideal. Far from a trifling matter, this procedural hurdle threatens to prevent copyright law from satisfying its constitutional mandate. This paper maps the problematic conflict between copyright and privacy and points towards some possible solutions.*

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## 1. INTRODUCTION

The law of the United States forces authors to choose between copyrights and privacy rights.<sup>1</sup> It evidently does so, moreover, by accident rather than by design. Federal lawmakers passed the Copyright Act with anonymous and pseudonymous authors in mind.<sup>2</sup> The Copyright Office dutifully followed suit by declining to require authors to reveal their real names on copyright registration forms.<sup>3</sup> Despite these efforts, though, authors who mask themselves in anonymity or pseudonymity still face a choice between keeping their identities secret and fully enjoying copyright privileges.<sup>4</sup> The good intentions of federal lawmakers and civil servants have come to less than full fruition. This paper maps the conflicted terrain and suggests some ways forward.

The problem addressed by this paper: Anonymous or pseudonymous authors (jointly, “masked”) find it difficult if not impossible to invoke state

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1. See Stephen B. Thau, *Copyright, Privacy, and Fair Use*, 24 HOFSTRA L. REV. 179, 180 (1995).

2. See 17 U.S.C.A. § 101 (West 2015).

3. See U. S. COPYRIGHT OFFICE, FORM CA 1 (2011), <http://copyright.gov/forms/formcawi.pdf>.

4. Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1570 (2007).

power against copyright infringers.<sup>5</sup> That is not a trifling matter. Copyright works not by sweet-talk or moral suasion.<sup>6</sup> It instead relies crucially on the looming threat of police action, as when customs officers bar the import of pirated CDs<sup>7</sup> or federal agents serve court orders on losing defendants.<sup>8</sup>

Run-of-the-mill authors enjoy the privilege of borrowing state power to defend their copyrights by the relatively simple expedience of registering works with the Copyright Office and filing federal copyright infringement claims.<sup>9</sup> Masked authors, in contrast, face a variety of pitfalls and hurdles on their way toward winning judicial enforcement of their copyrights.<sup>10</sup> Their problems start at the Copyright Office, which despite a good faith effort to respect authorial privacy, and for understandable reasons, has so structured its registration forms and requirements as to impose special burdens on anonymous and pseudonymous authors.<sup>11</sup> The very structure of copyright law, because it imposes strict liability—even on those who innocently deal in infringing derivative works—makes it difficult for masked authors to reliably transfer good title, which decreases the value such authors get from their copyrights even if they manage to register them.<sup>12</sup> Fixing those problems would still leave anonymous and pseudonymous authors getting less from their copyrights than unmasked authors because United States District Courts, which have original jurisdiction over copyright infringement claims, make it difficult, if not impossible, for plaintiffs to keep their identities secret.<sup>13</sup> For all these reasons, extant copyright law and practice ill serves anonymous and pseudonymous authors.

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5. *See id.* at 1541.

6. It bears noting that sweet talk and moral suasion, along with innovative business models, can do a great deal to ensure that authors—even anonymous and pseudonymous ones—get proper credit and payment for their work. TOM W. BELL, *INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD* 154-55 (Mercatus 2014).

7. 17 U.S.C.A. § 501(a) (West 2012); 17 U.S.C.A. § 602(b) (West 2010).

8. FED. R. CIV. P. 69(a)(1) (providing for writ of execution for enforcement of money judgements); *see Service of Process: Writ of Execution*, U.S. MARSHALS SERV., <http://www.usmarshals.gov/process/execution-writ.htm> (last visited Feb. 25, 2016).

9. 17 U.S.C.A. § 411(a) (West 2008) (providing for registration of copyrighted works as prerequisite for filing suit); 28 U.S.C.A. § 1338(a) (West 2011) (giving United States District Courts exclusive jurisdiction over copyright claims).

10. *See, e.g.*, George H. Carr, *Application of U.S. Supreme Court Doctrine to Anonymity in the Networked World*, 44 CLEV. ST. L. REV. 521, 530-31 (1996). Notably, not to winning judicial enforcement; there is no guarantee that any author will succeed in maintaining both a masked identity and a lawsuit. *See, e.g., id.*

11. U.S. COPYRIGHT OFFICE, FORM TX (2011), <http://www.copyright.gov/forms/formtx.pdf> [hereinafter FORM TX].

12. *See* Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 415 (2002).

13. *See* 28 U.S.C.A. § 1338(a) (giving United States District Courts exclusive jurisdiction over copyright claims); *see also* Lidsky & Cotter, *supra* note 4, at 1541.

Though this paper follows the Copyright Act in discussing both anonymity and pseudonymity, the same general principles apply to each. Strictly speaking, after all, anonymity represents little more than a special case of pseudonymity—one where the author chooses not a unique *nom de plume*, like “Mark Twain,” but instead shares the same generic name, “anonymous,” with an indefinite crowd of equally mysterious authors.<sup>14</sup> Anonymity never exists in its purest form; clues such as a publication’s date, language, and style inevitably reveal something about its source.<sup>15</sup> Instead, anonymity marks the nadir of a spectrum that measures identification by degrees. That spectrum continues up through pseudonyms, which link the same author with various works while obscuring other personal traits, to the sorts of unique tags, such as taxpayer identification numbers, that officials use to keep track of particular people in the real world.<sup>16</sup> This paper thus sometimes uses “masked” to refer to anonymous and pseudonymous authors alike. The distinction between anonymity and pseudonymity matters less than the distinction between masked authors and authors who, lacking such protections, face the full impact of civil and criminal law.<sup>17</sup>

Freedom of expression reaches its fullest height when it escapes all fear of earthly blows. The masks worn by anonymous and pseudonymous authors protect not just their identities, but their fortunes, standing, and lives.<sup>18</sup> To the extent that copyright privileges come at the expense of authorial privacy, they impinge on our freedoms of speech, expression, and the press.<sup>19</sup> Great art has suffered second-class treatment as a consequence.<sup>20</sup> Not much more need be said here on that count; this paper

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14. See Malcolm Collins, *The Ideology of Anonymity and Pseudonymity*, HUFFINGTON POST (Aug. 2, 2013, 11:28 AM), [http://www.huffingtonpost.com/malcolm-collins/online-anonymity\\_b\\_3695851.html](http://www.huffingtonpost.com/malcolm-collins/online-anonymity_b_3695851.html).

15. See Katherine A. Wallace, *Online Anonymity*, in THE HANDBOOK OF INFORMATION AND COMPUTER ETHICS 165, 170 (Kenneth Einar Himma & Herman T. Tavani eds. 2008) (“[S]omeone could be anonymous in one respect (e.g., with respect to public authorities) and not in another (e.g., with respect to family members): the Unabomber became identifiable (not anonymous) to family members while remaining anonymous to law enforcement officials and the wider public.”).

16. See generally JAMES C. SCOTT, *SEEING LIKE A STATE* (1998).

17. See generally Margot E. Kaminski, *Real Masks & Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815 (2013).

18. See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *PRIVACY, INFORMATION, AND TECHNOLOGY* 77 (2d ed., 2008).

19. See generally *MacIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (holding that restrictions on anonymous political speech must be narrowly tailored and serve an overriding state interest); *Talley v. California*, 362 U.S. 60 (1960) (striking down as an infringement on freedom of expression a Los Angeles ordinance banning all types of anonymous pamphlets).

20. James R. Alexander, *Evil Angel Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright*, 20 J. INTELL. PROP. L. 209, 261 (2013) (“Authorial anonymity left both [Lord Byron and Percy Bysshe Shelley] without standing to sue for copyright infringement unless they wished to establish

largely takes for granted that the law does and should value anonymous and pseudonymous speech.

This paper does not provide an extended argument on behalf of privacy in general or masked authorship in particular. Other scholars have canvassed those themes quite ably.<sup>21</sup> It also declines to address how privacy plays into the fair use defense to copyright infringement, another theme to which other scholars have given thorough consideration.<sup>22</sup> This paper, for the most part, assumes the desirability of empowering (or at least allowing) authors to publish their works anonymously or pseudonymously,<sup>23</sup> an assumption amply supported by the Bill of Rights,<sup>24</sup> Supreme Court precedent,<sup>25</sup> and the Copyright Act.<sup>26</sup> None of that is to say that masked authorship represents a paramount good, of course; as this paper need not and does not argue for that, it sidesteps debates about the extent to which legal freedoms of expression should protect the identities of anonymous or pseudonymous authors from disclosure.<sup>27</sup> It suffices here to describe how copyright could do more to respect authorial privacy, leaving for another day questions about how to fine-tune that value against others.<sup>28</sup>

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their property in a work at law before claiming copyright infringement. Thus, the works of both Byron and Shelley were widely pirated . . .”).

21. For background material, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (seminal paper arguing for legal protection of privacy); Adam Thierer, *Privacy Law's Precautionary Principle Problem*, 66 ME. L. REV. 467 (2014) (critiquing over-caution about privacy and inflexibility about cultural norms and expectations regarding privacy); Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996) (analyzing the pros and cons of anonymous expression).

22. See generally, e.g., Thau, *supra* note 1 (offering a defense of fair use taking account of authorial privacy rights).

23. But see Sundeep Bisla, *The Return of the Author: Privacy, Publication, the Mystery Novel, and The Moonstone*, 29 BOUNDARY 2 177, 177 (2002) (arguing against sympathizing with authors' privacy rights on grounds that, “to keep my privacy intact, it would have been better for me not to have published.”).

24. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech or of the press . . .”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”).

25. See generally, e.g., *MacIntyre*, 514 U.S. 334; *Talley*, 362 U.S. 60.

26. 17 U.S.C.A. § 302(c) (West 1998) (creating special copyright term for anonymous or pseudonymous works); 17 U.S.C.A. § 409(3) (West 2010) (providing for registration of anonymous or pseudonymous works by requiring not names but only “the nationality or domicile of the author or authors . . .”).

27. For one view on that issue, see Tom W. Bell, *Anonymous Speech*, WIRED (Oct. 1, 1995, 12:00 PM), [http://archive.wired.com/wired/archive/3.10/cyber.rights\\_pr.html](http://archive.wired.com/wired/archive/3.10/cyber.rights_pr.html) (arguing that extant law requires very strong respect for anonymous speech).

28. The paper does not completely overlook the topic, however. See *infra* Section 4 (discussing how to safeguard against bad actors hiding behind authorial privacy by, in effect, holding their copyrights ransom).

Though this paper focuses on a relatively narrow and admittedly far-from-life-or-death issue—how blockchain<sup>29</sup> technology can make copyright work better for masked authors—it provides proof of the far more broad and important claim that public blockchain technologies might offer an upgraded alternative to many of the services that political institutions traditionally monopolize.<sup>30</sup> The possibility—and increasingly, the *actuality*—of bitcoin<sup>31</sup> supplanting fiat money offers the most prominent example of that phenomenon.<sup>32</sup> The same features that make a public blockchain database a good fit for purely financial transactions—its accessibility, scalability, and security—make it a good fit for other uses too.<sup>33</sup> This paper does not tackle that broader and more significant topic, however; it simply offers another tile in a growing mosaic (“pixel in a loading display” if you prefer) that, as we step back, reveals an emerging trend: Political chains will bind us less as the blockchain connects us more. If that sounds like a happy prospect, you can regard the present paper about using the blockchain to improve copyright as a small step in the right direction.

The paper proceeds as follows. Immediately following this introduction, Section 2 describes the tension between copyrights and privacy rights.<sup>34</sup> Both represent important concerns; both receive careful and respectful treatment by the Constitution, the Copyright Act, and Copyright Office.<sup>35</sup> At present, however, authors who resort to the

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29. Usage in this area remains in flux but “blockchain” appears more common than “block chain” in common parlance. Unless otherwise noted, herein “blockchain” refers to the public distributed database on which bitcoin runs.

30. Most obviously, the bitcoin use of blockchain technology presents a challenge to fiat money. From a broader view, though, the blockchain offers a multi-purpose tool for solving social coordination problems. See MELANIE SWAN, *BLOCKCHAIN: BLUEPRINT FOR A NEW ECONOMY* 44 (Tim McGovern ed., 2015) (suggesting the use of “blockchain technology to provide services traditionally provided by nation-states in a decentralized, cheaper, more efficient, personalized manner. . . . Blockchain governance takes advantage of the public record-keeping features of blockchain technology: the blockchain as a universal, permanent, continuous, consensus-driven, publicly auditable, redundant, record-keeping repository.”); Nozomi Hayase, *The Blockchain is a New Model of Governance*, COIN DESK (July 26, 2015, 3:00 PM), <http://www.coindesk.com/consensus-algorithm-and-a-new-model-of-governance/> (“Enshrined in the bitcoin protocol is a blueprint for decentralized forms of governance.”).

31. As with “dollar” or “yen” in conventional usage, this paper uses the lowercase “bitcoin” to refer to the unit of exchange created and sustained by the blockchain. See Paul Vigna, *BitBeat: Is It Bitcoin, or bitcoin? The Orthography of the Cryptography*, WALL ST. J. (Mar. 14, 2014), <http://blogs.wsj.com/moneybeat/2014/03/14/bitbeat-is-it-bitcoin-or-bitcoin-the-orthography-of-the-cryptography/> (adopting and arguing for the lowercase).

32. See Neale Godfrey, *A Few Words about Bitcoin . . . Because Fiat is Not Just a Car*, FORBES (Mar. 8, 2015, 8:40 AM), <http://www.forbes.com/sites/nealegodfrey/2015/03/08/a-few-words-about-bitcoin-because-fiat-is-not-just-a-car/#673471b14c82>.

33. SWAN, *supra* note 30, at 44-52.

34. See *infra* Section 2.

35. See U.S. CONST. amend. I; U.S. CONST. amend. IV; U.S. Const. amend. IX; 17 U.S.C.A. § 302(c).

protection of masks must pay the unnecessary and unfair price of their copyright privileges.<sup>36</sup> Section 3 makes a preliminary inquiry into whether public blockchain database technologies might offer solutions to these problems.<sup>37</sup> Projecting how institutional reforms and blockchain technologies might combine, Section 4 sketches a system where copyright and privacy harmonize.<sup>38</sup> The paper concludes by summarizing the conflict between copyrights and privacy and calling for more research into how technology can bring the law up to date.<sup>39</sup>

## 2. COPYRIGHT LAW VERSUS AUTHOR PRIVACY

Copyright law in the United States treats masked authors with a mixture of indifference and bumbling good intentions. As subsection 2.1 illustrates, copyright historically treated the privacy of anonymous and pseudonymous authors with greater respect over time, excepting a few flashes of hostility directed toward foreigners.<sup>40</sup> Today, as subsection 2.2 explains, the copyright law of the United States shows marked solicitude toward the particular needs of masked authors.<sup>41</sup> Nonetheless, those evident good intentions fall short of treating all authors, named or otherwise, equally. Subsection 2.3 documents copyright's failings on that count.<sup>42</sup>

### *2.1. The Historical Origins of Copyright's Approach to Authorial Privacy*

Copyright's respect for authorial privacy has generally grown along with copyright itself.<sup>43</sup> Copyright's primordial ancestor, as represented in the comparatively brutish 1662 Licensing of the Press Act, denied authors any privacy rights.<sup>44</sup> The Act, which gave the Stationers' Company control of all publishing not in order to reward authors but to censor them, required printers to declare authors' names upon pain of forfeiture of the offending materials.<sup>45</sup> The Statute of Anne, passed in 1709, adopted a more modern

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36. See Lidsky & Cotter, *supra* note 4, at 1569-70.

37. See *infra* Section 3.

38. See *infra* Section 4.

39. See *infra* Section 5.

40. See *infra* Section 2.1.

41. See *infra* Section 2.2.

42. See *infra* Section 2.3.

43. See generally Benjamin Ely Marks, Note, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade*, 72 N.Y.U. L. REV. 1376 (1997).

44. *Charles II: 1662: An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Bookes and Pamphlets and for Regulating of Printing and Printing Presses*, reprinted in 5 STATUTES OF THE REALM 428, at VI (2015) (1819), <http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435>.

45. *Id.* at V.



and pro-author approach, but apparently still conditioned its privileges on disclosure of authors' identities.<sup>46</sup>

Intentionally or not, lawmakers in the fledgling United States evinced little curiosity about the identity of authors of copyrighted works.<sup>47</sup> The first Copyright Act, passed by the United States in 1790, did not require that authors disclose their identities but instead required only the registration of titles.<sup>48</sup> That act used "author or proprietor" throughout, leaving open the possibility that the latter might assert a copyright transferred from an unnamed author.<sup>49</sup> A similar approach appears in subsequent acts and revisions, all the way up to current law.<sup>50</sup>

The first sign that lawmakers noticed the special issues raised by masked authors appeared in the 1909 Act, which specified that regardless of "whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name," it should enjoy the same first term of twenty-eight years from the date of its first publication.<sup>51</sup> That demonstrated a certain solicitude for anonymous and pseudonymous authors. It also heralded the provision of the current Act, discussed more fully below, which likewise specifies the copyright term for anonymous or pseudonymous works.<sup>52</sup>

Elsewhere, however, the 1909 Act hints that lawmakers did not much care for mask-wearing authors of foreign works; anyone seeking *ad interim* protection for a book first published abroad in English had to reveal the

46. See JODY GREENE, *THE TROUBLE WITH OWNERSHIP: LITERARY PROPERTY AND AUTHORIAL LIABILITY IN ENGLAND, 1660-1730* 142 (2005) (arguing that administrative practices under the Act forced authors to reveal their identities); *but see* Ronan Deazley, *Trouble with The Trouble with Ownership*, 27 J. LEGAL HIST. 81, 87-88 (2006) (arguing that unidentified authors were denied only monetary, not equitable relief. Deazley does not explain how an author could remain unidentified while suing in equity, however).

47. See Copyright Act of 1790, 1 Stat. 124 § 1 *reprinted in* COPYRIGHT OFFICE, *COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT* 22 (1973) (1790) (disclosure of author's name not mentioned or required).

48. *Id.*

49. Copyright Act of 1790, 1 Stat. 124 §§ 2, 4-6, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 22-24.

50. See Copyright Act of 1831, 4 Stat. 436 (1831), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 27-28; Revised Statutes, Title 60 of 43rd Cong. 1st Sess., 1876 Rev. Stat 972 (1873), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 43; Copyright Act of 1909, 35 Stat. 1075 (1909), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 64.

51. Copyright Act of 1909, 35 Stat. 1075, § 23, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 73; H.R. Res. 60-2222, 60th Cong. *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 14 (E. Fulton Brylawski & Abe Goldman eds., 1976) (1909) (briefly discusses Section 23 of the 1909 Act, although anonymous or pseudonymous authors are not mentioned here); *see generally* *Stenographic Report of the Proceedings of the First Session on the Conference on Copyright*, *reprinted in* LEGISLATIVE HISTORY OF THE 1909, *supra* note 51, at 6-8, 36-40 (references to anonymous or pseudonymous authors are scattered throughout).

52. *See infra* Section 2.2.

name and nationality of its author.<sup>53</sup> A similar odor of xenophobia emanates from a 1913 amendment to the 1909 Act requiring any claimant of a copyright in a work by an alien author domiciled in the United States to provide the author's name and address to the Copyright Office in order to register the work.<sup>54</sup> In effect, this provision conditioned copyright's privileges on identification of foreign authors living in the United States.<sup>55</sup>

Perhaps we should not make too much of these suggestive provisions, given that the 1909 Act did not generally require those registering a work to identify its author; only the proprietor had to be named.<sup>56</sup> It also bears noting that the 1909 Act, like prior acts, did not require copyright notices to name authors but, again, only proprietors.<sup>57</sup> Foreign authors could have used these devices to hide their identities by simply publishing their first English editions in the United States and living abroad. That would have put them on level footing with other masked authors, all of whom under the 1909 Act could have assigned their unrecorded copyrights for valuable consideration without revealing their identities.

How? Intentionally or not, the 1909 Act generally allowed authors to sell their copyrights while preserving their privacy by fairly rudimentary measures.<sup>58</sup> Imagine an unknown author, her face cloaked in a scarf, selling a commercial publisher both a copy of her racy novel and its unrecorded copyright, receiving cash in return.<sup>59</sup> She walks away with her privacy and her pay; the proprietor-*cum*-publisher walks away with her work and her copyright. The proprietor then first records the assignment with the

53. An Act to Amend and Consolidate the Acts Respecting Copyright § 21 (1909), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 64, 72. There is some evidence that disapproval of foreign masked authors indeed inspired this provision. *Stenographic Report of the Proceedings of the First Session of the Conference on Copyright, reprinted in* 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 1, 40 (E. Fulton Brylawski & Abe Goldman eds., 1976) (1905) [hereinafter *Stenographic Report*] (expressing the view that “it is not desirable to encourage” anonymous or pseudonymous works expressing from foreign authors).

54. Act of March 2, 1913 § 55 (1913), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 90, 90-91 (amending section 55 of the Copyright Act of 1909).

55. *See id.* (amending section 55 of the Copyright Act of 1909).

56. An Act to Amend and Consolidate the Acts Respecting Copyright §§ 9-10, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 68 (referring with “such person” to “copyright proprietor” in section 9).

57. *Id.* at 71-72.

58. *See id.* at 68; *id.* at § 18, 71-72. Notably, this does not seem to be the mechanism lawmakers had in mind when they envisioned anonymous or pseudonymous authors dealing with publishers; they instead envisioned a scenario where “the author arranges with some other person who complies with the statutory formalities, registration and deposit of copies and printing of notice, under his agreement with the author as proprietor.” *Stenographic Report, supra* note 53, at 40. This seems to be a more conventional arrangement wherein the proprietor knows the identity of the author, who must trust the proprietor's discretion. *Id.*

59. Even if, as under the present act, the extant copyright law required a signed writing for assignments of copyrights, the masked author could simply scrawl an “x” on a sheet of paper to satisfy this statute of frauds.

Copyright Office and, by doing so, secures better title than one who later innocently purchases the same copyright from the same author.<sup>60</sup> Given the prospect of receiving a potentially valuable and legally enforceable interest, the proprietor should be willing to give the masked novelist good value for her copyright.<sup>61</sup>

Through this and functionally equivalent (if less romantic) mechanisms, such as the use of friendly intermediaries, most masked authors would have been able, under the copyright law of the United States prior to the present Act, to preserve their privacy and yet sell their unrecorded copyrights to proprietors. These proprietors would in most cases have been able to provide the copyright system with the only party-identifying information that the law then required as a prerequisite to enjoying copyright privileges. As we will see below, that same feature holds true under the 1976 Act, as amended.<sup>62</sup>

That speaks solely to the assignment of copyrights and demonstrates only that, under earlier versions of the copyright law of the United States, masked authors could (with some precautions) have sold their unrecorded copyrights without forsaking their privacy.<sup>63</sup> It does not speak to the ability of masked authors to record and exercise their copyright privileges *themselves*, while still hiding their true identities. That would have posed an insurmountable hurdle under earlier copyright acts just as it does under the present one—unless, as discussed more fully below, masked authors can use strong digital pseudonymity when interacting with the Copyright Office, federal courts, and other parties involved in the enforcement of copyright claims.<sup>64</sup>

## 2.2. *How Copyright Law Currently Tries to Protect Author Privacy*

The current Copyright Act—vintage 1976, as amended—addresses anonymous and pseudonymous authors at three points.<sup>65</sup> Each of these three references shows a certain solicitude to the special needs of masked authors. As reflected in registration forms and commentary, the Copyright

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60. An Act to Amend and Consolidate the Acts Respecting Copyright § 44, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 81. Students of property take note: The 1909 Act, like the present one, establishes a race-notice recordation system. *Id.*

61. Theory suggests, however, that publishers in such situations would pay a discounted rate to the detriment of masked authors. *See infra* Section 2.3.1.3. (explaining the effect and why it puts masked authors at a disadvantage).

62. *See infra* Section 2.2.

63. *See* An Act to Amend and Consolidate the Acts Respecting Copyright §§ 9-10, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 47, at 68.

64. *See infra* Section 4.

65. 17 U.S.C. § 302(c) (specifying the term for anonymous or pseudonymous works); 17 U.S.C. § 409(2) (making special provision for the registration of anonymous or pseudonymous works); *Id.* at § 409(3) (addressing the registration of anonymous or pseudonymous works).

Office's practices reflect the same accommodating spirit. The next subsection reveals why those good intentions fall short of treating all authors alike. First, though, this subsection gives fair credit to such halfway measures as copyright in the United States now takes towards protecting the privacy of anonymous and pseudonymous authors.

Subsection 302(c) of the Copyright Act specifies the term for anonymous or pseudonymous works and otherwise accommodates the peculiarities of dealing with masked authors.<sup>66</sup> When the author of a work is an identified individual, the work's copyright term runs for the author's life plus seventy years.<sup>67</sup> That "life-plus" mechanism for setting the copyright term cannot get traction, though, in the case of masked authors who die on unknown dates.<sup>68</sup> The Copyright Act thus defines the term of an anonymous or pseudonymous work as the lesser of ninety-five years from the work's first publication or 120 years from the date of its creation.<sup>69</sup> Section 302 also includes provisions that describe how an anonymous or pseudonymous author may be officially unmasked and how that might affect the term of the author's copyrighted works.<sup>70</sup> If not outwardly welcoming, these provisions at least indicate the willingness of federal lawmakers to bestow copyrights on masked authors.<sup>71</sup>

Section 409 of the Copyright Act, which addresses copyright registrations, makes special provision for anonymous and pseudonymous authors at two points.<sup>72</sup> Subsection 409(2) requires a registration to include the name and nationality or domicile of the work's author or authors, but only "in the case of a work other than an anonymous or pseudonymous" one.<sup>73</sup> Subsection 409(3) explains what to do in those exceptional cases, specifying that "if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors" must still be included on the

66. 17 U.S.C. § 302(c). The same device fixes the term of works for hire, which are typically "authored" by corporations and other unnatural and potentially immortal legal persons. 17 U.S.C. § 101.

67. 17 U.S.C. § 302(a).

68. A Senate Judiciary Committee report on a precursor bill to what eventually became the 1976 Copyright Act explains that because the copyright term for known authors is partly based on their date of death, different terms would be needed where the author's identity is not known. *See* S. Rep. No. 93-983, at 170-71 (1974) (analyzing S. 1361, 93rd Cong. (1974), the text of which is included in the report at 1-100). A House Judiciary Committee report from two years later analyzing the actual bill that became the final Act reiterates these points. *See* H.R. Rep. No. 94-1476, at 137-38 (1976) (analyzing S. 22, 94th Cong. (1976)).

69. 17 U.S.C. § 302(c).

70. *Id.* In such a case, "the copyright in the work endures for [a] term . . . based on the life of the author or authors whose identity has been revealed." *Id.* Note that this would result in a potentially eternal (and thus presumably unconstitutional) copyright if, say, a corporation authored an anonymous work via the work for hire doctrine only to later have its identity revealed.

71. *Id.*

72. 17 U.S.C. § 409(2)-(3).

73. *Id.* at § 409(2).

registration form.<sup>74</sup> Perhaps this echoes the suspiciously xenophobic policies of the 1909 Act and its amendments discussed above.<sup>75</sup> Nonetheless, section 409(3) does not demand copyright registrants to reveal the actual names of anonymous or pseudonymous authors; instead, it gives registrants a choice between revealing an author's nationality or domicile.<sup>76</sup> This option demonstrates an accommodating approach to masked authorship.

The solicitude, or at least resigned acceptance, that the Copyright Act shows toward masked authors likewise appears in the practices adopted by the civil servants tasked with running the Copyright Office.<sup>77</sup> Though registration forms request authors' names, the instructions clarify that the line may be left blank for anonymous or pseudonymous works.<sup>78</sup> That coheres with subsections 302(c) and 409(2) of the Copyright Act, both of which evidently envision registrations of works that have masked authors.<sup>79</sup> Registration forms nonetheless require that the nationality or domicile of every author, masked or not, be reported.<sup>80</sup> In this way the Copyright Office fulfills the mandate of subsection 409(3).<sup>81</sup>

### 2.3. *How Copyright Law Currently Fails to Protect Author Privacy*

The previous subsection described how United States copyright law, as set forth in legislation and administered by the federal government, shows evident concern for the privacy of anonymous and pseudonymous works. This section describes how masked authors nonetheless suffer second-class treatment. The problem in a nutshell: the law requires copyright claimants to reveal their identities in order to register and enforce their copyrights.<sup>82</sup> Section 2.3.1. addresses how copyright law itself discriminates against anonymous and pseudonymous authors, and Section 2.3.2. briefly addresses how federal civil procedure does so.<sup>83</sup> Together, these two effects deny masked authors the full panoply of copyright privileges, forcing them to

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74. *Id.* at § 409(3).

75. Act of March 2 § 55, reprinted in COPYRIGHT ENACTMENTS, *supra* note 47, at 90-91 (amending section 55 of the Copyright Act of 1909).

76. *See* 17 U.S.C. § 409(3).

77. *See, e.g.*, U. S. COPYRIGHT OFFICE, FORM PA (2015), [copyright.gov/forms/formpa.pdf](http://copyright.gov/forms/formpa.pdf) [hereinafter FORM PA]; FORM TX, *supra* note 11; U. S. COPYRIGHT OFFICE, FORM VA (2012), [copyright.gov/forms/formva.pdf](http://copyright.gov/forms/formva.pdf) [hereinafter FORM VA].

78. *See, e.g.*, FORM PA, *supra* note 77; FORM TX, *supra* note 11; FORM VA, *supra* note 77.

79. 17 U.S.C. § 302(c); 17 U.S.C. § 409(2).

80. *See, e.g.*, FORM PA, *supra* note 77; FORM TX, *supra* note 11; FORM VA, *supra* note 77 (instructing that "the citizenship or domicile of the author *must* be given in all cases.").

81. 17 U.S.C. § 409(3) (requiring the nationality or domicile of the author if the work is anonymous or pseudonymous).

82. *Id.* at § 409(1)-(2).

83. *See infra* Sections 2.3.1.-2.3.2.

resort to working only through intermediaries, which as Section 2.3.3. explains, offers a decidedly second-rate option.<sup>84</sup>

### 2.3.1. *How Copyright Limits Authors' Privacy Rights*

As described above, although neither the Copyright Act nor the Copyright Office's forms require copyright registrants to reveal an author's real name, the same is not true of the party who claims ownership of copyright—the copyright claimant.<sup>85</sup> The law makes clear that “the name and address of the copyright claimant” must appear on an application for copyright registration.<sup>86</sup> The Copyright Office's registration forms duly fulfill this mandate by requiring applicants to provide the names and addresses of each claimant “even if the claimant is the same as the author.”<sup>87</sup>

This policy raises a question: How can a masked author preserve his or her privacy when registering a work as its claimant? According to the Copyright Office, which evidently has had occasion to address the matter before, anonymous authors are simply out of luck: “In no case should you omit the name of the copyright claimant.”<sup>88</sup> It could hardly allow otherwise, as that seems like the only position consistent with the plain language of section 409(1). But what about pseudonymous authors? After all, the Copyright Act requires that registrations include claimants' names, but it does not specify whether a claimant's name might be a pseudonym.<sup>89</sup> On this count, the Copyright Office equivocates: “You can use a pseudonym for the claimant name. But [this] . . . may raise questions about its ownership. Consult an attorney for legal advice on this matter.”<sup>90</sup> Basically, the Copyright Office gives the green light to pseudonymous copyright claimants but warns that they proceed at their own risk.<sup>91</sup>

What if you took the Copyright Office's advice and consulted an attorney about the wisdom of registering a work as its pseudonymous claimant? Any attorney worth his or her salt would probably warn that you risked either giving up your privacy or failing to establish enforceable legal rights in the work. The problem, in brief: Even if a claimant can register a

84. *See infra* Section 2.3.3.

85. *See, e.g.*, FORM PA, *supra* note 77; FORM TX, *supra* note 11; FORM VA, *supra* note 77. As the Copyright Office explains, “The copyright claimant is either the author of the work or a person or organization to whom the copyright initially belonging to the author has been transferred.” FORM PA, *supra* note 77; FORM TX, *supra* note 11; FORM VA, *supra* note 77.

86. 17 U.S.C. § 409(1).

87. *See, e.g.*, FORM PA, *supra* note 77; FORM TX, *supra* note 11; FORM VA, *supra* note 77.

88. U. S. COPYRIGHT OFFICE, PSEUDONYMS-FL-101(2011), <http://www.copyright.gov/fls/fl101.pdf> [hereinafter PSEUDONYMS].

89. 17 U.S.C. § 409(1)-(3).

90. PSEUDONYMS, *supra* note 88.

91. *See id.*

work pseudonymously (hardly a foregone conclusion), that claimant would have trouble enforcing, licensing, or assigning the copyright without revealing his, her, or (in the case of works authored by legal persons under the work for hire doctrine) its identity.<sup>92</sup>

This sub-subsection explains the nature of the problem in three parts. Section 2.3.1.1. sets up the analysis that follows by relating the hypothetical of Publius v. 3, a pseudonymous author who wants both privacy protections and copyright privileges.<sup>93</sup> Section 2.3.1.2. discusses how Publius v. 3 can, with some effort, register his work without revealing his identity.<sup>94</sup> The problem arises because registering a copyright provides Publius v. 3 with little benefit. He cannot enforce it himself without putting his privacy at dire risk. Nor, as explained in Section 2.3.1.3., can Publius v. 3 count on getting good value if he tries to transfer his copyrights to another.<sup>95</sup>

#### 2.3.1.1. The Story of Publius v. 3

To illustrate the problems that pseudonymous authors face, consider the hypothetical case of Publius v. 3. The original Publius—Publius v.1, we might say—won fame for protecting the liberties of the people of ancient Rome.<sup>96</sup> Alexander Hamilton, James Madison, and John Jay created the second historically significant Publius—Publius v. 2, by extension—when they wrote *The Federalist Papers* under that joint pseudonym.<sup>97</sup> Historians ascribe many motives for their masked authorship.<sup>98</sup> Gentlemen of the time often favored discretion in public discussions of contentious political matters, lest they seem unduly quarrelsome, and incautiously naming the subject of a public criticism risked triggering a duel.<sup>99</sup> In that era before the First Amendment, public prosecution for uttering politically unpopular views also loomed in the background.<sup>100</sup>

Like the authors of *The Federalist Papers*, our hypothetical Publius v. 3 aspires not only to invoke past heroes, but also to avoid present prosecution.<sup>101</sup> And well might he worry, given the subject matter of his pseudonymously published writing—a critique of government courts as

92. See Lidsky & Cotter, *supra* note 4, at 1567.

93. See *infra* Section 2.3.1.1.

94. See *infra* Section 2.3.1.2.

95. See *infra* Section 2.3.1.3.

96. Publius Valerius, ENCYCLOPEDIA BRITANNICA, [http://www.theodora.com/encyclopedia/v/publius\\_valerius.html](http://www.theodora.com/encyclopedia/v/publius_valerius.html) (last visited Feb. 17, 2016) (describing his public service c. 509-03 B.C.E.).

97. David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 888-89 (2000).

98. *Id.* at 888 (citing *A Note on Certain of Hamilton's Pseudonyms*, 12 WM. & MARY Q. 282, 282 n. 1 (1955)).

99. *Id.* (citing *A Note on Certain of Hamilton's Pseudonyms*, *supra* note 98, at 282 n. 1).

100. *A Note on Certain of Hamilton's Pseudonyms*, *supra* note 98, at 283-84.

101. See McGowan, *supra* note 97, at 888-89.

unfitting and inherently biased venues for deciding claims against the government itself.<sup>102</sup> Instead, Publius v. 3 argues that such claims should be decided by panels chosen by both the parties, a practice routine in commercial arbitration.<sup>103</sup>

Publius v. 3 decides to put these thoughts into a short booklet titled “Against a Standing Judiciary.” While motivated primarily by a love of justice and country, he also wants to enjoy all the privileges that copyright affords, including those that allow a copyright holder to license it, assign it for valuable consideration, or retain it and sue for infringement.<sup>104</sup> In order to maximize the impact of his message, Publius v. 3 also wants to wield his copyright to help him retain control of who publishes his work and in what context.

At the same time, and understandably, Publius v. 3 would prefer to keep his identity secret. He reasons that government courts wield considerable clout at all events, and that he would never want his fate put in the hands of a tribunal that he has chastised as inherently biased. Furthermore, it just so happens that Publius v. 3 works in the law, and has frequent occasion to brush shoulders, so to speak, with the very judges and court system that his work criticizes.<sup>105</sup> If he cannot preserve his privacy, Publius v. 3 might decline to publicly express his views. And, yet, “Against a Standing Judiciary” represents exactly the kind of work that the First Amendment aims to encourage.

Can Publius v. 3 enjoy copyright’s privileges without compromising his privacy? No. At root, the problem arises because nobody can sue to stop infringement of a copyright without first registering the work.<sup>106</sup> In other words, absent registration, a copyright affords little value. And no one can register a work unless they reveal its claimant.<sup>107</sup> As detailed immediately below, Publius v. 3, like any pseudonymous author, will find it difficult to register “Against a Standing Judiciary” with the Copyright Office without risking disclosure of his identity. More to the point, he will find it hard to credibly establish good title to the copyright. As a consequence, he will

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102. Strictly speaking, we should refer to Publius v. 3 as “he, she, they, or it” in order to encompass the widest possible forms of authorship; for the sake of brevity, “he” here stands for all.

103. For an (arguably foolhardy) author making similar arguments without a pseudonym, see Tom W. Bell, *Principles of Contracts for Governing Services*, 21 GRIFFITH L. REV. 472, 486-87 (2012) (advocating truly independent resolution of claims against governing services); Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. L. REV. 17, 68-71 (2010) (describing the problem and suggesting “citizen courts” as a remedy).

104. See Ciolino & Donelon, *supra* note 12, at 415.

105. Far from feeling surprise that Publius v. 3 works in the law, we should expect it, given that the most trenchant criticisms of any institution comes from those who know them the best.

106. 17 U.S.C. § 411(a) (requiring registration or preregistration as a prerequisite to a suit alleging copyright of a United States work).

107. 17 U.S.C. § 409(1); see Ciolino & Donelon, *supra* note 12, at 415.



find it difficult to get good value from a transferee who, indifferent to operating in the public eye, has no qualms about registering (if Publius v.3 has not done so already) and enforcing the copyright.<sup>108</sup> Publius v. 3, and other masked authors, must sacrifice their privacy rights to get their copyrights.<sup>109</sup>

### 2.3.1.2. Copyright Registration v. Privacy

Publius v. 3 would face two problems, one easy and one hard, in trying to register “Against a Standing Judiciary” while preserving his pseudonym. The easy problem arises from the fact that those who register their copyrights have to pay for the privilege, a process that can put a pseudonymous registrant’s identity at risk of being revealed.<sup>110</sup> Although the Copyright Office does not accept cash, it allows for payment of fees through a money order, which with a bit of care can be obtained without revealing the payee’s identity.<sup>111</sup> Publius v. 3 and his ilk can thus pay for their registrations without losing their privacy.

The hard problem arises because, while both the Copyright Act and the Copyright Office permit the registration of works having pseudonymous authors, both also require registrations to disclose the relevant claimant’s name.<sup>112</sup> In other words, it does not matter who authored a work so much as who holds the copyright.<sup>113</sup> Though the Copyright Office cautions against the practice, it admits, “You can use a pseudonym for the claimant name.”<sup>114</sup> So, nobody could stop Publius v. 3 from registering via an untraceable money order and putting down his pseudonym as the claimant. He could do it, yes, but doing it is not the problem. The problem arises because registering under his pseudonym would afford Publius v. 3 little more than a theoretical copyright.

Why? First, while registering a copyright in “Against a Standing Judiciary” would theoretically provide Publius v. 3 with standing to sue infringers (and thus a way to squeeze value from licensees or assignees of

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108. See Ciolino & Donelon, *supra* note 12, at 415.

109. See Jason M. Shephard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, And Election Speech*, 15 YALE J.L. & TECH 92, 115 (2012).

110. See U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 11 (2012), [http://www.copyright.gov/eco/help/#eCO\\_4.1](http://www.copyright.gov/eco/help/#eCO_4.1) (describing payment options).

111. See *id.* (describing payment options).

112. See 17 U.S.C. § 409 (“The application for copyright registration . . . shall include - (1) the name and address of the copyright claimant . . . .”); PSEUDONYMS, *supra* note 88 (“In no case should you omit the name of the copyright claimant.”).

113. PSEUDONYMS, *supra* note 88.

114. See *id.*

the work), it would not safeguard his privacy.<sup>115</sup> As discussed below, the extant civil litigation process does not make it easy for plaintiffs to conceal their identities even when they work through intermediaries (a strategy that itself puts privacy at risk); still less does it let pseudonymous plaintiffs deal directly with the court system.<sup>116</sup> Given those limitations, Publius v. 3 can enjoy his copyright only by assigning it for value to someone who has no qualms about enforcing it in the public eye.

That constraint on Publius v. 3's options gives rise to the second reason why registering under his pseudonym would give him little more than a theoretical copyright: Copyright's recordation system does not make it easy for pseudonymous authors to establish good title to their statutory privileges.<sup>117</sup> As explained in the next section, if an author like Publius v. 3 cannot offer prospective transferees good title to his copyright, he can hardly expect to get good value in return.

### 2.3.1.3. Copyright Transfer v. Privacy

As noted, Publius v. 3 cannot personally enforce the copyright in "Against a Standing Judiciary" without putting his privacy at risk.<sup>118</sup> This means he cannot expect to win much value solely from licensing it, either.<sup>119</sup> After all, a license affords its holder no more than protection from a copyright infringement suit.<sup>120</sup> Suppose, then, that Publius v. 3 offered a newspaper a license to publish portions of his booklet. "Why should we pay?" might come the hard-nosed reply. "You cannot sue us without giving up your privacy, so we sharply discount the risk of an infringement suit."

In that scenario, Publius v. 3 would have three options. He could accept a percentage of the price that an unmasked author would have been able to demand for a license to republish "Against a Standing Judiciary."<sup>121</sup> He could refuse to license the use only to watch the newspaper call his bluff and use the work without permission or payment. Neither of those offers a very attractive option. Alternatively, Publius v. 3 could perhaps assign his

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115. See Wenjie Li, *Standing to Sue in Another's Shoes: Can an Assignee of an Accrued Copyright Infringement Claim with No Other Interest in the Copyright Itself Sue for the Infringement*, 28 PACE L. REV. 73, 74 (2007); Ciolino & Donelon, *supra* note 12, at 415.

116. See *infra* Section 2.3.3.

117. U.S. COPYRIGHT OFFICE, RECORDATION OF TRANSFERS AND OTHER DOCUMENTS 3 (2014), <http://copyright.gov/circs/circ12.pdf>.

118. See PSEUDONYMS, *supra* note 88.

119. See Daniel Tysver, *Copyright licenses and Assignments*, BITLAW, <http://www.bitlaw.com/copyright/license.html> (last visited Mar. 3, 2016).

120. See *id.* Unlike an assignment, which transfers exclusive rights, a license does not give its holder standing to sue for infringement. See Li, *supra* note 115, at 74.

121. See James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 240 (2005).

copyright to another party for good value—a party who, not sharing the author’s fear of publicity, might enforce it to the hilt.<sup>122</sup>

Note that if Publius v. 3 can assign his copyright in “Against a Standing Judiciary” to another party without sacrificing his privacy or suffering a discounted price, he will have solved his problem with the likes of the newspaper that scorned his offer of a license. It should suffice that Publius v. 3 can threaten to put the copyright in the hands of someone willing to enforce it with a public infringement suit. Foreseeing that possibility, a rational licensee would pay the going rate for avoiding a lawsuit, and Publius v. 3 would not have to suffer a discounted price on account of his concern for his privacy. So his access to either kind of transfer—a nonexclusive license or an exclusive assignment—depends on whether he can reliably assign the work without dropping his mask. Can he?<sup>123</sup>

Not really. With regard to assignment and licensing, Publius v. 3 and other pseudonymous authors will find they have to pay for their privacy by suffering a reduction in the value they receive from transferees. In the case of licensing, the discounted pricing occurs because infringement suits seem less likely from pseudonymous authors than from normal authors. In the case of assignment, discounted pricing occurs because infringement suits seem more likely with masked authors in general.

Why do infringement suits seem more likely when you take an assignment from the likes of Publius v. 3? In brief, because copyright’s title recordation system gives those who purchase from pseudonymous authors relatively little protection against infringement claims by parties who, due to prior transactions, hold better title to the copyright.<sup>124</sup> To unpack that somewhat dense explanation, let us set aside the story of Publius v. 3 for a moment and return to the story of the mysterious authoress.<sup>125</sup>

The paper earlier illustrated the possibility of a masked author winning valuable consideration for her copyrighted work without disclosing her identity.<sup>126</sup> In that scenario, set in the days when the 1909 Copyright Act remained in force, a scarf-covered woman sold a fresh manuscript along with a signed assignment of its copyright to a proprietor-publisher for cash.<sup>127</sup> The purchaser then secured better title than any subsequent claimants by first recording the assignment with the Copyright Office.<sup>128</sup>

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122. It bears noting that Publius v. 3 need not register his copyright in order to execute a valid assignment of it. *Id.* at 228. Note also that registration (establishing a copyright) is different from recordation (establishing a transfer). *Id.*

123. I thank Professor Alex Tabarrock for posing this question.

124. See RECORDATION OF TRANSFERS AND OTHER DOCUMENTS, *supra* note 117, at 1.

125. See *supra* Section 2.1.

126. See *id.*

127. See *id.*

128. See *id.*

While that story ended happily enough, it could have ended very differently. What if the satisfied customer had been played for a rube? Suppose, for instance, that the mysterious authoress had earlier engaged in much the same transaction with another proprietor-publisher, who had rushed to register the work and record his assignment. Under the race-notice recordation system then and now in force, the earlier purchaser would have a superior claim to the copyright, leaving the later purchaser in our story with effectively nothing at all to show for his expenditure.<sup>129</sup> Worse yet, the rightful copyright holder—the first to purchase and record the work—might bring an infringement claim against the victim of the double-dealing authoress.<sup>130</sup> *Ex hypothesis*, the author would be unavailable for suit, leaving the defrauded second-buyer alone to bear the costs.

Notably, though it adds color to the drama, we do not have to assume that the same woman sold both works. The fraud would work just as well if the second woman simply pretended to sell the copyright in a work she never authored at all. The problem in general, in all such cases: To a prospective transferee, an honest masked author looks identical to a masked author who sells the same copyright more than once or who sells a copyright in which she never had any claim. Privacy gets in the way of credibility.<sup>131</sup>

Anyone dealing with Publius v. 3 under today's law would face the same uncertainty about whether his proposed assignment would result in good title or a surprise lawsuit. For instance, suppose that Publius v. 3 offered a prospective publisher the copyright in "Against a Standing Judiciary" and asked for good value in return—money and some promises about the manner of the work's publication. The publisher might well reply:

Thanks, but you propose too risky a transaction. How can you guarantee that you have good title to the "Against a Standing Judiciary"? Your registration might have been made under fraudulent pretenses (no offense, but it's hard to trust a guy wearing a mask). I don't know if you wrote the work at all. Or maybe you wrote it, or an earlier version

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129. Copyright Act of 1909, Pub. L. No. 349, ch. 320, § 44, 35 Stat. 1075, 1084-85 (1909), reprinted in COPYRIGHT ENACTMENTS, *supra* note 47, at 81; 17 U.S.C.S. § 205(d) (2015).

130. See *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1559 (Fla. Dist. Ct. App. 1993). Pseudonymous authors present the same risk to a lesser degree, the degree depending on how well the author can establish a credible reputation by repeat dealings and/or bonding. Howard G. Zaharoff, *A Rose by any Other Name: The Pros and Cons of Pseudonyms*, WRITER'S DIG. (June 23, 2003), <http://www.mbbp.com/news/rose-by-any-other-name>.

131. See Mollie Brunworth, *How Women are Ruining Their Reputations Online: Privacy in the Internet Age*, 5 CHARLESTON L. REV. 581, 620 (2011).

of it, and have already talked a more gullible purchaser into an assignment. That possibility puts a big cloud on the title you offer me. For all I know, that earlier assignee has already recorded her interest with the Copyright Office, making what you offer me a legal nullity. I cannot realistically search the Copyright Office's records to rule out that possibility.<sup>132</sup> The prior assignee might not only have better title; she might have an infringement suit against us both. But you would be long gone, leaving me holding the bag. No, that's not a good deal at all.

That sort of reasoning would tend to sharply depress the value that Publius v. 3 is able to receive for his work. The transaction might not be viable at any price. This problem arises because Publius v. 3 cannot secure good title to his alienable statutory privileges.<sup>133</sup> Both copyright and freedom of expression suffer as a consequence, to say nothing of the opportunities lost by Publius v. 3, publishers, and the reading public.

You might object that here, as with regard to sales of real property, a prospective purchaser could search public records to establish the quality of title being offered, allowing Publius v. 3 to exchange good title for good value.<sup>134</sup> Alas, the theoretic ideals of property law must give way to the real world of copyright practice. There is no reliable way for a would-be assignee of a pseudonymous author's work to guard against superior claims merely by searching Copyright Office records. Pseudonymous authors can easily change names, making searches by name unreliable.<sup>135</sup> A determined con artist could also change the work's title, further deterring discovery by suspicious victims. And, of course, a work registered under a different claimant's name and title would nonetheless provide a good basis for an infringement suit against a victim who was not suspicious enough; the amount and type of copied content alone determines liability in such cases.<sup>136</sup>

It is not possible to search Copyright Office records for potentially infringing content, however. Even if the Copyright Office implemented the

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132. She might even record *after* I do and still prevail in a struggle over priority of title, if she does so quickly enough. 17 U.S.C.S. § 205(d) ("As between two conflicting transfers, the one executed first prevails if it is recorded . . . within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer.")

133. See Shyamkrishna Balganes, *Copyright and Good Faith Purchases*, 104 CALIF. L. REV. 1, 29 (Forthcoming 2016).

134. See generally *Title Insurance: the Duty to Search*, 71 YALE L.J. 1161, 1161 (1962).

135. See Laura A. Heymann, *Naming, Identity And Trademark Law*, 86 IND. L.J. 381, 442-43 (2011). This is to say nothing of searching for anonymous authors.

136. 17 U.S.C.S. § 501(b).

latest technology, the volume of materials and the lack of publicly available content-searching tools would render a bulk record search for masked works impracticable.<sup>137</sup> Because a copyright holder also has a cause of action against those who deal in unauthorized variations<sup>138</sup> and because copyright is a strict liability offense,<sup>139</sup> even the most diligent search of the Copyright Office records cannot forewarn of a valid infringement suit. By way of comparison, consider the hazards of relying on title searches in a real property transaction and then imagine if the properties at issue had inherently fuzzy boundaries and a tendency to drift from place to place. You might object that any author masked or otherwise, could engage in fraud on the same terms. True, but that is hardly telling. *Could* does not equate to *would*; the prospect of criminal, civil, and social punishment for fraud largely prevents average, identified people from taking good money for bad copyrights.<sup>140</sup> Pseudonymous authors face far fewer inhibitions, and would-be assignees know it.

As a consequence, markets between pseudonymous authors and potential proprietor-purchasers tend to never get off the ground. If an earlier proprietor can undetectably secure better claim to a masked author's copyright than a later, innocent purchaser, after all, that earlier proprietor has to worry about falling victim to the same ploy.<sup>141</sup> Anyone dealing with an author who can escape the penalties for fraud thus runs the risk of buying an empty promise of a good copyright, at best, and a bad case of infringement, at worst.

This section has explained why Publius v. 3 cannot expect to transfer his copyright for value. As the next section explains, he also cannot expect to enforce it himself.<sup>142</sup> Unless we can figure out some way for Publius v. 3 to establish good title to his copyrights or to secure a reputation without an identity, he and other authors like him will continue to pay for their privacy through their copyrights. Section 3 will air a few ideas on that count.<sup>143</sup>

### 2.3.2. *How Legal Enforcement of Statutory Privileges Limit Authors' Privacy Rights*

Masked authors find it difficult or impossible to legally enforce their copyrights without revealing their identities to the United States District

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137. See *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> (last visited Mar. 25, 2016) (offering searches by author, claiming, or title, *inter alia*, but not by content).

138. 17 U.S.C.S. § 106 (2015) (creating exclusive right to create derivative works).

139. 17 U.S.C. § 501 (defining infringement); Balganes, *supra* note 133, at 4.

140. See 17 U.S.C.S. § 506 (2015).

141. Balganes, *supra* note 133, at 29.

142. See *infra* Section 2.3.2.

143. See *infra* Section 3.

Courts that have original and exclusive jurisdiction over such claims.<sup>144</sup> This results not so much from animus as it does practicality. It is not easy to imagine how a truly anonymous litigant could even participate in civil litigation; some sort of pseudonym—some continuing identity—would seem necessary to ensure the court that the same party stands behind all pleadings and other communications going to and from one side of the “v.” in the case name.

The Federal Rules of Civil Procedure require that “all the parties” be named in the title of the complaint.<sup>145</sup> As Judge Richard Posner explained, this requirement serves the public interest: “The people have a right to know who is using their courts.”<sup>146</sup> Courts have nonetheless “carved out a limited number of exceptions to the general requirement of disclosure” of parties’ real names.<sup>147</sup> This exception allows for a form of pseudonymity, as in cases filed under “Doe,” “Roe,” or other fake names.<sup>148</sup> However, that signifies only litigation under seal—cases in which the court has been persuaded not to make a party’s name public.<sup>149</sup> On the other hand, it does not signify real pseudonymity because a party seeking to file a case under seal must reveal his or her identity to the court itself so that it may determine whether an exception to the usual practice of publicly identifying parties should apply.<sup>150</sup> Therefore, even if masked authors could expect to consistently meet the standards for sealed litigation—hardly a foregone conclusion—they would still have to reveal their identities to the court itself (to say nothing of their counsels).<sup>151</sup> That would offer little consolation in any case and would prove especially unsatisfying to Publius v. 3, who, for good reason, wants to keep his identity secret from government courts most of all.

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144. FED. R. CIV. P. 10(a); 28 U.S.C.S. § 1338 (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in . . . copyright cases.”).

145. FED. R. CIV. P. 10(a); *see* FED. R. CIV. P. 17(a) (requiring that “real party in interest” litigate the action).

146. *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997).

147. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001).

148. *See, e.g., Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (“[A] party may preserve his or her anonymity in judicial proceedings in special circumstances when the party’s need for anonymity outweighs [1] prejudice to the opposing party and [2] the public’s interest in knowing the party’s identity.”).

149. *See id.*

150. *See generally* *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2d Cir. 2008) (setting for multi-factor test for determining court should allow sealed litigation).

151. *See generally id.* On that count as generally, masked authors might well prefer a system that did not force them to rely on trusted intermediaries.

### 2.3.3. *Why Using Intermediaries is No Substitute for a Mask*

A skeptic might argue that masked authors can simply work through trusted intermediaries. An author who longs to publish a racy novel without revealing her identity to the world at large might, for instance, work solely through an agent or attorney bound to preserve her privacy. Little more need be said about this option than to observe that its efficacy relies crucially on human trustworthiness. The problem is not simply that people break promises, though that gives concern enough; it is that even the most well-intended intermediaries make mistakes, letting personal details about their clients slip through the veil of secrecy or inadvertently leaving trails that run back to the otherwise hidden author.<sup>152</sup>

Consider, too, that at least some authors crave privacy because they want to express views that others find distasteful, false, obscene, sacrilegious, or treasonous.<sup>153</sup> Such authors may find it difficult to find friends at all, much less friends they can trust to serve as intermediaries in the complicated and risk-fraught business of profitably publishing a controversial work. It asks too much of masked authors to relegate them to only working in teams, at the mercy of another's faith, competence, and goodwill.

## 3. CAN THE BLOCKCHAIN HELP?

The prior section described how extant copyright law and policy force masked authors to choose between their copyrights and their privacy rights.<sup>154</sup> To summarize: Anonymous authors cannot register, transfer, or enforce their copyrights without having to depend on a trusted (and hopefully trustworthy) intermediary.<sup>155</sup> Pseudonymous authors fare a bit better because they can, with some care, register their copyrights.<sup>156</sup> They struggle, however, to transfer their copyrights without suffering steep discounts in the value received for want of a credible guarantee of good title.<sup>157</sup> And, like anonymous authors, pseudonymous authors cannot directly enforce their copyrights, but must rely on trusted intermediaries and an accommodating court system.<sup>158</sup>

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152. See Jonathan Brown, *JK Rowling 'Angry' and 'Disappointed' after Law Firm Leaked Robert Galbraith Pseudonym*, INDEPENDENT (July 18, 2013), <http://www.independent.co.uk/arts-entertainment/books/news/jk-rowling-angry-and-disappointed-after-law-firm-leaked-robert-galbraith-pseudonym-8718087.html>.

153. See Adam L. Penenberg, *Amazon's Plagiarism Problem*, FAST COMPANY (Jan. 16, 2012, 12:35 AM), <http://www.fastcompany.com/1807211/amazonsplagiarismproblem>.

154. See *supra* Section 2.

155. See *supra* Section 2.3.3.

156. See *supra* Section 2.3.1.

157. See *supra* Section 2.3.1.3.

158. See *supra* Section 2.3.3.



Legal channels offer many potential ways to remedy that tension between copyrights and privacy. If we had all the lobbying power in the world, we could simply rewrite the Copyright Act to ensure that masked authors suffer no inconveniences as a consequence of their shyness, perhaps by instituting a race-notice recordation system and providing a good faith defense to infringement suits. We could likewise imagine ways for the Copyright Office to make its practices more friendly to masked-authors, perhaps by clarifying that claimants can register copyrights and record transactions under the cover of pseudonyms. And, if we really want to dream big, we could radically reform how the civil justice system treats anonymous and pseudonymous litigants.

But those remedies are not likely to happen. The plight of masked authors, while theoretically interesting and potentially even of constitutional import, is not likely to rouse much attention in the halls of power.<sup>159</sup> Nor would those remedies likely suffice to correct the conflict between copyrights and privacy rights. What good would it do the Copyright Office to accept pseudonyms, for instance, if masked authors still cannot convince prospective assignees of their good faith?

This section takes a quick look at blockchain database technology to see what tools it might offer to remedy the plight of masked authors. This survey does no more than flag a few potentially useful, technical, and functional features that mark possible paths toward a more complete solution, leaving many details unresolved. Section 3.1. offers a brief guide to the technology in question.<sup>160</sup> Section 3.2. describes how it these tools might in theory give pseudonymous authors robust yet identity-protecting identities, allowing them to manage their own copyright concerns without relying on intermediaries or revealing their real world names.<sup>161</sup> Section 3.3. introduces the Proof of Existence extension to the blockchain and explains how it might help establish the true (or at least most likely) author of a given work.<sup>162</sup>

### *3.1. A Brief Guide to Blockchain Databases, The Blockchain, and Bitcoin*

Establishing the integrity of data is not hard. You could for instance write it on a piece of paper, lock it in a safe, and throw it into the ocean. Establishing the integrity of a database that many various people can access

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159. Kaminski, *supra* note 17, at 817 (the constitution has traditionally protected anonymous speech under free speech).

160. *See infra* Section 3.1.

161. *See infra* Section 3.2.

162. *See infra* Section 3.3.

and update, though? That poses a more difficult problem. Public blockchain databases offer a solution.

Blockchain databases store information in a way that ensures its integrity through mathematics rather than human nature.<sup>163</sup> They use a network of cryptographically-linked network of computers to keep a running list of all changes made to the stored data, linking each new entry to all former ones—hence the “chain” in “blockchain.”<sup>164</sup> This protocol prevents data tampering because, even if an attacker could alter the data in one network node, the nodes making up the larger system would detect and reject the changes.<sup>165</sup>

The bitcoin network uses a blockchain protocol to facilitate transactions denominated in bitcoins, the network’s currency.<sup>166</sup> The protocol records all bitcoin transactions in an open access, publicly available ledger—the blockchain—which is replicated across the nodes that make up the bitcoin network.<sup>167</sup> When a node reports a new transaction (the order of a pizza for bitcoin, for instance) the other nodes in the network use public key cryptography to confirm it against all previously confirmed transactions.<sup>168</sup> If it checks out (the customer actually has enough bitcoin to buy the pizza, for instance) they confirm the transaction and record it in blockchain, creating another link.<sup>169</sup>

### 3.2. *What the Blockchain Means for Masked Authors*

As all this talk of recordation and public access might suggest, the blockchain is far from private. Alarmists thus miss the mark insofar as they condemn bitcoin as anonymous cash perfect for illegal deals.<sup>170</sup> At the same time, however, bitcoin is not as hard on privacy as, say, a typical credit card transaction.<sup>171</sup> How can the blockchain offer a middle path for privacy?

Though the blockchain records the database-specific identities of the parties to all transactions—their so-called “public keys”—by no means does

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163. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 8 (2008), <http://www.scribd.com/doc/275175747/Bitcoin-A-Peer-To-Peer-Electronic-Cash-System>.

164. *Id.* at 2.

165. *Id.* at 3, 6-8; see JERRY BRITO & ANDREA CASTILLO, BITCOIN: A PRIMER FOR POLICYMAKERS 5 (2013).

166. See NAKAMOTO, *supra* note 163, at 2; BRITO & CASTILLO, *supra* note 165, at 3.

167. See NAKAMOTO, *supra* note 163, at 2-3.

168. Mike Montgomery, *Bitcoin is Only the Beginning for Blockchain Technology*, FORBES (Sept. 15, 2015, 1:33 PM), <http://www.forbes.com/sites/mikemontgomery/2015/09/15/bitcoin-is-only-the-beginning-for-blockchain-technology/#15d91b336f04>.

169. See NAKAMOTO, *supra* note 163, at 3.

170. BRITO & CASTILLO, *supra* note 165, at 20.

171. *Id.* at 12.

it require those keys to be associated with any particular realspace person.<sup>172</sup> It qualifies as robustly pseudonymous rather than truly anonymous.<sup>173</sup> It need not be even that, strictly speaking; a person could, by revealing herself (or having herself revealed) as associated with a particular public key, make all transactions with that key traceable to her real space identity. What matters for present purposes, however, is that someone could use public key cryptography and the blockchain to create and sustain a pseudonym—a bitcoin “address”—through which she could reliably engage in financial and other digital transactions without revealing her real space identity.<sup>174</sup>

This kind of digital identity could prove very useful, indeed, for ensuring that masked authors can fully enjoy copyright’s privileges. Current Copyright Office practices are not quite ready to accommodate such methods, but it is not difficult to imagine the Copyright Office adapting to bitcoin payments soon enough. Making provision for authors to use robust digital pseudonyms would require a bigger leap into the future and would probably not happen anytime soon. When and if it did, however, pseudonymous authors might finally be able to register as claimants of their own works using (digital) addresses that would persist over time, provide a connection through which business could be transacted, and encourage the rise of reputations that feel some of the same pressures that keep ordinary authors honest. In effect, such an author would have a mask that, while hiding his or her real identity, would nonetheless be unique to him or her.

A pseudonymous author who spends years working under a particular well-known and trusted pen name would not want to throw away all that good will by transacting in bogus copyrights.<sup>175</sup> That would put such authors well on the way toward receiving full value for copyrights they transfer to others. Also helping that remedy for lacuna in the copyright privileges enjoyed by masked authors would be the Proof of Existence service, described in the next section.<sup>176</sup>

As noted above, it does not fully mend the breach between copyright and privacy to suggest that masked authors deal only with trusted intermediaries. That imposes costs on those authors that other authors need not bear, and even in the best of cases puts their privacy at heightened peril of breach. It bears noting, though, that the same blockchain and public key cryptography tools discussed above as tools for helping masked authors deal with copyright might also be put in the service of helping them deal with

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172. *Id.* at 8.

173. *Id.*

174. *Id.*

175. See Lidsky & Cotter, *supra* note 4, at 1567-68. (they tend to be more trustworthy, because an intermediary can vouch for the author’s identity and reliability as opposed to anonymous speech).

176. See *infra* Section 3.3.

agents, attorneys, and other intermediaries. Suppose, for instance, that Publius v. 3 managed his copyright in “Against a Standing Judiciary” through a literary agent with whom he has communicated only through channels that keep his real world identity secret. Publius v. 3 would still face some of the same agent-principal problems that plague all such relationships; his agent might prove incompetent or lazy, for instance.<sup>177</sup> But he would no longer have to worry that she would deliberately or inadvertently reveal his identity. Not having that information, she could not share it with another person.

### 3.3. *How the Proof of Existence Service Can Help Prove Authorship*

As the prior section discussed, the public key cryptography functions built into the blockchain could be used to, in effect, give pseudonymous authors robust identities over time, allowing them to develop reputations and increase credibility of their claims to hold good title to transferable copyrights.<sup>178</sup> That, in turn, would increase the value such authors might get for their copyrights and help heal the rift between copyright and privacy rights.<sup>179</sup> The Proof of Existence (“POE”) service serves the same ends by different means.<sup>180</sup>

POE provides a timestamp demonstrating that a particular (possibly pseudonymous) person had access to a particular document at a particular time.<sup>181</sup> It then stores that timestamp in the blockchain, making it publicly available to all.<sup>182</sup> Notably, it does not store the document itself.<sup>183</sup> Instead it allows you “to publicly prove that you have certain information without revealing the data or yourself, with a decentralized certification based on the bitcoin network.”<sup>184</sup>

How could POE help anonymous authors establish the validity of their claims to copyright? The author of a work is always the first person to have access to it. With POE, an author can establish a timestamp of their document that of necessity antedates any timestamp someone copying the

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177. See generally Ramon Casadesus-Masanell & Daniel F. Spulber, *Trust and Incentives in Agency*, 15 S. CAL. INTERDISC. L.J. 45, 47 (2005) (the article discusses in depth the factors that foster a trust relationship in principle-agent relationships).

178. See *supra* Section 3.2.

179. See *supra* Section 3.2.

180. Manuel Araoz & Esteban Ordano, *What is Proof of Existence*, PROOF OF EXISTENCE (2015), <https://proofofexistence.com/about>.

181. *Id.*

182. *Id.*

183. *Id.* (“All we store is a cryptographic digest of the file, linked to the time in which you submitted the document. In this way, you can later certify that the data existed at that time.”).

184. *Id.* (describing how “to manually confirm the document’s existence at the timestamped time . . .”).

document could establish.<sup>185</sup> This would allow a masked author to proclaim: “This timestamp proves that I had this document at this time, and it provides strong evidence that nobody had earlier access to it, thus supporting my claim of authorship.” Skeptics could confirm that claim by creating their own stamp for the document and then searching the blockchain to confirm that it first appeared in association with the masked author’s pseudonym.<sup>186</sup>

That would not alone prove authorship, of course. It might turn out, for instance, that the person who first uses POE to timestamp a document stole it off of the actual author’s desk. POE can at least bolster masked authors’ copyright claims, however—an effect that, together, with the durable pseudonymous reputations that the blockchain permits, would do a great deal to put pseudonymous authors on even footing with named authors.<sup>187</sup> The Copyright Office could bolster the effect of POE by enacting regulations to require or encourage authors to use the service to timestamp the documents in which they claim copyrights. Once authors are expected to create timestamps of their documents, it will mean all the more when a masked author uses POE to establish his or her copyright in a work.

#### 4. LOOKING FORWARD

The measures described above, even if implemented perfectly, would still not allow masked authors to enjoy all the fruits of copyright. For one thing, truly anonymous authors would remain too far beyond the reach of the law to enjoy any of copyright’s privileges. No technological fix can change the fact that the Copyright Act and copyright registrations require copyright claimants’ names.<sup>188</sup> Furthermore, neither pseudonymous nor anonymous authors can represent themselves in civil proceedings without revealing themselves to the court (if they ask the court for sealed litigation) and probably also to the public (in the all-too-likely event that the plea fails).<sup>189</sup> Further progress toward harmonizing copyright and privacy would require not just technological advances but also changes in legal, regulatory, and market conditions. This section outlines some of the larger features of that imagined, braver world.

As even a skeptic must concede, a combination of institutional and technological changes might someday allow masked authors to enjoy copyright’s privileges at no greater cost or inconvenience than named authors suffer. Would that put us into a sort of copyright and privacy

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185. Araoz & Ordano, *supra* note 180.

186. *Id.*

187. See Montgomery, *supra* note 168.

188. 17 U.S.C.S. § 409(1).

189. FED. R. CIV. P. 10(a); *Does I thru XXIII*, 214 F.3d, at 1068.

nirvana? Ordinary authors and publishers—the kinds that do not wear masks—might not think so. Rather than nirvana, they might well see injustice. Why? Because insofar as masked authors escape the reach of civil authorities (the main reason for wearing a mask), they enjoy an advantage over identified parties.

For instance, the Copyright Office might worry that it could not effectively sanction Publius v. 3 if he lied on his copyright registration forms.<sup>190</sup> Similar worries would haunt the defendant in a copyright infringement suit brought by Publius v. 3. How could the defendant enforce a judgment, should one be rendered, requiring Publius v. 3 to pay the defendant's attorney's fees?<sup>191</sup> The court itself might worry that Publius v. 3 would prove immune to judicial sanctions, such as those levied under Rule 11 of the Federal Rules of Civil Procedure. If you cannot get blood from a stone, how can you get it from someone you cannot even touch?

This worthy concern draws two consoling replies. First, the federal system of civil justice in the United States already has means in place to accommodate judgment-proof plaintiffs, such as indigent prisoners.<sup>192</sup> Even if that is not the ideal model for giving masked authors access to the courts, it overcomes the claim that it just cannot be done.

Second, masked authors can be made to bleed, metaphorically speaking. How? By making them stake their copyrights on their good faith when they deal with government officials or civil litigants. After all, those copyrights subsist thanks only to the Copyright Act, Copyright Office, and United States federal law enforcement system.<sup>193</sup> If Publius v. 3 refuses to honor legal processes relative to the Copyright Office, a civil litigant, or the judicial system, those aggrieved parties should have the power to seize the copyright in the subject work. In this way, those who deal with Publius v. 3 would not have to rely solely on reputation and luck; they would have the comfort of knowing that, *in extremis*, they could hit the masked author right where it hurts—the copyright. Granted, this would not guarantee adequate compensation for those with legal claims against the likes of Publius v. 3. But every fining bureaucrat and private litigant faces the risk of judgment-proof defendants.<sup>194</sup>

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190. See 17 U.S.C.S. § 506(e) (providing for fines against copyright registrants who misrepresent relevant facts). Of course, thanks to POE timestamping, Publius v.3 could effectively *not* lie about some items required by copyright registration forms. That technology could not, however, prevent a masked “author” from lying about who really created the fixed original expressive work, or whether it is original at all.

191. See 17 U.S.C.S. § 505 (2015) (providing for attorneys' fees).

192. See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 607 (2006).

193. See 17 U.S.C.S. § 410(a) (2015).

194. See, e.g., Gilles, *supra* note 192, at 606.

Masked authors wielding copyrights would also prove immune to criminal or corporeal punishments.<sup>195</sup> They are not likely to engage in such offenses, however, given that masked authors have only the powers of expression and civil litigation. True, expressing the wrong ideas can still get a person thrown in jail.<sup>196</sup> For example, the famously unmasked exile from federal law, Edward Snowden, faces criminal sanctions for expressing state secrets.<sup>197</sup> But those defendants arise rarely; even Publius v. 3 would have little fear of a treason charge.<sup>198</sup>

So what should we say about a hypothetical world where masked authors have a marginally greater chance of escaping legal sanctions but face the hazard of forfeiting their copyrights? On the one side, we have copyright affording the fullest possible respect for authors' privacy; on the other, we have some administrative costs, a marginal increase in the risk of financially insolvent defendants, and the possibility that masked authors might escape criminal punishment. As specified at the start, this paper assumes that authorial privacy constitutes at least a *prima facie* good. The presumption in its favor might of course be overcome by countervailing costs imposed on innocents.<sup>199</sup> Authorial privacy is not the greatest good. Here, though, the bargain looks like a good one. We all get a more honest, original, and lively world of original expressions. Some authors—not likely many, but ones of particular interest—would find themselves newly empowered in this privacy-friendly copyright system. They might tell us truths that others dare not, or regale us with bold new stories. We cannot know until we try, and we can always throw on the brakes if it does not work.

To “throw on the brakes” in this context means simply refusing to honor copyright claims by masked authors in federal courts. It does not—it could not—mean putting an end to masked speech. Authors already have the power to reach the world without revealing their identities.<sup>200</sup> They lack

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195. See 17 U.S.C.S. § 506(a)(1).

196. See, e.g., Peter Finn & Sari Horwitz, *U. S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), [https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc\\_story.html](https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html).

197. *Id.* Snowden's legal troubles merely illustrate that expressions can lead to criminal sanctions; they do not say much about copyright, since his fault, if any, lay largely in copying and publicly distributing works of the federal government. *Id.* These works were not copyrighted because they could not be copyrighted. See 17 U.S.C.S. § 105.

198. See generally Scott Bomboy, *Treason Charges for Snowden Would be Rare, Challenging*, NAT'L CONST. CTR. (June 11, 2013), <http://blog.constitutioncenter.org/2013/06/treason-charges-for-snowdon-would-be-rare-challenging/>.

199. Costs of authorial privacy voluntarily borne cannot count against it. You end up better off on net if, say, you agree to assume the risk of facing an insolvent masked author in civil litigation in return for the prospect of a flourishing environment of original expressions.

200. PSEUDONYMS, *supra* note 88.

only full access to copyright's privileges.<sup>201</sup> And the kinds of authors who would find access to those incentivizing privileges represent the kinds of authors we want to hear from. Publius v. 3 writes his tract with the express aim of reaching many readers and pleasing them so much that they want to echo his words. Extant authorities might not like the message, but copyright has the public good as its ultimate aim, not the welfare of particular politicians.<sup>202</sup> If Publius v. 3 (unlike John Locke) makes a fair return on "Against a Standing Judiciary," it shows the favor of the people and thus merits the respect of the law.

## 5. CONCLUSION

This paper has explained how the law of the United States puts copyrights and privacy rights into conflict and suggested that blockchain technologies might offer a path toward peace. Section 2 described how lawmakers and civil servants evidently tried to respect the privacy rights of masked authors, but failed.<sup>203</sup> Despite those good intentions, and at peril to both copyrights and freedoms of expression, masked authors nonetheless face little prospect of enjoying the privilege of controlling access to or earning good value from their copyrighted works.<sup>204</sup> Eschewing calls for legal and regulatory reform as largely futile and at all events premature, Section 3 looked for technological solutions to this problem.<sup>205</sup> That inquiry uncovered promising signs that the blockchain offers ways for authors to establish robust (and thus potentially reputable) pseudonymous identities and, through POE, to provide credible public evidence that the documents they claim did, indeed, originate with them. Similar devices can also make it easier for masked authors to act through intermediary agents in privacy-protecting ways. Looking forward, as in Section 4, suggests how institutional reforms and blockchain technologies might combine to create a system where copyright and privacy harmonize.<sup>206</sup>

Much work, both technological and institutional, remains before the United States copyright system can claim it treats anonymous and pseudonymous authors on equal footing with other authors. This paper has diagnosed the problem, suggested a tool kit, and foreseen a better, fairer system. Further work toward making that ideal more real might include: Stress-testing current Copyright Office procedures by attempting to register

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201. *Id.*

202. See Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PENN L. REV. 635, 637 (2007).

203. See *supra* Section 2.3.

204. See PSEUDONYMS, *supra* note 88.

205. See *supra* Section 3.

206. See *supra* Section 4.



a work using a public key-based pseudonym for the claimant; encouraging the use of POE timestamps by the public and private sector; and drafting clarifying regulations and statutes to balance the privacy rights of masked authors against the just scope of civil and criminal law. Through these means, masked authors might enjoy both their copyrights and their privacy rights, and we might enjoy the expressions thereby encouraged.