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COPYRIGHT BASICS: FROM EARLIEST TIMES TO THE DIGITAL AGE

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I. INTRODUCTION AND THE HISTORY OF COPYRIGHT

This year marks a momentous time in the history of copyright law; 2010 is the 300th anniversary of the British Statute of Anne,² the first modern copyright law that influenced our own Congress to enact the first U.S. copyright law just three years after ratification of the Constitution. It is also the 100th anniversary of the effective date of the Copyright Act of 1909,³ the statute that immediately preceded the current Act. This is also a time when there is tremendous strain on copyright law brought about by the digital environment. In my opinion, the strain also highlights the fact that the United States has moved away from a principled approach to copyright and has instead focused on solving particular problems for individual copyright industries. Thus, the statute itself lacks both coherence and a theoretical underpinning that makes sense to ordinary people. This has resulted in greater tensions between the users of copyrighted works and the owners of copyrights in unprecedented new ways, further complicated by the advent of the digital age and the Internet. Other papers in this symposium issue will explore some of these tensions and offer potential solutions.

As long as there have been artistic, literary, and musical works produced, there have been unscrupulous persons who copied others' creative works and appropriated it as his or her own. Perhaps it was just admiration of the creativity of the artist or poet or perhaps a desire to gather acclaim for one's own supposed genius. Or, in the case of the Great Library at Alexandria, founded in 290 B.C. by Ptolemy I, it was a desire to build a great library. Ptolemy asked other rulers

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² Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

³ Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

around the known world to lend him texts which scribes would then copy for the library. Additionally, when ships landed at the port of Alexandria, vessels were searched, not for contraband, but for books and maps. These were confiscated, copied, and then returned to their owners, and the copies were added to the library. There were complaints, however, that sometimes Ptolemy kept the original for his library and returned the copy to the owner,⁴ which puts a whole new spin on literary piracy!

In the ancient world, the copying of a book or some other work occurred through a scribe obtaining access to an original work and meticulously copying that work by hand. At the time, copyists felt at liberty to "improve" the text of the original author or to simply forge the text or a large part of it. This might include the addition of embellishments from the copyist or the omission of certain parts of the original author's text as the copyist acted as a censor. As a result, the earliest copies of a work were the most accurate and therefore considered the most valuable. Provided that a person had both the time and the skill to copy a book, there was no legal prohibition on them doing so. In fact, the main restriction on the production of copies of a work likely was securing sufficient access to the physical original in order to complete the copy.⁵

The earliest recorded violation of this nebulous property right is an often told but likely apocryphal tale of a quarrel between Saint Columba and his teacher Finnian of Moville. Legend says that in the year 567 Saint Columba, sitting up all night, furtively made a copy of Finnian's Psalter,⁶ which Finnian had lent him. The Abbot protested and claimed not only the original, but also the copy, as his property. The dispute eventually went before King Diarmed, who issued judgment for the Abbot saying, "To every cow her calf, and accordingly, to every book, its copy."⁷

Prior to the invention of the printing press, thousands of copyists were employed in various monasteries to reproduce manuscripts. There was little need for copyright laws because the scale of copying was necessarily so small. Even had copyright law existed at that time, most of the religious texts, hymns, and other

⁴ Andrew Erskine, *Culture and Power in Ptolemaic Egypt: The Museum and Library of Alexandria*, 42 GREECE & ROME 38, 39 (1995).

⁵ See generally ELLWOOD P. CUBBERLEY, *THE HISTORY OF EDUCATION: EDUCATIONAL PRACTICE AND PROGRESS CONSIDERED AS A PHASE AND DEVELOPMENT OF THE SPREAD OF WESTERN CIVILIZATION 126-37* (1920) (explaining the history of literary copying).

⁶ A psalter is a collection of psalms for liturgical use.

⁷ AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 42 (New York, G.P. Putnam's Sons 1899).

works that were copied probably would not have qualified for copyright protection today, but would be considered to be public domain⁸ works due to their age. All of this copying did not amount to a hill of beans since one rogue monk could not make a dent in the market for such works.⁹ It took the invention of moveable type to make the reproduction of copies important enough to be controlled by law.¹⁰

It was nearly 1,000 years later before the first authentic complaint of literary piracy in English law was recorded. Printer Wynkyn de Worde sued for the protection of his right to print a grammar treatise by Robert Witinton in 1553. De Worde obtained “a privilege” for the second edition, which prevented further misappropriation, but Peter Trevers had reprinted his version from the 1525 edition, so de Worde complained of piracy.¹¹

The advent of the printing press brought about many changes in society. Those early printers were highly literary persons who either wrote or translated from another language the books they printed. In England, with a small population of literate individuals at the beginning of the 16th century, the market became flooded with books, and foreign imports were banned. At the same time, books began to be printed, which challenged the authority of the church and king. As a form of censorship, Henry VIII began to grant licenses for printing purposes.¹² The Stationer’s Company was chartered in 1556 by Phillip and Mary for the primary purpose of preventing the propagation of the Protestant Reformation. The Stationer’s Company enjoyed a monopoly since no author could publish his or her writing except through the Company. The Company also could control the price paid to authors. This is where the term “booksellers’ monopoly” originated.¹³ This licensing system flourished until 1694, after which time piracy and plagiarism abounded.¹⁴

⁸ Those works on which copyright has expired.

⁹ See BIRRELL, *supra* note 7, at 47-48.

¹⁰ See RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW: BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT WITH SPECIAL REFERENCE TO THE AMERICAN CODE OF 1909 AND THE BRITISH ACT OF 1911* 10 (Boston & New York, Houghton, Mifflin Co. 1912).

¹¹ *Id.* at 21.

¹² Historyofcopyright.org, *Early Writings & the Beginning of Book Printing* (2005), http://www.historyofcopyright.org/pb/wp_27fa9cd0/wp_27fa9cd0.html?0.22301878884365667.

¹³ L. Ray Patterson & Stanley F. Birch, Jr., *A UNIFIED THEORY OF COPYRIGHT*, (Craig Joyce ed., 2009), *reprinted in* 46 Hous. L. Rev. 215, 243-46 (2009).

¹⁴ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 24 (1991).

The author owned the manuscript, but the true property interest belonged to the owner of the printing press. The important right was the right to make and sell copies.¹⁵ Authors and printers protested loudly, and during the reign of Queen Anne, in 1710, Parliament responded with the first copyright law.¹⁶ This Statute of Anne recognized authors as the fountainhead of copyright protection, a very revolutionary concept. Further, copyright would exist only for limited times and not be perpetual.¹⁷ So, Queen Anne could be hailed as the Queen of Copyright, although she clearly is better known for lace and furniture.

Prior to the adoption of the Constitution in 1787, all of the 13 colonies except Delaware had passed laws conferring the right to make and circulate copies publicly upon the authors for limited times after publication.¹⁸

II. CONSTITUTIONAL PROVISIONS

Federal authority to regulate copyright is found in the U.S. Constitution, Article I, Section 8, Clause 8: “The Congress shall have power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁹ The primary purpose of copyright is not to reward the author, but to secure “the general benefits derived by the public from the labors of authors.”²⁰ The grant of a limited monopoly to authors is predicated on the premise that the public benefits from the creative activities of the authors. The exclusive rights granted to the copyright owner are a necessary condition to the full realization of such creative activities.

To analyze the Constitutional clause requires an examination of each of its phrases. “To promote the progress of science and the useful arts,” basically means to promote learning, and among whom was Congress to promote learning but the public? “By securing for limited times...” The word “securing” recognizes congressional power to enact copyright legislation. The phrase “for limited times” actually serves to limit congressional power. Enacting perpetual copyright

¹⁵ MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 14 (1993).

¹⁶ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

¹⁷ *Id.*

¹⁸ Francine Crawford, *Pre-Constitutional Copyright Statutes*, 47 J. COPYRIGHT SOC'Y 167, 167 (2000). For the text of the various state laws, see Jesse Feder's Website, U.S. Copyright Laws – 1783-Present, Copyright Laws of the Original States (2008), http://jessefeder.com/copyright/copyright_laws.aspx.

¹⁹ U.S. CONST. art. I, § 8, cl. 8.

²⁰ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1931).

protection thus would be unconstitutional. The term of copyright under the original 1790 Act was fourteen years,²¹ and under the 1909 Act²² was twenty-eight years. At the end of the term, the copyright owner could apply for an additional twenty-eight year term, for a maximum of fifty-six years.²³ Under the original Copyright Act of 1976²⁴ as originally passed, the term was life of the author plus fifty years and seventy-five years from the date of first publication for works of corporate authorship and for anonymous or pseudonymous works. In 1998, the term was extended to seventy years after the death of the author and ninety-five years for corporate, anonymous and pseudonymous works.²⁵

As to interpreting “to authors...”, the word “author” has been defined broadly as anyone who originates a work.²⁶ In the case of works for hire, the employer or other person for whom the work was prepared is considered the author.²⁷ “The exclusive right...” This phrase emphasizes the power of Congress under the Constitution to grant an exclusive right to authors. “To their respective writings...” is the phrase that loosely defines what may be protected. The term “writings” has been construed quite liberally by the courts, recognizing that in 1789 many types of works were not yet in existence,²⁸ as new media is developed, works created in those forms also must be afforded protection. The Supreme Court has said that writings include any physical rendering of the fruits of creative, intellectual or aesthetic labor.²⁹ Not everything qualifies as a writing, however. The following have been held to lack sufficient intellectual labor to constitute a writing: facts, ideas, processes, discoveries, concepts, a trademark, blank charts, etc.³⁰ Intellectual labor is not the same requirement as originality. The term suggests an absolute standard of creativity, albeit very slight.³¹

In order for a work to qualify as a writing, it must be embodied in some tangible form; i.e., some material form capable of

²¹ Copyright Act of 1790, ch. 15, 1 Stat. 124, § 1 (repealed 1831).

²² Copyright Act of 1909, ch. 320, 35 Stat. 1075, § 23 (repealed 1976).

²³ *Id.*

²⁴ Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572 (1976).

²⁵ 17 U.S.C. § 302 (2008).

²⁶ *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 57-58 (1884) (“an author . . . is ‘he to whom anything owes its orig[i]n’”).

²⁷ 17 U.S.C. § 201(b).

²⁸ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.07 (2009).

²⁹ *Goldstein v. California*, 412 U.S. 546, 561 (1973).

³⁰ 1 NIMMER, *supra* note 28, § 1.08 [C][1], [D], [F].

³¹ 1 *id.* § 1.08 [C][1].

identification and having a more or less permanent endurance.³² Thus, a live television broadcast or the performance of a play or a musical composition is not per se a writing. Although an author has the right to control performance of his or her work, a performance does not make it a writing. To achieve tangibility, the performance must be recorded either earlier or simultaneously.³³

III. COPYRIGHT BASICS

A. COPYRIGHT DEFINED

Copyright is defined as the legally secured right to publish and sell both the substance and form of a literary, musical or artistic work.³⁴ Copyright protects the form of expression and not the idea itself; it protects the literary work and not the idea for the plot. The essence of copyright is to prohibit copying of protected works.³⁵

The current statute is the Copyright Act of 1976, which became effective January 1, 1978, and is Title 17 of the United States Code. It has been amended several times, including once to comply with the terms of the major international copyright treaty, the Berne Convention,³⁶ to which the United States became a signatory in 1989,³⁷ almost a century after Berne was first negotiated and signed by European countries.

B. REQUIREMENTS

Registration of the work with the U.S. Copyright Office is optional, and may be done anytime during the life of the copyright.³⁸ The work must be registered, however, if the copyright holder wants to sue infringers in order to enforce his or her rights.³⁹ In a way, the opposite of copyrighted works are those in the public domain. The public domain includes works on which the term has expired and those which were never protected by copyright because of the failure to

³² 1 *id.*

³³ 17 U.S.C. § 101 (2008).

³⁴ See generally COPYRIGHT: CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION (A. Kent & H. Lancour eds., 1972) (defining copyright).

³⁵ See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 2 (3d ed. 1999).

³⁶ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, available at http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

³⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853-61 (codified as amended at 17 U.S.C. § 101 (2009)).

³⁸ 17 U.S.C. § 408.

³⁹ *Id.* § 411.

comply with statutory requirements in existence at the time, such as notice of copyright.⁴⁰ Normally, materials produced by the U.S. Government are not subject to copyright protection but may be freely copied by all.⁴¹ They are sometimes referred to as public domain works. State governments may claim copyright in their works, although, according to the U.S. Copyright Office, governments cannot claim copyright in "official documents."⁴² This typically means no claim of copyright applies to judicial opinions or the text of legislation.

To obtain a copyright, two things are required: originality and fixation.⁴³ When an author creates an original, fixed work, copyright protection attaches automatically. Originality means only that the work owes its origin to the author, independently created, and was not copied from other works.⁴⁴ Thus, a work will not be denied protection just because it is similar to a work previously produced.⁴⁵ Included in the originality requirement is at least a smidgen of creativity. There must be some element of creativity, however minimal, but even a most banal effort may yield enough to qualify for copyright.⁴⁶ Not every effort qualifies, however. For example, the Copyright Office denied copyright registration to items, such as a cardboard star covered in aluminum foil, as simply lacking enough creativity to qualify for copyright.⁴⁷ It is difficult to determine the amount of originality required; frequently it necessitates judicial line drawing, but any distinguishable variation will meet the originality requirement.⁴⁸

The second requirement, fixation, requires that a work be fixed in a tangible medium of expression now known or later developed.⁴⁹ This means it could be handwritten, recorded on DVD, painted on canvas, or stored on a server so that others may access it. Most works are fixed today. Even live television broadcasts may be fixed by simultaneous videotaping.⁵⁰ Works that are not fixed include improvisational theater (which would have to be videotaped), extemporaneous speeches for which there is no written text, and sidewalk art that washes away with the rain.

⁴⁰ For example, publication without notice under the 1909 Act resulted in the work entering the public domain.

⁴¹ 17 U.S.C. § 105.

⁴² 1 NIMMER, *supra* note 28, § 5.12[A].

⁴³ 17 U.S.C. § 102(a).

⁴⁴ 1 NIMMER, *supra* note 28, § 108[A].

⁴⁵ 1 *id.*

⁴⁶ 1 *id.* at § 2.01[B].

⁴⁷ *See* *Bailie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958).

⁴⁸ 1 NIMMER, *supra* note 28, § 2.01[B].

⁴⁹ 17 U.S.C. § 102(a) (2008).

⁵⁰ *See id.* § 101.

Notice of copyright is no longer mandatory,⁵¹ but it was under earlier statutes. This means that failure to include a notice on a work today does not result in a loss of copyright for the owner, nor does it mean that the owner does not claim copyright. It simply means that the owner has chosen not to include a notice. Most copyright owners still include a notice of copyright since it alerts the world that someone is claiming rights, and it also tells anyone interested in seeking permission to use the work whom to contact. Moreover, inclusion of the notice on the work deters those individuals who, in good faith, do not want to infringe the copyright by telling them that it is protected. It has an important legal benefit too: inclusion of notice on the work cuts off a defendant's ability to mitigate damages by claiming innocent infringement.⁵² The elements of copyright notice include the copyright symbol, ©, the date of first publication, and the name of the copyright holder.⁵³

C. CATEGORIES OF PROTECTED WORKS

There are eight categories of copyrightable works. Some of the categories are self-explanatory, but others benefit from some explanation.

Literary works⁵⁴ is the first category of copyrightable works. This includes all the works of fiction and nonfiction, compilations, such as electronic databases, and collective works, such as periodicals. Computer software is also considered a literary work for copyright purposes.⁵⁵

Musical works, including any accompanying words,⁵⁶ are the second category of works for which copyright protection is available. This is the musical composition that may be expressed as sheet music, recorded on a phonorecord or stored digitally.⁵⁷

Dramatic works, including any accompanying music,⁵⁸ also are subject to copyright protection. A dramatic work is a written work invented and set in order in which the narrative is told by dialogue and

⁵¹ *See id.* § 401(a).

⁵² *Id.* § 405(b).

⁵³ *Id.* § 401(b).

⁵⁴ *Id.* § 102(a)(1).

⁵⁵ H.R. Rep. No. 94-1476, 94th Cong. (1976) reprinted in 17 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1 (2001).

⁵⁶ 17 U.S.C. § 102(a)(2) (2008).

⁵⁷ 1 NIMMER, *supra* note 28, § 2.05[A].

⁵⁸ 17 U.S.C. § 102(a)(3).

action, and the characters go through a series of events which tell a connected story.⁵⁹

Similar to dramatic works, but occupying their own category, are pantomimes and choreographic works,⁶⁰ which were added to the Copyright Act only in 1976. It took the advent of videotaping to fix these works sufficiently to qualify for copyright protection. Choreographic works are works primarily for the stage and do not include social dance steps.⁶¹

Pictorial, graphic and sculptural works⁶² are defined in the Act to include two- and three-dimensional works of fine, graphic and applied arts, photographs, prints and art reproductions, maps, globes, charts, diagrams, and models.⁶³ This represents the largest category of works and perhaps has the greatest variety. First, the category contains all of the works of fine art and photography, along with all scientific drawings, models, and three-dimensional works such as mechanical drawings, maps, globes, engineering diagrams, etc.⁶⁴ But still, this is not what makes it the largest category. Instead, it is all of the consumer trade goods that have a design aspect that makes this category so large: greeting cards, dolls, games, toys, prints, pictorial illustrations, china patterns, silverware designs, etc.

Motion pictures and other audiovisual works⁶⁵ represent an old category of works with something new added. Motion pictures⁶⁶ have been protected by U.S. copyright law since the early part of the 20th century, but audiovisual works⁶⁷ were not mentioned until the 1976 Act. Thus, educational films and videos were included for the first time, which raised interesting issues about public performance since works in this category, by their nature, are meant to be performed.

Sound recordings⁶⁸ have been protected under U.S. copyright law only since 1972.⁶⁹ They include works that result from the

⁵⁹ See 1 NIMMER, *supra* note 28, § 2.06[A] (citing *Daly v. Palmer*, 6 F. Cas. 1132 (S.D.N.Y. 1868); *O'Neill v. Gen. Film Co.*, 152 N.Y.S. 599 (N.Y. Sup. Ct. 1915)).

⁶⁰ 17 U.S.C. § 102(a)(4).

⁶¹ See 1 NIMMER, *supra* note 28, § 2.07[B].

⁶² 17 U.S.C. § 102(a)(5).

⁶³ *Id.* § 101.

⁶⁴ See *id.*

⁶⁵ *Id.* § 102(a)(6).

⁶⁶ Motion pictures are defined as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with any accompanying sounds, if any.” *Id.* § 101.

⁶⁷ Audiovisual works are defined in the Act as: “. . . works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.” *Id.*

⁶⁸ *Id.* § 102(a)(7).

fixation of musical, spoken or other sounds.⁷⁰ The usual format for these works has been vinyl records, audiotapes, CDs and now other digital formats.

Architectural works⁷¹ were added to the Act only in 1990⁷² after the United States joined the Berne Convention.⁷³ Architectural works are basically the designs for a building embodied as the building itself, architectural blueprints, etc.⁷⁴

D. EXCLUSIVE RIGHTS

When one creates a copyrightable work, copyright attaches automatically.⁷⁵ Authors then get a bundle of rights, referred to as the exclusive rights⁷⁶ even though they are not as exclusive as the term might imply. The author may retain the copyright, transfer it or license it.⁷⁷ The rights are divisible, so the owner may also transfer one right and retain all others. Individual rights may be licensed to various entities, and the licensing of these rights is extremely important in copyright.

Reproduction⁷⁸ is the most important right. It is the hallmark of copyright and often is referred to as copying. The most common manifestation of the reproduction right is when the author transfers the right to reproduce the literary work in book copies and distribute them to libraries and bookstores. Reproduction in any form, such as copying in longhand, photocopying or tracing, counts as reproduction. With technology, one can reproduce in a whole variety of ways from photocopying, to scanning, to downloading from an electronic database, to cutting and pasting something found on the web. Just because it is technologically possible to reproduce a work does not mean that it is not infringement. People often ask why a reproduction is infringement when reproduction equipment is openly made and

⁶⁹ Sound Recordings Act, Pub. L. No. 140, 85 Stat. 391 (1971).

⁷⁰ 17 U.S.C. § 101.

⁷¹ *Id.* § 102(a)(8).

⁷² *See* Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990).

⁷³ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2854.

⁷⁴ 17 U.S.C. § 101. The definition of architectural works specifically includes the overall form, arrangement, position of spaces, etc., but excludes individual standard features. *Id.*

⁷⁵ *See id.* § 201(a)

⁷⁶ These include the rights of reproduction, distribution, adaptation, public performance and display, as well as the right of public performance for sound recordings transmitted by digital means. *See id.* § 106.

⁷⁷ *Id.*

⁷⁸ *Id.* § 106(1).

sold. The manufacturers of reproduction equipment typically do not own copyrights, and further, the reproduction equipment has substantial non-infringing uses.

Distribution is a corollary right to reproduction. The right to distribute⁷⁹ the reproduced copies also belongs to the copyright holder. Although “distribution” is not defined in the statute, in the past it meant distributing physical copies of copyrighted works. Today, posting something on the web is a type of distribution.

Adaptation is the right to prepare derivative works,⁸⁰ and is very important to the copyright holder. This includes the rights to prepare the motion picture script from the literary work, prepare new editions, translations, etc. Musical arrangements also are adaptations, as are condensations such as the old Reader’s Digest Condensed Books.⁸¹

The public performance⁸² right also belongs to the copyright holder. A public performance is defined as one that takes place in a public place or outside the normal circle of family and friends.⁸³ Transmissions of works such as movies and music are also public performances, even though receipt of the transmission may be by people who are not physically located in the same place and who receive the performance at different times.⁸⁴

The display right is the right to display the work publicly,⁸⁵ i.e., to show a copy of it either directly or with the aid of a machine or device.⁸⁶ One normally thinks of the display right as attaching to works of fine arts, but it applies to copies of any works. Whole new display issues have arisen because of digital copies and viewing them on a computer screen.

For sound recordings, there is a relatively new, very specific exclusive right of public performance by digital means.⁸⁷ Sound recordings currently do not have performance rights, so when recordings are played on the radio, all performance royalties go to the composer. The Recording Industry Association of America (RIAA) recognized that protection for digital performance by transmission was needed. So, the statute was amended in 1995⁸⁸ and again in 1998⁸⁹ to

⁷⁹ *Id.* § 106(3).

⁸⁰ *Id.* § 106(2).

⁸¹ *See id.* § 101.

⁸² *Id.* § 106(4).

⁸³ *Id.* § 101.

⁸⁴ *See id.* § 101.

⁸⁵ *Id.* § 106(5).

⁸⁶ *Id.* § 101.

⁸⁷ *Id.* § 106(6).

⁸⁸ The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

create this right, which is the basis of the current webcasting controversy.⁹⁰ Now radio stations that webcast pay royalties both to the composer and to the record company.⁹¹

IV. INFRINGEMENT, EXCEPTIONS, AND DEFENSES

A. INFRINGEMENT

Generally, when anyone violates one of the exclusive rights of the copyright holder, he or she has infringed the copyright. In order to succeed in an infringement suit, a plaintiff has to prove ownership and copying.⁹² The following are aspects of ownership: (1) originality with the author; (2) copyrightability of the subject matter; and (3) compliance with applicable statutory formalities for registration in order to bring suit in federal court.⁹³ The copyright registration certificate constitutes prima facie evidence of ownership if the work is registered within five years after its first publication.⁹⁴ There are other ways to prove ownership of the copyright, but the registration certificate is the easiest.

Unauthorized copying is the essence of copyright infringement. A plaintiff can establish copying by direct evidence or by proving access and substantial similarity.⁹⁵ Access may be defined as a reasonable opportunity to copy.⁹⁶ It is often difficult to prove access unless the alleged infringed work is a very popular one with wide distribution or airplay. Substantial similarity is the second element needed to prove copying absent direct evidence. Courts compare the two works to judge substantial similarity, and the important question is

⁸⁹ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2899 (1998).

⁹⁰ See generally Susan A. Russell, *The Struggle over Webcasting – Where is the Stream Carrying Us?*, 1 OKLA. J.L. & TECH. 13 (2004) (outlining the legal history of webcasting).

⁹¹ Royalties are paid to the American Society of Composers, Authors and Publishers, (ASCAP). See generally ASCAP, <http://www.ascap.com/index.aspx>; Broadcast Music Inc., (BMI), <http://www.bmi.com>, and SESAC, formerly the Society of European Stage Actors and Composers, <http://www.sesac.com>. Royalties are paid to the composer and to the record company through SoundExchange, a nonprofit performance rights organization. See generally SoundExchange, <http://www.soundexchange.com/>. A portion of those royalties are paid to the performers. See generally *id.*

⁹² 4 NIMMER, *supra* note 28, § 13.01[A]-[B].

⁹³ 4 *id.* § 13.01[A].

⁹⁴ 17 U.S.C. § 410(c).

⁹⁵ 4 NIMMER, *supra* note 28, §§ 13.01[A]-[B].

⁹⁶ See *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 316 (6th Cir. 2004).

how similar the two works have to be to prove copying.⁹⁷ Courts have used a number of tests to judge substantial similarity, such as the existence of common errors in the two works, the ordinary observer test, and striking similarity, which looks for the existence of elements so idiosyncratic that it virtually precludes independent creation.⁹⁸

B. EXCEPTIONS, LIMITATIONS, AND DEFENSES

There are a number of exceptions, limitations, and defenses to copyright infringement, but only a few are relevant for this discussion.

Independent creation is a significant defense. Copyright law recognizes that even without copying, it is possible (though unlikely) that two very similar or even identical works might be produced.⁹⁹ A defendant claiming independent creation bears the burden of proving that he or she created the work independently.¹⁰⁰ Courts look at factors, such as how quickly the work was created, the defendant's past history in creating copyrighted works, and the like.¹⁰¹

Section 106 of the Copyright Act gives all the rights to the copyright holder, but sections 107-122 take rights away from the copyright holder. The most important of these exceptions and limitations for users of copyrighted works is fair use. Section 107 basically says that activity which would normally be infringement is excused because of the existence of certain factors. It is called the "safety valve" of copyright. The section reads "...the fair use of a copyrighted work, including such use by reproduction in copies...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."¹⁰² Courts have held that these uses are illustrative only and that not all uses for scholarship or for criticism are fair use.¹⁰³ The statute then lists four factors that a court must apply to determine whether a use is fair use: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality used; and (4) effect on the potential market for or value of the work.¹⁰⁴

⁹⁷ 4 NIMMER, *supra* note 28, § 13.03.

⁹⁸ 4 *id.* § 13.02[B].

⁹⁹ 4 *id.* § 12.01[B][2][b].

¹⁰⁰ *See* Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 967 (8th Cir. 2005).

¹⁰¹ 4 NIMMER, *supra* note 28, § 13.01[B].

¹⁰² 17 U.S.C. § 107.

¹⁰³ *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994).

¹⁰⁴ 17 U.S.C. § 107(1)-(4).

The fair use defense is under stress because users in the digital environment seek to extend and expand it, while copyright owners want to reduce its applicability to digital works. Technology makes it possible for both of these things to occur. Users can reproduce and distribute copyrighted works in ways that were previously impossible and at speeds that were unimaginable just a few years ago. While users are clamoring for greater fair use rights, copyright owners are resistant. Some of the same technologies that make it easier for users to make copies also make it possible for copyright owners to measure uses, identify users, and track and block their access. Owners have implemented stronger controls on their works and want to control both access and use even further.

Another important exception to the rights of the copyright holder is the first sale doctrine. Under the first sale doctrine, the owner of a copy of a copyrighted work can dispose of that copy however he or she chooses.¹⁰⁵ No royalties are due to the owner for any subsequent sale or loan of that copy.¹⁰⁶ So, when someone purchases a used book, no royalties based on that sale go to the copyright holder. It is the first sale doctrine, in fact, that permits libraries to lend books from their collections to users. Libraries acquire materials by purchase or gift and choose to lend them; they can even rent books to users.

A controversial issue is whether and to what extent the first sale doctrine applies to digital works since it was developed for the print environment. In other words, can one dispose of a digital copy just as one can dispose of a printed or analog copy? Clearly, in reality the answer is yes, if one does not also retain a copy on his or her computer. But licensing agreements may restrict one's ability to dispose of a copy by giving or transferring it to someone else. Moreover, the Register of Copyrights says that the first sale doctrine for digital works is seriously limited since when one transfers a digital copy it is not the same copy that the user possessed, unlike a transfer of a physical copy of a printed book.¹⁰⁷

There are two important exceptions to the rights of the copyright holder for educational institutions. The first is the classroom exemption, found in section 110(1).¹⁰⁸ It provides an exemption to the public performance and display rights for nonprofit educational institutions engaged in face-to-face teaching, in a

¹⁰⁵ *Id.* § 109(a).

¹⁰⁶ *Id.*

¹⁰⁷ See generally U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. (analyzing the effects of digital technology on the first sale doctrine).

¹⁰⁸ The statute refers to section 110 as an exemption rather than an exception.

classroom, in the course of instruction and permits them to perform or display works without permission of the copyright owner.¹⁰⁹ There is also an exemption for distance education and any transmitted performance, section 110(2). Called the TEACH Act, it provides that an accredited nonprofit educational institution may transmit performances of entire non-dramatic literary and musical works, but for other works, such as audiovisual works, only reasonable and limited portions may be transmitted without a license.¹¹⁰ There are a number of restrictions on the transmission of the performance and display of copyrighted works by these institutions that make it somewhat difficult for academic institutions to take advantage of the exemption.¹¹¹

Outside of the education arena, nonprofit performances may be excused if there is no payment of fees to promoters, organizers, or performers, if there is no admission fee, or if there is one, proceeds go back to charitable, religious, or educational purposes.¹¹²

V. REMEDIES

A. INJUNCTIONS AND IMPOUNDMENT

The Copyright Act provides that both temporary and permanent injunctions may be ordered by a court in order to prevent or restrain infringement of a copyright.¹¹³ The injunction may be the sole remedy or it may be accompanied by a damage award. Impoundment and destruction of infringing articles may also be ordered by a court. At any time during the pendency of an infringement action, the court may order impoundment of all copies claimed to have been made or used in violation of the copyright owner's exclusive rights.¹¹⁴ As a part of a final judgment, a court may order destruction of all copies found to be infringing.¹¹⁵

¹⁰⁹ 17 U.S.C. § 110(1).

¹¹⁰ *Id.* § 110(2).

¹¹¹ *Id.* § 110(2) (A)-(D). For example, the performance and display must be technologically limited to students enrolled in the course, apply technological measures that reasonably prevent retention of the work for longer than the class session and prohibit unauthorized dissemination in accessible form to others. *Id.* § 110(2)(D)(ii).

¹¹² *Id.* § 110(4).

¹¹³ *Id.* § 502.

¹¹⁴ *Id.* § 503(a).

¹¹⁵ *Id.* § 503(b).

B. DAMAGES

An owner whose copyright has been infringed has two choices of damages: actual damages and profits or statutory damages.¹¹⁶ Damages are awarded to compensate the owner for losses incurred. The copyright owner selects the type of damages, although some damages are available only when the owner had registered the work prior to the occurrence of the act of infringement.¹¹⁷ A copyright owner can recover actual damages suffered as a result of the infringement. An owner also may recover profits of the infringer that are attributable to the infringement.¹¹⁸

At any time before the final judgment is rendered, a copyright owner may elect statutory damages rather than actual damages and profits.¹¹⁹ Statutory damages are available, however, only if the work was registered at the time the infringement occurred.¹²⁰ The current limits for statutory damages are not less than \$750 or more than \$30,000 per work infringed.¹²¹ The damage award may be increased to \$150,000 per act of infringement if the infringement was committed willfully.¹²² The copyright owner has the burden of proving willful infringement, and the court must actually find willfulness in order to award the higher amount.¹²³ Likewise, in the case of "innocent infringement" the award may be lowered to \$200 per act of infringement if an infringer can prove to the court that he or she was not aware and had no reason to believe that the acts constituted infringement.¹²⁴ If the work infringed contains a notice of copyright, however, then the defendant cannot claim to be an innocent infringer.¹²⁵

Costs and attorneys' fees may be recovered except against the United States as a party. Reasonable attorneys' fees may be awarded to the prevailing party.¹²⁶ If the work was not registered prior to the time the infringement occurred, no attorneys' fees may be awarded.¹²⁷ Both costs and attorneys' fees are in the court's discretion.¹²⁸

¹¹⁶ *Id.* § 504(a).

¹¹⁷ *Id.* § 412.

¹¹⁸ *Id.* § 504(b).

¹¹⁹ *Id.* § 504(c)(1).

¹²⁰ *Id.* § 412.

¹²¹ *Id.* § 504(c)(1).

¹²² *Id.* § 504(c)(2).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* § 402(d).

¹²⁶ *Id.* § 505.

¹²⁷ *Id.* § 412.

¹²⁸ *Id.* § 505.

VI. INTERNET-RELATED ISSUES

A. WHY COPYRIGHT AND THE INTERNET ARE SO INTERTWINED

The process of digitization allows the conversion of such materials into binary form, which can be transmitted across the Internet, and then redistributed, copied, and stored, in perfect digital form. To the owner, copyright is about controlling the reproduction and distribution of works, and the Internet has been described as the world's biggest copy machine. On the Internet, one can make an unlimited number of copies, virtually instantaneously, without any perceptible degradation in quality. Further, the copies can then be transmitted around the world in a matter of minutes. These challenges face the copyright industries at a time when the share of copyright in national economies is reaching unprecedented levels. In the United States, this is estimated at nearly \$890 billion annually which accounts for over six percent of the gross domestic product, growing twice as fast as the rest of the economy.¹²⁹

This leads one to question what role fair use plays in copyright infringement on the web. The answer could be easy: the same as in the analog world. However, it may be somewhat more difficult to apply fair use, especially if the copyright holder restricts access to the work. How can one even claim fair use if he or she is unable to get access to the work? Access clearly has become an important issue, but it was not so much of an issue in the print world. Anyone could obtain access through a library. If that library did not have the work in its collection, one could almost always obtain a copy through interlibrary loan. In fact, in more recent years, libraries often provided photocopies in lieu of lending the original. Now, publishers and other copyright holders may decide to make works available digitally via the web. So, only a user who has paid for it may be able to obtain access. Thus, access is the first step even before one can make a fair use of the work. But the copyright holder may further restrict use of the work by putting a time restriction on that access and could prevent copying and downloading.

¹²⁹ See STEPHEN E. SIWEK, ECONOMISTS INCORPORATED, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003-2007 REPORT (2009), *available at* <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

B. DIGITAL CONSUMERS BILL OF RIGHTS

Because of this, a group has produced what it calls the Digital Consumers Bill of Rights.¹³⁰ (1) *Users have the right to "time-shift" content that they have legally acquired.* This gives one the right to record video or audio for later viewing or listening; for example, to use a DVR to record a television show and view it later. (2) *Users have the right to "space-shift" content that they have legally acquired.* This gives one the right to use lawfully acquired content in different places (as long as each use is personal and non-commercial). For example, one could copy a CD to a portable music player so that he or she could listen to the songs while jogging. (3) *Users have the right to make backup copies of their content.* This gives users the right to make archival copies to be used in the event that original copies are destroyed. (4) *Users have the right to use legally acquired content on the platform of their choice.* This gives users the right to listen to music on an iPod, to watch television on an iPod, and to view DVDs on any portable device with that capability. (5) *Users have the right to translate legally acquired content into comparable formats.* This is an important right that gives users the right to modify content in order to make it more usable. For example, a visually impaired person could modify an electronic book so that the content could be read out loud. (6) *Users have the right to use technology in order to achieve the rights previously mentioned.* This guarantees the ability of users to exercise the other rights in this list. It focuses on problems caused by the anti-circumvention provision¹³¹ that paradoxically claimed to grant certain rights, but then criminalized all technologies that would allow users to exercise those rights. In contrast, this Bill of Rights states that ,use rights.¹³²

C. ONLINE SERVICE PROVIDER LIABILITY

The Digital Millennium Copyright Act¹³³ (DMCA) was signed into law on October 28, 1998. As an amendment to the Copyright Act of 1976, its purpose was to update the copyright law and better adapt it to the digital environment.¹³⁴ Some of its provisions, however, also cover print and analog as well as digital works.

¹³⁰ See DigitalConsumer.org, The Consumer Technology Bill of Rights, <http://www.digitalconsumer.org/bill.html> (last visited June 6, 2010).

¹³¹ See *supra* text accompanying notes 131-40.

¹³² DigitalConsumer.org, *supra* note 122.

¹³³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

¹³⁴ S.Rep. No. 105-190, 105th Cong. 1-2 (1998).

For a couple of years prior to passage, Congress considered whether and under what conditions online service providers (OSPs) should be liable for copyright infringement committed by someone using the OSP's network to infringe.¹³⁵ Certainly, the individual would be liable for infringement, but the issue is whether the OSP is secondarily liable. This is why universities and other OSPs are so concerned about issues such as peer-to-peer file sharing by the users of their systems.

The section recognizes that there are two types of service providers: those that serve merely as passive conduits and those that provide online services such as hosting content.¹³⁶ Passive conduits have fewer responsibilities in order to avoid liability than do those that host content for users such as web pages. In order to escape liability, a passive conduit may not: (1) initiate or direct material; (2) select material (it must be just automatic response by the OSP); (3) select recipients (automatic response only by OSP); (4) copy material or keep for longer than necessary; or (5) modify content of material transmitted.¹³⁷ For OSPs that host contents, the requirements to void liability for the infringing behavior of users are more stringent. The OSP must: (1) have no actual knowledge that the material or activity infringes copyright; (2) not receive any financial benefit from the alleged infringement; (3) have no awareness of facts or circumstances from which infringing activity is apparent; (4) receive no financial benefit attributable to infringing material; and (5) act expeditiously to remove material that a copyright owner claims is infringing if the OSP obtains actual knowledge or awareness of the circumstances that point toward infringement or if the OSP receives actual notice of such claimed infringement.¹³⁸ This last requirement is the so-called "notice and take down provision." The OSP must designate an agent to receive complaints and post the name and address on its website.¹³⁹ Moreover, the OSP may not repost the material, absent an investigation showing that the posting of material was not infringing and a counter notification to the copyright owner.¹⁴⁰

¹³⁵ *Id.* 5-7 (1998).

¹³⁶ *See* 17 U.S.C. § 512(c)(1).

¹³⁷ *Id.* § 512(a)(1)-(5).

¹³⁸ *Id.* § 512(c)(1).

¹³⁹ *Id.* § 512(c)(2).

¹⁴⁰ *Id.* § 512(g).

D. ANTI-CIRCUMVENTION

The second provision added by the DMCA addresses anti-circumvention.¹⁴¹ It says that, “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”¹⁴² The provision was immediately applicable to the manufacturing and importing of anti-circumvention devices and systems¹⁴³ and three years later to individual uses of anti-circumvention tools.¹⁴⁴ The second anti-circumvention provision provides:

No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology product or service, device component or part thereof that –

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.¹⁴⁵

There are some recognized exemptions to these prohibitions, such as legitimate encryption research,¹⁴⁶ reverse engineering to determine system interoperability,¹⁴⁷ security testing,¹⁴⁸ law enforcement,¹⁴⁹ and for nonprofit libraries that gain access in order to determine whether to acquire a work, but it cannot commercially exploit the work.¹⁵⁰

VII. UNANSWERED QUESTIONS IN THE DIGITAL WORLD

With the rapid development of technology, the growth of use of the Internet and the development of Web 2.0 for interactive content,

¹⁴¹ *See id.* §§ 1201-1204.

¹⁴² *Id.* § 1201(a)(1)(A).

¹⁴³ *Id.* § 1201(a)(2), (b).

¹⁴⁴ *Id.* § 1201(a)(B).

¹⁴⁵ *Id.* § 1201(a)(2)(A)-(C).

¹⁴⁶ *Id.* § 1201(g).

¹⁴⁷ *Id.* § 1201(f).

¹⁴⁸ *Id.* § 1201(j).

¹⁴⁹ *Id.* § 1201(e).

¹⁵⁰ *Id.* § 1201(d).

it is natural that new copyright issues will arise. Courts and policy makers are beginning to address some of the issues, but often there is no uniformity. Others are so new that the legal system has not yet begun to grapple to any significant extent with the questions they present. This article highlights but does not attempt to answer the ten questions raised below.

1. *Peer-to-peer (P2P) file sharing* – The unanswered question with P2P file sharing is whether there is any way to permit the sharing of copyrighted information and still provide fair compensation to copyright holders. Owners say that they cannot compete with free copies downloaded through file sharing, but putting a ceiling on technology has not worked in the past, and it is unlikely to work successfully now. Fear of P2P is particularly acute in the recording industry, but it is beginning to be felt in the motion picture industry as well, with individuals sharing infringing copies of copyrighted movies.

2. *Use of thumbnail images of digital photographs* – Federal courts in California ruled favorably in *Kelly v. Arriba Soft Corp.*¹⁵¹ on the use of thumbnail images in order to create a visual image search engine.¹⁵² Although the *Perfect 10*¹⁵³ case was decided similarly to *Kelly*, it raised an issue, in addition to the use for image search engines, of when a thumbnail image itself has economic value and can be licensed, i.e., for its use on cell phones. It is likely that other issues will be found in the future that could challenge future uses beyond the approved search engine use and perhaps even that use itself.

3. *Caching as reproduction* – OSPs use caching to avoid tying up the systems with repeat searches over a short period of time. The cached copies could be stored for a few hours or a few days depending on the individual search engine. Certainly, caching makes a copy of copyrighted works, but should this reproduction be viewed as infringement or is it so central to use of the Internet that it must be ignored or tacitly approved?

4. *The Google Books settlement* – The Google Books Project, which will ultimately scan twenty million books and make them searchable through the Google database¹⁵⁴ will be the subject of scholarly debate far into the future. It is already the subject of litigation, and the proposed settlement agreement is of such magnitude that it is almost unimaginable. The settlement concerns matters

¹⁵¹ See 280 F.3d 934 (9th Cir. 2002).

¹⁵² *Id.*

¹⁵³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹⁵⁴ Google Books, About Google Books, <http://books.google.com/googlebooks/history.html> (last visited June 6, 2010).

ranging from antitrust, to class actions, to orphan works, to reproducing copyright books in full in order to be able to display “snippets” of them. At this writing, the Southern District of New York has not approved the Google Books settlement 2.0.¹⁵⁵ Regardless of whether it is rejected, approved in part or wholly approved, it will produce much uncertainty for years to come.

5. *Orphan works* – An orphan work is one for which the copyright owner cannot be identified or cannot be located. Thus, a party who wants to obtain a license to use the work cannot do so. This issue was not created solely by the digital environment, but it certainly has been exacerbated by it. The U.S. Copyright Office proposed legislation¹⁵⁶ to provide indemnity for parties who make a good faith effort to locate the copyright holder, but when they are unable to do so, go ahead and use the orphan work. Under that proposed legislation, if that copyright owner later comes forward, then the user of the work must negotiate a license for continued uses.¹⁵⁷

6. *Mashups* – A new form of creativity is found in the mashups of songs, videos, etc. The works created are eligible for copyright protection as a new work, but the mashups use existing copyrighted works and reproduce portions of them to create the new work. The equivalent in the art world would be a collage. Copyright owners often object to the use of their works in this fashion even though the resulting mashups often are comments on society, satire, etc., and clearly reflect today’s culture.

7. *New business models for copyright owners* – Content owners are challenged by the digital environment just as users of their works are challenged. This has resulted in uncertainty on the part of copyright owners about what business models they need to develop to accommodate this changing environment so they can continue to produce copyrighted works. This has made owners hesitant to liberalize the access to their works without having copyright management systems in place. Further, owners have recognized the “long tail” for books and other publications long out of print, and that the digital environment will enable them to print copies on demand and make additional sales since the value no longer drops to zero when a work is out of print. Because of this uncertainty about new business

¹⁵⁵ See Am. Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf.

¹⁵⁶ See Marybeth Peters, Register of Copyrights., *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFF., Sept. 25, 2008, <http://www.copyright.gov/orphan/>.

¹⁵⁷ *Id.*

models, copyright owners have been hesitant to relax controls on their works or to support enhanced fair use claims by users.

8. *User generated content (UGC)* – Whole new copyright issues have been raised by user generated content along with the changing expectations of users for this content. The complaints of copyright owners surrounding YouTube.com and especially the use of music recordings with the videos are examples of the changing expectations of users for this new type of content and the problems copyright owners face. It is unlikely, however, that UGC will be reduced; in fact, it is more likely that the amount and types of UGC will increase along with the number of participants in creating it. So, these problems will continue to grow.

9. *Personal use* – The whole notion of private copying was never settled in the print environment, and it is even more important today. The question is whether users of copyrighted works have the right to make copies for their own personal use. Many copyright scholars believe that copies for personal use are fair use while others posit that there is simply a personal use right that is so basic that it exists outside of fair use and requires no mention in the Act. Copyright holders point out that with the variety of entertainment works aimed at the consumer market such as movies on DVD and computer games, making a copy for personal use equates with a lost sale for the copyright owner. Therefore, owners believe there is no personal use right.

10. *Digital preservation* – In order to preserve both print and analog works, libraries and archives are turning to digital means for preservation. As these institutions increasingly acquire works in digital format, these works need to be preserved also. Digital preservation requires making not just one copy of a work but making many copies over time to refresh the copies and upgrade them for newer platforms. Reproduction typically is infringement, but in order to preserve the cultural record of society, reproduction is required. Should an exception be created to permit cultural institutions such as libraries, archives, and museums to preserve works digitally? There have been recommendations to amend the Act to enhance the ability of cultural institutions to engage in digital preservation activities.¹⁵⁸

¹⁵⁸ U.S. COPYRIGHT OFFICE AND NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM OF THE LIBRARY OF CONGRESS, SECTION 108 STUDY GROUP REPORT at v-viii (Mar. 2008), *available at* <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

VIII. CONCLUSION

One last word: If the public does not understand copyright law or if it makes no sense to them, the public will ignore the law. Clearly, this has already happened with P2P sharing of music and is beginning to happen with downloading movies. The Copyright statute lacks a theoretical base, is too complicated for ordinary people to read and understand, and contains a series of special provisions championed by the various copyright industries designed to benefit them. Users of copyrighted works believe that they have been left out of the legislative process, and they are demanding changes that reflect the way they use and access information and copyrighted works today. Copyright law is likely to remain unsettled as new issues arise and technology continues to advance.