

# *Fordham Intellectual Property, Media and Entertainment Law Journal*

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*Volume 23, Issue 2*

2013

*Article 3*

VOLUME XXIII BOOK 1

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## Copyright 1992-2012: The Most Significant Development?

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## Abstract

On the occasion of the twentieth anniversary of the Fordham Intellectual Property Law & Policy Conference, its organizer, Professor Hugh Hansen, planned a session on “U.S. Copyright Law: Where Has It Been? Where Is It Going?” and asked me to look back over the twenty years since the conference’s inception in order to identify the most important development in copyright during that period. Of course, the obvious answer is “the Internet,” or “digital media,” whose effect on copyright law has been pervasive. I want to propose a less obvious response, but first acknowledge that digital media and communications have presented significant challenges to every one of the exclusive rights that §106 of the Copyright Act grants to authors. Part I will summarize those challenges, as well as the addition of a new §106 right, and of new “paracopyright” rights regarding technological protection measures and copyright management information. Digital media have also considerably broadened the scope of fair use and have prompted the introduction of commercially significant immunities for intermediary service providers. Part II will address the expansion of copyright defenses and immunities and will suggest that, contrary to the popular depiction of overreaching copyright rights and remedies, the courts have re-balanced copyright to weight toward users. Finally, turning from digital media, I will offer a less obvious response, one that I hope evokes the core of copyright law, past, present and future.

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\*Columbia University School of Law. Many thanks to John L. Schwab, Columbia Law School, Class of 2012, and to Philip Sancilio and John Briggs, both Columbia Law School class of 2013.

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<sup>1</sup> See, e.g., David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC’Y U.S. 401, 405 (1998).

## I. EXCLUSIVE RIGHTS, MODIFIED BY DIGITAL MEDIA?

### A. Section 106 rights

Over the last twenty years, the growth of digital media has obliged courts to reconsider the basic statutory concepts of fixation, transfer, reproduction and public performance and display. The perils, and promise, of digital exploitations have also prompted Congress to create a new exclusive right, to control access to works of authorship through imposition of technological protection measures.

#### 1. Right to reproduce the work in copies

With respect to the first of the § 106 rights, the exclusive right to reproduce the work in copies, case law has addressed the basic issues of “what is a copy?” and “who makes the copy?”<sup>2</sup> The first question concerns the vexed issue of “RAM copying”—is the temporary digital copy of a program that resides on a computer’s random access memory considered “fixed,” even though the copy remains more or less briefly in the RAM and is lost when the computer is shut down? Is there a difference between a copy temporarily resident in RAM (which could remain there for days until the user turns the computer off), and a copy transiting through a computer network? Both types of a copy appear to meet the statutory prerequisite of capacity to be “perceived, reproduced or otherwise communicated . . . with the aid of a machine or device.”<sup>3</sup> But the statute also requires that this capacity endure for “a period of more than transitory duration.”<sup>4</sup> The 1976 House Report states that “transient reproductions . . . captured momentarily in the ‘memory’ of a computer’ should not be deemed fixed.”<sup>5</sup> It is not clear how fleeting Congress expected a “transient reproduction” to be. The subsequent report of the congressionally created

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<sup>2</sup> Compare *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008) (holding cable company was not directly liable under the Copyright Act because copies were “made” by its customers), with *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding copying under copyright law includes transfer from permanent storage device to a computer’s RAM).

<sup>3</sup> 17 U.S.C. § 102(a) (2006).

<sup>4</sup> *Id.* § 101.

<sup>5</sup> H.R. REP. NO. 94-1476, at 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666.

Commission on New Technological Uses of Copyrighted Works (CONTU) led to a 1980 amendment of § 117 of the Copyright Act exempting a temporary reproduction of a computer program that is made simply by turning on the computer (§ 117(a)(1)) and a further amendment of that section in 1998 to the same effect (§ 117(c)).<sup>6</sup> This legislation appears to adopt the principle, expressed in the CONTU report, that entry of a work into the memory of a computer makes a “copy” of the work, apparently without distinction as to the duration of the copy.<sup>7</sup> Congress’s provision of narrow exemptions for RAM copying in § 117 of the Copyright Act points toward a congressional understanding that such copying would otherwise be infringing under § 106.<sup>8</sup>

But neither CONTU nor the § 117 amendments explicitly addressed especially evanescent reproductions in transit from one computer to another. Is there a point at which a reproduction is too fleeting to be a “copy” within the scope of the exclusive right of reproduction? The Second Circuit, in *Cartoon Network v. CSC Holdings*,<sup>9</sup> emphasizing what it called the “duration requirement” in the definition of “fixed,” held that reproductions made in a computer’s “buffer” and lasting 1.2 seconds, were insufficiently “fixed” to be “copies.” The ruling may be in some tension with decisions from other circuits and a study by the Copyright Office interpreting the reproduction right to encompass a broad temporal range of “RAM copies.”<sup>10</sup> The court distinguished the case law

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<sup>6</sup> These amendments accorded exemptions for such copying when unauthorized if for the expected use of purchased programs or in connection with the “maintenance or repair” of the computer. Section 117(c) responds to the Ninth Circuit’s decision in *MAI Sys. Corp.*, 991 F.2d 511, which had found a repair service’s creation of a temporary copy to infringe.

<sup>7</sup> See NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 22 (1978).

<sup>8</sup> But see R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies,”* 2001 U. ILL. L. REV. 83, 145 (2001) (contending that applying reproduction analysis to RAM copying disputes creates an overbroad “RAM copy doctrine” that “may allow a copyright owner not only to use copyright to control activities by third parties . . . that would not otherwise infringe, but . . . may allow copyright owners . . . to control other people’s access to, and use of, noncopyrightable elements contained in a copyrighted work”).

<sup>9</sup> 536 F.3d 121, 130 (2d Cir. 2008).

<sup>10</sup> See, e.g., *Stenograph LLC v. Bossard Assocs.*, 144 F.3d 96, 101–02 (D.C. Cir. 1998); *MAI Sys. Corp.*, 991 F.2d 511; U.S. COPYRIGHT OFFICE, DMCA SECTION 104

authorities for failure to explicitly address the duration requirement. It also criticized the Copyright Office Report, which had confronted the duration issue, but had reached a different conclusion: “According to the Copyright Office, if the work is capable of being copied from that medium *for any amount of time*, the answer to both questions [embodiment and duration] is ‘yes.’ The problem with this interpretation is that it reads the ‘transitory duration’ language out of the statute.”<sup>11</sup> Inquiring, therefore, “[d]oes any such embodiment [in Cablevision’s buffer] last ‘for a period of more than transitory duration’?” the court answered no.<sup>12</sup> While ruling that 1.2 seconds were not “more than transitory,” the court did not indicate what period of embodiment would suffice, although it did imply that “at least several minutes” would meet the duration requirement.<sup>13</sup> Nor did the court suggest how to characterize durations falling between those two limits.<sup>14</sup>

As for who makes the copy, the Second Circuit, imposing a controversial “volition” condition, ruled that the entrepreneur of an automated system that copies, stores, and plays back television programming to subscribers at the subscribers’ demand, did not “make” those copies because the system simply responded to the end-user’s choice of programming to copy. It is not clear,

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REPORT 107–23 (2001) [hereinafter COPYRIGHT OFFICE REPORT], available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. Of these authorities, however, only the Copyright Office Report specifically addresses reproductions as transient as “buffer copies.” The Ninth and D.C. Circuit decisions involved software loaded into RAM and apparently retained for some minutes. *But see* MDY Indus., LLC v. Blizzard Entm’t Inc., 629 F.3d 928, 938–39 (9th Cir. 2010) (finding as licensees, not owners, of game software, players may infringe when their computers temporarily copy software into RAM).

<sup>11</sup> *Cartoon Network*, 536 F.3d at 129.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 128.

<sup>14</sup> *Id.*; see also License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,177 (proposed Nov. 7, 2008) (to be codified at 37 C.F.R. pt. 201 and 255) (“The [*Cablevision*] court’s reasoning leaves at least something to be desired and offers no guidance as to when a copy might be considered to be ‘embodied’ for ‘a period of more than transitory duration.’ . . . Indeed, it leaves open the possibility that a buffer copy that exists for several seconds might have sufficient duration to satisfy the fixation requirement. We can glean no principle from the Second Circuit’s opinion which offers any guidance as to where the line is to be drawn.”).

however, that volition must always be a distinct element of the violation of the reproduction right. The court's principal authority for a volition requirement, *Religious Technology Center v. Netcom On-Line Communications Services*,<sup>15</sup> a Northern District of California decision from the first years of the twenty-year period here surveyed, concerned a "mere conduit" online service provider, who simply conveyed copies of works from one subscriber to another.<sup>16</sup> By contrast, Cablevision's own transmissions were the *source* of the copies the subscribers requested. Moreover, while Cablevision did not select the particular program designated by the user, the user made her selection from a universe proposed by Cablevision, and Cablevision stored the selected programs.

One suspects that underlying the court's determination that Cablevision did not "make" the copies it stored for users at their request, was an unstated conclusion regarding an issue the parties agreed not to litigate: whether the end users would be liable for copying the television programming. The court seems to have considered the subscribers' activities as a higher-tech form of "time shifting;" under the Supreme Court's *Sony* decision,<sup>17</sup> time shifting (at least of free broadcast television)<sup>18</sup> is non-infringing, thus the higher-tech version must be non-infringing, too. That calculus may have informed the court's assessment of "who" made the copy. Suppose instead, however, that Cablevision had been offering its customers access to programming that the customers were not otherwise entitled to view, for example because those customers formed an audience to which Cablevision's cable or satellite distribution compulsory license did not extend.<sup>19</sup> One may

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<sup>15</sup> 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>16</sup> Congress in 1998 codified much of the *Netcom* results with respect to online service providers in § 512 of the Copyright Act.

<sup>17</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984).

<sup>18</sup> Cablevision customers were time shifting cable transmissions, which fall outside the stated scope of *Sony*.

<sup>19</sup> See 17 U.S.C.A. §§ 111, 119, 122 (2006 & Supp. V 2011). Sections 111 and 119 differentiate between local broadcasts and distant broadcasts. Local broadcasts are those that can reach viewers in the area where the cable system or satellite is located without the use of a cable system or satellite, and distant broadcasts are those that viewers would not otherwise receive without the cable system or satellite because they are imported from distant broadcast stations. Cable systems or satellites can retransmit local broadcasts without having to pay copyright license fees, but §§ 111 and 119 establish a

wonder whether, in this version, the court still would have found that Cablevision lacked sufficient agency to be the “maker” of those storage copies.

The court may have assumed that it ultimately will not matter who “makes” the copy if the business that “induced” the end-user to make the copy would in any event be liable as a contributory infringer<sup>20</sup> (an issue the parties agreed not to litigate). But if the end-user’s copy is not infringing, there will be no secondary liability. Arguably, if the end-user’s copying would be fair use, then assisting that copying should not be infringing either, whether the assistance comes in the form of enabling the end-user to do the copying herself, or instead doing the copying for the user. But the case law is far from clear that copying on behalf of the user is fair use.<sup>21</sup> Given the proliferation of increasingly automated “on demand” services, to designate as the de jure “copyist” the beneficiary of the copy that the service offered to make on the user’s behalf risks putting significant amounts of economic activity beyond the reach of the copyright law (and spawning new business models designed to exploit this newly-introduced gap in the law).<sup>22</sup>

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compulsory license scheme for distant broadcasts. Section 119 defines the households and subscribers eligible to receive secondary transmissions from the satellite carrier, and sets out “violation[s] of territorial restrictions on statutory license for network stations.” Section 122 allows a satellite carrier to make secondary transmissions into the television station’s local market, subject to a compulsory license. Pursuant to § 122(f), the satellite carrier may not transmit the performance or display to a subscriber who does not reside in the originating television station’s local market.

<sup>20</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923, 937–40 (2005) (finding that the users of defendants’ file-sharing software downloaded copyright files, but defendants were liable for contributory infringement because they induced infringement); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014, 1022 (9th Cir. 2001) (holding that Napster’s users violated plaintiffs’ right of reproduction, but Napster was liable as a contributory infringer because it supplied the means of copying and had specific knowledge of what works were being copied).

<sup>21</sup> See generally Joseph P. Liu, *Enabling Copyright Consumers*, 22 BERKELEY TECH. L.J. 1099, 1099–1100 (2007) (“[C]ourts quite frequently hold companies liable for helping consumers engage in activities that would be fair or non-infringing uses if undertaken by consumers themselves.”).

<sup>22</sup> See, e.g., *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011) (dismissing count of direct copyright infringement by file-sharing service for failure to plead volitional conduct); *Fox Broadcasting Co. v. Dish Network LLC*, 2012 US Dist LEXIS 169112 (C.D. Cal. 2012). Other courts have not found the Second Circuit’s volition prerequisite persuasive. See, e.g., *Warner Bros. Entm’t, Inc. v. WTV*

## 2. Derivative works right

The meaning of “derivative works” covered by § 106(2) came into question in cases testing the scope of the definition “any form in which the work may be recast, transformed or adapted.” Is a complementary product, designed to intervene in the experience of watching a movie or playing a videogame, for example by altering the game’s speed, or by deleting salacious scenes from the film, a “derivative work” if the product does not memorialize the changes in some fixed form? Case law is unclear,<sup>23</sup> and Congress in the Family Movie Act of 2005<sup>24</sup> provided a specific exemption for wholesome-izing software, while avoiding a determination of whether that software’s sanitized output would have been a “derivative work.”

## 3. Distribution right

The third exclusive right under § 106, to distribute copies of the work “to the public by sale or other transfer of ownership, or by rental, lease or lending” has given rise to several inquiries in the digital context. First, does “by sale or other transfer of ownership” limit the kinds of distribution that come within the scope of the right, so that the right covers only transfer of physical copies? Because one who sends a digital file retains ownership of her source copy, if “transfer of ownership” implies divestiture, then only hardcopy formats are susceptible to such transfers. A transfer of ownership of an analog copy implicitly involves the transferor’s divestiture of her copy so that the transferee may take possession. A book sold by a bookstore leaves the store with the customer; there is one fewer copy in the store’s inventory. With digital

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Sys., 824 F. Supp. 2d 1003, 1011 (C.D. Cal. 2011); Fox Television Stations Inc. v. BarryDriller Content System PC, 2012 US Dist LEXIS 184209 (C.D. Cal. 2012). For more detailed criticism of *Cartoon Network v. Cablevision*, see Jane C. Ginsburg, *Recent Developments in U.S. Copyright—Part II, Caselaw: Exclusive Rights on the Ebb?*, 218 REVUE INTERNATIONALE DU DROIT D’AUTEUR 167 (January 2009), available at <http://lsr.nellco.org/columbia/pllt/papers/08158>.

<sup>23</sup> *Compare* Micro Star v. Formgen, Inc., 154 F.3d 1107, 1110, 1112 (9th Cir. 1998), with Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992).

<sup>24</sup> Family Movie Act of 2005, 17 U.S.C. § 110(11) (2006) (exempting certain bowdlerizing technologies).

copies, by contrast, one typically “sends” a copy, but retains one’s “original” or “own” copy in one’s computer memory. There is no divestiture; rather at least two people now own copies where before there was only one owner. Under these circumstances, is there a “transfer of ownership”?

In *London-Sire Records, Inc. v. Doe*,<sup>25</sup> the district court focused on the creation of a new copy in the computer of the recipient, a copy which the recipient now owns: “What matters in the marketplace is not whether a material object ‘changes hands,’ but whether, when the transaction is completed, the distributee has a material object.”<sup>26</sup> The concept of “transfer” in the digital world does not imply the disappearance of the transferor’s copy, yet the term appears as a matter of course. For example the phrase “file transfer” (as in “file transfer protocol” or “FTP”) is widely used to denote sending a digital file without necessarily (or ever) deleting the file from the sender’s computer.<sup>27</sup> Moreover, on further examination, a “distribution” need not always result in a loss of possession, even in the analog world. For one very old technological example, consider the biblical loaves and fishes. English versions of the gospels recount that Jesus ordered his disciples to “distribute” the loaves and fishes to the public. Though the supply seemed inadequate, all the public were served, yet at the end, the same number of loaves and fishes remained in the baskets as at the outset.<sup>28</sup>

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<sup>25</sup> 542 F. Supp. 2d 153 (D. Mass. 2008).

<sup>26</sup> *Id.* at 175. Taken out of context, the court’s end-up-with-a-copy test could be overbroad. For example, if a home viewer records a television broadcast, thus creating a copy, has the broadcaster “distributed” the “copy” the viewer ended up with? Indeed, with contemporary recording media, any performance or display could result in “copies,” though, as a matter of common sense, it is doubtful that many of them would constitute “distributions.” For example, if passers-by photograph the wearer of a t-shirt emblazoned with copyrightable text or image, copies will result, but the wearer cannot reasonably be said to have distributed them. For a distribution to take place, the exchange (or new creation) of a copy should be the object of the transaction.

<sup>27</sup> Other common uses of “transfer” that do not imply divestiture include Hypertext Transfer Protocol (HTTP), and Simple Mail Transfer Protocol (SMTP). See Margaret Rouse, *What Is File Transfer Protocol?*, SEARCHENTERPRISEWAN.COM (Apr. 2007), <http://searchenterprisewan.techtarget.com/definition/File-Transfer-Protocol>.

<sup>28</sup> *John* 6:11 (King James). For another bread-related example of a distribution which does not require the donor to part with her possession, a baker can parcel out to other

Legislation enacted during our twenty-year review period endorses the characterization of a transfer of a digital file as a form of “distribution.” In 1995, Congress amended the § 115 “compulsory license for making and distributing phonorecords” to include among the beneficiaries of the license “those who make phonorecords or digital phonorecord deliveries,” and further specifying, “[a] person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.”<sup>29</sup> The definition of “digital phonorecord delivery” confirms that the constitution of the copy in the recipient’s computer is the key activity: “A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which *results in a specifically identifiable reproduction by or for any transmission recipient* of a phonorecord of that sound recording . . . .”<sup>30</sup> It is reasonable to assume that by 1995 Congress was aware that digital deliveries create new copies without divesting the sender’s copy; if Congress nonetheless equated “digital phonorecord delivery” with distribution, then “transfer of ownership” cannot, at least with respect to the distribution rights in musical works and sound recordings, have been understood to require dispossession of the transferor’s copy.<sup>31</sup>

But other problems remain, particularly concerning the compliance of the U.S. with the internationally-mandated “making available right.”<sup>32</sup> The U.S. ratified the 1996 WIPO Treaties without providing explicitly for a “making available” right because it took the position that current U.S. law covered the substance of the right through a combination of the distribution and public

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bakers batches of sourdough “starter” yet retain an amount sufficient to prepare her own loaves.

<sup>29</sup> 17 U.S.C. § 115(a)(1) (2006), amended by Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

<sup>30</sup> 17 U.S.C. § 115(d) (2006) (emphasis added).

<sup>31</sup> See S. REP. NO. 104-128 at 17 (1995) (legislative history of 1995 Act, advertent to uncertainty whether a “transmission can constitute a distribution of copies” and “express[ing] no [general] view on current law in this regard” but wanting to remove uncertainty “as to digital transmissions of recorded music”).

<sup>32</sup> See WIPO Copyright Treaty, art. 6, Dec. 20, 1996, S. TREATY DOC. NO. 105-17.

performance rights.<sup>33</sup> Some U.S. courts have nonetheless held that merely offering a file via a website or filesharing network does not “distribute” the work because “distribution” requires actual receipt.<sup>34</sup> So far the case law, all from district courts, has provided inconsistent responses. While early decisions generally considered (without extended analysis) that making a work available for end-user access and copying “distributed” copies of the work,<sup>35</sup> later rulings are more tormented. Some require a showing of actual receipt, but disagree whether the court may presume receipt if the making available has set in motion all the other elements of distribution.<sup>36</sup> At least one other court, emphasizing the definition of “publication,” which covers both distribution of copies and the offering to distribute copies, has concluded that making copies available for download is akin to offering to distribute, which constitutes a “publication,” which is synonymous with distribution.<sup>37</sup> Although Congress in 2005 amended the criminal provisions of the Copyright Act to cover “the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the

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<sup>33</sup> See, e.g., MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET* 502–04 (2002).

<sup>34</sup> See *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210, 1218–19 (D. Minn. 2008). *Contra Elektra Entm’t Grp. v. Barker*, 551 F. Supp. 2d 234, 241–42 (S.D.N.Y. 2008) (equating distribution with publication and holding that an offer is sufficient).

<sup>35</sup> See, e.g., *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

<sup>36</sup> Compare *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (holding that “a reasonable fact-finder may infer that the distribution actually took place”) with *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1218–19 (D. Minn. 2008) (holding that “actual dissemination” is required).

<sup>37</sup> See *Elektra*, 551 F. Supp. 2d at 241 (S.D.N.Y. 2008). For an extensive discussion of the distribution right and its application to digital media, see Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1 (2012).

public,”<sup>38</sup> courts have yet to interpret this amendment as a general equation of the distribution and making available rights.<sup>39</sup>

#### 4. Right to perform the work “publicly”

Difficulties proliferate in connection with the fourth § 106 right, to perform the work publicly. First, while the hardcopy world warranted the traditional distinction between copying and distribution on the one hand, and public performance on the other, digital media blurs the boundary, leaving courts to determine when an online exploitation is a distribution of copies and when it is a public performance. When new modes of exploitation challenge the familiar order, courts and litigants grope toward the most apt metaphor. Hence, when ASCAP contended that sending downloadable ringtones and music files should be deemed public performances, the court characterized the download as the digital equivalent of buying a disc at a record store, and streaming as the Internet equivalent of the radio.<sup>40</sup> While streaming would come within the ambit of a public performance license, if a download is like buying a record and taking it home to listen to, then only private performances would ensue from the download.<sup>41</sup> The court acknowledged that there might be exploitations occupying a midpoint on the spectrum between streams and downloads, but determined that it need not yet ascertain their correct characterization.<sup>42</sup>

Even were the act deemed a “performance,” to trigger § 106(4), it must also be “public.” Where only one member of the public receives a transmission of a performance, the transmission’s characterization as a public pay-per-view or a private performance

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<sup>38</sup> Artists’ Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, 119 Stat. 218, 220 (amending § 506(a) to criminalize “the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution”).

<sup>39</sup> For a fuller discussion of the making available right, see David Carson, *Making the “Making Available” Right Available*, 33 COLUM. J.L. & ARTS 135 (2010).

<sup>40</sup> See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010).

<sup>41</sup> See *id.* at 73; see also *In re Celco P’ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).

<sup>42</sup> *Am. Soc’y of Composers, Authors & Publishers*, 627 F.3d at 75 n.10.

may, according to the Second Circuit, turn on whether a centralized source copy generates multiple transmissions to members of the public, or whether only one member of the public can receive a transmission from a single, dedicated source copy.<sup>43</sup> As the cost of digital storage drops, the prospects for redundant individually-dedicated copies increase, potentially spawning a host of new copyright-avoiding business models, particularly as that storage moves to the “cloud.”<sup>44</sup>

#### 5. Right of public display

The § 106(5) right of public display encounters many of the same ambiguities as the public performance right, as well as an additional uncertainty regarding “who” engages in an online public display. The Ninth Circuit has ruled that the “display” of a digital image emanates from the source website, even when an intermediary frames the image in a way that, to the viewer, appears to make the framer (whose advertisements also accompany the third-party image) the source of the display.<sup>45</sup>

#### 6. Digital public performance of sound recordings

Finally, in this review of the impact of digital media on the exclusive rights under copyright, Congress in 1995 and again in 1998 established a new right, of digital public performance of sound recordings. The new § 106(6) regime confers a full exclusive right on interactive communications (such as listen on demand), and imposes a compulsory license for webcasting and other non-interactive services. The compulsory license mandates a 50-50 division of royalties between producers and performers

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<sup>43</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008). Other courts have not found the Second Circuit’s volition prerequisite persuasive. *See, e.g., Fox Television Stations v. Barrydriller Content Sys.*, 2012 U.S. Dist. LEXIS 184209 (C.D. Cal. 2012) (finding public performance and taking issue with *Cartoon Network*); *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1011 (C.D. Cal. 2011).

<sup>44</sup> *See, e.g., Am. Broad. Cos. v. Aereo*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (following *Cablevision*, no infringement found because retransmission of over-the-air television broadcast signals not a public performance as signals are first copied and stored for individual users and each user receives transmission from her individualized copy).

<sup>45</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007).

(with 5% of the performers' share set aside for "non featured" performers). By contrast, if the full exclusive right applies, performers will be remunerated according to their contracts, which may mean that they will not in fact be compensated.<sup>46</sup> This division of spoils inspires a heretical inquiry: if creators are guaranteed a share of the income from a compulsory license, but may well get nothing from the market rate right, might they be better off without exclusive rights in exchange for guaranteed remuneration?

*B. DMCA—Strengthening the hand of copyright holders?*

In addition to their impact on the interpretation of traditional exclusive rights set out in § 106 of the Copyright Act, digital media have spawned new copyright-reinforcing rights, sometimes referred to as "paracopyright."<sup>47</sup> Given the speed with which the Internet can be used both to reproduce near-perfect copies and phonorecords and to transmit them around the world, Congress concluded it was important to support the efforts of copyright owners to prevent infringement at the outset, rather than merely to seek judicial relief afterward.<sup>48</sup> Of course, digital dissemination of copyrighted works also poses opportunities, notably in reducing the costs of producing hardcopies and distributing them through "bricks and mortar" stores. Congress perceived that the development of a digital marketplace would require building copyright owner confidence that digital dissemination would not result in rampant unauthorized redistribution.<sup>49</sup> Further, a digital marketplace would give rise to new business models for individualized on-demand delivery of copyrighted works. Accordingly, Congress adopted the Digital Millennium Copyright Act (DMCA) in 1998.<sup>50</sup> Its purpose, in § 1201, is to promote lawful digital dissemination by ensuring that "technological protection measures" that copyright owners choose to apply to their works—such as scrambling or encrypting digital versions of

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<sup>46</sup> See 17 U.S.C. § 114(g) (2006).

<sup>47</sup> See Nimmer, *supra* note 1, at 5.

<sup>48</sup> See S. REP. NO. 105-190, at 8 (1998); H.R. REP. NO. 105-551, pt. 2, at 21–23 (1998).

<sup>49</sup> See S. REP. NO. 105-190, at 2 (1998); H.R. REP. NO. 105-551, pt. 2, at 23 (1998).

<sup>50</sup> Pub. L. 105-304, 112 Stat. 2860 (1998).

recordings, films and books—are not circumvented without proper authorization. Such technological protection measures are intended to prevent usable copies of the copyright-protected work from being copied, stored or transmitted to others. They also seek to safeguard the new access-based business models.<sup>51</sup>

### 1. Paracopyright—Anticircumvention controls

Section 1201(a) provides that “no person shall circumvent a technological protection measure that effectively controls access to a work” protected by copyright, and that “no person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof” that (among other things) is “primarily designed or produced” for the purpose of circumvention or is knowingly marketed for use in circumvention. While § 1201(a) thus forbids circumvention of what is known as “access-protection” technology, § 1201(b) imposes comparable proscriptions upon “copy-protection” technology. Violations of § 1201 are not technically infringements of copyright,<sup>52</sup> hence the “paracopyright” sobriquet, but §§ 1203 and 1204 impose civil and criminal liability, respectively, much like that for copyright infringement.

Case law has focused on two threshold issues: what are the works whose access controls § 1201(a) protects;<sup>53</sup> and is the right to control “access” in effect a right independent of the § 106 exclusive rights?<sup>54</sup> That is, must there be a nexus between access to the work and exercise of an exclusive right under copyright, or does a protected access control also cover forms of exploitation or enjoyment of copyrighted works, such as private performances, to which § 106 does not extend?

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<sup>51</sup> See S. REP. NO. 105-190, at 1–2 (1998).

<sup>52</sup> Nor is registration of copyright in the technologically-protected work a prerequisite to an anti-circumvention claim. See *I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d 521, 532 (S.D.N.Y. 2004).

<sup>53</sup> See *infra* text accompanying notes 55–62.

<sup>54</sup> See *infra* text accompanying notes 63–69.

## a) Subject matter protected

In notorious but, happily, unsuccessful attempts to leverage the DMCA into protecting the “aftermarket” for spare and replacement parts, the producers of printers and cartridges, in one case,<sup>55</sup> and of garage door openers, in the other,<sup>56</sup> asserted that rival printer cartridge and door opener manufacturers had violated the DMCA’s prohibition on circumvention of access controls. In both cases, the spare part in question would not interact with the host device unless the host device recognized the spare part as authorized to function together with the host device. If the spare part entered the appropriate authentication sequence or, in the terms of a frequently-used metaphor, engaged in the “secret handshake” with the host device, then the host would be “fooled” into “thinking” that it was working with a component made by the same producer and would allow the component to perform its intended function.<sup>57</sup> The “secret handshake” thus made it possible for a rival printer cartridge to substitute for the printer producer’s own replacement cartridges, and for a “universal garage door opener” to open the remote controlled garage doors manufactured by a rival company.

Since neither printer cartridges nor garage doors are copyrighted works, one might query the basis on which § 1201 could have applied. The plaintiffs emphasized that computer programs control the functioning of these devices, and computer programs are copyrighted works.<sup>58</sup> The extraordinary consequence of the plaintiffs’ reasoning would have been that any useful object whose workings are controlled by computer programs can come within the scope of § 1201 if the object’s producer makes access to those programs subject to an authentication sequence. As a policy matter, this result is inconceivable. Among other things, Congress has persistently declined to legislate design protection, in part because of its inability to resolve the spare parts issue;<sup>59</sup> Congress

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<sup>55</sup> *Lexmark Int’l, Inc. v. Static Controls Corp.*, 387 F.3d 522, 547 (6th Cir. 2004).

<sup>56</sup> *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1183 (Fed. Cir. 2004).

<sup>57</sup> *See Lexmark*, 387 F.3d at 530.

<sup>58</sup> *See id.* at 546; *Chamberlain*, 381 F.3d at 1186.

<sup>59</sup> The closest Congress has come is setting out a *sui generis* regime limited to the production of boat hull designs. *See* 17 U.S.C. §§ 1301–1302 (2006).

is unlikely to have sought the result of an exceptionally strong design protection regime through the stealthy means of the DMCA.

Policy aside, the text of § 1201 does not require protecting against the circumvention of the authentication sequence that controls access to the copyrightable computer program that controls the functioning of the consumer product. The *Lexmark* court reviewed earlier “secret handshake” cases, involving access to transmissions of recordings of musical works, to videogames and to motion pictures on DVDs.<sup>60</sup> The court underscored that all of those cases involved circumvention of access to computer programs that were “conduit[s] to protectable expression.”<sup>61</sup> In the printer cartridge case, by contrast, operating the computer program did not make it possible to see, hear or otherwise engage with a work of authorship. Rather, “the program’s output is purely functional: [it] ‘controls a number of operations’ in the Lexmark printer.”<sup>62</sup>

b) Nature of the access that the measure controls

If the technological protection measure must control access to a non-functional copyrighted work, does the access also have to be related to the exercise of rights under copyright? The court in the *Chamberlain v. Skylink* garage door opener controversy also declined to protect the authentication sequence against circumvention, but arrived at that result by addressing the *purpose* of the access that the technological measure controls.<sup>63</sup> The court interpolated into § 1201 a requirement that the protection against circumvention of an access control be related to protection against infringement.<sup>64</sup> In the court’s analysis, to the extent that an access control forestalls infringement, for example, by making unauthorized copies unplayable and therefore futile, the access control comes within the scope of § 1201. But the court

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<sup>60</sup> See, e.g., *RealNetworks v. Streambox*, 2000 U.S. Dist. LEXIS 1889, at \*20–21 (W.D. Wash. Jan. 18, 2000) (one of the first decisions to find violations of technological protection measures, in this case both access and copy controls).

<sup>61</sup> *Lexmark*, 387 F.3d at 547–48.

<sup>62</sup> *Id.* at 548.

<sup>63</sup> 381 F.3d at 1204.

<sup>64</sup> *Id.*

determined that if the uses that the access control cuts off are not infringing uses, then the access control is not one that § 1201 was designed to protect.<sup>65</sup> While this distinction makes some sense in the case of garage door openers, as applied to access controls that are “conduits” to works of authorship, the proposition is in some tension with Congress’s goals in prohibiting the circumvention of those technological measures. The *Chamberlain* court worried that interpreting § 1201 to create an independent violation for circumventing access controls (or disseminating access circumvention devices) would “effectively create two distinct copyright regimes,” one tied to the traditional rights of copyright owners (§ 1201(b)), and the other allowing copyright owners “unlimited rights to hold circumventors liable under § 1201(a) merely for accessing that work, even if that access enabled only rights that the Copyright Act grants to the public.”<sup>66</sup>

But, as the Ninth Circuit observed in *MDY Industries, LLC v. Blizzard Entertainment Inc.*, a controversy involving the online multi-player videogame “World of Warcraft,” there is considerable evidence from the text and from the legislative history that Congress *did* intend to create an additional copyright regime based on the control over access to digitally distributed works of authorship.<sup>67</sup> The text indicates that the “access” that § 1201(a) protects goes beyond traditional copyright prerogatives; it distinguishes “access” from a “right of the copyright owner under this title.” The legislative history shows that the DMCA was designed in part specifically to foster a variety of business models offering the public a diversity of levels of access, for a diversity of prices. The Ninth Circuit quoted the report of the House Commerce Committee:

[A]n increasing number of intellectual property works are being distributed using a “client-server” model, where the work is effectively “borrowed” by the user . . . . To operate in this environment, content providers will need both the technology to

<sup>65</sup> *Id.* at 1197–1201; *accord* Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc., 421 F.3d 1307, 1319 (Fed. Cir. 2005).

<sup>66</sup> *Chamberlain*, 381 F.3d at 1200–01.

<sup>67</sup> 629 F.3d 928, 947–48 (9th Cir. 2010).

make new uses possible and the legal framework to ensure they can protect their work from piracy.<sup>68</sup>

Thus, the “access” that § 1201(a) protects goes beyond traditional copyright prerogatives. The difference in scope becomes apparent if one compares the consequences of protecting a measure controlling “access to a *work*” with a measure controlling “access to a *copy* of a work.”<sup>69</sup> The latter corresponds to “access” in the traditional copyright sense of the right to distribute copies of the work; the former is the new right introduced in the DMCA. In a pay-per-view scheme, viewing the work at home is not a public performance; circumventing an access protection to view the film more times than paid for does not violate a “right of the copyright owner.” Legal protection of the access measure thus gives the copyright owner control over consumer activities not reached by traditional copyright rights but within the scope of the electronic commerce envisioned by Congress.

c) Exceptions to circumvention of access controls

Given the broad scope of § 1201’s coverage, one might inquire if concomitantly capacious exceptions temper the new rights. In fact, § 1201 also sets out a long, disparate (and somewhat incoherent) list of exceptions to the prohibition on circumvention of access controls,<sup>70</sup> but these are narrowly-drafted and do not suggest a general limiting principle from which further exceptions might be derived. Instead, Congress instructed the Librarian of Congress, in consultation with the Register of Copyrights, to

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<sup>68</sup> *Id.* at 947–48 (quoting H.R. REP. NO. 105-551, pt. 2, at 23 (1998)).

<sup>69</sup> *See* S. REP. NO. 105-190, at 28 (1998).

<sup>70</sup> *See* 17 U.S.C. § 1201(d)–(j) (2006). The § 1201(f) exception for reverse engineering permits the circumvention of access controls for the sole purpose of creating non-infringing interoperable programs. This provision might offer a significant safety valve, notably because it also permits both development of devices necessary to effect the permitted reverse engineering, and distribution of the fruits of the permitted reverse engineering. The case law construing § 1201(f) remains fairly sparse, however. *See* Davidson & Assoc. v. Internet Gateway, 334 F.Supp. 2d 1164 (E.D. Mo. 2004), *aff’d*, 422 F.3d 630 (8th Cir. 2005) (rejecting application of exception). For a fuller description of these and other exceptions to § 1201(a), see Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM. J.L. & ARTS 137, 148–52 (1999).

conduct a rulemaking every three years, both to identify particular “classes of works” whose users would be “adversely affected by the prohibition . . . in their ability to make noninfringing uses under this title,” and to suspend the application of the prohibition on the act of access control circumvention as to those works until the next rulemaking period.<sup>71</sup> The burden of proving the need for the exemption falls on the proponent, and a class identified in a prior rulemaking is not automatically reinstated.<sup>72</sup> The Copyright Office determines whether a need for an exemption continues to be demonstrated.<sup>73</sup> Note that the prohibitions against trafficking in access circumvention devices still apply.<sup>74</sup>

A detailed discussion of the excepted classes is beyond the scope of this review,<sup>75</sup> as is an analysis of other potential bases for exceptions, particularly to accommodate First Amendment concerns.<sup>76</sup> For present purposes it suffices to say that while no court has yet entertained a First Amendment exception to § 1201,<sup>77</sup> the excepted classes designated by the Copyright Office have expanded over time, ranging from obsolete formats and devices, to cover certain commentary, criticism and educational uses of motion pictures, uses of audiovisual works and ebooks for the visually disabled, and, importantly, cellphones.<sup>78</sup> One such exemption allows owners of cellphones to switch phone service networks while retaining their hardware.<sup>79</sup> The need for this cell

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<sup>71</sup> 17 U.S.C. § 1201(a)(1)(C) (2006). For a fuller discussion, see June M. Besek, *Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 389, 416–23 (2004).

<sup>72</sup> See Robert A. Gorman, Jane C. Ginsburg & R. Anthony Reese, COPYRIGHT: CASES AND MATERIALS 1106 (8th ed. 2011).

<sup>73</sup> *Id.* at 1106–07.

<sup>74</sup> *Id.* at 1107.

<sup>75</sup> For fuller discussions, see *id.* at 1106–11. The rulemakings are available on the Copyright Office website at <http://www.copyright.gov/1201>.

<sup>76</sup> See, e.g., Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the U.S. Copyright Act*, 16 INFO. & COMM. TECH. L. 191, 207–09 (2007).

<sup>77</sup> See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

<sup>78</sup> See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260 (Oct. 26, 2012).

<sup>79</sup> See *id.* at 65264 (to be codified at 37 C.F.R. pt. 201).

phone exception arose because of the arguable misuse of the anti-circumvention protections to achieve a goal the statute was not designed to achieve. Proprietors of wireless networks appear to have been bootstrapping access to their network service to protection of the technological measure that controls access to the software, which causes the cellphone to function in connection with the service.<sup>80</sup> The second cellphone exemption covers the activity colloquially known as “jailbreaking,” or, in the words of the rulemaking, lists as a class of works “[c]omputer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset.”<sup>81</sup> Although the exception is phrased in general terms, it was prompted by a particular (mis)use of an access control: Apple’s design of the iPhone to prevent the running of third-party applications that Apple had not approved.<sup>82</sup>

Whether the excepted classes in fact forestall misuse of access controls may depend on their implementation. Because the exception extends to the act of circumvention, rather than to the provision of circumvention devices or services, arguably only the individual cell phone owner would be entitled to circumvent for the cited purposes. Since most cellphone owners may not be sufficiently computer-adept, it might follow that the exception is of little practical application. If, however, the offering of services specifically targeted to the particular exemption were deemed to come within the scope of the exemption, or were to benefit from a judge-made exception for fair circumvention,<sup>83</sup> then the excepted classes might safeguard against misuse of access controls.

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<sup>80</sup> *Id.* In the current Rulemaking, however, the “cellphone unlocking” exception “applies only to mobile phones acquired prior to the effective date of the exemption or within 90 days thereafter” *Id.* at 65265.

<sup>81</sup> *Id.* at 65263.

<sup>82</sup> *See id.* at 65264.

<sup>83</sup> *See* Ginsburg, *supra* note 76, at 207–09; Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1 (2008).

## 2. Copyright Management Information

Section 1202 of the DMCA reflects similar Congressional goals to enhance electronic commerce in works of authorship. It is designed to encourage the copyright owner to embed important copyright-related information in digital copies and phonorecords, including the name of the author and copyright owner and the terms and conditions for use of the work. Protecting this “copyright management information” (CMI) against removal or falsification should achieve the desired reliability and accuracy of information relevant to proper identification of works and to electronic (or other) transactions in rights under copyright.

How effectively § 1202 advances this aim is debatable. Section 1202 prohibits knowingly providing false CMI with the intent to facilitate or conceal copyright infringement, as well as furthering the removal or alteration of CMI with reasonable grounds for knowing it will facilitate or conceal an infringement.<sup>84</sup> This double knowledge standard has proved difficult to satisfy.<sup>85</sup> Moreover, linking the violation of the copyright management information provisions to copyright infringement does not effectively achieve the objective of ensuring the accuracy and reliability of a key component of copyright management information—proper identification of the author (as opposed to the copyright holder). Apart from the § 106A right of attribution with respect to works of visual art, there is no right *under copyright* to be credited as the author of a work. This gap in § 1202’s coverage disserves the general public interest in knowing who is the author of the work. Congress recognized the public benefit of authorship credit, since § 1202(c)’s definition of copyright management information includes “the name of, and other identifying information about, the author of a work.”<sup>86</sup> Section 1202 does not

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<sup>84</sup> See, e.g., *Gordon v. Nextel Commc’ns*, 345 F.3d 922 (6th Cir. 2003); *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC*, No. 03-4962, 2005 U.S. Dist. LEXIS 9996 (E.D. Pa. May 25, 2005) (illustrating the difficulty of securing relief under § 1202(b)).

<sup>85</sup> See, e.g., *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 U.S. Dist. LEXIS 17768 (W.D. Pa. Mar. 9, 2007); see also *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596 (S.D.N.Y. 2010); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925 (N.D. Cal. 2009).

<sup>86</sup> In addition, § 409(2) states that an application for registration of copyright “shall include” the name of the author.

oblige the rights owner to attach copyright management information to distributions of the work, but if the rights holder does attach copyright management information, then it would be appropriate to interpret the statute to require that the information include the name of the author. Thus understood, § 1202 expresses a public policy favoring author identification as part of a reliable system of dissemination (especially electronic distribution) of copyrighted works, but as the judicial interpretation of § 1202 suggests, Congress may not have drafted this provision in a way that sufficiently implements either authors' interests or the more general interest in ensuring accurate information about a work of authorship.

## II. DEFENSES AND IMMUNITIES: FAIR USE AND § 512—THE COPYRIGHT “BALANCE” WEIGHTS TOWARD USERS

Some years ago, with the advent of digital copyright, some copyright scholars (some celebrating, others dreading) anticipated the radical diminution of the fair use doctrine.<sup>87</sup> On the contrary, I would suggest that the last twenty years have marked its extraordinary expansion.<sup>88</sup> Courts now regularly give wide berth to “transformative” reworkings of portions of copyrighted works.<sup>89</sup> Moreover, where fair use of an entire work was once considered exceptional, and almost inconceivable if the entire work was used

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<sup>87</sup> See, e.g., Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 561 (1998) (arguing transactions costs justification for fair use no longer applies); Raymond Ku, *Consumers and Creative Destruction: Beyond Fair Use as Market Failure*, 18 BERKELEY TECH L. J. 539, 545 (2003) (criticizing reduced transactions costs rationale for diminishing fair use); Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian World of On-line Commerce,”* 12 BERKELEY TECH L. J. 115, 130 (1997) (positing shrinkage of fair use in light of reduction of market failure).

<sup>88</sup> For a range of views on recent developments in fair use, see Symposium, *Fair Use: “Incredibly Shrinking” or Extraordinarily Expanding?*, 31 COLUM J.L. & ARTS 433 (2008).

<sup>89</sup> See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 603–06 (2008) (observing how over 80% of circuit court fair use opinions include a—generally dispositive—“transformativeness” analysis).

for commercial purposes,<sup>90</sup> in the last twenty years, the concept of “transformative use,” which originally envisioned the creation of new *works* that build on their predecessors,<sup>91</sup> has extended to a variety of commercial digital *exploitations* that do not produce new copyrightable expression.<sup>92</sup>

In addition, as digital media increasingly enable end-users to engage in copyright-implicating acts, enforcement efforts have shifted from direct infringers to the technological entrepreneurs who facilitate unauthorized acts of reproduction and communication to the public; but judicial interpretation of Congress’ provisions for service provider immunity in § 512(c) of the Copyright Act has further re-balanced copyright to favor business models built (without authorization) on third-party copyrighted content.

#### A. Fair, “Transformative” Use

##### 1. Transformative purposes

In the context of the first fair use factor (the purpose and character of the use), Judge Leval’s seminal coinage of “transformative use”<sup>93</sup> (formerly known as “productive use”<sup>94</sup>) predates the twenty-year period here reviewed, but the Supreme Court’s endorsement of the term and of Judge Leval’s analysis falls within our time frame. In *Campbell v. Acuff-Rose Music, Inc.*, the Court inquired whether the defendants’ musical parody had

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<sup>90</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984).

<sup>91</sup> See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

<sup>92</sup> Moreover, traditional beneficiaries of fair use or other exceptions, seeking to ensure the transposition, and perhaps enlargement, of their privileges to the digital environment, have embarked on what one might call “fair use entrepreneurship” (a phrase whose coinage I credit to my colleague June M. Besek) through drafting of aspirational “best practices.” See, e.g., ASSOCIATION OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (January 2012), available at <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>. See generally, Patricia Aufderheide & Peter Jaszi, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK INTO COPYRIGHT (2011).

<sup>93</sup> See Leval, *supra* note 91, at 1111–12.

<sup>94</sup> See, e.g., *Sony*, 464 U.S. at 427, 455 n.40; *id.* at 479–80 (Blackmun, J., dissenting).

made a “transformative” use: not one that merely supersedes the objects of the earlier work by copying it, but that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>95</sup> While the context of *Campbell* suggests that the defendant has “transformed” the prior work by creating a new work, courts have come to interpret “something new, with a further purpose” to encompass copying that does not add “new expression,” so long as the copying gives the prior work “new meaning.”<sup>96</sup> Recent cases evidence a drift from “transformative *work*” to “transformative *purpose*”; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation.

In the initial shift from “transformative *work*” to “transformative *purpose*” the defendant had in fact created an independent work of authorship, even though that work did not significantly alter the copied work. Thus, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,<sup>97</sup> (which did not concern digital technologies) the Second Circuit held “transformative” reduced-sized complete images of posters of the legendary rock band the Grateful Dead by the publisher of a coffee table book biography of the group because the book used the images of the posters as “historical artifacts” to document the Dead’s concerts, rather than for the posters’ original aesthetic purpose.<sup>98</sup> But the documentary-aesthetic distinction has also significantly expanded the application of the fair use exception to new technological uses that do not yield new works. The search engine practice of “indexing” has been the principal digital beneficiary of the “documentary” or “new

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<sup>95</sup> 510 U.S. 569, 579 (1994).

<sup>96</sup> See, e.g., *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (copying of photograph into visual collage for “an entirely different purpose and meaning” held fair use).

<sup>97</sup> 448 F.3d 605 (2d Cir. 2006).

<sup>98</sup> Even in more traditional contexts, the distinction in purpose can help ensure that the copyright in a work does not preclude third parties from producing a work *about* the copied work, so long as they do not copy more than needed for the documentary purpose. See *id.* at 609–10. By contrast, courts discount the assertions of documentary purpose if they perceive that the defendant has reproduced the copied author’s “original expression for its inherent entertainment and aesthetic value.” See, e.g., *Warner Bros. v. RDR Books*, 575 F. Supp. 2d 544 (S.D.N.Y. 2008) (*Harry Potter Lexicon* “not consistently transformative” because it copied too much.).

purpose” brand of transformativeness.<sup>99</sup> But other applications of the distinction are emerging. For example, the constitution of a commercial database containing complete copies of copyrighted works may be fair use if the database does not exploit the works for their expressive value.<sup>100</sup> Google has asserted that its scanning and retention of millions of copyrighted books is a transformative fair use because Google’s responses to user queries seeking bibliographic information or arguably fair use extracts from the books depend on storing full-text copies in its database.<sup>101</sup> Twenty years ago, I doubt many copyright lawyers (if any) would have found Google’s unauthorized and commercial mass digitization a plausible fair use candidate. Today even copyright traditionalists would acknowledge that notwithstanding its stunning boldness, the fair use claim is at least conceivable.

## 2. Transformative markets

The fourth fair use factor (the impact of the use upon the potential market for the work), is often conflated with the first factor; courts tend to equate “transformative” works or purposes with those that do not substitute for the copyright owner’s normal markets for the work.<sup>102</sup> Indeed, the Second Circuit has even coined the term “transformative market,”<sup>103</sup> apparently meaning an exploitation that falls outside the copyright owner’s zone of exclusivity. The counterpoint to a “transformative market”

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<sup>99</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174–75 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 942 (9th Cir. 2002).

<sup>100</sup> See *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (“iParadigms’ use of plaintiffs’ works [in a plagiarism detection database] had an entirely different function and purpose than the original works.”).

<sup>101</sup> Defendant Google Inc.’s Memorandum of Points & Authorities in Support of Its Motion for Summary Judgment or in the Alternative Summary Adjudication at 27–28, *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. July 27, 2012); cf. *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351(HB), 2012 WL 4808939, at \*11 (S.D.N.Y. Oct. 10, 2012) (“The use to which the works in the HDL were put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material.”).

<sup>102</sup> See, e.g., *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1146; *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>103</sup> *Bill Graham Archives*, 448 F.3d at 614–15.

(favoring fair use) is “a traditional license market,” that is, a “traditional, reasonable, or likely to be developed market”<sup>104</sup> (disfavoring fair use). Courts inquire into whether the plaintiff is currently exploiting the market, or whether the market is one that similarly situated copyright owners would normally exploit. The latter showing is important in instances where the author has chosen for artistic or other reasons not to develop a particular market. For example, in the case of a novelist who declines to create or authorize a sequel,<sup>105</sup> or of a screenwriter-television producer who refuses to license a trivia quiz book about the show,<sup>106</sup> arguments that unauthorized entrants into those markets cause the creators no harm because they chose to forgo those derivative works markets have proven unavailing because courts so far have recognized both that defendants’ uses occupy traditional markets, and that the copyright confers the right to control the work’s artistic as well as its commercial destiny.

The inquiry into “traditional license markets” also endeavors to avoid the charge of circularity. Arguably, if the use is one that copyright owners *could* license, then its unlicensed exploitation cannot be fair use.<sup>107</sup> By focusing on whether license markets in fact exist, or are in imminent prospect,<sup>108</sup> courts seek to follow factor four’s direction to examine the use’s impact on the “*potential* market for the work” (emphasis supplied) without overstretching the realm of possible licensing opportunities. Recourse to the “transformative” character of the use may help courts identify what uses properly fall within that potential. (Put another, more cynical, way, having determined that a use should not be ruled infringing, courts may announce that its “transformativeness” precludes cognizable potential market harm.)

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<sup>104</sup> *Id.* at 614 (quoting *Am. Geophysical v. Texaco*, 60 F.3d 913, 930 (2d Cir. 1994)).

<sup>105</sup> *See Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

<sup>106</sup> *See Castle Rock Entm’t, Inc. v. Carol Publ’g, Inc.* 150 F.3d 132 (2d Cir. 1998).

<sup>107</sup> *See, e.g., Bell, supra* note 87.

<sup>108</sup> *See e.g., A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1016–17 (9th Cir. 2001) (examining market harm from the perspective not only of file-sharing’s impact on established markets for sales of CDs, but also on the emerging market for licensed downloads).

### 3. Other developments

The significance of new licensing markets may be greatest when the transformative character of the use is weakest, particularly when the “transformation” might better be seen as a new form of redistribution of the same content. The photocopying decisions rendered during our twenty-year period are significant in this regard not only for their endorsement of new licensing markets but equally importantly for their recognition that the new technology at issue had changed the nature of the object of inquiry into economic harm. Where once the relevant economic unit was the book or journal issue as a whole, the photocopier’s disaggregation of the work into separate chapters or articles,<sup>109</sup> or even shorter excerpts,<sup>110</sup> shifts the focus to smaller compensable units.<sup>111</sup> This phenomenon is not confined to photocopiers or to literary works, as the emergence of a market for “ringtones” (usually twenty to thirty seconds of a recorded musical composition) attests. As a result, the third factor (amount and substantiality of the portion taken) may blend with the fourth, as the “substantiality” of the copied amount may turn on its distinct exploitability.

As we have seen, however, redistribution of the same content is no longer fatal to a fair use claim. In addition to entertaining some digital redistributions’ (very) arguable “transformativeness,” courts have also credited the defense of implied license.<sup>112</sup> Arguably, anyone who posts a website wants that website to be found on the Internet; to be found, one’s site has to be “indexed,” that is, copied and stored in the search engine’s database, as well as partly reproduced in search reports. Copyright owners who do not wish to have their sites copied can “opt out” of being crawled by including an instruction to the search engine’s “robot” not to copy

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<sup>109</sup> See *Am. Geophysical Union*, 60 F.3d at 913.

<sup>110</sup> See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc).

<sup>111</sup> *But see Cambridge Univ. Press v. Becker* 863 F. Supp. 2d 1190, No. 1 (N.D. Ga. 2012) (evaluating impact on books as a whole rather than individual chapters of books in assessing fair use of portions of books placed on university course “electronic reserves”). Publisher appears not to have pleaded market harm to individual chapters.

<sup>112</sup> See, e.g., *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

the site.<sup>113</sup> Otherwise, in this fully automated process (whose defaults the search engine nonetheless sets), the website will be included. Failure to withdraw completely from the indexing process (in the absence of a halfway setting allowing the “bot” to reproduce some but not all of the content of an open-access webpage) is construed as acceptance of the search engine’s terms.<sup>114</sup> The more widespread the practice of implied licensing, the more “fair” it becomes. While the outcome seems reasonable in the context of search reports, it is more problematic with respect to news aggregation sites (compiled by the same search engines) that copy headlines and full sentences from news organizations’ websites. It is also troubling that fair use may be becoming intertwined with implied license arguments which themselves presume copyright owner acceptance of search engines’ unilaterally-imposed design choices.

*B. ISP immunity and copyright-exploiting business models*

Where end-users once merely consumed copyrighted works brought to them by distribution or transmission intermediaries, the Internet has given end-users the capacity to copy and communicate works themselves. Consequently, it has also altered the role of intermediaries, many of whom now facilitate end-user communications without themselves actively intervening in the creation or selection of the content that they transmit. Internet service providers (ISPs) that allow home computer users to connect to the Internet and to post and exchange all manner of potentially copyright-protected materials provide an appealing target for copyright infringement lawsuits, when the alternative would often be cumbersome suits against individuals. ISPs accordingly have, thanks to the DMCA, largely succeeded in insulating themselves from most copyright liability.<sup>115</sup> ISPs now enjoy liability limitations even in circumstances unanticipated by Congress in 1998, circumstances which have promoted copyright-dependent, yet largely copyright-immune business models.

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<sup>113</sup> See, e.g., *Googlebot*, GOOGLE (June 7, 2012), <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=182072>.

<sup>114</sup> See *id.*

<sup>115</sup> See 17 U.S.C. § 512 (2006).

### 1. The statutory safe harbor regime

Section 512 of the Copyright Act exempts online service and access providers from liability for damages for copyright infringement, and significantly reduces the scope of injunctive relief, if the providers meet the bill's cumulative factors assessing the independence of the providers from the infringing content they transmit, host or link to. Service providers have no general duty to monitor their sites, nor to seek out evidence of infringing activity.<sup>116</sup> Failure to comply with § 512 does not of itself subject the service provider to liability for copyright infringement; § 512 offers a safe harbor, but a nonqualifying provider must still be proved to have infringed, and may still invoke traditional copyright and other defenses.

A thorough review of the § 512 case law exceeds the scope of this summary; I will focus on judicial interpretation of the criteria for limiting the liability of hosts of third-party content residing on systems or networks at the direction of users (§ 512(c)). Section 512(c) sets forth cumulative prerequisites to a hosting service provider's qualification for exemption from direct or vicarious liability for copyright infringement. First, the host must be a "service provider." Section 512's definition of "service provider" is exceedingly vague; the term "means a provider of online services or network access or the operator of facilities therefor." "Online services" are not defined, but the case law has generally interpreted "service provider" broadly, to cover not only Internet-specific businesses, but a variety of traditional businesses' Internet operations as well.<sup>117</sup>

Second, § 512(c) absolves a host service provider from liability "for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." At first blush, it might appear that § 512 does not suspend liability for other acts in which the service provider might engage

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<sup>116</sup> *Id.* § 512(m).

<sup>117</sup> *See, e.g.,* Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1175 (C.D. Cal. 2002) (assuming defendant qualified as a service provider, but admitting that it "has found no discussion [in prior case law] of this definition's limits").

independently of, or even with respect to, third-party-posted content. But, as the Ninth Circuit has stressed, § 512 assumes that users will be able to access content posted to host websites.<sup>118</sup> Thus, the websites must be permitted to transmit the stored content to the requesting user; to limit § 512(c) to the sole act of storage would effectively nullify the safe harbor.<sup>119</sup> To the extent the storage-plus activity is not closely related to the storage, the service provider would lose the safe harbor only with respect to the activities that exceeded the bounds of “‘storage’ and allied functions”; any excess would not disqualify those activities that came within those bounds.<sup>120</sup>

Third, a host provider must “not have actual knowledge that the material or an activity using the material on the system or network is infringing”<sup>121</sup> and it must not be “aware of facts or circumstances from which infringing activity is apparent”;<sup>122</sup> this is sometimes referred to as the “red flag” standard.<sup>123</sup> Once the host becomes “aware” of infringing activity, it must act “expeditiously to remove, or disable access to, the material.”<sup>124</sup> Most importantly, in the absence of prior awareness, but upon proper notification by the copyright owner, the service provider must respond “expeditiously to remove, or disable access to” the allegedly infringing material.<sup>125</sup> Accordingly, § 512(c)(2) requires that a service provider, in order to benefit from the reduction in liability, designate, and provide contact information concerning, an agent to receive notification of claimed infringements.<sup>126</sup> Under § 512, the qualifying service provider incurs no general burden of

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<sup>118</sup> See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1033 (9th Cir. 2011).

<sup>119</sup> See *id.*

<sup>120</sup> See *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010), *aff’d*, 676 F.3d 19 (2d Cir. 2012).

<sup>121</sup> 17 U.S.C. § 512(c)(1)(A)(i) (2006).

<sup>122</sup> *Id.* § 512(c)(1)(A)(ii).

<sup>123</sup> See, e.g., *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *Shelter Capital*, 667 F.3d at 1038; *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

<sup>124</sup> 17 U.S.C. § 512(c)(1)(A)(iii) (2006).

<sup>125</sup> *Id.* § 512(c)(1)(C).

<sup>126</sup> *Id.* § 512(c)(2).

anticipating or preventing infringement; it need only react to notices of infringement that the copyright holders uncover.

## 2. Practical implications of the safe harbor regime

In practice, § 512(c)'s notice and take-down system may not adequately address the hydra-like reappearance of noticed content. Because other users may promptly re-post content the notified service provider takes down, the question arises at what point, if any, the service provider becomes disqualifyingly "aware" that the contested content is making repeat appearances, so that some obligation to forestall specific infringements may attach. So far, the case law interpreting the statutory "red flag" standard suggests the flag may need to be an immense crimson banner before any service provider obligation to intervene of its own accord comes into play.<sup>127</sup> General knowledge that the service's users are posting infringing content does not suffice to shift the burden of investigation; indeed, courts have held that if any investigation is required to ascertain a particular infringement, then the service has no duty to intervene.<sup>128</sup> Rather, as the Second Circuit held in *Viacom v. YouTube*, knowledge of specific infringements is required: the "red flag" waves only if "the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."<sup>129</sup> Although the point is debatable, it has been held that even repeated take-down notices identifying the same specific unauthorized content do not give rise to sufficient awareness.<sup>130</sup> It appears from *Viacom* and other decisions that if the service provider must of its own accord remove infringing content, it must know, without investigation, not only what the particular content is, but where it is to be found on the website.

Lest this standard seem exceedingly forgiving, the *Viacom* court tempered it by interpreting § 512(c) to accommodate common law principles of "willful blindness," and thus to attribute

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<sup>127</sup> See, e.g., *Viacom*, 676 F.3d at 32; *Perfect 10*, 488 F.3d at 1114.

<sup>128</sup> See *Perfect 10*, 488 F.3d at 1114.

<sup>129</sup> 676 F.3d at 31.

<sup>130</sup> See *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009).

actual knowledge to the person or entity who consciously avoids confirming the existence of blatant infringements.<sup>131</sup> While the Court of Appeals acknowledged that willful blindness must be assessed in light of the statute's rejection of an affirmative duty to monitor one's site, it held that the district court should have considered whether YouTube was willfully blind to infringements of which it should have known, and directed the district court to address this issue on remand.<sup>132</sup>

Even allowing for some enlargement of the "red flag" standard through the doctrine of willful blindness, the threshold of awareness remains sufficiently high to foster new business models built on third-party copyrights from which the entrepreneur maintains the statutory degree of attenuation. While Congress in § 512(c) clearly intended to encourage new Internet intermediary businesses by removing the disincentive of prospective liability, it also sought to facilitate copyright enforcement through expeditious and effective take-down of infringing content. Perhaps the text Congress enacted resists a construction that takes account of the intervening technological developments that have set the original balance askew, or perhaps judicial interpretation has emphasized solicitude for copyright intermediaries at the cost of copyright owners. Either way, judicial application of § 512(c), together with the expansion of technological fair use and the sometimes cramped interpretation of the § 106 exclusive rights, further illustrates the evolution of copyright doctrine toward what, just before our twenty-year period, Ray Patterson and Stanley Lindberg presciently dubbed "a law of users' rights."<sup>133</sup>

### III. CONCLUSION: A DIFFERENT DEVELOPMENT . . .

With creators in mind, I turn to the promised less-obvious development in the last twenty years of U.S. copyright. My candidate for the most important copyright development is Harry Potter. J.K. Rowling is, after all, the poster child for copyright,

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<sup>131</sup> See *Viacom*, 676 F.3d at 35.

<sup>132</sup> *Id.*

<sup>133</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991).

having gone from public assistance to riches surpassing the Queen of England, all on the fruits of her intellectual labor.<sup>134</sup> Her success reassures us of the centrality of individual creativity in the copyright scheme. She has, moreover, managed to retain a remarkable degree of artistic and financial control over her works, from film rights to ebooks. Harry Potter is also an international phenomenon, widely translated, distributed—and infringed, whether by “Tanya Grotter,” a Russian emulation condemned by the Dutch courts, or “Harry Potter in Calcutta” ruled an infringement in India.<sup>135</sup>

Harry Potter also affords a useful vehicle to examine limitations on copyright, both de jure, in the form of the fair use doctrine, and de facto, via the Internet. The *Harry Potter Lexicon* sparked an interesting debate about the doctrinal differences between the non-commercial online version, which J.K. Rowling had praised, and the commercially published book, which she sought to have enjoined.<sup>136</sup> In the transition from web format to print, the *Lexicon* lost the crossreferential and interactive features that had enhanced its claim to fair use. In print, as Rowling’s lawyer put it, the author and publisher “took too much and did too little.”<sup>137</sup> It had become a cut-and-paste job lacking “transformative” commentary or analysis, and potentially competed with Rowling’s own revision of her works into reference volumes. By contrast, Rowling does not pursue the myriad acolytes who post on the web vast numbers of “fan fiction” variants on the Harry Potter books. The “HarryPotterFanfiction.com” site alone boasts almost 36,000

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<sup>134</sup> See The Wealthiest Women, SUNDAY TIMES (London), Apr. 29, 2012 at 74 (estimating Rowling’s wealth at £560 million and the Queen’s at £310 million); see also Robert P. Merges, JUSTIFYING INTELLECTUAL PROPERTY 133–35 (2011).

<sup>135</sup> See Tim Wu, *Harry Potter and the International Order of Copyright*, SLATE MAGAZINE (June 27, 2003, 12:42 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2003/06/harry\\_potter\\_and\\_the\\_international\\_order\\_of\\_copyright.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2003/06/harry_potter_and_the_international_order_of_copyright.html).

<sup>136</sup> See Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 517, 521 (S.D.N.Y. 2008).

<sup>137</sup> See Elyssa A.L. Spitzer, *Lawyer Curses Potter Copyright Crimes*, HARVARD CRIMSON, Nov. 7, 2008, <http://www.thecrimson.com/article/2008/11/7/lawyer-curses-potter-copyright-crimes-the>.

authors of over 78,000 Harry Potter stories.<sup>138</sup> Were these (or some of them) commercialized as sequels, an infringement action might well follow; as webposts, they constitute one of the most significant examples of what my colleague Tim Wu has called “tolerated use,” that is, uses which may be pervasive yet pass under the radar of copyright enforcement, in part because their financial or artistic impact may be trivial, and in part because authors do not wish to antagonize their fan base.<sup>139</sup>

The Harry Potter books also provide a tantalizing glimpse of author-managed exploitation. Rowling kept her ebook rights, and released the Potter books as ebooks only in March 2012.<sup>140</sup> They are compatible with all ebook readers, but available only from Rowling’s own “Pottermore” website. Or, available illegitimately, since within less than nine days the books could be obtained from the Pirate Bay and other unlawful sources.<sup>141</sup>

Of course, when it comes to controlling one’s literary or artistic property, not everyone is J.K. Rowling, but it bears emphasis that less than twenty years ago, J.K. Rowling was “everyone,” struggling to write and to make a living. And almost twenty years later, the digital tools are available for “everyone” directly to reach her audience, and even get paid for her work (assuming that those same tools have not made copyright unenforceable).<sup>142</sup>

That hopeful forecast notwithstanding, I must also sound a somber note. In the last twenty years we have seen a progressive denigration of authors, from the Romantic Author-bashing of the

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<sup>138</sup> HARRYPOTTERFANFICTION.COM, <http://harrypotterfanfiction.com> (last visited Sept. 5, 2012).

<sup>139</sup> See Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 619 (2008).

<sup>140</sup> See *Harry Potter’s New Digital Adventure Begins*, N.Y. TIMES, Mar. 28, 2012, at C3.

<sup>141</sup> See *Harry Potter ebooks*, PIRATE BAY, [http://thepiratebay.se/torrent/7161723/Harry\\_Potter\\_ebooks\\_%28Pottermore%29](http://thepiratebay.se/torrent/7161723/Harry_Potter_ebooks_%28Pottermore%29) (ebook uploaded Apr. 5, 2012).

<sup>142</sup> For example, “fantasy fiction” author Terry Goodkind recently (and so far very successfully) began self-publishing digital books. See *Tracking Amazon: Terry Goodkind’s Self-Published Novel Skyrockets*, PUBLISHERS WEEKLY (July 3, 2012), <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/52860-tracking-amazon-terry-goodkind-s-self-published-novel-skyrockets.html>.

1990s<sup>143</sup> to the new romances<sup>144</sup> of “crowdsourcing,” and of authorial altruism (unremunerated authors who just can’t restrain themselves from being creative). More recently, with the advent of mass digitization, another attack on authors arrives, this time for complicating transactions: if we didn’t have so many pesky authors who may be hard to find (or who if found, claim ownership of residual digital rights) then we could reduce the friction that discourages putting our entire cultural heritage online for the broader public good—or at least for the good of the entrepreneurs who would profit from new digital exploitations.<sup>145</sup>

But this is not a new complaint. In 1933 Australian novelist Miles Franklin imagined a conversation among movie moguls:

[T]hey were generally agreed that the total elimination of the author would be a tremendous advance. . . .

“Authors,” said [the] gentleman, “are the bummiest lot of cranks I have ever been up against. Why the heck they aren’t content to beat it once they get a price for their stuff, gets my goat.”

. . . .

There was ready agreement that authors were a wanton tax on any industry, whether publishing, drama or pictures.<sup>146</sup>

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<sup>143</sup> See, e.g., THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee & Peter Jaszi eds., 1994). The death knell of individual genius continues to sound, as contemporary critics contend that the true source of creativity is the author’s surrounding community, to which authors owe a debt, whose disregard violates the human rights of the community. See also, e.g., Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (contending authors irrationally overvalue their work, distorting IP policy).

<sup>144</sup> See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1332 (2004) (whose title inspired the identification of similar “romances”).

<sup>145</sup> See, e.g., Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMPETITION L. & ECON. 411 (2009); see also *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

<sup>146</sup> MILES FRANKLIN, *BRING THE MONKEY* 38–39 (1933).

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In the future, will we continue to perceive authors as a “wanton tax,” or as essential contributors to the Constitutional aspiration for “the progress of Science”?<sup>147</sup>

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<sup>147</sup> U.S. CONST. art. I, § 8, cl. 8.