Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers

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> "[W]hile I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science."
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> Lord Ellenborough, *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng.Rep. 679, 681 (K.B.1803)

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I. INTRODUCTION

As art museums approach the twenty-first century, one of the most potentially explosive problems they confront pertains to copyright: that branch of the law that restricts the uses that one person or entity may make of another's creative work.[1] While a myriad of factors have, undoubtedly, combined to cause the explosion in copyright-related issues, and the significance of any one of these factors may be open to debate, one thing is indisputable. The rapid development and deployment of revolutionary new technologies is at the core of the explosion, in particular, technologies that enable reproduction of art work in digital form, and instantaneous transmission of digitized works

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[1] As Marshall Leaffer points out:

> Although the term "copyright" is highly descriptive in one sense, it is a misnomer in another. Today's copyright goes much farther in protecting works against copying in the strict sense of the word. Much of what we protect in copyright law today, such as performance rights, display rights, and derivative work rights, are more akin to rights to *use* a work rather than to *copy* it.

MARHSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 2 (2d ed. 1995) [hereinafter LEAFFER, UCL] (emphasis in original). *See also* Marshall A. Leaffer, *Protecting Authors' Rights in a Digital Age,* 27 U. TOL. L. REV. 1, 4 (Fall 1995) [hereinafter Leaffer, *Protecting Authors' Rights*].

through the Internet[2] and throughout the world.[3] On the eve of the millennium, art museums are moving quickly into the future, digitizing images, developing products using digitized images, and posting digitized images on the Internet.[4] Yet, they are doing so without necessarily understanding, or even considering, the potential ramifications of their actions as far as the law of copyright is concerned.[5]

Art museums have long found themselves entangled in nettlesome copyright issues, such as whether works in their collections are under copyright protection and, if so, who owns the copyrights in the works, whether reproductions of works on loan may be included in an exhibition catalogue, and whether photographs commissioned by the museum for use in promotional materials are copyrightable by the museum.[6] Likewise, museums have long found that they are both users of copyrighted works—such as when they wish to make reproductions of works to which they do not hold the copyright, and creators of copyrighted works—such as when their staff creates catalogues, gallery guides, or audio-visual materials.[7]

Museums have operated relatively smoothly in this environment, in some cases by obtaining copyright clearances, but, more typically, by either assuming that as nonprofit institutions their actions are insulated

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[2] The "Internet" is an international network of computer networks: a collection of several thousand local, regional, and global computer networks interconnected via the TCP/Internet Protocol suite. Religious Tech. Center v. Netcom On-Line Communication Serv., Inc., 907 F. Supp. 1361, 1365 n.2 (N.D. Cal. 1995) (citing DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 16 (1994). *See also infra* note 139.

[3] *See* Dhruv Khanna and Bruce M. Aitken, *The Public's Need for More Affordable Bandwidth: The Case for Immediate Regulatory Action,* 75 OR L. REV. 347, 351 (1996) ("The current digital revolution has been brought about by the convergence of a highly competitive [personal computer] industry and the Internet.").

[4] *See* Kim L. Malone, Comment, *Dithering Over Digitization: International Copyright and Licensing Agreements Between Museums, Artists, and New Media Publishers*, 5 IND. INT'L & COMP. L. REV. 2, 393 (1995).

[5] *See* Michael S. Shapiro, *Not Control, Progress*, MUSEUM NEWS, Sept./Oct. 1997, at 37, 38.

[6] *See* Rhoda L. Berkowitz and Marshall A. Leaffer, *Copyright and the Art Museum*, 8 COLUM J. ART. & L. 249, 252-53 (1984).

[7] *Id.* at 253.

from liability for copyright infringement under the fair use doctrine,[8] or simply failing to recognize that their actions raise any questions regarding copyright at all.[9] While this "ignorance-is-bliss" approach may have worked well in the past, the curtain on such freewheeling activity may well be rising. Artists, their heirs and representatives, and the various entities to whom they have assigned their copyrights, have become far more cognizant of their rights as copyright holders and vigilant about exercising them than they were in the past.[10] In addition, an expansion of the rights of copyright holders is currently in progress, both nationally and internationally, with far-reaching implications for the application of copyright law to the new frontier of cyberspace,[11] as well as to the routine, day-to-day uses of copyrighted works in which museums have historically engaged. Consequently, museums have little choice but to become more knowledgeable about the law of copyright, its application to the online environment, the efforts at copyright reform that are currently underway, and how their interests tie in with the broader issues at stake in the debate regarding copyright reform. Failure to do so, and to become prominent players in the debate, will subject museums and the public they serve to the possibility that the regulatory structure that is ultimately developed will not adequately protect their interests.

The purpose of this article is to provide a thorough overview of the law of copyright, including its application to the digital environment;

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[8] *See* Shapiro, *supra* note 5, at 38.

[9] *See* Berkowitz, *supra* note 6, at 254.

[10] *See* Weil, *Not Money, Control*, MUSEUM NEWS, Sept.-Oct. 1997, at 36 [hereinafter Weil, *Not Money, Control*].

[11] "'Cyberspace' is a popular term referring to the world of electronic communications over computer networks." *Netcom*, 907 F. Supp. at 1363 n.1. The word "cyberspace" is derived from "cybernetics" which, in turn, is derived from the Greek word for steersman, intending to identify the link between communications and power. "In giving the definition of Cybernetics . . . I classed communication and control together." Peter Lyman, *What is a Digital Library? Technology, Intellectual Property, and the Public Interest*, DAEDALUS, Vol. 125, No. 4 (1996) 1, 2 at 14 (quoting NORBERT WIENER, THE HUMAN USE OF HUMAN BEINGS: CYBERNETICS AND SOCIETY 23-24 (1967)). "Cyberspace cannot be defined in technological terms alone; it is a technology that was originally designed to use information as a means to assert social control." *Id.* at 14.

to highlight the challenges of applying the "old law" to the "new world" of cyberspace; to survey some of the proposals for copyright reform that have been propounded in governmental and academic fora; and to analyze how the newly-enacted Digital Millennium Copyright Act ("DMCA")[12] and Copyright Term Extension Act ("CTEA")[13] fit within the debate regarding copyright reform. The article also discusses the particular copyright-related issues that museums face with respect to digitization of images and transmission of digital images through the Internet. Finally, the article acknowledges the conflicting interests that museums have by virtue of their status as both copyright holders and users of copyrighted works, but it argues that museums should resolve this conflict by focussing on their defining status as nonprofit institutions that exist to make their works available and accessible to the public. Consequently, the article concludes that museums should ally themselves with those forces in the debate that argue for the contraction of copyright, the expansion of fair use, and the development of an expansive public domain in cyberspace. The article further advocates that museums participate in the various rulemaking proceedings to be conducted under the Digital Millennium Copyright Act, but that they not limit their participation in the debate regarding copyright reform to those administrative fora.

II. THE LAW OF COPYRIGHT

A. Historical Origins of Copyright Law

Copyright is a system of property rights protecting certain classes of intangible products, or "intellectual" property, generally called works of authorship.[14] Whether property rights should be recognized in products of the mind is a matter of long-standing debate[15] but

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[12] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[13] Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[14] LEAFER, UCL, *supra* note 1, at 2.

[15] *See id.* at 11 (citing James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading,* 80 CAL L. REV. 1413 (1992)); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, Part I*, 18 COLUM.-VLA J.L. & ARTS 1, 24 (1993-94).

throughout history such rights have been recognized and protected.[16]

The law of copyright originated and has evolved continuously in response to the introduction of new technologies that reproduce and distribute human expression.[17] The modern world's first copyright statute was the Statute of Anne, enacted in England in 1709, effective 1710.[18] Although enacted more than two centuries after the fact, its origins lie in the advent of the printing press—invented in Germany in 1450 and introduced into England in 1476—and in the profound changes wrought by this revolutionary new technology upon European society.[19]

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[16] Ancient Jewish Talmudic law, for example, required permission of an author or his heirs before a work could be copied. Aoki, *supra* note 15, at 27 n.95 (citing Victor Hazan, *The Origins of Copyright Law in Ancient Jewish Law*, 18 BULL. COPYRIGHT SOC'Y 3, 24-27 (1970)). Similarly, the Roman Catholic Church in medieval Europe recognized a concept of intellectual property, identifying the monastery (rather than individual monks) as the author of manuscripts, chronicles and books, and granting the monastery the right to assign such works. *Id.* at 27 n.96.

[17] LEAFFER, UCL, *supra* note 1, at 3.

[18] 8 Anne, ch. 19 (1710) (Eng.).

[19] LEAFFER, UCL, *supra* note 1, at 3. The print revolution has been described as being about "the effect on European culture of a new means of communicating ideas within a society that was essentially aristocratic, [and that] was long to accept a culture and a tradition of learning which was restricted to certain social groups." Peter Lyman, *supra* note 11, at 2. The printing press revolutionized Western society during the centuries following its invention by making possible, for the first time in history, the mass production and distribution of written materials to the general public independently of the central authority of the Church-State. LEAFFER, UCL, *supra* note 1, at 3. *See also* Sherri L. Burr, *The Piracy Gap: Protecting Intellectual Property in an Era of Artistic Creativity and Technological Change*, 33 WILLAMETTE L. REV. 245, 245-46 (1997). To control this potential unleashing of the free flow of uncensored ideas throughout society, the Crown instituted a system of regulation intended to control the means through which the ideas were distributed: the nascent publishing industry. As part of this regulatory structure, the Crown, in 1557, granted a publishing monopoly to the Stationers Company, a group of printers and booksellers in London. A series of Parliamentary ordinances were also issued, prohibiting the printing of any book without prior issuance by official censors of a license to print, and prior consent of the author. Gillian Davies, *Copyright and the Public Interest*, IIC STUDIES: STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, 14, at 7-8 (1994). In this way, the Crown used the Stationers Company as an instrument of censorship, monopoly and state control. LEAFFER, UCL, *supra* note 1,

The Statute of Anne was enacted for the express purpose of preventing the publication of books without the consent of their authors, to thereby stem the pirate trade in books, and to encourage "learned men to compose and write useful books."[20] To achieve these ends, the Statute granted to "authors and their assigns"[21] an exclusive right of publication, but it limited the duration of this right to a term of 21 years for existing works, and two 14-year terms for new books.[22] In doing so, the Statute rewarded authors for their creations[23] but recognized the public's interest in access to the works by limiting the duration of the reward.[24]

The Statute of Anne provides the foundation upon which the modern concept of copyright in the Western World has been built.[25] It became the model for copyright law in the United States, and is reflected in both the Constitutional provision that authorizes Congress

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at 4-5. In 1694, Parliament abolished the requirement of prior licensing. David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139, 140 (1992). However, the Stationers' monopoly was not withdrawn and pirate presses began to flourish, creating competition, for the first time, for the Stationers Company. The Stationers responded by lobbying Parliament for a new licensing act. Davies, *supra*, at 7-8. Proponents of a "natural rights" theory, also began to lobby in favor of institution of copyright: just as individuals have a natural right to property in their bodies, so too do they have a right to the fruits of their labors, from the fields as well as from their minds. LEAFFER, UCL, *supra* note 1, at 13. In response to these lobbying efforts, Parliament enacted the Statute of Anne. *Id.* at 4.

[20] Anne preamble (Eng.). Note that copyrightable subject matter under the Statute of Anne was limited to books. *See, e.g.*, Burr, *supra* note 19, at 247.

[21] It is important to recognize that while copyright law is typically characterized as conferring upon *authors* the exclusive benefits of copyright, by giving authors the right to *assign* this right, the law may ultimately be conferring the benefits of copyright upon *assignees*. Such assignees have historically included such entities as the Stationers Company, other publishing companies, record companies, cable television companies, and, more recently, computer software companies. *See, e.g.*, LEAFFER, UCL, *supra* note 1, at 1-2. *See also infra* notes 23 and 33, and accompanying text.

[22] LEAFFER, UCL, *supra* note 1, at 4.

[23] Likewise, the Statute rewarded authors' *assigns* for the authors' creations. *See supra* note 21; *infra* note 33.

[24] *Id.*

[25] Davies, *supra* note 19, at 1; Aoki, *supra* note 15, at 29 n.107.

to legislate copyright protection, and the three omnibus copyright acts passed by Congress since that time: the Copyright Act of 1790,[26] 1909[27] and 1976.[28] An understanding of the Statute of Anne and the concepts and events that underlie it is thus critical to an understanding of contemporary copyright law because the philosophy upon which it is based continues to run through the law today.

B. Constitutional and Philosophical Underpinnings of Copyright Law

The direct source of authority for copyright protection in the United States is Article I, Section 8, Clause 8 of the Constitution, known as the Patent and Copyright Clause. This section empowers Congress:

> 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.[29]

The philosophy embodied in this provision reflects the central themes of the Statute of Anne: financial incentive to create and eventual unrestricted public access to creations. Regarding the former, the grant of "exclusive rights" to authors evidences the belief of the Framers of the Constitution, akin to the belief of their Parliamentary counterparts in England, that economic incentives are necessary in order to stimulate the production of creative works which, in turn enables the progress of culture. Without such incentives, the philosophy goes, no one would create. The essence of this philosophy has been distilled as follows: "[n]o man but a blockhead ever wrote except for money."[30]

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[26] Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

[27] Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

[28] Copyright Act of 1976, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 47-50 (1976). *See* LEAFFER, UCL, *supra* note 1, at 5.

[29] U.S. CONST. art. I., § 8, cl. 8. Note that the scope of copyrightable subject matter has been expanded over the years to go far beyond what the terms "science," "useful arts," "writings" and "discoveries" might connote. *See infra* note 37 and accompanying text.

[30] *See, e.g.*, LEAFFER, UCL *supra* note 1, at 1 (quoting Samuel Johnson, as quoted in 3 BOSWELL'S LIFE OF JOHNSON 19 (Hill ed. 1934)).

A countervailing philosophy has, however, also been succinctly stated:

> The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—become after voluntary communication to others, free as the air to common use.[31]

The Patent and Copyright Clause reflects this sentiment as well, in that it limits the period of time during which authors and inventors may retain their exclusive rights. This limitation indicates that the constitutional goal of eventually making the works freely available to the public is just as important as that of providing economic incentives to promote creativity. Therefore, if the author/author's heirs were ever to have unrestricted access to creative works, progress would be impeded and the inefficiencies that the Statute of Anne sought to eliminate would once again surface. The concept of public access or public domain[32] is, by the express terms of the Patent and Copyright Clause, just as important in the Constitutional grant of patent and copyright protection as is the concept of authorial ownership of intellectual property rights.

C. The Copyright Act of 1790

The Patent and Copyright Clause of the Constitution was adopted by Congress in 1787. Pursuant to the authority contained in this section, Congress enacted its first copyright statute, the Copyright Act of 1790. Modeled upon the Statute of Anne, the Act of 1790 gave protection to the author or his assigns[33] of books, maps and charts for two 14-year terms: an initial 14-year term and an option to renew for

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[31] International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[32] For a discussion of the public domain as an intellectual "common" that is a prerequisite to a culturally and intellectually thriving democracy see Aoki, *supra* note 15. *See also* Litman, *supra* note 15, at 68-69; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement*, 41 STAN L. REV. 1343, 1460-61 (1989); Boyle, *supra* note 15, at 1533.

[33] Note the distinction between the language of the Patent and Copyright Clause, which speaks of securing rights for *authors*, and the language of the statute, which secures rights for authors and their *assigns*. For further discussion of this matter, *see supra* notes 21, 23.

an additional 14 years.[34]

The Copyright Act of 1790 underwent two general revisions, one in 1831 and one in 1870, and several significant amendments. The net effect of these revisions and amendments was to: establish federal jurisdiction for copyright cases; expand copyrightable subject matter to include musical compositions, photographs, paintings, drawings and other works intended to be works of fine art; extend the duration of the initial term of copyright from 14 to 28 years; create requirements regarding deposit of copies with the Library of Congress; create a public performance right for dramatic works; create the Copyright Office as a subdivision of the Library of Congress; and create provisions requiring affixation of notice as a prerequisite to copyright protection.[35]

D. The Copyright Act of 1909

In 1905, President Theodore Roosevelt called for a complete overhaul of the Copyright Act of 1790 to adapt it to modern conditions. This resulted in four years of investigation and then passage of the Copyright Act of 1909.[36] Among the more important provisions of the new Act were the following:

(1)copyrightable subject matter was expanded to include "all the writings of an author;"[37]

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[34] LEAFFER, UCL, *supra* note 1, at 6.

[35] *Id.* at 6 n.21-22. *See also* Ralph S. Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 UCLA L. REV. 1070, 1072 (1977). Note that since its creation in 1897 to administer copyright registration and deposit, the Copyright Office has been a separate department within the Library of Congress. LEAFFER, UCL, *supra* note 1, at 204.

[36] *See*, LEAFFER, UCL, *supra* note 1, at 6.

[37] 17 U.S.C. § 4 (1909 Act). Note also that by the time the 1909 Act was passed, a broad judicial construction of the term "writings" had emerged. "By writings in [the Patent and Copyright] clause is meant . . . to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). The statutory language of "all the writings of an author" reflects this precedent, as does the Supreme Court's more recent interpretation of the term: any physical rendering of the fruits of intellectual activity. Goldstein v. California, 412

(2)a renewal term of 28 years was established, in addition to the initial 28 year term recognized under the previous statute;[38] and

(3)protection under federal law began at the moment of "publication" of the work[39] provided that all authorized copies[40] contained proper notice

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U.S. 546 (1973). Judicial precedent likewise establishes that the term "author," within the meaning of the Copyright Act, is not limited to the creator of a written work. Rather, it is a far broader concept, referring to the creator of any original, copyrightable work. *See, e.g.*, Remick Music Corp. v. Interstate Hotel Co. of Nebraska, 58 F. Supp. 523 (D. Neb. 1944).

[38] 17 U.S.C. § 24 (1909 Act).

[39] Although "publication" was a prerequisite to federal copyright protection, the 1909 Act did not include a definition of this critical term, leaving it to develop through case law instead. LEAFFER, UCL, *supra* note 1, at 108-109. The Copyright Act of 1976 attempts to codify this judicial precedent, by defining publication as:

> [T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101. Thus, if the author of a creative work voluntarily sells, leases, lends or gives away the original or tangible copies of the work to the general public, a "publication" within the meaning of copyright law has occurred. Berkowitz, *supra* note 6, at 269. Likewise, if the creator of a copyrightable work authorizes an offer to the public to dispose of the work in any manner, a publication of the work has occurred. *Id.* These examples are to be distinguished from a private sale, such as where an artist sells a painting to a collector directly from her studio, without having first offered the painting for sale to the public through a gallery or otherwise; in this case a publication has not occurred. *Id.* Similarly, publication does not occur where a work of art is displayed without an accompanying offer to sell, if care is taken to deter copying. Thus, the exhibition of a work of art by a museum does not amount to publication of the work where the public is admitted to view the work with the understanding that no copying will take place, and that these restrictions will be enforced by the museum. *Id.* (citing American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907)). Finally, a "limited" publication, *i.e.*, one that communicates the contents of a work to a limited group, for a limited purpose, without transferring the rights of reproduction, distribution or sale, does not amount to a publication for purposes of copyright law. LEAFFER, UCL, *supra* note 1, at 112.

[40] Even though both the 1909 Act and the 1976 Act speak in terms of "copies," *i.e.*, the plural, the 1976 Act defines "copies" as including the material object in which the work is first fixed. Berkowitz, *supra* note 6, at 269 n.91. Thus courts have found publication by the sale or distribution of a single copy. *Id.* (citing Pierce & Business Mfg. Co. v. Werckmeister, 72 Fed. 54 (1st Cir. 1896); Burke v. Nat'l

of copyright.[41]

In addition, except for works not intended for reproduction, such as motion pictures and speeches, unpublished works were not covered by the Act. This left intact the dual system of state common law protection for unpublished works[42] and federal protection for published works.

In the decades following passage of the 1909 Act, Congress amended the Act to reflect changing times and technologies but, in 1955, determined that the Copyright Act should be entirely replaced by new legislation. Toward this end, Congress authorized a copyright revision project. This project led to many reports and hearings over a 20-year period, but no definitive results until 1976 when, finally, a new omnibus Copyright Act was passed, effective January 1, 1978.[43]

E. The Copyright Act of 1976

The Copyright Act of 1976 ("1976 Act") went into effect on January 1, 1978, and governs works created on or after that date. The 1976 Act made several changes to the Act of 1909 and clarified ambiguities in the law.[44] Among the more important provisions are

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Broadcasting Co., 598 F.2d 688 (1st Cir. 1979)).

[41] 17 U.S.C. § 10 (1909 Act). Under the 1909 Act, proper notice required the following: the copyright symbol ("C" in a circle, "Copr." or "Copyright"); the author's name; and the year date of first publication. 17 U.S.C. §§ 19-21 (1909 Act). Failure to affix proper notice resulted in injection of the work into the public domain.

[42] Common law copyright was a system of protection, by state law, of unpublished works. *See* Brown, *supra* note 35, at 1070. Under common law copyright, the author of an unpublished copyrightable work had a right to prevent the copying, publication or use of such unpublished work without his or her consent, and to obtain damages where any such unauthorized uses occurred. *Id.* at 1072. In addition, the duration of common law copyright endured so long as the work remained unpublished, ceasing only upon publication of the work. For a discussion of how the Copyright Act of 1976 affects common law copyright, *see infra* note 57 and accompanying text.

[43] LEAFFER, UCL, *supra* note 1, at 8.

[44] *Id.* at 8. Note that the 1976 Act, and various amendments thereto, also result in changes to the duration of copyright of certain works created before January 1, 1978. *See* 17 U.S.C. §§ 302-304. *See also infra* notes 49, 57, and 288.

those discussed below.

1. Threshold Requirements for Copyright Protection

The 1976 Act clarified that copyright protection is available only for:

> [O]riginal works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.[45]

The operative concepts here are "originality," "authorship" and "fixation."[46] Although the Act does not define these terms, the concepts are central to copyright and are developed extensively in the case law.[47]

The 1976 Act also codified the judicially recognized idea-expression dichotomy, that is, the principle that copyright protection is available only for a particular expression of an idea, but not for the idea itself.[48]

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[45] 17 U.S.C. § 102(a).

[46] For a discussion of the significance of the statutory language "now known or later developed," *see infra*, note 127 and accompanying text.

[47] As defined by the Supreme Court, "author" means the one "from whom the work owes its origin." Burrow-Giles Lithographic Co., 111 U.S. at 58. Other courts have described the author as the "beginner . . . or first mover of anything . . . creator, originator." Remick Music Corp. v. Interstate Hotel Co. of Nebraska, 58 F. Supp. 523, 531 (D. Neb. 1944). Originality, like author, is also a critical concept. Originality, within the meaning of copyright law, requires both independent creation and creativity. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340 (1990). The requisite level of creativity, however, is minimal; a "modicum" will suffice. *Id.*

[48] *See* Baker v. Selden, 101 U.S. 99 (1879), a landmark decision of the U.S. Supreme Court, holding that a system of bookkeeping, illustrated by ruled lines and blank columns, was not copyrightable. While the particular expression of the idea, here the book on bookkeeping, was copyrightable, the underlying idea regarding the bookkeeping system was not. *See also* 17 U.S.C. § 102(b). *Baker* also originated the "merger doctrine": where there is only one way in which to express an idea, the expression of the idea "merges" with the idea itself and, therefore, the expression is not copyrightable.

2. Duration

For most works created by an individual author, the 1976 Act replaced the system of two 28-year terms for copyright protection with a single term of life of the author plus 50 years from the year of death of the author.[49] For anonymous works,[50] pseudonymous works[51] and works made for hire,[52] however, the term was 100 years from creation or 75 years from publication, whichever occurred first.[53] For joint works (except works for hire), the term was 50 years from the death of the last surviving author.[54]

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[49] Note that the Copyright Term Extension Act changes this durational period to life plus *70* years. 17 U.S.C. § 302(a). Note also that the 1976 Act, as amended by the CTEA and other legislation, changes the duration of copyright for works created before January 1, 1978. The combined result is that, with respect to works created *and published* before January 1, 1978:

(1)works published 95 or more years ago: public domain;
(2)works published from 1964-1977 have a duration of copyright that is 95 years from the date of publication, regardless of whether an application for the renewal term was filed; and
(3)works published before 1964, but less than 95 years ago: term of copyright is 28 years from date of publication, with a renewal term of 67 years. To take advantage of the renewal term, a timely application for renewal had to be filed with the Copyright Office.

17 U.S.C. § 304. Regarding duration of copyright for works created before January 1, 1978, but *unpublished* as of that date, *see infra* notes 57 and 288.

[50] The 1976 Act defines an "anonymous work" as one on the copies of which no natural person is identified as the author. 17 U.S.C. § 101.

[51] The 1976 Act defines a "pseudonymous work" as one on the copies of which the author is identified under a fictitious name. 17 U.S.C. § 101.

[52] The 1976 Act defines "work made for hire" as one: (a) prepared by an employee within the scope of his or her employment; or (b) specially ordered or commissioned for use as a contribution to a collective work, part of a motion picture or other audiovisual work, translation, supplementary work, compilation, instructional text, test, answer material for a test, or atlas, if the parties expressly agree in a written document signed by them that the work is considered a work for hire. 17 U.S.C. § 101.

[53] 17 U.S.C. § 302(c). Note that the CTEA amends this statutory section to provide for a duration of copyright of *120* years from creation or *95* years from publication, whichever occurs first.

[54] 17 U.S.C. § 302(b). The CTEA amends this statutory section to provide for a duration of copyright of *70* years from the year of death of the last surviving author.

3. Preemption of Common Law Copyright

Under the 1909 Act, federal copyright protection was only available to published works.[55] Unpublished works were protected, if at all, by state common law copyright.[56] The 1976 Act, however, provides federal protection for published as well as unpublished works, thereby preempting common law copyright.[57] Under the 1976 Act all original works of authorship fixed in a tangible medium of expression, and created on or after the effective date of the Act, are protected from the moment created.[58]

4. Formalities

"Formalities" refers to notice, registration, and deposit. The 1976 Act continued to require notice for all published works and provided that failure to affix notice would result in forfeiture of copyright.[59]

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[55] For a discussion of "publication," *see supra* note 39.

[56] For a discussion of common law copyright, *see supra* note 42.

[57] 17 U.S.C. § 301. Note, however, that while the Copyright Act of 1976 eliminated common-law copyright on a forward-going basis, *i.e.*, with respect to works created on or after the effective date of the Act (January 1, 1978), it did not completely eliminate the protections of common law copyright with respect to *works created before the effective date of the Act and unpublished as of that date.* With respect to these works, the 1976 Act, as amended by the Copyright Term Extension Act: (1) replaces those common law copyrights that existed on January 1, 1978, with federal copyright, and assigned to such copyrights the durational periods set forth in the 1976 Act generally (discussed *supra* (II)(E)(2)); (2) mandates that in no event may the copyright in such unpublished works expire before December 31, 2002; and (3)encourages publication of unpublished works by providing that if the work is published after January 1, 1978, and on or before December 31, 2002, the copyright in the work will last until December 31, 2047. *See* 17 U.S.C. § 303.

Note also that the 1976 Act leaves certain works outside its preemptive effect, most notably, works that are not fixed in a tangible medium of expression, such as: purely oral works, improvised music, spontaneous speeches, and other unfixed performances. LEAFFER, UCL, *supra* note 1, at 368; 17 U.S.C. § 301. Thus, the Act does not preempt state law governing such works.

[58] LEAFFER, UCL, *supra* note 1, at 8; *see also* 17 U.S.C. § 301.

[59] 17 U.S.C. §§ 401, 405. Note, however, that under a savings provision in the 1976 Act, failure to include notice does not result in forfeiture of copyright if: (1) the notice has been omitted from a relatively small number of copies distributed to the public; or (2) the work is registered with the Copyright Office within five years of

However, the requirement of notice was eliminated by the Berne Convention Implementation Act of 1988 ("BCIA"),[60] effective March 1, 1989, which was passed by Congress in order to bring U.S. law into compliance with international law.[61] Thus, while notice is a prerequisite to copyright protection for works published before March 1, 1989, it is optional for works published after that date.[62]

Under the deposit requirement, the owner of a copyright in a published work must deposit two copies of the best edition of the work with the Copyright Office within three months of publication.[63] Failure to do so will not result in forfeiture of copyright, but may result

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publication without notice, and a reasonable effort is made to add notice to all copies that are distributed to the public in the U.S. after the omission is discovered; or (3) the notice has been omitted in violation of a written requirement that, as a condition of the copyright owner's authorization of the public distribution of copies, they bear the prescribed notice. 17 U.S.C. § 405(a). This provision applies to works created between January 1, 1978, and February 28, 1989. For a discussion of the details of the notice requirement, *see supra* note 41.

[60] Pub. L. No. 100-568 (1988).

[61] More specifically, the BCIA was passed in order to bring U.S. law into compliance with the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), the principal treaty governing international copyright relations. The BCIA and related federal statutes (the NAFTA Act, enacted in 1993 to bring the U.S. into compliance with the North Amendment Free Trade Agreement; and the Uruguay Round Agreements Act ("URAA"), enacted in 1994 as a result of the Uruguay Round of the General Agreement on Tariffs and Trade) include several other provisions relevant to the art world such as restoration of copyright in foreign works that had fallen into the public domain, and recognition of "moral rights" in works of visual art. *See, e.g.*, LEAFFER, UCL, *supra* note 1, at 141-45; 125. *See also infra* (II)(F).

[62] If notice is included, it must comply with the three requirements regarding the author's name, the year of publication, and the word "copyright." 17 U.S.C. § 401.

Note also that the net result of the savings provision (*see supra* note 59), in combination with the BCIA, is that notice: (1) is required for copyright protection for works created before January 1, 1978; (2) is required for copyright protection for works created and published between January 1, 1978, and February 28, 1989, except that defects in notice may be cured by compliance with the requirements of 17 U.S.C. § 405(a)(2); and (3) is not required for copyright protection for works created on or after March 1, 1989.

[63] 17 U.S.C. § 407.

in imposition of fines.[64]

The 1976 Act also provides that copies of the work may be registered with the Copyright Office. Although not a prerequisite to establishment of a valid copyright, registration is a prerequisite to: (1) an action for infringement with respect to works created in the U.S.; and (2) the remedies of statutory damages and attorneys fees.[65]

5. Copyrightable Subject Matter

The 1976 Act, as amended, recognizes eight categories of copyrightable subject matter which, according to legislative history, are to be construed liberally: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.[66]

6. Exclusive Rights and Limitations Upon Such Rights

Section 106 of the 1976 Act provides that the copyright owner has the exclusive rights to:

(1)reproduce the copyrighted work;67

(2)prepare derivative works based upon the copyrighted work;68

(3)distribute copies of the copyrighted work;69

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[64] *Id.*

[65] 17 U.S.C. §§ 408, 411-412. These rules apply to all works created in the U.S., whether before or after the effective date of the 1976 Act. 17 U.S.C. § 408.

[66] 17 U.S.C. § 102(a).

[67] This right is implicated only where copies or phonorecords are fixed in a relatively permanent form; thus, reading a book aloud would not violate the right of reproduction.

[68] A derivative work is defined as: "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101.

[69] The distribution right refers to the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). This right imparts to the copyright

(4) perform the copyrighted work publicly;70 and

(5)display the copyrighted work publicly.71

These rights constitute the "bundle of rights" that comprise copyright. Thus, they constitute the core of copyright protection. However, the Copyright Act also sets forth several limitations upon the exclusive rights. The most important of these, particularly to art museums, is the doctrine of fair use, which permits unauthorized use of a copyrighted work where such use, as a matter of public policy, is "fair." The statutory provision regarding fair use provides that: "the fair use of a copyrighted work including such use by reproduction in copies . . . *for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research* is not an infringement of copyright."[72] This section also sets forth four factors that must be

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owner the right to control the first public distribution of the work.

[70] To perform a work is: "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. The performance right arises in several contexts in the music industry, and performing rights societies (such as the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI")) have been formed to provide collective representation of copyright owners and to collect and distribute royalties.

Note also that a performance is public where it: (1) occurs in a place that is open to the public; (2) occurs at a place where a substantial number of persons outside of the normal circle of family and friends is gathered; (3) is transmitted or otherwise communicated to a place described in (1) and (2); or (4) is transmitted or otherwise communicated to the public by means of any device or process, whether or not the members of the public capable of receiving it actually do so in the same place and time. 17 U.S.C. § 101.

[71] To display a work is: "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. § 101. "Public" is defined with respect to the display right in the same way as it is defined with respect to the performance right. *See supra* note 70.

Note also that Section 106 of the 1976 Act also recognizes a sixth exclusive right with respect to sound recordings: the right to perform the copyrighted work publicly by means of a digital audio transmission.

[72] 17 U.S.C. § 107 (emphasis added).

considered in determining whether a particular use is "fair" within the meaning of the law: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) effect of the use upon the market for or value of the copyrighted work.[73]

Five other limitations upon the exclusive rights are also of particular note to museums and other nonprofit institutions. First, an important, but limited, exception to the reproduction right is available to public archives and libraries, and their employees, who reproduce and distribute copyrighted works for noncommercial purposes.[74] Second, the doctrine of "first sale" limits the distribution right by allowing the owner of a particular copy of the work to sell or otherwise dispose of it without the permission of the copyright owner.[75] Third, the performance right is limited by an exception that allows nonprofit performances of copyrighted nondramatic literary and musical works under certain circumstances.[76] Fourth, the display right is qualified by an exception that allows the owner of a lawfully made copy to display it publicly, either directly or by the projection of one image at a time, to viewers present where the copy is located.[77] Finally, the "face-to-face teaching" exception limits the performance and display rights. This

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[73] 17 U.S.C. § 107. For a full discussion of fair use, *see infra* (II)(G).

[74] 17 U.S.C. § 108. Note that the DMCA and CTEA update this statutory section. *See infra* note 269 and accompanying text.

[75] 17 U.S.C. § 109(a). The rationale for this doctrine reflects the intangible nature of intellectual property. As discussed *infra* (II)(E)(7), copyright law distinguishes between ownership of the material object (tangible property) and ownership of the copyright in that object (intellectual property). Without the first sale doctrine, the copyright owner could interfere with the property right of the owner of the material object to "freely alienate" her tangible property. LEAFFER, UCL, *supra* note 1, at 238. Note that this exception only applies if the copy was lawfully made. *Id.* For a discussion of the DMCA and the first sale doctrine, *see infra* note 272 and accompanying text.

[76] The requirements are that: (1) the performance is made directly to the public and is not transmitted; (2) there is no direct or indirect commercial advantage; (3) the performers, promoters and organizers are not paid for the performance; and (4) there is no admission charge (or, if there is, the proceeds, after deducting the costs of the performance, are used exclusively for educational, religious or charitable purposes). 17 U.S.C. § 110(4).

[77] 17 U.S.C. § 109(c).

exception allows the performance or display of a copyrighted work "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction . . ."[78]

7. Ownership of Copyright

Also of major significance regarding exclusive rights, the 1976 Act specifically provides that ownership of copyright is divisible, and the copyright owner may license or assign parts of the copyright to third parties who may bring suit for infringement of their ownership rights.[79] Likewise, the Act explicitly provides that ownership of the work is distinct from ownership of the copyright in the work, and that one may be conveyed without the other.[80] Finally, the Act provides that, in order to be valid, a transfer of copyright must be in writing and signed by the owner of the copyright or the owner's duly authorized agent.[81]

8. Compulsory Licenses

A compulsory license system is one in which the prospective user of the copyrighted work obtains the right to use the work without the copyright owner's permission by paying a mandatory licensing fee. The 1976 Act included four compulsory licenses: cable television;[82] mechanical recording;[83] public broadcasting;[84] and jukebox. Since

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[78] 17 U.S.C. § 110(1).

[79] 17 U.S.C. § 201(d).

[80] 17 U.S.C. § 202.

[81] 17 U.S.C. § 204(a). The 1976 Act thus reverses the "Pushman presumption," which held that the sale by the author of an *unpublished manuscript or work of fine art* automatically transferred copyright, unless the author specifically reserved the copyright. Pushman v. New York Graphic Society, Inc., 287 N.Y. 302, 39 N.E.2d 249 (1942). As for transfers of *published* works, the 1909 Act, like the 1976 Act, required a writing for a complete transfer of copyright; but, unlike the 1976 Act, the 1909 Act did not require a writing for transfer of an exclusive license. 17 U.S.C. § 28 (1909 Act).

[82] 17 U.S.C. § 111.

[83] 17 U.S.C. § 115.

[84] 17 U.S.C. § 118.

passage of the 1976 Act, the jukebox license has been repealed[85] and the satellite retransmission license[86] and digital audio tape device license have been added.[87]

9. Infringement, Remedies and Penalties

Copyright infringement is defined as the unprivileged violation of any of the copyright owner's exclusive rights.[88] Thus, reproduction, adaptation, distribution, publication, performance, or public display of a copyrighted work without permission of the copyright owner amounts to infringement unless it falls within one of the exceptions to the copyright owner's exclusive rights.[89] To establish infringement the copyright owner must prove: (1) ownership of a valid copyright in the work; (2) copying[90] by the defendant; and (3) that defendant's copying amounts to an improper appropriation.[91]

In addition to direct infringement, infringement may be vicarious, as in an employer/employee relationship,[92] or contributory, where one

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[85] *See* LEAFFER, UCL, *supra* note 1, at 223, 266.

[86] 17 U.S.C. § 119; LEAFFER, UCL, *supra* note 1, at 9.

[87] The Audio Home Recording Act of 1992, Publ. L. 102-563, 106 Stat. 4237 (1992) added a new Chap. 10 to Title 17. LEAFFER, UCL, *supra* note 1, at 9, 223.

[88] 17 U.S.C. § 501(a).

[89] *See id.*

[90] The term "copying" in the second prong of this test is a term of art that subsumes two other critical concepts. First, the plaintiff must prove that the two works are "substantially similar" and that the defendant took an improper amount of the plaintiff's work. Second, the plaintiff must prove that the defendant, in fact, copied the work. While direct evidence of copying is rarely available, the plaintiff can nonetheless satisfy his burden of proof by showing that the defendant had access to his work, and that the similarities between the two works are probative of copying. LEAFFER, UCL, *supra* note 1, at 285-86. *See also* Selle v. Gibb, 741 F. 2d 896 (7th Cir. 1984).

[91] LEAFFER, UCL, *supra* note 1, at 285.

[92] *See, e.g.*, Netcom, 907 F. Supp. 1361. Under the doctrine of "vicarious liability," one who has the right or power to supervise the acts of another, and has a financial stake in such acts, may be liable for such acts, even in the absence of knowledge of, or participation in, the acts. LEAFFER, UCL, *supra* note 1, at 316. For a discussion of the DMCA's provisions regarding liability of online service providers, providers of network access, and entities that offer the transmission, routing or providing of connections for digital online communications, *see infra*

has reason to know of someone else's infringing activity and actively participates in it by inducing, materially contributing to, or furthering the infringing acts.[93]

Remedies for infringement include injunctions, actual damages, statutory damages, lost profits, impoundment and destruction of infringing copies, and attorneys fees.[94] Criminal penalties are also available for certain specified acts.[95]

F. International Law and Amendments to Copyright Act of 1976

Since enactment of the Copyright Act of 1976, the U.S. has entered into several international treaties that include provisions regarding copyright. To bring U.S. law into compliance with the requirements of these treaties, Congress has enacted several federal laws that amend the 1976 Act. Among the more significant amendments, particularly with respect to the fine arts, are the following.[96]

1. The Berne Convention Implementation Act of 1988

The BCIA amended the 1976 Copyright Act to bring it into compliance with the requirements of the Berne Convention, which the U.S. joined effective March 1, 1989. The most important amendments are as follows:

(1)Notice: for works published on or after March 1, 1989, notice is not required and failure to affix notice can no longer result in forfeiture of copyright;[97]

(2)Registration: for works created in countries that are parties to the Convention, registration with the Copyright Office is no longer a

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(II)(H)(4)(a)(1)(b).

[93] *See id.*

[94] 17 U.S.C. § 502-505.

[95] 17 U.S.C. § 506.

[96] Note also that in addition to the statutes discussed in this section, the Digital Millennium Copyright Act also amends U.S. law to bring it into compliance with international treaties (Title I of the DMCA implements the WIPO Copyright Treaty and Performances and Phonograms Treaty, both of which the U.S. entered into in 1996). The DMCA is discussed in detail *infra* (II)(H)(4).

[97] 17 U.S.C. § 405 (as amended by BCIA). *See also supra* (II)(E)(4).

prerequisite to bringing a suit for copyright infringement (except for works whose country of origin is the U.S.)[98]; and

(3)Recording: recording an interest in copyright in the Copyright Office is no longer a prerequisite to bringing a suit for infringement.[99]

2. Uruguay Round Agreements Act ("URAA")[100]

The URAA, which implements negotiations completed under the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"),[101] restores copyright status to vast numbers of foreign

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[98] 17 U.S.C. § 411, as amended by the BCIA and DMCA.

[99] 17 U.S.C. § 205. Note also that in drafting the BCIA, Congress took a "minimalist" approach, meaning that it made only those changes to the 1976 Act that were absolutely essential to comply with the Berne Convention. In doing so, it declined to include Article 18 of the Convention, known as the "retroactivity" provision. This section requires member nations, upon joining the Convention, to protect all works from other member countries whose copyrights have not yet expired in their countries of origin. Adopting this section would have resulted in restoration of copyright protection to foreign works that had fallen into the public domain in the U.S. for failure to comply with formalities such as notice and renewal. However, Congress ultimately did amend the 1976 Act to include sweeping restoration provisions, through the Uruguay Round Agreements Act, enacted in 1994. LEAFFER, UCL, *supra* note 1, at 141, 144, 379. *See also infra* (II)(F)(2).

[100] Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[101] The obligations of the United States under the GATT (renamed and restructured as the World Trade Organization ("WTO") as of January 1, 1995) are based on the Uruguay Round negotiations pursuant to the GATT. The Uruguay Round resulted in, among other things, the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS"), and it is TRIPS that is the basis for the amendments to the Copyright Act that retroactively restore copyright. More specifically, Article 9 of TRIPS provides that "members shall comply with Articles 1-21 and the Appendix of the Berne Convention." Thus, TRIPS requires compliance with the retroactivity provisions of Article 18 of the Berne Convention. LEAFFER, UCL, *supra* note 1, at 395, 143 n.226. The TRIPS Agreement is also of great significance for reasons that go beyond its restoration provisions. The substantive provisions of the TRIPS agreement cover all aspects of intellectual property. *Id.* at 396. These provisions, together with TRIPS' enforcement provisions, and the fact that 117 countries are parties to the Agreement, result in the expansion of copyright protection throughout the world. Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSAC'L L. 613, 615 (1996) In particular, TRIPS provides detailed rules for minimum standards of protection for intellectual property,

works[102] that had been in the public domain in the U.S. Specifically, the URAA restores copyright in foreign works that had lost copyright protection under U.S. law because of noncompliance with formalities or because the work did not originate in a country with which the U.S. has copyright relations.[103] To qualify for restoration the work must meet certain requirements.[104] If these requirements are met, copyright

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which incorporate by reference the minimum standard contained in Articles 1-21 of the Berne Convention (except, at the insistence of the U.S., Article 6 *bis*, which grants moral rights, was not included). TRIPS also includes detailed provisions for Most Favored Nation ("MFN") treatment with limited exceptions. MFN likewise contributes to the global expansion of copyright by requiring that any benefit granted by a party to the Agreement to the nationals of any other country be accorded immediately and unconditionally to the nationals of all other WTO members. TRIPS also explicitly requires protection for computer programs and other compilations of data. TRIPS' enforcement provisions further fortify the Agreement by: requiring contracting parties to provide civil and administrative procedures and remedies; including measures for prohibiting the importation of infringing goods; and including criminal penalties for willful infringement. Finally, TRIPS' dispute settlement procedures, which apply where a member is alleged to have violated the substantive or procedural provisions of the Agreement, strengthen the Agreement. Penalties include suspension of concessions which otherwise would be due the offending party. LEAFFER, UCL, *supra* note 1, at 396.

As for the significance of TRIPS with respect to copyright in cyberspace see Hamilton, *Imperialistic, Outdated, and Overprotective. See also infra* note 149.

[102] One commentator estimates that the number ranges from the tens of thousand to hundreds of thousand. Stephen E. Weil, *Fair Use/Museum Use: How Close is the Overlap?*, 12 VISUAL RESOURCES 353, 354 (1997).

[103] LEAFFER, UCL, *supra* note 1, at 143-44.

[104] The work must meet the following three requirements: (1) it must be protected by copyright, and not be in the public domain, in its source country; (2) at the time the work was created: (a) at least one author or rightholder of the work must have been a national or domiciliary of an eligible country; and (b) if the work was published, it must have been first published in an eligible country and not published in the U.S. during the 30-day period following publication in such eligible country; (3) it must have fallen into the public domain under U.S. law because: (a) of failure to comply with formalities such as copyright notice, registration or renewal; (b) of lack of copyright relations between the U.S. and the source country; or (c) the work was a sound recording published before February 15, 1972; and (4) if the source country for the work is an eligible country solely via its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording. 17 U.S.C. § 104(A)(h)(6).

Note, however, that Uruguay Round restoration provisions do not affect the public

will be restored for the remainder of the term of copyright that would have applied if the work had not entered the public domain.[105]

The URAA also includes provisions to protect the interests of "reliance parties,"—persons who have used the works extensively and invested substantially in their exploitation, without permission, in reliance on their status as within the public domain.[106] These provisions condition liability of reliance parties for unauthorized use of a restored work upon receipt by the reliance party of notice that the copyright has been restored.[107]

G. Fair Use

The ultimate purpose of American copyright law is plainly stated in the Constitution. The law exists "to promote the progress of science and the useful arts" or, in plain, contemporary English, to promote the advancement of society at large. While the same clause in the Constitution that defines the purpose of copyright law as the promotion

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domain status of works of U.S. authors who forfeited copyright for failure to comply with formalities. Likewise, works of foreign authors who first published their works in the U.S. will also remain in the public domain. LEAFFER, UCL, *supra* note 1, at 143-44.

[105] LEAFFER, UCL, *supra* note 1, at 144. Ownership rights in restored works vest initially in the author as determined by the law of the source country. 17 U.S.C. § 104A(b). As for the term of protection, it is the same as it would have been had the work not lost copyright protection. 17 U.S.C. § 104A(a)(1).

[106] 17 U.S.C. § 104A(h)(4). An example of a reliance party would be an art museum that has created a line of umbrellas upon which are printed images of works the museum had believed to be in the public domain.

[107] The URAA sets forth detailed provisions regarding notification and provides that: (1) the reliance party may: (1) continue the performance, distribution, or display of the work for 12 months from the earliest notice; and (2) during the 12-month period commencing on the date of receipt of actual notice or notice via publication in the Federal Register (whichever occurs first), sell or otherwise dispose of copies of the work made before the date of restoration of copyright without authorization of the restored work's copyright owner. 17 U.S.C. § 104A(c)-(e). As for use of derivative works, if the derivative work was created before enactment of the URAA, the reliance party may continue to exploit that work for the duration of the restored copyright, provided that the reliance party pays to the owner of the copyright reasonable compensation for its use. LEAFFER, UCL, *supra* note 1, at 145; 17 U.S.C. § 104A.

of science and the useful arts also grants to authors of creative works the right to enjoy the financial fruits of their labors, the plain language of the clause evidences that this grant of monopoly is subservient to the primary goal of promoting the progress of society as a whole. The Patent and Copyright Clause thus reflects a tension between the right of the public to have access to creative works and the right of authors of creative works to benefit financially from their efforts. The plain language of the clause, however, resolves the tension in favor of the public. It is the promotion of progress that is, by its terms, the purpose of the Patent and Copyright Clause. Granting economic monopolies to authors is simply a means to this end.[108]

The language of the Patent and Copyright Clause raises questions about the nature of the relationship between fair use and the law of copyright generally. The Supreme Court has analyzed this question as follows:

> From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts . . . " . . . For as Justice Story explained, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." . . . Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, *one must not put manacles upon science.*" . . . In copyright cases brought under the Statute of Anne of 1710, English courts held that in some instances "fair abridgements" would not infringe an author's rights, . . . and although the First congress enacted our initial copyright statute . . . without any explicit reference to "fair use," as it later came to be known, the doctrine was recognized by the American courts nonetheless.[109]

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[108] The Supreme Court has repeatedly held this to be the case. *See, e.g.*, Fox Film Corp. v. Doyal, 286 U.S. 123, 126-27 (1932); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[109] Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164, 1169-70 (1994) (emphasis added) (citations omitted).

The doctrine of fair use continued to be recognized by courts over the years, but was not included in American statutory law until it was incorporated into the Copyright Act of 1976. Section 107 of the 1976 Act provides as follows:

> [T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the market for or value of the copyrighted work.[110]

Fair use thus emerges as an essential component of copyright law, without which the Constitutional goal of promotion of science and the useful arts could not be achieved. A rigid view of copyright protection—one that would prevent all unauthorized public access to copyrighted work during the duration of copyright—would thwart the progress of culture. As Lord Ellenborough summed it up at the dawn of the nineteenth century, "one must not put manacles upon science."[111]

The doctrine of fair use has frequently been called "the most troublesome in the whole law of copyright."[112] Since passage of the Copyright Act of 1976, the Supreme Court has been called upon to issue decisions on fair use three times.[113] The Court's most recent pronouncement, in *Campbell v. Acuff-Rose Music, Inc.*, is perhaps its clearest. The issue in *Campbell* was whether the unauthorized use by

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[110] 17 U.S.C. § 107.

[111] Campbell, 114 S.Ct. at 1169 (quoting Carey v. Kearsley, 4 Esp. 168, 170, 170 Eng.Rep. 679, 681 (K.B.1803)). *See also supra* note text accompanying note 109.

[112] *See, e.g.*, Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

[113] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); Harper & Row v. Nation Enters., 471 U.S. 539, 558 (1985); *Campbell*, 114 S. Ct. 1164

the rap music group 2 Live Crew of certain material from Roy Orbison's copyrighted song "Oh, Pretty Woman" in a parody version of the song constituted a fair use of the song within the meaning of the Copyright Act. The Court held that it did, stressing the transformative value of the new work.[114]

An equally important issue in *Campbell*, however, was whether the commercial purpose and use of the parody precluded it from protection under the fair use doctrine. The Court held that it did not and stressed that the four statutory fair use factors should be explored and weighed together, that commercial nature is only one element of one factor, and that the central question is not whether the allegedly infringing work suppresses demand for the original, but whether it serves as a market substitute.[115] This holding clarifies earlier Supreme Court decisions on the subject of whether unauthorized use of copyrighted material for a commercial purpose precludes application of the fair use doctrine, and settles what had been a vigorous debate among the courts and commentators on the subject.[116]

Another recent case that may have far-reaching implications for the fair use debate generally, and for the art world in particular, is *Ringgold v. Black Entertainment*.[117] The issue in *Ringgold* was whether the unauthorized display of a copyrighted work of art on television for 27 seconds as part of a background set on a weekly soap opera was permissible as either *de minimis* or fair use. In rejecting the *de minimis* defense, the court pointed to regulations issued by the Library of Congress that require royalties to be paid by broadcasters when a visual work is displayed in the background. The court likewise rejected the fair use defense, holding that such defense must be evaluated in light of the actual context in which the work is used and

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[114] The degree to which an allegedly infringing use "transforms" a work is likely to be a particularly important question in the debate over fair use in cyberspace. *See infra* (II)(H)(3)(d).

[115] *Campbell*, 114 S.Ct. at 1176, 1178. *See also* Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994).

[116] *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1086 (1990); Leval, *supra* note 115.

[117] 126 F.3d 70 (2d Cir. 1997).

that in *Ringgold*, the work had been used for the precise purpose for which it had been created: to be decorative. The court further held that an artist is only required to show "a 'traditional, reasonable or likely to be developed' market for licensing [the] work as set decoration" to defeat a fair use defense.[118] The court's reading of fair use in this case is arguably narrow and at odds with the broad reading of fair use voiced by the Supreme Court in *Campbell*.

Also on the subject of fair use and art is *Rogers v. Koons*,[119] which imposes liability on an appropriationist artist[120] for unlawful copying.

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[118] *Id.* at 81 (quoting Campbell v. Acuff-Rose, 114 S.Ct. at 1177).

[119] 960 F.2d 301 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992).

[120] "Appropriationist art" is art "in which one artist takes as her or his own images, often the extremely well-known images of another." Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOKLYN L. REV. 373, 384 n.66 (1993) (quoting ARTHUR C. DANTO, *Narratives of the End of Art, in* ENCOUNTERS & REFLECTIONS: ART IN THE HISTORICAL PRESET 331, 332 (1990)). This case has led to a flurry of commentary. *See, e.g.*, Note, *The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law*, 13 REV. LITIG. 685 (1994).

Appropriationism falls within the rubric of "Postmodernism." Postmodernism is characterized by a rejection of the concept of objectivity and certainty, and of reality as static and objective, and an embracing, instead, of a fundamentally subjective world view. Postmodernism rejects the Modernist and Enlightenment world view which holds that: an objective body of knowledge exists that is neutral and value-free; humankind is capable of discovering and mastering such knowledge; and the pursuit of knowledge benefits all of humankind and not just a particular social or economic class. Dan Thu Thi Phan, *Will Fair Use Function on the Internet?* 98 COLUM L. REV. 169, 207 (1998). Instead, Postmodernists argue that language/text is a social construct and that meaning is not inherent in the text itself; rather, it is ascribed to the text by the individual reading the text on the basis of that particular individual's experience, perspective and world view. Thus, postmodernists maintain that each reader transforms the text by bringing his or her own interpretation to it, thereby acting as a collaborator in an endless process of reading, writing and editing. *Id.* at 208. *See also*, Heather J. Meeker, Comment, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195 (1993).

> Post-modern artists . . . speak in a symbolic language of quotations and allusions. . . . The style and philosophy of post-Modernism is heavily dependent upon the practice of Appropriationism, which gives contemporary art its unique and irreverent flair.
>
> To the law, appropriation is simple copyright infringement, for which only minor exceptions are allowed through the doctrine of fair use. Appropriationists have tried

In *Rogers*, the defendant artist had commissioned the creation of a three-dimensional, life-size version of a photograph of a seated man and woman with a string of eight puppies sitting across their laps. The court rejected the defendant's argument that his sculpture constituted a parody of the photograph and was entitled to protection under the fair use doctrine on the ground that while the sculpture might have constituted a "satirical critique of our materialistic society [as defendant contended], it is difficult to discern any parody of the photograph 'Puppies' itself."[121] The court stressed that "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[122]

These cases demonstrate that by casting fair use as a defense to infringement and requiring that the determination of whether a use is fair be a judicial determination, the law requires the would-be fair use claimant to take a "wait-and-see" or "act now, pay later" approach.[123] Thus, while fair use is a central component of copyright law, the procedure through which a fair use claimant must establish his or her

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> to avoid liability by invoking the defense of fair use, to little avail. The philosophical underpinnings of post-Modernism and intellectual property are fundamentally at odds.

Id. at 195, 220.

[121] *Rogers*, 960 F.2d at 310.

[122] *Id.* Note that in concluding that the sculpture did not constitute a parody of the photograph, the court is arguably ill-versed in the language of contemporary art, and engaging in precisely the kind of judgment of artistic merit that the Supreme Court, in the landmark case of Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903), proclaimed was inappropriate. In the words of Justice Holmes:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Id. at 251-52.

[123] *See, e.g.*, Burr, *supra* note 19, at 252. In the words of one commentator, "fair use is a troublesome privilege because it requires a hideously expensive trial to prove that one's actions come within its shelter." Jessica Litman, *Innovation and the Information Environment:Revising Copyright Law for the Information Age*, 75 OR L. REV. 19, 45-46 (1996).

claim is one that necessarily exposes the claimant to substantial risk and expense.

H. Electronic Rights: The New Frontier

1. Introduction

Copyright law is grounded in the concepts of author, originality, fixation, and reproduction of creative works via print media.[124] As history shows, it has been continuously adapted to respond to changing times and technologies. However, two critical factors distinguish the current technological era from any that has preceded it. These factors present an unparalleled challenge to copyright. First, new digital and telecommunications technologies radically alter the ways in which creative works may be stored, modified and distributed,[125] thereby challenging the fundamental concepts of author, originality and fixation upon which copyright is based.[126] Second, the pace of technological change in the digital and telecommunications environment far surpasses the pace of technological change in any preceding era, rendering it virtually impossible for regulatory reform to keep up with technological innovation.[127] Together, digital technologies and the telecommunications revolution pose a challenge to copyright law of an unprecedented nature.

The executive, legislative, and judicial branches of government, as well as the academy, have long recognized that various conundrums

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[124] *See, e.g.*, Litman, *supra* note 123.

[125] *See, e.g.*, Leaffer, *Protecting Authors' Rights*, *supra* note 1, at 6.

[126] *See, e.g.*, Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art*, 75 OR. L. REV. 257, 258-61(1996); DON E. TOMLINSON, COMPUTER MANIPULATION AND CREATION OF IMAGES AND SOUNDS: ASSESSING THE IMPACT 1, 9-10, (The Annenberg Washington Program 1993). *See also infra* (II)(H)(3)(d); (II)(H)(2).

[127] Although the 1976 Act attempts to ensure its continued vitality with respect to new technologies by explicitly providing that "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, *now known or later developed* . . . ," 17 U.S.C. § 102(a) (emphasis added), this language ignores the possibility that the nature and capabilities of new technologies may, in themselves, render the Act's provisions obsolete.

result from the intersection of copyright law with the digital environment. A variety of approaches to copyright reform have emerged in response to this recognition. These include establishment by Congress of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") following passage of its omnibus Copyright Act of 1976; the widely ranging proposals for copyright reform appearing in the academic literature; and most recently, the enactment of the Digital Millennium Copyright Act and Copyright Term Extension Act.

This section defines basic technological terms and surveys the recent history of copyright reform. It then reviews the new laws and analyzes the extent to which they reflect the debate regarding copyright reform that has been underway for the past several years. It concludes that the Digital Millennium Copyright Act extends existing legal precepts to the digital environment and confers new rights upon copyright holders in that environment, while the Copyright Term Extension Act significantly lengthens the duration of most copyrights. Consequently, it further concludes that the two new laws serve to strengthen the rights of copyright holders.[128]

2. Technological Matters and Definition of Terms

"Digitization" is the process of translating information that exists in textual, visual or audio form into a binary code (literally, a sequence of 0's and 1's), which can then be read by a computer.[129] It is a universal language into which any communications medium may be translated. Digitization has led to media convergence which has, in turn, led to the development of "multimedia" (the interactive presentation of video, audio, graphics, animation, text and data)[130] and "hypermedia" (a computer-based medium combining multimedia with high levels of

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[128] *See infra*, (II)(H)(4).

[129] Tomlinson, *supra* note 126, at 9 n.20. "The letter "A," for example, can be represented to a computer by the eight bits: 10000011." Id.

[130] Heather J. Meeker, Note, *Multimedia and Copyright*, 20 RUTGERS COMPUTER & TECH. L.J. 375, 376 (1994) (quoting DAVID L. GERSH & SHERI JEFFREY, STRUCTURING THE MULTIMEDIA DEAL 1 (Monograph, Stroock & Stroock & Lavan 1992)).

user interaction, thereby enabling users to link one piece of information within a system with any other piece of information in that system in an infinite number of ways).[131] The digitization of media has also meant that, for the first time in history, the economic value of a creative work is no longer inextricably linked to the physical form in which the work was initially embodied. Rather, its value lies in the work's content.[132]

In addition to allowing the storage of all creative works in a universal language, digital technologies, in particular, compression techniques, allow for the storage of enormous quantities of data in ever smaller volumes.[133] This has led to the development of the CD-ROM (Compact Disk-Read Only Memory, a high- capacity digital storage medium capable of carrying multimedia and hypermedia.[134]

Digital technology has also revolutionized the nature and process of reproduction of creative works. First, the quality of digital reproduction is, in certain respects, superior to that of its analog predecessor.[135] Second, digitization enables easy manipulation of

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[131] BOB COTTON & RICHARD OLIVER, UNDERSTANDING HYPERMEDIA 2000, 13, 48-49, 176 (2d ed. 1997).

[132] *Id.* at 13.

[133] Leaffer, *Protecting Authors' Rights*, *supra* note 1, at 6.

[134] COTTON, *supra* note 131, 177. The user views a CD-ROM on her computer by placing it in a ROM drive, which "reads" the signals stored on the disk. Timothy Everett Nielander, *The Mighty Morphin Ninja Mallard: the Standard for Analysis of Derivative Work Infringement in the Digital Age*, 4 TEX. WESLEYAN L. REV. 1, 4 (1997) [hereinafter Nielander, *Digital Age Infringement*].

[135] With analog technology, reproduction occurs through transference of an electronic signal of waveforms that degrade every time they are transferred; thus, quality declines with each successive copy. TOMLINSON, *supra* note 126, at 9. *See also* Barbara Hoffman, *From Virtual Gallery to the Legal Web*, N.Y. L.J., March 15, 1996, Entertainment Update at 5. With digital reproduction technology, on the other hand, the quality of successive copies of *the initial digital version of the original* work does not decline; copies are identical to the initial digital version. PETER ROBINSON, THE DIGITIZATION OF PRIMARY TEXTUAL SOURCES 13 (Office for Humanities Communication Publications Number 4 (1993)). However, *the initial digital image of the original work is not an exact copy of the original work. See e.g.*, *id.* at 4-5, 9-10; AZRIEL ROSENFELD, AVINASH C. KAK, DIGITAL PICTURE PROCESSING, VOL.1, 5, 71-72, 106, 111-23 (2d ed. 1982); IOANIS PITAS, DIGITAL IMAGE PROCESSING ALGORITHMS 2-3 (1993). Thus, while digitization is widely touted as a technological innovation that permits the creation of "perfect copies," this

creative works in ways that were previously impossible. Alterations are difficult to detect without access to the original, and it may be difficult even to define "the original."[136]

Finally, the telecommunications revolution has combined with the digital revolution to create radical new possibilities for the distribution and generation of creative works. In particular, the telecommunications revolution has spawned the development of data transmission services that permit the transfer of vast quantities of digitized material through telecommunications networks at lightening speed.[137] These technologies, together with the increase in the use of personal computers ("PCs")[138] and of the Internet,[139] mean that images,

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is misleading because it erroneously implies that digitization results in perfect copies of the original creative work.

[136] The process of digitizing an image, for example, occurs via a scanner or electric camera converting the image into a string of numbers that a computer can read and produce on a screen. Geoffrey Samuels, *Cybermuse: The Site Licensing Solution*, MUSEUM NEWS, May/June 1996, at 54. The scanning device or camera divides the image into thousands of square or rectangular units known as picture elements, or "pixels," and then assigns to each pixel a numerical value that acts as a descriptor of the color or other visual characteristics of the area. The image can then be manipulated and altered, simply by changing values for the various characteristics. TOMLINSON, *supra* note 126, at 9 n.20; Nielander, *Digital Age Infringement*, *supra* note 134, at 20.

[137] Khanna, *supra* note 3, at 349-51. *See also*, *Bill Gates Has Marilyn's Digitized Legs, As Well As a Bank of 500,000 More Images that You Just Might Want, So . . . Download a Pose*, THE DALLAS MORNING NEWS, Mar. 25, 1996, at Business 20. (New technologies will continue to be developed that will further increase the speed at which digital information can be sent between computers, and the size and quality of the monitors.).

[138] More than one-third of the 100 million households in the U.S. had at least one PC. Khanna, *supra* note 3, at 347.

[139] The Internet is an international network of interconnected computer networks that, "[l]ink[ ] people together via computer terminals and telephone lines (and in some cases wireless radio connections) in a web of networks and shared software, allowing users to communicate with one another wherever they are in the 'net.'" John Gladstone Mills III, *Entertainment on the Internet: First Amendment and Copyright Issues*, J. PAT. & TRADEMARK OFF. SOC'Y (July 1997) 461, 462-63 n.3.

The Internet is an outgrowth of ARPAnet, a computer network developed by the Advanced Research Project Agency ("ARPA") of the Department of Defense, which was designed to enable computers operated by the military, defense contractors, and

text, and sound may now be distributed to and by virtually anyone with a computer and a modem, or other means of accessing the Internet, anywhere in the world.[140] Thus, the new technologies transform every Internet user into a potential publisher and distributor. Similarly, given the ease with which digitized works may be altered, and the interactive nature of Internet use, the transmission of digitized works through the telecommunications network transforms every Internet user from a passive observer of a digital work (as is the case with CD-ROM use)

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universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. Although ARPAnet no longer exists, it provided a prototype for the development of civilian networks that ultimately linked with one another to form the embryo of the Internet. Reno v. A.C.L.U., 521 U.S. 844, 850 (1997). The Internet has undergone extraordinary growth, from 25 million people worldwide accessing it in 1995 (Mills, *Entertainment on the Internet*, at 462-63 n.3) to 40 million people in 1996, with more than 200 million expected in 1999. *See* Reno, 521 U.S. at 851. The primary means of accessing the Internet is via a "personal computer . . . a modem . . . a communications program, access to a telephone line, and an account with and [sic] Internet service provider," Mills, at 462-63 n.3, but alternative means of access exist.

Internet Service Providers, generally commercial entities that charge a monthly fee, provide access to computers and networks linked directly to the Internet. A variety of Internet applications exist, and are being developed. Existing applications include electronic mail ("e-mail"), mailing list services ("list-servs"), "newsgroups," "chat rooms," and the World Wide Web ("the Web"). All of these methods may be used to transmit text, and most can transmit images and sound as well. These applications together constitute a unique medium known as 'cyberspace,' located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. *Reno,* 521 U.S. at 851.

The World Wide Web ("Web") consists of vast numbers of digitized works stored in computers all over the world and allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. The Web is the most well-known category of communication over the Internet. *Reno,* 521 U.S. at 852.

From the publishers' perspective, the Internet constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and anyone else who posts material on the Internet. *Id.*

[140] Mills, *supra* note 139 at 464. Likewise, images, text and sound, may be transmitted from "everyone to anywhere." LEAFFER, UCL, *supra* note 1, at 6.

into a potential author, co-author, group author, transformer, or creator of derivative works.[141] The traditional notion of fixation of creative works is likewise challenged by the fact that works that have been posted on the Internet have the potential to evolve continuously.[142]

In sum, the digital and telecommunications revolutions combine to disrupt the foundation upon which traditional copyright law rests.

3. Copyright in Cyberspace: A Review of Recent History

a. The Problem

In the words of one copyright scholar:

> The digital revolution will make us rethink all of the fundamental givens of copyright law.
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> ... [T]he Copyright Act places subject matter in eight discrete categories.... What category you place a work in will determine the scope of rights each work enjoys.... Digitization plays havoc with traditional categories.... For example, how does one classify a work, received by an on-line service, of an actor reciting a piece of poetry, where visual images and music are transmitted? Is it a literary work, dramatic work, or a sound recording?
>
> Copyright is based on the concept of a fixed text whose contents are static, permanent, unchanging. The Act confers the copyright privilege only on those works that are "fixed in a tangible medium of expression." Traditionally, the author has been able to determine the finished product.... By contrast, digitized information is not frozen in print. The digital world is an interactive one, radically different than the world of the printing press on which so much of our current copyright law is based.... In a way, we may be returning to an earlier era where stories were passed on from mouth to ear, without an authoritative version. But our system of copyright makes no accommodation whatsoever for

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[141] Lyman, *supra* note 19, at 7.

[142] Thus, the presentation of digital works via CD-ROM is to be distinguished from the presentation of digital works on the Internet. With the former, the user may not manipulate, modify, download, upload, etc. Rather, the user may only view the material. With the Internet, on the other hand, the user may alter the work, distort it, incorporate it into a new work, transmit it to someone else in its original, untouched form, or in a modified state, etc.

> expressions which do not become fixed at some point or for cultural expressions which lack a specific author. Will we look back at copyright law as a Gutenberg artifact, without relevancy to the way in which expressive information is produced and disseminated?[143]

Despite these and other questions regarding the merits of applying existing copyright principles to the digital environment, the one certainty is that at least some courts will attempt to do so[144] unless the Copyright Act is radically overhauled.[145] This was the approach taken by the court in *Tasini v. New York Times*.[146] *Tasini* involved a claim by freelance writers that their sale of stories to the New York Times and other newspapers and magazines for publication in the daily edition did not include the right to republish the stories electronically when the daily editions were reformatted for online databases. The court framed the question differently, however, and ruled that the publishers had published the articles as part of original compilations (as opposed to publishing each story as an independent document); the publishers held copyrights in those compilations; and the copyrights in the compilations included the right to publish the compilations in any medium of the publishers' choosing, whether print, online, CD-ROM or otherwise. The court further held that such new modes of publication amount to "revisions" to the collective works and under section 201(c) of the Copyright Act, the owner of the copyright in a compilation has a right to make revisions to that compilation.[147]

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[143] Leaffer, *Protecting Artists' Rights, supra* note 1, at 7-8.

[144] *See, e.g., Religious Tech. Ctr.,* 907 F. Supp. at 1365 n.11; Tasini v. New York Times, 972 F. Supp. 804 (S.D.N.Y. 1997).

[145] Although the Digital Millennium Copyright Act and Copyright Term Extension Act amend the 1976 Act, in no way do they radically revise it. For a full discussion of the new laws, *see infra* (II)(H)(4).

[146] *Tasini,* 972 F. Supp. 804.

[147] *Id.* According to one court, the owner of the copyright in a compilation does not have the right under § 201(c) to make copies of individual works that are part of the compilation. Ryan v. Carl Corp., 23 F. Supp. 2d 1146 (N.D. Cal. 1998). In *Ryan*, the court held that while § 201(c) gives the owner of the copyright in a compilation the right to make copies of the entire compilation, it does not give the copyright owner the right to make copies of individual works that are included in the compilation. *Id.* at 1149. That right, the court held, is retained by the owner of the copyright in the individual work. *Id.* at 1150-51. The court's reasoning was based on its interpretation of § 201(c), which grants the owner of the copyright in a

Regarding the arguably inequitable repercussions that flow from its ruling, the court stated:

> [P]laintiffs insist that the framers of Section 201(c) never intended the windfall for publishers permitted under this court's ruling. This may well be. If today's result was unintended, it is only because Congress could not have fully anticipated the ways in which modern technology would create such lucrative markets for revisions; it is not because Congress intended for the term revision to apply any less broadly than the court applies it today. In other words, though plaintiffs contend mightily that the disputed electronic reproductions do not produce revisions of defendants' collective works, plaintiffs' real complaint lies in the fact that modern technology has created a situation in which revision rights are much more valuable than anticipated as of the time the specific terms of the Copyright Act were being negotiated. If Congress agrees with plaintiffs that, in today's world of pricey electronic information systems, Section 201(c) no longer serves its intended purposes, Congress is of course free to revise that provision to achieve a more equitable result. Until and unless this happens, however, the courts must apply Section 201(c) according to its terms, and not on the basis of speculation as to how Congress might have done things differently had it known then what it knows now.[148]

The decision is on appeal.[149]

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compilation the "privilege of reproducing and distributing the contribution *as part of that particular collective work*, any revision of that collective work, and any later collective work in the same series." *Id.* at 1149 (quoting 17 U.S.C. § 201(c)) (emphasis added). The court held that the right to reproduce the individual work *as part of a compilation* meant precisely that, and did not include the right to reproduce individually particular works included within the compilation. *Id.* at 1149-50.

[148] *Tasini*, 972 F. Supp. at 827. Note that, despite the Court's invitation to Congress to amend § 201(c) of the Copyright Act, Congress declined to do so, at least via the DMCA.

[149] *Id., appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997). Note also that, given the global nature of the contemporary world and the online environment, an understanding of the issues regarding copyright in cyberspace requires some understanding of the current state of international copyright law, as well as domestic law. As discussed *supra* note 101, the TRIPS Agreement, in combination with the fact that over 117 countries are parties to it, results in the expansion of copyright worldwide. Yet, as at least one commentator has argued, TRIPS fails to address the issues regarding public access to copyrighted works caused by the fact that a large portion of the international intellectual property market will soon be online. *See*,

b. Early Congressional Reform: the National Commission on New Technological Uses of Copyrighted Works ("CONTU")

Although the House Report had provided that computer databases and programs were copyrightable as literary works, the Copyright Act of 1976, as originally enacted, did not include computer programs as copyrightable material.[150] This disparity reflects the fact that at the time it enacted the 1976 Act, Congress was aware of the existence of electronic databases, but did not fully understand the implications of such technologies.[151] To further investigate the subject, Congress established the National Commission on New Technological Uses of Copyrighted Works ("CONTU").[152] CONTU issued its final report in 1979, leading Congress to amend the Copyright Act to recognize computer programs as copyrightable subject matter, and to define computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[153] The CONTU Report also reached the controversial conclusion that the placement of a copyrighted work into a computer, or "inputting" the work, amounted to preparation of a copy within the meaning of copyright law.[154]

Two of CONTU's Commissioners disagreed with these conclusions and filed separate opinions. Commissioner Hershey, in dissent, argued that computer programs, unlike other forms of copyrightable subject matter, are essentially mechanical, labor-saving devices that do not

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Hamilton, *supra* note 101, at 613-15. In doing so, this argument continues, TRIPS gives publishers and other copyright holders the ability to inappropriately restrict access to ideas and information, and to require payment as a precondition to accessing online works, thereby precluding the poor, and others who are less than "relatively wealthy," from participating in the online environment. *Id.* at 615, 629. The answer to this problem, according to this perspective, is not abandonment of copyright, but, rather, to balance universal access with copyright protection by creation of a "free-use zone." *Id.* at 622-23. For further discussion of "free-use" zones and related matters, *see infra* (II)(H)(3)(d).

150 LEAFFER, UCL, *supra* note 1, at 73-74.

151 *Tasini,* 972 F. Supp. at 818.

152 *Id.*

153 17 U.S.C. § 101. *See also* LEAFFER, UCL, *supra* note 1, at 74.

154 Chon, *supra* note 126, at 260 n.8.

communicate with people, and, therefore, are not entitled to copyright protection. Adopting a more qualified approach, Commissioner Nimmer, in a concurring opinion, argued that copyright protection should only be granted to computer programs that produce a copyrightable output such as a video game that produces an audio-visual work. Full protection for computer programs, he argued, would strain the meaning of "writings" and "authors," thereby excessively broadening copyright law and transforming it into a general "misappropriation" law.[155] The subject of the proper scope of expansion of copyright law continues to be highly controversial, as does the question whether placement of a transient copy of a work into the memory of a computer should constitute the making of a copy within the meaning of the Copyright Act.[156]

c. Executive Efforts at Reform: Information Infrastructure Task Force ("IITF")

In 1993, President Clinton formed the Information Infrastructure Task Force ("IITF") to articulate and implement his Administration's vision of the National Information Infrastructure ("NII").[157] The IITF is organized into three committees: the Telecommunications Policy Committee, the Committee on Applications and Technology, and the Information Policy Committee. Within the Information Policy Committee, the Working Group on Intellectual Property Rights ("Working Group") was established to examine the intellectual property implications of the NII and to make recommendations to Congress and the President regarding changes to U.S. intellectual property law and policy.[158]

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[155] LEAFFER, UCL, *supra* note 1, at 74-75. *See also* Chon, *supra* note 126, at 260 n.9.

[156] *See infra* (II)(H)(3)(d).

[157] THE CONFERENCE ON FAIR USE ("CONFU"), REPORT TO THE COMMISIONER ON THE CONCLUSION OF THE FIRST PHASE OF THE CONFERENCE ON FAIR USE 1 (Sept. 1997).

[158] *Id.* See also, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, EXECUTIVE SUMMARY 1 (Nov. 1995) (available at <http://www.uspto.gov/web/offices/com/doc/ipnil/execsum.html>).

1.The Working Group on Intellectual Property Rights

The Working Group released a preliminary report ("Green Paper") on July 7, 1994, which expressed significant concerns over the ability of existing copyright law to provide the public with adequate access to copyrighted works transmitted digitally.[159] These concerns propelled the Working Group to convene a Conference on Fair Use ("CONFU"), as a means of bringing together copyright holders and users to discuss fair use. CONFU was still in session at the time the Working Group issued its final report ("White Paper"), on November 15, 1995.[160]

The White Paper concludes that existing copyright law, if properly interpreted, is adequate to protect the interests of copyright owners in cyberspace.[161] The White Paper further concludes that since any use of a computer to view, read, hear, or otherwise access a work in digital form requires reproducing that work in a computer's memory, and since the Copyright Act gives the copyright holder exclusive control over reproductions, it is necessary to have either a statutory privilege or the copyright owner's permission to view, read, hear, or otherwise access a digital work.[162] The White Paper also concludes that the right of reproduction is implicated by: (1) placement of a work into a computer's random access memory ("RAM"); (2) scanning of a printed work into a digital file; (3) digitization of photographs, movies, and other works; (4) "uploading" of a digitized file from a user's computer to a bulletin board system or other server; (5) "downloading" of a digital file to users; and (6) use of an end user's computer as a "dumb" terminal to access a file on another computer, where a copy of any portion viewed is made in the temporary memory of the user's computer.[163]

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[159] CONFU, *supra* note 157, at 2.

[160] *Id.* at 9-10.

[161] EXECUTIVE SUMMARY, *supra* note 158, at 3. *See also* Litman, *supra* note 123, at 20-21.

[162] Litman, *Revising Copyright Law*, *supra* note 123, at 21.

[163] MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 176-178 n.314-21 and accompanying text (2d ed. 1998). Note that the Digital Millennium Copyright Act does not appear to displace these conclusions regarding the reproduction right.

As described in an open letter written by Prof. James Boyle and supported by more

Regarding liability, the White Paper concludes that individuals, as well as their Internet service providers and the proprietors of any computers that assist in the transfer of files, are liable for copyright infringement whether or not they have knowledge that intellectual property rights have been violated.[164] As a policy matter, the White Paper holds that it is online service providers that are in the best position to know the identity and activities of their subscribers and to stop unlawful activity.[165]

2. The Conference on Fair Use ("CONFU")

The formation of CONFU was triggered by the Working Group's preliminary report, the Green Paper, and its: (1) expression of concern over the ability of existing copyright law to provide the public with adequate access to copyrighted works transmitted digitally; and (2) call for a conference to discuss the matter.[166] CONFU held its first meeting in September, 1994, and issued proposed guidelines ("Guidelines") as part of its Final Report, issued in September 1997.[167]

As the preamble to CONFU's Guidelines makes clear, the Guidelines do not constitute binding authority, because "only the courts

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than 100 other law professors to Bruce A. Lehman, the Assistant Secretary of Commerce and head of the Working Group, the White Paper presents an inaccurate and one-sided picture of fair use, characterizing it as a means of avoiding the transaction costs of obtaining permission from the copyright owner— transaction costs which, the White Paper goes on to incorrectly conclude, will be largely eliminated when the Internet becomes more efficient and commercially viable, because obtaining licensing from the copyright owner would, at that point, become easy. Phan, *supra* note 120, at 197-98.

[164] Litman, *supra*, note 123, at 21-22. *See also*, William O. Ferron, Jr., Christopher J. Daley-Watson, Michael L. Kiklis, *On-Line Copyright Issues, Recent Case Law and Legislative Changes Affecting Internet and Other On-Line Publishers (Part I)*, 79 J. PAT. & TRDMRK. SOC'Y, Jan. 1997, at 5, 24-25; EXECUTIVE SUMMARY, *supra* note 160, at 4-5.

[165] Ferron, *supra* note 164, at 25-26; EXECUTIVE SUMMARY, *supra* note 158, at 4-5. For a discussion of the DMCA's provisions regarding liability for online service providers, which presumably preempt those of the White Paper, *see infra* (II)(H)(4)(a)(1)(b).

[166] *See* CONFU, *supra* note 157, at 16-17, 20.

[167] *Id.* at Appx. G-K.

can authoritatively determine whether a particular use is fair use . . . ."[168] Thus, the Guidelines merely "represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required."[169] The stated purpose of the Guidelines, then, is:

> [T]o provide guidance on the application of fair use principles by educational institutions [including museums], educators, scholars and students . . . who wish to digitize copyrighted visual images . . . develop multimedia projects using portions of copyrighted works . . . [or who wish] to use copyrighted works for distance education [ ] under fair use *rather than by seeking authorization from the copyright owners for non-commercial educational purposes.*[170]

Although the impetus for CONFU's formation was concern about the public's ability under existing law to access copyrighted works transmitted digitally, and although the stated purpose of the Guidelines is to facilitate use of copyrighted works via fair use rather than authorization from copyright holders, in the final analysis the Guidelines require that authorization be sought prior to use. In so requiring, the Guidelines severely restrict the application of fair use in the electronic environment. More specifically, the Guidelines: (1) require that access to, or display or distribution of, images digitized under the Guidelines be limited to the institution's secure electronic network;[171] (2) limit the duration of digital image collections;[172] (3) require a "reasonable inquiry"[173] into the copyright owner's

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[168] *Id.* at Appx. G, § 1.1.

[169] *Id.*

[170] *Id.* (Emphasis added.)

[171] *Id.* at Appx. H, § 2.3.3.

[172] *Id.* at Appx. H, § 2.4.

[173] "Reasonable inquiry" is defined as a search for information about the image including, at a minimum:

> (1) [C]hecking any information within the control of the educational institution, including slide catalogs and logs . . . ; (2) asking relevant faculty, departmental staff, and librarians, including visual resource collections administrators . . . ; (3) consulting standard reference publications and databases . . . ; and (4) consulting rights reproduction collectives and/or major professional associations representing image creators in the appropriate medium.

Id. at Appx. H, § 5.2.

whereabouts in an attempt to obtain permission for a particular use;[174] (4) require attribution and acknowledgement, *i.e.*, crediting of the sources and providing of relevant information regarding ownership of copyright;[175] (5) admonish educators, scholars and students to respect the integrity of the original images and to use caution in making any alterations to the image;[176] and (6) stress that even as an institution proceeds to digitize copyrighted images as permitted under the Guidelines, it should "simultaneously conduct the process of seeking permission to retain and use the images."[177] The extent to which the Guidelines have force or effect, always a question, is even more doubtful in light of passage of the DMCA.[178]

d. From Free Use to Toll Road: Academic Perspectives on Reform

Proposals for reform of copyright law to make it applicable to the digital environment have, at least up until enactment of the Digital Millennium Copyright Act and Copyright Term Extension Act, abounded in the academic literature, reflecting different philosophical and political perspectives. As discussed above, under the law as interpreted by the White Paper, uploading, downloading, and other common manipulation of copyrighted material by Internet users constitutes copying within the meaning of copyright law, and is unlawful unless done with the copyright owner's permission or via statutory privilege.[179] For those who accept the rationale upon which this approach is based, a question arises as to how to prevent, apprehend, or collect revenues for such activity. Among the potential

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[174] *Id.* at Appx. H, § 5.1.

[175] *Id.* at Appx. H, § 5.3.

[176] *Id.* at Appx. H, §§ 5.6, 5.7.

[177] *Id.* at Appx. H, § 5.1. Where the image is from a known source, it may be used for one academic term and may be retained in digital form while permission is sought. Id. at Appx. H, § 2.4.1. Where the rights holder of an image is unknown, however, a digital version of the image may be used "for up to 3 years from first use, provided that a reasonable inquiry . . . is conducted by the institution seeking permission to digitize, retain, and reuse the digitized image." Id. at Appx. H., § 2.4.2.

[178] For a full discussion of the DMCA, *see infra*, (II)(H)(4)(a).

[179] *See supra* notes 154-56 and accompanying text.

solutions recommended in the literature are the following: development of an online regulatory protection scheme or protocol through which the Internet user would participate in policing;[180] technological "self-help," or encryption techniques that render works unviewable unless the user pays a fee to obtain a decryption key;[181] and licensing arrangements.[182] On the other side of the fence are those who believe that copyright is anachronistic on the ground that it is based upon notions of authorship, originality, fixation, and reproduction via print media that are antiquated, inapplicable to the digital environment, and inconsistent with the contemporary "Postmodern"[183] era in which we live. Emerging somewhere in between are a variety of middle-of-the-road perspectives that would apply copyright to the online environment but establish a broader zone of fair use. A review of some of these proposals, and the schools of thought from which they derive, is essential in order to understand the breadth of the debate regarding amendment of copyright law, the ideological context within which the debate is occurring, and how the Digital Millennium Copyright Act and Copyright Term Extension Act fit within this debate.

In the words of one contemporary observer on the copyright scene, Prof. Neil Weinstock Netanel:

> [A]n extraordinarily bitter battle is raging in Congress, the courts, law reviews, Internet discussion groups, and numerous international fora over the purpose and scope of copyright as we enter the digital age. On one side are U.S. business leaders, government officials, and others who have called for expanded copyright protection to support commercial development of the much heralded National and Global Information Infrastructures. These proponents of an expansive copyright have drawn heavily upon emerging scholarship that applies an amalgam of neoclassical and new institutional economic property theory to copyright.[184]
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[180] Mills, *supra* note 139, at 493-94.

[181] Leaffer, *Protecting Authors' Rights*, *supra* note 1, at 10-11.

[182] *Id.* at 11-12.

[183] For a discussion of Postmodernism, *see supra* note 120.

[184] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285-86 (1996).

> [Neoclassicists] favor a proprietary copyright regime in which, absent incurable market failure, owners have the absolute right . . . to prevent unauthorized uses and to set licensing prices through ex ante negotiations.[185]
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> . . . .
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> Neoclassicists assert that, as new collective licensing institutions and computerized tracking systems sharply reduce negotiating costs and as digital technology makes possible ever more exact price discrimination, a regime of property rules and market transactions should be the cyberspace norm.[186]
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> On the other side, numerous critics have expressed serious misgivings over the political, cultural, and economic ramifications of expanded protection. In so doing, many such critics have espoused, in one form or another, what might be termed a minimalist position.[187]
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> [T]he minimalist position has led some critics to a utopian vision of a world without copyright, where we all would be free to engage in collaborative, creative play. These critics believe that little or no copyright incentive is required to encourage creative activity and interaction on the Internet and, therefore, that copyright as we know it is not needed in the digital world.[188]
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> Somewhat more moderately, other critics would make room for some form of copyright in cyberspace, but would insist on maintaining in the digital network environment the same "free use zones" that have arisen in the hard copy world.[189]

As for Prof. Netanel's views, he recommends what is, in his words, a "democratic paradigm,"—a conceptual framework for copyright that rejects both the expansionism of neoclassicist economics and the

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[185] *Id.* at 320.
[186] *Id.* at 372.
[187] *Id.* at 287.
[188] *Id.* at 338.
[189] *Id.* at 339.

minimalism of many critics.[190] The democratic paradigm holds that copyright is a state measure that uses market institutions to promote the democratic character of civil society. Although the democratic paradigm would require that copyright protection be sufficiently strong to support copyright's production and structural functions, it would at the same time accord authors a limited proprietary right to encourage transformative and educative uses of existing works.[191] It would also advocate different treatment for different types of transformative uses in an effort to maintain incentives for the creation and distribution of original work without unduly suppressing secondary borrowing.[192]

This analytical structure, although it may overstate the perspectives at the poles, provides a useful prism through which to analyze the various proposals for reform. First are the proposals from, in the words of Prof. Netanel, the neoclassical end of the spectrum. Neoclassicists argue that copyright is necessary because, without it, unbridled competition from free riders—persons who would be able to copy and distribute the work without paying copyright royalties—would result, driving the price for user access to its near-zero marginal cost. This "free rider" problem, in turn, would greatly impair the ability of authors and publishers to recover their fixed production costs. Thus, this perspective continues, only authors and publishers unconcerned with monetary remuneration would produce and distribute creative expression, thereby resulting in underproduction and underdistribution of creative works.[193]

The neoclassicist solution to this problem is to institute online collective licensing schemes[194] and computerized tracking systems based on property rules and market transactions. The extension of

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[190] *Id.* at 288.

[191] *Id.*

[192] *Id.* at 378.

[193] *Id.* at 292.

[194] Online collective licensing systems would be analogous to ASCAP, BMI, and the Copyright Clearance Center, collective licensing organizations that exist in the off-line universe. Such organizations typically enforce the copyrights of their members by granting users a blanket license to use works in the organization's catalogue, thereby enabling authors to receive payment from users who are widely dispersed and who would otherwise likely use the works without permission and without paying. *Id.* at 375.

copyright to such private uses as online browsing and viewing would, in the view of neoclassicists, enable the market pricing system to efficiently and fully allocate resources, giving copyright holders the ability "'to channel their investments more precisely to meet . . . newly articulated patterns of demand.'"[195]

These licensing systems, if implemented, would likely result in elimination of free use on the Internet and establishment of a "pay-per-view" system. Although such licensing systems would allow copyrighted works to be lawfully accessed (viewed, downloaded, uploaded, manipulated, etc.) without the prior authorization of the copyright owner, payment of a fee for access would likely be required. In such a scenario, Internet use would be strictly monitored and recorded, and each Internet account would be billed for all locations "visited" with charges assessed for each "trip."[196]

At the other end of the spectrum are those "minimalists"—Postmodernists and others—who argue that copyright should be abolished on the ground that it is anachronistic in the electronic environment and/or misplaced in the first instance. Several strands of thought appear at this end of the spectrum. One view argues that intellectual property law is a means of undemocratically withdrawing material from the public domain into the private domain of the economically and politically powerful.[197] This view holds that the fundamental concepts of author, originality, and financial incentive as necessary to induce creativity are, in the end, a fiction used to create an illusion of copyright holders as "romantic" authors, "unique and transcendent being[s], possessing originality of spirit", geniuses, whose works are inherently creative and original.[198] This view further holds that the concept of the romantic author was fabricated to deflect

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[195] *Id.* at 372 n.398 and accompanying text (quoting PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 200 (1994)).

[196] The DMCA increases the likelihood that this scenario will develop. *See infra* (II)(H)(4)(a).

[197] Aoki, *supra* note 15 at 2.

[198] *See, e.g., Id.*. "As some recent scholars have suggested, the trope of the Romantic Author serves to suppress information's contradictory character and provides the legal regime with an attractive figure on whom to confer property rights." *Id.* at 72.

attention away from the fact that the vast majority of copyright-holders are mega-corporate entities, such as the publishing, cable television and software industries, which have been deeply involved in the lobbying process through which copyright law has been created, and which have created a law that benefits them and confers monopolies upon them, thereby undemocratically enabling them to control access to and use of the vast body of material that comprises their industries.[199]

Another view at the minimalist end of the spectrum holds that the model of romantic authorship erroneously assumes that most, or most significant, cultural production is highly individualized, thereby relegating other types of cultural production, such as semi-anonymous (*e.g.*, folkloric) or collaborative production, to the status of mere "sources." By doing so, this view continues, the romantic model of authorship inappropriately focusses attention upon the originality that an author brings to pre-existing "source" materials rather than on the degree to which all authorship is influenced by such "sources;" it also inappropriately grants one class of authors monopoly rights in the reworked sources, thereby denying other prospective authors free access to such material. The net result, this perspective concludes, is the conversion of source material that is in the public domain into private intellectual property.[200] This view further posits that the fit between copyright's theory of authorship and originality, and the reality of the electronic environment, is even more strained than in the print environment, given the possibilities for manipulation, alteration, and collaborative authorship of digitized works.[201]

For those minimalists who subscribe to these views with little qualification and define the coming era as "post-literate, post modern,

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[199] Litman, *supra* note 123, at 43, 47. In 1990, the copyright industries generated $331.5 billion, or 5.8% of the U.S. gross national product, and employed 5.6 million people or 4.8% of total U.S. employment. Equally significant, in 1990, a subset of core copyright industries (pre-recorded music, motion pictures, home videos, books, periodicals, newspapers, and computer software) generated foreign sales of $34 billion. As of 1995, software produced by U.S. companies constituted more than half of the world market. These numbers will only increase in the coming years. LEAFFER, UCL, *supra* note 1, at 2.

[200] Aoki, *supra* note 15, at 39-40.

[201] *See, e.g.*, Chon, *supra* note 126, at 264.

post structuralist, antiformalist, and surfictive,"[202] the end of copyright is at hand. These minimalists argue that:

> [W]hatever theoretical justification there may have been for copyright under the regime of the press and the linear text, in the post-literate millennium that lies ahead, given the technologies that are already at hand, we will surely encounter the end of authorship as we have known it, and the emergence of a new experience of creative play.[203]
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> . . .
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> [A]uthorship . . . will survive, though in radically personal form, and the constraining figure of societal (or state) authority [ ] will vanish—and with it, in all likelihood, intellectual property as we know it.[204]

A less extreme perspective on copyright reform is articulated by those minimalists who are sympathetic to some of the elements of these views but who believe that rather than eliminating copyright, what is necessary is a shifting of copyright's balance which, in their view, weighs heavily in favor of copyright holders rather than the general public. A variety of proposals emerge from this camp, many of which share populist elements. One such proposal stresses that copyright law has always been formulated, in large part, by copyright-intensive industries, and that the general public has never had the opportunity to influence the drafting process to ensure that the law does not unduly burden private, non-commercial use of copyrighted works.[205] This view recommends that copyright be recast as an exclusive right of commercial exploitation, and that the crucial distinction between lawful and unlawful copying be whether someone has "[made] money (or tr[ied] to) from someone else's work without permission" or has engaged in "large-scale interference with the copyright holders' opportunities to do so."[206]

Another proposal of a populist nature focusses upon the new forms of collaborative authorship that have come about through the Internet. To recognize such authorship, this proposal would create an expanded

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202 *See, e.g.*, Lange, *supra* note 19, at 139.

203 *Id.* at 147.

204 *Id.* at 148.

205 Litman, *supra* note 123, at 23.

206 *Id.* at 39-41.

"joint work" category.[207]

Also emerging from the populist literature is a proposal that national and international policymakers create an online "free use" zone that would permit the type of free use of copyrighted works that is lawful outside of cyberspace. This proposal would authorize online "borrowing" and "browsing" of copyrighted works without the copyright holders' permission or payment of a fee. More specifically: (1) "browsing," with the exception of browsing in online public libraries, would include brief perusal of a work, but would not include permanent downloading;[208] (2) an online version of the existing library lending and photocopying exemption would be created; this exemption would hold libraries responsible for ensuring that their electronic "borrowers" do not download copyrighted works or retain works beyond a limited period of time; and (3) a "personal lending" exemption would be created, allowing individuals to transmit copies of works online to friends and family for personal and private use.[209]

As for Prof. Netanel's "democratic paradigm," this is essentially a traditional view of copyright law with an emphasis on the "transformative value" component of fair use discussed by the Supreme Court in *Campbell v. Acuff-Rose*,[210] and the Second Circuit Court of Appeals in *Rogers v. Koons*.[211] This view argues that digital technologies will radically alter copyright markets, substantially diminishing authors' revenues from the sale of hard copies. To compensate for the loss in hard copy sales and to continue to provide an incentive for the production of creative works, copyright should be extended to many digital uses,[212] such as online browsing, personal downloading, and related activities, for which a fee should be charged.[213] Rejecting the neoclassicist embrace of collective licensing, however, because of the monopoly power and pricing problems that

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[207] Chon, *supra* note 126, at 275.

[208] Devices that permit publishers to distinguish between the two, already exist. Hamilton, *Imperialistic, Outdated and Overprotective*, *supra* note 101, at 623.

[209] *Id.* at 631.

[210] *See supra* notes 109-116 and accompanying text.

[211] *See supra* notes 119-122 and accompanying text.

[212] Netanel, *supra* note 184, at 373.

[213] *Id.* at 373-74.

typically develop with collective licensing organizations,[214] the democratic paradigm instead recommends that a more measured assessment be conducted of the extent to which online activities such as browsing and personal downloading, if permitted on a mass scale, would erode existing copyright markets. To the extent that private use licenses are ultimately instituted, this view recommends that a system of state regulation likewise be instituted to ensure that user license fees are reasonable.[215]

This view also stresses that copyright's reproduction right and derivative right have been inappropriately expanded, resulting in the prohibition of uses that are truly transformative on the pretext that they appropriate the original work's expression.[216] The democratic paradigm posits that the solution to this problem is to apply different treatment to different types of transformative uses, so that incentives for authors are maintained secondary borrowing is not inordinately restricted.[217]

The importance of transformative value is also stressed by several other commentators in the literature and forms the basis for other proposals for reform. The common thread running through these proposals is that the Internet's unique combination of capabilities—interactivity, independent publication, instantaneous worldwide dissemination—permit infinite transformation of existing works, and that such transformation should be encouraged.[218] One view holds that the use is transformative if it adds value to the original material such that the original is transformed in the creation of "new information, new aesthetics, new insights, or new understandings that are of the very type that the fair use doctrine intends to protect for the enrichment of the public interest."[219] Applied to the Internet, such transformative uses could include displaying the work and then creating a dialogue about it, digitally altering the original work and incorporating it into a

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214 *Id.* at 375.

215 *Id.* at 376.

216 If the use is truly transformative then, by definition, it is not appropriative.

217 *Id.* at 376-79.

218 *See, e.g.*, Phan, *supra* note 120, at 215.

219 *Id.*

new work, or creating hypertext links to other works.[220] To facilitate the proper balancing of the copyright holder's economic interest with the public interest, however, transformative use would still be evaluated along with the other four factors in the fair use analysis.[221] Moreover, the copyright holder would still have the opportunity to rebut a presumption of fair use if analysis of the other four factors demonstrated that the taking was excessive.[222]

Other commentators likewise point to the fact that digital images and other online material may be easily altered and manipulated, and to the heavy flood of derivative right infringement cases that could result from such alteration.[223] One test proposed in the literature for determining whether the derivative right has been infringed holds that expressive characterization in a work of authorship has distinct elements, and that protection should extend to cover each of these expressive qualities individually. Under this view, infringement would occur if a "distinct expressive characteristic" from the original were cognizable in the derivative work, and if the derivative "generate[d] the identity of the original work in the mind of the observer."[224]

e. Summary

While much disagreement exists regarding what the law should be, certain general principles of law may be identified as governing, at least until enactment of the Digital Millennium Copyright Act and Copyright Term Extension Act.

First, when copyrighted material is transmitted electronically at least three of the rights that are part of the bundle of rights that comprise copyright are implicated. They are the rights to reproduce, display, and perform the copyrighted work.[225]

—Reproduction within the meaning of the Copyright Act occurs when a computer program is read into RAM.[226] This is so despite the fact that

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220 *Id.*

221 *Id.*

222 *Id.* at 216.

223 Nielander, *supra* note 134, at 16.

224 *Id.*

225 Ferron, *supra* note 164, at 7.

226 MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1993) *cert.*

reproduction, by definition, requires fixation in a tangible form that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[227]

—The performance right is implicated because to perform a work means "to recite, render, play, dance or act it, either directly or by means of any device or process."[228] Such devices and processes include, "all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented."[229] Since transmission of a copyrighted work via a computer network amounts to rendering the work by means of a transmitting apparatus or electronic retrieval system, it follows that the performance right is implicated.[230]

— Likewise, the display right is implicated in that under the Copyright Act to display a work means "to show a copy of it, either directly or by means of . . . "any other device or process . . ."[231]

In sum, the mere act of posting material on the Internet implicates these rights.

Second, the basic activities in which Internet users routinely engage— downloading, uploading, and forwarding material, to name a few—implicate the three rights discussed above and constitute copyright infringement unless authorized by the copyright owner or protected via fair use or other statutory privilege.[232]

Finally, digital manipulation of a copyrighted work could constitute violation of the copyright owner's exclusive right to make derivative

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dismissed 114 S.Ct. 671 (1994). For a discussion of the merits of MAI's interpretation of the law, see MALARO, *supra* note 163, at 177-78 nn.318-21 and accompanying text. *See also supra* notes 154 and 156 and accompanying text.

[227] Ferron, *supra* note 164, at 14 (quoting H.R. REP. 1476, 94th Cong., 2d Sess. at 62 (1976).

[228] 17 U.S.C. § 101.

[229] Ferron, *supra* note 164, at 7 (quoting H.R. REP. 94-1476 at 63).

[230] *Id.* at 8.

[231] 17 U.S.C. § 101.

[232] *See, e.g.*, Litman, *supra* note 123, at 21.

works.[233]

4. 1997-98: New Laws and Legislative Proposals

During its 1997-98 session, Congress considered several legislative proposals directed at amending copyright law to make it explicitly applicable to the digital environment. The most significant proposals to become law were the Digital Millennium Copyright Act and Copyright Term Extension Act. The central provisions of these two laws, focussing upon those that have particular significance for museums and other nonprofit institutions, are discussed below. Also discussed are some of the other legislative proposals considered by Congress that are of particular note.

a. The Digital Millennium Copyright Act

1. Overview

The DMCA implements the World Intellectual Property Organization ("WIPO") Treaties signed by the U.S. in 1996.[234] In doing so, it declares unlawful and institutes penalties for: (a) circumventing technological measures that control access to and reproduction of copyrighted works transmitted digitally; (b) providing, distributing, or importing for distribution copyright management information that is false; and (c) removing or altering copyright management information.[235]

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[233] *See supra* notes 220-21 and accompanying text.

[234] DMCA, 17 U.S.C. Ch. 12. The DMCA is organized into the following five titles: Title I, known as the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, beginning with section 101; Title II, known as the Online Copyright Infringement Liability Act, beginning with section 201; Title III, known as the Computer Maintenance Competition Assurance Act, beginning with section 301; Title IV, Miscellaneous provisions, beginning with section 401; and Title V, known as the Vessel Hull Design Protection Act, beginning with section 501. The provisions most relevant to museums are contained in Titles I, II, and IV.

[235] 17 U.S.C. §§ 1201-1205. "Copyright management information" is defined as: certain information, including the title, name of author and copyright owner, and terms and conditions for use of a copyrighted work. 17 U.S.C. § 1202(c).

In addition to implementing the WIPO treaties, the DMCA also limits the liability of online service providers, providers of network access, and entities that offer the transmission, routing, or providing of connections for digital online communications (collectively "service providers") for copyright infringement that occurs on networks that they operate but over which they do not exercise editorial control.[236]

Finally, the DMCA requires the Library of Congress, Copyright Office, and Department of Commerce, variously, to conduct specified studies and rulemaking proceedings, participate in international fora, and provide advice on a wide range of copyright-related matters.[237] It further directs these administrative entities to report to Congress on a variety of matters relating to the new law, including its impact upon the public's ability to freely access and make non-infringing uses of copyrighted works, and its adequacy in protecting copyright owners against unauthorized access to their encrypted copyrighted works.[238]

a. Copyright Protection and Management Systems[239]

The DMCA contains anti-circumvention provisions[240] that prohibit both circumvention of technological measures that control access to protected works (*e.g.*, encryption)[241] and manufacturing or trafficking in technology designed to circumvent encryption measures.[242] Exempted from these provisions are: (1) users of a copyrighted work that is in a particular class, if the prohibition is likely to adversely affect such persons in their ability to make noninfringing uses of that

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[236] 17 U.S.C. § 512. Note that the term "service provider" is defined broadly. Any entity that meets the definition of service provider, including a museum, is protected by the DMCA's liability limitation provisions. *See infra* (II)(H)(4)(a)(1)(b).

[237] *See infra* notes 250-52 and accompanying text; note 273 and accompanying text; notes 281-82 and accompanying text.

[238] 17 U.S.C. §§1201(a)(1)(C), 1201(g)(5). *See also infra* note 254 and accompanying text; notes 270-72 and accompanying text; note 279 and accompanying text; notes 283-84 and accompanying text.

[239] 17 U.S.C. §§ 1201-1205.

[240] 17 U.S.C. § 1201.

[241] 17 U.S.C. § 1201(a)(1)(A).

[242] 17 U.S.C. § 1201(a)(2)-(3).

class of works;[243] (2) nonprofit libraries, archives, or educational institutions that gain access to a commercially exploited copyrighted work solely to make a good faith determination of whether to acquire the work;[244] (3) lawfully authorized investigative, protective, "information security,"[245] or intelligence activities of governmental entities;[246] (4) activity intended to achieve interoperability of computer programs;[247] and (5) circumvention that occurs in the course of good faith encryption research.[248]

These provisions do not go into effect until two years after the date of enactment of the law.[249] During this time, and during each succeeding three-year period, the Register of Copyrights ("Register") shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce ("Secretary"). Upon recommendation of the Register, the Librarian of Congress ("Librarian") is required to conduct a rulemaking proceeding to determine whether the anti-circumvention provisions adversely affect copyright users in their ability to make noninfringing uses of a particular class of copyrighted works.[250] In conducting the rulemaking, the Librarian must examine: (1) the availability of copyrighted works for use; (2) the availability of copyrighted works for nonprofit archival, preservation, and educational purposes; (3) the impact of the anti-circumvention provisions on traditional fair use activities such as criticism, comment, news reporting, teaching, scholarship, or research; and (4) the effect of circumvention of encryption measures on the

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[243] 17 U.S.C. § 1201(a)(1)(B). Interpretation of this section and, in particular, the term "adversely affected," is likely to have a significant effect upon how the fair use doctrine is held to apply to the Internet. The DMCA directs the Librarian of Congress to interpret this section in a rulemaking proceeding. *See* 17 U.S.C. § 1202(a)(1)(C); *see also infra* notes 250-52 and accompanying text.

[244] 17 U.S.C. § 1201(d). Note that certain conditions apply. *See id.*

[245] "Information security" is defined as "activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network." 17 U.S.C. § 1201(e).

[246] 17 U.S.C. § 1201(e).

[247] 17 U.S.C. § 1201(f).

[248] 17 U.S.C. § 1201(g)(1)-(4).

[249] 17 U.S.C. § 1201(a)(1)(A).

[250] 17 U.S.C. § 1201(a)(1)(C).

market for or value of copyrighted works.[251] If the Librarian determines that copyright users are adversely affected, she must publish the affected class of works; the prohibition will then be inapplicable to users of the affected class of works for the ensuing three-year period.[252]

The DMCA also permits anti-encryption activity in connection with good faith encryption research.[253] It further directs the Register and the Secretary to report jointly to Congress on the effect of these provisions on: (1) encryption research and the development of encryption technology; (2) the adequacy and effectiveness of encryption techniques to protect copyrighted works; and (3) protection of copyright owners against unauthorized access to their encrypted copyrighted works.[254]

In addition to containing anti-circumvention provisions, the DMCA also contains a section regarding the integrity of copyright management information.[255] This section declares unlawful the provision or distribution of false copyright management information with the intent to induce or conceal infringement.[256] Likewise, it bars the removal or alteration of copyright management information.[257] Exempted from this prohibition are: (1) lawfully authorized investigative, protective, information security, or intelligence activities of governmental entities;[258] and (2) certain transmissions by broadcast stations or cable television systems.[259]

The DMCA also creates civil remedies to apply to both the circumvention of technological protection measures and the falsification of copyright management information.[260] In addition, it establishes criminal penalties for willful violations committed for

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[251] *Id.*
[252] 17 U.S.C. § 1201(a)(1)(D).
[253] 17 U.S.C. § 1201(g)(2)-(4).
[254] 17 U.S.C. § 1201(g)(5).
[255] 17 U.S.C. § 1202.
[256] 17 U.S.C. § 1202(a).
[257] 17 U.S.C. § 1202(b).
[258] 17 U.S.C. § 1202(d).
[259] 17 U.S.C. § 1202(e).
[260] 17 U.S.C. § 1203(a)-(c).

commercial advantage or private financial gain.[261] Of particular note to museums, the criminal penalties do not apply to nonprofit libraries, archives, and educational institutions.[262]

b. Limitations on Liability for Copyright Infringement Relating to Material Online[263]

The DMCA limits the liability for copyright infringement of entities that offer the transmission, routing, or providing of connections for digital online communications by reason of the intermediate and transient storage or transmission of material through the provider's system or network if: (1) the transmission is not initiated by the provider; (2) the transmission or storage is carried out through an automatic process, and the provider does not select or modify the material or select the recipients of it; and (3) the material is not ordinarily accessible to anyone other than the intended recipients, and no copy of it is maintained any longer than is required to complete the transmission.[264]

The DMCA also limits the liability of service providers for material residing on their systems or networks at the direction of users if the provider: (1) lacks knowledge that the material is infringing; (2) does not receive a financial benefit from the infringing activity; and (3) upon receiving notification of claimed infringement responds expeditiously to remove or disable access to the material.[265] This liability limitation only applies, however, where the provider: (1) designates an agent to receive notifications of claimed infringement;[266] (2) implements a policy for terminating subscribers who are repeat infringers; and (3) accommodates and does not interfere with standard technical measures used by copyright owners to identify or protect

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[261] The penalties are: up to $500,000, or imprisonment for up to 5 years, or both, for the first offense; and up to $1,000,000, or imprisonment for up to 10 years, or both, for the second offense. 17 U.S.C. § 1204(a).

[262] 17 U.S.C. § 1204(b).

[263] 17 U.S.C. § 512.

[264] 17 U.S.C. § 512(a), (k)(1)(A).

[265] 17 U.S.C. § 512(c)(1), (k)(1)(B).

[266] 17 U.S.C. § 512(c)(2)-(3).

their copyrighted works.[267]

As for educational institutions that function as service providers, the DMCA specifies that certain liability limitation provisions apply when faculty members or graduate students perform a teaching or research function.[268]

c. Distance Education, Libraries and Archives, Electronic Commerce, and Other Matters

The DMCA also contains miscellaneous provisions that expand certain existing rights of libraries and archives to reproduce and distribute copies or phonorecords, to authorize three copies or phonorecords to be produced or distributed for preservation, security, or replacement purposes.[269] In addition, the Act directs the Register to submit recommendations to Congress on how to promote distance education through digital technologies while maintaining a balance between the rights of copyright owners and the needs of copyright users.[270]

Also of note, the DMCA requires the Register and Secretary to report to Congress on: (1) the effects of Title I of the DMCA (the WIPO Copyright Treaties Implementation Act)[271] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of the Copyright Act of 1976; and (2) the relationship between existing and emergent technology and the operation of such provisions.[272]

Finally, the DMCA mandates that the Register: (1) advise Congress, Federal agencies and departments, and the Judiciary on

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[267] 17 U.S.C. § 512(i)(1)(A)-(B).

[268] 17 U.S.C. § 512(e). This provision would, presumably, apply to art museums that are part of universities, where their staff performs teaching or research functions.

[269] 17 U.S.C. § 108(b). Note that several technical requirements qualify these rights. For rules regarding unpublished works see 17 U.S.C. § 108(b); for published works see 17 U.S.C. § 198(c).

[270] DMCA § 403.

[271] *See supra* note 234 and accompanying text.

[272] DMCA, § 403. Note that museums, as educational institutions, would arguably be eligible for any exemption that is ultimately developed pursuant to this provision. *See also infra* note 284 and accompanying text.

national and international issues relating to copyright; (2) participate in meetings relating to copyright of international organizations and with foreign officials; and (3) conduct studies and programs regarding copyright and related matters, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations.[273]

2. Analysis

The Digital Millennium Copyright Act clarifies that existing copyright law, and the principles of authorship and originality upon which traditional copyright law is based, apply to the digital environment. To the extent that the new law changes existing law, it does so by strengthening the rights of copyright holders. Also of profound significance, the combined effect of the DMCA and the deployment of encryption technologies is that copyright owners, for the first time in history, have both the right and the ability to completely control access to copyrighted works. Finally, the DMCA arguably serves to increase the value of copyrights.

The DMCA accomplishes these results through a variety of vehicles. First, it declares unlawful the circumvention of and trafficking in technology designed to control access to and reproduction of copyrighted works.[274] It also institutes a wide range of civil[275] and criminal penalties[276] for such actions. Finally, it conditions the service provider liability limitation provisions on such providers accommodating, and not interfering with, encryption measures used by copyright owners to protect copyrighted works.[277] The net result is to facilitate the use of encryption mechanisms on the Internet, and thereby pave the way for the transformation of the Internet from its current incarnation as a kind of global public library to something more like a global pay-per-view shopping mall or "celestial jukebox."[278]

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[273] 17 U.S.C § 701(b).

[274] 17 U.S.C. §§ 1201(a)(1)(A), (a)(2)-(3).

[275] 17 U.S.C. § 1203.

[276] 17 U.S.C. § 1204(a).

[277] 17 U.S.C. § 512(i)(1)(B).

[278] *See* GOLDSTEIN, *supra* note 195, at 28. Goldstein's book describes a future that promises:

The DMCA further serves to protect the interests of copyright holders by requiring the Register and Secretary to report to Congress on the effectiveness of encryption measures to protect copyrighted works and to protect copyright owners against unauthorized access to their works.[279] These provisions create an opening for copyright holders to lobby for amending the law to provide additional protection for them.

In sum, while the debate regarding copyright reform—particularly the debate occurring in the scholarly literature—reflects a broad range of perspectives, the reform instituted by the DMCA reflects a narrow range of views. For example, the law does not encourage the myriad opportunities for collaborative authorship, generation of derivative works, or "creative free play" made possible by the Internet. Instead, it focusses on the first iteration of the work that is placed online and on protecting the holder of the copyright in that work. In the final analysis, the new law adopts a traditional approach to copyright law and, in large part, reflects a neoclassicist point of view.

The DMCA does not, however, represent an unqualified or immediate victory for copyright holders. First, the prohibitions regarding circumvention of technological measures that control access to copyrighted works do not take effect until two years after the date of enactment of the law.[280] During this two-year period, and during each succeeding three-year period, the Librarian of Congress, if the Register of Copyrights so recommends, is required to conduct a rulemaking

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> [D]azzling new possibilities for access to entertainment and information: a celestial jukebox. Whether it takes the form of a technology-packed satellite orbiting thousands of miles above the earth or remains entirely earth-bound, linked by cable, fiber optics, and telephone wires, the celestial jukebox will give millions of people access to a vast range of films, sound recordings, and printed material, awaiting only a subscriber's electronic command for it to pop up on his television or computer screen.
>
> None of this will come free. The celestial jukebox will bill subscribers much as the telephone company does or, if it is linked to the subscriber's bank account, by simply debiting his balance. Pricing may be more refined, however. Where the telephone company charges calls on the basis of length and time of day, the celestial jukebox will also be able to charge according to the value of the work transmitted.

279 17 U.S.C. § 1201(g)(5). *See also supra* note 196 and accompanying text.

280 17 U.S.C. § 1201(a)(1)(A).

proceeding to determine whether the anti-circumvention provisions are adversely affecting copyright users in their ability to make noninfringing uses of copyrighted works, in particular, use of works for nonprofit archival, preservation, and educational purposes, and for traditional fair use activities such as criticism, comment, news reporting, teaching, scholarship, and research.[281] If the Librarian ultimately concludes that users are adversely affected, the Librarian must publish the affected class of works and users will not be bound by the anti-circumvention provisions for the particular class of works for the ensuing three-year period.[282] This administrative process should help to ensure that copyright users, including nonprofit educational organizations such as museums, have a continuing opportunity to present their views, to comment on how the development of copyright enforcement on the Internet is affecting their ability to access creative works, and to lobby for revisions to the law that they deem appropriate. Finally, the provision regarding submission by the Register to Congress of recommendations regarding distance education specifies that the rights of copyright owners and users must be balanced,[283] and explicitly recognizes that it may be necessary to create an exemption from exclusive rights of copyright owners with respect to distance education.[284]

a. The Copyright Term Extension Act

The Copyright Term Extension Act extends the term of copyright for works created on or after January 1, 1978, by 20 years, to make the term consistent with the term of copyright in the European Union.[285] Thus, for works created by an individual author, the duration of copyright has been increased from 50 to 70 years from the year of

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[281] 17 U.S.C. § 1201(a)(1)(C). *See also supra* notes 237-38 and accompanying text; notes 250-52 and accompany text.

[282] *Id.*

[283] DMCA, § 403(a).

[284] DMCA, § 403(b)(1). Museums, as educational institutions, would arguably qualify for any exemption created under this section. *See supra* note 270 and accompanying text.

[285] *Congress Amends Copyright Law for Digital Era,* AVISO, Nov. 1998, at 2.

death of the author.[286] Similarly, the duration of copyright for joint works is now 70 years from the year of death of the last surviving author.[287] For anonymous works, pseudonymous works, and works for hire, it is 95 years from the year of first publication, or 120 years from creation, whichever occurs first.[288]

The duration of copyright has thus evolved from two 14-year terms under the original 1790 Act, to up to 120 years from the year of death of the author, on the eve of the twenty-first century. Whether the new durational periods legislated by the Copyright Term Extension Act comport with the constitutional mandate that intellectual property protection endure for limited times only is debatable. This issue is udner review in *Eldred v. Reno.*[289]

b. Summary

During its 1997-98 session, in addition to enacting the Digital Millennium Copyright Act and the Copyright Term Extension Act, Congress also enacted the No Electronic Theft ("NET") Act, which institutes criminal penalties for "willful copyright infringement" regardless of financial gain.[290] Other proposals were directed at

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[286] 17 U.S.C. § 302(a).

[287] 17 U.S.C. § 302(b).

[288] 17 U.S.C. § 302(c). Note that the CTEA also changes the duration of copyright with respect to works created *before* January 1, 1978. For works created, *but not published or copyrighted* before January 1, 1978, the term of copyright is that specified by 17 U.S.C. § 302, with the caveat that in no case shall the term of copyright in such a work expire before December 31, 2002, and, if the work is published on or before December 31, 2002, the term of copyright will not expire before December 31, *2047*. 17 U.S.C. § 303. For works created before January 1, 1978, and published before that date, the CTEA extends the *renewal* term of copyright by 20 years. Thus, for works in their first term of copyright on January 1, 1978, the first term of copyright is 28 years; the renewal term is *67* years. 17 U.S.C. § 304(a). For works in their renewal term of copyright on January 1, 1978, the duration of copyright is *95* years from the date the copyright was originally secured. 17 U.S.C. § 304(b). *See also supra* notes 49, 57.

[289] Case No. 1:99CV0065 JLG (D.D.C. filed Jan. 11, 1999). For a discussion of the "limited Times" language of the Patent and Copyright Clause see *supra* (II)(B); *see also supra*, note 34 and accompanying text.

[290] P.L. 105-47. 111 Stat. 2678; *see* Jason Hall, Lauryn Guttenplan Grant,

creating greater copyright protection for databases[291] and requiring Internet service providers to offer screening software.[292]

The various legislative proposals that Congress entertained—with their provisions regarding greater protection of databases, civil and criminal liability for circumventing encryption measures, criminal liability for infringement, and a substantially lengthened copyright term—demonstrate that expansion of copyright is in progress, with increased protection for copyright holders, increasingly restricted public access, micro-monitoring of electronic uses, and the possibility of additional expansion on the way. Expansion of copyright is certainly in progress in the international arena and, given increasing internationalization, the increasingly global nature of the economy, and the global nature of the Internet, the expansion of copyright domestically is related to its expansion worldwide.[293]

I. Summary and Significance for Museums

In summary, copyright law sets forth the advancement of society as a whole as its central goal and it prescribes a means to this end: the establishment of economic incentives to stimulate the production of creative works. Its history shows that it originated in response to the development of new technology and has been rewritten many times to respond to new technologies. The challenge to copyright law today, however, stems not merely from the fact that yet another round of new technologies has been introduced, but from the fact that the capabilities of the new technologies challenge the concepts that are at the core of copyright law.

Also threatening the foundation upon which copyright law rests is the fact that the balance that copyright law seeks to achieve is shifting in favor of copyright holders. This shift is the result of the confluence of several factors including: relaxation of formalities; extension of the

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Legislative Update 1998, ALI-ABA COURSE OF STUDY MATERIALS, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, March 26-28, 1998, at 151.

[291] Collections of Information Antipiracy Act (H.R. 2652). *Id.* at 152.

[292] The Family-Friendly Internet Access Act of 1997 (H.R. 1180); The Internet Freedom and Child Protection Act (H.R. 774). *Id.*

[293] The expansion of domestic copyright law should be viewed within the broader context of the global expansion of copyright law. *See supra* notes 101, 149.

duration of copyright protection; expansion of the scope of copyrightable subject matter; restoration of copyright to foreign works that had fallen into the public domain; the global expansion of copyright; the development of encryption technologies; and, most recently, the implementation of legislation that outlaws online anti-encryption activity, with limited exemptions, and punishes such activity with civil and criminal penalties. Finally, the fair use doctrine—traditionally relied upon to help ensure that the public's access to creative works is not unduly restricted—is itself being restricted, at least with respect to its application to the digital environment. First, to the extent that the Guidelines issued by CONFU continue to have any relevance or effect, they restrict existing fair use principles by requiring users to seek permission prior to using an image. Second, and of more enduring significance, the implementation of encryption technologies and pay-per-view viewing on the Internet facilitated by the DMCA will likely have a chilling effect on traditional fair use activities. This is so despite the fact that the DMCA contains an exemption that appears to allow anti-encryption activities with respect to traditional fair use purposes[294] because the exemption amounts to an "after-the-fact" approach. If the status quo is encryption, then de-encrypting works will require affirmative action on the part of the user, and there is no reason to assume that all users will have the ways or means to access anti-encryption technology. In addition, for the reasons discussed earlier, relying on fair use exposes the claimant to substantial risk and expense.[295] The net result is an increase in the number of works under copyright protection, a fortification of the rights of copyright holders, and the erection of ever more formidable barriers to public access.

At the same time, determining whether a work is under copyright protection and, if so, whether use without permission from the copyright holder is lawful, is a labyrinthine process with no fail-safe outcome. Answering copyright-related questions requires application not only of the Copyright Act of 1976 (as amended by the DMCA, CTEA, and other federal laws), the Copyright Act of 1909, and several

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[294] 17 U.S.C. § 1201(a)(1)(B); *see also supra* note 243 and accompanying text.

[295] *See supra* (II)(G).

other federal statutes enacted to bring U.S. law into compliance with international treaties, but predictions about how this unwieldy body of law will be held to apply in cyberspace.

The current state of copyright law, and the direction in which it is heading, pose two central problems for art museums—institutions that are dedicated to the presentation and interpretation of creative works for the benefit of the public.[296] The immediate problem is that in order to determine the kinds of uses they may lawfully make of a work, their already overburdened staffs, which rarely include a lawyer, must apply an extraordinarily complicated body of national and international law and predict what future law will be. Moreover, if a museum actually manages to find the resources to devote to such an endeavor, and it discovers that it does not hold the copyright to a work it wishes to use, it will find itself faced with a Solomon's choice. Its options will be to:

> (1)seek the permission of the copyright holder, which is often impractical (either because it does not know who owns the copyright, or because the time between when it investigates copyright status and when it needs to use the image is short, or because it does not have the resources to devote to seeking permission); or
>
> (2)refrain from using the image, which ultimately will prejudice the public interest—the very interest that the museum, and copyright law generally, are intended to serve;[297] or
>
> (3)use the image and hope that doing so amounts to a "fair use" within the meaning of the law, which may expose the museum to liability because fair use is a judicial determination, made on a case-by-case basis.

This problem is particularly pronounced for museums with collections of contemporary art because works of contemporary art are typically under copyright and museums that own such works often do not own the copyrights in the works. These museums rely heavily on traditional notions of fair use to carry on routine activities such as public programming, publication of brochures and gallery guides, and publicizing exhibitions.[298]

In the long-term, however, all art museums face a more serious

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[296] *See infra* (III)(A).

[297] *Id.*

[298] Weil, *supra* note 10, at 38; *see supra* (II)(E)(7).

problem, and it is one they share with the public at large: a shrinking public domain and a cordoning off of creative works that previously could have been more freely accessed. Restricted access to creative works will inevitably limit artists in their ability to create new art, and hamstring museums, and others, in their ability to exhibit, interpret, and acquire art.

In sum, despite the short-term benefits that some museums might enjoy from enhanced copyright protection, the long-term losses for museums, artists, and the public would likely be far more significant.

III. COPYRIGHT AND ART MUSEUMS: THE DIGITAL FRONTIER

A. The Problem

Museums and the law of copyright share the common purpose of promoting the progress of science and the arts.[299] As defined under federal law, a museum is, "a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or aesthetic purposes which, utilizing a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis."[300] An art museum is defined more specifically as, "a permanent, nonprofit institution, essentially educational and aesthetic in purpose, with professional staff, which acquires or owns works of art, cares for them, interprets them, and exhibits them to the public on some regular schedule."[301] The nature of the museum's relationship to the public is, in effect, that of a charitable trust. Museums hold their collections in trust for the public, and the trustees of a museum owe a fiduciary duty to the public in carrying out their

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[299] The origin of the modern museum dates back at least to the Second Century A.D., when Ptolemy built the Temple of the Muses in Alexandria: a site including a library and collection of antiquities, where music, dance and poetry were performed. MALARO, *supra* note 163, at 3 n.1. The "muses," in Greek mythology, were nine sister goddesses who presided over poetry, song, the sciences and arts.

[300] Museum Services Act, 20 U.S.C. § 968(4).

[301] *Professional Practices in Art Museums, Report of the Ethics & Standards Committee*, (American Association of Museum Directors (1981)).

responsibilities.[302]

As its legal definition makes clear, among the central obligations of an art museum are the duties to make its collections available to the public, to interpret its collections in a way that makes them accessible to the public and that educates the public, and to care for and manage its collections. Additionally, museums must ensure that they have the resources necessary to fulfill these obligations. Museums increasingly face questions regarding copyright and digitization of images in connection with carrying out these responsibilities.

B. Digitization and Availability of Collections

Given the explosive growth in Internet use among the public,[303] and the fact that for vast numbers of persons the Internet is as natural a part of life as is an electric light,[304] art museums are facing increasing pressure to make their collections available via online exhibition on the Internet.[305] The posting of images on the Internet by a museum poses a host of legal questions regarding copyright, including whether the museum holds the copyright to the image, or a license to present it online and, if not, whether it is "fair" within the meaning of the fair use doctrine for the museum to post the images, and these are questions that the museum is often ill-equipped to answer. Related legal problems include the fact that visitors to the museum's website could be engaged in copyright infringement every time they download, upload, or forward copyrighted material or engage in other common online activities.[306] This could result in liability upon the museum on a theory of contributory infringement, vicarious liability, or the like, unless the museum takes special care to inform users of possible

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[302] MALARO, *supra* note 163, at 8, 16.

[303] *See supra* note 139.

[304] *See, e.g.*, Wendy J. Gordon, John Carlin, Rochelle Cooper Dreyfuss, Marci A. Hamilton, Peter Jaszi, Beryl Jones, Jaron Lanier, Martha Woodmansee, Russ VerSteeg and Diane Zimmerman, *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion*, 13 CARDOZO ARTS & ENT. L.J. 91, 92 (1994).

[305] *See, e.g.*, Christine Steiner, *The Double-Edged Sword: Museums and the Fair Use Doctrine*, MUSEUM NEWS, Sept./Oct. 1997, at 32, 33.

[306] *See supra* (II)(H)(3)(e).

limitations on use.[307]

In addition to the many layers of copyright questions that exist regarding online posting of images, other issues include ethics and control. Once an image is available electronically on the Internet, it is subject to manipulation and alteration.[308] Given the historic concern of museums with the integrity of the art in their collections, some museums are concerned about the ceding of control that occurs when an image is displayed online.[309] Although encryption could, theoretically, address some concerns that museums hold in this regard, the "flip side" would be that encrypting images, by definition, would create barriers to the viewing of images, thereby defeating th central educational purpose museums' have in placing images online.[310]

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[307] Steiner, *supra* note 305, at 34.

[308] Note that given the "read-only" nature of CD-ROMs, digital images presented on CD-ROM cannot be altered by the user. *See supra* (II)(H)(1)-(2).

[309] *See, e.g.*, Corey S. Powell, *The Rights Stuff: Buying and Selling Art in a Digital World*, SCI. AM. Jan. 1995, at 30; Jane Lusaka, Susannah Cassedy O'Donnell & John Strand, *Whose 800-lb. Gorilla Is It: Corbis Corporation Pursues Museums*, MUSEUM NEWS, May/June 1996, at 34, 36; Lyndel King, *The Fair Use Dilemma*, MUSEUM NEWS, July/Aug. 1997, at 36, 37; Steiner, *Double-Edged Sword*, *supra* note 247, at 49; Malone, *supra* note 4; Suzanne Muchnic, *Technoarts; In Cyberspace, Can Anyone Really Appreciate Art? CD-ROMs Are Giving Home Computer Users Access to Museums and Private Collections. But Some Institutions are Holding Back From the Digital Age for Fear of Losing Control—And Dollars*, L.A. TIMES, Apr. 3, 1994, at Calendar 4; Suzanne Muchnic, *ArtWorld Meets the Techno World; The Arts: An International Group of Museum Directors is Gathering in Seattle to Ponder the Technological New Age and the Impact on Institutions*, L.A. TIMES, June 1, 1994, at F-1; T. D. Mobley-Martinez, *A Museum Walk on the Web*, ALBUQUERQUE TRIBUNE, May 15, 1998, at C3.

[310] It is also possible that the unauthorized manipulation and alteration of digitized art would violate the moral rights of the artist who created the underlying work. While this would likely not be the case in the U.S. (the U.S. statute that recognizes moral rights in works of art, the Visual Artists Rights Act of 1990 ("VARA"), Pub. L. No. 101-650, 104 Stat. 5128 (1990), explicitly states that the rights it creates "shall not apply to any reproduction" of works of art, 17 U.S.C. § 106A(c)(3)), it could be the case elsewhere. Given the possibilities for global transmission of images via the Internet, it is possible that moral rights claims would be recognized in countries that apply a broader interpretation of moral rights, such as those in which article 6 *bis* of the Berne Convention governs. *See supra* note 101.

Control over digitized images is an issue for museums for reasons that go beyond concern for the integrity of the digitized image. Museums are also concerned about who has control over the revenues that can potentially result from the posting of digitized images on the Internet.[311] As discussed earlier, the possibility that online collective licensing systems will be introduced in the not-so-distant future is a distinct one, and enactment of the DMCA only makes this eventuality more likely. Given the massive, and ever-growing number of Internet users worldwide, significant revenues would likely be generated from introduction of such a system.[312] Consequently, some museums are concerned about the timing of introducing digitized images online.[313] They make the argument that rather than rushing to place their collections online, it may be more prudent to wait and see what types of licensing systems and technologies are ultimately developed and to then determine the means through which they can generate the most revenues from the display of images electronically.[314]

Another piece of the discussion about control concerns who will actually digitize the image—a for-profit corporation or a non-profit entity.[315] Corbis Corp. ("Corbis")[316] is, by several orders of magnitude, the world's largest player in the realm of digitizing images.[317] Created by Bill Gates, the multi-billionaire chairman of Microsoft Corporation ("Microsoft"),[318] its self-described purpose is to "'capture the entire human experience throughout history'" and to then collect royalties for each use of a digitized image.[319] Since 1989, when its predecessor Interactive Home Systems was formed, Corbis has been buying

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311 *See, e.g., supra*, note 309 and articles cited therein.

312 *See supra* (II)(H)(3)(d).

313 *Id.*

314 *See, e.g.*, Lusaka, *supra* note 309, at 75.

315 *Id.*

316 "Corbis" is a Latin term for "basket." *Id.* at 34.

317 *See, e.g., id.*; Katie Hafner, Jennifer Tanaka & N'gai Croal, *Focus on Technology: Picture This*, NEWSWEEK, June 24, 1996, at 88.

318 Lusaka, *supra* note 309, at 34.

319 Hafner, *supra* note 317, at 88 (quoting Doug Rowan, Chief Executive Officer of Corbis, until his resignation in May, 1997). *See also* Michele Matassa Flores, *Corbis Corp.'s Vision for its Digital Archive Changing Direction*, DALLAS MORNING NEWS, Dec. 8, 1997, at 2D.

paintings, prints, drawings and other works of art, including the copyrights to such works, buying the copyrights to other works that it does not ultimately purchase, and entering into licensing agreements that permit specified uses of other works.[320] Corbis's stated purpose in purchasing the rights to digitize images is "'to create new uses and markets for high-quality visual content.'"[321] Its goal is to develop the world's foremost archive of rights to digital images, and to control the content that it believes will fuel the growth of electronic publishing and the Internet.[322] While Corbis allows the free downloading of images from its website, its plans are to ultimately institute a subscription charge.[323] With a collection of over 1.3 million high-quality digital images and access to a total of more than 23 million images[324]—including the rights to the archives of some of the world's most prominent museums,[325] the world's largest photo archive,[326] other notable photo archives,[327] and additional acquisitions on the way[328]—Corbis intends, one day, to provide "one-stop shopping" for anyone in

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[320] *See, e.g.*, Lusaka, *supra* note 309, at 34.

[321] *Id.*

[322] DALLAS, *supra* note 137, at 20.

[323] *Id.*

[324] Andrea Siedsma, *Bill Gates Buys Encinitas Digital Imagery Firm*, SAN DIEGO BUSINESS JOURNAL, Feb. 9, 1998 (Vol. 19, No. 6) at 11; *Corbis Acquires Westlight*, M2 PRESSWIRE, May 13, 1998; and Tim Phillips, *Computing and the Net: Beyond the Glass Case*, THE GUARDIAN (LONDON), May 14, 1998, at 4.

[325] These museums include the Hermitage Gallery in St. Petersburg, the National Gallery in London, the State Russian Museum, the National Gallery in Washington, the Philadelphia Museum of Art, the Seattle Art Museum, the Kimbell Art Museum, the Royal Ontario Museum, the Barnes Foundation, the Detroit Institute of Fine Arts, the Corcoran Gallery of Art, and the Bass Museum of Art. DALLAS, *supra* note 137; *Corbis & Detroit Institute of Fine Arts Announce Partnership*, M2 PRESSWIRE, Feb. 29, 1996; Corbis Corporation Announces Agreements with Washington's Corcoran Gallery and Miami Beach's Bass Museum, BUSINESS WIRE, Dec. 16, 1997.

[326] The Bettman Archive. DALLAS, *supra* note 137.

[327] Corbis acquired Digital Stock Corp., a provider of royalty-free commercial imagery to graphic designers, advertising firms, Nike, Mercedes-Benz and other commercial entities, in February, 1998. Siedsma, *supra* note 324.

[328] For example, in May, 1998, Corbis announced plans to acquire Westlight, a commercial stock photography agency with a collection of more than three million images. *Supra* note 324.

the market for images.[329] Corbis's view is that "content is king,"[330] and it has stated that it wants to be "'the premier place to come to for digital content.'"[331]

To the extent that Microsoft has shown a striking ability to dominate parts of computer markets, such as those for computer operating software, some museums and others have expressed concern that a similar pattern of dominance could develop in the emerging market for commercially exploitable digital image databases, in light of the involvement of Bill Gates in both Microsoft and Corbis.[332] The specific concern that has been articulated is that Corbis could radically reduce access to images in the public domain by creating digital photographs of such works, and claiming copyright in the digital

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[329] *Id.* Regarding the global reach of Corbis' activities, note that Corbis has recently entered into an agreement with Japan's leading photo agency, Pacific Press Service ("PPS"), through which PPS will represent Corbis in the licensing of its archive to Japanese customers. *Corbis Expands its Worldwide Image Distribution: Agreement With Leading Japanese Photo Agency, Pacific Press Service, Increases Corbis' Presence in Japan*, BUSINESS WIRE, Aug. 4, 1997.

On a related point, Marubun Corp., a trader specializing in electronics, has signed a general agency contract with Digital Projection Ltd. of Britain to sell digital projectors for large displays in Japan. *Marubun to Sell Digital Projectors*, JIJI PRESS TICKER SERVICE, Apr. 21, 1997. The projectors will be used to display digital images on giant screens at theaters, museums, aquariums and racetracks. The system was developed through the joint efforts and investments of Digital Projection Ltd (15 million British Pounds) and Texas Instrument Inc. of the U.S. ($500 million), since 1992. Marubun's projections regarding sale are 380 million Japanese Yen by the end of 1997, 750 million Yen in 1998, and 1 billion Yen in 1999. *Id.*

Nippon Telegraph & Telephone ("NTT") has also developed a super high definition ("SHD") digital image processing system. NTT's image processing system has a resolving power 14 times greater than that of normal television. The SHD technology represents the culmination of a decade of research, and NTT intends to apply the system in the areas of medicine, printing, publishing and film production. As for art museums, the Whitney Museum of American Art in New York has used NTT's SHD system to display more than 80 works of art on a large color monitor. *Whitney Museum's Preview Uses Image System of NTT*, JIJI PRESS TICKER SERVICE, Mar. 14, 1997.

[330] *See, e.g.*, Hafner, *supra* note 317; DALLAS, *supra* note 137.

[331] Lusaka, *supra* note 309, at 78.

[332] *See id.* at 77-78.

photographs.[333] While a recent district court decision—*The Bridgeman Art Library, Ltd. v. Corel Corp.*[334]—has rejected such a copyright claim, holding that a photograph that is a substantially exact reproduction of a public domain work lacks sufficient originality to be copyrightable, the decision is on appeal.[335] The ultimate resolution of this case could have a significant impact upon the development of the market for digital images of works of art, in particular, on the ability of suppliers of digital images to enter that market. It could likewise have a significant effect upon the ability of the public to freely access such images at little or no cost. By holding that a photograph of a work of

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[333] *Id.* at 77-78; *see also* DALLAS, *supra* note 137.

[334] *Bridgeman*, 27 F. Supp. 2d. 421 (S.D.N.Y. 1998), *aff'd on reargument and reconsideration* 1999 WL 85513 at *8-9.

[335] The Bridgeman Art Library, Ltd. v. Corel Corp., *appeal docketed*, No. 98-9625 (2d Cir. Dec. 11, 1998). A legal question exists as to whether a digital photograph of a creative work has sufficient originality to meet the threshold requirements of copyright protection and, if so, whether the creation of such a digital photograph would render it unlawful for someone else to create another digital photograph of the same work without authorization. A subset of this question is whether a digital photograph of a work that is in the public domain is copyrightable. These and related matters were at issue in *Bridgeman I*. In particular, the court examined the question of whether photographs of works that are in the public domain are copyrightable. The court recently issued its decision, ruling that because the photographs were published in the United Kingdom ("UK"), the issue of whether they are copyrightable must be decided under UK law. *Bridgeman,*, 27 F. Supp. 2d. at 426. The court further held that the photographs failed to meet the originality requirement of the governing UK law. *Id.* In so holding, the court stressed that "Bridgeman's images are substantially exact reproductions of public domain works, albeit in a different medium," *id.*, that "[t]he images were copied from the underlying works without any avoidable addition, alteration or transformation," *Id.* and that "the originality requirement is not met where the work in question is 'wholly copied from an existing work, without any significant addition, alteration, transformation, or combination with other material.'" *Id.* (quoting 2 MELVILLE B. NIMMER AND PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW & PRACTICE § 2[1][b][ii], at UK-19). Thye court also explicitly state that given that UK law regarding originality appears to be substantially the same as U.S. law on the subject, it would have reached the same result under American law. *Id.* at 427 nn.41, 47 and accompanying text. The court affirmed this ruling in *Bridgeman II*, stating that "[t]he Court has held as a matter of law, and *reiterates*, that plaintiff's works are not original under either British or United States law." *Bridgeman*, 1999 WL 85513 at *8.

art that is in the public domain is not copyrightable, the district court's decision eliminates one potential legal barrier to competitors entering the market—the specter of liability for copyright infringement—at least until an appellate court reverses the district court's holding. The question whether additional legal, economic, or other barriers to entry exist, and how such barriers might affect the public's ability to access digital images of works of art, is, of course, another matter.

In the meantime, although theoretically there are at least some alternative creators of digital images,[336] it does not appear that any commercial entity is ready to enter the market to compete vigorously with Corbis.[337]

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[336] Grolier, Inc., the multimedia unit of Lagardere Groupe SA, recently won the exclusive rights, for a ten-year period, to create CD-ROMs of the work of the Spanish painter, Pablo Picasso. DALLAS, *supra* note 134. Another entity, Hitachi America, Ltd., a subsidiary of Hitachi Ltd., has created a propriety digital image system through which images may be digitized and restored. *See Hitachi Launches Online "Viewseum"*, MULTIMEDIA &VIDEODISC MONITOR, Feb. 1, 1996, at § 2.

[337] Note, however, that Getty Images, co-founded by Mark Getty (heir to part of the Getty Oil fortune) and Jonathan Klein in 1995, has also become a player in the digital image market. Its acquisitions since 1995 have included: Tony Stone, a stock photography collection with more than 1 million photos; the world's second largest photography collection (only the Bettman Archive, now owned by Corbis, is larger), the Hulton Deutsch collection (renamed Hulton Getty) with more than 16 million images dating from the early days of photography; Allsport, a leading sports agency; Gamma Liaison, an American news and photojournalism agency; and Energy Firm, a stock footage library. Hannah Gal, *A Picture of Wealth; Bill Gates and Mark Getty, Two of the World's Richest Men, are Vying for Control of One of the World's Richest Emerging Markets—the Business of Selling and Distributing Digital Images*, THE INDEPENDENT (LONDON), Apr. 14, 1998, at N2 N. Also of note, Getty Images announced a merger with PhotoDisc, a royalty-free image company (pay once for unlimited use) in February, 1998, *Id.*

Creation of a digital image fine art library "to rival giants such as Microsoft's Corbis and the Hulton-Getty library" is also underway in Europe as a result of funding pledged by the European Commission's Info2000 programme. *EC Backs Artweb*, NEW MEDIA AGE, Dec. 18, 1997, at 2. Artweb, a consortium of the three largest European Specialist art libraries (the Bridgeman Art Library in London, Bildarchiv Preussischer Besitz in Berlin, and Giraudon in Paris) plans to offer a single point of access over the Internet to a combined database of art images. Artweb plans to introduce its Internet service gradually, rather than attempting a full launch for the year 2000. *Id.*

On the nonprofit front, however, some potential alternatives to Corbis have begun to emerge. Foremost is the Museum Educational Site Licensing Project ("MESL"), launched in 1995 through the collaborative efforts of the Getty Information Institute and MUSE Educational Media.[338] MESL's aim is to develop collectives or consortia to serve as vendors to the education market of high quality digital images from the collections of museums and universities. Toward this end, MESL launched a pilot project, involving seven museums and seven universities, to develop and test a model of licensing visual material across closed campus networks.[339] MESL's vision is of a non-profit entity that would provide easy access to the collections of museums, in high-quality digital form, with full documentation, cataloging, and contextualizing materials.[340] MESL has created a digital library of more than 9000 images, and has exhibited this library at each of the universities that participated in its pilot project.[341]

Two other non-profit licensing consortia have also recently formed:

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[338] Steiner, *supra* note 305 at 49; Samuels, *supra* note 136, at 67; David L. Green, *Museums Collaborate in New Marketing Ventures for Digital Images*, ARL: A BIMONTHLY NEWSLETTER OF RESEARCH LIBRARY ISSUES AND ACTIONS, Aug. 1997 (No. 193), 1.

[339] The museums and universities are: the Fowler Museum of Cultural History (at UCLA); George Eastman House, Rochester, NY; The Harvard University Art Museums; The Library of Congress; The Museum of Fine Arts, Houston; The National Gallery of Art; and The National Museum of American Art, Washington. The universities are: American University; Columbia University; Cornell University; University of Illinois at Champaign-Urbana; University of Maryland; University of Michigan; and University of Virginia. Green, *supra* note 338, at 4 n.2.

[340] *Id.* at 1.

[341] For a full discussion of the work of MESL see the two volume project report it issued: DELIVERING DIGITAL IMAGES: CULTURAL HERITAGE RESOURCES FOR EDUCATION; and IMAGES ONLINE: PERSPECTIVES ON THE MUSEUM EDUCATIONAL SITE LICENSING PROJECT (1998) (available at <http://www.ahip.getty.edu/mesl/reports/final_reports.html>. On a related subject, note the formation of LUNA Imaging, Inc., a joint venture of the J. Paul Getty Trust and Eastman Kodak Company, formed to offer digital imaging services and electronic publications to the academic community worldwide. Heather Pemberton, *Getty Trust and Kodak to Develop Digital Collections for the Arts; Photo CDs*, CD-ROM PROFESSIONAL, Sept. 1993 (Vol. 6, No. 5), at 139.

the Art Museum Image Consortium ("AMICO") and the Museum Digital Library Collection, Inc. ("MDLC").[342] AMICO, a project of the Association of Art Museum Directors ("AAMD"),[343] is a nonprofit corporation formed to serve the museum and educational communities.[344] It intends to provide museums with a library of digital materials for licensing to educational users.[345] Its goals include creating a collective library of art for educational use; providing members with access to collective holdings; negotiating digital rights with artists, artists' estates, artists' rights societies and other rights holders; and improving technological, administrative, and documentary practices of members.[346] AMICO expects to be ready for full subscription by the 1999 academic year.[347] While initially its membership is to be comprised of art museums, its library is intended to be broader, and its first phase will focus on developing a university site license, followed by licenses for museums, school grades K-12, and public libraries.[348]

MDLC has been developed in close consultation with the American Association of Museums ("AAM").[349] Unlike AMICO, its membership will be open to all museums, not only art museums, and, while its initial focus will be on developing an educational site license, it will also work to develop a commercial licensing division.[350] MDLC expects to be open to museums for membership in the fall of 1999.[351]

In sum, while a small number of commercial alternatives to Corbis

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[342] AMICO and MDLC are planning consortia that intend to build digital libraries and offer non-exclusive licenses, enabling museums to digitize and market individual works. Green, *supra* note 338, at 2; *see also* <http://museumlicensing.org> (MDLC internet site). Note also that the literature refers to the organization alternatively as the Museum Digital Licensing Collective, Inc. and the Museum Licensing Cooperative.

[343] *Id.* at 2. AAMD represents 170 of the larger art museums in the U.S., Canada and Mexico. *Id.*

[344] Steiner, *supra* note 305, at 49.

[345] *Id.* at 49.

[346] *Id.*

[347] Green, *supra* note 338, at 2.

[348] *Id.*

[349] *Id.*

[350] *Id.* at 3.

[351] MDLC internet site, *supra* note 342.

currently exist, and a few non-profit alternatives are "in the works," Corbis appears to be, if not "the only show in town," at least the biggest, and most available.

C. Digitization, Interpretation and Management of Collections

Just as the digital revolution—and the massive number of persons who have joined it—have placed pressure on art museums to make their collections available online, so too has the revolution caused museums to integrate digitized images into their educational efforts. "Digital docents," for example, interactive audio tours featuring a touch-screen computer and head phones, are now available.[352] On a more expansive scale, "micro galleries" have been installed in some museums, displaying an interactive, digital, hypertext[353] catalogue of the entire collection of the museum.[354]

Museums have also begun to use digitized images in the interpretive materials that accompany the live display of art objects, for example, interactive computers and multi-media productions that accompany special exhibitions.[355] Likewise, museums have begun to incorporate "thumbnail" digital images of objects in their collections into their collections management record keeping.[356]

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[352] Lonna O'Neal Parker, *Digital Docents: Computers Give Interactive Audio Tours*, THE WASHINGTON POST, July 8, 1997, at E1.

[353] "Hypertext" consists of "'randomly connected pieces of information through machine-supported links that allow [the user] to touch a screen or indicate a highlighted word with a mouse for a definition or connection to other avenues of information.'" Note, *Dithering Over Digitization*, *supra* note 4, at 404 n.65 (quoting Maxwell L. Anderson et al., ART MUSEUMS ON THE INFORMATION SUPERHIGHWAY: INFORMATION TECHNOLOGY PRIMER, AAMD 1994 Annual Meeting, June 1-4, 1994, Seattle, glossary 24). *See also* Patricia Sanders, *The New Exhibition: The Museum as Hypertext*, ARTWEEK, Nov. 1997, at 12.

[354] The National Gallery in London, the National Gallery in Washington, the Louvre in Paris, the Museum of Modern Art in New York, for example, all have microgalleries. *See, e.g.*, Bernard Sharratt, *Please Touch the Paintings*, N.Y. TIMES BOOK REVIEW, Mar. 6, 1994, at 3; John Burgess, *Cybertalk: Art Lovers, Meet Your New Guide*, WASHINGTON POST, June 20, 1994, at F17, 22; Steven Vincent, *High Art, High Technology*, ART & AUCTION, Feb. 1993, at 78, 81.

[355] *See, e.g.*, Parker, *supra* note 352.

[356] *See, e.g.*, Weil, *supra* note 10, at 36, 38, 41.

In all of these examples regarding the use by museums of digitized images as interpretive and administrative aids, many of the same copyright questions arise as in the context of museums placing images online. Does the museum hold the copyright to the image? If not, is it possible to identify the holder of the copyright and to contact that entity for permission? Alternatively, if the museum does not hold the copyright, can it nonetheless display the image electronically without risking liability on some other ground? When, if at all, can a museum assume that it will be insulated from liability on fair use grounds? Again, museums are placed in the untenable position of having overburdened staffs investigating legal questions that cannot necessarily be accurately answered.[357]

D. Digitization and Generation of Funds to Preserve Collections

Another area in which issues pertaining to copyright and digitization abound in the museum world is in the realm of product development. As museums face increasing financial pressures, many are developing products for commercial sale through museum gift shops,[358] catalogues, websites and, most recently, television.[359] CD-ROM databases of art in museums' collections are, for example, widely available, and typically include digitized images, as well as textual and audio material.[360]

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[357] While many of these uses arguably would fall under fair use, many circumstances could tip the argument in favor of a finding of infringement. For example, if a digitized image is used in an educational material such as a "digital docent," and that image is also available for sale in the Museum's gift shop on a mousepad or tee-shirt, could a court hold that the digital docent was, in effect, advertising for the museum's products, thereby excluding a finding of fair use?

[358] The Metropolitan Museum of Art, for example, opened 14 shops in the United States, and 19 shops in foreign countries, between 1986 and 1996. During that period revenues from merchandising more than doubled, from $38 million in 1986 to $79 million in 1996. Shapiro, *supra* note 5, at 39.

[359] *See, e.g.*, Jill I. Prater, *When Museums Act Like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause*, 17 LOY. L.A. ENT. L.J. 97 (1996).

[360] *See, e.g.*, Peter Jasco & Judit Tiszi, *Multimedia Databases of Fine Arts CD-ROM and Online; Products From Eight Vendors*, DATABASE, Dec. 1996 (No. 6, Vol. 19), at 12. CD-ROMs showing art objects from the collections of the Barnes

The legal questions that arise here are the same as those that arise in the context of digitized images used for educational purposes, but here the museum's need for permission to use the images is far stronger. Where the purpose of the use is commercial and no comment, transformation, or interpretation is involved, neither fair use nor any other exemption is likely to apply. Thus, even where museums are seeking to develop products purely as a means of generating income so that they can properly care for and manage their collections, they must tread lightly. The fact that the ultimate purpose of their commercial activities is educational will not necessarily insulate museums from liability in connection with such commercial exploits.[361]

E. Conclusions and Recommendations

The parameters of the debate regarding copyright law have historically been shaped, and continue to be shaped, by legislators and lobbyists, with little involvement by others.[362] This trend persists in the debate regarding copyright in cyberspace.[363] Consequently, art museums, artists, and supporters of the arts must become more involved in the national and international fora in which the debate is

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Foundation, the Art Institute of Chicago and the National Gallery of London are available, to name a few. *Id.* Note, however, that a recent article in The New York Times reports that the "museum-on-a-disk market" has collapsed. The article suggests that part of the reason for the decline in popularity is that most art CD-ROMs fail to make adequate use of the CD-ROM's unique audio and visual capabilities, and ability to store huge quantities of information that can be sorted and linked in complex ways. Lee Rosenbaum, *Art Lovers Cool to Lure of CD-ROMs*, N.Y. TIMES, July 23, 1998, at G6.

[361] *See Religious Tech Ctr.*, 907 F. Supp. 1361. Note also that while a provision exempting nonprofit organizations from liability for copyright infringement in cases of good faith reliance upon fair use previously existed, Congress eliminated this exemption, effective January 1, 1978, commenting that the "the line between commercial and 'nonprofit' organizations is increasingly difficult to draw." Shapiro, *supra* note 5, at 39 (quoting H.R. REP. No. 1476, 94th Cong., 2nd sess. 62-63 (1976)). The DMCA, however, creates a similar exemption with respect to *criminal* liability. 17 U.S.C. § 1204(b). *See also supra*, notes 261-62 and accompanying text.

[362] *See supra* notes 205-206 and accompanying text.

[363] *See id.*; *see also supra* (II)(H)(3)(d).

occurring to ensure that the contours and content of the debate reflect their concerns. Failure to do so will subject museums, and the public they serve, to the risk that the regulatory regime that is ultimately developed will not adequately protect their interests.

Although art museums have been involved in the debate regarding application of copyright law to the digital environment in some fora—for example, in the Administration's Conference on Fair Use—they have done so primarily in conjunction with schools and libraries, and it is not clear that the interests of the two groups are entirely coextensive. Moreover, the Guidelines issued by CONFU restrict existing fair use principles, thereby contravening the interests of museums. It is also not clear to what extent the Guidelines ever had any force or effect and, in light of enactment of the DMCA, whether they have been preempted. Museums have, perhaps more effectively, been involved in representing their interests before Congress as it considered the DMCA.[364] But, given the DMCA's provisions regarding initiation of several rulemaking proceedings, museums continue to be confronted with the need to formulate, and lobby for implementation of, their position regarding copyright in the electronic environment.

The current economic, political, and cultural environment presents a variety of challenges to the development by art museums of a uniform position regarding copyright reform. Of paramount importance, museums do not exist as a monolithic entity. On the contrary, they are split into various camps, along various lines, including whether their collections consist primarily of works of older art that are either in the public domain, or to which they hold the copyright, or whether their collections consist primarily of works of contemporary art that are not in the public domain and to which they do not hold the copyright. In addition, regardless of the "fault lines," most museums play divergent roles. They are at different times, or at the same time, copyright holders, copyright users, vehicles for educating the public regarding the works in their collections and related artistic and cultural matters, and creators of products and services for the purpose of generating revenues. The position that a museum, or an association of museums, takes in the debate regarding

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[364] *Congress Updates Copyright Law for Digital Era*, AVISO, Nov. 1998, at 1,2.

copyright in cyberspace will likely relate to which of these roles the museum is performing, and which of these functions it wishes to promote.[365] If a museum focusses upon its status as a copyright holder (*e.g.*, an art museum with a collection of older art) it is more likely to support expansion of copyright and approach presentation of its collections online as a way of generating income. Conversely, if it focusses upon its status as a copyright user (*e.g.*, a museum with a collection of contemporary art) it will likely endorse restriction of copyright, expansion of fair use, establishment of online free use zones, and view presentation of its collections online as fundamentally educative and nonprofit.[366]

The position that art museums take regarding copyright in the electronic environment thus ties in with a broader issue facing museums and nonprofit organizations in general, namely, the extent to which a museum or other nonprofit entity may engage in profit-oriented activity without jeopardizing its status as a nonprofit educational institution. It is true that in the contemporary arena of privatization, shrinking interest in public institutions, and shrinking public funds for nonprofits, museums are facing enormous financial pressures. But, these are institutional questions that confront the nonprofit sector as a whole and that should be debated within that context.[367] To view copyright law as a potential, or partial, remedy to the financial problems plaguing museums would not only inappropriately divert museums from their core nonprofit, educational functions and further contribute to their transformation from nonprofit entities into market players, but it would deflect attention from the institutional problems plaguing the nonprofit sector as a whole—problems that must be ameliorated if museums are to experience any long-term relief from their financial problems.

The question remains: if art museums should not approach

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[365] *See, e.g.*, Weil, *supra* note 10, at 38, 41. *See also supra* note 364, at 2 ("AAM [The American Association of Museums] continues to represent museums before Congress and the U.S. Copyright Office as both owners and users of copyrighted works—a difficult balancing act.")

[366] *Id.*

[367] *See, e.g.*, MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS POLICY (1994) 22-28.

copyright reform as a vehicle through which to ameliorate their budgetary problems, then how should they approach it? The answer lies in the fundamental nature of art museums as educational, nonprofit institutions that hold their collections in trust for the public, and that have a responsibility to make these collections available to the public. To help fulfill this responsibility, museums should advocate for the contraction of copyright, the expansion of fair use, and the development of an expansive public domain in cyberspace. The various rulemaking proceedings mandated by the Digital Millennium Copyright Act provide one forum for such activities; but museums should, in no way, view themselves as limited in their advocacy efforts to such domestic administrative fora.

IV. CONCLUSION

The law of copyright is at war with itself, at least with respect to its application in cyberspace. By holding that downloading, uploading, and other routine activities that are necessary to fully realize the educational potential of the Internet amount to copying within the meaning of copyright law, the law thwarts one of its essential purposes. The law deals another blow to the public/copyright user half of the copyright equation by creating a hospitable environment for the use of encryption technology, thereby paving the way for the transformation of the Internet into a pay-per-view cybermall. The battle is a particularly ironic one for museums, given that museums and the law of copyright share the same underlying purpose of promoting science and the arts, and the progress of culture. To impose potential liability upon museums and their electronic visitors for copyright infringement in connection with the electronic presentation and viewing of digitized works of art contravenes the essential purpose of copyright law, and threatens the ability of museums to carry out their mission in the electronic times in which we live.

CONFU to the rescue? Not likely. The Guidelines proposed by the Administration's Conference on Fair Use place a weighty burden on museums and other educational institutions to seek prior permission to use copyrighted works, and inappropriately contract, rather than expand, the concept of fair use. Moreover, the Guidelines are likely moot in light of the recently-enacted Digital Millennium Copyright

Act. Nor can museums expect much relief from the new legislation, despite the fact that it gives lip service to fair use and acknowledges that nonprofit, educational institutions may have a legitimate need for free access to copyrighted works, unless they are prepared to articulate their vision of how fair use should develop under the new law. Thus, museums should gear themselves up for vigorous representation of their interests in the various rulemaking proceedings that are to be commenced under the Digital Millennium Copyright Act and in any other national and international fora that they deem appropriate. They should likewise focus renewed attention on their core educational functions, their defining nonprofit status, and their public trust responsibilities, and, with these matters in mind, expand their participation, nationally and internationally, in the debate regarding copyright in cyberspace. In doing so, museums should, consistent with their core responsibilities, ally themselves with those forces in the debate that advocate for broad public access, expanded fair use, free use zones, and the like.

The law of copyright has always involved a conflict between the rights of copyright holders, and the right of the public to have unrestricted access to creative works, with profound consequences for society as a whole. In the online world of cyberspace, however, where anyone with access to the Internet can communicate with everyone, anywhere,[368] the conflict is particularly charged, the stakes are unprecedentedly high, and the prospect of manacles in cyberspace[369] looms at the frontier.

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[368] *See supra* note 140 and accompanying text.

[369] *See supra* at 1; *see also supra* notes 109 and 111, and accompanying text.