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Individual Behavior, Private Use and Fair Use, and the System for Copyright

As discussed in Chapter 3, the information infrastructure creates both opportunities for and concerns about public access to information and archiving. Continuing the inquiry into the consequences of the information infrastructure for intellectual property, this chapter considers impacts on individual behavior and discusses the difficult concepts of fair use and private use. In addition, it raises the question of whether the current regime of copyright will continue to be workable in the digital age or whether some of the basic legal models for intellectual property (IP) need to be reconceptualized.

UNDERSTANDING COPYRIGHT IN THE DIGITAL ENVIRONMENT

Earlier sections of the report note how the technology of digital information has vastly increased the ability of individuals to copy, produce, and distribute information, making the behavior of individuals a far more significant factor in the enforcement of IP rights than in the past. Yet we as a society apparently know relatively little about the public's knowledge of or attitude toward intellectual property. The committee found no definitive or widely recognized formal research on this issue, only circumstantial evidence that most people do not have an adequate understanding about copyright as it applies to digital intellectual property.

The General Public

A number of copyright-related myths and urban legends have circulated on the Internet; they are sufficiently widespread that some of the industry trade associations have taken steps to debunk them.¹ In the world of digital music, for example, some misconceptions include the claims that the absence of any copyright notice on a Web site or on a sound file (commonly an MP3 format file) indicates that the recordings or the underlying musical composition have no copyright protection and are freely available for copying; that downloading a copy for purposes of evaluation for 24 hours is not an infringement; that posting sound recordings and other copyrighted material for downloading is legally permissible if the server is located outside the United States because U.S. copyright laws do not apply; that posting content from a CD owned by an individual is not an infringement; that downloading sound recordings is not an infringement, and so on.² As discussed in Chapter 2, the extent of the unauthorized copying of copyrighted material posted on the Internet and the apparent ignorance of the rules of copyright are particularly compelling in regard to digital music files.³

Other misconceptions concern print, graphics, or other visual content. Some of these are that if the purveyor of the illegal copies is not charging for them or otherwise making a profit, the copying is not an infringement; that anything posted on the Web or on a Usenet news group must be in the public domain by virtue of its presence there; that the First Amendment and the fair use doctrine allow copying of virtually any content so long as it is for personal use in the home, rather than redistri-

¹See, for example, <<http://www.audiodreams.com/mtvhits/>> (stating, "This page is non-profit and audio files can be downloaded for evaluation purposes only and must be deleted after 24 hours"); <<http://www.warezrevolution.com>> (indicating "You must delete everything after 24 hours and use it for educational purposes only. All files contained here are only links and are not from our server"); <<http://www.fullwarez.com>> (indicating, "This page in no way encourages pirated software. This page is simply here to let you TRY the applications before you decide to buy them. Please delete whatever you download after testing them and let the hard working programmers earn their money"); <<http://www.escalix.com/freepage/thehangout/disclaim.html>> (stating, "MP3's are legal to make yourself and keep to yourself, but illegal to download [sic] publicly and keep them, as they are copyrighted material, that is why you MUST NOT keep an MP3 for more than 24 hours." For an example of a trade association's attempt to debunk some of these myths, see the Software Publishers Association site at <<http://www.spa.org/piracy/legends.htm>> (the SPA has merged with the Information Industry Association, producing the Software and Information Industry Association, at <<http://www.siiia.net>>).

²See <http://208.240.90.53/html/top_10_myths/myths_index.html>.

³According to a briefer at the committee meeting of July 9, 1998, "We're bringing up a generation of college students who believe that music should be free because music is free to them in the colleges."

bution to others; that anything received via e-mail can be freely copied and that if the uploading, posting, downloading, or copying does not, in the view of the end user, hurt anybody or is just good free advertising, then it is permissible.⁴

Still other common myths concern software. Among these are the 24-hour rule (i.e., software may be downloaded and used for up to 24 hours without authorization if the ostensible purpose is to determine whether the user wants to continue to use it, at which point he or she would have to delete it or buy it, but there is no limit on the number of times the user can download and reuse the software so long as it is deleted or purchased at the end of each 24 hours) and the “abandonment” rule (i.e., software is available for copying without liability if the copyright owner has ceased actively distributing it for more than some number of years). Some people who copy digital content do not know that they are doing anything illegal and believe that their ignorance of the law should absolve them from liability for copyright infringement. (As a matter of law, it doesn’t.)

There is also the question of how well informed the public is about intellectual property more generally, including compliance with the private contracts embodied in shrink-wrap licenses, point-and-click licenses, subscriber agreements, and terms-of-service contracts. The intuitive conclusion is that a relatively small portion of the end-user population can be expected to read and fully comprehend all of the restrictions regarding intellectual property protection by which they may be legally bound, and in that sense the public is not well informed about what constitutes legal behavior.⁵

The committee believes that if, as a matter of legal and social policy, members of the general public are expected to comply with the requirements of intellectual property law, then it is important that the law be set forth in a clear and straightforward manner that the general public can readily comprehend. At face value, those sections of the Copyright Act that relate most directly to the conduct of members of the general public can appear to be somewhat straightforward: the exclusive rights of the copyright owner embodied in section 106, the first-sale doctrine embodied in section 109, and the four factors to be analyzed and balanced in evaluating fair use under section 107.⁶ Much less straightforward is the interpretation of these sections in particular instances, which can be very complex and difficult (Box 4.1).

⁴See <http://www2.deakin.edu.au/lrs/pub_manual/copyright/Myths/Myths.htm>.

⁵The committee was unable to identify a relevant and authoritative source of data; this conclusion is based on the committee’s readings, testimony presented, and deliberations.

⁶These three sections of the Copyright Act are reproduced in the addendum to this chapter.

BOX 4.1

Intellectual Property Law and Common Sense

Ordinary people at times find existing intellectual property law difficult to follow, or they resist following it on the grounds that it violates their common sense. Consider as one example a college professor who develops a set of course notes and posts them on the World Wide Web so that his students can retrieve them. This is a very efficient way of “handing out” notes—the students get the information without the professor’s having to photocopy or even e-mail it, and updates, additions, and corrections can easily be linked in as the semester progresses. Because the notes are on a public Web page, any Internet user can download them. Imagine that a second professor teaching a similar course at another college downloads them and uses them in her course.

Under existing law, the second professor may have violated the intellectual property rights of the first.¹ Arguably, she should have obtained his permission before using the notes, even if the Web page contained no instructions about how to contact the professor who wrote them, or about which, if any, uses he wanted to allow. To many World Wide Web users, this does not make sense. The author of the course notes chose to put them on a public Web page and chose not to include with them any instructions about how they were to be used or about how to obtain permission to use them. He had the options of posting them on a password-protected Web page and giving the password only to his students, or of posting them in encrypted form on a public, unprotected Web page and giving the decryption key only to his students. He also had the option of posting them in the clear on a public Web page, along with instructions that they were developed for his course and that anyone who wanted to comment on or use them should contact him at the appropriate e-mail address. Password protection, encryption, and “use-only-as-follows” instructions are standard mechanisms that any Web user can avail himself of, and many Web users do. The fact that the author of these course notes chose not to use these mechanisms is easily interpreted to mean that he thought it was acceptable for anyone who found his notes on the Web to use them.

¹If the professor who created the course notes filed an action against the second professor for copyright infringement, in such an action the second professor would be likely to assert defenses of express or implied consent, waiver, estoppel, and abandonment. Essentially, her argument would be that by posting the course notes “in the clear” on the World Wide Web without any indication of any intent to restrict further dissemination, the plaintiff (the professor who created the course notes) had implied consent to their retransmission and republication. The outcome of such a claimed defense might well turn on whether there is a custom or practice currently observed in academia regarding the posting of such course notes in the clear, whether it was reasonable for the plaintiff professor to expect protection for such a posting in the absence of a notice prohibiting publication, and whether it was reasonable for the defendant to assume or infer from the posting without accompanying restriction that a dedication to the public domain, or at least implied consent to republish the material, was reasonably intended by the plaintiff.

The entire body of written copyright law is voluminous, and many of its subjects (e.g., retransmission royalties) are arcane and complex.⁷ This was less problematic when copyright was focused primarily on the behavior of large organizations, but now the behavior and the attitude of individuals can significantly affect markets and industries. Although companies have the resources to analyze, understand, and even help draft legislation, individual consumers do not. Consumers thus face the problem that the law is large, complex, and industry-specific.

The committee favors a greater degree of simplicity, clarity, straightforwardness, and easy comprehensibility for all aspects of copyright law that prescribe individual behavior. This goal might be enhanced by the development of specific interpretive guidelines on those aspects of consumer behavior that raise questions frequently encountered in daily life in dealing with copyright protection.⁸ Wherever possible, a clear set of rules would be particularly useful, even if they only outline copying that is assuredly permitted under the law (although there is a risk that such rules could discourage legal copying that is beyond the scope of these rules).⁹ This movement toward clarity and specificity must, however, preserve a sufficient flexibility and adaptability in the law so it can accommodate the future evolution of technologies and behaviors.¹⁰ It is important to note that making it easier to comply with the law does not guarantee improved compliance.¹¹

⁷U.S. copyright law is embodied in several key federal statutes—the 1909 act and the 1976 act, amended by additional statutes from time to time, including, for example, the Digital Millennium Copyright Act of 1998 and the Copyright Term Extension Act of 1998, and interpreted by numerous decisions of U.S. District Courts, U.S. Courts of Appeal, and the United States Supreme Court.

⁸Some efforts in the federal government include the Plain Language Action Network, a group working to improve communications from the federal government to the public. See information available online at <<http://www.plainlanguage.gov>>.

⁹One attempt at simplification and clarification of the intellectual property law is the set of guidelines for teacher photocopying distributed by the U.S. Copyright Office (1998). Such guidelines can be the product of a negotiated compromise, but they are sometimes issued by an interest group. As desirable as guidelines are, political complexities have thus far made it difficult for truly workable guidelines (for teacher photocopying or other situations) to emerge.

¹⁰See Box 6.2 in Chapter 6 for a list of principles that the committee recommends for use in the formulation or revision of law related to intellectual property.

¹¹In publications and discussions about developing or enhancing the public's awareness and appreciation of the need for the protection of intangible property, a comparison is often made to the stealing of tangible property (e.g., shoplifting), accompanied by the claim that in terms of moral and ethical culpability people (particularly young people) who illegally copy intellectual property would never think of stealing tangible property. There is less comfort in this claim than may be apparent, however. In October 1998, a nationwide survey purportedly showed that nearly half of all high school students admitted that they had

Rights Holders

Although no rigorous study has been done, there is circumstantial evidence suggesting that many rights holders, too, are misinformed about legal behavior with respect to intellectual property, and do not understand the legal limits to their control. For example, a major academic publisher places the following legend on the page bearing the copyright notice for its publications: "No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission."

The use of similar legends or legal notices is widespread in the publishing industry. Yet the fair use privilege in the Copyright Act clearly authorizes the reproduction of at least some limited portion of a copyrighted publication for legitimate purposes, including critical commentary, scientific study, or even parody or satire. In that respect the absolute nature of the prohibition above is an overstatement of the copyright owner's rights. Similar observations could also be made with respect to the type of notice prohibiting any form of copying that appears on videocassettes and digital video disks (the so-called "FBI notice"), in the shrink-wrap licenses that accompany mass market software, in point-and-click licenses, and even on some individual Web sites.

Just as it is important for consumers to understand and obey the legal requirements affecting use of copyrighted material, it is also important that rights holders learn about fair use and other limits to their control over intellectual property and that they avoid making overstatements concerning what constitutes legal use of their material. Overstatements may well be counterproductive for rights holders if consumers recognize them as such, judge these statements to be excessive, and ignore them entirely as a result.

stolen tangible property from a store at least once within the past 12 months. If the study's results are valid, then a larger deterioration in ethics, particularly among people in the younger age range, concerning all forms of taking of property, whether tangible or intangible, may be taking place and would constrain the effectiveness of IP initiatives based on voluntary compliance.

Results of the study can be found online at <<http://www.josephsoninstitute.org/98-Survey/98survey.htm>>. Although the study claimed a margin of error of only ± 3 percent and drew substantial media attention (see, for example, CNN Newsroom, 1998; Jackson and Suhler, 1998; Ove, 1998; and Thomas, 1998), the committee found no other independent data to validate the methodology, accuracy, or conclusions of the study and believes that they should be viewed with that caveat in mind.

THE CHALLENGE OF PRIVATE USE AND FAIR USE WITH DIGITAL INFORMATION

Perhaps the most contentious current copyright issue concerns the legality of private, noncommercial copying. This is not solely a digital intellectual property issue, but the risk to rights holders from unbridled private copying is especially acute when the information is in digital form and can be copied without loss of quality and disseminated by digital networks. The extremes of the positions on this issue are well established and heavily subscribed to. Some rights holders seem to believe that all, or nearly all, unauthorized reproduction of their works, whether private or public, commercial or noncommercial, is an infringement. Many members of the general public appear to believe that all or virtually all private, noncommercial copying of copyrighted works is lawful.

In the national copyright law of a number of countries, there is a specific private use copying privilege.¹² In the United States, for example, some private use copies are shielded by specific exceptions in the copyright statute. One illustration is the right of owners of copies of copyrighted computer programs to make backup copies of the software under 17 U.S.C. sec. 117. In the main, however, the legality of private use copying will be determined by application of the fair use doctrine and its four-factors test.¹³

The notion of private use copying as a matter of fair use law is most clearly articulated in the Supreme Court's decision in the *Sony Corp. of America v. Universal City Studios, Inc.* case.¹⁴ In this case, the Court stated that courts should presume that private, noncommercial copying is fair. The presumption of fairness should only be overcome by proof of a meaningful likelihood of harm resulting from the private copy. The fair use ruling in the *Sony* case concerned only taping of television programs off the air for time-shifting purposes.¹⁵ It did not discuss, let alone rule on,

¹²In some countries, private use copying privileges are being reassessed. In the future, they may be restricted to analog copying.

¹³An appropriate analysis of fair use requires consideration of four factors (the purpose and character of the use, including whether such use is commercial in nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use on the potential market for or value of the copyrighted work). Evaluating each factor can be a difficult judgment, even for lawyers and judges. See the addendum to Chapter 4 for the full text of the law.

¹⁴464 U.S. 417 (1984).

¹⁵The reading of the *Sony* case is not uniform among committee members. Some committee members view *Sony's* fair use analysis as applying to private home taping of programs from cable and other forms of pay TV as well as free broadcast television, while other committee members view *Sony* more narrowly, and as applying to free broadcast television only, which is what was directly involved in this case.

the legality of taping to build up a library of programs, although it was clear that Betamax machines, the Sony product at issue, could be used for this purpose as well. Given how close the decision was on the fairness of time shifting, it is far from clear that a majority of the Court would have ruled that developing a library of off-the-air tapes was protected under fair use. Yet observed behavior suggests that the general public's views on private copying are closer to the Supreme Court's general pronouncement on private copying, rather than its precise ruling in the case. Among some rights holders, the *Sony* decision remains unpopular. The *Intellectual Property and the National Information Infrastructure* (IITF, 1995) white paper interpreted the *Sony* decision as holding that home taping of programs was fair use because owners of copyrights in these programs had not yet devised a licensing scheme to charge for these uses. Although nothing in the Court's decision provides direct support for this view, subsequent case law developments have considered the availability of licensing as a factor in deciding whether certain educational or research copying was outside fair use.¹⁶ Meanwhile, the Internet and related technology have increased the ease of and demand for private copying, which is likely to influence future case law.

The Wide Range of Private Use Copying

There is much disagreement on the lines separating legal and illegal private uses. One reason it is difficult to make judgments on the legality of private use copying is that the act encompasses a wide range of actions. Closer to the clearly infringing end of the spectrum, for example, is the practice of "borrowing" a software disk from a friend and loading a copy of the software onto one's hard drive without paying for it. This action may be private in the sense that it occurs in one's own home, and non-commercial in the sense that the copy does not enter the market in direct competition with the firm that developed the software. But defending this kind of action as a fair use would be difficult, given the harm that it arguably could have on the market for the software by reducing future sales.¹⁷ Such an instance might present a meaningful likelihood of harm

¹⁶For example, see *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D. N.Y. 1991), which ruled that it was not fair use to photocopy book chapters and articles for academic course packs, and *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995), which ruled that it was not fair use for a commercial research scientist to make archival copies of articles relevant to his research.

¹⁷Although harm to the market is not necessary to establish copyright infringement, it is an important factor weighing against fair use. The phrase "could arguably" is used in the text because there is not a consensus on the effects of copy protection on the software

to the market that could cause the *Sony* presumption of fairness of private, noncommercial copying to be overcome.

Closer to the middle of the spectrum, at least in the view of much of the public, is making an audiotape of a music CD—for which one has paid the full price—to be able to listen to it as one drives or walks home from work. This view recently found favor with a federal appellate court, which opined that place shifting of this sort was as much fair use as the time shifting in the *Sony* case.¹⁸ Closer to the noninfringing end of the spectrum is making one photocopy of a favorite cartoon or poem to share with a friend or post on an office wall.

In the context of academic research, a wide variety of so-called private use copying occurs. Some of these actions are more clearly fair use than others; some may not, in fact, represent fair uses, even if the copy maker sincerely believes they are. Academic “private use” copying includes hand-copying of quotes from a book or article for research; photocopying of portions of a work for the same purpose; cutting and pasting from an electronic version of a work for the same purpose; making a copy of one’s own articles in order to have a complete file of one’s writings (a potential act of infringement if the scholar has assigned copyright to the publisher); making copies to send out to reviewers to enable them to assess one’s work for tenure; making a copy of an article from one’s own copy of a journal so that the copy can be carried into the laboratory and the journal itself kept from possible damage in the laboratory work environment; making a copy of an article to share with a colleague at another institution with whom one is working on a research project; making a similar copy for a graduate student who can’t afford to buy his own copy of the journal; doing the same, but instead from a library copy of the journal; and developing an archive of materials on a subject for research purposes, just to name a few. These kinds of uses are widely perceived in the academic community as fair uses. At least some of them are considered by some rights holders to go beyond fair use. Of particular concern to publishers are interlibrary loan, document delivery, and electronic course reserve practices in the academic context (the electronic analogue to materials on reserve in a library reading room).

Also complicating resolution of the private-use-as-fair-use dilemma is the fact that the boundaries of “private use” as a category are far from clear. What does “private” mean in the context of certain acts of copying? What does “noncommercial” mean when paired with “private” in the

market. See, for example, “The Economics of Software Copyright Protection and Other Media” (Shy, 1998) and the references contained in the article.

¹⁸*RIAA v. Diamond/Multimedia*, F.3d (9th Cir. 1999). Also see “In Court’s View, MP3 Player Is Just a ‘Space Shifter,’” Carl S. Kaplan, *New York Times on the Web*, July 9, 1999.

context of these copies? In the *American Geophysical Union v. Texaco* case, Texaco claimed that the photocopying of articles from certain technical journals by one of its research scientists was a private act, and that it was noncommercial because these copies did not enter the market. The majority court opinion in *Texaco* gave little credence to either claim, although it did not find the commercial nature of Texaco's research projects to be dispositive either. Yet many people seem to consider private use as a very wide privilege, covering everything from photocopies made for one's civic group to a picture of one's favorite celebrity scanned for posting on a Web site.

As a way of providing readers of this report with a better understanding of the competing perspectives about the legality of private use copying, the next two sections present, first, the arguments that private use copying is never or virtually never fair use and, second, the arguments that private use copying is always or virtually always fair use.

Arguments That Private Use Copying Is Not Fair Use

Some rights holders would argue that private use copying is not fair use. A legal argument in support of this position could be based on the fact that copyright law gives rights holders the exclusive right to control the reproduction of their works. Unlike a number of other exclusive rights in the U.S. statute, the right of reproduction is not necessarily restricted to public activities. Rights holders may be entitled to control only "public" performances or displays of protected works, but when the issue of a private use exception to the reproduction right was raised in the legislative debate leading up to the enactment of the Copyright Act of 1976, Congress chose not to pursue this. Although Congress chose to adopt some specific exceptions to the reproduction right to respond to concerns of libraries and archives, it decided that private use should be dealt with in the context of fair use. The fair use provision of U.S. copyright law envisions mainly "transformative" uses of a protected work as fair (e.g., quoting from a work in order to criticize it in a second work). Private use copying, by contrast, is generally regarded as "consumptive" in character (e.g., use of the work so as not to be put to the trouble of paying money for it). In order for either type of use to be "fair," it must meet the four-factors test, and it may be difficult for "consumptive" private use copying to satisfy the fair use standards.¹⁹

Although there may have been a time when private copying was a minor matter, the widespread use of digital information and networks

¹⁹See footnote 13.

has created increased opportunities for ordinary people to engage increasingly in acts of infringement that are difficult to detect, yet mount up. The availability of this technology has bred a mind-set that seems to regard all copyrighted works as available for the taking without paying compensation. To counteract the seemingly widespread view that private use copies are lawful, it may be necessary to establish a counter-principle that private use copies are not lawful, and, as the argument goes, to use all means necessary within reason to regain control of commercially valuable properties.

An important part of the argument that private use is not necessarily fair use is the position that fair use is a defense against charges of infringement, not an affirmative right possessed by members of the public.²⁰ This argument maintains that the copyright law is clear in giving authors certain exclusive rights, subject to specific enumerated exceptions. Beyond these specific exceptions, the four factors used to determine fair use become the defense when a use is challenged and do not define affirmative rights. Most who take this position believe that there is no absolute right of public access to material still under copyright. The vagueness of the notion of “publish” and “publication” in an electronic environment adds to the issues of concern. Does the electronic distribution of a work to a controlled list make the work “published”? And, if so, is there then some automatic right for public access? Most rights holders would say no.

Arguments That Private Use Copying Is Fair Use

The views of those who regard private use as always or virtually always fair use stand in stark contrast to the views set forth above. Arguments that private use copies generally fall within the realm of fair use are based on the Supreme Court’s finding in the *Sony* case that private, non-commercial copying should be presumed to be fair, as most often it is. Those taking this position argue that many private copies are made for limited purposes, on an occasional basis, and that they do not displace sales of commercial products. As the Supreme Court indicated in the *Sony* case, “A use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create. The prohibition of

²⁰The idea that fair use could be construed as an affirmative right is very controversial. One of the reviewers of this report calls such a notion “absurd,” while another reviewer states that “fair use has evolved strictly as a defense.” Some legal scholars, such as William Patry, agree with these reviewers. However, some prominent legal scholars, such as Julie Cohen, David Nimmer, and Pamela Samuelson, do consider fair use to have a more affirmative character.

such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.”²¹

The argument favoring private use is based in part on a claim of market failure: The licensing revenue from private use copying is likely to be low compared to the transaction cost of negotiating a license for each such use. If this is true, it may be difficult to establish a meaningful likelihood of harm from private use copying.²² Hence, there may still be some room for a transaction-cost-based market failure rationale for treating private use as fair use. In addition, many copies made for private use either have no economic significance or can be justified because of special circumstances (e.g., to enable research or to fulfill other valued purposes). Even where private use copies are economically significant and no special circumstances justify the copying, the costs of enforcement against private users may be far greater than can be economically justified. (Rights holders may argue that this is their business decision to make.)

In addition, many private use copies are made by people who have purchased both the work they are copying and many other copyrighted works (e.g., making a tape of music on a CD to play in one’s car). Consumers may believe that the price they paid for their copies of copyrighted works implicitly reflects the rights holder’s understanding that some consumers will make private use copies of them.²³ A lawsuit against such individuals over private use copying may reduce business both from those customers and from others who may sympathize with them. The publicity from such a lawsuit would be a public relations nightmare. While publishers may again regard this as their business decision, as a practical matter, the public may sense that rights unenforced are rights abandoned.²⁴

Some private use advocates also believe that what one does with a copy of a copyrighted work in the privacy of one’s own home is simply none of the copyright owner’s business. There would be substantial societal costs in establishing an enforcement system that reached into the privacy of people’s homes and forced them to show sales receipts or licenses for all the information they possess. The resulting system would

²¹464 U.S. 417 (1984).

²²There is less of a market failure rationale if, instead of negotiating a license, the consumer can buy a second copy easily and inexpensively.

²³Economists point out that consumers may be willing to pay higher prices for goods if they can be reused, shared, or copied for some purposes. See Shapiro and Varian (1998), p. 98.

²⁴There are also, of course, some people who make so-called private copies that they know to be illegal and infringe because they either don’t think they’ll get caught or they disagree with private ownership rights in intangible works.

likely produce even more negative public reaction than would arise from suing private use copiers. Some leakage of copyrighted works may be part of the price of living in a free society.

Advocates of private use copying are among those who would tend to consider fair use to be a "right" to which the public is entitled once a copyright owner has disseminated her work to the public. Even if the fair use provision is structured as a defense to copyright infringement, once a defense is successful, it may seem to establish a right on the part of the user and other individuals to engage in this sort of act. For example, other software companies benefited from the ruling of the Ninth Circuit Court of Appeals when the court decided that *Accolade, Inc.*, had made fair use of Sega's software when it decompiled the code in order to discern elements of the Sega program interface so that *Accolade* could make a compatible program.²⁵ Decompilation to achieve interoperability thus came to be perceived as a right. It is argued that there is a historical lineage to the view that the law grants rights holders only certain limited rights for a limited time, while reserving to the public all other rights, including arguably, the right to make fair uses of works. The Supreme Court's decision in *Campbell v. Acuff-Rose* recognizes that leaving some room for fair use is often necessary if copyright law is to achieve its constitutional purpose of promoting knowledge.²⁶ Some copyright scholars regard fair use as such a strong right that it overrides contractual provisions or technical protection services aimed at eliminating fair use.²⁷

Private Use Copying: The Committee's Conclusions

This report cannot resolve the debate over private use copying. However, it may contribute to a better understanding of the dilemma by articulating the widely divergent positions on this and other issues. The committee as a whole does not endorse the view that all private use copies are illegal or the view that all private use copies are legal. It agrees that private use copying is fair use when, for example, an academic researcher makes a photocopy of a scientific article in the course of her research. However, the committee also agrees that copying a commercial software product from a friend for regular use without payment to the software publisher cannot be justified as fair use. In addition, the committee believes that the view is too prevalent that private use copying is virtually always fair use and agrees that it is often invoked to mask activi-

²⁵*Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992).

²⁶114 S. Ct. 1164 (1994).

²⁷See, for example, Nimmer et al. (1999) and Cohen (1998).

ties that, in the plain light of day, cannot be justified as fair uses. The committee also believes that copyright education should be undertaken to raise public consciousness about why respect for copyright is a good thing for society, not just for rights holders. Progress would be made if members of the public at least considered the question of whether the copying they do is justifiable or not.²⁸

The Future of Fair Use and Other Copyright Exceptions

As with private use copying, diverse views exist about the future of fair use and other exceptions and limitations on copyright owners' rights in digital networked environments. The *Intellectual Property and the National Information Infrastructure* (IITF, 1995) white paper, for example, predicted a diminishment, if not the demise, of fair use in the digital realm because it concluded that rights holders would license uses and copies of digital information, and predicted that fair use would become unavailable when uses could be licensed.²⁹ Uses that might once have been considered fair, and that have even become customary, may become illegal if the white paper's conclusions become reality and a licensing scheme is put in place to regulate digital uses. Judging whether a use is "fair" involves (among other things) consideration of the impact of the use on the market; where there is no market (e.g., no pragmatic way to negotiate and pay for the right to quote a report), there is no market impact. But where licensing schemes do exist, there is a market and, hence, a chance for market impact, and consequently a potential diminishment of the territory formerly considered as fair use.

The committee came to perceive that fair use and other exceptions and limitations may sometimes have other beneficial functions as applied to digital information. It is obviously for the legislature and the courts to determine how broad or narrow fair use can be and what other exceptions should apply in the digital environment. However, it may further inform debate on these issues for this report to discuss some functions that fair use and other exceptions and limitations might play in the world of digital information. The report briefly discusses seven of the categories into which exceptions and limitations to copyright owners' rights seem generally to fall, and considers how each might arise in the digital environment:

²⁸Some understanding of copyright is considered to be a basic element of "fluency" with information technology. See *Being Fluent with Information Technology* (CSTB, 1999a).

²⁹For example, see *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1995) aff'g 802 F. Supp. 1 (S.D. N.Y. 1992); accord, *Princeton Univ. Press v. Michigan Document Serv.*, 99 F.3d 1381 (6th Cir. 1996) (en banc).

- Those that are based on fundamental human rights;
- Those that are based on public interest grounds;
- Those that arise from competition policy;
- Those that promote flexible adaptation of the law to new circumstances;
- Those that arise from perceived market failures;
- Those that are the fruit of successful lobbying; and
- Those that cover situations in which uses or copying of protected works are de minimis, incidental to otherwise legitimate activities, or implicitly lawful given the totality of circumstances.

A number of fundamental human rights might provide a basis for a limited exception to copyright owner rights, including freedom of speech, freedom of the press, freedom of expression, freedom of information, democratic debate, and privacy or personal autonomy interests. A literary critic for a print magazine, for example, can republish a portion of another author's work in order to develop her critique of that author's work. A reporter for a print newspaper can publish some portions of a politician's speech in order to show the errors it contains. Copyright laws in some countries have specific "rights of fair quotation" to provide for legitimate copying for purposes of criticism and news reporting. In the United States, these concerns are generally dealt with through the fair use doctrine. Given the robustness of criticism, news reporting, and public debate on the Internet, it would seem that fair quotation/fair use rules would likely have some application in the digital world, just as they do in the print world.

Public interest exceptions to copyright vary to some degree from country to country. Among those that could arise under the laws of the United States and some other nations are those that permit performance of copyrighted works in the course of face-to-face instruction in nonprofit educational settings; those that enable libraries and archives to make copies for preservation, replacement, and other legitimate purposes; and those that enable the creation of derivative works for the blind. It is worth noting that the Digital Millennium Copyright Act seeks to maintain an appropriate balance between the rights of rights holders and the needs of others and contains a provision to enable libraries and archives to make digital, as well as print and facsimile, copies for these purposes. It also mandated a study to help Congress consider what copyright rules might be appropriate to promote distance learning.³⁰ Fair use may sometimes be invoked on public interest grounds to justify some copying of copy-

³⁰See *Report on Copyright and Digital Distance Education*, a report of the Register of Copyrights (U.S. Copyright Office, 1999).

righted articles in legal proceedings (e.g., as evidence relevant to a contested issue of fact) or to satisfy some administrative regulatory requirements (e.g., to demonstrate the efficacy of drugs).

Competition policy concerns underlie some exceptions to and limitations on copyright owners' rights.³¹ Two examples of competition policy-based limitations in U.S. law are rules that impose compulsory licenses on owners of musical copyrights to enable further recordings of those musical works and on owners of rights in broadcast signals for passive retransmissions of the broadcasted material by cable systems. The U.S. fair use defense is sometimes employed to promote competition policies, as in the *Sega v. Accolade* case, which upheld the legality of unauthorized decompilation of computer programs for the legitimate purpose of developing a compatible but noninfringing program. As the *Sega* case demonstrates, competition policy issues may arise at times when information is in digital form.

In times of rapid technological change, it may be difficult for legislatures to foresee what new technologies will arise, how they will be used, and what copyright rules ought to apply. Courts in the United States have often employed the fair use doctrine as a flexible mechanism for balancing the interests of rights holders and of other parties in situations in which the legislature has not indicated its intent. These include not only the *Sony v. Universal City Studios* decision about home taping of television programs for time-shifting purposes, but also a number of cases involving digital information. These include the *Galoob v. Nintendo* case, which upheld Galoob's right to distribute a "game genie" that enabled users to make some temporary alterations to the play of certain Nintendo games,³² and the *Religious Technology Center v. Netcom* case in which automatic posting of user-initiated Internet messages by an online service provider was found to be fair use.³³

Exceptions and limitations may arise from a perceived possible market failure. One argument for fair use may be that a market cannot effectively be formed when the transaction costs of negotiating a license far outweigh the benefits derivable from the transaction (whether they be licensing revenues or some other benefit, such as enhanced reputation or goodwill). To the extent that a fair use defense arises, at least in part, from market failure considerations, the scope of the fair use may be affected by changed circumstances that enable new markets to be formed effectively. As noted above, this view is expressed in the *Intellectual Property and the*

³¹In some circumstances, ensuring that the public policy underlying the free marketplace is effective may compel restrictions on the rights of rights holders.

³²*Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992).

³³907 F. Supp. 1361 (N.D. Cal. 1995).

National Information Infrastructure (IITF, 1995) white paper, specifically in relation to the digital environment. To some degree, the exception aimed at promoting publication of works for visually impaired persons reflects market failure, as well as public interest, considerations.

Finally, some exceptions and limitations to copyright owners' rights would seem to be the result of successful lobbying or of a legislative perception of the de minimis or incidental character of a use. In Italy, for example, military bands are exempt from having to do rights clearances for music they perform in public. In the United States, a number of exceptions, such as those creating special copyright privileges for veterans' groups, are the result of successful lobbying. Whether they can be justified on de minimis grounds or are pure pork barrel politics is perhaps debatable. Better examples of de minimis or incidental uses for which special copyright exceptions have been created are those in the Digital Millennium Copyright Act, which provides some "safe harbor" rules for certain copies in the digital environment, such as those made in the course of a digital transmission from one site to another where the transmitting intermediary (e.g., a telephone company) is merely a conduit for the transmission and not an active agent in it.³⁴ It is conceivable that other such exceptions will need to be devised for incidental digital copying in the future, or that fair use law will be used to exempt incidental or de minimis copying.

During the course of its deliberations, the committee became aware that exceptions to and limitations of the rights of copyright owners may be an area of contention in coming years, particularly in light of the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994. Among other things, Article 13 of the TRIPS agreement obligates member states of the World Trade Organization not to adopt exceptions or limitations except "in certain special cases that do not conflict with a normal exploitation of the work or otherwise unreasonably prejudice the interests of the rights holders."³⁵ The U.S. Congress will need to keep TRIPS obligations in mind when it contemplates adopting new exceptions and limitations to copyright law, including those that might apply to digital works. Judicial interpretations of exceptions and limitations will also need to be consistent with TRIPS obligations.

³⁴ 17 U.S.C. sec. 512.

³⁵ Final Act Embodying the Result of the Uruguay Round of Multilateral Negotiations, Marrakesh Agreement Establishing the World Trade Organization, signed at Marrakesh, Morocco, April 5, 1994, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), article 13.

IS “COPY” STILL AN APPROPRIATE FUNDAMENTAL CONCEPT?

All of the preceding discussion accepts a fundamental perspective that underlies copyright, namely, the concept of copying as a foundational legal and conceptual notion. As the very name of the law indicates, the right to control the reproduction of works of authorship is central to the law. Deciding whether a work has been copied has, as a result, been a fundamental question underlying much of copyright history and analysis.

The committee considers here whether the notion of copy remains an appropriate mechanism for achieving the goals of copyright in the age of digital information, exploring two reasons why it might not be.³⁶ One reason is that so many noninfringing copies are routinely made in using a computer that the act has lost much of its predictive power: Noting that a copy has been made tells far less about the legitimacy of the behavior than it does in the hard-copy world. A second reason is that, in the digital world copying is such an essential action, so bound up with the way computers work, that control of copying provides, in the view of some, unexpectedly broad powers, considerably beyond those intended by the copyright law.

This issue is clearly controversial, with some on the committee noting that, precisely because the digital world facilitates making an unlimited number of copies without degradation in quality, protection against copying must remain a *sine qua non* of copyright protection. In raising the issue, the committee is attempting to open the discussion to serious consideration of whether this foundational concept ought to be reconsidered in the world of digital information; the committee makes no recommendation other than that such discussion would be useful.

Control of Copying

The control of copying provided for in copyright law is a means to an end. The ultimate goal of intellectual property policy and law is promoting progress of science and the arts, achieved in large measure by providing incentive to authors and inventors, in the belief that society as a whole will in time benefit from their efforts. Historically, control of copying has been a key means of providing incentive, because it has given authors and publishers control over the use of their work. Control of copying provides rights holders who wish to profit from their work the means to require payment for its use, and offers valuable incentive to those whose reward comes from seeing their work published and distributed in ways they deem appropriate, even if economic reward is not their aim.

³⁶The committee acknowledges the reviewer who suggested that the committee should deliberate this question.

But control of reproduction is the mechanism, not the goal. To see this, note that loss of control, for example, unauthorized reproduction, is in principle neither necessary nor sufficient to erode an author's incentive. Unauthorized reproduction is not by itself a sufficient disincentive. Consider the situation in which someone makes 500 copies of a work but does nothing with them other than store them or use them for fireplace kindling. Would this have any effect on the rights holder's interest in and incentive for creating subsequent works?

Nor is unauthorized reproduction in principle necessary for disincentive. Disincentive can arise without reproduction, as implicitly recognized in the copyright law's provision for an exclusive right to public performance (e.g., for movies, music, plays, dance). Even assuming no audio or video copy is ever made, unrestrained public performance can have adverse consequences on the market for the work and consequently produce disincentive for the rights holder. The right of public display is similar: In the absence of this right, incentive would be damaged even if no copies were made.

Hence, unauthorized reproduction, by itself, is neither necessary nor sufficient to discourage authors. Its significance lies in what it enables—misuse of a work (e.g., unauthorized distribution)—not in the action of reproduction itself. In addition, the very fact that copyright law specifies the rights holder's exclusive control over performance and display, as well as copying, underscores the central role of copying as one mechanism for protection of intellectual property through copyright, not its goal.

Note that in analyzing an act of unauthorized reproduction under current law, we need not ask what consequences that reproduction has for the rights holder in order to determine its legality; the law specifies an exclusive right to reproduction (within limits such as fair use). The issue addressed here is why the law was written to make it so. The claim is that control of reproduction is the means, not the end. If this is so, then it makes sense to ask whether the means is still appropriate in the world of digital IP, and, if it is not, whether there is a viable alternative that can accomplish the same goals more effectively.

Is Control of Copying the Right Mechanism in the Digital Age?

Control of reproduction may not be an appropriate mechanism to support copyright where digital information is concerned. Consider that control of copying has worked so well in practice through much of the history of copyright because of two important properties of copying a physical object. First, in the world of physical works, copying is an explicit and overt act, carried out with specific intent; one does not acciden-

tally or incidentally copy an entire book. Second, copying is a prerequisite to distribution; before you can sell copies, you have to make them.

In the world of physical artifacts, making a copy, of a book for example, requires an explicit, carefully selected action that has one goal and one obvious result—a copy of the book. There are, in addition, few reasons in the physical world to reproduce an entire work, other than to make a copy that can substitute for an original and, hence, potentially harm the rights holder. In the physical world, the focus on reproduction is thus effective and appropriate, because there is an intimate connection between reproduction and consequences for the rights holder, namely, substituting the copy for the original.

One important consequence of these observations is that, in the world of physical artifacts, reproduction is a good predictor: The act is closely correlated to other actions, such as distribution, that may harm the rights holder and reduce incentive. A second consequence is that, because reproduction is routinely necessary for distribution (and thus exploitation of the work), control of reproduction is an effective means, a convenient bottleneck by which to control exploitation of the work. Finally, because reproduction is not necessary for ordinary use of the work (e.g., reading a hard-copy book), control of reproduction does not get in the way of intended consumption of a work (i.e., reading it).

All of these consequences are false in the digital world: Reproduction is a far less precise predictor of infringement, control of reproduction is a problematic means of controlling exploitation that in some circumstances has important side effects, and reproduction is necessary for ordinary consumption of the work.

Reproduction is not a good predictor of infringement in the digital world because there are many innocent reasons to make a copy of a work, copies that do not serve as substitutes for the original and hence have no impact on the rights holder. For example, as noted in Chapter 1, digital works are routinely copied simply in order to access them. Code must be copied from the hard disk into random access memory in order to run a program, for example, and a Web page must be copied from the remote computer to the local computer in order to view it. More generally, in the digital world, access requires copying.

The numerous ways in which copies get made in the digital world also cloud the question of whether a copy (in the legal sense) has been made. Arguments have arisen, for example, as to whether the copyright in a work can be infringed by the two actions noted above—copying a program from the disk into random access memory to run it and accessing a Web page from another computer. In both cases the information has been copied in the technical sense, but it is unclear whether this constitutes legal infringement.

One consequence of this difference in the digital world is the many discussions that have occurred concerning what kinds of copies to care about, as, for example, the calls for distinguishing between ephemeral and permanent copies, and the discussions that attempt to determine what is sufficiently ephemeral not to matter. Although it has some technical justification, this approach to dealing with the ubiquity of copying in the digital world is not particularly reliable, because, among other reasons, ephemeral copies are at times easily captured and turned into persistent copies, and because, as technology evolves, the list of ephemeral types will become obsolete very quickly.

In the digital world, then, reproduction of many sorts is a common, indeed technologically necessary, action with fundamental technical justification, frequently innocent of any infringement intent or effect. As making those technologically necessary copies is the means of gaining access to the work, such copying is in fact the fundamental mechanism by which a rights holder exploits the work in the digital world.

As a result, the action loses much of its predictive quality. Reproduction is far less tightly linked to a loss of incentive for rights holders. And if this is true, controlling reproduction in the digital world may fail to serve nearly as well as it does in the hard-copy world as a means of achieving the ultimate goals of intellectual property policy. The focus on reproduction also produces debates that may not be particularly revealing or useful, for example, the question posed above about whether accessing a Web page involves making a copy and hence can constitute an infringement of copyright.

But the problem is larger than that. Control of reproduction in the digital world may not be an appropriate means of protecting rights holders. In that world, reproduction is so bound up with any use of digital information that true control of reproduction would bring unprecedented control over *access* to information. In the world of physical works, once a work (e.g., a book) has been published, the rights holder cannot in any pragmatic sense control access to the copies distributed. Social institutions (such as bookstores and libraries) and individuals with copies enable any motivated reader to gain access to the information in the work.³⁷

But when access requires reproduction, as it does for works in digital form, the right to control reproduction is the right to control access, even the access to an individual copy already distributed.³⁸ We do not expect

³⁷Note that access here is meant in the limited sense of reading; rights holders clearly maintain control over the distribution and sale of copies of the work.

³⁸For digital works, access requires reproduction even for an individual copy that has already been published, i.e., reproduced and distributed. For example, an authorized individual copy of a musical work (e.g., an MP3 file) must be reproduced (once again) in order to be heard.

that authors would routinely deny access to their published digital works; why else would they have written and published them, if not to offer some form of access? The point is that while in the hard-copy world the rights holder can control access to the work as a whole by delaying publication or restricting the number of copies that may be made, in the digital world access requires reproduction, so control of reproduction provides control of access to individual published copies. Because control of access to individual published copies was not conceived of as part of copyright, this control is not to be embraced lightly, whether or not routinely exercised by authors or other rights holders.

To summarize, two points are important here. First, in the digital world reproduction loses much of its power as a predictor of important consequences, and hence the question of whether a protected work has been copied may be considerably less important. Second, in the digital world control of reproduction is a blunt instrument whose impact reaches considerably beyond the original intent, bringing into question its use in accomplishing the goals of intellectual property law.

What Can Be Done?

Rather than engage in epicycle-like debates over how ephemeral a copy has to be before it fails to matter, the committee suggests asking whether it might be appropriate to replace copying as a benchmark concept. Considering that control of reproduction is a means, not the goal, can we find some other means of control that is more tightly connected to the goal, whether in the digital or analog world? This will not easily be done, but the committee makes an attempt here solely for the sake of opening the discussion and promoting serious consideration of the issue; the committee makes no recommendation other than that discussion should be initiated.

As above, the committee suggests viewing control of reproduction as a mechanism aimed at preventing uses of a work that would substantially reduce an author's incentive to create. The committee speculates that it may be useful to start from what the law is attempting to achieve—ensuring progress in the sciences and arts—and ask whether a use being made of a work is substantially destructive of a common means of achieving that goal, namely, providing incentive to authors. This approach is similar in overall spirit to the concept of fair use, which requires consideration of (among other things) the impact on the market for the work or on the value of the work. But it is somewhat broader in scope, as incentive arises for authors in more than the marketplace alone, coming as well from, for example, the ability to control the time, place, and manner of publication.

This view would not conflict with all of the (other) traditional exclu-

sive rights in copyright. Creation of derivative works, distribution, public performance, and display of the work can all be conceived of and protected on grounds independent of whether a copy has been made. They also have evident impact on incentive, whether via economic effects in the marketplace or other factors, and hence would be consistent with an incentive-based analysis.

Any such substantial change would of course also bring problems. There would have to be a substantial period of familiarization, as individuals and courts become knowledgeable about the concept and better able to define its currently quite vague boundaries. There would also be the tension between trying to make such a law easier to follow by drawing a sharp line defining what constitutes incentive-destroying use, and keeping the criteria more general (as is the case for fair use) in order to permit the concept to handle new, unanticipated situations in the future.³⁹

As the committee discovered, tackling this task would also be difficult because of how highly charged the issue is. The thought of basing copyright on something other than the notion of control of reproduction is viewed with dismay by some in the legal community, given how long and largely successfully it has stood as a central pillar of copyright law and scholarship.⁴⁰ Finally, the focus on reproduction also offers a simple mechanism—the first-sale rule—that underlies a number of important social institutions (e.g., libraries); removing the reliance on copy would require a new legal framework for their operation. The needs of these and other stakeholders would have to be carefully considered in any change.

Despite the expected difficulty of the task, the committee believes that it may prove revealing theoretically as well as useful pragmatically in the digital age to undertake this exercise in rethinking copyright protection without the notion of a copy.

ADDENDUM: SECTIONS 106, 107, AND 109 OF THE U.S. COPYRIGHT LAW

The three sections of the U.S. copyright law that relate most directly to the conduct of members of the general public are reproduced in this addendum: the exclusive rights of the copyright proprietor embodied in section 106, the four factors to be analyzed and balanced in evaluating fair

³⁹While this would be no small undertaking, the legal system has successfully struggled with such tasks in the past, as, for example, elucidating over time the distinction between “idea” and “expression.”

⁴⁰For example, committee deliberations on this subject were extremely intense.

use under section 107, and the first-sale doctrine embodied in section 109.⁴¹

106 Exclusive rights in copyrighted works*

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) 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;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

106A Rights of certain authors to attribution and integrity[†]

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

- (1) shall have the right—
 - (A) to claim authorship of that work, and
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutila-

⁴¹This material was obtained from the Web site of the U.S. Copyright Office at <<http://www.loc.gov/copyright/>>. It is intended for use as a general reference, and not for legal research or other work requiring authenticated primary sources.

*Section 106 was amended by the Digital Performance Right in Sound Recordings Act of November 1, 1995, Pub. L. 104-39, 109 Stat. 336, which added paragraph (6).

[†]A new section 106A was added by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128. The act states that, generally, it is to take effect 6 months after the date of its enactment, that is, 6 months after December 1, 1990, and that the rights created by section 106A shall apply to—(1) works created before such effective date but title to which has not, as of such effective date, been transferred from the author, and (2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3)) of any work that occurred before such effective date.

tion, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) SCOPE AND EXERCISE OF RIGHTS.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.

(c) EXCEPTIONS.—

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is a result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) DURATION OF RIGHTS.—

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) TRANSFER AND WAIVER.—

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

107 Limitations on exclusive rights: Fair use*

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a 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

(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Section 107 was amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5128, 5132, which struck out "section 106" and inserted in lieu thereof "sections 106 and 106A." Section 107 was also amended by the Act of October 24, 1992, Pub. L. 102-492, 106 Stat. 3145, which added the last sentence.

109 Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord*

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

(1) the date of the publication in the *Federal Register* of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.[†]

(b)(1)(A) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the pos-

*Section 109 was amended by the Act of October 4, 1984, Pub. L. 98-450, 98 Stat. 1727, and the Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194. The 1984 Act redesignated subsections (b) and (c) as subsections (c) and (d), respectively, and inserted after subsection (a) a new subsection (b).

The earlier amendatory Act states that the provisions of section 109(b) “shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before . . . [October 4, 1984], to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act.” It also states, as modified by the 1988 amendatory Act, that the amendments “shall not apply to rentals, leaseings, lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring after the date which is 13 years after . . . [October 4, 1984].”

Section 109 was also amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, 5135, which added at the end thereof subsection (e). The amendatory Act states that the provisions contained in the new subsection (e) shall take effect 1 year after the date of enactment of such Act, that is, 1 year after December 1, 1990. The Act also states that such amendments so made “shall not apply to public performances or displays that occur on or after October 1, 1995.” See also footnote 22, Chapter 1.

[†]Section 109(a) was amended by the Uruguay Round Agreements Act of December 8, 1994, Pub. L. 103-465, 108 Stat. 4809, 4981, which added the second sentence.

session of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

(B) This subsection does not apply to—

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title.

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, “antitrust laws” has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a

criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.*

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.[†]

(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.

*Section 109(b) was amended by the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5134, in the following particulars: a) paragraphs (2) and (3) were redesignated as paragraphs (3) and (4), respectively; b) paragraph (1) was struck out and new paragraphs (1) and (2) were inserted in lieu thereof; and c) paragraph (4), as redesignated by the amendatory Act, was struck out and a new paragraph (4) was inserted in lieu thereof. The amendatory Act states that section 109(b), as amended, "shall not affect the right of a person in possession of a particular copy of a computer program, who acquired such copy before the date of the enactment of this Act, to dispose of the possession of that copy on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before such date of enactment." The amendatory Act also states that the amendments made to section 109(b) "shall not apply to rentals, leaseings, or lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring on or after October 1, 1997." However, this limitation, set forth in the first sentence of section 804 (c) of the amendatory Act [104 Stat. 5136], was subsequently deleted by the Uruguay Round Agreements Act of December 8, 1994, section 511 of which struck the above mentioned first sentence in its entirety. See Pub. L. 103-465, 108 Stat. 4809, 4974. See also footnote 20, Chapter 1.

[†]The Act of November 5, 1988, Pub. L. 100-617, 102 Stat. 3194, made technical amendments to section 109(d), by striking out "(b)" and inserting in lieu thereof "(c)" and by striking out "coyright" and inserting in lieu thereof "copyright."