

# THE COPYRIGHT PRINCIPLES PROJECT: DIRECTIONS FOR REFORM

*Pamela Samuelson and Members of The CPP<sup>†</sup>*

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<sup>†</sup> This article was jointly authored by the members of The Copyright Principles Project (The CPP), including the group's convenor, Pamela Samuelson (Berkeley Law School). For a complete list of authors, see page 1180, *infra*. The CPP also benefited from visits with Marybeth Peters, the Register of the U.S. Copyright Office, the Honorable Margaret McKeown, Ninth Circuit Court of Appeals Judge, and Professor Molly van Houweling, Berkeley Law School, as well as from discussions with Paul Geller and Randall Davis. Thomas Kearney provided support for the CPP at most meetings.

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### **PREAMBLE**

Copyright law performs a number of important functions. It facilitates public access to knowledge and a wide range of uses of creative works of authorship, and, in so doing, it helps educate our populace, enrich our culture, and promote free speech, free expression, and democratic values. It provides opportunities for rights holders to recoup investments in creating and disseminating their works and to enjoy the fruits of whatever success arises from the public's uses of their works. In the process, copyright also plays a role in regulating new technologies and services through which creative works may be accessed.

A well-functioning copyright law carefully balances the interests of the public in access to expressive works and the sound advancement of knowledge and technology, on the one hand, with the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other. Copyright law should enable the formation of well-functioning markets for creative and informative works that yield benefits for all stakeholders.

At this level of generality, agreement is easy to reach. Disagreements tend to arise over how to implement these goals in statutory language and actual practice.

The Copyright Principles Project (CPP), whose Report appears below, was formed in 2007 out of a collective sense among its members that although copyright law today works reasonably well in some domains, it can be improved and should be refined in light of dramatic technological advances. The twenty people who joined the CPP have various kinds of expertise and experience with copyright law and policy. Among us are law professors, lawyers from private practice, and lawyers for copyright industry firms. The goal of the CPP was to explore whether it was possible to reach some consensus about how current copyright law could be improved and how the law's current problems could be mitigated.

Copyright law is, for many reasons, under considerable stress today. The most obvious and perhaps most significant source of this stress is the radical transformation of public access to information that has been brought about by changes in computing and communications technologies and accessibility of information through global digital networks. The Internet and World Wide Web, in particular, have destabilized many copyright industry sectors as the economics of creating, publishing, and disseminating information-rich works have dramatically changed. New business models have not always proven successful. It may take some time and patience to allow disrupted copyright sectors to consider, experiment with, and develop other or more refined models and approaches with which they will be reasonably comfortable.

One important development has been the phenomenal growth and profusion of user-generated content. Copyright has, of course, always touched and enriched untold ordinary people, as well as specialists, by fostering the provision of entertainment, education, and other information goods and services, but until recently copyright law was relatively invisible to the general public. Amateurs as well as professional artists and authors are now encountering copyright issues on a regular basis. Copyright rules implicate many daily activities of ordinary people. Copyright has thus suddenly become significant not only to industry insiders who are steeped in this law's complexities, but also to the millions of people who access information on the Internet and who often share this information with others.

Another important development has been the widespread use of peer-to-peer file-sharing technologies to exchange copies of copyrighted works, particularly music and movies. The willingness of millions of people to engage in such file-sharing has understandably frustrated the entertainment industry and generated a sense of crisis. Efforts to address this phenomenon through litigation have shut down some services and resulted in some compensation to rights holders, but the phenomenon itself has not abated. Efforts to encourage or require intermediaries, especially technology and telecommunications companies, to control or impede infringing activities have met with limited success.

There is, in addition, a more general problem that affects copyright law today: technological advances often pose questions that Congress did not and could not have anticipated in the mid-1970s when the last copyright reform effort reached fruition. Patchwork amendments to the copyright law since then have contributed further to the complexity of current copyright law. Due to this complexity, it has sometimes been difficult for judges to

glean the powerful normative principles that ought to illuminate how copyright law should be applied in particular instances.

At the outset of this project, we spent a considerable amount of time discussing the scope and objective of our efforts. We considered a range of possible outputs, from a simple statement of normative principles to the formulation of a detailed blueprint for comprehensive copyright reform. Although the group was broadly representative of different viewpoints and each of us had opinions about particular strengths and weaknesses of the existing copyright system, our ability to propose a substantial and comprehensive reform of U.S. copyright law was limited, partly because we met only three times a year for three years. We believe that we have succeeded in mapping the terrain of copyright law and policy and in articulating both where we agree and where and why we disagree about particular aspects of U.S. copyright law. We believe, moreover, that we have accomplished these objectives in a way that has avoided the climate of recrimination that has characterized so many copyright debates in recent years. The significance of this achievement should not be understated. We are not, however, in a position to offer a comprehensive and detailed set of reform proposals.

What can and should be done to address the difficulties that attend today's copyright law? There is, of course, no one "silver bullet" that can relieve all the stresses, maintain or renew public confidence in copyright, and bring calm to copyright industries disrupted by new technologies. CPP members are not uniformly of one mind about various steps that could lead to improvements. Some CPP members are relatively content with the existing legal framework, yet accept the desirability of making some adjustments to fix certain problems. Other CPP members believe that copyright law can only be saved by very substantial reforms that many copyright industry groups would regard as radical. These changes would include dramatically shortening copyright's duration, cutting back on the scope of protection, privileging private, non-commercial uses of protected works, and reinstating copyright rules that provide the public with better notice of copyright claims than the law today requires.

During the course of this project, some of us have generated ideas about broader reform proposals, but those ideas are not part of this group project. It is to be expected that future work by some of our members will explore those ideas and contribute further to a more general conversation that we think should occur about copyright reform.

The deliberations of the CPP on new ideas and perspectives on copyright law were conducted in the spirit of open discussion and dialogue. The views expressed in this Report are, however, those of the individuals involved; they

should not be ascribed to the members' institutions, organizations, clients, or employers. Individual participation in this project should, moreover, not be interpreted as an endorsement of each and every proposal discussed in this document. In fact, various members of the group maintain reservations and even objections to some proposals described as recommendations in this Report.

While various proposals elicited enough support within the group that it was deemed constructive to style them as recommendations, we do not intend affirmative statements or the use of phrases, such as "we recommend" or "we believe," to suggest that the group as a whole was uniformly in support of each particular view stated. It is a tribute to the collegiality of the group and our collective desire to foster a constructive dialogue about copyright law that there was enough agreement among us to set forth recommendations in this manner.

Despite our strong differences on some issues, CPP members have, over the course of three years, collectively decided that it would be beneficial to articulate some principles of a "good" copyright law, to analyze respects in which existing copyright law does or does not comport with these principles, and to recommend changes to copyright law that would bring it into greater conformity with the principles. Making changes recommended in this Report would overcome some dysfunctions we perceive in current law and put it on a sounder normative foundation. Even where we disagree, recording the nature of our disagreements could advance discourse on copyright issues by others. Some changes recommended in this Report can only be brought about by legislative action, while others can be accomplished through common law evolution. We hope that this Report will contribute to a wider and more effective conversation about how to improve copyright law and policy. We further hope that this Report will lead to follow-on activities to assess, refine, and implement our recommendations.

We end this preamble with one last observation. Too much discourse about copyright law in the past fifteen years has been burdened by rhetorical excesses and an unwillingness to engage in rational discourse with those having differing perspectives. The CPP has proven that it is possible for persons of good will with diverse viewpoints and economic interests to engage in thoughtful civil discourse on even the toughest and most controversial copyright issues. After three years of conversations, the CPP members all came away from this project believing that a better copyright law is possible. We hope our work will inspire others to imagine the same and bring that vision to fruition.

The following persons are members of the Copyright Principles Project:

Pamela Samuelson, Berkeley Law School (convenor)

Jon A. Baumgarten, Proskauer Rose LLP

Michael W. Carroll, American University, Washington College of Law

Julie E. Cohen, Georgetown University Law Center

Troy Dow, The Walt Disney Co.

Brian Fitzgerald, Queensland University of Technology

Laura Gasaway, University of North Carolina School of Law

Daniel Gervais, Vanderbilt Law School

Terry Ilardi, IBM Corp.

Jessica Litman, University of Michigan School of Law

Lydia Pallas Loren, Lewis & Clark Law School

Glynn Lunney, Tulane University School of Law

Tyler Ochoa, Santa Clara University School of Law

R. Anthony Reese, University of California, Irvine, School of Law

Jule Sigall, Microsoft Corp.

Kate Spelman, Cobalt LLC

Christopher Sprigman, University of Virginia School of Law

Michael Traynor, President Emeritus, American Law Institute

Tara Wheatland, Berkeley Law School

Jeremy Williams, Warner Bros. Entertainment Inc.

## I. GUIDING PRINCIPLES

A well-functioning copyright law carefully balances the interests of the public and of copyright owners. To do this in a way that is both efficient and fair, copyright law should be informed by the following principles:

1. Copyright law should encourage and support the creation, dissemination, and enjoyment of works of authorship in order to promote the growth and exchange of knowledge and culture.
  - 1.1. A successful copyright “ecosystem” should nurture a diverse range of works. It should encourage creators to make and disseminate new works of authorship and support readers, listeners, viewers, and other users in experiencing those works.
  - 1.2. To accomplish these goals most effectively, copyright law should embody rules that are clear and sensible, yet flexible enough to apply in a changing environment.
2. Copyright law should promote the creation and dissemination of new works in three distinct and complementary ways: by encouraging the provision of capital and organization needed for the creation and dissemination of creative works; by promising creators opportunities to convey their works to their intended audiences; and by limiting control over uses of creative works, as appropriate, to aid education, cultural participation, the creation of new works, and the development of new forms of creative output.
3. Copyright law should facilitate the provision of capital and organization for creative works by providing a set of rights over which parties can reliably transact.
  - 3.1. To further this purpose, copyright law should articulate clear and sensible rules for identifying which works and parts of protected works can be protected by copyright law, in whom copyright ownership initially vests, and which rights the copyright owner enjoys.
  - 3.2. Copyright law should support owners in the exercise of their rights by articulating clear and sensible rules about what constitutes infringement of those rights and by providing clear and appropriate remedies for infringement.
4. Copyright law should give creators opportunities to convey works to their intended audiences by vesting exclusive rights, as an initial matter, in the authors of works and encouraging authors to explore different ways of reaching audiences for the works.

- 4.1. To further this purpose, copyright law should enable the licensing or assignment of some or all of the copyright exclusive rights to intermediaries.
- 4.2. Copyright law should also support owners who choose to reach audiences directly, using either conventional or “open” licensing models.
5. Copyright law should limit control over uses of creative works by setting boundaries on the rights of copyright owners and on remedies for infringement.
  - 5.1. To further this purpose, copyright law should articulate clear and sensible rules about limitations on copyright owners’ power over uses of creative works that correspond to the purposes of the copyright system, and that take into account the reasonable needs and interests of users of copyrighted works, including follow-on creators.
  - 5.2. Copyright law should protect original expression, but should not protect ideas, systems, processes, or facts, regardless of whether they are original.
6. Copyright law should support opportunities for innovation and competition in technologies for disseminating and experiencing creative works; it should also support rights holders’ reasonable interests in effective protection of their rights in the face of technological change.
  - 6.1. Copyright law should recognize that new technologies may create new opportunities to infringe copyrights as well as new opportunities to transact over copyright rights and new opportunities to distribute and use copyrighted works. Some, but not all, of these opportunities should be subject to copyright owners’ control.
  - 6.2. Deciding whether a particular type of use should be within the scope of copyright’s exclusive rights requires balancing the sometimes-competing interests of creators, distributors, consumers, and the public.
7. Copyright law should recognize that the system in which creative activity occurs and in which creative works are circulated is increasingly global.
  - 7.1. The United States should develop its copyright law in a manner that respects the global system in which creative activity occurs.



- 7.2. The United States should seek to ensure that international law leaves room to allow domestic laws to fully comport with these principles.

## II. HOW CONSISTENT WITH GOOD COPYRIGHT PRINCIPLES IS U.S. COPYRIGHT LAW TODAY?

U.S. copyright law is fully consistent with some principles set forth in Part I, partly consistent with others, but inconsistent with a few of them. This Part considers U.S. copyright law in light of these principles. Insofar as U.S. copyright law diverges from good copyright principles, this Report suggests some reforms intended to bring U.S. copyright law into better alignment with good copyright principles. Part III sets forth more details about possible reforms.

### A. THE SUBJECT MATTER OF COPYRIGHT: ORIGINAL WORKS OF AUTHORSHIP

We applaud the simplicity and elegance of that part of U.S. copyright law that extends copyright protection to authors of newly created works of authorship that have been fixed in a tangible medium of expression. These works must be “original” not only in the sense that they owe their origin to the person claiming to be the author, but also in the sense that they exhibit some creativity in the expression of whatever ideas or information the works embody.

Although some countries extend copyright protection to creations that are not fixed in a tangible medium (for example, live jazz improvisations), we believe that U.S. law’s fixation requirement is consistent with good copyright principles because fixation facilitates achieving the cultural goal of making extant copies of the work available for future generations and because it provides a workable basis for differentiating those works that are the subject of copyright protection and those that are not. It is also consistent with the U.S. Constitution, which identifies the “writings” of authors as the subject matter of copyright.

Original designs of useful articles are not protected by U.S. copyright law.<sup>1</sup> Members of the CPP believe withholding conventional copyright protection from the designs of useful articles insofar as their designs are inextricably interconnected with the functionality of the articles is a sound rule because it promotes robust competition in the market for useful

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1. Some countries protect original industrial designs either by copyright law or by a copyright-like design right.

products, such as chairs and kitchen tools. Thus, we support that part of the statute that excludes from copyright pictorial, sculptural, and graphic works that have intrinsic utilitarian functions if the original expression in their designs is not separable from their utilitarian aspects.

#### B. DURATION OF COPYRIGHT PROTECTION

The U.S. Constitution directs that legal protection for original writings should last only “for limited times.”<sup>2</sup> This constitutional norm has meant that works of authorship enter the public domain upon expiration of their copyright terms and become available for free uses of all kinds.

Between 1790 and 1978, U.S. copyright law measured the duration of protection in a standard way: the law granted the author an initial term of protection that was renewable if an author (or other relevant rights holder) took the simple step of renewing his or her claim of copyright for an additional term. The 1790 Act granted authors fourteen years of protection, which could be renewed, if the author was alive and wished to do so, for another fourteen years. By the twentieth century, this duration had doubled, making a twenty-eight-year initial term plus a twenty-eight-year renewal term the statutory duration through three-quarters of that century.

Several societal benefits accrued from this model for copyright duration. Authors enjoyed a substantial period of protection against market-harmful appropriations of their works, a situation that enabled them, if their works proved to be commercially successful, to recoup the costs of creation and to support continued production of creative works. It was also relatively easy to determine whether a work was in-copyright by looking at the date of publication and doing a little math, or by checking Copyright Office records as to whether the copyright was renewed. Yet, there was sometimes confusion and ambiguity about when, whether, or where a particular work was “published,” which complicated the calculation of term under the old U.S. system.

In 1976, Congress adopted a life-of-the-author-plus-fifty-years model for measuring copyright duration for works by identified individual authors, and a term-of-years model (seventy-five years from first publication or one hundred years from first creation, whichever expires first) for anonymous, pseudonymous, and corporate-authored works. This change in U.S. copyright duration had at least two benefits: first, it brought U.S. law into conformity with the international standard established in the Berne Convention for the Protection of Artistic and Literary Works, and second, it

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2. U.S. CONST. art. I, § 8, cl. 8.

gave creators greater assurance that they could receive many years of rewards from their creative labors. In 1998, copyright terms were extended an additional twenty years.<sup>3</sup>

While we understand some reasons why copyright terms have become so long and recognize that some CPP members believe longer terms to be justified, most CPP members believe that the duration of copyright nowadays is longer than is needed to achieve the normative goals of a good copyright regime, and indeed, that the overlong duration of copyright is impeding some important goals of the copyright regime. The switch to a life-plus-years model and the twenty-year extension have contributed, for example, to a growing societal problem; namely, those wishing to license older works often cannot locate the rights holders even after a reasonably diligent search (often referred to as the “orphan works” problem). This problem inhibits appropriate reuses of older works that may be important to preserve as part of our cultural heritage.

We were not able to reach consensus on shortening the copyright term or restoring the “initial term of years plus renewal term of years” model for measuring duration, as some of us would prefer. We could, however, reach consensus on some duration-related issues. To mitigate one of the social harms arising from the lengthened term of copyrights, we suggest in Part III some new incentives for registering copyrighted works, which would make it easier than it is today to locate rights holders for licensing purposes. We also support legislation to allow uses of “orphan works,” that is, works that are still in copyright, but whose rights holders cannot reasonably be identified or located in order to obtain permission to make use of the works. A third measure that would help mitigate the social costs of lengthened copyright durations would be to adopt an easy procedure for authors to dedicate their works to the public domain. Part III sets forth some reform proposals as to registration incentives, orphan works, and public domain dedication to make duration-related rules more consistent with good copyright principles.

#### C. FORMALITIES: NOTICE, REGISTRATION, AND DEPOSIT

Authors today are under no obligation to give notice to the world about their claims of copyright, either by placing notices on individual copies of their works or by registering their claims of copyright with a government office. This rule has some beneficial effects because the law should not erect unreasonable hurdles to obtaining copyright protection. Nor should rights be entirely forfeited, as in the past, if a work’s authors or other rights holders or

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3. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

licensees failed to comply with some fine detail of notice or registration requirements.

However, inadequacies in notice about copyright claims and reduced incentives to register copyright claims have contributed to substantial difficulties in tracking down who owns which rights in which works. These difficulties impede many socially desirable uses, including some that would be licensed if it were easier to find the appropriate rights holder.

The current law's relative indifference to notice and registration contrasts sharply with the two hundred-year U.S. tradition of requiring authors to give public notice of their claims of copyright and to register those claims and deposit copies of their works with a centralized government office, such as today's U.S. Copyright Office. For many years, copyright notices (such as the familiar "©" symbol, name of author, and year of publication notice typically found in books) were required to appear in prominent places on published copies of protected works. Authors who were motivated by copyright incentives could easily "opt-in" to the copyright system by complying with these rules. The fact that many creators continue to employ some form of copyright notice despite its optional nature indicates that it is important to authors and owners to give practical signals to the world about their claims of ownership.

Registration and notice made it relatively simple for persons who were interested in licensing certain uses of protected works to check the central registry for contact information about the copyright owner. Works that were created with no expectation of or need for copyright protection would, under a notice-based regime, generally be outside of the copyright system.

The move to an automatic protection regime puts current law in tension with the principle that there should be reasonable ways for the public to get information about who owns which rights in which works and whether works are or are not available for use or are in the public domain. Many documents and other works that do not really need copyright protection have it anyway, which blocks some of these works from being creatively reused or distributed freely because of risks of copyright lawsuits.

Despite the existence of some incentives to register copyright claims with the Copyright Office, relatively few authors actually do so, which means that the public does not have access to useful information about who the owners are and how to track them down to seek permission. Part III discusses some ideas about how U.S. copyright law might reinvigorate registration, notice, and similar opt-in features to U.S. copyright law to make it more compatible with good copyright principles. Advances in technology and networks should be harnessed to facilitate better notice and registration practices and policies.

This change would help to create more clear and simple boundaries for copyright that are easily understood by owners and users alike.

Current copyright law continues the long U.S. tradition of requiring rights holders to deposit copies of protected works with a government office. Much of the massive collection of the Library of Congress consists of books and other works submitted to the U.S. Copyright Office in compliance with copyright registration and deposit rules. Deposit requirements are consistent with the preservation of cultural heritage and with copyright's constitutional copyright purpose to "promote the progress of science," by which the Founders meant knowledge.

Yet, because few works are registered with the Copyright Office these days, relatively few copies are actually deposited with the Office. Although the Librarian of Congress has authority to demand deposit copies, he does not routinely do so. If deposit continues to serve important public purposes—and we think it may—then implementing changes to the law that will induce greater compliance with this requirement needs to be given serious consideration. Also, serious thought should be given to updating and modifying deposit requirements to accommodate the digital age and deposits of works that were "born digital."

#### D. GRANTS OF EXCLUSIVE RIGHTS

Ownership of copyright in a work means that the law has conferred on the work's author a set of rights to control exploitations of the expression in the work. When the subject matter of copyright was restricted to books, maps, and charts, as it was in the eighteenth century, the law gave authors exclusive rights to control the printing, reprinting, and selling of their books, maps, and charts. By the late twentieth century, the subject matter of copyright had expanded to encompass many types of artistic and literary works, including photographs, motion pictures, sound recordings, and computer programs. As modes of commercialization and technological means of exploitation of works expanded, so did the rights granted to authors, often tailored to the primary marketplaces appropriate for the works.

U.S. law now grants authors rights to control the reproduction of their works in copies, the making of derivative works (e.g., a movie version of a novel), distribution of copies to the public, and (in most cases) public performance and public display of protected works. These rights are said to be "exclusive" because they allow the author, or a person or firm authorized by the author, to exclude (that is, stop or prevent) unlicensed persons from doing things that fall within the granted right. The exclusive rights also provide authors with power to bargain with firms that want to exploit their

works by performing a song at a concert, making a motion picture of a novel, or reproducing a photograph in a magazine.

Members of the CPP deliberated at considerable length about the exclusive rights provisions of current U.S. copyright law. We have concluded that it may be desirable to refine these rights. For reasons explained in Part III, we believe that the reproduction and derivative work rights, as now embodied in U.S. law, are insufficiently well-defined. The reproduction right has become particularly problematic insofar as it is susceptible to an interpretation that would give rights holders control over every access to and use of copyrighted works in digital form because of copies automatically made during access and use (e.g., RAM copies). Congress did not anticipate in 1976 the digital networked environment in which we now live, nor did it craft the reproduction right with this environment in mind. Part III discusses a recommendation that copyright owners be required to prove commercial harm when they make claims of infringement other than those involving exact or near-exact copies that operate in the same market as the allegedly infringed work. We offer some suggestions about other possible refinements of exclusive rights in Part III.

While our main concerns are with the reproduction and derivative work rights, some refinement would also be desirable as to the distribution and public performance rights so they are more coherent and consistent with international practice. In particular, we suggest that cable and satellite retransmissions, along with digital transmissions via the Internet, should probably fall within a right of communication to the public, as is common in other jurisdictions, rather than being treated, as they sometimes are today, as performances or distributions, or both. We also note that U.S. law is unique in having a public display right, and the boundaries of this right are quite uncertain. We are unsure whether it is serving a useful purpose in U.S. copyright law, but to the extent that it is, that purpose might better be achieved through a right of communication to the public, as in other countries.

Finally, one category of exclusive rights that U.S. copyright law does not currently protect is the “moral rights” of authors. The two most widely accepted of these rights outside the U.S. are the right of attribution (chiefly, to be identified as the author of a work one has created) and the right of integrity (chiefly, the right to prevent destruction, mutilation, or similar harms to the work). At present, only authors of works of visual art—a term that is narrowly defined—qualify for the rights of attribution and integrity. Because attribution has become a more accepted social norm in the U.S. in recent years, we recommend that Congress give serious consideration to granting authors a right of attribution. This would better align U.S. law with

norms prevalent in many authorial communities and many other countries. Yet, we recognize that it may be complicated to reach agreement on the scope of this moral right and define it with exactitude in the statute. A reasonableness limitation on the attribution right should, as in other nations, avert most problems that some U.S. commentators have predicted would occur if the U.S. adopted an attribution right. Even without congressional action, there is, we believe, some leeway for courts to take attribution interests into account in infringement cases.

We recognize that redefining exclusive rights to address our concerns will not be easy to accomplish, and we could not reach consensus about exactly how to redraw the boundaries of the rights. Redefinition of rights could introduce new areas of ambiguity and complexity to copyright law and undermine the overarching principle of making copyright law clearer and more sensible. We nevertheless believe that it is desirable to start a conversation about the exclusive rights provisions of U.S. copyright law and to consider possible refinements.

E. AUTHORIAL OWNERSHIP AND RIGHTS TO LICENSE AND SELL  
COPYRIGHT INTERESTS

Copyright law grants rights initially to authors and allows them considerable freedom to contract with others to exploit their works. Authors often take advantage of this freedom because they lack the expertise, equipment, and capital to commercialize their works successfully. The exclusive rights that copyright law confers on authors enable them to license or sell their rights to those who do have the appropriate expertise, equipment, and capital.

Authors can assign (that is, sell) their copyrights outright to others. They can also license (that is, authorize) many exploitations of their works. Such licenses may be exclusive (e.g., I will allow only this company to sell copies of my work) or non-exclusive (e.g., I will license public performance of my music to anyone who wants to play it at a club or for television broadcast). Non-exclusive licenses can be express (e.g., by written or oral agreement) or implied from the dealings of the parties. If, for instance, one author makes a video that he knows another author intends to use in a television news program, the first author must have intended to license the use, even if there is no written contract saying so, and so, a license can be implied from the circumstances. Authors often negotiate up-front fees for licensing of their works; they may also negotiate for a royalty stream to be paid over a period of years. If a work has more than one author, any one author can license an exploitation of the work, subject to a duty to account to her co-authors for

their shares of the compensation. These freedoms of authors to license or sell their rights are consistent with principles of good copyright law.

Also consistent with the principles, however, are some limits aimed at protecting authors. Out of concern that authors should not lose control over exploitations of their works unless there is evidence that they really meant to relinquish this control, U.S. copyright law requires that copyright assignments and exclusive licenses be in writing and signed by the author whose rights are being transferred.

U.S. law also protects independent contractors, such as freelance writers and graphic artists, from having their works be deemed works made for hire, under which the party commissioning the work would be considered the “author” of the work and the owner of copyright. We think these rules, too, are consistent with good copyright principles.

We have no quarrel with the rule that grants employers copyrights in works prepared by an employee within the scope of employment, nor with identifying certain categories of specially commissioned works that can qualify for treatment as works made for hire if contracts so specify. Part III considers whether additional categories of works should be eligible for specially commissioned work for hire status.

The copyright transfer rules about which we have the gravest reservations are those that currently allow individual authors or their heirs to terminate transfers, including exclusive and non-exclusive licenses and assignments, after a certain number of years. Most, but not all, of us believe that the policy underlying the termination of transfer rules is well intentioned: to allow authors who might have licensed or assigned their rights for a pittance in an early stage of their careers to reclaim their copyrights and license the rights anew in order to capture a larger share of whatever commercial value the works still have. Part III explains why we think the termination of transfer rules are too complicated and formalistic to achieve the desired objective of allowing authors to have new opportunities to control uses of their works. It goes on to suggest how such rules might be reformed.

#### F. COPYRIGHT LAW PROTECTS EXPRESSION, NOT FACTS, IDEAS, OR FUNCTIONS

Copyright law protects the way that authors have expressed themselves in their works but not the ideas, facts, or functional designs depicted therein. Ideas and facts, once made public, are in the public domain and free for everyone’s use. Functional designs depicted in publicly available copyrighted works may also be freely reused unless the designs have been patented.



The expression protected by copyright law certainly includes the exact words an author uses in her text, the notes of her song, the lines she draws, and the way in which she arranges data in a compilation. In the early years of modern copyright law, only exact or near-exact copying of the whole of a copyrighted work, which would obviously undermine the primary market for authorized copies of the author's work, was deemed an infringement of copyright.

Over time, courts decided that those who made only minor changes (such as slight rewordings or paraphrasing in a text or use of different colors in a painting) should be treated as infringers as well. As proximate markets evolved—such as the markets for motion picture versions of short stories, translations of texts from one language to another, and rearrangements of music—the conception of “expression” expanded. Some of us believe this concept has become too amorphous and that follow-on creations are too often deterred because the scope of copyright protection, tied to the concept of “expression,” is so uncertain.

Copyright case law is also confusing and sometimes incoherent because courts use several different tests for determining when an accused work is similar enough to a copyrighted work to constitute infringement. Some frameworks for infringement analysis focus on analytic dissection of similarities and differences between the works at issue, while others rely heavily on lay observer impressions. Nor is the case law clear about the roles that experts can and cannot play in the assessment of infringement claims.

In Part III, we offer suggestions about how courts could develop better and more consistent tests for infringement and for distinguishing between protectable expression and unprotectable elements in copyrighted works, such as ideas, information, and functional designs.

Part III also offers some refinements to copyright preemption rules to ensure that important purposes of U.S. copyright law will not be frustrated by application of state law rules in a manner that would confer copyright-like protection on works of authorship.

While there was consensus that it was worthwhile to consider reforms in these areas, there was not consensus about whether refinements are really necessary and whether reforms would do more good than harm, particularly in the area of revising preemption rules.

#### G. FAIR USE AND OTHER LIMITS ON COPYRIGHT PROTECTION

Fair use is an important limiting principle of U.S. copyright law. This doctrine grew out of judicial recognition that if copyright rules are applied too strictly, they would thwart rather than promote the ongoing progress of knowledge creation and dissemination, contrary to the constitutional purpose

of copyright. In the context of critical commentary on an earlier work, for instance, it is often reasonable and sometimes necessary to quote from a pre-existing work to criticize or explain it effectively.

Current copyright law states that making fair use of a copyrighted work is not an infringement. The statute identifies certain uses, such as criticism, commentary, news reporting, research, scholarship, and teaching, as exemplary purposes that may be fair. It sets forth four factors that courts should take into account in particular cases when considering whether a use is fair or unfair: the purpose of the defendant's use, the nature of the copyrighted work, the amount and substantiality of the taking, and the likelihood that the use will harm the market for the copyrighted work if the use is deemed fair. All factors must be balanced together, and no one factor is dispositive. Congress did not mean for these factors to be exhaustive. Courts may and do apply fair use as an equitable rule of reason. The Supreme Court has pointed to the fair use doctrine, as well as to the idea/expression distinction, as elements of copyright law that contribute to that law's consistency with First Amendment protections of freedom of speech and freedom of expression.<sup>4</sup>

We believe that the fair use doctrine is generally consistent with the copyright principles set forth in Part I, although some fine-tuning of fair use may be warranted to ensure that courts recognize that fair use serves a broader array of policy purposes than the current provision acknowledges. Part III also addresses whether personal use copying of copyrighted works should be regulated by the fair use doctrine or exempted more explicitly from the scope of copyright, as it is in some other countries.

Current U.S. copyright law also contains numerous other exceptions and limitations on copyright's scope. The first sale rule, for example, generally allows those who buy a copy of a copyrighted work to resell, lend, rent, give away, and even destroy that copy. This rule enables used bookstores, archives, libraries, video rental stores, and other entities to redistribute copies of protected works. A complex set of rules also regulates uses of copyrighted materials by libraries. These rules are consistent with the principles of a good copyright law, although as we explain in Part III, we think the library exception provisions need to be updated to make them better attuned to the current technological environment and to other changes in norms and practices since the mid-1970s.

Still other copyright exceptions allow teachers and their pupils, in the course of non-profit classroom activity, to recite copyrighted poems, to show

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4. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

pictures of copyrighted images to study them, and to perform copyrighted dramatic plays. Public broadcasters have the right to make certain uses of copyrighted materials beyond what fair use might allow, in order to promote broader public access to information and culture. Limits on copyright's reach that promote similar public policies are found in many national copyright laws and are consistent with the principles set forth in Part I.

We finish this section with a separate and important observation. It seems obvious to us that the existing set of exceptions and limitations in today's U.S. copyright statute is more a product of legislative compromise than of principled assessment of how far the law should extend to regulate certain kinds of uses of copyrighted materials. Part III speculates about institutional design principles that might aid in the accomplishment of a more principled approach to limiting principles of copyright law.

#### H. COPYRIGHT AND TECHNOLOGY

Copyright law has been seriously challenged by the rise of digital technology, and in particular by the advent and explosive growth of global digital networks. In the past, it was only possible to engage in widespread, unauthorized copying and distribution of copyrighted works if one had made commercial-scale capital investments (e.g., buying a printing press and housing it in a building). It is by now well recognized that ordinary users of computer networks, with little or no investment or even significant effort, can accomplish widespread, unauthorized copying and distribution. Unauthorized activities such as peer-to-peer file-sharing of copyrighted works are understandably viewed as a serious threat to the financial incentives that the copyright system is designed to give to professional authors as well as to those who invest in the creation and publication of their works.

Yet, advances in digital technologies have also contributed greatly to the achievement of copyright's core goal of stimulating the creation and dissemination of new works, such as user-generated content. Millions of network users now have access to tools that allow them to produce and publish their own creations and share them with others. Advances in digital technologies have also enabled copyright industries to introduce new formats for distributing creative works. A good copyright law must consider both the benefits and the problems resulting from digital networks.

Since new technology is a significant contributor to the infringement problem, many copyright owners have responded with technological solutions. Widely discussed and increasingly deployed technical approaches include the use of encryption and other technical measures, designed to limit unauthorized access and copying, and the adoption of filtering technologies

by service providers, designed to limit unauthorized distribution or performance of protected works. Many copyright owners believe that such technological solutions are essential—or at least must be tried—if widespread infringement of complete works is to be meaningfully prevented or reduced. They also believe that the legal system should prohibit circumvention of technological protection measures and dissemination of circumvention tools, and should encourage the design and deployment of infringement-inhibiting measures by those in a position to do so.

While recognizing the significant threat posed by widespread infringement, many representatives of the consumer electronics and information technology industries, as well as members of academic and user communities, have expressed concerns about these technological solutions. One concern is that innovation will be hampered if technology producers must design products and systems that contain or respond to copyright protection technology. Another is that measures such as filtering will prevent not only infringing activity, but also a large amount of user activity that is lawful, such as fair uses, or to which copyright owners do not or cannot legitimately object. There are also questions about who should properly bear the costs and burdens of deploying and maintaining such solutions and about the societal costs of creating or maintaining a legal regime that, by the threat of serious monetary liability, in some cases inhibits technological innovation and the creative and lawful activity of users. Yet, many in the consumer electronics, computer, and service industries have contributed to the development of innovative technical measures and participated in the introduction of new products and services thereby enabled.

We believe that in this, as in other circumstances, a good copyright law must strike a balance between protecting authors and other copyright owners from infringement, on the one hand, and encouraging innovation, creative expression and public access to works, on the other. Technological protection measures can play a role in preventing infringement, and in encouraging new forms of commercial distribution. Experimentation with such measures has a place in the copyright system, as do reasonably designed legal principles that prevent circumventing them. Serious efforts need to be made to design and deploy measures that are both commercially reasonable and “smart,” measures that interfere as little as possible with other types of innovation and with lawful activity. The results should be evaluated in an ongoing fashion, and copyright law may well have to be adjusted from time to time—by Congress through statutory amendments or by the courts in individual cases—to get the balance right.

If properly limited in scope, principles of primary and secondary liability should continue to play a role in encouraging technology and service

providers to participate in deploying reasonable measures and discouraging widespread infringement. We believe that “safe harbors” are an important legal device that can be used both to limit liability in appropriate ways and to encourage those providers to help reduce widespread infringement.

U.S. copyright law currently recognizes at least five safe harbors for firms that facilitate, even if not intentionally so, the infringing acts of others. The first and perhaps best known of these safe harbors is for makers of technologies that have substantial non-infringing uses. The Supreme Court created this safe harbor in the *Sony Betamax* case.<sup>5</sup> There is, however, some uncertainty in the scope of this safe harbor because of disagreements over how “substantial” non-infringing uses must be, as well as over which uses are, in fact, non-infringing.

Four other safe harbors were created for Internet service providers (ISPs) in 1998 as part of the Digital Millennium Copyright Act (DMCA).<sup>6</sup> These safe harbors allow ISPs (1) to transmit digital content from one user to another free from concern about whether the transmitted material is or is not infringing, (2) to store digital content on behalf of customers, (3) to cache digital content to make it more accessible to customers, and (4) to facilitate users’ queries to locate information of interest to them. The latter three safe harbors are subject to “notice and take down” rules, which provide that upon receiving notice from a copyright owner that specific infringing materials exist on the ISP’s site or a search engine is linking to infringing materials, the ISP or search engine has an obligation, as a condition of the safe harbor protection, to remove the infringing materials or not link to them. These safe harbors are also contingent on ISPs having rules to prevent abuse by restricting access to the Internet by repeat infringers. We believe that the safe harbor rules in copyright law today, while not perfect, are nonetheless generally consistent with the good copyright principles set forth in Part I.

We suggest in Part III that Congress consider creating a new safe harbor that would insulate from copyright liability those firms that undertake reasonable measures to prevent copyright infringement. We do not, as a group, intend for this safe harbor to create a duty on the part of technology developers or service providers to adopt such measures.

#### I. REMEDIES WHEN INFRINGEMENT OCCURS

It is a fundamental legal norm that when the law confers a right and that right is violated, the owner of the right is entitled to a remedy. Copyright law

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5. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

6. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

gives judges the power to order an infringer to cease the infringing conduct. It also allows rights holders to be compensated for the losses they suffered because of the infringement, such as a lost license fee or lost profits on sales that they would have made but for the infringement. A successful plaintiff can disgorge from an infringer any profits it made that are attributable to the infringement. This extra monetary remedy is aimed at deterring infringement. Without such a rule, people might be tempted to infringe thinking that if their unauthorized exploitation is detected, they will only have to pay the price of a lost license fee for the infringing activity, that is, the same price they would have had to pay if they had sought permission in advance.

An infringer may also have to pay the costs of the lawsuit, including the plaintiff's attorney fees. To deter overzealous copyright claims, courts also allow defendants to recover attorney fees from plaintiffs when their defenses to infringement are successful. Courts can also order infringing copies to be seized and destroyed. We regard these remedies as generally consistent with the good copyright principles set forth in Part I.

However, some aspects of the current law's remedial scheme are in some respects inconsistent with good copyright principles. Current law allows copyright owners who have promptly registered their claims of copyright to elect, at any time until final judgment, to recover what are known as "statutory damages," in any amount between \$750 and \$150,000 per infringed work that the court deems "just," as an alternative to the actual damages plus defendant's profits remedies. While statutory damages may be an important remedial mechanism for providing some compensation to copyright owners when damages are difficult to prove and deterring infringement, we are troubled that statutory damage awards sometimes appear arbitrary or grossly excessive in comparison with a realistic assessment of actual damages incurred. We recommend in Part III some changes to address the defects of the current statutory damages regime. This could be accomplished either by adopting guidelines to make statutory damages more consistent and equitable or by replacing statutory damages with a regime in which actual damages might be doubled or trebled to deter or punish egregious infringements.

A second remedial reform recommended in Part III is greater use of damage awards instead of injunctive relief in copyright cases, in line with Supreme Court precedents.<sup>7</sup>

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7. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (noting that the purposes of copyright may better be served in some cases by awards of damages instead of injunctive relief).

A third remedial reform discussed in Part III concerns the presumption of irreparable harm in copyright cases, either at the preliminary or permanent injunction stage, upon a finding of a likelihood of success on the merits or actual success on the merits. As the Supreme Court made clear in *eBay Inc. v. MercExchange, L.L.C.*, injunctions in intellectual property cases should only issue in accordance with traditional principles of equity.<sup>8</sup>

A fourth remedial reform addressed in Part III responds to problems arising when high costs of litigation make it effectively impossible to justify vindicating one's rights in court, as when the actual monetary harm suffered is small relative to the costs of litigation. Part III considers whether Congress should establish a low-cost adjudication procedure to allow copyright disputes to be resolved without the need for highly expensive federal court litigation.

### III. COPYRIGHT REFORM PROPOSALS

Twenty-five reform proposals are set forth in this section of the CPP Report. The four most ambitious are these: First, we recommend a substantial reinvigoration of copyright registration so that it becomes easier to know who owns what rights in which works, which would also facilitate reuses and licensing. Second, we recommend some changes in the role of the Copyright Office to modernize its functions and to take on some new roles that we think would be beneficial. Third, we recommend some refinements to the exclusive rights that copyright law grants to authors and to the tests courts use for judging infringement. Fourth, we recommend a new safe harbor for those who undertake reasonable measures to inhibit copyright infringement.

Other possible reforms discussed in this section pertain to a wide array of other copyright matters, such as attribution interests of authors, fair use and library privileges, the public domain, orphan works, statutory damages, and injunctive relief.<sup>9</sup> In some cases, we were able to reach consensus on proposed reforms, while in other cases, we set forth various views that informed our deliberations and reasons for not achieving consensus. As noted in the Preamble, various proposals elicited enough support within the CPP group that it was deemed constructive to style them in this Report as recommendations. However, we do not intend affirmative statements or the

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8. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–94 (2006).

9. The copyright reforms considered in Part III do not, of course, exhaust the list of issues about which some reform proposals should be considered.

use of phrases such as “we recommend” to suggest that the group as a whole was uniformly in support of each particular view stated.

A. REINVIGORATING COPYRIGHT REGISTRATION

**Recommendation #1: Copyright law should encourage copyright owners to register their works so that better information will be available as to who claims copyright ownership in which works.**

Copyright law in the United States has long included a system of procedural mechanisms, often referred to collectively as “copyright formalities,” that helped to maintain copyright’s traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw. These formalities included requirements to give notice of one’s copyright claim by placing copyright notices on copies of protected works and registering with the U.S. Copyright Office to qualify for a renewal term.

Under current law, copyright protection arises the moment a creative work is fixed in a tangible medium of expression. Authors are under no obligation to register their interest in copyright or put notices on copies distributed in the marketplace. Although current law attempts to induce registration by conditioning the ability to recover attorney’s fees and statutory damages on prompt registration, relatively few copyright owners register their works at all, let alone within three months of publication.<sup>10</sup>

This “deformalization” of U.S. copyright law has obviously had some advantages for authors and those who exploit copyrighted works, for there is no longer a risk that failure to put notices on copies of works or to register claims of copyright will cause the work to go into the public domain. However, deformalization has also harmed creators, follow-on users, and social welfare more generally because it is more difficult than it should be to determine who owns what rights in which works and how to locate the rights holders to ask permission for uses. Deformalization inhibits reuses of many works because there is no simple way to distinguish between those works whose authors care about copyright protection and those who do not.

The vast majority of copyrighted works created each year have little or no commercial value. Billions of works, such as e-mails and business memos, are created without the incentive of copyright and lack independent commercial value as expressive works. Many other works that people create, such as blog posts, are subject to copyright, although their authors intend to distribute

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10. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright Law*, 57 STAN. L. REV. 485, 495–96 (2004).



them without restraint or with fewer restraints than the default rules of copyright impose. Many works are created with the intent to exploit their commercial value as expression, but lack that value at inception or perhaps enjoy evanescent commercial value that endures for a much shorter period than the current copyright term.

These types of works are similar in one important respect. They are not producing revenues. For this reason, continued copyright protection serves no real economic interest of the author. Copyright does not, of itself, create commercial demand for protected works. In a deformalized, opt-out copyright system, commercially “dead” works cannot safely be reused as building blocks for potentially valuable new works. The costs of locating the rights holder and obtaining permission will often be prohibitively expensive. In such instances copyright is unbalanced: its potential benefits are absent or depleted, and it therefore imposes only social costs.

To respond to the overly expansive copyright regime now in place, there emerged strong interest within the CPP group for “reformatizing” copyright law. Copyright law should not just re-introduce the formalities from the past. However, a more robust registration system would be desirable. Non-compliance with this registration procedure would not, as in the past, consign a work into the public domain. Instead, it would affect the rights and/or remedies available to the rights holder, so as to reduce certain liability risks for reusing unregistered works. The law presently does this in part by making the availability of statutory damages and attorney fee awards dependent on prompt registration, but this inducement to registration has not sufficed.

We believe that a reinvigorated registry regime would comply with U.S. obligations under the Berne Convention and the subsequent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which incorporates by reference many of Berne’s provisions.

The core idea is to make copyright registration an attractive and easy option for copyright owners so that members of the public can have better information about the works currently protected by copyright and about those works’ respective owners. This idea can be implemented by restructuring the availability of certain rights and remedies depending on the rights holders’ registration of the work with a registry service. Advances in information technologies and networks will, we believe, substantially assist copyright owners in complying with an updated registration system. We describe some of these advances and how they might be used to construct a more effective and user-friendly registration system in Section III.B in connection with our discussion of the administrative reforms to the U.S. Copyright Office.

As explained further in Section III.B, we do not envision that the Office itself would retain all registration responsibilities; instead, we envision a series of registries that would meet the needs of particular authorial communities and industry participants and that could compete for business from copyright owners, as has occurred with the domain name registration system. Creative Commons, for instance, could become a registry for authors of works who prefer to allow wider uses of their works, but want control over commercial distributions of them. The Office would take on new responsibilities to set standards for registries, which should include requirements for interoperability of key registration data.

This new registration system would provide meaningful incentives to register works that authors or other rights holders expect to have commercial value, ease user access to registered works, and reduce the consequences of infringement for unregistered works. A subgroup of the CPP developed some possible implementations of a new copyright registration regime that would distinguish between rights and remedies available to registered and unregistered copyright owners. Owing to constraints of time, among other things, we were not able to articulate all details of this new regime, but we offer here a few suggestions about how it would work and why it would be beneficial.

The class of unregistered works would obviously include both works that already exist and works that will be created after the new registration regime is adopted. There should be a grace period to allow owners of existing works for whom copyright incentives are important to register under the new regime to enjoy the benefits it would provide. Authors of newly created works would similarly be encouraged to register works if they expect the works to have commercial value and they created the works with copyright incentives in mind.

Unregistered works would still be protected by copyright law against exact or near-exact copying that would cause commercial harm, but fair uses might well be broader as to such works. Moreover, certain remedies, such as statutory damages and attorney fees, would not be available if unregistered works were infringed. Millions of works, such as blogs, YouTube videos, fan fiction tales, Flickr photos, and Twitter streams, if unregistered, would be fair game for follow-on creators and archivists to reuse in non-commercial ways without fear of copyright damage awards because of the inference that non-registration would create.

Registration, by contrast, would signal to the world that copyright incentives are important to the owner of rights in a particular work and would help potential reusers and follow-on creators to locate the person who owns the rights and possibly the conditions under which licenses might be

available. Because we envision that registries would be obliged to make registration data available through an interoperable networked system, it should be possible for potential reusers to find rights holders more easily.

Benefits of registration would mainly flow from the greater accessibility of copyright ownership information but would also potentially include a more extensive set of rights and remedies. Termination of transfer rights could, for example, be granted to registered rights holders but not unregistered ones. One could also allow infringement to be found for copying of non-literal elements of registered works but not for such copying as to unregistered works. Registered rights holders might also be able to sue to stop certain non-commercial exploitations of a work likely to have market-impairing effects. Authors who initially did not register their works could do so later, but they would only enjoy the extra rights and remedies arising from registration as to future reusers.

Owners of rights should also be obliged to inform the registry about updated information, such as assignments of copyright or the death of the author and the identity of the author's successor in interest, so that the registry has current information. Failure to provide this sort of updated information could result in a loss of registration benefits.

A more effective registry system would tailor copyright to provide more appropriate protections in a wide range of circumstances. It would do so by identifying those rights holders who place significant value on their works and who wish to obtain the widest range of protections; it would ease the identification of rights holders; it would encourage voluntary transactions; and it would reduce the penalties for infringement of, and thereby ease access to, unregistered works (i.e., works which, on the whole, owners do not value highly enough to invest in registration). For this large class of works, the copyright system can permit wider public access and use without harming author interests. Limiting the scope of rights and/or remedies available to those rights holders who do not register their works encourages rights holders to identify themselves, thereby facilitating licensing by those who wish to make use of a work.

Lest this proposal seem unduly radical, we wish to point out that it is, in many ways, a logical extension of the private registry regimes that already exist, such as ASCAP, BMI, and the Copyright Clearance Center, which have taken on increased importance in the years since the removal of copyright's formalities. The new registry regime we envision would allow for private registries to exist for particular communities of copyright owners, and ideally, public and private registries would be able and have incentives to share information about registered works, thereby increasing the social value of all of the registries.

Registration regimes are, moreover, common in many areas. Compliance with the domain name registration system, for instance, is necessary to obtain a website address, and many thousands of ordinary people have been able to take advantage of this registration system without undue difficulty. Similarly, it is common to require registration of cars, professional licenses, and real property interests, just to name a few.

Authors and other owners of copyright interests should have the ability to comply without undue difficulties as long as the registration system is carefully designed and incentives exist to steer them toward registration when that suits their interests and needs. The new registration regime would need to be carefully designed so that it did not inadvertently lead to abuses, such as enabling conflicting claimants to register the same work with different registries or burdening copyright owners with multiple registry requirements. It is a risk of establishing a reinvented registration regime in the U.S. that some other nations might be induced to adopt registries in a manner that would disadvantage U.S. copyright owners. Attention must be paid to the practical details as to how this new registry regime would work internationally.

#### B. ADMINISTRATIVE REFORMS

The U.S. Copyright Office has played a critical role in the development and administration of copyright law for over a century. Its current functions include, among other things: operating a voluntary registration system for copyright claimants; administering statutory licenses; promulgating regulations and conducting rulemakings; providing the public with information about copyright; and engaging in policymaking and providing advice to Congress and the other branches on international and domestic copyright matters.

The Office has generally executed these functions admirably. However, the landscape around copyright law has changed dramatically in the past two decades, primarily owing to the rapid development and dissemination of technology that allows copyrighted works to be copied and distributed quite easily. As a consequence, nearly every copyright-related industry sector is in the midst of profound changes that affect all actors in those copyright ecosystems—authors, publishers, distributors, users, and consumers, among others. Many of these actors rely on the Copyright Office for various services and information. It should not come as a surprise that the rapid changes happening in the copyright world might require change to how and what the Copyright Office does.

It is in that spirit that we offer the following ideas for modernizing the role and functions of the Copyright Office. The overarching purpose of

these suggestions is to help ensure that the Office is in the best position to accommodate the rapid pace of change and thereby continue to serve its important role in the future. These suggestions are neither comprehensive nor definitive—they are primarily designed to surface important points of discussion and debate that ideally will lead to a more robust, concrete, and specific set of recommendations that would be supported by all stakeholders in a well-functioning Copyright Office.

**Recommendation #2: The Copyright Office should transition away from being the sole registry for copyrighted works and toward certifying the operation of registries operated by third parties, both public and private.**

This is perhaps the most radical of our proposals, but also the most important. The reality of the digital age is that it has greatly increased expectations about access to information. The information that the Office currently collects and administers as part of the registration system is the kind that everyone expects to be accessible through something like a simple web search. More importantly, transactions involving copyrighted works often take place in the same hyper-efficient environment, and the parties to those transactions require access to copyright information at a speed and in a format that matches that efficiency.

While the Office has observed and anticipated these developments and has moved many of its functions and services online, the reality is that the functionality of the registry remains woefully behind what leading-edge search and database technologies permit. As a consequence, the creators and users of copyrighted works have had to develop their own systems to generate and disseminate copyright information that is relevant to their activities. These databases often supplant the information in the Copyright Office registration records. For example, information about who is currently able to license the copyright in a particular photograph is much more accessible in commercial databases operated by Corbis and Getty than in the records of the Copyright Office. Similarly, Creative Commons has developed an efficient means for copyright owners to provide more information to users about what uses are permitted for their works, information that is valuable to users but that the Copyright Office registration system as it currently operates does not facilitate.

The basic idea of any reform in this area would be to shift the Copyright Office away from day-to-day operation of the copyright registry and toward a role of setting standards for and superintending a system of separate but networked and interoperable private registries.

The first step would be to authorize the Copyright Office to set standards for acceptable private registries—i.e., both technical standards and also specifications determining what kinds of copyright information a compliant registry *must* and *may* ask for from users and place into its database. The Office would need to be empowered to make sure any private registry meets important public interest requirements regarding transparency and efficient searches through multiple services, so as to minimize burdens on both copyright owners and users on accessing the data and benefits of these services. Once these standards are established, the Copyright Office would accept applications from firms seeking to operate as private registries and would certify that private registries (of many different types) meet and continue to adhere to the registry standards.

The end result, if this task is done properly, would be an environment in which private firms compete to obtain copyright registration information from rights holders. Competition should lead to lower costs and innovations in registry design. And if the registries operate according to compatible technical standards, user searches for copyright information will be able to draw upon the data stored in all of the networked private registries. The result would be a system that is in reality decentralized but that is architected and managed to provide a “search once, search everywhere” experience to users. The model is similar to the domain name registration system, where multiple private parties provide services and access to the database of domain names.

There are many potential benefits to this reform, for both owners and users. For owners, this new approach acknowledges that they often already use registration-like systems in their business dealings, whether through collecting societies, online services, or other means of tracking their copyrights. These existing systems could become part of the network of registries, allowing owners to participate in registration systems that are more tailored to their business practices and are not as burdensome as the Copyright Office’s practices can be. For example, photographers who sell their images through an online service could, provided that service becomes a certified registry, enjoy the benefits of registration with essentially the same activity that they already undertake to monetize their works. For users, provided the private registries comply with a good set of requirements of transparency and efficiency, the benefits would be development of search tools and technology by private vendors that will be more useful than the current Copyright Office systems. Competition among registries should keep registration fees at reasonable levels; some registries, such as Creative Commons, might choose to charge minimal or no fees for registration.

To be sure, there are potential costs and pitfalls with this approach that would need to be addressed. Specifically, procedures would need to be developed to prevent false claims of ownership or overclaiming of copyright. Likewise, making the data interoperable among different entities may present technological and legal challenges, and procedures to ensure that the private registries are meeting their public interest obligations would need to be developed, including reporting, auditing, and re-certification requirements. Also, provisions anticipating that a private registry might cease operations would be required to ensure that the copyright ownership and licensing data remain accessible to the public.

Moreover, there are many ramifications of this change that need to be considered. A primary issue is how the Library of Congress continues to use the registration system to help build its collections. This would be an important aspect of the Copyright Office regulation of private registries: to develop a means to facilitate deposit of works for the Library's benefit. Other similar effects of this reform should be identified and discussed.

**Recommendation #3: The Copyright Office should develop additional policy expertise and research capability, particularly in the area of economics and technology.**

The Copyright Office's policymaking and legislative advisory function would be improved by the consistent application of certain expertise that the Office currently lacks. It would be desirable for the Office to undertake an economic analysis of the effects of copyright law and proposed law and policy changes. Also desirable would be a better understanding of the relationship between copyright law and proposed law and policy changes to the technological environment in which copyright law operates. Understanding of both economics and technology is critical to the Copyright Office's policymaking function.

Copyright in the United States is a social welfare tool. It is deeply economic in nature, and it requires a sensitive balance of both public and private interests. Additionally, the way in which copyright rules play out in the real world is influenced directly by the technological environment in which the law must function—an environment that is itself always changing. For all these reasons, copyright policy cannot and should not be made based solely on the interactions of lawyers, legislators, and interested parties. Some additional expertise is required.

Accordingly, we recommend that two new positions be created in the Copyright Office—(1) Chief Economist, and (2) Chief Technologist. We suggest that these positions should not be filled by permanent Copyright Office employees, but rather should be posts that will be filled by a new

occupant for a relatively short term, such as two or three years. In our conception, the Copyright Office would recruit individuals with significant economic and technical expertise from academia, other government agencies (e.g., the Federal Trade Commission, the Federal Communications Commission, the Office of Management and Budget, the Antitrust Division of the Department of Justice), and the private sector. We hope that a temporary but prestigious posting of this kind would attract first-rate candidates and also ensure a regular infusion of fresh thinking.

The expertise and policy-making function of the Copyright Office could also be improved by consulting with experts in other fields related to production of copyrighted works, such as individuals with experience in media studies and other disciplines related to the creation and dissemination of culture. The Office could, for example, convene *ad hoc* panels of such experts to address particular issues. It would also be desirable for the Office to develop better capabilities to conduct empirical research to support a thorough analysis of policy issues and recommendations.

**Recommendation #4: The Copyright Office should give serious consideration to developing some mechanism(s) through which users could receive guidance on “fair use.”**

The fair use provision of U.S. copyright law is perhaps the most important limitation on copyright’s exclusive rights. This doctrine functions, among other things, as a mechanism for reconciling copyright law with the First Amendment, for ensuring that copyright’s exclusive rights do not impose significant restrictions on expression, and for freeing up a range of uses that do not threaten rights holders’ ability to obtain an adequate return from their works.

The fair use doctrine is not a set of discrete rules. It is structured, instead, as a general standard. As a consequence, it is not self-enforcing. Rather, assessing whether a particular use will eventually be deemed fair by a court involves a complex and context-specific analysis, requiring judges to balance evidence pertinent to four statutory factors, plus whatever other facts may enter into a court’s equitable analysis. Such analysis often can be undertaken only with the assistance of competent counsel, and, even when a user relies on counsel, it poses significant residual risk of liability.

It would be desirable for the Copyright Office to consider providing the public with more guidance about what constitutes “fair use” and what does not. One alternative discussed by the CPP group was having the Office provide fair use “opinion letters.” Individuals or firms considering whether a contemplated use of a copyrighted work would qualify as a fair use could submit a request to the Copyright Office for an opinion. The request would



provide the relevant facts describing the contemplated use. The Copyright Office would meet with the applicant and elicit further information. When the Copyright Office felt informed enough to do so, it would undertake a fair use analysis and issue an opinion letter. It is hoped that these letters would provide guidance in specific cases, and, over time and as a whole, provide guidance more generally regarding the contours of permissible fair use.

These letters would be similar in concept to the “business review letters” that are issued by the Antitrust Division of the Department of Justice, wherein firms considering a course of conduct that might affect competition in a relevant antitrust market apply to the Antitrust Division for guidance regarding whether the conduct is permissible under the antitrust laws.

The Copyright Office would have discretion regarding which applications for fair use opinions it would act on. Our expectation is that discretionary jurisdiction would allow the agency to conserve its resources and focus them on the most difficult and significant fair use questions.

There were, however, some reservations about this proposal within the CPP. Some questioned whether the opinion letter procedure would provide any real benefit to users, given its non-binding nature and the Office’s discretionary jurisdiction. To perform this function, the Office would have to add new staff and expertise to its ranks. Such a system might also be too “conservative,” for some well-known fair use cases have been departures from what most lawyers would have predicted from extant case law. The procedure might also become complicated insofar as it included participation by the relevant copyright owner and led to judicial review of the Office’s determination. The Office might also find it difficult to issue such letters in light of the “collective impact” one letter might have on a wide range of activity involving copyrighted works.

We considered some alternatives to the opinion letter approach, including having the Copyright Office develop procedures for certifying “best practices” for fair use, such as those developed recently in the documentary film sector. Also, the Office could develop some form of “guidebook” for fair use determinations to help users seeking additional information about the boundaries of this critical exception.

**Recommendation #5: A small claims procedure should be available for resolving small-scale copyright disputes.**

Another area of potential administrative reform is to create within the Copyright Office (or elsewhere if serious doubts exist about the constitutionality of housing this process within the Office) a procedure for efficient resolution of small-scale copyright claims.

Current U.S. law requires copyright owners to engage in expensive federal court litigation to enforce their copyright through legal process, a costly means of protecting copyright that is often effectively inaccessible to individual owners because of the modest damage amounts at issue. Developing a balanced small claims procedure would provide obvious benefits to these copyright owners; it would also help potential users by providing a more rational and predictable scope of remedies for “ordinary” types of infringement that is not widespread and not at the level sometimes referred to as “piracy.”

Many details about how such a procedure would work need to be developed, but we envision that the Copyright Office could receive and decide “small” infringement claims (that is, claims of less than a certain dollar amount). This procedure would be part of the overall civil enforcement structure of copyright law and would rely on an interface with the general civil remedies and litigation system. It would require the Office to be able to receive submissions, decide them in an efficient fashion, publish the rulings, and generally administer the procedure. Because a central component of the procedure would limit the submission of evidence to paper submissions and would not require hearings, discovery, or extensive written opinions, it is anticipated that this function would not require the Office to need extensive additional resources.

While the focus of such a system would be individual or small business copyright owners, such a system should also be designed to allow even large-scale copyright owners to avail themselves of its benefits, provided that the claims adjudicated remained “small” and the system could not be abused to provide inappropriately large collective damage awards. It would also be beneficial if the system could be used by individuals to help vindicate non-monetary remedies, such as addressing breaches of attribution conditions of copyright licenses.

It may also be possible to develop a small claims process for copyright disputes in other venues. Some federal district courts already have well-developed alternative dispute resolution programs, and these could be used for certain kinds of copyright matters.

#### C. REFINEMENT OF COPYRIGHT’S EXCLUSIVE RIGHTS PROVISIONS

The most extensive discussions among CPP members concerned the exclusive rights of copyright and how various members of the group thought they might be refined. We were able to reach consensus on some matters, but by no means on all.

One option considered at some length was the possibility of articulating one exclusive right as the “core” right to encompass not only the wide range

of activities now regulated under the exclusive rights provisions, but also new uses that might develop over time that would not fit easily within the existing exclusive rights framework. Various ways exist to articulate such a core right. The law might, for example, grant authors an exclusive right to control the appropriation of commercial value of the expression in a copyrighted work. Or the law could grant authors an exclusive right to disseminate their works to the public or an exclusive right to commercialize their works.

Arguments in favor of what we called “the big lumpy right” included that it might crystallize the sets of acts that copyright owners should be able to control, it would avoid intellectually sterile debates about whether this exclusive right or that should apply to conduct not envisioned when the law was enacted, and it seemed flexible enough to adapt to changing circumstances. While such a broad exclusive right might, on its face, seem simpler than the existing exclusive rights regimes, we came to the conclusion that it would likely introduce new ambiguities and hence uncertainties, and it was also out of synch with international norms and practices. We ultimately concluded that it would be better to direct our efforts to consider how existing exclusive rights could be refined to make their application more predictable.

**Recommendation #6: Commercial use or commercial effect should be given weight in assessing whether an exclusive right has been infringed.**

Maintaining a balance between a copyright owner’s exclusive rights and the public’s right to use such works free from copyright owner control is critical for a well-designed copyright law. Such a balance allows copyright law to provide the proper incentive to encourage authors and their financial backers to create and to distribute new works, while permitting users and follow-on creators to engage in activities that further knowledge and progress.

The scope of the exclusive rights granted to a copyright owner under U.S. copyright law is a function of not only the grant of rights provision, but also of the nature and scope of the limitations placed on those rights. Initially, copyright law conferred on authors the rights to print, reprint, publish, and vend, and the statutory limitations on those rights were virtually non-existent. Over time, the rights granted to copyright owners expanded to include a right to control the creation of an adaptation of the work, later fashioned as a right to control the creation of derivative works. Rights were also added to control public performances and public displays of copyrighted works.

As the rights of authors expanded, a need for limitations on those rights was recognized, at first in the courts and later in Congress. The fair use doctrine, which began as a judicially created doctrine and is now codified in the statute, is an important ingredient in the shape of the rights granted to copyright owners. The specific express limitations codified in the current copyright law also play an important role in shaping the rights of copyright owners. To deal with new types of uses beyond those contemplated by Congress in 1976 when it adopted these specific limitation provisions, defendants have often had to rely on fair use or perceived limits on boundaries of exclusive rights to justify their uses.

Current copyright law in the U.S. strikes the balance between the owner's and the public's rights by first broadly defining the owner's rights to reproduce, adapt, publicly distribute, publicly perform, or publicly display the work of authorship for any purpose, and then subjecting these broad rights of control to a variety of limitations and exceptions that range from the flexible doctrine of fair use to very specific uses for particular classes of works.

In practice, many copyright owners tolerate a range of unauthorized uses of their works. Imprecision in the scope of exclusive rights often makes copyright owners reluctant to sue those whom they reasonably believe to be infringers, owing in part to the cost and uncertainty of litigation. At the same time, the current legal structure makes it possible for an aggressive copyright owner to overclaim rights and to force good faith users or follow-on creators to defend a use as falling within the complex web of existing limitations and exceptions. Overclaiming can impose high litigation costs, including risks of statutory damage awards, and thereby chill some uses that if challenged would ultimately be found non-infringing. A well-functioning copyright law would deter overclaiming imbalances. At the same time, any attempt to correct the balance must recognize the risk of burdening the copyright owner's ability to enforce its rights, particularly against a user who has simply disregarded those rights altogether.

Currently, the copyright owner need not prove that a use has commercial effect in order to succeed on a claim of copyright infringement. Commercial harm is only a factor as part of a fair use defense. A putative fair user must argue either that his use does not cause harm to the copyright owner's market(s) or that if any such harm exists, the other fair use factors still favor the use.

The CPP group discussed two principal approaches to refining the copyright owner's exclusive rights to take commercial harm into account. One approach would differentiate between uses of all or virtually all of a work and uses of only some parts of a work because of the different

probabilities that the latter uses will cause commercial harm to the copyright owner's interests as well as because of the different probabilities that the user has engaged in a socially productive use. A second approach would redefine the copyright owner's exclusive rights so that commercial distribution or commercial dissemination would be an element of the right.

Under the first proposal, copyright law would recognize that reproducing or publicly distributing, performing, or displaying all or virtually all of a copyrighted work without a license has a greater likelihood of causing harm to the copyright owner because it interferes with a core right of the copyright owner. Use of less than all or virtually all of a work is less likely to cause harm to the copyright owner and is more likely to include creative contributions by the user, and thus should be seen as a subsidiary right because creative reuses are less threatening to a copyright owner's core interests. Consequently, for unlicensed uses of less than all or virtually all of a work, copyright law should require the copyright owner to prove commercial harm in order to prove infringement of the owner's exclusive rights.

This first proposal would alter how the copyright owner's exclusive rights would be influenced by the actual or potential commercial effect of an unlicensed use on the copyright owner. Unless a defendant was using all or virtually all of the copyrighted work, the copyright owner would be obliged to prove that the defendant's use has caused or is likely to cause commercial harm. Commercial use by the defendant would not be a substitute for proof of commercial harm to the copyright owner, as not all commercial uses necessarily cause commercial harm. Additionally, a mere desire by the copyright owner to charge the defendant a license fee for the defendant's use should not suffice to demonstrate commercial harm.

Commercial harm to the copyright owner would include harm to traditional and economically plausible and appropriate licensing markets. Yet, the user might still assert fair use as a defense. The fair use analysis then would be directed at weighing the degree of commercial harm to the owner against the social value of the use. In this way, the fair use defense would also remain for cases involving use of all or virtually all of a copyrighted work. This division between a core right of a copyright owner and subsidiary rights would help to address the risk of overclaiming and its resultant chilling effects on users while preserving a copyright owner's ability to get meaningful relief without undue burden.

The second approach we discussed would redefine the copyright owner's exclusive rights so that commercial distribution or commercial dissemination would be an element of the right. Under this second approach, the adaptation right, for example, would be recalibrated to strike the balance between the copyright owner and the public with greater specificity. The

principal right would be redefined as the exclusive right to prepare adaptations, arrangements, and continuations of the copyrighted work for commercial dissemination to the public by reproduction and distribution of copies, public performance, or public display. An adaptation would be defined as the transposition into another artistic medium of all or virtually all of the expression of the copyrighted work. An arrangement would be defined as the fixation in a tangible medium of expression of a new version of the copyrighted work in the same medium of expression that includes all or virtually all of the expression of the copyrighted work plus additional protectable expression. And a continuation, for fictional works, would be defined as an extension of the story being told in the original copyrighted work.

The right to prepare adaptations, arrangements, and continuations would not encompass adaptations, arrangements, and continuations for non-commercial dissemination, nor would it encompass the preparation of adaptations, arrangements, or continuations for private, personal, or non-profit educational use. However, in cases where it is not reasonably apparent from the circumstances, the copyright owner should have the right to require that such adaptations, arrangements, and continuations be identified as unauthorized by the copyright owner. Finally, the second proposal also contemplates distinct exclusive rights of translation and merchandising. The copyright owner would have ten years to work the translation right or it would lapse.

Under this second proposal, the reproduction right would likewise be redefined as the right to reproduce the copyrighted work for commercial distribution to the public, and the rights of public performance and display would be redefined in parallel. This would change the default in today's copyright law which posits that an owner controls the reproduction, public distribution, public performance, and adaptation of the work. Absent a license, the defendant must fit any of those activities into an exception to that control, including the fair use exception. This reform would alter that default principle in a material way, at least in principle, by removing control over a potentially large category of non-commercial uses. Support for that change would rest on an instrumental view of copyright as a means of providing an economic incentive for the creation of works.

Because the underlying purpose of the copyright grant is to reserve to the owner the right to earn money from commercial exploitation of the work, the scope of the right would encompass some exploitations, ostensibly for non-commercial distribution, that would frustrate that purpose (e.g., a website offering first-run movies for free). However, the rights would not extend to reproductions, performances, or communications for private or

personal use, those intended for distribution to a small circle of family or friends, or other types of limited uses that do not cause commercial harm to the copyright owner. For example, unless a work was produced or marketed primarily for use in educational institutions, the reproduction right would not extend to a reproduction of that work for limited distribution in a non-profit educational setting. Unless a work is produced or marketed for distribution within business settings on a per-user basis, the reproduction right would not extend to a reproduction of that work for limited distribution to one or a small number of professional colleagues. As before, the fair use doctrine would be available for some commercial use cases in which social value would be weighed with the potential for commercial harm to the copyright owner.

While recognizing the arguments in favor of making commercial harm an element of a copyright plaintiff's claim, some members of the CPP group have reservations about it. First, they are concerned that courts might place too much weight on the shift in the burden of proving commercial harm and thus set the bar too high. Proving either actual or likely harm to existing markets should suffice, and harm to likely future markets should be considered along with harm to present ones. The commercial nature of the defendant's use may indicate harm, but it is not a necessary factor in determining that the plaintiff's market may be harmed. Second, some of us believe that many members of the public, and certainly most creators, are likely to have a dose of "natural rights" theory in their perception about copyright law, under which authors would have at least some control over the use of their works even if the use is non-commercial—and especially when the use is commercial.

The concerns articulated above suggest consideration of a more modest reform. Under it, the plaintiff would have the burden of proving commercial harm only if the defendant's activity was not undertaken for commercial gain. If the defendant is using the plaintiff's work for commercial gain and claims the use will not hurt the plaintiff's market, it may be reasonable to ask the defendant to show why. This approach would still meet the key objective of shielding a vast amount of "for fun" uses that have become the hallmark of the Internet age, as well as many kinds of research uses. It would leave commercial users in the position they are in now, having to demonstrate that their activity should be treated as non-infringing. Copyright industries may be more amenable to this than to a more general shift in the burden on the issue of harm or the exclusion of non-commercial uses from the copyright owner's bundle of rights.

Proponents of the more general burden-shifting and exclusion of non-commercial uses do not believe these proposals would materially reduce the

protection of works from much activity that would be considered infringing today. Rather, its purpose is to shield non-harmful activity from the threat of overly zealous copyright claims, thus reducing the chilling effect that threat tends to generate. Put another way, it is hoped that this reform would not generate a substantial new jurisprudence about harm or otherwise create undue “empirical” burdens on plaintiffs. To others in the group, the danger of that happening is inherent in the proposal and should be carefully weighed in evaluating its merits.

**Recommendation #7: Copyright owners should have the exclusive right to control communications of their protected works to the public, whether by transmission or otherwise.**

Prior to the 1976 Act, transmissions of copyrighted works were not generally included within the public performance right. The drafters of the 1976 Act decided to graft the right to control cable company retransmissions of broadcast television signals onto the performance right as part of the compromise to resolve an intense controversy over the copyright significance of cable transmission of broadcast programs. Today, some transmissions are dealt with through the public performance right, some through the distribution of copies to the public right, some through the public display right, and some through the reproduction right. It would simplify the law and make it conceptually more coherent to treat commercially significant transmissions under the rubric of a right of communication to the public.

Separate from the exclusive right to perform a work in a public or semi-public place, copyright owners should have the exclusive right to communicate their works to the public by means of a transmission whereby members of the public who receive the transmission can perceive or reproduce the work. Communicating protected works to the public should include transmitting them to different members of the public in different places or at different times. For these purposes, “the public” should include any subset of the public, but should not include a transmitting party’s family and immediate or close circle of friends.

This proposal would be a substitute for the existing transmission prong of the public performance/display right. We believe it would be wise to separate communications to the public by means of transmission from the “performance in a public/semi-public place” right for two principal reasons. First, this change would bring U.S. copyright law into closer conformity with the copyright laws of other nations. Second, it would make U.S. law more coherent.

We recognize that the communication right may be somewhat broader than the transmission prong of the public performance right in that it would



include transmissions where the recipient stores the work instead of only viewing or listening to it. But transmissions to store would likely be covered by the distribution or reproduction rights, so we do not regard this proposal as an expansion of the scope of copyright.

**Recommendation #8: There should be greater coherence and consistency in the tests courts use to determine infringement of the reproduction right.**

Courts have used a variety of approaches when analyzing whether the exclusive right to reproduce a work in copies has been infringed. Making this determination is, of course, relatively straightforward when the case involves exact or near-exact copies. But when copying is non-literal, or when there are arguably substantial differences between the works at issue, the inquiry is more difficult. The commercial harm/use limitation suggested above would help to make non-literal infringement decisions more predictable, but there is still a substantial problem with the inconsistent ways in which courts analyze infringement in these cases.

A common theme of existing judicial approaches is to search for “substantial similarity in expression” between the defendant’s and the plaintiff’s works, and to conclude infringement exists if there is substantial similarity in expression and the defendant copied the expression from the plaintiff. Some courts use Judge Learned Hand’s “patterns of abstractions” approach. It seemingly calls for construction of a complex hierarchy of abstractions of the two works so that inquiry can be made as to whether similarities are at abstract levels (e.g., a cross-ethnic romance disapproved of by the lovers’ parents) and hence constitute “ideas,” or are sufficiently detailed (e.g., exact plot sequences even with different dialogue) so they should be considered protectable “expression.”<sup>11</sup>

Even more analytically dissective is the “abstraction-filtration-comparison” test widely used in judging computer software infringement. Like Judge Hand’s test, it begins with construction of a hierarchy of abstractions, then directs that all unprotectable elements (such as efficient designs, commonly used building blocks, or elements whose design is constrained by the hardware or software with which the program must operate) be eliminated from consideration, and then compares the “golden nuggets” of expression remaining to discern whether infringement has occurred.<sup>12</sup>

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11. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.).

12. *See, e.g., Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706–11 (2d Cir. 1992).

Yet, some courts reject a dissective analysis of similarities and differences, and direct that infringement should be determined on a lay observer's impression about the similarities or the "total concept and feel" of the two works.<sup>13</sup>

The Ninth Circuit Court of Appeals has arguably sought to blend the two approaches by directing a two-step analysis, under which an "extrinsic" analysis of similarities and differences is undertaken, followed by an "intrinsic" analysis that takes a more subjective approach.<sup>14</sup> But it is very difficult to predict how this test will be applied in different contexts.

The non-standardization of infringement tests and analysis contributes to uncertainties about copyright's boundaries and to chilling effects on follow-on creators. We believe it is possible to develop a more coherent and predictable analytic framework, and we suggest that if the judiciary cannot reach consensus on this matter, other institutions, such as the American Law Institute, might work on refining tests for copyright infringement.

D. SAFE HARBOR FOR THOSE WHO DEPLOY REASONABLE MEASURES  
TO DETER INFRINGEMENT

**Recommendation #9: Online service providers that deploy reasonable, effective, and commercially available measures to minimize infringement should be eligible for a safe harbor from liability for the infringing acts of others.**

Part II noted that technology may have a role to play in preventing widespread, unauthorized distribution and performance of copyrighted works. Online service providers, whose facilities make such activity possible, may sometimes be in the best practical position to deploy preventive technological measures. This proposal would create a new safe harbor for online service providers that undertake to do so.

The ISP safe harbor rules added to U.S. copyright law as part of the DMCA were aimed at achieving two goals: (1) protecting service providers from excessive liability arising from the activities of their users, and (2) encouraging those providers to participate in the reduction of infringement. To achieve those goals, Congress created four safe harbors that encourage service providers to take certain steps, such as responding to takedown notices, in exchange for substantial freedom from liability.

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13. *See, e.g.*, Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (coining the phrase "total concept and feel").

14. *See, e.g.*, Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1162–67 (9th Cir. 1977).

Since the enactment of the DMCA, technologies have become much better at recognizing and filtering out infringing copies of works available on or being distributed via the Internet. Most of this technology has been developed by small entrepreneurs who see a potential market for the technology among service providers and content companies. The technology is increasingly “smart,” that is, capable of determining, for example, how much of a copyrighted movie is contained in a given online file and even whether the file combines video or audio tracks from the movie with new material. As with the DMCA safe harbors, the proposed new safe harbor would encourage service providers to use such new technology (or a technology later developed) if that technology constitutes a reasonable, effective, and commercially available measure for deterring infringement.

For a measure to be deemed “reasonable,” it should take appropriate account of limitations on the exclusive rights of copyright owners, such as fair use, as well as the privacy interests of users and perhaps other social considerations. Reasonableness must be assessed with due consideration for the cost of deployment, the scale of the enterprise that would deploy it, the private and public value which the enterprise or technology generates, as well as the magnitude of harm to copyright owners which the measure is likely to prevent or reduce. Copyright owners should bear a share of the costs of such measures, particularly with respect to producing information about what works may or may not be distributed over the ISP’s networks.

The requirement that the measure be “commercially available” is intended to avoid the implication that technology must be designed in the first instance to prevent infringement. If, however, commercially available technology can be deployed in an existing system, such as an online network, in a commercially reasonable way and it would be effective in reducing significant infringing activity, the system operator’s failure to deploy it would be relevant to whether the safe harbor protection from liability should be afforded to that party.

A practical problem arises when one considers adoption of such a safe harbor; namely, how to encourage the use of reasonable measures while discouraging the use of measures that do not take adequate account of the other side of the equation, including permitting lawful uses and protecting privacy. There is a risk that a service provider would elect to deploy a very “blunt” filter in the hope of obtaining the safe harbor, with little regard for its adverse effects, although service providers may be economically disinclined from use of such blunt instruments insofar as doing so would cause customer dissatisfaction.

We reached no consensus on a solution to this practical problem, but one approach that is worthy of further consideration is to call upon a regulatory

agency, such as the Federal Trade Commission, to assess whether a particular technical measure is, indeed, reasonable, effective, and commercially available. The safe harbor would then apply only to certified measures. The burden of proof that the measure meets the reasonableness, effectiveness, and commercial availability standard would be on firms wanting to encourage its use.

Failure to adopt such measures should not, by itself, give rise to liability for infringement, although it could be considered in assessment of secondary liability if other evidence establishes an actual intent to cause infringement. The potential for reasonable measures to mitigate infringement is already, we believe, leading researchers in development labs around the world to explore such solutions. A governmental agency may not be able to respond as quickly as the marketplace when new and better solutions become available. Thus, we hope the safe harbor would encourage service providers to adopt reasonable measures voluntarily, as they become available.

Any proposal to encourage deployment of technological measures should also be cognizant of the collateral consequences of their use. Incorporation of technological measures in an online service or network does have an effect on design and development of those networks and relevant technologies. This may well have implications for the kinds of innovations firms are willing to undertake, although it is difficult to assess at this point whether there will be a chilling effect on some beneficial innovations, or whether some beneficial innovations will occur, in part, because of the safe harbor. Accordingly, it is important that the safe harbor definition of “service provider” focus on those providers as to which the positive and negative effects of uses of technical measures are relatively well known and understood.

Most discussions around reasonable measures have focused on two main types of services: (1) internet access providers and the use of those services by peer-to-peer file-sharing services that are designed and used for infringement, and (2) online video services that allow users to upload video content that is often infringing. The reasonable measures proposal discussed here was developed with those types of reasonably well known services in mind but still raise important questions about their propriety and effectiveness.

Whether a similar safe harbor proposal should cover other types of services, computer networks, mobile devices and their networks, personal computers, and other technologies may raise very different questions with very different answers. A prudent approach would start with small steps and learn from those before applying these concepts to other services and

technologies. This uncertainty is one reason to support a voluntary safe harbor approach rather than a mandatory one.

Furthermore, no matter how “smart” any technology is, determination of what is and is not copyright infringement is often not susceptible to a simple, binary choice but instead requires assessment of issues such as fair use that will be beyond any technology. Any safe harbor must have provisions for users to receive notice of and opportunity to contest the application of a reasonable measure to their circumstance to correct for any “false positives.”

While a majority of the CPP group favors the non-mandatory safe harbor approach set forth above, a few members believe that a mandatory approach should at least be considered. This approach would impose an obligation on ISPs to deploy reasonable measures. In their view, a safe harbor is meaningful only to the extent that it shields firms from potential liability. At present, intermediaries usually face potential liability under secondary liability doctrines, such as vicarious and contributory infringement. Those doctrines require proving that some party is the direct infringer, which in turn often points the threat of liability at individual users of online systems. Moreover, the secondary liability approach raises difficult-to-answer questions about when intermediaries should be liable for acts of their customers—questions that involve tricky issues of knowledge, inducement, control, and the like, and on which courts have divided.

Those favoring a possible mandatory approach would prefer to reduce the dependence on the secondary liability doctrines, thus avoiding the difficulties just noted. They believe that the law should simply require the deployment of reasonable measures as part of online service systems that create the danger (and fact) of widespread, consumptive copyright infringement. Proponents of the mandatory approach believe that the contours of reasonable measures outlined above are themselves so “reasonable” that mandatory deployment is not likely to prove damaging to the economic interests of intermediaries or the digital economy generally. If such a proposal were adopted, the key questions would be the administrative ones already mentioned in the context of creating a safe harbor. Alternatively, if secondary liability doctrines continue to be used to address ISP liability, they suggest that failure to adopt reasonable measures to prevent known infringements should be considered as an element supporting the imposition of secondary liability.

Yet, some CPP members regard even a non-mandatory safe harbor as posing some risks. Instead of insulating ISPs from liability, creating such a safe harbor might eventually lead to an expansion in the scope of secondary copyright liability. A safe harbor makes sense only to protect against a corresponding liability. Congress enacted § 512’s safe harbors, in particular,

to insulate ISPs from liability for infringing content stored on their systems as a direct response to judicial recognition of potential contributory and vicarious liability for ISPs.<sup>15</sup> There has been no corresponding judicial recognition of secondary liability based upon a failure to employ so-called “reasonable” technological matters alone. Enacting a safe harbor, even a non-mandatory one, may implicitly suggest that ISPs should be liable for failing to adopt reasonable technological measures. Given the likely expense and uncertainty associated with guessing whether any given measure will ultimately be found “reasonable,” recognition of the proposed non-mandatory safe harbor may push ISPs to adopt unreasonable technological measures in order to avoid any risk of liability.

One important objective of the non-mandatory safe harbor proposal would be to focus attention more on the “gatekeepers” who can make the greatest impact on infringement and less on individual users. Service providers can do more to inhibit infringement and may bear some legal responsibility for infringement when they do nothing to mitigate it, as when they know infringing materials are on their sites and do not take them down after being notified by the copyright owners. Service providers must, of course, be free to provide their essential services and innovate on those services without undue economic risk. The present proposal is an attempt to find a middle ground and to stimulate thoughtful consideration of the role technology might play in preventing infringement.

#### E. REFORMS PERTAINING TO STATUTORY DAMAGES

**Recommendation #10: If copyright law is to retain the right to elect to recover statutory damages in lieu of actual damages, guidelines for awarding statutory damages in a consistent, reasonable, and just manner should be developed.**

Copyright owners have long been entitled to be compensated for pecuniary harms that infringement inflicts on them, such as the license fee the owner would have charged, a royalty stream the owner would have gotten, or profits the owner would have made but for the infringement. Copyright law also allows successful plaintiffs to force infringers to disgorge any profits attributable to that infringement. This disgorgement plays a crucial role in deterring infringement and preventing unjust enrichment. These remedies, taken together, remove or substantially diminish the

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15. *See* Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995); WIPO COPYRIGHT TREATIES IMPLEMENTATION AND ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION, H.R. REP. NO. 105-551, pt. 1, at 11 (1998).

incentive that a potential infringer might otherwise have to force the owner into an involuntary exchange of the right for only a compensatory award, such as a license fee. These core parts of the current copyright remedial scheme are sound.

Present law also allows copyright owners who have promptly registered their claims of copyright to choose, in lieu of an award of actual damages and infringer's profits, an award of "statutory damages" in an amount ranging from \$750 to \$30,000 per infringed work in the ordinary case, and up to \$150,000 per infringed work in cases of willful infringement, as the court deems "just." Courts can reduce statutory damages to \$200 when an infringer proves that he was not aware of and had no reason to believe his conduct was infringing, and to \$0 if the good faith user is affiliated with a non-profit educational institution. In practice, however, the lower level of statutory damages is hardly ever used.<sup>16</sup>

Statutory damages sometimes provide reasonable compensation when actual damages and infringer profits are difficult or expensive to prove or when damages and profits are low. At the higher end of the scale, statutory damages are thought to provide extra deterrence or punishment for egregious infringement.

However, the wide numerical range of permitted awards, coupled with the lack of standards or guidelines for awards, the ability of the plaintiff to unilaterally elect an award of statutory damages at any time in the litigation, and the willingness of courts and juries to decide that infringement was willful if the defendant should have realized his acts were infringing, has too often led to awards that seem arbitrary and capricious, inconsistent with awards in similar cases, and sometimes grossly excessive or disproportionate when compared with a realistic assessment of actual damages and profits.<sup>17</sup> The unpredictability of statutory damages sometimes has an undesirable chilling effect on some conduct that, if challenged, would be lawful.

It would be possible for Congress to develop guidelines to ensure that statutory damage awards are just. Courts could also, through case-by-case analysis, build a principled jurisprudence on statutory damage awards, but this has not happened thus far. If statutory damages are to be retained in U.S. copyright law, guidelines for their just application should be developed.

**Recommendation #11: An alternative way to achieve the deterrent or punitive functions of statutory damages would be to give courts**

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16. See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 474–75 (2009).

17. *Id.* at 480–91.

**discretion to award up to three times the amount of actual damages and infringer profits in exceptional cases as long as the copyright owner registered the infringed work(s) before the infringement commenced.**

CPP members considered an alternative to statutory damage awards for dealing with egregious infringements. It would authorize courts to award up to three times the amount of actual damages/infringer profits to provide an extra degree of deterrence or punishment for egregious infringement. This alternative would preserve and clarify some of the deterrent or punitive goals that statutory damages were partly intended to serve, while ensuring that awards are more commensurate with the infringers' behavior and proportionate to the actual harm inflicted on the owners.

The independence of this proposed remedy from the recovery of actual damages and profits aims to correct one of the fundamental structural failings of the current statutory damages provision, namely, the melding of two distinct types of objectives in one statutory provision: the perceived need for some compensation when damages and profits are difficult to prove, on the one hand, and the need for some higher level of possible awards to be imposed on egregious infringers, on the other. The multiplier-based approach to enhanced damages is also consistent with the approach to damages in other areas of intellectual property law, such as patent and trade secrecy law, as well as consistent with the Supreme Court's mandate that punitive damages should bear a reasonable relationship to the actual harm caused in a particular case.<sup>18</sup>

This proposal would entrust the decision whether to award enhanced damages in a particular case to the discretion of the court, rather than to the sole election of the plaintiff, as under the current statutory damage provision. Consistent with our formalities proposal above, we would limit the application of the enhanced damage award to those rights holders who have registered their works.

While this proposal would address concerns about predictability and proportionality in statutory damage awards, some of us had reservations about this proposal because it may not adequately address one of the animating purposes of the current statutory damage regime: to provide some meaningful recovery in cases where actual damages are difficult to prove. It is important that damage awards in copyright cases accomplish not just the deterrent, but also the compensatory purposes of copyright law.

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18. *See, e.g.,* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1999) (striking down a punitive damage award as so excessive as to constitute a due process violation).



## F. REFORMS RELATED TO INJUNCTIVE RELIEF

Issuance of injunctive relief is a long-standing remedy in U.S. copyright law, and that is as it should be. Injunctions are especially important and necessary in cases where harm to the copyright owner will be irreparable unless an injunction issues. Harm may be irreparable for many reasons, as when an award of monetary damages would be insufficient to rectify the wrong. Such an insufficiency may exist when it is difficult to ascertain the proper amount of monetary compensation due. Harm may also be irreparable when it tends either to undermine the plaintiff's business to a significant extent or to compromise its ability to obtain a money judgment. While injunctive relief is often appropriate, it sometimes is not. The recommendations below address two sets of issues involving injunctive relief: the need for application of traditional principles of equity before copyright injunctions issue, and circumstances in which injunctive relief may not be appropriate as compensation will rectify harm caused by infringement.

**Recommendation #12: Courts should have discretion to issue both preliminary and final injunctions in copyright infringement cases, but should apply traditional equitable principles before doing so.**

Following the Supreme Court's recent decision in *eBay Inc. v. MercExchange, L.L.C.*,<sup>19</sup> courts have renewed their attention to the equitable underpinnings of injunctive relief in copyright and other intellectual property cases.<sup>20</sup> Sound copyright principles support the principle recognized in *eBay*, that injunctions should not issue automatically. We believe that it is appropriate for courts to possess the authority to enter injunctive relief in copyright cases. Full attention to the traditional equitable principles will further the underlying goals of the copyright law. The *eBay* decision suggests that copyright owners should demonstrate that they will suffer irreparable harm and that the remedies provided at law are inadequate to compensate for the harm in order to qualify for injunctive relief. Use of equitable principles can help ensure that the goals of copyright law are not thwarted by too-frequent awarding of injunctive relief.

A separate question exists about whether courts should presume irreparable harm in copyright cases in which plaintiffs have sought preliminary or permanent injunctions. It has become quite common for courts to issue preliminary injunctions in copyright cases once rights holders have shown a reasonable likelihood of success on the merits without also requiring the rights holders to prove that they will suffer irreparable harm

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19. 547 U.S. 388, 391–94 (2006).

20. *See, e.g.,* *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

unless the preliminary injunction issues. Harm in these cases is often presumed to be irreparable. Also common is presuming irreparable harm once infringement has been found. The viability of these presumptions in the aftermath of the *eBay* decision, especially as to preliminary injunctions, has been questioned in some post-*eBay* case law, although some courts continue to invoke the presumptions. However, an automatic presumption of irreparable harm in every case is troubling.

A presumption of irreparable harm is particularly troublesome in cases involving transformative uses of existing works, such as parodies, remixes, and mashups, because free expression and free speech interests of creative users are at stake and transformative use cases often raise plausible non-infringement defenses.

On the other hand, the bar to establishing irreparable harm should not be raised so high as to preclude injunctions against clear and obviously harmful infringements. For example, injunctions are appropriate against counterfeiters or those who make unauthorized derivative works that would compete with the rights holders' intended works. Harm in these types of cases is likely to be irreparable.

We considered two options for responding to these concerns. One would eliminate the presumption of irreparable harm in all copyright cases. Under this approach, copyright owners would have to prove each equitable element to qualify for injunctive relief in each case. The goal would be to develop a jurisprudence that would both adequately protect the reasonable exercise of copyright owner interests and the free expression interests of follow-on creators. A second approach would allow a presumption of irreparable harm in some cases, such as those involving counterfeiting and other straightforward infringement, but would require plaintiffs to prove irreparable harm in other cases. In straightforward infringement cases, a presumption of irreparable harm may well serve the interests both of equity and judicial efficiency.

In light of the *eBay* decision, copyright plaintiffs should also show that the balance of the hardships weighs in their favor, and courts should explicitly consider the effect on the public interest when determining whether to enter an injunction. These final considerations should focus the court's attention on the effect an injunction may have not only on the defendant, but also on society as a whole. This would encourage explicit consideration of the First Amendment and of copyright's constitutional goal of promoting widespread dissemination of knowledge.

**Recommendation #13: Courts should avail themselves of the discretion they have to fashion alternative remedies in lieu of injunctive relief.**

The Supreme Court has repeatedly recognized the authority of courts to permit the defendant to continue to engage in an activity determined to be infringing conditioned upon payment of a specified amount, either a lump sum or an on-going royalty, and/or satisfaction of other conditions the court deems reasonable under the circumstances.<sup>21</sup> Courts should continue to develop guideposts for when such alternative relief should be granted.

Lower courts have thus far been reluctant to grant relief that permits a defendant to continue to engage in activity found to be infringing, even upon payment of a license fee. Such relief can be viewed as imposing a compulsory license and as encouraging infringement on a theory that putative defendants will calculate the risks differently *ex ante*. We do not believe that this result necessarily follows from the availability of the alternative remedy. If courts effectively articulate the situations in which alternative relief may be imposed, the possibility of such alternative relief being awarded will not result in encouraging egregious infringement. On the contrary, the real possibility of such alternative relief in appropriate cases should, in fact, lead to more appropriate bargaining between the copyright owners and the putative infringers.

Alternative relief may be appropriate in a number of situations. Consider, for example, a case in which a defendant has used a copyrighted work without authorization in the creation of a new work, but the copyrighted work is only a small part of the work while other factors played more significantly in the creation of the new work. In such situations, it may be appropriate for a court to permit continued exploitation of the new work upon payment to the copyright owner. The ability of the copyright owner to threaten court-ordered cessation of further exploitation of the new work may create an inappropriate hold-out potential that can skew negotiations in settling the dispute. On the other hand, it would be appropriate for a copyright owner to use such a hold-out potential against a putative defendant who is using the copyrighted work in its entirety, without authorization, with little or no added authorship.

Cases involving close questions of substantial similarity or fair use cases may also be cases in which, even though the court has determined there is infringement, an injunction against further use is inappropriate. This would be particularly appropriate when the case implicates free speech/free

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21. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, n.10 (1994).

expression concerns. It is important, however, that the availability of such alternative relief not affect the determination of the infringement which is, and should remain, a separate inquiry. A defendant's intent, and in particular, a lack of awareness of copying, should also factor into a court's willingness to impose alternative injunctive relief.

Alternative relief may also be appropriate in cases where there is a collective action problem or a market failure due to high transaction costs which leads to a difficulty in clearing all of the rights necessary from a multitude of copyright owners. Again, the power possessed by one copyright owner to put an end to a much larger project as a result of the entry, or even mere threat of entry, of a complete injunction may lead to the cessation of a project, or even prevent the inception of such a project, due to the disproportionate leverage one copyright owner may be able to exert.

In determining whether to enjoin the infringing activity or to permit the activity conditioned upon the payment of a license fee or other conditions, the court should consider relevant factors, such as

- (1) the public benefit of the use engaged in by the defendant;
- (2) the additional authorship added to the infringing work by the defendant;
- (3) the close nature of the substantial similarity inquiry;
- (4) the strength of the defendant's unsuccessful fair use or other defenses;
- (5) the plaintiff's non-economic motivations for seeking injunctive relief; or
- (6) the defendant's intent.

A court should also consider the potential for the leverage power of a complete injunction to be disproportionate to the level of benefit gained by the defendant in using the copyrighted work and to the level of harm to the plaintiff caused by such use.

In determining the appropriate monetary compensation that would allow the defendant to continue to engage in infringing activity, it may be appropriate for the award to reflect compensation for only the amount copied that is in excess of fair use or in excess of otherwise permissible copying (e.g., in a close question of substantial similarity). Finally, it is important to be sensitive to the incentive effects that such an alternative to injunctive relief may cause. It may be appropriate in certain cases to require payment of a licensing fee that is in excess of what a reasonable royalty would have been, had it been negotiated prior to the infringing activity.

## G. PUBLIC DOMAIN REFORMS

**Recommendation #14: Once information resources become part of copyright's public domain, they must remain in the public domain.**

The public domain encompasses many information resources that are not subject to the exclusive rights of copyright. Public domain resources are generally available for free use by all, although contract law can sometimes be used to control access and use of these resources, subject to copyright law's preemption doctrine. In the American context, bedrock principles of freedom of expression and freedom of competition, as well as the constitutional objective of promoting the progress of science, underlie the policy of copyright's public domain. Because of this, we think that information resources that are in copyright's public domain should remain so.

Creative works and information resources can become part of the public domain in several different ways. Some creations, such as the design of useful articles (e.g., a chair), are ineligible for copyright protection in the U.S. and hence are in the public domain upon their disclosure to the public (unless they are patented). Some works, such as the white pages of telephone directories, lack a creative spark that would satisfy copyright's originality standard; upon publication, they become public domain resources as well. After expiration of copyright terms, works of authorship join other unprotected works in the public domain. Many works created before 1989 are also in the public domain for failure to give proper notice of copyright claims. Even works protected by copyright contain information, ideas, principles, and the like that are in the public domain.

**Recommendation #15: Copyright law should make it easy for copyright owners to dedicate their work to the public domain.**

Copyright's public domain can also include works of authorship whose rights holders have chosen to dedicate the work to the public domain. Scholars might, for example, be interested in making their out-of-print books freely available in a digital library. Public domain dedication is not expressly provided for by the current Copyright Act, although it has been recognized by the courts. To make such a dedication requires an overt affirmative act or statement by the copyright owner from which an intent to surrender copyright is manifest.

While judicial recognition of public domain dedications should continue, it would be desirable for there to be a statutory provision making it easy for copyright owners to achieve this goal. Once a copyright owner has dedicated her work to the public domain, it is and must remain free from exclusive rights control. The copyright statute should make clear that public domain

dedication is not a transfer of copyright that is subject to copyright's terminations of transfer rules.

#### H. COPYRIGHT LIMITATIONS AND EXCEPTIONS

**Recommendation #16: More elements in copyrighted works than just ideas and information should be excluded from the scope of copyright's protection for original works of authorship.**

Important limitations on copyright law are set forth in Section 102(b) of the 1976 Copyright Act. This provision is a partial embodiment of good copyright principles insofar as it characterizes ideas, concepts, and principles, along with procedures, processes, and methods of operation, as unprotectable elements of copyrighted works.

We recommend an amended provision that is more reflective of the many types of elements of copyrighted works that copyright law does not and should not protect. Although we did not reach consensus on precise legislative language to accomplish this objective, this example illustrates the concept:

Copyright protection extends to an author's expression, but not to any (a) ideas, concepts, or principles; (b) facts, data, know-how, or knowledge; (c) stock elements typical in works of that kind; (d) laws, regulations, or rules; (e) systems, processes, procedures, methods of operation, or functions, regardless of how any of these elements may be embodied in protected works. Nor is copyright protection available to a work or an element of a work if there is only one or a very small number of ways to express that idea or other unprotectable element. Elements identified in (a) through (d) should be regarded as in the public domain and available for free copying and reuse when the work has been made available to the public such that it cannot be claimed as a trade secret. The elements identified in (e) may also be in the public domain after publication of a work in which they are explained or embodied unless protected by a utility patent.

**Recommendation #17: Copyright law should recognize that there are more fair use purposes than is recognized in the current statute.**

Another important limitation on U.S. copyright law is embodied in its fair use provision. Fair uses of copyrighted works are not infringements. The Supreme Court has recognized that fair use helps to mediate tensions that would otherwise exist between copyright and free speech and expression values.<sup>22</sup> It also helps to ensure that second authors can build on pre-existing works so as to promote the progress of science. Fair use law, in fact, serves a

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22. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

wider variety of policies than this, and we think an improved fair use provision would more accurately reflect the range of social policy purposes for which fair use is often used in practice.

Fair use has often been found when:

- (1) a second author uses the first work to criticize it or create a parody, or otherwise transformatively recasts the work in the course of making a new work;
- (2) a second author productively uses some or all of an earlier work in the course of news reporting, teaching, scholarship, artistic expression, or the like;
- (3) a second author makes incidental copies that enhance access to information, such as by reverse engineering computer programs to get access to information necessary to create an interoperable program;
- (4) a competitor uses part of the author's work to engage in comparative advertising or otherwise to promote fair competition;
- (5) a person makes private non-commercial uses that do not compete with or otherwise undermine the author's market;
- (6) market failures prevent the development of a viable market for clearing rights;
- (7) administrative, legal, or other governmental use of the work is necessary to carry out legitimate government purposes;
- (8) courts are faced with a use not contemplated by Congress and where the fair use balancing process will result in an interpretation of the law consistent with copyright purposes.

The amount and substantiality of the taking and the likelihood of harm to the author's market should, as now, be given due weight in determining whether a use is fair or unfair.

**Recommendation #18: Personal uses of copyrighted works should be privileged to some degree.**

One difficult question that the CPP group discussed at length is how copyright law should treat personal use copying of copyrighted materials. We did not reach consensus on this issue. Some of us think that personal use should continue to be dealt with under the fair use rubric; others thought that exclusive rights should be drafted so that most personal use copying would not fall within the scope of the right; still others supported a carefully-crafted personal use exception. Creating some room for personal uses is consistent with the copyright principle endorsing meaningful limits on copyright owner control.

Several reasons can be proffered in support of an exemption of certain personal uses of copyrighted works from the realm of activities that copyright law regulates.

For one thing, copyright's main job is to provide authors with a means of controlling commercial exploitations of their works, as these are the acts by which copyright owners typically recoup their investments in producing their creative works. Personal uses, by definition, do not involve such exploitations.

Second, members of the public often express themselves through personal uses of copyrighted works—some of which may be transformative in nature and some non-transformative—and copyright law should respect user self-expression as well as the interests of authors in protecting their works.

Third, many, though certainly not all, personal uses happen in the privacy of a home, automobile, or other spaces as to which people have reasonable expectations of privacy. Respect for privacy interests support exempting personal uses from the scope of copyright.

Fourth, even leaving aside privacy concerns, it is generally infeasible to regulate personal uses of copyrighted works because it would be difficult and costly to enforce copyrights in spaces where personal uses take place.

Fifth, ordinary people do not think copyright applies to many common personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works. It would thus undermine the public's perception of copyright's legitimacy for it to extend to forbidding personal uses of protected works. If we want members of the public to respect copyright law and to abide by it, we should craft it to be a law that they will respect.

However, some copyright owners regard personal uses as implicating the same core reproduction right as commercial uses do. Insofar as there is a commercial demand for personal use copies, copyright owners may want compensation. For example, consumers typically pay one price for one copy of proprietary computer software and expect to pay more for extra copies for different machines, and certainly expect to pay additional sums for copies to be shared with friends. As copyright owners pursue new business models in a changed technological and economic environment, these new models may be focused on serving the personal use copy market. Motion picture studios, for instance, have begun to offer multiple home video release offerings, with additional copies of movies formatted for computers and portable devices among the enhanced features on premium discs. Rights holders perceive these and other offerings as fairly within the exclusive rights of copyright and directed toward markets that are reasonable and likely to be developed. They



also argue that adoption of a personal use exemption might well lead to higher prices for copyrighted goods to compensate rights holders for the extra copies purchasers may make, regardless of whether these purchasers actually make or value extra copies.

While there was no consensus within the group on how personal uses should be treated, we discussed at least four ways in which personal uses could be exempted from copyright: through a general personal use exception, a set of specific personal use exceptions, the fair use doctrine, and a careful crafting of exclusive rights.

Some nations (Japan and Switzerland, for instance) have personal use exemptions in their copyright laws. Article 30 of the current Japanese Copyright Act provides, “[i]t shall be permissible for a user to reproduce by himself a [copyrighted] work . . . for the purpose of his personal use, family use or other similar uses within a limited circle . . . .”<sup>23</sup> Some personal use exceptions in national laws require reasonable compensation in the form of levies on recording devices and/or blank media.

Other nations exempt certain specific personal uses but do not have a general personal use exception. U.S. copyright law, for example, exempts backup copying of computer programs and non-commercial consumer uses of analog and certain digital copies of recorded music under the Audio Home Recording Act (AHRA).<sup>24</sup> The fair dealing provisions of U.K. and Canadian copyright laws encompass some of what would fall within the penumbra of a general personal use exception. Some nations allow certain kinds of personal use copying but require payments of levies to recompense rights holders for this copying. The AHRA does this as well.

Although the United States does not have a general personal use exception, there is a reasonable consensus, at least among U.S. academics, that many personal uses would, if litigated to final judgment, be held fair and non-infringing uses of copyrighted works. Although there is very little copyright case law on personal use copying, the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, ruled that making copies of movies shown on broadcast television for time-shifting purposes was a fair use, largely because of the private, non-commercial nature of the copying.<sup>25</sup> Backing up the contents of one’s hard drive would likely be fair use as well, even though there is no statutory exemption for doing so except as to computer programs. Some scholars have argued that other personal uses are

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23. Copyright Act of Japan, Law No. 48 of 1970, art. 30.

24. Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001–1010).

25. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

fair, although the precise scope of fair personal uses is contested. Of course, the fact that a use is personal does not, by itself, render the use fair; other factors must be considered as well.

Exclusive rights can also be crafted to leave personal uses unregulated. One could, for instance, limit exclusive rights so that they extended only to uses that are commercially harmful, as suggested above. Or authors could be granted a core exclusive right to disseminate their works to the public, which would leave personal uses outside copyright's scope.<sup>26</sup> U.S. copyright law already limits exclusive rights of performance, display, and distribution to those that are "public," seemingly immunizing, albeit implicitly, many personal use performances. A reproduction or derivative work/adaptation right might be designed to exclude personal uses by requiring a showing of intent to distribute the copies into the right (e.g., "reproduce a work in copies with the intent to distribute the copies"). It would be important to make more explicit the underlying policy reasons for leaving such personal uses unregulated.

There are several disadvantages to addressing the personal use issue through the fair use doctrine: First, it may be unpredictable, cumbersome, and expensive to adjudicate. Second, courts often give considerable weight these days to the "transformative" character of a defendant's use, leaving iterative personal use copying vulnerable to challenge. Third, fair use is arguably already doing too much work in U.S. copyright law, and exempting personal uses would relieve this law of one significant burden. Fourth, many forms of personal use do not cause copyright owners more than de minimis harm, and hence they will so often be fair uses that an exemption seems appropriate on that ground. Finally, an express personal use exception in copyright would demonstrate that the law conforms to reasonable public expectations and appropriately balances public and private interests.

Retention of fair use as a way of shielding personal uses would, however, be better than trying to name and write a specific rule as to every possible personal use that should be exempted, a task that seems impossible to perform well, especially given the fact that technology is constantly changing the realm of possible uses.

**Recommendation #19: Copyright exceptions for libraries, archives, and museums should be updated to better enable preservation and other legitimate uses in light of ongoing technological change.**

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26. See, e.g., Paul Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COP. SOC'Y 168 (2008).

Libraries, archives, and museums are cultural institutions created to serve the public good by making books, journals, ephemera, artifacts, and other materials available in order to increase knowledge, taste, and culture and to enhance the ability of citizens to interact with the world around them. The public has a strong interest in the preservation of the cultural record. Libraries, archives, and museums have the institutional mission to perform this critical function. The public shares a similarly strong interest in access to works, information, and artifacts preserved by these institutions. Libraries, archives, and museums are generally willing to undertake this task only if they can make these preserved copies available to the public.

Copyright law should encourage libraries, archives, and museums to fulfill their missions, while also taking into account the effect of such policies on the market for copyrighted works. Providing access to copyrighted works, reproducing portions of works upon the request of a user so the user can make a non-infringing use of the material, and encouraging research and scholarship are critical not only to these institutions, but also to society. Moreover, these activities further the ultimate constitutional purpose to promote the progress of science.

Although the exact contours of library, archive, and museum exceptions need to be carefully defined, these institutions undertake many activities that copyright law should enable to some extent and with appropriate safeguards to protect the rights of copyright holders. These include the following:

- (1) reproducing copies of lawfully acquired copyrighted materials for the purposes of preservation and security;
- (2) curating and preserving collections of publicly available online content based on the needs and interests of local communities, and making them available to users;
- (3) replacing copies of lawfully acquired copyrighted works that have been lost or stolen or that are damaged or deteriorating;
- (4) converting the format of works when the equipment for perceiving the work is obsolete and the copyright holder has not distributed the work in the newer format;
- (5) making both preserved and replaced copies available to users under the same conditions as the original copies when original copies and replacement copies are not reasonably available; and
- (6) reproducing single copies of small portions of all types of works, regardless of format, for purposes such as scholarship, research, or private study, upon the request of a user.

In addition, libraries, archives, and museums should be able to outsource these privileged acts as long as adequate safeguards are in place to protect copyright owners.

**Recommendation #20: Limitations and exceptions to copyright law ought to be based on principles, rather than being largely the product of successful lobbying.**

An examination of the numerous exceptions and limitations to U.S. copyright law reveals an odd assortment of rules whose underlying normative justifications are not always easy to discern. Some exceptions and limitations do, we believe, have a principled basis, including the fair use and library provisions mentioned above, as well as the first sale limitation on copyright owner control of distributions of copies and exceptions allowing those engaged in non-profit educational institutions to perform copyrighted works in the course of instruction. Yet, it is puzzling that horticultural fairs have an exemption when other types of fairs do not. Several exceptions resolve inter-industry disputes (such as the exception for secondary transmission of broadcast signals by cable television systems) or establish compulsory licensing rules for situations when Congress has been convinced that market forces will not yield appropriate results.

While it is beyond the scope of the CPP inquiry to do a thorough review of exceptions and limitations of copyright and articulate the principled basis on which these provisions can be justified, we do think that future copyright reform efforts should undertake to articulate such principles.

#### I. ORPHAN WORKS LEGISLATION

**Recommendation #21: Congress should limit remedies as to those who reuse in-copyright works whose rights holders cannot be found after a reasonably diligent search.**

Copyright terms today are, in comparison with historical practices, exceptionally long—ninety-five years from first publication for corporate-authored works and life of the author plus seventy years for individually-authored works—owing to numerous copyright term extensions by Congress. Only rarely are works from the 1920s through 1960s still commercially available. Yet, copyrights may still be in force long after the commercial life of a work has ended. Many of these works do have considerable value, however, for historical and other research purposes, but reuses for these purposes are limited because of copyright constraints. Especially problematic are the inhibitions on reuses of these works when the rights holder cannot be located after a reasonably diligent search.

The U.S. Copyright Office has recognized this “orphan works” problem and has recommended legislation to enable those who make reasonable

efforts to locate rights holders to use them, both to make orphan works available in their original form (e.g., on a website containing historical documents) and to make derivative uses of them (e.g., a movie based on a short story from the 1930s).<sup>27</sup> This legislation would substantially limit remedies against good faith reusers if the owner of a particular work later comes forward. Works that are true orphans would be freely reusable by all.

The CPP supports legislation to allow reuses to be made of orphan works in line with the Office's recommendations. Until this legislation passes, we hope that courts will consider efforts to locate the appropriate rights holder and the out-of-commercial-circulation nature of works as part of their fair use analysis in cases involving the reuse of older works.

The orphan works problem should be significantly ameliorated if the copyright registration regime is substantially reinvigorated, as discussed above. A presumption might well be established that if a work has not been registered within a certain period of years (e.g., fourteen years after creation), it could be presumed an orphan and available for reuses. A later registration by the appropriate rights holder might preclude some future non-transformative uses, but this should not prevent a good faith reuser from enjoying the fruits of his or her own creation based upon use of an underlying work that he or she reasonably believed to be an orphan.

#### J. REFINING COPYRIGHT'S PREEMPTION DOCTRINE

**Recommendation #22: Courts should be more careful in assessing federal preemption of contractual provisions and state statutory rights insofar as they alter the balance of user and copyright owner rights and insofar as their enforcement would frustrate the purposes of copyright law.**

The U.S. Constitution provides that federal law is "supreme" over other laws. This has been interpreted to mean that when state law conflicts with federal law, either expressly or implicitly, or when state law attempts to regulate in a field in which the Constitution or Congress provides that federal law is exclusive, state law will be preempted. The Constitution gives Congress the power to grant exclusive rights to authors in their writings in order to "promote the progress of science." The founders' main purpose in giving Congress this power was to ensure that copyright law would be uniform throughout the nation. Copyright is thus a legal domain in which federal law is exclusive. States cannot, in other words, pass copyright laws of

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27. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 92–127 (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

their own. If they did, those state laws would be preempted by federal copyright law. The same preemption principle also applies insofar as state courts apply their laws in a manner that extends copyright-like protections to in-copyright works or to works or aspects of works that federal copyright law regards as unprotectable by copyright law, such as unoriginal compilations of data or news of the day. The federal preemption principle also applies when an interpretation of state law would frustrate the purposes of federal copyright law.

The CPP group discussed the inclination of some federal judges to brush aside arguments that enforcement of certain contract provisions should be preempted because they would frustrate copyright purposes. Some members think that judges too often act as though contract provisions cannot be preempted because the parties agreed to them and that a more serious analysis should be conducted. Other members think that the perceived problems with this judicial approach are more theoretical than real and that the proposed refinement risk undermining laudable uses of contract that make the copyright system work in practice.

Despite this lack of consensus, we have included the proposed preemption refinement here to advance the dialogue and study of this issue. Some factors that courts might usefully consider in determining whether preemption applies include the following:

- (1) the extent to which the contractual provision at issue alters the scope of protection copyright would otherwise provide;
- (2) whether the contractual provision accompanies a work that is published or otherwise publicly distributed;
- (3) whether the contractual provision is individually negotiated or part of a uniform, mass market license;
- (4) whether the idea or information that is the subject of contractual protection is otherwise readily available from other sources without similar contractual restrictions;
- (5) whether enforcing the contract would establish legal control over ideas or information that copyright leaves unprotected in ways that would unreasonably inhibit future authorship or create undue monopolization;
- (6) whether the contract would stifle the dissemination of new creative works, such as works that criticize or comment on existing works;
- (7) the copyright owner's purpose in including the challenged provision in the contract;

- (8) whether failure to enforce the contractual provision would frustrate efficient, practical enforcement of the copyright owner's rights; and
- (9) whether the contract would restrict access to works that are no longer protected by copyright.

These factors are not intended as a multi-part balancing test or for statutory codification, but rather as suggestions for some considerations relevant to resolving, through case-by-case development, the ultimate question of whether enforcing a given contract right in a given set of circumstances will frustrate copyright's purposes.

In the absence of meaningful judicial scrutiny, the balance of interests that copyright seeks to achieve may be vulnerable to disruption by license or other contractual conditions that inhibit activities that copyright law seeks to promote. Courts should, of course, not adopt categorical rules, such as one that would render unenforceable any term of a mass market license prohibiting use of a copyrighted work that otherwise would be a fair use. Instead, contractual provisions that forbid undertaking activities that copyright law would otherwise permit or that require action, such as giving attribution, that copyright law otherwise does not expressly require should be subject to implied preemption analysis in appropriate cases. That analysis could usefully focus on the factors suggested above. This principle respects the general freedom of contract and the role of state contract law in furthering copyright's purposes by supplying means for enforceable transfers or licenses of federal rights while also addressing the danger that contract law's flexibility can be abused to undermine copyright's purpose in particular instances.

We also recognize that some contracts that alter copyright's scope do not frustrate its purposes. Consider, for example, a contractual provision that prohibits the reverse engineering of software or the extraction and reuse of facts or ideas from a database or other works. Despite altering the scope of protection copyright provides, such contractual clauses do not in every case frustrate the purposes of copyright and may in fact promote them. For example, a software company may include a no-reverse-engineering clause in the contract that accompanies custom designed software which is distributed to only a single customer for purposes of evaluation. Or an author may include a "no copying of facts or ideas" clause in a contract that accompanies a script proposal. In each case, the clause at issue may prove material in ensuring that both the initial disclosure and the eventual public dissemination of the work occur. Rather than frustrating the purposes of copyright, using such complementary contract protections may further copyright's goals of encouraging authorship and the dissemination of original works.

Yet, inclusion of those clauses in contracts in different circumstances may pose a more direct threat to copyright's fundamental balance. Under copyright law, the copyright owner has the exclusive right to those aspects of her work that are both original and expressive. She does not, however, own every aspect of her work. Under copyright law, she does not have the exclusive right to the facts and ideas in her work, even where they are original. As a matter of policy, copyright leaves these aspects of a work unprotected and available for others to use both to avoid undue monopolization and to leave room for future authorship.

Allowing state contract law to restrict reuse of facts and ideas through contracts that bind everyone with access to the work may disrupt the balance copyright strikes between what an author owns and what she does not. Later authors could not as readily write their own works, or publish competing works, if they faced a plausible threat of breach of contract suit under state law whenever their works happened to include or explore some of the same facts or ideas found in an earlier work. In such a case, enforcing under state law a contractual prohibition on copying or reverse engineering would frustrate copyright's purpose of leaving room for future programmer authorship and competition.

Enforcement of state law contract rights might frustrate copyright's purposes in other circumstances as well. For example, a defining and constitutionally required feature of copyright is that it has a limited term. Attempts to extend copyright's term through the use of contractual restrictions on use and copying would fundamentally alter the balance that copyright strikes. Additionally, copyright, through the fair use doctrine, seeks to promote new works that comment, critique, or parody existing works. Attempts to limit criticism, comment, or parody through contractual provisions may impede the creation of such works and frustrate copyright's purposes.

#### K. REFINING THE SPECIALLY COMMISSIONED WORK FOR HIRE RULES

**Recommendation #23: Contributions to computer programs should be considered as a new category of specially commissioned work eligible for treatment as works made for hire.**

U.S. copyright law has special rules for vesting copyrights when works have been made "for hire." When a work has been created by an employee within the scope of his or her employment, U.S. law treats the employer as "the author" of the work, and the copyright automatically vests in the employer. We do not suggest any change to current law with respect to this kind of work for hire.



A second type of work for hire arises when someone who is not in an employment relationship with the putative author commissions the latter to create a work or contribute to a work, as long as the commissioned party agrees in a signed writing that the commissioned work should be treated as a work for hire in which the commissioning party will own the copyright.

Current law provides that only nine types of works, such as contributions to motion pictures, to encyclopedias, and to atlases, are eligible for treatment as specially commissioned works for hire. It is somewhat difficult to discern a principled basis for the nine categories established in the law. But the qualifying works seem generally to have in common that they involve collaborations among more than a small number of individual contributors for the purpose of preparing one work that would most efficiently be made available by one copyright owner who holds all of the rights. The one rights holder is best situated to coordinate the contributions, supervise creation of the final product, and make the whole work commercially available to its intended audience.

One advantage of treating specially commissioned works with multiple contributors as works for hire is that the works' copyright term will be more certain than if each contributor was considered a joint author (the last surviving contributors might die decades after others, contributing to uncertainty about duration). Such works can also still be exploited without risk that one contributor would terminate the transfer after thirty-five years and make the work as a whole unavailable to future users.

By limiting the classes of works for which the specially commissioned work for hire rule is available, Congress clearly intended—and we agree this is appropriate—that works prepared by independent contractors should not be treated as works for hire. Independent contractors may well assign their rights to a commissioning party, but they are entitled to terminate this transfer during the window of time that U.S. copyright law permits terminations.

Our discussion of the specially commissioned work for hire category led us to articulate the above rationales for this rule. We also considered whether any new categories of specially commissioned works should be added to this rule. There was interest among CPP members in the possibility of adding computer programs as a tenth category of specially commissioned works for hire, as the rationale above would seem to support this in situations in which independent programmers were contributing parts to a large program.

That software was not initially included in the list of eligible specially commissioned works has historically not been a serious problem since software often has an economically useful life of something less than thirty-five years. Notwithstanding that fact, many firms now instruct that the

development of certain software must be done by employees to avoid the termination of transfer problem, which creates its own problems. As the software industry continues to mature, however, it is becoming more common for software to include bits and pieces of code that are more than thirty-five years old (for example, in mainframe operating systems). The fact that efficient creation of software has pushed vendors to create increasingly modularized systems that reuse components will only increase the presence of older software in the newest products. Moreover, economic exigencies have encouraged manufacturers to increasingly hire third parties for important pieces of software. The economic ramifications of allowing programmers to terminate their copyright interest in a valuable piece of software could be significant, leading to increased costs or, worse yet, interruption of its continued use.

There may well be other categories of works that should also be considered for inclusion in the work for hire exception, and we discussed whether a procedure should exist for adding new categories to this rule. We considered, for instance, whether the U.S. Copyright Office should be given rule-making authority to add computer software contributions or other types of works to the specially commissioned work for hire rule. We did not reach consensus on this approach.

An alternative approach to the list of specific types of works eligible for the specially commissioned work for hire rule would be to allow all works to be eligible for this treatment as long as there was a contract reflecting an agreement on the work-for-hire issue between the commissioning and commissioned parties, and so long as that contract was not unconscionable and enforcement of its terms would not offend public policy. The proposed limit on enforceability would recognize that the author/creator and the commissioning party may be in unequal bargaining positions and the commissioning party may try to dictate terms that exploit that difference in an unfair manner. However, there was little support within the CPP group for this approach, as unconscionability is very difficult to prove. This policy is also inconsistent with congressional choice in 1976 of allowing independent contractors to recapture transfers of copyrights through termination after a period of years.

#### L. REFORMING TERMINATION OF TRANSFER RULES

**Recommendation #24: Termination of transfer rules should be revised to make them less formalistic.**

Since at least 1831, Congress has provided some mechanism by which an author or his heirs could reclaim ownership of a copyright at some point even though it had been transferred to another person. Initially, this was

achieved by providing authors with an opportunity to claim a second term of copyright protection, even if they had assigned rights under the first term to another person. Current law achieves a similar goal through rules allowing authors to terminate assignments or licenses to others after thirty-five years.

Copyright's reversion mechanism has some important advantages. Copyrighted works may be long-lived. New and often unforeseeable ways to use those works are likely to arise over the life of the copyright. It is often difficult for authors to bargain effectively about unforeseen future exploitations. As a result, authors may systematically be unlikely to share (or to share fairly) in the benefits that new technological means of exploitation create. When new media arise, reversion may allow authors to exploit their works in those new media when their grantees, particularly if they are old-media incumbents, may not be willing or well positioned to do so. Reversion may allow for clarification and consolidation of rights in new media. If contracts are unclear as to who has rights in the new media (as is often the case), then reversion of rights to the author would usually clarify that the author (or her successors) has those rights and can upon reversion clearly grant them.

The current mechanism for reversion is a termination of transfer procedure, which applies to all post-1977 transfers by authors to others. This mechanism is so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate these transfers. Termination can be effected only during a five-year window. Calculating the dates on which that window opens and closes can be difficult, so authors may inadvertently miss opportunities to terminate. Indeed, in some cases an author may only learn of her termination right after the window has closed and the right has expired. In addition, the requirement that notice of termination be served not more than ten, and not less than two, years before the effective date of termination may also cause some authors to lose their ability to terminate a transfer through mistake or inadvertence.

When an author has died before the termination window arrives, the current system permits termination by statutorily-specified successors (generally a surviving spouse, children, or grandchildren). But because the statute divides the termination interest among the successors it names and then requires majority action by those interest holders in order to terminate a transfer, it creates opportunities for deadlock and miscalculation. The statute repeats those problems when it requires that those holding the divided interests in the terminated rights again act by a majority to make any further grant of those rights; in that situation, the danger of deadlock poses the risk that the reclaimed rights will not be regranted at all, potentially diminishing the use of the work.

The termination of transfer provisions of current law were the subject of considerable discussion at CPP meetings. We were able to reach consensus that the existing rules are too complicated and formalistic, and that some reform of them would be beneficial. But when it came to specific proposals to improve these rules, there was substantial disagreement.

There was some sentiment in favor of elimination of termination rights altogether, in part because current provisions are too complicated to be useful to most authors, and in part because termination reflects a paternalistic effort to protect authors. Others preferred to reform termination in order to create a simplified copyright reversion mechanism that would be easier for authors to actually use.

One example of a simpler termination mechanism is to limit the termination right to the author himself during his lifetime. Under one implementation of this approach, the author would have an unwaivable, inalienable right during his lifetime to terminate a copyright grant after some period of years after that grant. But only the author would have the power to terminate a transfer. After the author's death, the statutory termination right would be unavailable.

Because this approach would allow only the author to terminate, those favoring this approach thought that the opportunity to terminate should become available at a much earlier date than under current law. Fifteen or twenty years after a grant could well be an appropriate time at which the termination window would open. Marketing cycles for many different sorts of works have gotten much shorter in the three decades since Congress enacted the 1976 Act, and new media offering unforeseen opportunities for exploiting older works are emerging more frequently.

Even after a termination occurred, the grantee or the grantee's successor in interest should be permitted, as under current law, to continue to exploit any existing adaptation/derivative work according to the terms of the terminated grant. Perhaps it would even be appropriate to offer more protection to a grantee's interest in derivative works by expanding this privilege so that the grantee would also retain a non-exclusive license to prepare new derivative works under the terms of the terminated grant.

The reversion approach discussed here would retain many features of the current termination provisions. For example, termination rights would be unavailable as to works made for hire. In addition, an author could terminate both transfers and grants of non-exclusive licenses, and termination would not be automatic. Any termination would affect only rights arising under U.S. copyright law and not other rights that the author may have transferred. But the most cumbersome aspects of the current termination system would be

altered to make it easier for authors to terminate their transfers if they wish to do so.

Although we were not able to reach consensus on specific reforms to the termination of transfer rules, we have taken the trouble to set forth several ideas on which we deliberated, as they may be informative for future conversations about terminations of copyright transfer rules.

M. EXTENDING ATTRIBUTION RIGHTS TO MORE THAN VISUAL ARTISTS

**Recommendation #25: Serious consideration should be given to extending to authors of works, other than those made for hire, a right to be identified as authors of their works.**

Being properly identified as the author of literary and artistic works is an interest that predates the emergence of the formal regime of copyright, which has focused mainly on the grant of economic rights to control the making and dissemination of copies of protected works. Attribution is a norm in many cultures and legal systems and is reflected in a variety of ways, including through well-established norms against plagiarism. A modern manifestation of this interest is the widespread use of Creative Commons licenses that require reusers of CC-licensed works to acknowledge the authorship of the reused work.

Attribution interests of authors are recognized in the Berne Convention for the Protection of Artistic and Literary Works, which the United States joined in 1989. Article *6bis* of that treaty says: “Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work.”<sup>28</sup> This right is supposed to last for the author’s lifetime and under Berne, should be maintained “at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.” Although attribution interests are sometimes protected in the United States by contracts, union rules, state laws, fair use rulings that take into account whether authorship attribution has or has not been acknowledged, or laws protecting against misrepresentations and deception, U.S. copyright law has not yet provided general protection to authors as to their attribution interests.<sup>29</sup>

The CPP group debated at some length whether U.S. copyright law should extend the right of attribution to authors more generally. An

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28. Berne Convention for the Protection of Literary and Artistic Works art. *6bis*, Sept. 9, 1886, 1 B.D.I.E.L. 715.

29. See 17 U.S.C. § 106A (2006) (granting rights of attribution and integrity only to authors of works of visual art).

attribution right would serve two main purposes. One would be to bring U.S. law into greater compliance with the Berne Convention. A second would be increased legal recognition of authors' desires to be given credit for their creations, particularly in circumstances in which others make legal but unlicensed uses of their works. Many of us favored such an extension of rights, but we also recognized that doing so would require resolving a thicket of practical issues. Hence, our recommendation is for serious consideration to be given to general recognition of a right of attribution for authors of copyrighted works, other than those created as works made for hire.

Among the important practical questions are these: First, must the name of the author appear on each copy of a work? Many countries have adopted reasonableness limits on the attribution right, which would allow consideration of factors such as the context in which a work appears, business practices and exigencies affecting attribution, and whether the work was so well-known as to be, in essence, self-attributing. A reasonableness limit would ensure that an attribution right would not be too zealously or mechanistically applied.

Second, should the law protect against misattribution (i.e., allowing an author to insist that a work not be attributed to her)? The misattribution interest might be protectable under principles of tort law. It is worth noting, however, that the Supreme Court has ruled that a reuser of a public domain work did not violate a false designation of origin law when it made and sold copies of that work without attributing authorship to the owner of the now-expired copyright.<sup>30</sup>

Third, should the attribution right be waivable by contract? Granting an attribution right to authors may not effectively protect that interest if authors will routinely be subject to demands for waiver by those in negotiating positions far stronger than most creators, thereby undermining and possibly eviscerating the right. Counterbalancing that concern, however, is the strong U.S. policy in favor of freedom of contract. Research should be conducted to determine if there are some legitimate interests of commercial exploiters of protected works in allowing the work to be made available without attribution.

Fourth, should the right of attribution be available to all categories of works, or should there be some exclusions (e.g., for computer software)?

Fifth, what remedies should be available for violation of the attribution rights? It may be difficult to assess damages caused by failure to attribute

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30. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

authorship. Carefully tailored injunctions may be an important remedy to address non-attribution and misattribution problems.

Sixth, should an attribution right be limited to the life of the author, as it is under the Visual Artists Rights Act, or extended to the full copyright term, in keeping with other exclusive rights and the Berne Convention?

#### IV. CONCLUSION

In numerous respects, copyright law today serves well the interests of authors, those to whom authors assign or license their rights, and the public, but in some important respects, this law is askew. The last few decades have witnessed dramatic changes in the copyright landscape, especially with the advent of global digital networks and technological tools that are widely used to access and interact with copyrighted content, so it is not surprising that courts and Congress have found it difficult to adapt the law in a coherent and principled way. This project addresses those changes and difficulties and the ways in which current copyright law does not serve well the interests of those it affects. By articulating principles of a good copyright law and examining existing U.S. copyright law in light of those principles, members of the CPP have sought to achieve two main goals. The first is to explain the normative grounding of particular copyright rules that do comport with these principles. The second is to offer recommendations for change so that copyright law can better be adapted to meet the challenges of the day in a way that is principled and balanced, and that would command respect from the public as well as from copyright owners.

