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Fetishizing Copies

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Fetishizing Copies

*Jessica Litman**

ABSTRACT

Our copyright laws encourage authors to create new works and communicate them to the public, because we hope that people will read the books, listen to the music, see the art, watch the films, run the software, and build and inhabit the buildings. That is the way that copyright promotes the Progress of Science. Recently, that not-very-controversial principle has collided with copyright owners' conviction that they should be able to control, or at least collect royalties from, all uses of their works. A particularly ill-considered manifestation of this conviction is what I have decided to call copy-fetish. This is the idea that every appearance of any part of a work anywhere should be deemed a "copy" of it, and that every single copy needs a license or excuse. In this chapter, I focus on two well-known instances of copy-fetish: the contention that any appearance of a work or part of a work in the random access memory of a computer or other digital device is an actionable copy, and the assertion that the mere possession of a publicly accessible copy infringes the exclusive right to distribute copies to the public. Both arguments have their inception in difficult-to-justify court of appeals decisions, which were then embraced by copyright owners as tools to expand secondary liability. Neither one makes much sense on its own terms. The political economy of copyright, however, makes it overwhelmingly likely that any comprehensive copyright revision bill will incorporate both of them. That makes it imperative that we recognize readers', listeners', and viewers' copyright liberties expressly, and protect them with explicit statutory provisions.

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PROOF

The most important reason that we have copyright laws is to encourage authors to create books, music, art, theatre, films, computer software, and building designs, and to communicate those works to the public.[1] The most important reason we want to authors to create and communicate new works is that we hope that people will read the books, listen to the music, see the art, watch the films, run the software, and build and inhabit the buildings. That is the way that copyright promotes the Progress of Science.[2]

This assertion has become more contentious than it used to be. If the most important reason for copyright is to encourage readers, listeners, and viewers to experience works of authorship, that suggests that readers, listeners, and viewers have significant interests that the copyright laws should pay attention to. And that's controversial, even though it shouldn't be, because too many advocates for copyright owners have concluded that any explicit attention to the copyright interests of readers, listeners, and viewers might undermine the interests of owners.[3] Thus, over the past decade, we've seen ill-considered overstatements in copyright speeches and essays to the effect that there are no readers' rights under copyright law.[4]

The notion of readers' interests in copyright law wasn't invented by some 21st century cyber-radicals. The concept that the public (which is to say, readers, listeners, and viewers) have copyright interests that are as important and sometimes more important than the interests of authors and owners has a long scholarly pedigree;[5]

[1] Copyright laws may also accomplish other goals. Over the past few years, I have heard people mention such purposes as securing a favorable balance of trade, providing jobs, and exporting American values. See U.S. Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Internet Economy, www.uspto.gov/news/publications/copyrightgreenpaper.pdf (2013); Stewart Siwerk, Copyright Industries in the U.S. Economy: The 2013 Report (2013), www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF (prepared for the International Intellectual Property Alliance); Chris Dodd, Copyright: A Leading Force for Jobs, Innovation and Growth, Huffington Post, www.huffingtonpost.com/chris-dodd/copyright–a-leading-forc_b_4302882.html (Nov. 19, 2013). Those subsidiary purposes, though, are common to many different businesses, and are by-products of a functioning copyright system, rather than its core goals.

[2] Accord Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc'y 1, 4–5 (1997) ("authors … enrich society by creating works which promote learning").

[3] See Henry Horbaczewski, *Copyright Under Siege: Reflection of an In-House Counsel, The Sixth Annual Christopher A Meyer Memorial Lecture*, 53 J. Copr. Soc'y 387, 393–94 (2006); I. Fred Koenigsberg, *The Fifth Annual Christopher A. Meyer Memorial Lecture: Humpty-Dumpty in Copyrightland*, 51 J. Copr. Soc'y 677, 679 (2004). See also Ginsburg, *supra* note 2, at 20 ("Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.").

[4] See, e.g., David Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. Copyright Soc'y 345 (2005); Koenigsberg, *supra* note 3, at 679.

[5] See, e.g., Robert Gorman, Copyright Law 1 (1991); Benjamin Kaplan, An Unhurried View of Copyright (1967); L. Ray Patterson, Copyright in Historical Perspective (1968);

it appears in many of the Supreme Court copyright decisions handed down in the 20th Century,[6] and is expressed in the legislative history of every major copyright statute.[7] So why has it suddenly morphed into a dangerous idea?

Some of it, I think, is real fear caused by the rapid development of networked digital technology. The markets for works of authorship have evolved more swiftly than our 40-year-old statute can adjust to. A reader, viewer, or listener equipped with networked digital technology can look like a scary machine for disseminating millions of copies.[8] Another reason may be the sense that compensation for creators is already shockingly inadequate. Any suggestion that readers might be entitled to rights seems to threaten to shave off another portion of what has turned out to be a tiny share of the sloshing piles of money that inhabit the copyright system. Some of it is surely conviction, not grounded in either law or history, that copyright owners should be able to control, or at least collect royalties from, *all uses* of their works. That's never been true, either in fact or law, but representatives of copyright owners have gotten used to arguing that it should be true.[9]

A particularly ill-considered manifestation of this conviction is what I have decided to call copy-fetish. This is the idea that every appearance of any part of a work anywhere should be deemed a "copy" of it, and that every single copy needs a license or excuse, whether or not anyone will ever see the copy, whether or not the copy has any independent economic significance, whether or not the so-called copy is incidental to some other use that is completely lawful.

Copy-fetish inspired the Authors Guild to sue the HathiTrust for copyright infringement over copies that HathiTrust archived and indexed but didn't allow

Thomas Edward Scrutton, The Laws of Copyright (1883); Zechariah Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503 (1945).

6 *See Quality King v. L'Anza*, 523 U.S. 135, 150 (1998); *Fogerty v. Fantasy*, 510 U.S. 517, 526–27(1994); *Feist v. Rural*, 499 U.S. 340, 349–50 (1991); *Sony v. Universal*, 464 U.S. 417, 429(1984); *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also U.S. v. Loew's*, 371 U.S. 38, 46 (1962); *U.S. v. Paramount*, 334 U.S. 131, 148 (1948); *Fox Film v. Doyal*, 286 U.S. 123, 127 (1932).

7 See, e.g., S. Rep. No. 190, 105th Cong. 9 (1998); H.R. Rep. 2222, 60th Cong. 7 (1909).

8 See, e.g., Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations for 2003: Hearings before a Subcomm. of the House Comm. on Appropriations, 107th Cong. 455–63 (2002) (testimony of Jack Valenti, Motion Picture Assn of Am); David Price, Sizing the Piracy Universe (2013), at www.netnames.com//sites/default/files/netnames-sizing_piracy_universe-FULLreport-sept2013.pdf (NetNames report commissioned by NBC Universal).

9 See, e.g., Fair Copyright in Research Works Act: Hearing on HR 6845 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. On the Judiciary, 110th Cong., 50–51 (2009) (Serial # 110-204) (testimony of Ralph Oman, former Register of Copyrights); Performance Rights Act: Hearing on HR 848 Before the House Judiciary Comm., 111th Cong. 29 (2009) (testimony of Billy Corgan, MusicFIRST) (Serial # 111-8); Mark Helprin, *A Great Idea Lives Forever. Shouldn't its Copyright?*, N.Y. Times, May 20, 2007, at www.nytimes.com/2007/05/20/opinion/20helprin.html.

anyone to see.[10] Copy-fetish has persuaded others that fair use has somehow run amok because copyright owners are losing lawsuits that they would probably never have brought if they didn't feel obliged to protect themselves from all unlicensed copies.[11] Copy-fetish is encouraging lobbyists to push the United States Trade Representative to negotiate bilateral free trade agreements that incorporate copyright provisions far more generous to copyright owners (and stingier to copy users) than anything in U.S. law.[12] Copy-fetish is impelling copyright's defenders to insist that readers, listeners, and viewers have and should have no rights under the copyright law, at least if attention to user rights might breed tolerance for unlicensed copies.[13] As a rhetorical strategy, that tack seems short-sighted. Without a wide swath of freedom for readers, listeners, and viewers to encounter and enjoy works of authorship, the copyright law accomplishes little and is hard to defend.

Every single one of us who writes books, or articles, or stories, or music, or makes art, or photographs, or major motion pictures does so, at least in part, as an act of communication. We want to convey our ideas, words, sounds, and images to audiences, so that they can enjoy them, appreciate them, interact with them, and learn from them. The copyright system works because, in addition to encouraging authors to create works and communicate them to the public, it encourages audiences to read, listen, look at, learn from, and interact with those works.

[10] See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), aff'g 954 F. Supp. 2d 282 (SDNY 2013). When the district court upheld HathiTrust's fair use defense, one rightsholder representative reportedly described the decision as the 21st century's *Plessy v. Ferguson*. See http://policynotes.arl.org/post/79876737815/recap-of-the-copyright-offices-roundtables-on-orphan; Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-88) (testimony of James Neal, Columbia University). That's silly. There are lots of copies in the HathiTrust archive, but nobody actually sees them; nobody can read them. The copies make it possible to index, to perform sophisticated digital analysis of the text, and to attach metadata that tells us who owns the copyright and when the work will enter the public domain. None of that has ever been an infringement of copyright. See, e.g., *New York Times v. Roxbury Data Interface*, 434 F. Supp. 217 (SDNY 1977). The digital copies allow remote readers to search the text and discover that a particular word is in the book, but not to see so much as a snippet of the text itself. They make it possible to generate readable copies for print-disabled readers, which is explicitly permitted under 17 USC § 121. No licensing market has arisen for these uses and it is difficult to imagine how such a market could be designed. For most of the works in the HathiTrust collection, there is no easy way to ascertain the identity of the people or businesses that would be entitled to give permission for these uses if permission were required. The primary objection to what HathiTrust is doing is the largely noneconomic objection that the archive has a bunch of digital copies that nobody sees or reads, and that it didn't get licenses for those copies.

[11] See, e.g., *White v. West Publishing*, 12-CV-01340 (SDNY Feb. 11, 2013); *American Institute of Physics v. Winstead*, 109 USPQ 2d 1661 (ND Tx 2013); *Shell v. City of Radford*, Virginia, 351 F. Supp. 2d 510 (WD Va 2005).

[12] See, e.g., Margot Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. Cal. L. Rev. 977 (2014).

[13] See, e.g., Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users' Rights*, 56 J. Copyr. Soc'y U.S.A. 485 (2008).

The opportunities for readers, listeners, and viewers to read, hear, see, learn from, enjoy, and use works of authorship have always been among copyright law's most crucial features. For U.S. copyright law's first two centuries, it was rarely important to worry explicitly about the copyright rights of readers, listeners, and viewers, because the law left reading, listening, and viewing alone. Copyright law might have burdened the enjoyment of copyrighted works by supporting a system in which copies were scarce, overpriced, or both, but it didn't impinge directly on reading, seeing, or hearing those works. Publishers or bookstores that distributed books that were plagiarized from other works might have faced liability under the copyright law,[14] but it was never unlawful to read the books. George Harrison's *My Sweet Lord* might have infringed Ronald Mack's *He's So Fine*,[15] but Harrison fans who heard the song over the radio or played it on their phonographs were not themselves doing anything illegal.[16] Indeed, if, upon learning that Harrison had lost a copyright infringement suit, fans had run out and bought recordings of *My Sweet Lord* on CDs, they would not have had to worry about copyright liability for their purchases. The owners of the Skyline Supperclub may have been willful infringers when the club's band played *Proud Mary* and *I Heard it Through the Grapevine* without a performance license,[17] but the customers who danced to the music were not. Museum patrons who saw an infringing photograph hanging on the wall of the museum and bought postcards of it in the museum shop did not face even theoretical liability for copyright infringement unless and until they chose to send the postcard through the mail. Even though McDonald's McDonaldland commercials infringed Sid and Mary Krofft's *H.R. PuffNStuff* programs,[18] children who watched the McDonaldland commercials on television were not liable for seeing them, nor for begging their parents to dine at McDonald's because they were fans of Mayor McCheese.

Copyright law has traditionally sheltered readers, listeners, and viewers from liability for enjoying infringing works. That shelter is not an inadvertent failure to extend the law's reach to its logical targets, but a crucial mechanism for encouraging the use and enjoyment of works of authorship, and thereby promoting the progress of science. Rather than giving owners a broad general right to control all uses of their works, the copyright law has always conferred bounded exclusive rights that

[14] See, e.g., Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010); Horgan v. Macmillan, 789 F.2d 157 (2d Cir. 1986).

[15] See Bright Tunes Music v. Harrisongs Music Ltd., 420 F. Supp. 177 (SDNY 1976), aff'd in part, rev'd in part sub. nom. ABKCO Music v. Harrisongs Music, 722 F.2d 988 (2d Cir. 1983).

[16] But see Worlds of Wonder Inc. v. Vector Intercontinental, 1 USPQ 2d 1982 (ND Ohio 1986) (children who played unlicensed tapes in their Teddy Ruxpin toys created unauthorized derivative works; therefore the makers of the tapes were willful contributory infringers).

[17] See Broadcast Music v. Davis, 1986 U.S. Dist Lexis 27005 (D.S.C. 1986).

[18] See Sid & Marty Krofft Television Productions v. McDonalds Corp, 562 F.2d 1157 (9th Cir. 1977).

preserve sizeable zones of liberty for members of the public.[19] Copyright owners are not entitled to control many valuable uses of their works, including private distributions, performances, or displays. The challenges of adapting copyright law to the networked digital environment and copyright owners' effort to extend their exclusive rights to encompass control of any and all copies of their works are putting those zones of liberty at risk.

In the 21st century, we've seen significant erosion in reader liberties. Some of the erosion has been technological. Networked digital technology gives copyright owners and their agents abilities to monitor and meter what we read, hear, and see. This turns out to be useful if one seeks to sell our eyes and ears to advertisers.[20] Vendors of books, music, and movies use this information to recommend other items we might want to buy.[21] Publishers of digital textbooks convey detailed information about students' reading of assigned texts to their instructors to enable them to "assess student engagement" and intervene with individual students who may not have read the assignment with sufficient attention.[22] Because it can be both handy and profitable, businesses have equipped digital platforms for enjoying copyrighted works with technology that can identify, report, and disable users and their uses.[23]

Some of the erosion, though, has been legal. Vendors of works of authorship have moved from selling copies of works to a licensing model in which they detail which uses are permitted and which are prohibited.[24] They have yielded to the temptation to load the purported licenses up with multiple niggling conditions, exclusions, and bans.[25]

[19] See generally Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871 (2007).

[20] See, e.g., J. Howard Beales & Jeffrey A. Eisenach, An Empirical Analysis of the Value of Information Sharing in the Market for Online Content, Study conducted by Navigant Economics on behalf of the Digital Advertising Alliance, January 2014, at www.aboutads.info/resource/fullvalueinfostudy.pdf; Maxymiser, Deliver One-To-One Personalization with Quantifiable Results, www.maxymiser.com/products/online-personalization (visited August 4, 2014).

[21] See, e.g., Amazon.com, About Recommendations, www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=16465251 (visited August 4, 2014); Apple, Inc., iTunes: Genius, www.apple.com/itunes/features/ (visited Aug. 4, 2014); Netflix, Netflix Taste preferences and recommendations, https://help.netflix.com/en/node/9898?catId=en%2F131 (visited August 4, 2014).

[22] See www.coursesmart.com/.

[23] See, e.g., Electronic Frontier Foundation, Who's Tracking Your Reading Habits? An e_Book Buyer's Guide to Privacy, Nov. 29, 2012, at www.eff.org/deeplinks/2012/11/e-reader-privacy-chart-2012-update; Canoe, About Canoe Ventures, www.canoe-ventures.com/about.html (visited Aug. 6, 2014); Chris Kanaracus, Oracle Builds on Blue Kai Acquisition with Data Cloud, PC World (July 22, 2014), at www.pcworld.com/article/2457000/oracle-builds-on-bluekai-acquisition-with-data-cloud.html;Leap Media, About Leap Media Investments, www.leapmediainvestments.com/about.php (visited Aug. 6, 2014).

[24] See generally Margaret Jane Radin, Boilerplate (2012); Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 Notre Dame L. Rev. 1211 (2015).

[25] See, e.g., Cory Doctorow, Even Amazon Can't Keep Its EULA Story Straight, BoingBoing, January 12, 2010, at http://boingboing.net/2010/01/12/even-amazon-cant-kee.html;

Publishers of some works of authorship have combined their copyright rights, license terms, and legal prohibitions on circumvention of technological protections into florid schemes of user control that interfere with reader, listener, and viewer enjoyment of the works they purchase.[26]

When the legal erosion in reader, listener, and viewer copyright liberties meets up with copyright owners' appetite for enhanced control over all uses of their works, the combination creates a genuine danger that our copyright system will discourage rather than encourage reading, listening, and viewing. Indeed, the notion that readers, listeners, viewers, and other members of the public have cognizable interests in the copyright system strikes many copyright lawyers as both radical and unreasonable. The public's interest, they insist, is entirely congruent with the interests of copyright owners in a strong copyright system with powerful enforcement mechanisms.[27] Their insistence is accompanied by bitter complaints painting members of the public as hordes of ravening freewatchers,[28] but they don't appear to notice the irony.

The archetypal copy-fetish, familiar to all copyright scholars, is copyright owners' inconstant devotion to the infringing Random Access Memory copy.[29] (I call the devotion inconstant because even the most enthusiastic backers of the notion that unlicensed RAM copies infringe copyrights ignore the possibility of RAM fixation when it suits them.[30]) It's difficult to argue with a straight face that Congress intended

[26] See, e.g., Perzanowski & Schultz, *supra* note 24, at 1235-38; Nick Valery, *Difference Engine, Wanted: A Tinkerer's Charter, Babbage Science and Technology*, The Economist, Aug. 4, 2014, at www.economist.com/blogs/babbage/2014/08/difference-engine.

[27] See, e.g., Mark Helprin, Digital Barbarism: A Writer's Manifesto 131–35 (2009); Terry Hart, Copyright is for the Author First and the Nation Second, Copyhype, Oct. 23, 2012, at www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/; Terry Hart, Copyright, the Public Interest, and Free Trade, Copyright Alliance Blog, March 25, 2014, at https://copyrightalliance.org/2014/03/copyright_public_interest_and_free_trade; Koenigsberg, *supra* note 3, at 681–89.

[28] See, e.g., Helprin, *supra* note 27, at 37–39; Terry Hart, *Expendables 3 and the Negative Effects of Piracy*, Copyhype, July 30, 2014, at www.copyhype.com/2014/07/expendables-3-and-the-negative-effects-of-piracy/; Koenigsberg, *supra* note 3, at 680; Tim League & Ruth Vitale, Guest Post: Here's How Piracy Hurts Indie Film, IndieWire, July 11, 2014, at www.indiewire.com/article/guest-post-heres-how-piracy-hurts-indie-film-20140711; Ruth Vitale, *We're All Waiting Bittorrent*, Creative Future Blog, July 31, 2014, at http://creativefuture.org/were-waiting-bittorrent/. See also Chris Ruen, *Fifteen years of utter bollocks: how a generation's freeloading has starved creativity*, New Statesman, July 16, 2014, at www.newstatesman.com/culture/2014/07/fifteen-years-utter-bollocks-how-generation-s-freeloading-has-starved-creativity

[29] See Jane C. Ginsburg, *Copyright 1992–2012: The Most Significant Development?*, 23 Fordham Intellecutal Property Media and. Entertainment L. J. 465, 467–71 (2013); Jane C. Ginsburg, *From Having Copies to Experiencing Works*, 50 J. Copyright Soc'y 113, 121–22 &n.21 (2002); Aaron Perzanowski, *Fixing RAM Copies*, 104 Northwestern L. Rev. 1067 (2010).

[30] See, e.g., Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 107th Cong. 24 (2001) (Serial # 107-52) (testimony of Cary Sherman, Recording Industry Ass'n of Am.); Reply Memorandum

in 1976 to make RAM copies actionable; all the available evidence supports the contrary view. The doctrine that the reproduction right encompassed RAM copies, rather, resulted from a combination of ambitious lawyering, clueless judging, and dumb luck.

When Congress enacted the 1976 Act, it limited eligibility for copyright protection and the scope of the reproduction right to tangible embodiments of works. The statute's definitions of copies and fixation, Congress wrote, "would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer."[31] In 1991, though, customer service manager Eric Francis and three of his coworkers left their jobs at MAI Computing to work for a competitor. In his new job, Francis serviced and maintained computers leased to customers by his former employer. MAI filed suit against Francis and his new employer on a variety of grounds, including copyright infringement, misappropriation of trade secrets, trademark infringement, false advertising, and unfair competition. Francis had signed non-disclosure and non-compete agreements with MAI. The district court judge was apparently convinced that he had grievously injured his former employer, because Judge Real granted MAI's motion for a summary judgment on the trade secrecy claim, and, for good measure, also granted MAI's summary judgment on the copyright, trademark, false advertising, and unfair competition claims.[32] The court based its copyright infringement determination on two uses: first, Peak had computers on its premises that ran MAI software for which it had not secured licenses, and second, Peak's employees ran MAI software on customers' MAI computers when they serviced them. The court reasoned that

> the loading of copyrighted computer software from a storage medium (hard disk, floppy disk, or read only memory) into the memory of a central processing unit ("CPU") causes a copy to be made. In the absence of ownership of the copyright or express permission by license, such acts constitute copyright infringement.[33]

Peak appealed to the 9th Circuit, which affirmed. The court of appeals agreed with MAI that when Peak employees turned on computers leased from MAI on its customers' premises, an infringing copy resulted.

> Peak concedes that in maintaining its customer's computers, it uses MAI operating software "to the extent that the repair and maintenance process necessarily involves

of Law in Further Support of Plaintiff's motion for Partial Summary Judgment at 5n.1, Capitol Records v. Redigi, 934 F. Supp. 2d 640 (SDNY 2013) (No. 12-Civ-0095); *infra* note 44 and accompanying text.

[31] H. R. Rep. 1476, 94th Cong. 53 (1976).

[32] MAI Systems v. Peak Computer, 991 F2d 511 (9th Cir 1993), aff'g 1992 U.S. Dist. LEXIS 21829 (C.D. Cal. 1992).

[33] 1992 U.S. Dist LEXIS at *36-*37.

> turning on the computer to make sure it is functional and thereby running the operating system." It is also uncontroverted that when the computer is turned on the operating system is loaded into the computer's RAM. As part of diagnosing a computer problem at the customer site, the Peak technician runs the computer's operating system software, allowing the technician to view the systems error log, which is part of the operating system, thereby enabling the technician to diagnose the problem.
>
> Peak argues that this loading of copyrighted software does not constitute a copyright violation because the "copy" created in RAM is not "fixed." However, by showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[34]

This reasoning was unexpected.[35] Representative Joe Knollenberg introduced a bill to reverse the result.[36] Copyright owners, though, having been handed a shiny new tool, were loath to give it up. Colleagues persuaded Representative Knollenberg to narrow his legislation so that it permitted computer maintenance and repair firms, but not others, to turn on computers without incurring liability for copyright infringement.[37] Meanwhile, the Clinton Administration Task Force on the National Information Infrastructure seized on the RAM copy notion to support a vision of the Internet for which every individual would need copyright permission to look at or listen to anything posted online.[38] Congress enacted Knollenberg's narrowed

[34] 991 F.2d at 519.

[35] See, e.g., Michael E. Johnson, *Note: The Uncertain Future of Computer Software Users' Rights in the Aftermatch of MAI Systems*, 44 Duke L. J. 327 (1994); Jule L. Sigall, *Comment: Copyright Infringement was Never this Easy: RAM Copies and their Impact on the Scope of Copyright Protection in Computer Programs*, 45 Catholic U. L. Rev. 181 (1995); Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, Communications of the ACM, at 21 (Dec. 1994).

[36] H.R. 533, 104th Cong. (1995).

[37] See H.R. 72, 105th Cong. (1997); 143 Cong. Rec. E21 (Jan. 1, 1997) (remarks of rep. Knollenberg); 143 Cong. Rec. H7102 (remarks of Rep. Knollenberg). Congress enacted the narrowed legislation as title III of the Digital Millennium Copyright Act.

[38] See Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure 64–6 (1995), at www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf. The White House's Information Infrastructure Task Force authored a White Paper Report that became the basis for the 1998 Digital Millennium Copyright Act, Pub. L. 105–304, 112 Stat. 2860, and for the U.S. negotiating position in connection with some of the provisions of the World Intellectual Property Organization (WIPO) Treaties discussed *infra* notes 59–61 and accompanying text. The White Paper asserted that whenever a computer user viewed a file that resided on a remote computer, the image on the user's screen and the copies of the file made by every computer that helped to transfer the file would be potentially infringing copies. Intellectual Property and the National Information Infrastructure, *supra*, at 65–66.

PROOF

legislation and asked the Copyright Office to study the issue.[39] The Copyright Office reported that RAM copies should be deemed within the scope of the copyright owner's reproduction right. "In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived."[40] A statutory exemption for temporary copies incidental to lawful uses was not warranted, the Copyright Office concluded, because advocates for users had failed to make a compelling case that such an exemption was necessary.[41] Meanwhile, the Office characterized the risks of adding a new privilege to the statute as "significant:"

> Copyright owners have pointed out with justification that the reproduction right is the "cornerstone of the edifice of copyright protection" and that exceptions from that right should not be made lightly. In the absence of specific, identifiable harm, the risk of foreclosing legitimate business opportunities based on copyright owners' exploitation of their exclusive reproduction right counsels against creating a broad exception to that right.[42]

Even though the Register of Copyrights explained to Congress that RAM copies should be deemed to be actionable reproductions,[43] she appears not to have fully believed it. When the introduction of software that allowed individual viewers to skip sexually explicit or violent scenes in DVDs they watched inspired a copyright infringement suit, the Register testified to Congress that there was no need to amend the copyright law because using the software did not infringe any copyrights. That was so, she insisted, because the censored versions of the film created by the software were never fixed.[44] But, of course, if RAM copies are copies, the censored versions of the

[39] Digital Millennium Copyright Act, Pub. L. 105–304 §§ 104, 301, 302, 112 Stat. 2860, 2876, 2886, 2887 (Oct. 28, 1998).

[40] U.S. Copyright Office, DMCA Section 104 Report (2001), www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[41] Id. at 130.

[42] Id. at 142. The Copyright Office did support a narrow amendment to relieve licensed digital transmitters of sound recordings from liability for buffer copies that were incidental to the licensed transmissions. The Office thought that such buffer copies should be sheltered by the fair use privilege, but expressed sympathy for webcasters who faced copyright owners' demand for double compensation. See id. at 142–46.

[43] See The Digital Millennium Copyright Act (DMCA) Section 104 Report: Hearing Before the Subcomm. of Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 107th Cong. 15 (2001) (Serial # 107-52) (Statement of MaryBeth Peters, Register of Copyrights) ("we recommend against the adoption of a general exemption from the reproduction right to render noninfringing all temporary copies that are incidental to lawful uses"), also at www.copyright.gov/docs/regstat121201.html.

[44] See the Family Movie Act: Hearing on H.R. 4077 Before the Subcomm. of Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 108th Cong. 28 (2004) (Serial # 108-94)

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film were fixed in the DVD players' RAM. That is, after all, how the software enabled viewers to skip scenes.

Some courts adopted the 9th Circuit's reasoning,[45] although many decisions purporting to follow the decision applied it to indisputably fixed copies of software installed on computers and saved in durable computer storage.[46] Other courts reasoned around it.[47] In many other cases in which it might have had determinative effect, neither party raised it.[48]

Twenty years after the MAI opinion, a Commerce Department task force report characterized the RAM copy doctrine as well-settled:

> The right to reproduce a work in copies is the first and most fundamental of the bundle of rights that make up a copyright. In the online environment, this right is even more central, as copies are made in the course of virtually every network transmission of a digital copy. Temporary copies may be a key aspect of the value of the use in some circumstances, but merely incidental in others.
>
> The ability to control temporary copying in digital devices has long been important to rights owners. For software in particular, consumers increasingly engage in the exploitation of software they receive over a network without ever knowingly storing a permanent copy on their hard drive. Temporary copies are also prevalent in the context of streaming sound recordings and video, where "buffer copies" are a technologically necessary step in the delivery of content to the consumer.
>
> It has long been clear in U.S. law that the reproduction right is not limited solely to the making of "permanent" physical copies. The statutory definitions cover any fixation "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." In the seminal 1993 case v., the Ninth Circuit applied these definitions to hold that when

(Statement of MaryBeth Peters, Register of Copyrights) ("There is no infringement of the reproduction right because no unauthorized copies of the motion pictures are made"). While agreeing with the Register that the censored versions of the films created by this technology were not fixed, the Motion Picture Association of America's Jack Valenti nonetheless opposed the bill because it threatened to undermine the right to make derivative works: "The law tells us, with great clarity, that the owner of a copyrighted work – and only that owner – has the authority to decide if someone else may produce a product derived from that copyrighted work … The movie filtering bill would seriously erode that core right by legalizing businesses that sell technology, for a profit, which can 'skip and mute' scenes or dialogue to create an abridged version of a movie, as long as no 'fixed copy' of the altered version is created." Id. at 38.

45 See, e.g., Quantum Systems Integrators, Inc. v. Sprint Nextel Corp., 338 Fed. Appx. 329, 336–7 (4th Cir. 2009); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294 (D. Utah 1999); Religious Technology Center v. Netcom, 907 F. Supp. 1361, 1368–73 (N.D. Cal. 1995).

46 See, e.g., Stenograph LLC v. Bossard Assocs., 144 F.3d 90 (DC Cir 1998).

47 See, e.g., Cartoon Network v. CSC Holdings, 536 F3d 121 (2d Cir 2008); DSC Communications Corp. v. DGI Technologies, Inc., 81 F.3d 597 (5th Cir. 1996); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 235–36 (7th Cir. 1995).

48 See, e.g., Flava Works v. Gunter, 689 F.3d 754 (7th Cir. 2013).

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> a program is loaded into RAM, a copy is created. In a 2001 Report, the Copyright Office confirmed its agreement, noting that "[a]lthough it is theoretically possible that information … could be stored in RAM for such a short period of time that it could not be retrieved, displayed, copied or communicated, this is unlikely to happen in practice."[49]

My own story about the RAM copy and the *MAI* case is that is that the 9th Circuit Court of Appeals just made a mistake – courts do that all the time.[50] MAI's victory on its copyright infringement claim was improbable, but once it fell into copyright owners' laps, they became determined to retain it, even if they couldn't figure out exactly how to use it. If we cling to the determination that all RAM copies are actually actionable, though, and if we take it seriously, the reproduction right morphs into an all-purpose use right, covering, e.g., playing DVDs on a DVD player, watching TV on a digital TV; reading any ebook; or listening to music on a smartphone or MP3 player. That's not sustainable. All private performances on digital devices turn into actionable reproductions. This would be a major incursion on the interests of readers, listeners, and viewers, who have until now been able to count on a significant zone of freedom within which they can enjoy works of authorship that they have purchased or licensed.

The problem with the RAM copy is that making a RAM copy is just another name for private performance or display, which is to say, reading, listening, and viewing.[51] Private performance and display are not actionable. The copyright act has historically divided reproduction and distribution, and later, public performance, from reading, listening, and watching. The copyright owner has (some) control over the former activities but not the latter, because unfettered reading, listening, and viewing are as crucial to the promotion of the progress of science as encouraging the creation of new works. One half of the equation is meaningless without the other.

It has never before been copyright infringement to read a book, even if it turns out that the book is plagiarized from an earlier book. I can listen to an infringing recording or look at an infringing photograph without fear of liability. The RAM copy notion suddenly imposes liability for seeing, hearing, or enjoying any work using digital technology. There's no policy justification for that expansion in copyright scope: yes, if my reading the wrong ebook makes me an infringer, one can sue the ebook publisher as a contributory infringer, but one can sue the ebook publisher as a direct infringer anyway, so the only real effect is to burden and deter reading.

[49] Department of Commerce Internet Policy Task Force Report, *supra* note 1, at 12–13(footnotes omitted).

[50] See, e.g., Bridgeport Music v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

[51] See, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts Ent. L. J. 29, 31–32 (1994). Contrast the approach taken by the European Union: see, e.g., Public Relations Consultants Association v. Newspaper Licensing Agency Ltd. & Ors (Judgment of the Court) [2014] EUECJ C-360/13 (5 June 2014) (holding RAM copies non-infringing under EU Directive).

A copyright system designed to deter reading has completely lost its moorings and forgotten its purpose.

As we move to increasing reliance on cloud computing, the problem becomes more acute. Every time an individual views, hears, reads, or edits her files in the cloud, she creates potentially actionable RAM copies. If she commits prima facie infringement against the owners of rights in the songs, stories, software, movies, and other expression in those files whenever she consults them, then centuries of key reader liberties will have vaporized.

A more recent outbreak of copy-fetish has inspired the quest for an expansive "making available" right. The essence of infringement of the making available right is the possession of a copy (legitimate or not) that is accessible to other people. Again, the story begins with a difficult-to-justify opinion from a Court of Appeals. In *Hotaling v. Church of Jesus Christ of Latter Day Saints*, the Court of Appeals for the Fourth Circuit held that "a library distributes a published work, within the meaning of the Copyright Act … when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public."[52] Donna and William Hotaling sued the Mormon Church because Donna had discovered an unauthorized microfiche copy of her genealogical research in the Church library. The Church had purchased an authorized copy in 1985, and had made unlicensed microfiche copies for its branch libraries. In 1991, when the Hotalings discovered the unlicensed copies and complained, the church recalled and destroyed them, but retained a single microfiche copy as a replacement for its original purchased copy, which had been inadvertently destroyed.[53] In 1995, Donna visited the church's main library, discovered the microfiche copy, and filed suit. The church acknowledged having made the microfiche copy years earlier, but insisted that it had engaged in no reproduction or distribution within the 3-year limitations period. The library allowed patrons to consult materials on the premises, but did not permit them to check those materials out of the library.[54] Thus, the church insisted, it had not distributed any copies of the copyrighted work to the public.[55]

A divided Fourth Circuit concluded that the combination of possessing an unauthorized copy, listing the work in its card catalogue, and enabling members to the public to view the copy on its premises, should be deemed to be distribution, even though the copy didn't leave the library.[56] As an interpretation of statutory

[52] Hotaling v. Church of Jesus Christ of Latter Day Saints, 118 F. 3d 199, 201 (4th Cir. 1997).
[53] The church argued that its retention of this copy was authorized by 17 USC § 108(c). The 4th Circuit declined to reach that question. Id. at 204.
[54] Id. at 205 (Hall, J., dissenting).
[55] Id. at 203.
[56] Id.

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language that restricts distribution to the conveyance of copies to the public "by sale or other transfer of ownership or by rental, lease, or lending," the decision seems indefensible.[57] Some observers theorized that the Fourth Circuit had been influenced by evidence that the library had engaged in unauthorized reproductions and distributions outside of the limitations period.[58]

Coincidentally, the phrase "making available" also appeared in a pair of copyright treaties negotiated in 1996 (a year before the *Hotaling* decision) and ratified by the United States in 1998 (a year after *Hotaling*). The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty obliged signatory nations to protect authors' "exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership"[59] and their "exclusive right of authorizing any communication to the public of their works by wired or wireless means, including the making available to the public of their works. . . ."[60] The two "making available" provisions limited themselves, in terms, to making available by transferring copies to the public and making available by transmitting works to the public by wired or wireless means. At the time that Congress implemented the treaties, supporters assured Congress that extant U.S. law amply provided for the exclusive rights of communicating a work to the public. The making available provisions of the treaties were coextensive with the U.S. statute's rights, under section 106 to distribute copies ("by sale or other transfer of ownership or by rental, lease, or lending") and to perform or display a work publicly.[61]

[57] See, e.g., William F. Patry, Patry on Copyright § 13.9 (2014). But see Joseph F. Key, *Recent Decisions: the U.S. Court of Appeals for the Fourth Circuit*, 57 Md. L. Rev. 1157, 1174 (1998) (arguing that the decision was correct even though it was inconsistent with the statutory language because of the "unique nature of non-circulating research material in the library context").

[58] See, e.g., Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 Fordham Intellectual Property, Media & Entertainment L. J. 1145, 1149n.14, 1153n.28 (2008).

[59] WIPO Copyright Treaty art. 6. See also WIPO Performances and Phonograms Treaty art. 8 ("Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.").

[60] WIPO Copyright Treaty art. 8; see also WIPO Performances and Phonograms Treaty art. 10 ("Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.").

[61] See, e.g., WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on HR 2281 and HR 2280 Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the Judiciary, 105th Cong. 43- 54 (1997) (Serial # 105-33) (testimony of MaryBeth Peters, Register of Copyrights); id. at 72–3 (statement of Robert Holleyman, President, Business Software Alliance). As should be evident, the conduct at issue in *Hotaling* neither involved "sale or other transfer of ownership" nor "communication to the public by wired or wireless means," so it would have fallen outside the making available rights secured by the language of the treaties.

The *Hotaling* opinion's expansion of the statutory distribution right to encompass something it called "making available" that did not involve the transfer or loan of copies might have been limited to that case's particular circumstances were it not for the fact that the Fourth Circuit's analysis scratched an itch that troubled the recording industry. After Napster appeared on the scene, record labels faced difficulty demonstrating that their sound recordings had been reproduced or distributed to the public by the users of peer-to-peer file sharing software. It was easy for their investigators to ascertain that individual users had copies of particular recordings in the "share" files associated with their peer-to-peer clients, but not to determine where those copies had come from, nor whether other members of the public had copied them.

The recording industry seized on the *Hotaling* decision as a solution to that problem. Citing *Hotaling*, the labels argued that they did not need to introduce evidence of actual copying of any recordings because the presence of a file in a share directory, without more, violated the public distribution right by making the file available for copying.[62] Other copyright owners followed. Motion picture studios insisted that the making available right included in the treaties entitled copyright owners to control any offering of copyrighted works to the public, without regard to the actual distribution of copies.[63] The *Perfect 10* magazine and website argued that, under *Hotaling*, search engines violated its distribution right when they returned search results that included links to infringing copies of its erotic photographs.[64] Some courts were persuaded.[65] Other courts found the argument that "making available" should be deemed distribution of a copy to the public "by sale or other transfer of ownership or by rental lease or lending" inconsistent with the text of section 106(3).[66] Copyright scholar Peter Menell, in a highly selective exploration of the statute's legislative history, claimed to have discovered evidence that Congress had intended courts to find a violation of the distribution right whenever unlicensed

[62] See, e.g., Atlantic Recording v. Howell, 554 F. Supp. 2d 976, 981–84 (D. Az 2008); In re Napster, Inc. Copyright Litig., 377 F. Supp. 2d 796, 802–05 (N.D. Cal. 2005).

[63] See Brief of MPAA as Amicus Curiae, Capitol Records v. Thomas, 579 F. Supp. 2d 1210 (D. Minn 2008) (No. 06-1497), at www.eff.org/node/55647.

[64] See Brief of Appellant Perfect 10, Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir 2007) (No. 06-55405), 2006 US 9th Cir. Briefs 55406, at 41–42.

[65] See, e.g., UMG Recordings v. Green, 2009 US Dist LEXIS 39305 (ND NY 2009); Sony BMG Music v. Doe, 2008 US Dist LEXIS 106088 (ED NC 2008); Universal City Studios v. Bigwood, 441 F. Supp. 2d 185 (D Me 2006).

[66] See, e.g., Atlantic Recording v. Howell, 554 F. Supp. 2d 976 (D. Az 2008); Capitol Records v. Thomas, 579 F. Supp. 2d 1210, 1216–26 (D. Minn 2008); London-Sire Records v. Doe, 542 F. Supp. 2d 153 (D. Mass, 2008); Elektra Entertainment v. Barker, 551 F. Supp. 2d 234 (SDNY 2008). See also Capitol Records v. Thomas-Rasset, 692 F.3d 899 (8th Cir 2012) (declining to reach issue); Arista Record v. Doe, 604 F. 3d 110 (2010) (same); Maverick Recording v. Harper, 598 F. 3d 193 (5th Cir. 2010) (same); Warner Brothers Records v. Walker, 704 F. Supp. 460 (WD Pa 2010) (same).

copies were made available to the public.[67] For the majority of courts, though, the difficulty of squaring that interpretation with the statutory language dissuaded them from interpreting the distribution right to encompass making available without the transfer of tangible copies.[68]

Advocates for copyright owners have continued to argue that *Hotaling* was correctly decided, that the *Hotaling* construction represented the true meaning of the "making available" language in the WIPO treaties, and that the U.S. adherence to the WIPO Treaties therefore requires U.S. copyright law to give owners a robust right to recover for the existence of unlicensed, publicly accessible copies, whether or not any transfer of copies or public transmission has occurred.[69] A broad making available right, untethered to actual distributions or public performances, would give copyright owners a formidable weapon to deploy against Internet-enabled digital video recorders, cyberlockers, search engines, and cloud storage. Having glimpsed a law that would empower them to lay claim to control all publicly accessible copies, copyright owners are disinclined to give it up.

The Copyright Office is currently conducting a study on the making available right.[70] The premise of the study appears to be that if the U.S. law's protection of a making available right falls short of the right as defined by *Hotaling*, Congress should intervene to correct the problem. At a hearing in May 2014, the office expressed its position that U.S. copyright law *should* include a broad making available right and indicated that it would focus its study on whether it was

[67] Peter S Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. Copyright Soc'y 201, 233–66 (2012).

[68] See, e.g., Fox Broadcasting v. Dish Network, 905 F. Supp. 2d 1088 (CD Cal 2012), aff'd 723 F.3d 1067 (9th Cir 2013); Shannon's Rainbow LLV v. Supernova Media, 2011 US Dist LEXIS 9275 (D. Ut. 2011). See generally Patry, *supra* note 57 at § 13.9.

[69] See, e.g., Capitol Records v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn 2008); U.S. Copyright Office, Public Roundtable on the Right of Making Available, May 5, 2014, at www.copyright.gov/docs/making_available/public-roundtable/transcript.pdf, at pages 329–32 (remarks of Steve Tep, U.S. Chamber of Commerce); Comments of the MPAA and the RIAA Before the Copyright Office In the Matter of Study of the Right of Making Available (April 4, 2014), www.copyright.gov/docs/making_available/comments/docket2014_2/MPAA.pdf at 3 ("Where a party provides the public access to copyrighted works via the Internet without authorization – as a download, a stream, a link or otherwise – that party infringes one or more of the affected copyright owner's exclusive rights under Section 106 of the Act. It is not necessary to prove that any user actually availed herself of such access."); Brief Amici Curiae of International Federation of the Phonographic Industry et al. at 13–15, ABC v. Aereo, 134 S. Ct. 2498 (2014) (No 13–461), at http://sblog.s3.amazonaws.com/wp-content/uploads/2014/04/13-461_pet_amcu_ifpi-etal.authcheckdam.pdf; Thomas Syndor, The Making Available Right Under U.S. Law, 16 Progress on Point no. 7, Progress & Freedom Foundation (March 2009). See William F. Patry, MPAA's Brief and Charming Betsy, Patry Copyright Blog, June 24, 2008 at http://williampatry.blogspot.com/2008/06/mpaas-brief-and-charming-betsy.html.

[70] See http://copyright.gov/docs/making_available/

necessary to amend the law to make such a right robust, and, if so, how such an amendment should be cast.[71]

As the notion of actionable RAM copies transforms ordinary acts of reading, listening, and using into copyright infringement, a making available right potentially imposes liability for having copies, without more, as well as for posting hyperlinks or citations to copies one doesn't have. The combination of these two instances of copy-fetish jeopardizes copyright law's longstanding protection of the interests of readers, listeners, and viewers.

Copy-fetishists have demonstrated that they view the mere existence of any unlicensed copy as an invasion of their prerogatives. In the *HathiTrust* case, the Authors Guild was willing to spend millions of dollars in an effort to ensure that even invisible unlicensed copies were eradicated. The bare possibility that an unlicensed copy might somehow escape into the wild was, the Authors Guild argued, itself irreparable harm.[72] In *Capitol Records v. Thomas-Rasset*, the recording industry was willing to shell out for three jury trials and an appeal to the 8th Circuit against a judgment-proof defendant in the hope of establishing the illegality of having a file in the share directory of a peer-to-peer file sharing client. Neither lawsuit accomplished its larger doctrinal objective, but failing to persuade the courts appears to have galvanized copyright owners' determination to procure legislation that repudiates those losses.

As the U.S. Congress takes its first serious look in many years at a comprehensive revision of the copyright law, the possibility that readers' copyright interests will be swallowed up by a series of new copyright owner rights and remedies seems significant. Most people are aware that copyright statutes are made when lawyers for copyright owners and commercial and institutional copyright users get together and figure out a compromise that most of them can live with. It's not news that copyright-affected industries have thoroughly captured the Copyright Office, the White House, the Commerce Department, and Congress.[73] At least up until now, readers and listeners and viewers have never gotten an official seat at the negotiating table. Indeed, institutions, businesses, and NGOs who have claimed to be advancing the interests of users have found themselves demoted, and banished to the children's table. (That's the best description I can come up with for CONFU, the mid-1990s Conference on Fair Use that was devised to ensure that contentious

[71] U.S. Copyright Office, Public Roundtable on the Right of Making Available, May 5, 2014, at www.copyright.gov/docs/making_available/public-roundtable/transcript.pdf.

[72] Memorandum of Law in Support of Plaintiff's motion for Summary Judgment at 23, Authors Guild v. Hathitrust, 902 F. Supp. 2d 445(SDNY 2012) (No. 11-Civ-6351), at www.thepublicindex.org/wp-content/uploads/sites/19/docs/cases/hathitrust/115-ag-sj-brief.pdf;

[73] See, e.g., Kaminski, *supra* note 12, at 988-1005; Deborah Tussey, *UCITA, Copyright and Capture*, 21 Cardozo Arts & Enter. L. J. 319, 321–22 (2003).

disputes about the scope of fair use in the digital realm did not delay enactment of the Digital Millennium Copyright Act.[74] It bears some explanatory power, as well, for the section 108 study group convened in 2005 to define the scope of new library privileges.[75])

The Register of Copyrights has now called on Congress to enact the "next great copyright act."[76] The House Judiciary Committee held 19 hearings on copyright issues during the 113th Congress in what was billed as a comprehensive reexamination of the copyright system.[77] The committee heard from scores of witnesse testifying

[74] See www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf. In connection with the enactment of the Digital Millennium Copyright Act, discussions on the appropriate scope of fair use in the digital environment were diverted to a conference of fair use, in which many stakeholders met, argued, and failed to reach consensus. Meanwhile, supporters of the new legislation shepherded it through Congress without allocating Congressional attention to fair use questions. When fair use nonetheless appeared late in the game in connection with the bill's anticircumvention provisions, those questions were themselves diverted to a triennial copyright office rulemaking. See Jessica Litman, Digital Copyright 122–45 (2006).

[75] See www.section108.gov/docs/Sec108StudyGroupReport.pdf. The Section 108 Study Group was a group assembled by the Copyright Office and charged with recommending revision to the hopeless outdated library reproduction privileges in section 108 of the copyright act. The group was co-chaired by a librarian and a publisher; it included members from libraries, museums, archives, book publishers, journal publishers, film studios, and software publishers. Like CONFU, it failed to reach consensus on proposals to amend the law.

[76] See http://copyright.gov/regstat/2013/regstat03202013.html; www.copyright.gov/docs/next_great_copyright_act.pdf.

[77] See Copyright Issues in Education and For the Visually Impaired: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-119); Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-116); Chapter 12 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-115); Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-107); Moral Rights, Termination Rights, Resale Royalty, And Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm.,113th Cong. (2014) (Serial # 113-103); Music Licensing Under Title 17 Parts One And Two: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm.,113 the Cong. (2014) (Serial # 113-105); Hearing: First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-98); Compulsory Video Licenses Of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-89); Hearing: Preservation And Reuse Of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-88); Section 512 Of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-86); The Scope Of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-82); The Scope Of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2014) (Serial # 113-81); Satellite Television Laws In Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the

about what they thought was right and wrong with current copyright law. Witnesses speaking on behalf of readers, listeners, and viewers were in short supply.[78] As copyright owners have pressed Congress to recognize or clarify a more expansive scope for reproduction and distribution rights, supporters of enhanced copyright protection have deflected calls for recognition or clarification of readers' and listeners' liberties. They insist that readers have failed to make a compelling showing that current legal ambiguities cause them meaningful harm.[79] Any new or expanded privileges or exceptions, they argue, would pose a grave danger of injuring the creators and owners of copyrighted works.[80]

Internet of the House Judiciary Comm., 113th Cong. (2013) (Serial # 113-48); Innovation In America (Part I And II): Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2013) (Serial # 113-47); A Case Study For Consensus Building: The Copyright Principles Project: Hearing Before the House Judiciary Comm., 113th Cong. (2013); The Register's Call for Updates to U.S. Copyright Law: Hearing Before the House Judiciary Comm., 113th Cong. (2013) (Serial # 113-20). See also The Role of Voluntary Agreements in the U.S. Copyright System: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2013) (Serial # 113-49) (subcommittee hearing on voluntary agreements to address piracy of copyrighted works); Unlocking Consumer Choice and Wireless Competition Act, Hearing on H.R. 1123 Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Judiciary Comm., 113th Cong. (2013) (Serial # 113-27) (subcommittee hearing on restoring the telephone unlocking exception to § 1201).

[78] Five of the hearings included witnesses from nonprofit organizations that represent some aspect of the public's interest in copyright. The Hearing on Copyright First Sale included witnesses Jonathan Band on behalf of an organization named the Owners Rights Initiative, which advances the rights of copy buyers, and Sherwin Sy for Public Knowledge. Sy testified again at a later hearing on copyright remedies. The Hearing on the Scope of Fair Use included novelist Naomi Novik testifying for the Organization for Transformative Works. The Hearing on the Scope of Copyright included Jamie Love for Public Knowledge International. The Hearing on Issues in Education and for the Visually Impaired included witness Scott LeBarre for the National Federation for the Blind and Jack Bernard for the Association of American Universities. In addition, several hearings included law professor witnesses, and some of the law professors testified that a wise copyright law would take the interests of members of the public seriously.

[79] See, e.g., The Scope of Fair Use Hearing, *supra* note 77, at 104–11 (statement submitted by the Association of American Publishers); Copyright Office Section 104 Report, *supra* note 40, at 73–7, 96–101, 130; Department of Commerce Internet Policy Task Force Report, *supra* note 1, at 35–38.

[80] See, e.g., Copyright Office Section 104 Report, *supra* note 40, at 99; The DMCA Section 104 Report Hearing, *supra* note 43, at 18 (testimony of Carey Ramos on behalf of the National Music Publishers Ass'n); id. at 46 (testimony of Emery Simon, Business Software Alliance); Unlocking Consumer Choice and Wireless Competition Act: Hearing on H.R. 1123, *supra* note 77, at 54–58 (colloquy); First Sale Under Title 17, *supra* note 77, at 108–09 (testimony of Emery Simon, BSA|The Software Alliance); id. at 95–96 (testimony of John Villasenor, Brookings Institution fellow); Digital Media Consumers Rights: Hearing on HR 107 Before the Commerce Subcomm. of the House Energy & Commerce Com., 108th Cong. (2004) (Serial # 108-109) (testimony Of Cary A Sherman, Recording Industry As'sn of Am.); Recording Industry Association of America, Comments Concerning Promotion of Distance Education Through Digital Technologies, Docket No. 98-12A (Feb. 5, 1999), at http://copyright.gov/disted/comments/init023.pdf.

I've focused on two manifestations of copy-fetish that originated, I contend, in doctrinal mistakes by courts of appeals. Copyright owners' advocates are clinging to both of them, and have enlisted the support of the Copyright Office, the Patent Office, The Department of Commerce, the U.S. Trade Representative, and the White House in their efforts to incorporate them into the law. That doesn't make these expansions of copyright a done deal – the support of all of these actors for drastic "rogue websites" legislation didn't stop the defeat of Stop Online Piracy Act (SOPA).[81] It makes it unlikely, though, that any significant copyright revision bill will fail to incorporate them. The extent to which both expansions of owner rights pose significant threats to readers' interests simply is not salient to most of the policy makers involved in the debate. If copyright owners insist that it isn't appropriate to consider the interests of readers when crafting the next great copyright act, we can predict with some confidence that readers' rights will get short shrift. And that should worry all of us.

If copyright owners' control of the copyright legislative process all but guarantees that copyright's exclusive rights will expand further to encroach on reader, listener, and viewer liberties, then it becomes important to make those liberties explicit in the statute, and to define them with sufficient generosity and flexibility that they will survive technological innovation. Just as we want to promote creative authorship, we should also seek to encourage creative readership. Imaginative readers are valuable for many of the same reasons we prize imaginative authors.[82] It may be that we could rely on fair use and implicit reader privileges to continue to shelter creative reading rather than making readers' copyright liberties explicit. It's even possible that fair use and implicit reader privileges would give creative reading a broader shelter than any express exception or limitation that copyright owners will permit Congress to enact. But, when we fail to include express protections for the interests of readers, listeners, and viewers in the law, we lose an opportunity to express the importance of readers' interests in the copyright system. Affirming the core importance of readers, listeners, and viewers in the copyright ecosystem is an essential step toward restoring the public's respect for the copyright law. Giving explicit voice to the importance of readers' interests, meanwhile, may remind copyright owners that Congress has given them exclusive rights at least in part in the service of larger goals.

[81] See, e.g., Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. Times, January 18, 2012, at www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html.

[82] Consider the problems and opportunities posed by fan works. In theory, the most challenging uses to authors' rights would be the creation and widespread dissemination of fan fiction, fan video, and fan art. Yet, as many copyright owners have discovered, noncommercial fan works redound to the benefit of the copyright owners' bottom line. This shouldn't be surprising: the author/reader relationship is interactive rather than static, and the most devoted readers are the ones who feel invited to participate in the experience that the author communicates to them.

So, when I speak of explicit statutory readers' rights, what am I imagining?

The copyright rights that readers, listeners, and viewers need are modest unless one is a copy-fetishist: Individuals who make lawful use of works should be entitled to take a variety of actions that may enhance those uses.[83] Such an individual should have the right to make copies incidental to the lawful use, and to adapt the work to suit her needs. She should be able to store those copies where and as she wants to. She should be entitled to extract and use any material that is not protected by copyright – facts, ideas, processes, or expression that is in the public domain – even if doing so requires making another copy or defeating technological protections. She should not face liability for using citations, hyperlinks, or other information location tools to refer other readers to the work. She should be able to time-shift or format-shift her copy of the work; she should be entitled to loan, sell, or give her copies away to someone else, whether those copies are analog or digital.[84] She should be encouraged to enjoy the work, interact with it, revise it, describe it, respond to it, and share her responses with others, privately or publicly.[85] She should be able to do all of this with a reasonable expectation that her intellectual privacy will be respected.[86]

Those are very modest rights. If my list sounds ridiculously radical to you, recall that all of these uses represent behavior that readers, listeners, and viewers engaged in, completely lawfully, every day, before the wide deployment of networked digital technology.[87] The fact that the whole world has been linked up over digital networks hasn't changed the essence of reading, and interactive engagement with works of authorship is as crucial an aspect of reading (and listening and viewing) today as it was 40 years ago. None of the freedoms I enumerated need morph into a privilege to commercialize a work. All of the user rights I mentioned will, I believe, encourage respect for the copyright system and the process of authorship, and promote reader engagement in copyright norms.

[83] See, e.g., Ginsburg, *supra* note 2, at 12 ("Where one has a lawful access to the work, there may be an implied right to enjoy the work in a manner convenient to the consumer.").

[84] See Aaron Perzanowski & Jason Schultz, *Legislating Digital Exhaustion*, 29 Berkeley Tech. L. J. 1535 (2014). The current section 117 of the copyright act limits the right to transfer consumers' copies of computer programs by requiring that any transfer include both the original copy and all copies made by the consumer. The same general principle could be extended to copies of other classes of works. See id. at 1546–57.

[85] See Rebecca Tushnet, *Scary Monsters, Hybrid Mashups, and Other Illegitimate Children*, 86 Notre Dame L. Rev. 2133 (2011); Rebecca Tusnet, *I Put You There: User Generated Content and Anticircumvention*, 12 Vand. J. Art Tech. 889 (2010).

[86] See Julie E. Cohen, *What Privacy is For*, 126 Harvard L. Rev. (2013); Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 Seton Hall Const. L. J. 693 (1998); Neil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387 (2008).

[87] Those are the same core reader freedoms that copyright law has always given readers, until recently, by cabining the scope of copyright rights so that copyright impinges only minimally on reader liberties.

I imagine that some readers are thinking: "Why can't we rely on licensing to permit uses like this? If an author thinks that it's important to permit readers to make this use or that use, then surely the author will license those uses."[88]

We've learned that doesn't work. First, and most obviously, the author is often not the licensing agent. Most academic authors are delighted when scholars and teachers want to make use of their work in any way at all, but if the authors have assigned their copyrights to publishers, their enthusiasm for the use is worse than irrelevant.[89] The popular press is full of articles about performers whose record companies decline to release their recordings, but refuse to return them to the artists.[90] Recording artists who welcomed peer-to-peer file sharing had no grounds on which to overrule their labels.[91] While individual creators may prefer that their works be read, seen, heard, and used as widely as possible, owners of the copyrights in multiple works may have other interests: they may, for example, want to protect their more profitable works from the competition that might arise if their less profitable works were readily available. They may have business plans that do not rely on widespread licensing. Consider the sad story of George Clinton, who has said that he would happily offer inexpensive sample licenses for Funkadelic recordings.[92] That doesn't matter, because the Funkadelic sound recording copyrights were purchased by Bridgeport music, which is pursuing a different business model.[93]

In the 1990s, copyright lawyers were briefly seduced by the notion of subjecting all consumer uses to individually negotiated licenses managed by intelligent software

[88] See, e.g., Tom Sydnor, *A "digital-first-sale" doctrine – Do we really need (another) one – or two?*, TechPolicyDaily.com, Sept. 11, 2004, at www.techpolicydaily.com/technology/digital-first-sale-doctrine-really-need-another-one-two/. See also Jane C. Ginsburg, *Fair Use for Free or Permitted-but-Paid*, 29 Berkeley Tech. L. J. 1383 (2014) (suggesting that many of the current non-creative fair uses should be subject to a new licensing regime). Ginsburg acknowledges that the difficulty of setting terms and royalties for consumer licenses would be formidable.

[89] See American Geophysical Union v. Texaco, 802 F. Supp. 1 (1992), aff'd 37 F.3d 881 (1994).

[90] See, e.g., Aylin Zafar, What It's Like When a Label Won't Release Your Album, Buzzfeed, May 12, 2013, at www.buzzfeed.com/azafar/what-happens-when-your-favorite-artist-is-legally-unable-to.

[91] See, e.g., Janis Ian, the Internet Debacle, Performing Songwriter Magazine, May 2002, www.janisian.com/reading/internet.php.

[92] See, e.g., www.hiphopdx.com/index/news/id.18253/title.george-clinton-explains-saving-hip-hop-artists-on-samples-recalls-early-days-of-dr-dre-afrika-bambaataa-eminem.

[93] See Bridgeport Music v. UMG Recordings (6th Cir. 2009); Tim Wu, Jay Z v. The Sample Troll, Slate, Nov. 16, 2006, at www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html. Since Bridgeport demonstrated the economic advantages of operating as a copyright troll, a number of other businesses have followed its example of buying up copyrights in order to bring multiple lawsuits against alleged infringers. Some of these businesses have sued thousands of individuals who are alleged to have unauthorized copies of works. See, e.g., Righthaven v. Democratic Underground, 791 F. Supp.2d 968 (D. Nev. 2011); AF Holdings, LLC, v. Olivas, 108 USPQ 2d 1151 (D. Conn. 2013).

agents.[94] You remember: "okay, so I can download this track if I pay you 99 cents. I also want to convert the file format to something my hardware can read, include the recording in a compilation I want to put together for my girlfriend, and edit the recording so that I can use it as the soundtrack for my figure skating routine. May I do that for, say, $1.49?"

The vision of consumer licenses negotiated by intelligent software agents turned out to be a pipe dream. It isn't that we don't have the technology to do this. We do. Rather, it's that it makes no economic sense for owners to keep track of a multiplicity of individually tailored licenses when they can instead offer only one or two. If we say we're going to rely on voluntary licensing to take care of this sort of use, then, we've learned that means that it isn't going to happen. And while that might suit some copyright owners just fine, it would be bad for the copyright ecosystem, which is and should be designed to encourage creative reading as well as creative writing.

I said earlier that every author creates works, at least in part, as an act of communication. For some authors, that goal of communicating is the only important goal.[95] For others, an often more imperative goal is to earn money. Our copyright law is not yet well-designed to ensure that creators of works get paid. Indeed, we need to face the fact that our copyright system does an embarrassingly lousy job of funneling money to creators. That isn't the readers' fault; rather the blame belongs with the architecture of the system. The United States copyright law has never done an admirable job of helping creators to get paid.[96] The law encourages creators to convey their copyright interests to publishers, aggregators, and other intermediaries, and it does not pay much attention to whether they can take advantage of copyright's benefits once they have done so. I've written about this elsewhere.[97] But hamstringing readers is unlikely to help creators earn more money; it's merely going to prevent the copyright system from doing its job.

[94] See generally Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 Berkeley Tech. L. J. 161 (1997).

[95] See, e.g., Authors' Alliance, About Us, www.authorsalliance.org/about/ (visited August 22, 2014).

[96] See, e.g., Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenues and Lessons About Copyright's Incentives*, 55 Ariz. L. Rev. (2013); Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 153 Proceedings of the Am. Philos. Soc'y 147, 148–51 (2009), at www.amphilsoc.org/sites/default/files/proceedings/1530204.pdf; Maureen O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. Copyright Soc'y 425 (2002). Indeed the classes of creators with the strongest copyright control of the exploitation of their works are often the classes with the least likely prospect of earning a decent living from their creation of works of authorship. Playwrights, for example, have by custom retained almost European control over their scripts. Even very successful playwrights, though, earn very little money from licensing productions of their plays. Todd London & Ben Pesner, Outrageous Fortune: the Life and Times of the New American Play 50–63 (2009).

[97] Jessica Litman, *Real Copyright Reform*, 96 Iowa L. Rev. 1, 8–12 (2010).

In past 25 years, Congress has tweaked the copyright law repeatedly to enhance copyright owners' control over their works. None of those tweaks put more money in creators' pockets. If one of our goals in revising the copyright law is to ensure that creators are able to earn more money from their works – and I personally think that it should be – then we need to recognize that ratcheting up owner control yet again is unlikely to achieve it. Even when copyright revision results in increased copyright revenues, copyright owners have displayed a persistent reluctance to share their augmented revenues with creators.[98] The lesson of past copyright revisions is that even massive enhancement of the scope of copyright owners' rights and the robustness of their remedies doesn't effect a noticeable increase in author compensation.[99] We need to think instead about restructuring the system in ways that make money for creators a higher priority than control of copies. When we do that, though, we need to make sure that we are also paying attention to the rights of readers, listeners, and viewers. Rather than narrowing reader liberties, we should be looking at elements of current and past copyright laws that have helped creators to collect a larger share of copyright receipts. Statutory and collective licenses that include direct payments to authors,[100] termination of transfer and other reversion provisions,[101] a narrowing of the work for hire doctrine,[102] and author-favoring construction rules[103] all show some promise. Something as simple as requiring the disclosure of accurate information about how much of the price of a copy or subscription is actually paid to creators may assist the development of norms that support author compensation.

The impulse to radically expand the scope of copyright rights and control or suppress reader creativity may be motivated by panic about online piracy, but the creative engagement of readers, listeners, and viewers isn't what causes piracy. (Indeed, it usually enhances the copyright owners' bottom line.) More important,

[98] See, e.g., U.S. Copyright Office, Copyright and the Music Marketplace 76–8, 128–30 (2015).

[99] Accord Dan Hunter & Nicholas Suzor, *Why Australians Should Back Turnbull in the Stoush over Copyright*, The Conversation, August 8, 2014, at http://theconversation.com/why-australians-should-back-turnbull-in-the-stoush-over-copyright-30198.

[100] See, e.g., Comments of SAG, AFTRA, & AFM, Copyright Licensing Study, Docket No. 2014–13, (May 23, 2014), at www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SAG_AFTRA_AFM_MLS_2014.pdf.

[101] See, e.g., Moral Rights, Termination Rights, Resale Royalty, And Copyright Term, *supra* note 77 (testimony of Casey Rae, Future of Music Coalition).

[102] See, e.g., Jeffrey Trexler, *Taking Back the Kirby Case*, The Comics Journal (Aug. 20, 2013), at www.tcj.com/taking-back-the-kirby-case/.

[103] In Cohen v. Paramount, 845 F.2d 851 (9th Cir. 1988), for example, the Court of Appeals for the 9th Circuit adopted a rule of construction limiting an author's grant to encompass uses contemplated by the parties and to reserve to the author all uses the parties did not anticipate. See also Random House v. Rosetta Books, 150 F. Supp. 2d 613 (SDNY 2001), aff'd 283 F.3d 490 (2d Cir. 2002) (construing grant of right to publish work in book form to exclude ebook publication).

though, is that audience members' engagement greatly enriches the reader's, listener's, and viewer's experience of copyrighted works, and is precisely the sort of behavior that a copyright system is designed, and should be designed, to promote.

What makes this an easy choice is that proposals to further extend copyright rights or to subject reading, listening, and viewing to tight control are unlikely to discourage people from stealing access to works that they aren't able to buy. Those proposals are much more likely to discourage people from buying access to works that they would otherwise be eager to read, hear, or see.

But even if the choice were harder – if copyright owners came up with a new formulation of their exclusive rights or a new sort of control over their readers that seemed certain to produce a measurable reduction in infringement – if the control also created a significant burden on reading, listening, and viewing, then adopting it would pose a risk of ignoring half of copyright's purpose: the half that seeks to promote reading. That half is, as I've argued, crucially important to the copyright system. When we ignore it, the system breaks down.

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