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| MAIN MENU: | CALENDAR | SYLLABUS | DISCUSSION | ADMINISTRATION |
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Copyright in Cyberspace I: Introduction

READINGS

The goal (and challenge) of this section is to provide a reasonable overview of modern US copyright law -- sufficient to ensure that our discussion is firmly grounded in the basic doctrinal and theoretical principles.

First, to get a broad overview of the U.S. Copyright system, read the following "Copyright Basics" article from the U.S. Copyright Office:

[US Copyright Office, Copyright Basics \(2000\)](#) (pdf, 48 kb, edited)

Then **browse** (don't read in detail) the Copyright Law of the United States:

[Title 17, United States Code \(2001\)](#).

Alternative: [Title 17, United States Code \(2010\)](#) (offers PDF versions of the Code for download)

Next, we'll consider the basics of copyright in the following framework.

1. *Scope of Coverage*: What Does Copyright Cover?
2. *Exclusive Rights*: What Rights does a Copyright Owner Have?
3. *Limits on Rights*: What limits are there on Copyrights?

Scope of Coverage: What Does Copyright Cover?

First, read the critical statutory provisions:

[17 U.S.C. §§ 101, 102, 103, 104, 105 \(2000\)](#) (html, 44 kb)

Second, read the following important cases:

[Feist v. Rural Telephone Service Co., 499 U.S. 340 \(1991\)](#) (requirement of originality) (pdf, 36 kb, edited)

Baker v Selden, 101 U.S. 99 (1879) (idea versus expression) (pdf, 20 kb, edited)

MAI v. Peak Computing, 991 F.2d 511 (9th Cir. 1993) (defining "fixed in a tangible medium of expression") (pdf, 20 kb, edited)

Exclusive Rights: What Rights does a Copyright Owner Have?

The exclusive rights granted to a copyright owner are found in 17 U.S.C. § 106:

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
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Limits on Rights: What limits are there on Copyrights?

Section 107 to 121 of Title 17 outline the limitations on a Copyright Owner's rights:

17 U.S.C. §§ 107-121 (2000). (html, 56 kb)

For our purposes, the most important limitation on rights is the "fair use" provision, in 17 U.S.C. § 107. Accordingly, we'll focus our attentions on this limitation.

Statutory Provisions

§ 107. Limitations on exclusive rights: Fair use

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

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Justifications for Fair Use

What do you think the rationale behind the "fair use" concept is? Courts and commentators have variously described the theory as:

1. **Encouraging "socially desirable" uses of copyrighted works.** By granting free licenses to certain classes of uses and users, the law gives incentives to and subsidies for those who engage in those uses.
2. **Remedying a market failure for the copyrighted works.** It is often costly and difficult to negotiate for a license to use a copyrighted work. Where the cost of performing the transaction outweighs the benefits that accrue to society as a result of protecting the work, fair use operates.
3. **Necessary to balance the First Amendment rights of free expression with a system of laws (Copyright) that restricts expression (in Copyrighted works).** By limiting the scope of Copyright protection, fair use can be seen as an attempt to remain sensitive to the goal (and requirement) of free expression.

Which of these theories appeals to you? How do they relate to the eCommerce context?

Analyzing Fair Use

The following cases will provide a framework for discussion of the fair use concept in Copyright Law:

Sony v. Universal Studios, 461 U.S. 417 (1984) (pdf, 64 kb, edited)

Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110 (9th Cir. 2000) (pdf, 40 kb, edited)

What theories or justifications for fair use do these opinions advance? How relevant are they to the eCommerce world?

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TITLE 17 - COPYRIGHTS

- **Chapter 1.** Subject Matter and Scope of Copyright
- **Chapter 2.** Copyright Ownership and Transfer
- **Chapter 3.** Duration of Copyright
- **Chapter 4.** Copyright Notice, Deposit, and Registration
- **Chapter 5.** Copyright Infringement and Remedies
- **Chapter 6.** Manufacturing Requirements and Importation
- **Chapter 7.** Copyright Office
- **Chapter 8.** Copyright Arbitration Royalty Panels
- **Chapter 9.** Protection of Semiconductor Chip Products
- **Chapter 10.** Digital Audio Recording Devices and Media
- **Chapter 11.** Sound Recordings and Music Videos
- **Chapter 12.** Copyright Protection and Management Systems
- **Chapter 13.** Protection of Original Designs
- **Rules, forms, appendices, and other additional material**

Copyright Law of the United States of America

and Related Laws Contained in Title 17 of the *United States Code*

Chapter 1 *[edited]*

Subject Matter and Scope of Copyright

- 101. Definitions
- 102. Subject matter of copyright: In general
- 103. Subject matter of copyright: Compilations and derivative works
- 104. Subject matter of copyright: National origin
- 104A. *[omitted]* Copyright in restored works
- 105. Subject matter of copyright: United States Government works

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§ 101. Definitions²

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.³

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.⁴

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in

which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.⁵

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.⁶

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.⁷

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.⁸

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.⁹

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.¹⁰

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is-

- (1) the Universal Copyright Convention;
- (2) the Geneva Phonograms Convention;
- (3) the Berne Convention;
- (4) the WTO Agreement;
- (5) the WIPO Copyright Treaty;¹¹
- (6) the WIPO Performances and Phonograms Treaty;¹² and
- (7) any other copyright treaty to which the United States is a party.¹³

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.¹⁴

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.¹⁵

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.¹⁶

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

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

To perform or display a work "publicly" means-

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.¹⁷

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.¹⁸

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if-

(1) in the case of a published work, the work is first published-

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.¹⁹

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.²⁰

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.²¹

A "work of visual art" is-

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include-

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other

audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.²²

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is-

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.²³

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.²⁴

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.²⁵

§ 102. Subject matter of copyright: In general²⁶

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

§ 104. Subject matter of copyright: National origin²⁷

(a) Unpublished Works.-The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) Published Works.-The works specified by sections 102 and 103, when published, are subject to protection under this title if-

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party; or

(3) the work is a sound recording that was first fixed in a treaty party; or

(4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or

(5) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(6) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.

(c) Effect of Berne Convention.-No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

(d) Effect of Phonograms Treaties.-Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.²⁸

§ 105. Subject matter of copyright: United States Government works³⁵

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Chapter 1 Endnotes

1 In 1980, section 117 was amended in its entirety with an amendment in the nature of a substitute that included a new title. However, the table of sections was not changed to reflect the new title. Pub. L. No. 96-517, 94 Stat. 3015, 3028. In 1997, a technical amendment made that change. Pub. L. No. 105-80, 111 Stat. 1529, 1534.

2 The Audio Home Recording Act of 1992 amended section 101 by inserting "Except as otherwise provided in this title," at the beginning of the first sentence. Pub. L. No. 102-563, 106 Stat. 4237, 4248.

The Berne Convention Implementation Act of 1988 amended section 101 by adding a definition for "Berne Convention work." Pub. L. No. 100-568, 102 Stat. 2853, 2854. In 1990, the Architectural Works Copyright Protection Act amended the definition of "Berne Convention work" by adding paragraph (5). Pub. L. No. 101-650, 104 Stat. 5089, 5133. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 deleted the definition of "Berne Convention work" from section 101. Pub. L. No. 105-304, 112 Stat. 2860, 2861. The definition of "Berne Convention work," as deleted, is contained in part VI of the Appendix.

3 In 1990, the Architectural Works Copyright Protection Act amended section 101 by adding the definition for "architectural work." Pub. L. No. 101-650, 104 Stat. 5089, 5133. That Act states that the definition is applicable to "any architectural work that, on the date of the enactment of this Act, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under title 17, United States Code, by virtue of the amendments made by this title, shall terminate on December 31, 2002, unless the work is constructed by that date."

4 The Berne Convention Implementation Act of 1988 amended section 101 by adding the definition of "Berne Convention." Pub. L. No. 100-568, 102 Stat. 2853, 2854.

5 The Digital Performance Right in Sound Recordings Act of 1995 amended section 101 by adding the definition of "digital transmission." Pub. L. No. 104-39, 109 Stat. 336, 348.

6 The Fairness in Music Licensing Act of 1998 amended section 101 by adding the definition of "establishment." Pub. L. No. 105-298, 112 Stat. 2827, 2833.

7 The Fairness in Music Licensing Act of 1998 amended section 101 by adding the definition of "food service or drinking establishment." Pub. L. No. 105-298, 112 Stat. 2827, 2833.

8 In 1997, the No Electronic Theft (NET) Act amended section 101 by adding the definition for "financial gain." Pub. L. No. 105-147, 111 Stat. 2678.

9 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definition of "Geneva Phonograms Convention." Pub. L. No. 105-304, 112 Stat. 2860, 2861.

10 The Fairness in Music Licensing Act of 1998 amended section 101 by adding the definition of "gross square feet of space." Pub. L. No. 105-298, 112 Stat. 2827, 2833.

11 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that paragraph (5) of the definition of "international agreement" take effect upon entry into force of the WIPO Copyright Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

12 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that paragraph (6) of the definition of "international agreement" take effect upon entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

13 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definition of "international agreement." Pub. L. No. 105-304, 112 Stat. 2860, 2861.

14 The Fairness in Music Licensing Act of 1998 amended section 101 by adding the definition of "performing rights"

society." Pub. L. No. 105-298, 112 Stat. 2827, 2833.

15 The Berne Convention Implementation Act of 1988 amended the definition of "Pictorial, graphic, and sculptural works" by inserting "diagrams, models, and technical drawings, including architectural plans" in the first sentence, in lieu of "technical drawings, diagrams, and models." Pub. L. No. 100-568, 102 Stat. 2853, 2854.

16 The Fairness in Music Licensing Act of 1998 amended section 101 by adding the definition of "proprietor." Pub. L. No. 105-298, 112 Stat. 2827, 2833. In 1999, a technical amendment added the phrase "For purposes of section 513," to the beginning of the definition of "proprietor." Pub. L. No. 106-44, 113 Stat. 221, 222.

17 The Copyright Renewal Act of 1992 amended section 101 by adding the definition of "registration." Pub. L. No. 102-307, 106 Stat. 264, 266.

18 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definition of "treaty party." Pub. L. No. 105-304, 112 Stat. 2860, 2861.

19 The Berne Convention Implementation Act of 1988 amended section 101 by adding the definition of "country of origin" of a Berne Convention work, for purposes of section 411. Pub. L. No. 100-568, 102 Stat. 2853, 2854. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended that definition by changing it to a definition for "United States work," for purposes of section 411. Pub. L. No. 105-304, 112 Stat. 2860, 2861. In 1999, a technical amendment moved the definition of "United States work" to place it in alphabetical order, after the definition for "United States." Pub. L. No. 106-44, 113 Stat. 221, 222.

20 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definition of "WIPO Copyright Treaty." Pub. L. No. 105-304, 112 Stat. 2860, 2861. That definition is required to take effect upon entry into force of the WIPO Copyright Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

21 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definition of "WIPO Performances and Phonograms Treaty." Pub. L. No. 105-304, 112 Stat. 2860, 2862. That definition is required to take effect upon entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

22 The Visual Artists Rights Act of 1990 amended section 101 by adding the definition of "work of visual art." Pub. L. No. 101-650, 104 Stat. 5089, 5128.

23 The Satellite Home Viewer Improvement Act of 1999 amended the definition of "a work made for hire" by inserting "as a sound recording" after "audiovisual work." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

24 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 101 by adding the definitions of "WTO Agreement" and "WTO member country," thereby transferring those definitions to section 101 from section 104A. Pub. L. No. 105-304, 112 Stat. 2860, 2862. See also footnote 29, *infra*.

25 In 1980, the definition of "computer program" was added to section 101. Pub. L. No. 96-517, 94 Stat. 3015, 3028.

26 In 1990, the Architectural Works Copyright Protection Act amended subsection 102(a) by adding at the end thereof paragraph (8). Pub. L. No. 101-650, 104 Stat. 5089, 5133.

27 The Berne Convention Implementation Act of 1988 amended section 104(b) by redesignating paragraph (4) as paragraph (5), by inserting after paragraph (3) a new paragraph (4) and by adding subsection (c) at the end. Pub. L. No. 100-568, 102 Stat. 2853, 2855. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 104 as follows: 1) by amending subsection (b) to redesignate paragraphs (3) and (5) as (5) and (6), respectively, and by adding a new paragraph (3); 2) by amending section 104(b), throughout; and 3) by adding section 104(d). Pub. L. No. 105-304, 112 Stat. 2860, 2862.

28 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subsection (d), regarding the effect of phonograms treaties, take effect upon entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

29 In 1993, the North American Free Trade Agreement Implementation Act added section 104A. Pub. L. No. 103-182, 107 Stat. 2057, 2115. In 1994, the Uruguay Round Agreements Act amended section 104A in its entirety with an amendment in the nature of a substitute. Pub. L. No. 103-465, 108 Stat. 4809, 4976. On November 13, 1997, Section 104A was amended by replacing subsection (d)(3)(A), by striking the last sentence of subsection

(e)(1)(B)(ii) and by rewriting paragraphs (2) and (3) of subsection (h). Pub. L. No. 105-80, 111 Stat. 1529, 1530. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 amended section 104A by rewriting paragraphs (1) and (3) of subsection (h); by adding subparagraph (E) to subsection (h)(6); and by amending subsection (h)(8)(B)(i). Pub. L. No. 105-304, 112 Stat. 2860, 2862. That act also deleted paragraph (9), thereby transferring the definitions for "WTO Agreement" and "WTO member country" from section 104A to section 101. Pub. L. No. 105-304, 112 Stat. 2860, 2863. See also footnote 24, supra.

30 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subparagraph (C) of the definition of "date of adherence or proclamation" take effect upon entry into force of the WIPO Copyright Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

31 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subparagraph (D) of the definition of "date of adherence or proclamation" take effect upon entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

32 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subparagraph (C) of the definition of "eligible country" take effect upon entry into force of the WIPO Copyright Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

33 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subparagraph (D) of the definition of "eligible country" take effect upon entry into force of the WIPO Performance and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

34 The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 requires that subparagraph (E) of the definition of "restored work" take effect upon entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States. Pub. L. No. 105-304, 112 Stat. 2860, 2877.

35 In 1968, the Standard Reference Data Act provided an exception to Section 105, Pub. L. No. 90-396, 82 Stat. 339. Section 6 of that act amended title 15 of the United States Code by authorizing the Secretary of Commerce, at 15 U.S.C. 290e, to secure copyright and renewal thereof on behalf of the United States as author or proprietor "in all or any part of any standard reference data which he prepares or makes available under this chapter," and to "authorize the reproduction and publication thereof by others." See also section 105(f) of the Transitional and Supplementary Provisions of the Copyright Act of 1976, in Part I of the Appendix. Pub. L. No. 94-553, 90 Stat. 2541.

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[edited version]

FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO., INC.

SUPREME COURT OF THE UNITED STATES

499 U.S. 340; 111 S. Ct. 1282

March 27, 1991, Decided

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Marshall, Stevens, Scalia, Kennedy, and Souter, JJ., joined. Blackmun, J., concurred in the judgment.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified [***7] advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical [*343] directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings -- compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to

Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly [***8] status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to extend its monopoly in telephone service to a monopoly in yellow pages advertising." *Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610, 622 (Kan. 1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, [***9] then hired personnel to investigate the 4,935 that remained. These employees verified [*344] the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, [**1287] 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. App. 54 (P 15-16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover

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the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "courts [***10] have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. *663 F. Supp. 214, 218 (1987)*. In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App. to Pet. for Cert. 4a, judgt. order reported at *916 F. 2d 718 (1990)*. We granted certiorari, *498 U.S. 808 (1990)*, to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that [*345] "no author may copyright his ideas or the facts he narrates." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, *471 U.S. 539, 556 (1985)*. [***11] Rural wisely concedes this point, noting in its brief that "facts and discoveries, of course, are not themselves subject to copyright protection." Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data -- *i. e.*, wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* [***12] of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row, supra*, at 547-549. Original, as the term is used in copyright, means only that the

work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, *Copyright* § 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. *Id.*, § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, [*346] assume that two poets, each ignorant of the other, compose [**1288] identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See [***13] *Sheldon v. Metro-Goldwyn Pictures Corp.*, *81 F. 2d 49, 54 (CA2 1936)*.

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secure for limited Times to Authors ... the exclusive Right to their respective Writings." In two decisions from the late 19th century -- *The Trade-Mark Cases*, *100 U.S. 82 (1879)*; and *Burrow-Giles Lithographic Co. v. Sarony*, *111 U.S. 53 (1884)* -- this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In *The Trade-Mark Cases*, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." *100 U.S.*, at 94. The Court explained that originality requires independent [***14] creation plus a modicum of creativity: "While the word *writings* may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like." *Ibid.* (emphasis in original).

In *Burrow-Giles*, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." *111 U.S.*, at 58 (internal quotation marks omitted). As in *The Trade-Mark Cases*, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," *111 U.S.*, at 58, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence [*347] of those facts of originality, of intellectual

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production, of thought, and conception." *Id.*, at 59-60. [***15]

The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. See *Goldstein v. California*, 412 U.S. 546, 561-562 (1973). It is the very "premise of copyright law." *Miller v. Universal City Studios, Inc.*, 650 F. 2d 1365, 1368 (CA5 1981). Leading scholars agree on this point. As one pair of commentators succinctly puts it: "The originality requirement is *constitutionally mandated* for all works." Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 *UCLA L. Rev.* 719, 763, n. 155 (1989) (emphasis in original) (hereinafter Patterson & Joyce). Accord, *id.*, at 759-760, and n. 140; Nimmer § 1.06[A] ("Originality is a statutory as well as a constitutional requirement"); *id.*, § 1.08[C][1] ("[A] modicum of intellectual labor ... clearly constitutes an essential constitutional element").

It is [***16] this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." *Id.*, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." 111 U.S., at 58. "The discoverer merely finds and records." Nimmer § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures [**1289] from the world around them. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 *Colum. L. Rev.* 516, 525 (1981) (hereinafter Denicola). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer [**348] § 2.03[E]. The same is true of all facts -- scientific, historical, [***17] biographical, and news of the day. "They may not be copyrighted and are part of the public domain available to every person." *Miller, supra*, at 1369.

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal

degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer § § 2.11[D], 3.03; Denicola 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U.S., at 547. Accord, Nimmer § 3.03.

[***18] This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800-802; Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *Colum. L. Rev.* 1865, 1868, and n. 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see 471 U.S., at 556-557, but that he could prevent others from copying his "subjective [***19] descriptions and portraits of public figures." [**349] *Id.*, at 563. Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, *Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable)*, 12 *Com. & Law* 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "No matter how much original authorship the work displays, the facts and ideas it exposes [***20] are free for the taking. ... †The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to

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discover the facts or to propose the ideas." Ginsburg 1868.

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan [*1290] has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row, 471 U.S., at 589* (dissenting opinion). It is, rather, "the essence of copyright," *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)*. To this end, copyright assures authors the right to their original [*350] expression, but encourages others to build freely upon the ideas and information conveyed by a work. *Harper & Row, supra, at 556-557.* [***21] This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden, 101 U.S. 99, 103 (1880)*. We reiterated this point in *Harper & Row*:

"No author may copyright facts or ideas. The copyright is limited to those aspects of the work -- termed 'expression' -- that [***22] display the stamp of the author's originality.

"Copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original -- for example ... facts, or materials in the public domain -- as long as such use does not unfairly appropriate the author's original contributions." *471 U.S., at 547-548* (citation omitted).

This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a

compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to [*351] [***23] the particular selection or arrangement. In no event may copyright extend to the facts themselves.

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection.

* * *

[However, some] courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," [***26] "the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co., 281 F., at 88*:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industrious [*353] collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information [***27] previously published," but rather had to "independently work out the matter for himself, so as to arrive at the same result from the same common sources of information." *Id., at 88-89* (internal quotations omitted). "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law -- that no one may copyright facts or ideas. See *Miller v. Universal City Studios, Inc., 650 F. 2d, at 1372* (criticizing "sweat of the brow" courts because "ensuring that later writers obtain the facts independently ... is precisely the scope of protection given ... copyrighted

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matter, and the law is clear [**1292] that facts are not entitled to such protection").

* * *

[In response,] Congress enacted two new provisions [in the 1976 Copyright revisions]. First, to make clear that compilations were not copyrightable *per se*, Congress provided a definition of the term "compilation." Second, to make clear that the copyright in a compilation did not extend to the facts themselves, Congress enacted § 103.

The definition of "compilation" is found in § 101 of the 1976 Act. It defines a "compilation" in the copyright sense as "a work formed by the collection and assembling of preexisting materials or of data *that* are selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work [***34] of authorship" (emphasis added).

[*357] The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable *per se*. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. "This tripartite conjunctive structure is self-evident, and should be assumed to 'accurately express the legislative purpose.'" Patry 51, quoting *Mills Music*, 469 U.S., at 164.

At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a [**1294] compilation -- a collection of pre-existing material, facts, or data. What makes it significant is that it is not the *sole* requirement. It is not enough for copyright purposes that an author collects and [***35] assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection. Otherwise, there would be a period after "data."

The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement ("an *original* work of authorship"). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the "sweat of the

brow" courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to "make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works ... containing preexisting material." H. R. Rep., at 57; S. Rep., at 55.

[*358]

The key to the statutory definition is the second requirement. It [***36] instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged. This is a straight-forward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged "in such a way" as to render the work as a whole original. This implies that some "ways" will trigger copyright, but that others will not. See Patry 57, and n. 76. Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do [***37] so is dispositive. In accordance with "the established principle that a court should give effect, if possible, to every clause and word of a statute," *Moskal v. United States*, 498 U.S. 103, 109-110 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (*i. e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, [*359] the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which [***38] the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239,

251 (1903) (referring to "the narrowest and most obvious limits"). Such works are incapable of sustaining a valid copyright. Nimmer § 2.01[B].

Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of § 103 of the Act. [**1295] Section 103 explains that "the subject matter of copyright ... includes compilations," § 103(a), but that copyright protects only the author's original contributions -- not the facts or information conveyed:

"The copyright in a compilation ... extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the [***39] preexisting material." § 103(b).

As § 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. "The most important point here is one that is commonly misunderstood today: copyright ... has no effect one way or the other on the copyright or public domain status of the preexisting material." H. R. Rep., at 57; S. Rep., at 55. The 1909 Act did not require, as "sweat of the brow" courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. See, e. g., *Jeweler's Circular Publishing Co., 281 F., at 88-89*. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler -- the selection, coordination, and arrangement of facts.

* * *

III

[***42] There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, [**1296] towns, and telephone numbers of 1,309 of Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. See *Harper & Row, 471 U.S., at 548*. The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet. for Cert. 9.

The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white [***43] pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "owe its origin" to Rural. *Burrow-Giles, 111 U.S., at 58*. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory. The originality requirement "rules out protecting ... names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author." Patterson & Joyce 776.

Rural essentially concedes the point by referring to the names, towns, and telephone numbers as "preexisting material." Brief for Respondent 17. Section 103(b) states explicitly [*362] that the copyright in a compilation does not extend to "the preexisting material employed in the work."

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent [***44] standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. See Patterson & Joyce 760, n. 144 ("While this requirement is sometimes characterized as modest, or a low threshold, it is not without effect") (internal quotation marks omitted; citations omitted). As this Court has explained, the Constitution mandates some minimal degree of creativity, see *The Trade-Mark Cases, 100 U.S., at 94*; and an author who claims infringement must prove "the existence of ... intellectual production, of thought, and conception." *Burrow-Giles, supra, at 59-60*.

The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white [***45] pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

499 U.S. 340, *; 111 S. Ct. 1282, **;
1991 U.S. LEXIS 1856, ***; 113 L. Ed. 2d 358

Rural's selection of listings could not be more obvious: It publishes the most basic information -- name, town, and telephone number -- about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort [*363] to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly "select" to publish the names and telephone numbers of its subscribers; rather, it was [**1297] required to do so by the Kansas Corporation Commission as part of its monopoly franchise. See *737 F. Supp.*, at 612. Accordingly, one could plausibly [***46] conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. See Brief for Information Industry Association et al. as *Amici Curiae* 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess

the minimal creative spark required by the Copyright Act and the Constitution.

[***47] We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, *17 U. S. C. § 101* does not afford protection [*364] from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

[***48] Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way." *Baker v. Selden*, 101 U.S., at 105.

The judgment of the Court of Appeals is
Reversed.

101 U.S. 99, *; 1879 U.S. LEXIS 1888, **;
25 L. Ed. 841, ***; 11 Otto 99

[edited version]

BAKER v. SELDEN.

SUPREME COURT OF THE UNITED STATES

101 U.S. 99; 1879 U.S. LEXIS 1888; 25 L. Ed. 841; 11 Otto 99

OCTOBER, 1879 Term

[*99] [***842] MR. JUSTICE BRADLEY delivered the opinion of the court.

Charles Selden, the testator of the complainant in this case, in the year 1859 took the requisite steps for obtaining the copyright [*100] of a book, entitled "Selden's Condensed Ledger, or Book-keeping Simplified," the object of which was to exhibit and explain a peculiar system of book-keeping. In 1860 and 1861, he took the copyright of several other books, containing additions to and improvements upon the said system. The bill of complaint was filed against the defendant, Baker, for an alleged infringement of these copyrights. [**2] The latter, in his answer, denied that Selden was the author or designer of the books, and denied the infringement charged, and contends on the argument that the matter alleged to be infringed is not a lawful subject of copyright.

The parties went into proofs, and the various books of the complainant, as well as those sold and used by the defendant, were exhibited before the examiner, and witnesses were examined on both sides. A decree was rendered for the complainant, and the defendant appealed.

The book or series of books of which the complainant claims the copyright consists of an introductory essay explaining the system of book-keeping referred to, to which are annexed certain forms or blanks, consisting of ruled lines, and headings, illustrating the system and showing how it is to be used and carried out in practice. This system effects the same results as book-keeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week, or a month, on a single page, or on two pages facing each other, in an account-book. The defendant uses a similar plan so far as results are concerned; but makes a different arrangement [**3] of the columns, and uses different headings. If the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of

arrangement; but if it be assumed that the system is open to public use, it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. Where the truths of a science or the methods of an art are the common property of the whole world, and author has the right to express the one, or explain and use the other, in [*101] his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account-books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system.

The evidence of the complainant [**4] is principally directed to the object of showing that Baker uses the same system as that which is explained and illustrated in Selden's books. It becomes important, therefore, to determine whether, in obtaining the copyright of his books, he secured the exclusive right to the use of the system or method of book-keeping which the said books are intended to illustrate and explain. It is contended that he has secured such exclusive right, because no one can use the system without using substantially the same ruled lines and headings which he has appended to his books in illustration of it. In other words, it is contended that the ruled lines and headings, given to illustrate the system, are a part of the book, and, as such, are secured by the copyright; and [***843] that no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright. And this is really the question to be decided in this case. Stated in another form, the question is, whether the exclusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system [**5] is explained? The complainant's bill, and the case made under it, are based on the hypothesis that it can be.

101 U.S. 99, *; 1879 U.S. LEXIS 1888, **;
25 L. Ed. 841, ***; 11 Otto 99

It cannot be pretended, and indeed it is not seriously urged, that the ruled lines of the complainant's account-book can be claimed under any special class of objects, other than books, named in the law of copyright existing in 1859. The law then in force was that of 1831, and specified only books, maps, charts, musical compositions, prints, and engravings. An account-book, consisting of ruled lines and blank columns, cannot be called by any of these names unless by that of a book.

There is no doubt that a work on the subject of book-keeping, [*102] though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which [**6] it is intended to illustrate. The mere statement of the proposition is so evident, that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, -- would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The [**7] claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

The difference between the two things, letters-patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the [*103] public. If he

desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries.

The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. [**8] By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book.

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the [**9] book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that their form is their essence, [*104] and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition, as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone

is what is secured [**10] by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would undoubtedly be an infringement of the copyright.

Recurring to the case before us, we observe [***844] that Charles Selden, by his books, explained and described a peculiar system of book-keeping, and illustrated his method by means of ruled lines and blank columns, with proper headings on a page, or on successive pages. Now, whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book. Whether the art might or might not have been patented, is a question which is not before us. It was not patented, and is open and free to the use of the public. And, of course, in using the art, the ruled lines and headings [**11] of accounts must necessarily be used as incident to it.

The plausibility of the claim put forward by the complainant in this case arises from a confusion of ideas produced by the peculiar nature of the art described in the books which have been made the subject of copyright. In describing the art, the illustrations and diagrams employed happen to correspond more closely than usual with the actual work performed by the operator who uses the art. Those illustrations and diagrams consist of ruled lines and headings of accounts; and [*105] it is similar ruled lines and headings of accounts which, in the application of the art, the book-keeper makes with his pen, or the stationer with his press; whilst in most other cases the diagrams and illustrations can only be represented in concrete forms of wood, metal, stone, or some other physical embodiment. But the principle is the same in all. The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. the latter can only be secured, if it [**12] can be secured at all, by letters-patent.

The remarks of Mr. Justice Thompson in the Circuit Court in *Clayton v. Stone & Hall* (2 Paine, 392), in which copyright was claimed in a daily price-current, are apposite and instructive. He says: "In determining the true construction to be given to the act of Congress, it is proper to look at the Constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. 'Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.' The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the science to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term 'science' cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, [**13] and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way: it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the act of Congress is, 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. ... †We are, accordingly, or opinion that the paper in question is not [*106] a book the copyright to which can be secured under the act of Congress."

* * *

The conclusion to which we have come is, that blank accountbooks are not the subject of copyright; and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.

The decree of the Circuit Court must be reversed, and the cause remanded with instructions to dismiss the complainant's bill; and it is

So ordered.

991 F.2d 511, *, 1993 U.S. App. LEXIS 7522, **;
26 U.S.P.Q.2D (BNA) 1458; Copy. L. Rep. (CCH) P27,096

[edited version]

MAI SYSTEMS CORPORATION, v. PEAK COMPUTER, INC.
No. 92-55363, No. 93-55106

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

991 F.2d 511; 1993 U.S. App. LEXIS 7522; 26 U.S.P.Q.2D (BNA) 1458; Copy. L. Rep. (CCH) P27,096; 93 Cal. Daily Op. Service 2596; 93 Daily Journal DAR 4604

April 7, 1993, Filed

BEFORE: PREGERSON, BRUNETTI, and
FERNANDEZ, Circuit Judges. Opinion by Judge
Brunetti

[*513] OPINION

BRUNETTI, Circuit Judge:

Peak Computer, Inc. and two of its employees appeal the district court's order issuing a preliminary injunction pending trial as well as the district court's order issuing a permanent injunction following the grant of partial summary judgment.

I. FACTS

MAI Systems Corp., until recently, manufactured computers and designed software to run those computers. The company continues to service its computers and the software necessary to operate the computers. MAI software includes operating system software, which is necessary to run any other program on the computer.

Peak Computer, [**2] Inc. is a company organized in 1990 that maintains computer systems for its clients. Peak maintains MAI computers for more than one hundred clients in Southern California. This accounts for between fifty and seventy percent of Peak's business.

Peak's service of MAI computers includes routine maintenance and emergency repairs. Malfunctions often are related to the failure of circuit boards inside the computers, and it may be necessary for a Peak technician to operate the computer and its operating system software in order to service the machine.

In August, 1991, Eric Francis left his job as customer service manager at MAI and joined Peak. Three other MAI employees joined Peak a short time later. Some businesses that had been using MAI to service their computers switched to Peak after learning of Francis's move.

II. PROCEDURAL HISTORY

On March 17, 1992, MAI filed suit in the district court against Peak, Peak's president Vincent Chiechi, and Francis. The complaint includes counts alleging copyright infringement, misappropriation of trade secrets, trademark infringement, false advertising, and unfair competition.

* * *

IV. COPYRIGHT INFRINGEMENT

The district court granted summary judgment in favor of MAI on its claims of copyright infringement and issued a permanent injunction against Peak on these claims. The alleged copyright violations include: (1) Peak's running of MAI software licenced to Peak customers; (2) Peak's use of unlicensed software at its headquarters; and, (3) Peak's loaning of MAI computers and software to its customers. Each of these alleged violations must be considered separately.

A. Peak's running of MAI software licenced to Peak customers

To prevail on a claim of copyright infringement, a plaintiff must prove ownership of a copyright and a "copying" of protectable expression" beyond the scope of a license. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989).

MAI software licenses allow MAI customers to use the software for their own internal information processing. n3 This allowed [**14] use necessarily includes the loading of the software into the computer's random access memory ("RAM") by a MAI customer. However, MAI software licenses do not allow for the use or copying of MAI software by third parties such as Peak. Therefore, any "copying" done by Peak is "beyond the scope" of the license.

n3 A representative MAI software license provides in part:

4. Software License.

(a) License. ... Customer may use the Software (one version with maximum of two copies permitted -- a working and a backup copy) ... solely to fulfill Customer's own internal information processing needs on the particular items of Equipment ... for which the Software is configured and furnished by [MAI]. The provisions of this License ... shall apply to all versions and copies of the Software furnished to Customer pursuant to this Agreement. The term "Software" includes, without limitation, all basic operating system software

(b) Customer Prohibited Acts. ... Any possession or use of the Software ... not expressly authorized under this License or any act which might jeopardize [MAI]'s rights or interests in the Software ... is prohibited, including without limitation, examination, disclosure, copying, modification, reconfiguration, augmentation, adaptation, emulation, visual display or reduction to visually perceptible form or tampering. ...

(c) Customer Obligations. Customer acknowledges that the Software is [MAI]'s valuable and exclusive property, trade secret and copyrighted material. Accordingly, Customer shall ... (i) use the Software ... strictly as prescribed under this License, (ii) keep the Software ... confidential and not make [it] available to others

A representative diagnostic license agreement provides in part:

6. Access/Non-Disclosure. Licensee shall not give access nor shall it disclose the Diagnostics (in any form) ... to any person ... without the written permission of [MAI]. Licensee may authorize not more than three (3) of its bona fide employees to utilize the Diagnostics ... if, and only if, they agree to be bound by the terms hereof.

[**15]

It is not disputed that MAI owns the copyright to the software at issue here, however, Peak vigorously disputes the district court's conclusion that a "copying" occurred under the Copyright Act.

The Copyright Act defines "copies" as "

material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 101.

The Copyright Act then explains:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated [*518] for a period of more than transitory duration.

17 U.S.C. § 101.

The district court's grant of summary judgment on MAI's claims of copyright infringement reflects its conclusion that a "copying" for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM. [**16] This conclusion is consistent with its finding, in granting the preliminary injunction, 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." We find that this conclusion is supported by the record and by the law.

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 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. n4

n4 MAI also alleges that Peak runs its diagnostic software in servicing MAI computers. Since Peak's running of the operating software constitutes copyright violation, it is not necessary for us to directly reach the issue of whether Peak

991 F.2d 511, *, 1993 U.S. App. LEXIS 7522, **;
26 U.S.P.Q.2D (BNA) 1458; Copy. L. Rep. (CCH) P27,096

also runs MAI's diagnostic software. However, we must note that Peak's field service manager, Charles Weiner, admits that MAI diagnostic software is built into the MAI MPx system and, further, that if Peak loads the MAI diagnostic software from whatever source into the computer's RAM, that such loading will produce the same copyright violation as loading the operating software.

[**17]

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."

After reviewing the record, we find no specific facts (and Peak points to none) which indicate that the copy created in the RAM is not fixed. While Peak argues this issue in its pleadings, mere argument does not establish a genuine issue of material fact to defeat summary judgment. A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials in pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989). [**18]

The law also supports the conclusion that Peak's loading of copyrighted software into RAM creates a "copy" of that software in violation of the Copyright Act. In *Apple Computer, Inc. v. Formula Int'l, Inc.*, 594 F. Supp. 617, 621 (C.D. Cal. 1984), the district court held that the copying of copyrighted software onto silicon chips and subsequent sale of those chips is not protected by § 117 of the Copyright Act. Section 117 allows "the 'owner' n5 of a copy of a computer program to make or authorize the making of another copy" without infringing copyright law, if it "is an essential step in the utilization of the computer program" or if the new copy is "for archival purposes [*519] only." 17 U.S.C. § 117 (Supp. 1988). n6 One of the grounds for finding that § 117 did not apply was the court's conclusion that the permanent copying of the software onto the silicon chips was not an "essential step" in the utilization of the software because the software could be used through RAM without making a permanent copy. The court stated:

RAM can be simply defined as a computer component in which data and computer programs can be temporarily [**19] recorded. Thus, the purchaser of [software] desiring to utilize all of the programs on the diskette could arrange to copy [the software] into RAM. This would only be a temporary fixation. It is a property of RAM that when the computer is turned off, the copy of the program recorded in RAM is lost.

Apple Computer at 622.

n5 Since MAI licensed its software, the Peak customers do not qualify as "owners" of the software and are not eligible for protection under § 117.

n6 The current § 117 was enacted by Congress in 1980, as part of the Computer Software Copyright Act. This Act adopted the recommendations contained in the Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") (1978). H.R. Rep. No. 1307, 96th Cong., 2d Sess., pt. 1, at 23. The CONTU was established by Congress in 1974 to perform research and make recommendations concerning copyright protection for computer programs. The new § 117 reflects the CONTU's conclusion that: "Because the placement of a work into a computer is the preparation of a copy, the law should provide that persons in rightful possession of copies of programs be able to use them freely without fear of exposure to copyright liability." Final Report at 13.

[**20]

While we recognize that this language is not dispositive, it supports the view that the copy made in RAM is "fixed" and qualifies as a copy under the Copyright Act.

We have found no case which specifically holds that the copying of software into RAM creates a "copy" under the Copyright Act. However, it is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act. See e.g. *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 260 (5th Cir. 1988) ("the act of loading a program from a medium of storage into a computer's memory creates a copy of the program"); 2 Nimmer on Copyright, § 8.08 at 8-105 (1983) ("Inputting a computer program entails the preparation of a copy."); Final Report of the National Commission on the New Technological Uses of Copyrighted Works, at 13 (1978)

("the placement of a work into a computer is the preparation of a copy"). We recognize that these authorities are somewhat troubling since they do not specify that a copy is created regardless of whether the software is loaded into the RAM, the hard disk or the read only memory ("ROM"). However, since we find that [**21] the copy created in the RAM can be "perceived, reproduced, or otherwise communicated," we hold that the loading of software into the RAM creates a copy under the Copyright Act. *17 U.S.C. § 101*. We affirm the district court's grant of summary judgment as well as the permanent injunction as it relates to this issue.

B. Use of unlicensed software at headquarters

It is not disputed that Peak has several MAI computers with MAI operating software "up and running" at its headquarters. It is also not disputed that Peak only has a license to use MAI software to operate one system. As discussed above, we find that the loading of MAI's operating software into RAM, which occurs when an MAI system is turned on, constitutes a copyright violation. We affirm the district court's grant of summary judgment in favor of MAI on its claim that Peak violated its copyright through the unlicensed use of MAI software at Peak headquarters, and also affirm the permanent injunction as it relates to this issue.

C. Loaning of MAI computers and software

MAI contends that Peak violated the Copyright Act by loaning MAI computers and software to its customers. Among [**22] the exclusive rights given to the owner of a copyrighted work is the right to distribute copies of the work by lending. *17 U.S.C. § 106(3)*. Therefore, Peak's loaning of MAI software, if established, would constitute a violation of the Copyright Act.

[*520] MAI argues that it is clear that Peak loaned out MAI computers because Peak advertisements describe the availability of loaner computers for its customers and Chiechi admitted that the available loaners included MAI computers. However, there was no evidence that a MAI computer was ever actually loaned to a Peak customer. Paul Boulanger, a Senior Field Engineer at Peak, testified in his deposition that he was not aware of any MAI systems being loaned to Peak customers or of any customer asking for one. Charles Weiner, a Field Service Manager at Peak, testified in his deposition that he did not have any knowledge of MAI systems being loaned to customers. Weighing this evidence in the light most favorable to Peak, whether Peak actually loaned out any MAI system remains a genuine issue of material fact.

As a general rule, a permanent injunction will be granted when liability has been established and there [**23] is a threat of continuing violations. See, *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 732 (8th Cir. 1986); 3 Nimmer on Copyright § 14.06[B] at 14-88. However § 502(a) of the Copyright Act authorizes the court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." *17 U.S.C. § 502(a)* (emphasis added). While there has been no showing that Peak has actually loaned out any MAI software, the threat of a violation is clear as Peak has MAI computers in its loaner inventory. The permanent injunction is upheld as it relates to this issue.

* * *

Copyright Law of the United States of America

and Related Laws Contained in Title 17 of the *United States Code*

Chapter 1 [edited version]

Subject Matter and Scope of Copyright

- 107. Limitations on exclusive rights: Fair use
- 108. Limitations on exclusive rights: Reproduction by libraries and archives
- 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord
- 110. Limitations on exclusive rights: Exemption of certain performances and displays
- 111. Limitations on exclusive rights: Secondary transmissions
- 112. Limitations on exclusive rights: Ephemeral recordings
- 113. Scope of exclusive rights in pictorial, graphic, and sculptural works
- 114. Scope of exclusive rights in sound recordings
- 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords
- 116. Negotiated licenses for public performances by means of coin-operated phonorecord players
- 117. Limitations on exclusive rights: Computer programs¹
- 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting
- 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing
- 120. Scope of exclusive rights in architectural works
- 121. Limitations on exclusive rights: reproduction for blind or other people with disabilities
- 122. Limitations on exclusive rights; secondary transmissions by satellite carriers within local market

§ 107. Limitations on exclusive rights: Fair use³⁸

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

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives³⁹

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if-

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord⁴⁰

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . .

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays⁴¹

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if-

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for-

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

[. . . details omitted . . .]

§ 111. Limitations on exclusive rights: Secondary transmissions⁴²

(a) Certain Secondary Transmissions Exempted.-This secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if-

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection

of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: Provided, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions;

(4) the secondary transmission is made by a satellitecarrier for private home viewing pursuant to a statutory license under section 119; or

(5) the secondary transmission is not made by a cablesystem but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

[. . . details omitted . . .]

§ 112. Limitations on exclusive rights: Ephemeral recordings⁴⁴

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114 (a) or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if-

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

[. . . details omitted . . .]

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works⁴⁵

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

[. . . details omitted . . .]

§ 114. Scope of exclusive rights in sound recordings⁴⁶

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the

actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): Provided, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

[. . . provisions related to broadcasting omitted . . .]

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords⁴⁸

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

[. . . details of compulsory licensing scheme omitted . . .]

§ 116. Negotiated licenses for public performances by means of coin-operated phonorecord players⁵¹

(a) Applicability of Section.-This section applies to any nondramatic musical work embodied in a phonorecord.

(b) Negotiated Licenses.-

(1) Authority for negotiations.-Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(2) Arbitration.-Parties not subject to such a negotiation, may determine, by arbitration in accordance with the provisions of chapter 8, the terms and rates and the division of fees described in paragraph (1).

[* * *]

§ 117. Limitations on exclusive rights: Computer programs⁵²

(a) Making of Additional Copy or Adaptation by Owner of Copy.-Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, Sale, or Other Transfer of Additional Copy or Adaptation.-Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) Machine Maintenance or Repair.-Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if-

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) Definitions.-For purposes of this section-

(1) the "maintenance" of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the "repair" of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting⁵³

[*** details omitted ***]

§ 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing⁵⁴

(a) Secondary Transmissions by Satellite Carriers.-

(1) Superstations and PBS Satellite Feed.-Subject to the provisions of paragraphs (3), (4), and (6) of this subsection and section 114(d), secondary transmissions of a performance or display of a work embodied in a primary transmission made by a superstation or by the Public Broadcasting Service satellite feed shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing. In the case of the Public Broadcasting Service satellite feed, the statutory license shall be effective until January 1, 2002.⁵⁵

[***]

§ 120. Scope of exclusive rights in architectural works⁶⁵

(a) Pictorial Representations Permitted.-The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

(b) Alterations to and Destruction of Buildings.-Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

§ 121. Limitations on exclusive rights: reproduction for blind or other people with disabilities⁶⁶

(a) Notwithstanding the provisions of sections 106 and 710, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons

with disabilities.

(b)(1) Copies or phonorecords to which this section applies shall-

(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

[. . . details omitted . . .]

Chapter 1 Endnotes

38 The Visual Artists Rights Act of 1990 amended section 107 by adding the reference to section 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5132. In 1992, section 107 was also amended to add the last sentence. Pub. L. No. 102-492, 106 Stat. 3145.

39 The Copyright Amendments Act of 1992 amended section 108 by repealing subsection (i) in its entirety. Pub. L. No. 102-307, 106 Stat. 264, 272. In 1998, the Digital Millennium Copyright Act amended section 108 by making changes to subsections (a), (b) and (c); by redesignating subsection (h) as (i); and by adding a new subsection (h). Pub. L. No. 105-304, 112 Stat. 2860, 2889.

40 The Record Rental Amendment of 1984 amended section 109 by redesignating subsections (b) and (c) as subsections (c) and (d), respectively, and by inserting a new subsection (b) after subsection (a). Pub. L. No. 98-450, 98 Stat. 1727. That Act states that the provisions of section 109(b) "shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before [October 4, 1984], to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act." Pub. L. No. 98-450, 98 Stat. 1727, 1728. It also states that the amendments "shall not apply to rentals, leaseings, lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring after the date which is 13 years after [October 4, 1984]." In 1988, the Record Rental Amendment Act of 1984 was amended to extend the previously quoted time period from five years to 13 years as it is now. Pub. L. No. 100-617, 102 Stat. 3194. Also in 1988, technical amendments to section 109(d) inserted "(c)" in lieu of "(b)" and substituted "copyright" in lieu of "coyright." Pub. L. No. 100-617, 102 Stat. 3194.

The Computer Software Rental Amendments Act of 1990 amended section 109(b) as follows: 1) paragraphs (2) and (3) were redesignated as paragraphs (3) and (4), respectively; 2) paragraph (1) was struck out and new paragraphs (1) and (2) were inserted in lieu thereof; and 3) paragraph (4), as redesignated, was amended in its entirety with a new paragraph (4) inserted in lieu thereof. Pub. L. No. 101-650, 104 Stat. 5089, 5134. The Act states that section 109(b), as amended, "shall not affect the right of a person in possession of a particular copy of a computer program, who acquired such copy before the date of the enactment of this Act, to dispose of the possession of that copy on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before such date of enactment." The Act also states that the amendments made to section 109(b) "shall not apply to rentals, leaseings, or lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring on or after October 1, 1997." However, this limitation, which is set forth in the first sentence of section 804 (c) of the Computer Software Rental Amendments Act of 1990, at 104 Stat. 5136, was subsequently deleted in 1994 by the Uruguay Round Agreements Act. Pub. L. No. 103-465, 108 Stat. 4809, 4974.

The Computer Software Rental Amendments Act of 1990 also amended section 109 by adding at the end thereof subsection (e). Pub. L. No. 101-650, 104 Stat. 5089, 5135. That Act states that the provisions contained in the new subsection (e) shall take effect one year after the date of enactment of such Act, that is, one year after December 1, 1990. The Act also states that such amendments so made "shall not apply to public performances or displays that occur on or after October 1, 1995."

In 1994, the Uruguay Round Agreements Act amended section 109(a) by adding the second sentence, which begins with "Notwithstanding the preceding sentence." Pub. L. No. 103-465, 108 Stat. 4809, 4981.

41 In 1988, the Extension of Record Rental Amendment amended section 110 by adding paragraph (10). Pub. L. No. 97-366, 96 Stat. 1759. In 1997, the Technical Corrections to the Satellite Home Viewer Act amended section 110 by inserting a semicolon in lieu of the period at the end of paragraph (8); by inserting "; and" in lieu of the period at the end of paragraph (9); and by inserting "(4)" in lieu of "4 above" in paragraph (10). Pub. L. No. 105-80, 111 Stat. 1529, 1534. The Fairness in Music Licensing Act of 1998 amended section 110, in paragraph 5, by adding subparagraph (B) and by making conforming amendments to subparagraph (A); by adding the phrase "or of the audiovisual or other devices utilized in such performance" to paragraph 7; and by adding the last paragraph to section 110 that begins "The exemptions provided under paragraph (5)." Pub. L. No. 105-298, 112 Stat. 2827, 2830. In 1999, a technical amendment

made corrections to conform paragraph designations that were affected by amendments previously made by the Fairness in Music Licensing Act of 1998. Pub. L. No. 106-44, 113 Stat. 221.

42 In 1986, section 111(d) was amended by striking out paragraph (1) and by redesignating paragraphs (2), (3), (4) and (5) as paragraphs (1), (2), (3) and (4), respectively. Pub. L. 99-397, 100 Stat. 848. Also, in 1986, section 111(f) was amended by substituting "subsection (d)(1)" for "subsection (d)(2)" in the last sentence of the definition of "secondary transmission" and by adding a new sentence after the first sentence in the definition of "local service area of a primary transmitter." Pub. L. No. 99-397, 100 Stat. 848.

The Satellite Home Viewer Act of 1988 amended subsection 111(a) by striking "or" at the end of paragraph (3), by redesignating paragraph (4) as paragraph (5) and by inserting a new paragraph (4). Pub. L. No. 100-667, 102 Stat. 3935, 3949. That Act also amended section (d)(1)(A) by adding the second sentence which begins with "In determining the total number." Id.

The Copyright Royalty Tribunal Reform Act of 1993 amended section 111(d) by substituting "Librarian of Congress" for "Copyright Royalty Tribunal" where appropriate, by inserting a new sentence in lieu of the second and third sentences of paragraph (2) and, in paragraph (4), by amending subparagraph (B) in its entirety with substitute language. Pub. L. No. 103-198, 107 Stat. 2304, 2311.

The Satellite Home Viewer Act of 1994 amended section 111(f) by inserting "microwave" after "wires, cables," in the paragraph relating to the definition of "cable system" and by inserting new matter after "April 15, 1976," in the paragraph relating to the definition of "local service area of a primary transmitter." Pub. L. No. 103-369, 108 Stat. 3477, 3480. That Act provides that the amendment "relating to the definition of the local service area of a primary transmitter, shall take effect on July 1, 1994." Id.

In 1995, the Digital Performance in Sound Recordings Act amended section 111(c)(1) by inserting "and section 114(d)" in the first sentence, after "of this subsection." Pub. L. No. 104-39, 109 Stat. 336, 348.

The Satellite Home Viewer Improvement Act of 1999 amended section 111 by substituting "statutory" for "compulsory" and "programming" for "programing," wherever they appeared. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-543. The Act also amended sections 111(a) and (b) by inserting "performance or display of a work embodied in a primary transmission" in lieu of "primary transmission embodying a performance or display of a work." It amended paragraph (1) of section 111(c) by inserting "a performance or display of a work embodied in" after "by a cable system of" and by striking "and embodying a performance or display of a work." It amended subparagraphs (3) and (4) of section 111(a) by inserting "a performance or display of a work embodied in a primary transmission" in lieu of "a primary transmission" and by striking "and embodying a performance or display of a work." Id.

43 Royalty rates specified by the compulsory licensing provisions of this section are subject to adjustment by copyright arbitration royalty panels appointed and convened by the Librarian of Congress in accordance with the provisions of Chapter 8 of title 17 of the United States Code, as amended by the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304, 2311.

44 In 1998, the Digital Millennium Copyright Act amended section 112 by redesignating subsection (a) as subsection (a)(1); by redesignating former sections (a)(1), (a)(2) and (a)(3) as subsections (a)(1)(A), (a)(1)(B) and (a)(1)(C), respectively; by adding subsection (a)(2); and by amending the language in new subsection (a)(1). Pub. L. No. 105-304, 112 Stat. 2860, 2888. The Digital Millennium Copyright Act also amended section 112 by redesignating subsection (e) as subsection (f) and adding a new subsection (e). Pub. L. No. 105-304, 112 Stat. 2860, 2899. In 1999, a technical amendment to section 112(e) redesignated paragraphs (3) through (10) as (2) through (9) and corrected the paragraph references throughout that section to conform to those redesignations. Pub. L. No. 106-44, 113 Stat. 221.

45 The Visual Artists Rights Act of 1990 amended section 113 by adding subsection (d) at the end thereof. Pub. L. No. 101-650, 104 Stat. 5089, 5130.

46 The Digital Performance Right in Sound Recordings Act of 1995 amended section 114 as follows: 1) in subsection (a), by striking "and (3)" and inserting in lieu thereof "(3) and (6)"; 2) in subsection (b) in the first sentence, by striking "phonorecords, or of copies of motion pictures and other audiovisual works," and inserting "phonorecords or copies"; and 3) by striking subsection (d) and inserting in lieu thereof new subsections (d), (e), (f), (g), (h), (i), and (j). Pub. L. No. 104-39, 109 Stat. 336. In 1997, subsection 114(f) was amended by inserting all the text that appears after "December 31, 2000" (which is now December 31, 2001, in paragraph (1)(A)) and by striking "and publish in the Federal Register." Pub. L. No. 105-80, 111 Stat. 1529, 1531.

In 1998, the Digital Millennium Copyright Act amended section 114(d) by replacing paragraphs (1)(A) and (2) with amendments in the nature of substitutes. Pub. L. No. 105-304, 112 Stat. 2860, 2890. That Act also amended section 114(f) by revising the title; by redesignating paragraph (1) as paragraph (1)(A); by adding paragraph (1)(B) in lieu of paragraphs (2), (3), (4) and (5); and by amending the language in newly designated paragraph (1)(A), including revising the effective date from December 31, 2000, to December 31, 2001. Pub. L. No. 105-304, 112 Stat. 2860, 2894. The Digital Millennium Copyright Act also amended subsection 114(g) by substituting "transmission" in lieu of "subscription transmission," wherever it appears and, in the first sentence in paragraph (g)(1), by substituting "transmission licensed under a statutory license" in lieu of "subscription transmission licensed." Pub. L. No. 105-304, 112 Stat. 2860, 2897. That Act also amended subsection 114(j) by redesignating paragraphs (2), (3), (5), (6), (7) and (8) as (3), (5), (9), (12), (13)

and (14), respectively; by amending paragraphs (4) and (9) in their entirety and redesignating them as paragraphs (7) and (15), respectively; and by adding new definitions, including, paragraph (2) defining "archived program," paragraph (4) defining "continuous program," paragraph (6) defining "eligible nonsubscription transmission," paragraph (8) defining "new subscription service," paragraph (10) defining "preexisting satellite digital audio radio service" and paragraph (11) defining "preexisting subscription service." Pub. L. No. 105-304, 112 Stat. 2860, 2897.

47 The Digital Millennium Copyright Act states that "the publication of notice of proceedings under section 114(f)(1) . . . as in effect upon the effective date of [the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109Stat. 336], for the determination of royalty payments shall be deemed to have been made for the period beginning on the effective date of that Act and ending on December 1, 2001." Pub. L. No. 105-304, 112 Stat. 2860, 2899.

48 The Record Rental Amendment of 1984 amended section 115 by redesignating paragraphs (3) and (4) of subsection (c) as paragraphs (4) and (5), respectively, and by adding a new paragraph (3). Pub. L. No. 98-450, 98 Stat. 1727.

In 1997, section 115 was amended by striking "and publish in the Federal Register" in subparagraph 115(c)(3)(D). Pub. L. No. 105-80, 111 Stat. 1529, 1531. The same legislation also amended section 115(c)(3)(E) by replacing the phrases "sections 106(1) and (3)" and "sections 106(1) and 106(3)" with "paragraphs (1) and (3) of section 106." Pub. L. No. 105-80, 111 Stat. 1529, 1534.

The Digital Performance Right in Sound Recordings Act of 1995 amended section 115 as follows: 1) in the first sentence of subsection (a)(1), by striking "any other person" and inserting in lieu thereof "any other person, including those who make phonorecords or digital phonorecord deliveries"; 2) in the second sentence of the same subsection, by inserting before the period "including by means of a digital phonorecord delivery"; 3) in the second sentence of subsection (c)(2), by inserting "and other than as provided in paragraph (3)," after "For this purpose,"; 4) by redesignating paragraphs (3), (4) and (5) of subsection (c) as paragraphs (4), (5) and (6), respectively, and by inserting after paragraph (2) a new paragraph (3); and (5) by adding after subsection (c) a new subsection (d). Pub. L. No. 104-39, 109 Stat. 336, 344.

49 Royalty rates specified by the compulsory licensing provisions of this section are subject to adjustment by copyright arbitration royalty panels appointed and convened by the Librarian of Congress in accordance with the provisions of Chapter 8 of title 17 of the United States Code, as amended by the Copyright Royalty Tribunal Reform Act of 1993. Pub. L. No. 103-198, 107 Stat. 2304.

50 Pursuant to this subsection and section 803(a)(3) of title 17, the current rates have been established by regulation and may be found at 37 C.F.R. 255.

51 The Berne Convention Implementation Act of 1988 added section 116A. Pub. L. No. 100-568, 102 Stat. 2853, 2855. The Copyright Royalty Tribunal Reform Act of 1993 redesignated section 116A as section 116; repealed the preexisting section 116; in the redesignated section 116, struck subsections (b), (e), (f) and (g), and redesignated subsections (c) and (d) as subsections (b) and (c), respectively; and substituted, where appropriate, "Librarian of Congress" or "copyright arbitration royalty panel" for "Copyright Royalty Tribunal." Pub. L. No. 103-198, 107 Stat. 2304, 2309. In 1997, section 116 was amended by rewriting subsection (b)(2) and by adding a new subsection (d). Pub. L. No. 105-80, 111 Stat. 1529, 1531.

52 In 1980, section 117 was amended in its entirety. Pub. L. No. 96-517, 94 Stat. 3015, 3028. In 1998, the Computer Maintenance Competition Assurance Act amended section 117 by inserting headings for subsections (a) and (b) and by adding subsections (c) and (d). Pub. L. No. 105-304, 112 Stat. 2860, 2887.

53 The Copyright Royalty Tribunal Reform Act of 1993 amended section 118 by striking the first two sentences of subsection (b), by substituting a new first sentence in paragraph (3) and by making general conforming amendments throughout. Pub. L. No. 103-198, 107 Stat. 2304, 2309. In 1999, a technical amendment deleted paragraph (2) from section 118(e). Pub. L. No. 106-44, 113 Stat. 221, 222.

54 The Satellite Home Viewer Act of 1988 added section 119. Pub. L. No. 100-667, 102 Stat. 3935, 3949. The Copyright Royalty Tribunal Reform Act of 1993 amended subsections (b) and (c) of section 119 by substituting "Librarian of Congress" in lieu of "Copyright Royalty Tribunal" wherever it appeared and by making related conforming amendments. Pub. L. No. 103-198, 107 Stat. 2304, 2310. The Copyright Royalty Tribunal Reform Act of 1993 also amended paragraph (c)(3) by deleting subparagraphs (B), (C), (E) and (F) and by redesignating subparagraph (D) as (B), (G) as (C) and (H) as (D). The redesignated subparagraph (C) was amended in its entirety and paragraph (c)(4) was deleted. *Id.*

The Satellite Home Viewer Act of 1994 further amended section 119. Pub. L. No. 103-369, 108 Stat. 3477. In 1997, technical corrections and clarifications were made to the Satellite Home Viewer Act of 1994. Pub. L. No. 105-80, 111 Stat. 1529. Those two acts amended section 119 as follows: 1) by deleting or replacing obsolete effective dates; 2) in subsection (a)(5), by adding subparagraph (D); 3) in subsection (a), by adding paragraphs (8), (9) and (10); 4) in subsection (b)(1)(B), by adjusting the royalty rate for retransmitted superstations; 5) in subsection (c)(3), by replacing subparagraph (B) with an amendment in the nature of a substitute; 6) in subsections (d)(2) and (d)(6), by modifying the definition of "network station" and "satellite carrier"; and 7) in subsection (d), by adding paragraph 11 to define "local market."

The Digital Performance Right in Sound Recordings Act of 1995 amended section 119 in the first sentence of subsections

(a)(1) and (a)(2)(A), respectively, by inserting the words "and section 114(d)" after "of this subsection." Pub. L. No. 104-39, 109 Stat. 336, 348. In 1999, a technical amendment substituted "network station's" for "network's stations" in section 119(a)(8)(C)(ii). Pub. L. No. 106-44, 113 Stat. 221, 222.

The Satellite Home Viewer Improvement Act of 1999 amended section 119(a)(1) as follows: 1) by inserting "AND PBS SATELLITE FEED" after "SUPERSTATIONS" in the paragraph heading; 2) by inserting "performance or display of a work embodied in a primary transmission made by a superstation or by the Public Broadcasting Service satellite feed" in lieu of "primary transmission made by a superstation and embodying a performance or display of a work," (see footnote 55, *infra*) and 3) by adding the last sentence, which begins "In the case of the Public Broadcasting Service." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-530 and 543. The Act states that these amendments shall be effective as of July 1, 1999, except for a portion of the second item, starting with "performance or display" through "superstation." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544. The Act also amended section 119(a) by inserting the phrase "with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorization of the Federal Communications Commission governing the carriage of television broadcast stations signals" in paragraphs (1) and (2) and by inserting into paragraph (2), "a performance or display of a work embodied in a primary transmission made by a superstation" in lieu of "programming contained in a primary transmission made by a network station and embodying a performance or display of a work." *Id.* at 1501A-531 and 544. The Act amended section 119(a)(2) by substituting new language for paragraph (B) and, in paragraph (C), by deleting "currently" after "the satellite carrier" near the end of the first sentence. *Id.* at 1501A-528 and 544. It also amended section 119(a)(4) by inserting "a performance or display of a work embodied in" after "by a satellite carrier of" and by deleting "and embodying a performance or display of a work." *Id.* at 1501A-544. The Satellite Home Viewer Improvement Act of 1999 further amended section 119(a) by adding subparagraph (E) to paragraph (5). *Id.* at 1501A-528. It amended section 119(a)(6) by inserting "performance or display of a work embodied in" after "by a satellite carrier of" and by deleting "and embodying a performance or display of a work." *Id.* The Act also amended section 119(a) by adding paragraphs (11) and (12). *Id.* at 1501A-529 and 531.

The Satellite Home Viewer Improvement Act of 1999 amended section 119(b)(1) by inserting "or the Public Broadcasting Service satellite feed" into subparagraph (B). (See footnote 60, *infra*.) *Id.* at 1501A-530. The Act amended section 119(c) by adding a new paragraph (4). *Id.* at 1501A-527. The Act amended section 119(d) by substituting new language for paragraphs (9) through (11) and by adding paragraph (12). *Id.* at 1501A-527, 530 and 531. The Act substituted new language for section 119(e). *Id.* at 1501A-529.

55 The Satellite Home Viewer Improvement Act of 1999 amended section 119(a)(1) by deleting "primary transmission made by a superstation and embodying a performance or display of a work" and inserting in its place "performance or display of a work embodied in a primary transmission made by a superstation." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-543. This amendatory language did not take into account a prior amendment which had inserted "or by the Public Broadcasting Service satellite feed" after "superstation" into the phrase quoted above that was deleted. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-530. There was no mention of the phrase "or by the Public Broadcasting Service satellite feed" in that second amendment. To accommodate both amendments, the phrase "or by the Public Broadcasting Service satellite feed" has been placed at the end of the new language, after "superstation."

56 The Satellite Home Viewer Act of 1994 states that "The provisions of section 119(a)(5)(D) . . . relating to the burden of proof of satellite carriers, shall take effect on January 1, 1997, with respect to civil actions relating to the eligibility of subscribers who subscribed to service as an unserved household before the date of the enactment of this Act." Pub. L. No. 103-369, 108 Stat. 3477, 3481.

57 It appears that section 1011(b)(2)(D)(i) of the Satellite Home Viewer Improvement Act of 1999 inadvertently omitted the word "a" when it amended this paragraph. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-528.

58 The Satellite Home Viewer Act of 1994 states that "The provisions of section 119(a)(8)[,] . . . relating to transitional signal intensity measurements, shall cease to be effective on December 31, 1996." Pub. L. No. 103-369, 108 Stat. 3477, 3481.

59 It appears that Congress intended for the Satellite Home Viewer Improvement Act of 1999 to amend section 119(a) of title 17, as amended by section 1005(d) of the Satellite Home Viewer Improvement Act of 1999, by adding a new paragraph (12) at the end thereof. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-531. However, due to a drafting error, the reference in the amendment is to section 119(a) as amended by section 1005(e), instead.

60 It appears that Congress intended for the Satellite Home Viewer Improvement Act of 1999 to amend section 119(b)(1)(B)(ii) to insert "or the Public Broadcasting Service satellite feed" after "network station." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-530. However, due to a drafting error, the reference in the amendment is to section 119(b)(1)(B)(iii), instead. The Act states that this amendment shall be effective as of July 1, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

61 The Satellite Home Viewer Improvement Act of 1999 states that section 119(c)(4) shall be effective as of July 1, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-527.

62 The Satellite Home Viewer Improvement Act of 1999 states that section 119(c)(5) shall be effective as of July 1, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

63 The Satellite Home Viewer Improvement Act of 1999 states that section 119(d)(9) shall be effective as of July 1, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

64 The Satellite Home Viewer Improvement Act of 1999 states that section 119(d)(12) shall be effective as of July 1, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

65 In 1990, the Architectural Works Copyright Protection Act added section 120. Pub. L. No. 101-650, 104 Stat. 5089, 5133.

66 The Legislative Branch Appropriations Act, 1997, added section 121. Pub. L. No. 104-197, 110 Stat. 2394, 2416.

67 The Satellite Home Viewer Improvement Act of 1999 added section 122. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-523. The Act states that section 122 shall be effective as of November 29, 1999. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544.

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06/26/2000

464 U.S. 417, *; 104 S. Ct. 774, **;
1984 U.S. LEXIS 19, ***; 78 L. Ed. 2d 574

[edited version]

**SONY CORPORATION OF AMERICA ET AL. v. UNIVERSAL CITY STUDIOS,
INC., ET AL.**

No. 81-1687

SUPREME COURT OF THE UNITED STATES

*464 U.S. 417; 104 S. Ct. 774; 1984 U.S. LEXIS 19; 78 L. Ed. 2d 574; 52 U.S.L.W.
4090; 220 U.S.P.Q. (BNA) 665; 224 U.S.P.Q. (BNA) 736; 55 Rad. Reg. 2d (P & F) 156*

January 17, 1984, Decided

STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion in which MARSHALL, POWELL, and REHNQUIST, JJ., joined, post, p. 457.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television [*420] programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

...

An explanation of our rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the [***8] copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm.

Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals' holding that respondents are entitled to enjoy the distribution of VTR's, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

I

The two respondents in this action, Universal City Studios, Inc., and Walt Disney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these works in a number of ways: [***9] [*422] by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Petitioner Sony manufactures millions of Betamax video tape recorders and markets these devices through numerous retail establishments, some of which are also petitioners in this action. n2 Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set.

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n2 The four retailers are Carter Hawley Hales Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc., and Henry's Camera Corp. The principal defendants are Sony Corporation, the manufacturer of the equipment, and its wholly owned subsidiary, Sony Corporation of America. The advertising agency of Doyle Dane Bernback, Inc., also involved in marketing the Betamax, is also a petitioner. An individual VTR user, William Griffiths, was named as a defendant in the District Court, but respondents sought no relief against him. Griffiths is not a petitioner. For convenience, we shall refer to petitioners collectively as Sony.

[***10]

Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that [**779] have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined [*423] times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast-forward control enables the viewer of a previously recorded program to run [***11] the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was "time-shifting" -- the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a

broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes. n3 Sony's survey indicated [*424] that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax. n4 Respondents offered no evidence of decreased television viewing by Betamax owners. n5

n3 As evidence of how a VTR may be used, respondents offered the testimony of William Griffiths. Griffiths, although named as an individual defendant, was a client of plaintiffs' law firm. The District Court summarized his testimony as follows:

"He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, play-back and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.

"Griffiths copied about 20 minutes of a Universal motion picture called 'Never Give An Inch,' and two episodes from Universal television series entitled 'Baa Baa Black Sheep' and 'Holmes and Yo Yo.' He would have erased each of these but for the request of plaintiffs' counsel that it be kept. Griffiths also testified that he had copied but already erased Universal films called 'Alpha Caper' (erased before anyone saw it) and 'Amelia Earhart.' At the time of his deposition Griffiths did not intend to keep any Universal film in his library.

"Griffiths has also recorded documentaries, news broadcasts, sporting events and political programs such as a rerun of the Nixon/Kennedy debate." *480 F.Supp. 429, 436-437 (1979)*.

Four other witnesses testified to having engaged in similar activity. [***12]

n4 The District Court summarized some of the findings in these surveys as follows:

"According to plaintiffs' survey, 75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.

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"When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants' survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing." *Id.*, at 438.

n5 "81.9% of the defendants' interviewees watched the same amount or more of regular television as they did before owning a Betamax. 83.2% reported their frequency of movie going was unaffected by Betamax." *Id.*, at 439.

Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, [***13] and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection [**780] to the recording of their televised events for home use. n6

n6 See Defendants' Exh. OT, Table 20; Tr. 2447-2450, 2480, 2486-2487, 2515-2516, 2530-2534.

[*425] Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR's on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR's for time-shifting. *480 F.Supp.*, at 469.

* * *

II

Article I, § 8, of the Constitution provides:

"The Congress shall have Power ... To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[*429]

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. [***21] Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

"The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public [***22] appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. n10

n10 In its Report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this balance:

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. ...

"In enacting a copyright law Congress must consider ... two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a

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benefit upon the public that outweighs the evils of the temporary monopoly." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

[**23]

[*430]

From its beginning, the law of copyright has developed in response to significant changes in technology. n11 Indeed, it [**783] was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection. n12 Repeatedly, as new developments have [*431] occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton v. Peters*, 8 Pet. 591, 661-662 (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889).

n11 Thus, for example, the development and marketing of player pianos and perforated rolls of music, see *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U. S. C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study, see *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 129 (CA2 1982).

By enacting the Sound Recording Amendment of 1971, 85 Stat. 391, Congress also provided the solution to the "record piracy" problems that had been created by the development of the audio tape recorder. Sony argues that the legislative history of that Act, see especially H. R. Rep. No. 92-487, p. 7 (1971), indicates that Congress did not intend to prohibit the private home use of either audio or video tape recording equipment. In view of our disposition

of the contributory infringement issue, we express no opinion on that question. [***24]

n12 "Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas." Foreword to B. Kaplan, *An Unhurried View of Copyright* vii-viii (1967).

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. See, e. g., *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908); [***25] *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 487 F.2d 1345 (1973), aff'd by an equally divided Court, 420 U.S. 376 (1975). Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be [*432] encouraged and rewarded, but private motivation must ultimately serve the cause [***26] of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary

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object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. See *Kendall v. Winsor*, 21 How. 322, 327-328; *Grant v. Raymond*, 6 Pet. 218, 241-242. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted).

[**784] Copyright protection "subsists ... in original works of authorship fixed in [***27] any tangible medium of expression." 17 U. S. C. β 102(a) (1982 ed.). This protection has never accorded the copyright owner complete control over all possible uses of his work. n13 Rather, the Copyright Act grants the [*433] copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. β 106. n14 All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Compare β 106 with β 107.

n13 See, e. g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S., at 19; cf. *Deep South Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530-531 (1972). While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, e. g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-158 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349-351 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device). [***28]

n14 Section 106 of the Act provides:

"Subject to sections 107 through 118, the owner of copyright under this title has the

exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

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

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses [***29] into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." β 501(a). Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.

The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to restrain the infringer from violating [*434] his rights, the impoundment and destruction of all reproductions of his work made in violation of his rights, a recovery of his actual damages and any additional profits realized by the infringer or a recovery of statutory damages, and attorney's fees. β β 502-505. n15

n15 Moreover, anyone who willfully infringes the copyright to reproduce a motion picture for purposes of commercial advantage or private financial gain is subject to substantial criminal penalties, 17 U. S. C. β 506(a) (1982 ed.), and the fruits and instrumentalities of the crime are forfeited upon conviction, β 506(b).

[***30]

* * *

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may [**785] have to bring infringement actions based on Betamax copying of their works. n16 As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.

* * *

n16 In this regard, we reject respondents' attempt to cast this action as comparable to a class action because of the positions taken by *amici* with copyright interests and their attempt to treat the statements made by *amici* as evidence in this case. See Brief for Respondents 1, and n. 1, 6, 52, 53, and n. 116. The stated desires of *amici* concerning the outcome of this or any litigation are no substitute for a class action, are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analyzing the legal questions before us.

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to [**789] engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

IV

[***31]

III

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the [*435] Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U. S. C. β 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, β 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. n17 For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

The question is thus whether the Betamax [***41] is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

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[*443] A. *Authorized Time-Shifting*

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but [***42] it is well below 10%. n22 If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period. n23

n22 The record suggests that Disney's programs at the time of trial consisted of approximately one hour a week of network television and one syndicated series. Universal's percentage in the Los Angeles market on commercial television stations was under 5%. See Tr. 532-533, 549-550.

n23 The District Court did not make any explicit findings with regard to how much broadcasting is wholly uncopyrighted. The record does include testimony that at least one movie -- *My Man Godfrey* -- falls within that category, *id.*, at 2300-2301, and certain broadcasts produced by the Federal Government are also uncopyrighted. See *17 U. S. C. § 105* (1982 ed.). Cf. *Schnapper v. Foley*, *215 U. S. App. D. C. 59, 667 F.2d 102 (1981)* (explaining distinction between work produced by the Government and work commissioned by the Government). To the extent such broadcasting is now significant, it further bolsters our conclusion. Moreover, since copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year.

[***43]

The District Court found:

"Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

[*444] "Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing [**790] uses outweigh noninfringing uses.

"Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an [***44] extremely harsh remedy, as well as one unprecedented in copyright law." *480 F.Supp., at 468.*

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning "sports, religious, educational and other programming" was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record. In addition to the religious and sports officials identified explicitly by the District Court, n24 two items in the record deserve specific mention.

n24 See Tr. 2447-2450 (Alexander Hadden, Major League Baseball); *id.*, at 2480, 2486-2487 (Jay Moyer, National Football League); *id.*, at 2515-2516 (David Stern, National Basketball Association); *id.*, at 2530-2534 (Gilbert Stein, National Hockey League); *id.*, at 2543-2552 (Thomas Hansen, National Collegiate Athletic Association); *id.*, at 2565-2572 (Benjamin Armstrong, National Religious Broadcasters). Those officials were authorized to be the official spokespersons for their respective institutions in this litigation. *Id.*, at 2432, 2479, 2509-2510, 2530, 2538, 2563. See Fed. Rule Civ. Proc. 30(b)(6).

[***45]

[*445] First is the testimony of John Kenaston, the station manager of Channel 58, an educational station in Los Angeles affiliated with the Public Broadcasting Service. He explained and authenticated the station's published guide to its programs. n25 For each program, the guide tells whether unlimited home taping is

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authorized, home taping is authorized subject to certain restrictions (such as erasure within seven days), or home taping is not authorized at all. The Spring 1978 edition of the guide described 107 programs. Sixty-two of those programs or 58% authorize some home taping. Twenty-one of them or almost 20% authorize unrestricted home taping. n26

n25 Tr. 2863-2902; Defendants' Exh. PI.

n26 See also Tr. 2833-2844 (similar testimony by executive director of New Jersey Public Broadcasting Authority). Cf. *id.*, at 2592-2605 (testimony by chief of New York Education Department's Bureau of Mass Communications approving home taping for educational purposes).

Second is the testimony of Fred [***46] Rogers, president of the corporation that produces and owns the copyright on Mister Rogers' Neighborhood. The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times. n27

n27 "Some public stations, as well as commercial stations, program the 'Neighborhood' at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the 'Neighborhood' off-the-air, and I'm speaking for the 'Neighborhood' because that's what I produce, that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions.' Maybe I'm going on too long, but I just feel that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important." *Id.*, at 2920-2921. See also Defendants' Exh. PI, p. 85.

[***47]

[*446] If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized [**791] reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third-party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. [***48] But in an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use. n28 The seller of the equipment that expands those producers' audiences cannot be a contributory [*447] infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

n28 It may be rare for large numbers of copyright owners to authorize duplication of their works without demanding a fee from the copier. In the context of public broadcasting, however, the user of the copyrighted work is not required to pay a fee for access to the underlying work. The traditional method by which copyright owners capitalize upon the television medium -- commercially sponsored free public broadcast over the public airwaves -- is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues.

In the context of television programming, some producers evidently believe that permitting home viewers to make copies of their works off the air actually enhances the value of their copyrights. Irrespective of their reasons for

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authorizing the practice, they do so, and in significant enough numbers to create a substantial market for a noninfringing use of the Sony VTR's. No one could dispute the legitimacy of that market if the producers had authorized home taping of their programs in exchange for a license fee paid directly by the home user. The legitimacy of that market is not compromised simply because these producers have authorized home taping of their programs without demanding a fee from the home user. The copyright law does not require a copyright owner to charge a fee for the use of his works, and as this record clearly demonstrates, the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier. It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if respondents' competitors were ill-advised in authorizing home videotaping, that would not change the fact that they have created a substantial market for a paradigmatic noninfringing use of Sony's product.

[***49]

B. Unauthorized Time-Shifting

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 154-155. Moreover, the definition of exclusive rights in § 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright" "notwithstanding the provisions of section 106." The most pertinent in this case is § 107, the legislative endorsement of the doctrine of "fair use." n29

n29 The Copyright Act of 1909, 35 Stat. 1075, did not have a "fair use" provision. Although that Act's compendium of exclusive rights "to print, reprint, publish, copy, and vend the copyrighted work" was broad enough to encompass virtually all potential interactions with a copyrighted work, the statute was never so construed. The courts simply refused to read the statute literally in every situation. When Congress amended the statute in 1976, it

indicated that it "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976).

[***50]

[*448] [**792]

That section identifies various factors n30 that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement. n31 Although not conclusive, the first [*449] factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. n32 If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see *17 U. S. C. § 107(2)* (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact [*450] that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of [***51] fair use. n33

n30 Section 107 provides:

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

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work." *17 U. S. C. § 107* (1982 ed.).

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n31 The House Report expressly stated that the fair use doctrine is an "equitable rule of reason" in its explanation of the fair use section:

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. ...

....

"General intention behind the provision

"The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H. R. Rep. No. 94-1476, *supra*, at 65-66.

The Senate Committee similarly eschewed a rigid, bright-line approach to fair use. The Senate Report endorsed the view "that off-the-air recording for convenience" could be considered "fair use" under some circumstances, although it then made it clear that it did not intend to suggest that off-the-air recording for convenience should be deemed fair use under any circumstances imaginable. S. Rep. No. 94-473, pp. 65-66 (1975). The latter qualifying statement is quoted by the dissent, *post*, at 481, and if read in isolation, would indicate that the Committee intended to condemn all off-the-air recording for convenience. Read in context, however, it is quite clear that that was the farthest thing from the Committee's intention. [***52]

n32 "The Committee has amended the first of the criteria to be considered -- 'the purpose and character of the use' -- to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition

that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." H. R. Rep. No. 94-1476, *supra*, at 66.

n33 It has been suggested that "consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyright holder." Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982) (memorandum of Prof. Laurence H. Tribe). Furthermore, "[the] error in excusing such theft as noncommercial," we are told, "can be seen by simple analogy: jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold." *Ibid*. The premise and the analogy are indeed simple, but they add nothing to the argument. The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all. Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.

[***53]

[**793] This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no

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demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would [*451] merely inhibit access to ideas without any countervailing benefit. n34

n34 Cf. A. Latman, Fair Use of Copyrighted Works (1958), reprinted in Study No. 14 for the Senate Committee on the Judiciary, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess., 30 (1960):

"In certain situations, the copyright owner suffers no substantial harm from the use of his work. ... †Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimus non curat lex*."

[***54]

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. [***55] The District Court described respondents' evidence as follows:

"Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in 'not a great deal of harm.' Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'" 480 F.Supp., at 467.

[*452] Later in its opinion, the District Court observed:

"Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision [**794] involved in the calculations." *Id.*, at 469. n35

n35 See also 480 F.Supp., at 451:

"It should be noted, however, that plaintiffs' argument is more complicated and speculative than was the plaintiff's in *Williams & Wilkins*... †Here, plaintiffs ask the court to find harm based on many more assumptions. ... †As is discussed more fully in Part IV *infra*, some of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical."

[***56]

There was no need for the District Court to say much about past harm. "Plaintiffs have admitted that no actual harm to their copyrights has occurred to date." *Id.*, at 451.

On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' "fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease," by observing that current measurement technology allows the Betamax audience to be reflected. *Id.*, at 466. n36 It rejected respondents' prediction "that live television [*453] or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[there] is no factual basis for [the underlying] assumption." *Ibid.* n37 It rejected respondents' "fear that time-shifting will reduce audiences for telecast reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." *Ibid.* n38 And it declared that respondents' suggestion that "theater or film rental [***57] exhibition of a program will suffer because of time-shift recording of that program" "lacks merit." *Id.*, at 467. n39

n36 "There was testimony at trial, however, that Nielsen Ratings has already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the

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live audience. The later diary can augment that measurement with information about subsequent viewing." *Id.*, at 466.

In a separate section, the District Court rejected plaintiffs' suggestion that the commercial attractiveness of television broadcasts would be diminished because Betamax owners would use the pause button or fast-forward control to avoid viewing advertisements:

"It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them." *Id.*, at 468. [***58]

n37 "Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance." *Id.*, at 466.

n38 "The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters from rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given market practices, this

should aid plaintiffs rather than harm them." *Ibid.* [***59]

n39 "This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax owners will keep the tapes long enough to satisfy all their interest in the program and will, therefore, not patronize later theater exhibitions. To the extent that this practice involves librarying, it is addressed in section V. C., *infra*. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film." *Id.*, at 467.

[*454] [**795] After completing that review, the District Court restated its overall conclusion several times, in several different ways. "Harm from time-shifting is speculative and, at best, minimal." *Ibid.* "The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue [***60] to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts." *Ibid.* "No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date." *Id.*, at 468-469. "Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm." *Id.*, at 469. "Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture." *Ibid.*

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. In *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508, n. 12 (1983), we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that requires [***61] the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply [*455] supports the District Court's conclusion that home time-shifting is fair use. In light of the findings

of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.
n40

n40 The Court of Appeals chose not to engage in any "equitable rule of reason" analysis in this case. Instead, it assumed that the category of "fair use" is rigidly circumscribed by a requirement that every such use must be "productive." It therefore concluded that copying a television program merely to enable the viewer to receive information or entertainment that he would otherwise miss because of a personal scheduling conflict could never be fair use. That understanding of "fair use" was erroneous.

Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional. For one thing, it is not true that all copyrights are fungible. Some copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm. Copying a news broadcast may have a stronger claim to fair use than copying a motion picture. And, of course, not all uses are fungible. Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment. But the notion of social "productivity" cannot be a complete answer to this analysis. A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.

Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. In a hospital setting, using a VTR to enable a patient to see programs he would otherwise miss has no productive purpose other than contributing to the

psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit. The statutory language does not identify any dichotomy between productive and nonproductive time-shifting, but does require consideration of the economic consequences of copying.

[***62]

[*456]

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of [**796] copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

V

"The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972).

One may search the Copyright Act in [***63] vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

464 U.S. 417, *; 104 S. Ct. 774, **;
1984 U.S. LEXIS 19, ***; 78 L. Ed. 2d 574

[*457] JUSTICE BLACKMUN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

* * *

IV

Fair Use

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (CA2 1939); see *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (CA5 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (CA2 1977), cert. denied, 434 U.S. 1013 (1978). Although courts have constructed lists of factors to be considered in determining whether a particular use is fair, no fixed criteria [*806] have emerged by which that [*476] determination can be made. This Court thus far has provided no guidance; although fair use issues have come here twice, on each occasion the Court was equally divided and no opinion [***95] was forthcoming. *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 487 F.2d 1345 (1973), aff'd, 420 U.S. 376 (1975); *Benny v. Loew's Inc.*, 239 F.2d 532 (CA9 1956), aff'd *sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

Nor did Congress provide definitive rules when it codified the fair use doctrine in the 1976 Act; it simply incorporated a list of factors "to be considered": the "purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality of the portion used," and, perhaps the most important, the "effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis supplied). § 107. No particular weight, however, was assigned to any of these, and the list was not intended to be exclusive. The House and Senate Reports explain that § 107 does no more than give "statutory recognition" to the fair use doctrine; it was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report 66. See 1975 Senate Report 62; S. Rep. No. 93-983, p. 116 (1974); H. R. Rep. No. 83, 90th Cong., 1st Sess., 32 (1967); H. R. Rep. No. 2237, 89th Cong., 2d Sess., 61 (1966).

[*477] A

Despite this absence of clear standards, the fair use doctrine plays a crucial role in the law of copyright. The purpose of copyright protection, in the words of the Constitution, is to "promote [***97] the Progress of

Science and useful Arts." Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 156; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-128 (1932); see H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had [***98] gone before him. n28 [*807] The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own [*478] work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy -- albeit at the first author's expense -- to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the *Betamax* Case and its Predecessors, 82 *Colum. L. Rev.* 1600, 1630 (1982).

n28 "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Chafee, Reflections on the Law of Copyright: I, 45 *Colum. L. Rev.* 503, 511 (1945).

[***99]

A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used

464 U.S. 417, *; 104 S. Ct. 774, **;
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"for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research." The House and Senate Reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works [*479] to be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. [***102]

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 *F.Supp.*, at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp. v. Doyal*, 286 U.S., at 127. A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the

airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be [***103] free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access [*481] to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create. n34 [**809] Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act, Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate Report adds, "[the] committee does not intend to suggest ... that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" *Id.*, at 66. I cannot disregard these admonitions.

[edited version]

WORLDWIDE CHURCH OF GOD v. PHILADELPHIA CHURCH OF GOD, INC.**Nos. 99-55850, 99-55934, 99-56005, 99-56489****UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***2000 U.S. App. LEXIS 23390***September 18, 2000, Filed**

Before: Melvin Brunetti and A. Wallace Tashima, Circuit Judges, William W Schwarzer, * Senior District Judge. Opinion by Judge Schwarzer; Dissent by Judge Brunetti.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SCHWARZER, Senior District Judge:

Appellant Worldwide [*2] Church of God ("WCG") is a nonprofit religious organization whose late Pastor General, Herbert W. Armstrong, wrote a 380-page book entitled *Mystery of the Ages* ("*MOA*"), the copyright to which is held by WCG. After Armstrong's death, WCG retired *MOA* from distribution and use. Appellee Philadelphia Church of God ("PCG"), also a nonprofit religious organization, then appropriated *MOA* for use in its religious observance, copying it in its entirety and distributing large numbers of copies to its members and the public. We must decide whether PCG's copying and dissemination of *MOA* constitutes fair use under the Copyright Statute. *17 U.S.C. § 107*.

FACTUAL BACKGROUND

Herbert Armstrong founded the Radio Church of God, later renamed Worldwide Church of God, in 1934. He held the title of "Pastor General with the spiritual rank of Apostle" and was its undisputed spiritual and temporal leader until his death in 1986. Armstrong was a prolific writer, producing over three thousand articles for the church's magazine *The Plain Truth*, all of which were copyrighted in the name of WCG, or its affiliate teaching arm, Ambassador College.

Armstrong wrote [*3] *MOA*, his final work, between 1984 and 1985. He completed it when he was ninety-two years old, shortly before his death. He copyrighted it in the name of WCG and published it in serial form in *The Plain Truth* magazine, distributed free

of charge to approximately eight million people. In addition, WCG distributed over 1.24 million copies free of charge to employees and to viewers of WCG telecasts. In all, WCG put over nine million free copies of *MOA* into circulation.

Two years after Armstrong's death, WCG decided to discontinue distribution of *MOA* for several reasons, including the fact that the Church's positions on various doctrines such as divorce, remarriage, and divine healing had changed. The Church hoped to "prevent a transgression of conscience by proclaiming what the Church considered to be ecclesiastical error" espoused in *MOA* and it considered that Armstrong, who was ninety-two when he wrote *MOA*, conveyed outdated views that were racist in nature. Its Advisory Council of Elders indicated that the Church stopped distributing *MOA* because of "cultural standards of social sensitivity" and to avoid racial conflict. The Council noted, "Insensitivity [*4] in this area is contrary to the doctrinal program of WCG to promote racial healing and reconciliation among the races." WCG disposed of excess inventory copies of *MOA* and stopped distribution, but retained archival and research copies. WCG never sought to withdraw or destroy personal copies or copies held by public institutions or any public library, nor did it request that its members destroy their copies. WCG has indicated an interest in publishing an annotated *MOA* sometime in the future but has not yet begun work on it.

In 1989, two former WCG ministers, Gerald Flurry and John Amos, founded a new religious organization, PCG. The new church grew to over six thousand members by 1996 and claims strictly to follow the teachings of Herbert Armstrong. PCG asserts that *MOA* is central to its religious practice and required reading for all members hoping to be baptized into PCG. Until January 1997, PCG relied on existing copies of *MOA* but it then began copying *MOA* for its own use. It is undisputed that PCG never requested permission from WCG to print *MOA*. It is also undisputed that PCG copied *MOA* verbatim, deleting only WCG from the

copyright page and substituting [*5] Herbert Armstrong in its place, and deleting a "Suggested Reading" page and a warning against reproduction without permission. PCG has distributed approximately thirty thousand copies of its *MOA* in English text, in addition to foreign-language versions. It has advertised its version in newspapers and periodicals and has received substantial contributions from persons who have received its *MOA*.

When PCG ignored WCG's demand that it cease infringing its copyright and continued distribution of its *MOA*, this action followed.

* * *

II. THE "FAIR USE" DEFENSE

A.

The district court concluded that the facts "support a finding that PCG's use of *MOA* is a statutorily protected 'fair use' of the work." In reaching this conclusion, it found that PCG uses *MOA* "for non-profit religious and educational purposes," that copying a complete religious text "is reasonable in relation to that use," that WCG presented no evidence that it lost members due to PCG's distribution, that a potential annotated *MOA* produced by WCG would not compete against PCG's copies of *MOA*, and that *MOA*'s being out of print provided additional justification for PCG's production of *MOA*. WCG contends that the district court's determination of "fair use" is factually and legally erroneous.

Fair use is a mixed question of law and fact. If there are [*10] no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150-51 (9th Cir. 1986). Where the record is sufficient to evaluate each of the statutory factors, "an appellate court need not remand for further fact-finding ... [but] may conclude as a matter of law that the ... use does not qualify as a fair use of the copyrighted work." *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985) (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)).

Under § 106 of the Copyright Act, WCG as the owner of the copyright has the exclusive right to reproduce and distribute copies of *MOA*. 17 U.S.C. § 106(1), (3). That right is not diminished or qualified by the fact that WCG is a not-for-profit organization and does not realize monetary benefit from the [*11] use of the copyrighted work. Nor is that right affected by the religious nature of its activity; Congress narrowly limited

the privilege accorded religious uses to "performance of a ... literary or musical work ... or display of a work, in the course of services at a place of worship or other religious assembly." 17 U.S.C. § 110(3). PCG's unauthorized copying and distribution of *MOA* falls outside of that narrow exception to copyright protection. See *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 1982 U.S. App. LEXIS 20700, 214 U.S.P.Q. 409, 411, 1982 WL 19198 (7th Cir.) ("F.E.L. can prevent churches from copying or publishing its copyrighted works, even if the churches only intend to use the copies or publications at not-for-profit religious services. ... Neither the religious element nor the non-profit element of a performance will protect illegal copying or publishing."). We have held that we must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others. Such a deprivation would raise its own serious problems under the Free Exercise Clause [citation [*12] omitted]. It would also leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it.

Maktab Tarighe Oveysi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999).

Nor do First Amendment free speech considerations support PCG's claim of fair use based on WCG's withdrawal of *MOA* from distribution.

The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

Harper & Row, 471 U.S. at 558 (quoting *Iowa State Univ. Research Found., Inc. v. American Broad. Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)). "Moreover, freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.* 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977)); see also *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) [*13] (holding that copyright owner has right to protect "the expressive content of his unpublished writings for the term of his copyright"). This is not a case of "abuse of the copyright owner's monopoly as an instrument to suppress facts." *Harper & Row*, 471 U.S. at 559. Cf. *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (concurring opinion) (purchase by Howard Hughes of copyright on magazine articles to block

publication of his biography). As the Supreme Court has explained:

Although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors. [Citation omitted]. But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.

Stewart v. Abend, 495 U.S. 207, 228-29, 109 L. Ed. 2d 184, 110 S. Ct. 1750 (1990).

B.

PCG seeks to defend its infringing [*14] activity as fair use under β 107 of the Copyright Act. That section provides in relevant part that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship or research, is not an infringement of copyright." 17 U.S.C. β 107. In determining whether the use made of a work in any particular case is a fair use, β 107 provides that the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. β 107.

The common-law background of the fair use doctrine illuminates the consideration of the factors Congress incorporated into β 107. As the Supreme Court has explained:

The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law [*15] doctrine. ... "The author's consent to a reasonable use of his copyrighted works had always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus ... frustrate the very ends sought to be attained." [Ball, *Law of Copyright and Literary Property* 260 (1944)]. Professor Latman, in a study of the doctrine of fair use commissioned by

Congress for the revision effort, see [*Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 462-463 n.9, 78 L. Ed. 2d 574, 104 S. Ct. 774 (dissenting opinion)], summarized prior law as turning on the "importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?"

Harper & Row, 471 U.S. at 549-50.

The Court went on to observe that Justice Story gave early judicial recognition to the doctrine, quoting the following statement:

[A] reviewer may fairly cite largely from the original [*16] work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Id. at 550 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841)).

C.

With this background in mind, we turn to consideration of the four statutory factors.

1. The first factor calls for consideration of "the purposes and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. β 107(1). "The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersedes the objects' of the original creation [citations omitted] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' [*17] "' *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994). As Justice Story put it: "There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work." *Folsom*, 9 F. Cas. at 345.

PCG's copying of WCG's *MOA* in its entirety bespeaks no "intellectual labor and judgment." It merely "supersedes the object" of the original *MOA*, to serve religious practice and education. Although "transformative use is not absolutely necessary for a

finding of fair use," *Campbell*, 510 U.S. at 579, where the "use is for the same intrinsic purpose as [the copyright holder's] ... such use seriously weakens a claimed fair use." *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989). Nevertheless, PCG argues that this factor favors fair use because its use is not commercial or for profit. The Supreme Court has cautioned that "the commercial or nonprofit educational purpose of a work is only one element of the [*18] first factor inquiry into its purpose and character." *Campbell*, 510 U.S. at 584. While the fact that a publication is commercial tends to weigh against fair use, the absence of a commercial use merely eliminates the presumption of unfairness. "The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement" *Id.*; see also *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) ("Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have."); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983). "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562. We agree with the Second Circuit that in weighing whether the purpose was for "profit," "monetary gain is not the sole criterion ... particularly in [a] ... setting [where] profit [*19] is ill-measured in dollars." *Weissmann*, 868 F.2d at 1324 (holding that a professor's verbatim copying of an academic work was not fair use, in part because "the profit/nonprofit distinction is context specific, not dollar dominated" and a professor can "profit" by gaining recognition among his peers and authorship credit). See also Webster's Third New International Dictionary (1971) 1811 (defining "profit" as "an advantage, [a] benefit").

Putting aside the disputed question whether PCG uses *MOA* to generate income, and having in mind that like academia, religion is generally regarded as "not dollar dominated," *MOA*'s use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of *MOA* new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth. During the time of PCG's production and distribution of copies of *MOA* its membership grew to some seven thousand members. It is beyond dispute that PCG "profited" from copying *MOA* - it gained an "advantage" or "benefit" from its distribution and use of *MOA* without [*20] having to account to the copyright holder. The first factor weighs against fair use.

2. The second statutory factor, "the nature of the copyrighted work," turns on whether the work is informational or creative. See *Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."); see also *Sony*, 464 U.S. at 455 n.40 ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture."); *Hustler*, 796 F.2d at 1153-54 ("The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved."). PCG's brief describes *MOA* as "primarily a textual, historical account of [Armstrong's] views of the 'the truth' of the Bible." While it may be viewed as "factual" by readers who share Armstrong's religious beliefs, the creativity, imagination and originality embodied in *MOA* tilt the scale against fair use. See *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

3. The third factor directs us to consider "the amount and substantiality of the portion used [*21] in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). PCG copied the entire *MOA* verbatim, deleting only the "Suggested Readings" and the reference to "Worldwide Church of God" from the copyright page. While "wholesale copying does not preclude fair use per se," copying an entire work "militates against a finding of fair use." *Hustler*, 796 F.2d at 1155. Moreover, "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565.

PCG argues its verbatim copying of the whole work is reasonable because its use of *MOA* is religious in nature. "The extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586-87. In *Campbell*, the Court held that "copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart." *Id.* at 588. PCG's copying stands on a [*22] different footing for the purpose for which it uses the *MOA* is the same as WCG's. This court has held "that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use." *Marcus*, 695 F.2d at 1175. Reliance on *Sony* would be misplaced. There, the Supreme Court held that reproduction of the entire work "[did] not have its ordinary effect of militating against a finding of fair use" under the unique circumstances of that case, to wit: copying of videotapes for time-shifting for personal use to "enable[] a viewer to see such a work which he had been invited to witness in its entirety free

of charge." *Sony*, 464 U.S. at 449-50. No such circumstances exist here to justify PCG's reproduction of the entire work. PCG uses the *MOA* as a central element of its members' religious observance; a reasonable person would expect PCG to pay WCG for the right to copy and distribute *MOA* created by WCG with its resources. The third factor, therefore, weighs against fair use.

4. The fourth factor considers "the effect of the use [*23] upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). It has been said that "fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting Nimmer, Copyright § 1.10[D], at 1-87). This case presents a novel application of the fair use doctrine where the copyright owner is a not-for-profit organization. As might be expected, published case law deals with works marketed for profit. However, it cannot be inferred from that fact that the absence of a conventional market for a work, the copyright to which is held by a nonprofit, effectively deprives the holder of copyright protection. If evidence of actual or potential monetary loss were required, copyrights held by nonprofits would be essentially worthless. Religious, educational and other public interest institutions would suffer if their publications invested with an institution's reputation and goodwill could be freely appropriated by anyone.

The statute by its terms is not limited to market effect but includes also "the effect of the use [*24] on the value of the copyrighted work." 17 U.S.C. § 107(4) (emphasis added). As *Sony* states, "even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have." *Sony*, 464 U.S. at 450. Those rewards need not be limited to monetary rewards; compensation may take a variety of forms. *Id.* at 447 n.28 ("The copyright law does not require a copyright owner to charge a fee for the use of his works. ... It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights").

WCG points out that those who respond to PCG's ads are the same people who would be interested in WCG's planned annotated version or any future republication of the original version. With an annotated *MOA*, WCG hopes to reach out to those familiar with Armstrong's teachings and those in the broader Christian community. PCG's distribution of its unauthorized version of *MOA* thus harms WCG's goodwill by diverting potential members and contributions from WCG. While the district court found that PCG's *MOA* and WCG's proposed annotated [*25] *MOA* "would not in any sense 'compete' in the same market," undisputed evidence shows that individuals who received copies of

MOA from PCG are present or could be potential adherents of WCG. *MOA*'s value is as a marketing device; that is how PCG uses it and both PCG and WCG are engaged in evangelizing in the Christian community.

PCG argues that WCG's failure to exploit *MOA* for ten years and its lack of a concrete plan to publish a new version show that "*MOA* has no economic value to the WCG that the PCG's dissemination of the work would adversely affect." We disagree. Even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the "potential market" and, second, because he has the right to change his mind. *See Salinger*, 811 F.2d at 99. WCG explained that it ceased distribution because the Church's position on various doctrines had changed, continued distribution would offend cultural standards of social sensitivity, and dissemination would perpetuate what the Church considered ecclesiastical error. For those reasons, WCG planned an [*26] annotated edition of *MOA*. n2

n2 Because the Church plans at some time to publish an annotated version of *MOA*, it is entitled to protection of its copyright. This is not a case of market failure, as PCG contends, for the very reason stated in the article on which it relies:

When an owner refuses to license because he is concerned that defendant's work will substitute for his own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest. Market failure should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright - notably a desire to keep certain information from the public.

Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *Colum. L. Rev.* 1600, 1634 (1982).

Finally, PCG argues that if WCG published an annotated version [*27] it would be so different as not to be competitive with PCG's *MOA*. The argument, aside from being speculative, misses the point. The fact remains that PCG has unfairly appropriated *MOA* in its entirety for the very purposes for which WCG created *MOA*. We have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety. As the 1967 House Report

notes, the market factor "must almost always be judged in conjunction with the other three criteria." H.R. Rep. No. 83, at 35 (1967). Judge Pierre N. Leval has written:

When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in [*Harper & Row*], this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

[*28]

Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105, 1124 (1990).

On balance, the defense of fair use of *MOA* fails. The first three factors weigh in WCG's favor and the fourth factor is, at worst, neutral.

* * *

BRUNETTI, Circuit Judge, dissenting:

I respectfully dissent and disagree with the majority's reversal of the district court's ruling on fair use.

The copyright dispute in this case arises from a change in religious doctrine of the Worldwide Church of God ("WCG"). This doctrinal shift produced a splinter church, the Philadelphia Church of God ("PCG"). PCG, which was founded by "defrocked" WCG ministers in 1989, seeks to adhere to WCG's original religious doctrine as espoused by its former leader [*34] Herbert W. Armstrong. In particular, PCG views *Mystery of the Ages* ("*MOA*"), a book written by Armstrong, as a divinely inspired text necessary for proper interpretation of the Bible. It is required reading for every member baptized into the PCG church and any prospective member prior to their attendance at church services.

WCG, on the other hand, has renounced many of Armstrong's teachings since shortly after his death in 1986. Although it had previously distributed approximately 1.25 million copies of *MOA* in book form and 8 million copies in serial form, WCG ceased publication and distribution of *MOA* in 1988. WCG then destroyed all excess copies of *MOA* in its inventory, retaining only archival and research copies. WCG has not printed or distributed any copies of *MOA* since 1988

and has no plans for publication or distribution of the work as originally written.

WCG took this course of action, at least in part, because it believes that *MOA* contains historical, doctrinal and social errors. Armstrong's successor at WCG explained that WCG has kept *MOA* out of print based on a "Christian duty" to keep Armstrong's doctrinal errors out of circulation. WCG has [*35] described *MOA* as "not in conformity with biblical teaching" and "racist." Although WCG claims that it plans to publish an annotated version of *MOA*, as of 1998, a decade after it ceased publishing *MOA*, testimony of WCG leaders demonstrates that the annotation of *MOA* is "not something that is going to be decided or happen any time soon." Apart from determining whether an annotation is financially feasible, WCG would need to take surveys of its membership, assess its priorities, determine the format, hire an author and researcher, and secure a publisher before any such annotation of *MOA* could be published.

PCG was founded because its ministers and members believe the religious doctrine espoused by Armstrong and as set forth in *MOA*. When WCG changed its church doctrine and renounced much of Armstrong's teachings, the founders and believers of PCG were forced from WCG as they could no longer practice their religious beliefs as set forth in *MOA*. It was WCG's doctrinal shift and renunciations that created the PCG and its need to publish *MOA*.

In light of these facts, this court must decide whether PCG's publication and distribution of *MOA* to church members [*36] and the public without charge beginning in January 1997 constitutes fair use of WCG's copyrighted work.

The fair use doctrine is an equitable rule of reason. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 & n.31, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984). The statutory factors listed in 17 U.S.C. § 107 provide guidance in determining when the fair use doctrine applies. However, there are no bright-line rules and "each case raising the [fair use] question must be decided on its own facts." *Id.* at 448 n.31 (quoting H.Rep. No. 94-1476). All four statutory factors "are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994).

Here, PCG, a nonprofit organization, copied and distributed *MOA* free of charge to spread a religious message. PCG began publishing *MOA* because it was out of print and difficult to obtain through normal channels. It is undisputed that PCG did not solicit any funds in connection with its distribution of *MOA*. PCG's use

stands in [*37] sharp contrast to other uses found to be commercial under the first statutory factor. See *Campbell*, 510 U.S. at 583-85 (parodic rap song sold to the public); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985) (magazine printed excerpts of soon-to-be published presidential memoir); *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir.), cert. dismissed, 118 S. Ct. 27 (1997) (book-length parody of O.J. Simpson murder trial written in style of Dr. Seuss and intended for public sale); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152-53 (9th Cir. 1986) (magazine's parody of prominent minister mailed to minister's supporters together with letters soliciting donations and displayed on television as part of a fundraising drive).

Despite PCG's nonprofit status, its free-of-charge distribution of *MOA*, and the religious purpose behind such distribution, the majority concludes that the first statutory factor militates against a finding of fair use because PCG's use is not transformative and PCG [*38] profits by using *MOA* as a marketing tool to attract new tithing members. As an initial matter, PCG's use need not be transformative to qualify as fair use. *Campbell*, 510 U.S. at 579. In this case, altering or adding to *MOA* would defeat PCG's religious purpose because it believes that *MOA* is a divinely inspired text. As to the profitability of PCG's use, WCG does not contest PCG's assertion that unsolicited donations in response to the distribution of *MOA* fail to come close to covering the enormous expense of printing *MOA*. WCG itself has stated that the costly production of *MOA* was one of the reasons it ceased publication. In my view, the noncommercial and religious elements of PCG's use overwhelm any commercial aspects and weigh in favor of fair use under the first statutory factor. Moreover, the fact that *MOA* had been out of print for nine years at the time of PCG's publication and could only be obtained through some libraries and used bookstores also supports a finding of fair use under the first factor. See *Harper & Row*, 471 U.S. at 553 ("A key, though not necessarily determinative factor in fair use is whether or not [*39] the work is available to the potential user. If the work is out of print and unavailable for purchase through normal channels, the user may have more justification for reproducing it") (quoting S.Rep. No. 94-473 (1975)); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986) (out-of-print status of copyrighted book supports fair use determination).

The second and third statutory factors are mostly irrelevant to this case. For example, as a religious text, Armstrong's *MOA* defies easy classification under the second factor as either informational or creative. Compare *New Era Publications, Int'l v. Carol Publishing*

Group, 904 F.2d 152, 157 (2d Cir. 1990) ("the quoted works - which deal with [Scientology founder L. Ron] Hubbard's life, his views on religion, human relations, the Church, etc. - are more properly viewed as factual or informational") and *Religious Technology Center v. Netcom On-Line Com. Services, Inc.*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995) (policy letters of Hubbard Communication Office and works which are part of the methodology of "applied religious philosophy" are primarily functional or [*40] instructive, but other Hubbard works which appear more creative or original deserve greater fair use protection) with *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 635-36 (S.D. Cal. 1993) ("the undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational"). As to the amount of copying, even wholesale copying does not weigh against a finding of fair use under the third factor if it is consistent with the noncommercial purpose and character of the use. *Sony*, 464 U.S. at 449-50. In contrast to *Hustler* where the purposes of raising funds and rebutting derogatory information could have been served by less than wholesale copying of the parody, PCG's purpose in seeking to spread the religious message of Armstrong's divinely inspired text, like the nonprofit purpose of home videotaping in *Sony Corp.*, requires copying of the text as a whole. Accordingly, neither the second nor the third statutory factor militate against a finding of fair use.

Even though PCG's use is primarily noncommercial and religious, such use could not be considered fair use in light of the fourth and [*41] most important statutory factor if it impaired the value or marketability of WCG's original *MOA* or its proposed annotated *MOA*. Yet, WCG has intentionally kept *MOA* out of circulation and made no reasonable effort to create an annotated version of *MOA* in the decade following its decision to cease publication. WCG originally distributed *MOA* free of charge as a way of spreading the religious message of its then current leader Armstrong. Like PCG, WCG used *MOA* as an educational and evangelical tool and may have obtained an indirect financial benefit by attracting tithing members. WCG's decision to cease publication of *MOA*, destroy inventory copies, and disavow *MOA*'s religious message in the context of its doctrinal shift as a church demonstrates that *MOA* is no longer of value to WCG for such purposes, regardless of PCG's actions. Because WCG has admitted that it has no plans to publish or distribute *MOA* as originally written, there can be no market interference.

Nor has WCG shown that "some meaningful likelihood of future harm exists" as to the potential market for WCG's planned publication of an annotated version of *MOA*. See *Sony Corp.*, 464 U.S. at 451. [*42]

In *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), the court determined that publication of a book opposing abortion which used quotations from an earlier book tending to view abortion in a favorable light did not economically harm the earlier work. The court held that the plans for a second edition of the earlier work was not affected by the publication of the infringing work in part because "it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests [for a second edition] because a small portion of the work was used in an essay sharply critical of abortion." *Id.* at 1264. It continued by stating that "this conclusion is supported by our finding that the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats." *Id.*

Here, as in *Maxtone-Graham*, the functions served by *MOA* and the proposed annotation as well as their potential markets are different. In contrast to PCG's evangelical use, the central purpose behind WCG's proposed annotated version of *MOA* is to identify Armstrong's [*43] historical, doctrinal, and social errors. The target markets for the two versions of *MOA* are different because it simply does not make sense for WCG to widely distribute an annotated *MOA* highlighting the errors of the original *MOA* to the general public in order to recruit new members. Unlike a publication which would provide a straight-forward explanation of WCG's religious doctrines for the purposes of recruitment, an annotated version of *MOA* would require a reader to become familiar with the text of the original *MOA* and then to read WCG's response to or criticism of Armstrong's religious views in order to discover WCG's doctrines. Indeed, because WCG hopes to use an annotated *MOA* to reach out to those familiar

with Armstrong's teachings, PCG's use creates a larger potential market for an annotation rather than interfering with it. Moreover, the failure of WCG to make any reasonable progress on the annotation over the course of a decade as well as WCG's belief that it has a Christian duty to keep Armstrong's doctrinal errors out of circulation tends to undermine the credibility of WCG's intention to publish any such annotation.

Because there is no evidence, [*44] beyond the mere speculation by WCG's leaders, that PCG's use has a "demonstrable effect on the potential market for, or value of," *MOA* or WCG's proposed annotation, the use "need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. The prohibition of PCG's noncommercial, religious use "would merely inhibit access to ideas without any countervailing benefit." *Id.* at 450-51. Accordingly, the fourth statutory factor also supports a finding of fair use.

In this lawsuit, WCG appears less interested in protecting its rights to exploit *MOA* than in suppressing Armstrong's ideas which now run counter to church doctrine. Although the Supreme Court has recognized that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all,'" it does not "suggest that this right not to speak would sanction an abuse of the copyright owner's monopoly as an instrument to suppress facts." *Harper & Row*, 471 U.S. at 559.

In light of this principle and the statutory factors discussed above, I conclude that the district court did not err in granting [*45] partial summary judgment to PCG because it properly found that PCG's distribution of *MOA* constitutes fair use.