

# ESSAY

## COPYRIGHT WITHOUT COPYING

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### INTRODUCTION

Digital media and software have broken copyright law. Although a consumer experiences the same work when reading a book printed on paper or copied onto an e-reader, the applications of copyright law to traditional and digital media usage have diverged dramatically because digital works are frequently copied in the course of their use. Copyright theorists have struggled with how to craft legal rules that would align rights in traditional and digital works, frequently proposing new exceptions for digital uses or interpretations of fair use. But there is a more elegant path forward, which has been too difficult to contemplate seriously because the law that needs to be changed is synonymous with copyright itself.

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The reproduction right—the copy right—should be eliminated. Historically, the reproduction right functioned well to give copyright holders control over their work and as a reasonable tool for determining how much remuneration they were due. But now the reproduction right fails as a proxy for value in the digital realm by overcounting copies that have little relationship to the value created by authors.

This Essay makes the case for eliminating the reproduction right entirely and for augmenting other exclusive authors' rights in exchange. Although superficially radical, the elegant results of reform render the suggestion worth contemplating. Moreover, despite the political infeasibility of reforming copyright in the immediate future, understanding potential alternatives can prepare us to seize other opportunities for reform when they arise.

### I. THE CURRENT COPYRIGHT REGIME

The exclusive rights currently granted to copyright holders were largely codified in section 106 of the 1976 Copyright Act.<sup>1</sup> These exclusive rights include the rights to reproduce a copyrighted work, prepare derivative works based upon a copyrighted work, distribute copies of a work to the public, publicly display a work, and publicly perform a work (excepting non-digital performances of sound recordings).<sup>2</sup>

This Essay will leave to the side two significant aspects of copyright's exclusive rights regime because they are largely unrelated to the subject at hand: the right to prepare derivative works,<sup>3</sup> and the phenomenon that non-digital performances of sound recordings are not part of the bundle of exclusive copyright rights.

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<sup>1</sup> Pub.L. 94-553, 90 Stat. 2541 (1976). The 1976 Act codified the rights contained in 17 U.S.C. § 106(1)–(5). The digital sound recording performance right was added by the Digital Performance Right in Sound Recordings Act of 1995, Pub.L. 104-39, 109 Stat. 336 (1995).

<sup>2</sup> See 17 U.S.C. § 106 (2002). Most precisely, the exclusive rights, subject to several exceptions, consist of the rights to do and authorize the following activity:

- (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.

<sup>3</sup> A derivative work is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2010).

These issues left to the side, we can summarize the remaining exclusive rights as consisting of the right to reproduce, distribute, publicly display, and publicly perform a copyrighted work. Notably, these exclusive rights of copyright do not give the copyright holder complete control over what can be done with the work.<sup>4</sup> Private displays and performances of a work are not covered, nor are uses of a work.<sup>5</sup> For example, the exclusive rights do not grant a copyright holder the right to insist that a book buyer read a book in order, or only on Tuesdays, or only a certain number of times.

Because of technical differences in how traditional and digital media are accessed, the Section 106 exclusive rights apply to traditional and digital media in strikingly divergent ways. Consider, for example, printed books and e-books.

In the case of a printed novel, the copyright holder will license a printer to reproduce the book under Section 106(1) and distribute the copies under Section 106(3). The first sale doctrine, currently codified in Section 109(a), then provides that the purchaser of the books can redistribute them without violating the copyright holder's exclusive rights.<sup>6</sup> Under the first sale doctrine, a person who purchases the book in a bookstore similarly has the right to resell or give away the book. Because the other section 106 rights only protect particular *public* uses of the work—the right to display and perform a work publicly—a purchaser who looks at or reads aloud a book in her own home does not violate any other exclusive copyright rights.<sup>7</sup> Exceptions such as the fair use doctrine not-

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<sup>4</sup> Copyright protection “has never accorded the copyright owner complete control over all possible uses of his work.” *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 432 (1984).

<sup>5</sup> *Id.* at 468.

<sup>6</sup> Section 109(a) provides, “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.” 17 U.S.C. § 109(a) (2008).

<sup>7</sup> The exclusive rights of copyright law include the rights to “display [a] copyrighted work publicly,” 17 U.S.C. § 106(5); and to “perform [a] copyrighted work publicly,” 17 U.S.C. § 106(4), (6). The Copyright Act defines performing or displaying a work publicly as

(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.

17 U.S.C. § 101. Controversially, in 2009, executive director of the Author's Guild, Paul Aiken, took the position that an Amazon Kindle that used a text-to-speech function to privately read a book aloud would violate the derivative work copyright law if done without permission. Geoffrey A. Fowler & Jeffrey A. Trachtenberg, *New Kindle Audio Feature Causes a Stir*, WALL ST. J., Feb. 10, 2009, <http://www.wsj.com/articles/SB123419309890963869> (“They

withstanding,<sup>8</sup> the purchaser cannot make additional reproductions of the book by hand or using a copy machine.

Contrast this story with how a consumer acquires an e-book. In practice, e-books are generally licensed, not sold, to readers, and the permission readers have to access the e-book are governed by a detailed license agreement, not a direct application of copyright law.<sup>9</sup> In part, licensing digital content has become omnipresent because courts are willing to enforce license agreements for the use of digital media and software,<sup>10</sup> and companies find it attractive to delineate their rights, and limit less-desirable users' rights, when they can.<sup>11</sup> But more interest-

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don't have the right to read a book out loud," said Paul Aiken, executive director of the Authors Guild. "That's an audio right, which is derivative under copyright law"). Aiken's position was criticized because, if taken as law, it would eliminate the public's ability to make private displays and performances of a work without permission of the copyright holder, despite the statute appearing to not grant private performance and display rights to copyright holders. See, e.g., Mike Masnick, *According to Author's Guild, You Cannot Read Books Out Loud*, TECHDIRT, Feb. 10, 2009, <https://www.techdirt.com/articles/20090210/1014293724.shtml> ("Read to your kids at night? Watch out for the Authors Guild police banging down your door").

<sup>8</sup> Exceptions to the section 106 exclusive rights are set forth in sections 107 through 122 of title 17. See 17 U.S.C. § 106 ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following"). The broadest of the exceptions to section 106, the fair use doctrine, is set forth in section 107. Section 107 holds that "[n]otwithstanding the provisions of sections 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." When deciding whether a use of work falls under the fair use doctrine, courts are instructed to look at four factors: "(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." There are far too many significant works exploring the scope of the fair use doctrine to include in a single footnote, but those interested in exploring the scope of the doctrine might read William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); L. Ray Patterson, *Understanding Fair Use*, 55-SPG LAW & CONTEMP. PROBS. 249 (1992); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

<sup>9</sup> See, e.g., Kindle Store Terms of Use, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> (last updated Oct. 5, 2016); Nook Store Terms of Service, <https://www.barnesandnoble.com/h/nook-store-terms-of-service> (last updated Apr. 1, 2015).

<sup>10</sup> Courts' willingness to enforce non-negotiated agreements has generally become very permissive so long as the licenses' content is not unconscionable, is "reasonably expected," or is "not radically unexpected." See MARGARET JANE RADIN, *BOILERPLATE* 82–86 (2014).

<sup>11</sup> Courts tend to hold that licenses can completely change the contours of what end-users are permitted to do with licensed works; for example, several courts have held that users can waive their fair use rights by assenting to end-user license agreements. See, e.g., *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (shrink-wrap license precludes

ingly, licensing digital content has become *de rigueur* because, under current law, purchasing digital media without a license does not appear to grant the purchaser any useful set of rights.

Consider if one “bought” an e-book in the form of a Portable Document Format (PDF) file from an online store, without any additional license agreement. The purchaser’s computer would download a copy, making a reproduction with permission from the copyright holder under section 106(1). But unlike in the case of the physical book, once a purchaser tries to access and read the PDF file, the copyright holder’s exclusive rights are implicated again, under a prevailing interpretation of copyright law. In a 1993 Ninth Circuit decision, *MAI Systems Corp. v. Peak Computer Inc.*, the court held that, because running a program created a temporary copy in a computer’s Random Access Memory (RAM), running a software program constituted prima facie copyright infringement of a copyright owner’s exclusive right to reproduce a copyrighted work.<sup>12</sup> Although the *MAI Systems* decision was controversial, two years later President Bill Clinton’s Working Group on Intellectual Property released a White Paper expressing the view that *MAI Systems* was a correctly decided and routine application of the law.<sup>13</sup> The White Paper concluded that any use of a digital work constituted a prima facie copyright infringement because any copy of a work loaded into a computer’s RAM constituted an actionable copy under the copyright statute.<sup>14</sup> As a result, the White Paper argued copyright owners had the right to control whether and how someone read, listened to, or viewed a digital work, even though the copyright statute did not allow copyright holders to exert the same control over the use of non-digital works.<sup>15</sup>

Because a computer necessarily makes a copy of an e-book in RAM when a PDF file is accessed, the RAM copy doctrine means that any use

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reverse engineering of software); *Davidson & Associates, Inc. v. Internet Gateway*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004), *aff’d*, 422 F.3d 630 (8th Cir. 2005) (shrink-wrap license waives reverse engineering fair-use right); *Meridian Project Sys., Inc. v. Hardin Construction Co., LLC*, 426 F. Supp. 2d 1101 (E.D. Cal. 2006) (holding shrink-wrap license enforceable and clause forbidding reverse engineering was not preempted by federal law); see also RAYMOND T. NIMMER & JEFF C. DODD, *MODERN LICENSING LAW* § 9.31 (2014). For a more detailed discussion of this phenomenon and its economic effects, see Guy A. Rub, *Contracting Around Copyright, The Uneasy Case for Unbundling of Rights in Creative Works*, 78 CHL. L. REV. 257 (2011).

<sup>12</sup> 991 F.2d 511, 518 (9th Cir. 1993).

<sup>13</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 94–95 (2001).

<sup>14</sup> See, e.g., Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 65–66 (1995) [hereinafter “White Paper”], available at <https://catalog.hathitrust.org/Record/003022963>.

<sup>15</sup> LITMAN, *supra* note 13, at 94–95 (citing White Paper, *supra* note 14, at 19–130).

of a digital file can qualify as an infringing reproduction of the work.<sup>16</sup> Although hotly contested, many now accept this position as the law.<sup>17</sup> Absurdly, it appears to follow from the RAM copy doctrine that, even if one has legally “purchased” a copy of a digital e-book, one is legally estopped from using it absent some additional permission or statutory exemption that allows access to the work.<sup>18</sup> As a result, end-user license agreements to use digital copyrighted works proliferate, not only to restrict consumers’ rights to access the work, but to give consumers the necessary permissions to make practical use of the work.

The RAM copy doctrine remains controversial, particularly because of the apparently absurd results that follow from it.<sup>19</sup> Some argue that *MAI Systems* and the RAM copy doctrine are simply wrong as a matter of law and policy.<sup>20</sup> Others suggest that consumers may have fair use rights or an implied license to make copies necessary to use a lawfully-

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<sup>16</sup> LITMAN, *supra* note 13, at 92 (“For all works encoded in digital form, any act of reading or viewing the work would require the use of a computer . . . and would, under this interpretation, involve an actionable reproduction.”); *id.* at 95 (“[S]ince any use of a computer to view, read, reread, hear, or otherwise experience a work in digital form would require reproducing that work in a computer’s memory, and since the copyright statute gives the copyright holder exclusive control over reproductions, everybody would need to have either a statutory privilege or the copyright holder’s permission to view, read, reread, hear, or otherwise experience a digital work, each time she did so.”).

<sup>17</sup> See Aaron Perzanowski, *Fixing RAM Copies*, 104 Nw. U. L. Rev. 1067, 1070–71 (2010) (noting that, as the RAM copy doctrine “was embraced by a growing majority of courts, Peak’s critics took pains to detail its many flaws.”); *id.* at 1073 (“[M]ost courts that have applied Peak give its core holding a broader thrust . . . opting instead for clarity and simplicity. This hard RAM copy doctrine holds that all temporary digital instantiations of copyrighted works are copies.”). *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); has somewhat weakened the RAM copy doctrine by holding that a copy of a work that existed for at most 1.2 seconds did not qualify as a reproduction of the work. However, in practice, *Cartoon Network* has not changed how parties treat software and digital media files.

<sup>18</sup> LITMAN, *supra* note 13, at 92; Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 31–32 (1994).

<sup>19</sup> As Mark Lemley observed:

If one accepts the argument that RAM copies are actionable under § 106(1), the number of copies made in even the most routine Net transactions increases dramatically. Obviously, each act of uploading or downloading makes a RAM copy in the recipient’s computer, but that is only the beginning. When a picture is downloaded from a Web site, the modem at each end will buffer each byte, as will the router, the receiving computer, the Web browser, the video decompression chip, and the video display board. Those seven copies will be made on each such transaction.

Mark Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 554–55 (1997).

<sup>20</sup> See James Boyle, *Intellectual Property Policy Online: A Young Person’s Guide*, 10 HARV. J.L. & TECH. 47, 90 (1996) (“Even if information in RAM can be considered a copy, it is not a harmful copy and should not be deemed infringing.”); see also Perzanowski, *supra* note 17.

acquired file.<sup>21</sup> Still others are not particularly concerned with the RAM copy doctrine because they are comfortable with using end-user license agreements to delineate consumer's rights.<sup>22</sup> Purchased software avoids some of the absurdity of the RAM copy doctrine due to a separate section of the Copyright Act which lets one make copies of sold, but not licensed, software necessary for its use.<sup>23</sup>

A similar divergence in the law's application to traditional and digital media appears when one wants to move a work from one location to another. Carrying a physical book from one location to another implicates no copyright issues, and transferring it to another owner is covered by the first sale doctrine.<sup>24</sup> Similarly, transferring a hard drive that contains a purchased e-book to a different location or owner implicates no more legal issues than the RAM copy doctrine described above.<sup>25</sup> However, it is far more typical for users who consume digital media to want to access their files from a number of different devices. Copying an e-book onto an e-reader or general purpose tablet reproduces the file. The law doesn't need a contestable legal opinion like *MAI Systems* to find that copying the file onto a tablet creates a *prima facie* infringing copy of

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<sup>21</sup> See Lemley, *supra* note 19, at 567 (suggesting that implied license provides a defense to infringing copyright with RAM copies, but it does so "precisely . . . where . . . least needed"); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Jule L. Sigall, *Copyright Infringement Was Never This Easy: RAM Copies and Their Impact on the Scope of Copyright Protection for Computer Programs*, 45 CATH. U. L. REV. 181, 217–19 (1995) (arguing that RAM copies should be considered fair uses).

<sup>22</sup> See, e.g., Irina D. Manta & David S. Olson, *Hello Barbie: First They Will Monitor You, Then They Will Discriminate Against You. Perfectly.*, 67 ALA. L. REV. 135, 136 (2015).

<sup>23</sup> Although 17 U.S.C. § 117(a)(1) permits an "owner of a copy of a computer program to make . . . another copy . . . of that computer program provided . . . that such a new copy . . . 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." 17 U.S.C. § 117(a)(1) (1998). This "essential step" exception does not apply to copying software that has been licensed but not sold, or to other types of digital media. See Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1889 (2010) ("[O]nly those who are 'owners' of a copy are entitled to exercise the important rights of 17 U.S.C. § 109 and § 117, the first sale rights, and the right to make essential-step copies and adaptations of computer programs, respectively.").

<sup>24</sup> "[T]he owner of a particular copy or phonorecord . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (2008).

<sup>25</sup> "Section 109(a) . . . protects a lawful owner's sale of her 'particular' phonorecord, be it a computer hard disk, iPod, or other memory device onto which the file was originally downloaded. While this limitation clearly presents obstacles to resale that are different from, and perhaps even more onerous than, those involved in the resale of CDs and cassettes, the limitation is hardly absurd—the first sale doctrine was enacted in a world where the ease and speed of data transfer could not have been imagined." *Capitol Records LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

the work; it is legally indisputable that there is a reproduction.<sup>26</sup> While one needs no permission to carry a book from home to read it on the subway, copying a PDF file onto a tablet to read on-the-go requires the permission of the copyright holder or needs to fall under an exception to the exclusive rights.

Although this result is legally uncontroversial, many resist the idea that moving digital works between devices (and even to a new computer when the old one breaks) for personal use is something that a copyright holder should be able to forbid. Most commonly, commentators argue that personal and incidental uses of a work should qualify as fair use, or that “space shifting” is fair use.<sup>27</sup> Indeed, a Ninth Circuit case, *RIAA v. Diamond Multimedia Sys. Inc.*, stated in dicta that space shifting qualifies as a fair use.<sup>28</sup> But holdings in space-shifting cases turn on fine points that don’t necessarily map to intuitions or common sense. While one can probably rip one’s own CD on to one’s hard drive, another circuit court decision held that one couldn’t gain access to streaming music over the Internet by proving that one had a legal copy of the CD.<sup>29</sup> The law of space shifting is unsettled, although it mostly remains so because digital media sellers have not been inclined to litigate the position that space shifting to make personal uses is illegal.<sup>30</sup> As a result, many individuals use copyrighted digital works in what amounts to a “grey” copyright regime, in which consumers follow their own rule of thumb (“I paid for it and therefore should be able to use it”) that roughly reflects their intuitions about property rights and what the copyright holder or creator of the work deserves.

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<sup>26</sup> Cf. Boyle, *supra* note 20, at 90 (“Unlike information in Read Only Memory (ROM) or magnetic storage, information in RAM is volatile; it is constantly rewritten while the computer is being used and cannot survive the loss of power to the computer.”).

<sup>27</sup> The idea of “space shifting” is a riff on the notion of “time shifting” held to be fair use in *Sony v. Universal City Studios*. See *RIAA v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (stating in dicta that a digital music player “makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. . . . Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.”) (citing *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984)); cf. *Sony Corp.*, 464 U.S. at 455 (holding that “time shifting” of copyrighted television shows with VCRs constitutes fair use under the Copyright Act, and thus is not an infringement). Aaron Perzanowski and Jason Schultz argue for a similar result based on applying the doctrine of exhaustion in a digital context. See Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2136–38 (2012).

<sup>28</sup> *RIAA v. Diamond*, 180 F.3d 1072, 1079 (9th Cir. 1999) (stating in dicta that a digital music player “makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. . . . Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.”).

<sup>29</sup> *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351–53 (S.D.N.Y. 2000).

<sup>30</sup> Cf. Fred Von Lohmann, *RIAA Says Ripping CDs to Your iPod is Not Fair Use*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS (Feb. 15, 2006), <https://www EFF.org/deepinks/2006/02/riaa-says-ripping-cds-your-ipod-not-fair-use>.

The application of copyright law to digital works presents a problem for critics of end-user license agreements and for those who would prefer a regime where private uses of physical and digital media had a more similar legal character. Yet, it is difficult to imagine how copyright law, as currently codified, could be bent to create the same results in physical and digital circumstances. Physical copies of media are treated almost identically to personal property; when one legally acquires a physical book, one effectively gains the rights to make personal uses of it and to alienate the copy. But the analogy to a piece of property fails in a digital context; many uses of the digital file create additional copies, even if the consumer only accesses one at a time. There is no single piece of physical property to hold rights over. Licenses conceal the problem by granting users rights that make the works usable, such as “personal use rights” or the right to use the work on a certain number of devices, but they generally don’t create a legal regime that exactly parallels the rights one gains when buying physical copies.

As a result, while critiques of end-user licensing agreements are common, articulating alternatives to the widespread use of license agreements is a challenge.<sup>31</sup> Some have advocated for a “digital first sale” doctrine that permits one to sell a file and move it to a new storage device, so long as one deletes the original file at the same time the new file is being created, or immediately after,<sup>32</sup> although a district court rejected the argument that this practice was legal in the 2013 *Capitol Records v. ReDigi* decision.<sup>33</sup> By focusing on the conservation of copies, proposals for a digital first sale doctrine allow for the digital environment to mirror the physical one. We can pretend that the digital copy moved from one location to another, instead of recognizing that what really happened was that a second copy was made and the first copy destroyed.

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<sup>31</sup> As this Author has discussed elsewhere, the idiosyncrasy of digital licenses increases transaction and measurement costs of using digital property, leading to mistaken over- and under-use of the files and confusion about what one can do with digital content. See generally Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235 (2013); Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, 50 GA. L. REV. 1121 (2016); see also Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 U.C.L.A. L. REV. 889, 891, 901–02 (2011) (criticizing the use of EULAs and advocating for the development of a digital first sale doctrine). Moreover, licensing culture facilitates the waiver of other legal rights. See generally RADIN, *supra* note 10.

<sup>32</sup> See Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1st Sess. 1997); Victor F. Calaba, *Quibbles ‘N Bits: Making A Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. & TECH. L. REV. 1, 27–30 (2002) (describing the “simultaneous destruction” proposal); Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act, H.R. 1066, 108th Cong. (2003); Henry Sprott Long III, *Reconsidering the “Balance” of the “Digital First Sale” Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1194–98 (2008) (describing the suggestion of “forwarding and deleting” digital content).

<sup>33</sup> 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

The notion of “conservation of copies” may be initially appealing, but it unnecessarily requires the deletion of potentially useful information and back-up copies. For example, suppose that in the interest of conserving copies, someone deletes an e-book file from his home computer’s hard drive when copying the file to his tablet. Deleting the file from the hard drive has no practical effect if no one else would have accessed the e-book on the home computer while its owner was at work. But keeping exactly one digital copy has the potential to create more unexpected difficulties for an owner than keeping one physical copy. Digital storage devices don’t show wear-and-tear the same way a paper book does. In a world where we obsess over conservation of copies, a commuter could find her tablet abruptly and unexpectedly breaks, and that she has lost her only copy of a work (which may or may not be available to purchase again). Given the fragility of devices and the fact that their imminent failure is not always externally visible, forcing consumers to delete back-up copies in order to emulate a non-digital legal regime needlessly makes it easier for information to be lost or destroyed. Conservation of copies may have the appealing effect of creating symmetry in the application of copyright law to physical and digital copies, but it removes a beneficial feature of computing technology: storage is inexpensive, and as is frequently noted for important files, “lots of copies keep stuff safe.”<sup>34</sup>

The idea of conserving digital copies has not been embraced by courts.<sup>35</sup> But without it, the only alternative to avoid needing to license all digital content is to cobble together exceptions and rights from the fair use doctrine, notions of implied license, and the elimination of the RAM copy doctrine.<sup>36</sup>

There is, however, another path forward. The reproduction right creates unintended and undesirable results in a digital context. It is worth considering whether copyright law could still function, and provide the same protection it does to creators and copyright holders, with a set of protections that entirely omits the reproduction right.

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<sup>34</sup> See Preservation Principles, LOCKSS.ORG, <http://www.lockss.org/about/principles/> (last visiting Sept. 27, 2015).

<sup>35</sup> See *ReDigi*, 934 F. Supp. 2d at 648 (noting “courts have not previously addressed whether the unauthorized transfer of a digital music file over the Internet—where only one file exists before and after the transfer—constitutes reproduction within the meaning of the Copyright Act” and concluding that “th[is] Court holds that it does.”).

<sup>36</sup> Cf. Perzanowski & Schultz, *supra* note 27, at 2070 (“Courts and commentators have generally taken one of three approaches to justify personal uses: narrow interpretations of exclusive rights, fair use, and implied license. While each approach can resolve some aspects of the personal use dilemma, none are able to provide fully satisfying rationales or coherent doctrinal rules, and all three are limited in important respects and potentially vulnerable to erosion in the long term.”); See generally Perzanowski, *supra* note 20.

## II. WHY PROTECT AN EXCLUSIVE RIGHT TO COPY?

Why does the law confer an exclusive right to reproduce a copyrighted work in the first place? The centrality of the reproduction right to copyright jurisprudence makes this question initially seem bizarre.<sup>37</sup> But the particular rights granted to copyright holders are not divinely inspired; their moral character is not deduced from reason alone. Even if one believes that there is a moral or practical need for the government to enforce the protection of exclusive rights in intellectual works, it does not necessarily follow that the proper set of rights to enforce are reproduction, distribution, public display, and public performance. Many plausible rights are absent from this list: the rights to use publicly or privately, to display privately, to perform privately, to acquire, and to passively possess.

The choice to protect certain rights instead of others is motivated by both practicality—what is enforceable and politically feasible—and by the purposes of copyright law. But neither practical nor philosophical concerns necessitate the existence of a reproduction right.

Philosophically, intellectual property laws are typically justified by Locke's labor-desert theory,<sup>38</sup> utilitarianism,<sup>39</sup> or personality theory.<sup>40</sup> From the perspective of the goals of authors and copyright holders (as contrasted with the public's interest), these theories animate copyright holders' efforts to secure legal rights which help them achieve two overlapping ends: capturing economic value from their works, and exerting control over how their works are used and experienced, even if the control does not create economic benefit for the author. Eliminating the reproduction right need not prejudice the copyright holder's efforts to achieve either aim.

Consider the copyright holder's goal of monetizing works, most closely associated with the utilitarian justifications of copyright law. For the utilitarian, copyright law achieves its ends when authors earn or have the prospect of earning enough wealth from their creations (for various

<sup>37</sup> Indeed, William Patry and Richard Posner once remarked that "a right to unlimited copying of an expressive work without the authorization of the copyright owner . . . would be the undoing of copyright." William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 Cal. L. Rev. 1639, 1644 (2004).

<sup>38</sup> See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556–57 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEOR. L.J. 287, 296–98 (1988).

<sup>39</sup> E.g., Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 533 (2004) ("American copyright law has been set on a utilitarian foundation . . . [that] constructs copyright as a creature of positive law, by which exclusive rights . . . may be offered, or withheld, on whatever basis is rationally calculated to benefit the public."); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 670–71 (2006).

<sup>40</sup> E.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982); see also Hughes, *supra* note 38, at 330.

interpretations of “enough”) to motivate their creative work.<sup>41</sup> Because their goal is utility-increasing creative output rather than protection of rights, many utilitarians would be equally pleased if, instead of there being intellectual property protection that transferred wealth from consumers or creators, the government simply funded artists through prizes, grants, tax incentives, or other means. But historically, protecting a right to reproduce a copyrighted work was a decent, practical tool to achieve wealth transfer to creators and copyright holders. Prior to the advent of home computers, acts of reproduction were fairly visible—on a large scale, one historically needed large amounts of equipment to make reproductions, whether that equipment consisted of a printing press or a garage full of VCRs. Indeed, before July 8, 1870, American copyright holders only enjoyed the exclusive rights of “printing, reprinting, publishing, and vending” works.<sup>42</sup> Because of the fairly public and central nature of acts of printing, focusing on when reproductions occurred was a practical option for approximating when the copyright holder should be compensated for their work.

From a practical perspective, this is no longer true. Reproductions occur on home computers, in private, sometimes even without the knowledge of a computer user (for example, when a copy is made in RAM or is backed up by an automated process). Reproductions are not only frequently invisible, but they also no longer correspond to moments where value is created for the consuming public. As Sara Stadler argued in an earlier work calling for the end of the reproduction right, “the problem is not one of reproduction, but rather of distribution.”<sup>43</sup> The creation of a reproduction indicates little. However, the distribution of work, and the experience of a work, are moments where an author’s work affects commerce and consumer. If we want copyright law to reward authors for the impact they can have on the world, the exclusive right to reproduction fails to do this.

But perhaps, instead, one is more concerned with copyright holders’ having the right kind of control over their work. For the Lockean, copyright law should protect the natural rights that one has over one’s property.<sup>44</sup> Similarly, for the personality theorists, a significant purpose of copyright law is to preserve or create the right kind of relationship with

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<sup>41</sup> See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property Law*, 98 VA. L. REV. 1745, 1751 (2012); Stadler, *supra* note 39, at 611.

<sup>42</sup> Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (2d Sess.); Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (1st Sess.); Act of May 31, 1790, ch. 15, §1, 1 Stat. 124, 124 (2d Sess.).

<sup>43</sup> Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 944–45 (2007).

<sup>44</sup> See generally Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005).

one's property.<sup>45</sup> Under these theories, property holders need not provide an economic justification for their choices. The copyright holder may typically refuse to deal with those who want to use their works in particular ways, even if the copyright holder would be significantly financially rewarded by the arrangement. Here again, the reproduction right only roughly effectuates copyright holders' desire for control over their works. Even in combination with the distribution, public display, and public performance rights, most private activities remain outside the legal reach of a copyright holder. The right to exclusively control reproductions only imperfectly tracks a copyright holder's desire to control how their work is used generally.

In short, while the reproduction right has been historically central to copyright law, it need not remain so. Different combinations of rights could yield the same degree of authorial control the law provides today, as well as the same amount of compensation for authors. Moreover, a legal regime that focuses on compensating authors based on the distribution or consumption of a work may create a closer nexus between the compensation an author receives and the value the author creates.

Any consequentialist account of copyright law must also consider the effect of the law on the non-creating public; indeed, the Constitution vests Congress with the power to create copyrights and patents "to promote the progress of science and useful arts,"<sup>46</sup> a purpose which speaks to benefits for not only authors and inventors, but for the public in general. Here again, there is reason to question whether the reproduction right has outlived its usefulness to the public. Not only do acts of reproduction fail to map to moments where value is created for consumers, but in a digital context, the reproduction right is unintuitive and confusing. The prohibition on making additional physical copies of works is straightforward. But for a typical consumer of digital works, the notion that one must have specific permission to make any use of a work, because most uses require reproduction, is poorly understood.

The existence of copyright law may be supported in a variety of ways: by natural rights, utilitarianism, or personality theory, by a concern for the well-being of authors, by a desire to increase the public's knowledge, by a combination of several of these justifications. But just because a system of exclusive rights for authors is warranted, that does not necessarily mean that the reproduction right is. In the following section, this Essay will explain how removing the reproduction right can lead to a better copyright regime overall, for both authors and the public.

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<sup>45</sup> See Hughes, *supra* note 38, at 329 (arguing intellectual property "need[s] the support of a personality theory, such as the one proposed by Hegel, in which property is justified as an expression of the self").

<sup>46</sup> U.S. CONST. art. 1, § 8, cl. 8.

## III. REVISED RIGHTS &amp; APPLICATIONS

In a digital context, the reproduction right creates an unintuitive mess. Attempts to correct it under existing law are similarly *ad hoc*. This is a shame because law, particularly law that affects individuals in frequently-encountered situations, functions best when it is roughly understandable by the parties it affects. In the digital age, copyright law affects everyone, and so copyright law must work for everyone.

A revision to copyright law that eliminates the reproduction right would ideally have four qualities: *elegance*, *symmetry*, *intuitiveness*, and *conservation of authorial power*. *Elegance* is used in the mathematical sense: having the qualities of “neatness” and “simplicity.”<sup>47</sup> A proposed change should also create *symmetry* between how similar acts in a digital and non-digital environment are treated under the law. The law should be relatively *intuitive* for individuals who interact with copyrighted works on a regular basis—indeed, for most of the population. Dozens of rules and exceptions, whether in a statute or a license agreement, will typically not be intuitive, and therefore not be followed correctly. Finally, a proposal to create a more elegant copyright law should at least have the potential to conserve the same balance of power between author’s rights and public access to creative works. The purpose of *conservation* is more political and practical than aspirational: the goal of this Essay is to argue that the legal treatment of digital and nondigital works can be aligned easily and intuitively, and that the public will be better served by a law that treats digital and nondigital works the same. This alignment can be achieved without taking a maximalist or minimalist position on the scope of copyright law—indeed, there are ways to eliminate the reproduction right that would grant greater or lesser rights to copyright holders than they have today. This Essay aims to set aside the question of the proper scope of copyright, with the hope that most answers to that question can be accommodated herein.

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<sup>47</sup> MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/elegance> (last visited Feb. 28, 2016).

## Current Section 106

Subject to [several exceptions], 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; [ . . . ]
- (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.<sup>48</sup>

## Current Section 109(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.<sup>50</sup>

## Model Section 106

Subject to [several exceptions], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) 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;
- (2) in the case of [selected types of works] to perform the copyrighted work publicly, or from a copy;<sup>49</sup>
- (3) 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.

## Model Section 109(a)

Notwithstanding the provisions of section 106, the owner of a particular copy or phonorecord lawfully distributed under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner,

- (1) to sell or otherwise transfer, indivisibly, the possession of a copy of the work or phonorecord and all rights granted to the owner under this section;
- (2) to privately perform the copyrighted work;
- (3) to privately display the copyrighted work.

A private performance or display is any performance or display that is not public, under section 101.

This revision of the core exclusive rights has the primary effect of making the plethora of digital copies irrelevant to the question of copyright, while preserving roughly the same degree of control and ability to monetize work that copyright holders currently have. While eliminating

<sup>48</sup> 17 U.S.C. 106 (2002).

<sup>49</sup> This phrasing is intended to exempt nonpublic performances of a work from memory — i.e. not “from a copy” — from a copyright holder’s exclusive control.

<sup>50</sup> 17 U.S.C. 109(a) (2008).

the reproduction right, it also creates transferable private rights of display and performance, which a purchaser gains when they acquire a copy of the work which has been lawfully distributed.<sup>51</sup> Lawful distributions occur with permission of the copyright holder, under the first sale doctrine as codified in Model Section 109, or where another exception to the section 106 rights is operating. Note that once the owner of a particular copy exercises their right to sell or transfer a copy under Model Section 109(a), they lose all rights to perform or display copies of the work, or to transfer other copies of the work with good title.

The remainder of this section will walk through the effect of the law in a variety of situations under the new and old regimes.

### A. *Purchasing a Digital or Nondigital Work*

#### 1. Model Regime, Traditional Media

A printer prints copies of a novel and is licensed by the copyright holder to distribute the books. Under Model Section 106(1), the printer can only distribute copies of the book to a bookstore or wholesaler with permission of the copyright holder. However, if the printer made copies without permission, never distributed them, and merely kept them stored somewhere, Model Section 106 would not be implicated.

If the printer sells the books to a bookstore, the bookstore can rely on the benefits of Model Section 109 because the printer had permission from the copyright holder to distribute the books. Under Model Section 109, the bookstore then gains the right to distribute the copies of the book it has acquired from the printer.

When a customer purchases the book from the bookstore, they also gain the full set of rights listed under Model Section 109, which the bookstore correspondingly loses: the right to alienate a copy and to privately perform and display the work. The customer can use the book as she pleases, and even make copies of the book on a photocopy machine. However, exceptions such as the fair use doctrine notwithstanding, she can only alienate one copy of the book. Once that copy is alienated, she would no longer have the right to display its text (including by reading the book herself) or to transfer any remaining copies she had. Any additional copies she had made would be stored or destroyed. If for some reason the purchaser re-acquired the book through a legal distribution,

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<sup>51</sup> In an earlier work, Sara K. Stadler argued for the elimination of the reproduction right, but did not advocate for the creation of additional exclusive rights for the copyright holder. See Stadler, *supra* note 43, at 928 (“Accordingly, I argue that copyright owners should not enjoy the reproduction right, but instead should enjoy only the exclusive right of public distribution”). Stadler took the position that “creators are not entitled to expect the right to exclude others from engaging in acts of private copying . . . which, standing alone, do not serve as market substitutes to any significant extent.” *Id.* at 899.

she would have regained the rights to privately display and perform the copyrighted work, and be able to use the copies in her home for most personal uses.

## 2. Model Regime, Digital Media

Suppose an online e-book seller such as amazon.com sells (and does not license) an e-book version of a novel, without protecting it with any digital rights management tools. The seller has a license from the copyright holder to distribute copies of the work, and a purchaser downloads the e-book from the seller. Because the e-book was distributed legally, under Model Section 109 the purchaser gains the rights to display and perform the work privately, as well as the right to alienate her rights to display and perform the work.

Here, the purchaser is likely to make several copies of the work: in her computer's RAM, on her tablet or e-reader, and on her phone. Perhaps she uploads it to a cloud storage locker like Google Drive or Amazon Cloud so she can access it on other computers, such as a computer at her workplace. Because there is no reproduction right in the model regime, none of these copies will implicate copyright law. It is only when she displays the work on her monitor or screen (or, in the case of an audio file, plays or performs the song) that copyright is implicated. Because she acquired a copy in a legal distribution, the purchaser has the right to display the book on any of her devices.

If the purchaser decides she no longer wants the e-book, under Model Section 109(a)(1), she can choose to transfer her interests to another person. Suppose she emails a friend writing, "I already read this book and don't think I'll read it again—you can have it," and attaches the file to the email. Because she has transferred her Section 109 rights in the book, she no longer has the right to display it (and therefore, to read it), nor can she legally distribute a copy to another person. It's quite likely that she accidentally kept a copy of the book on a flash drive or a tablet, but passively keeping a copy, or even accidentally making more copies if she backs up her entire hard drive, for instance, does not implicate the proposed legal regime. As there is no reproduction right, making extra copies—which provide no value to the user so long as they aren't opened—is not copyright infringement under the model statute.

### B. *Illegal Downloading*

In order to be politically viable, any revision to the copyright statute would likely have to maintain the illegality of downloading content without permission of the copyright holder. This revision does so for both the distributor and, when the work is read or played, for the downloader.

Consider the person who is in a position to make a file available to be downloaded through a file sharing program. Currently, courts vary in their interpretations of the distribution right. Some courts have held that the person who makes a work available to others, such as by putting a file in a “share” folder, is violating the existing Section 106(3) right to distribute copies of the work.<sup>52</sup> Others have held that one who makes material available to others is not distributing the work.<sup>53</sup> The Model Sections 106 and 109 use the same “distribution” language as the existing statute. However the split resolves, the prevailing interpretation would apply equally under current law and under Model Sections 106 and 109. If making a work available in a share folder does qualify as distribution, then the party who has placed the media file in a share folder would be liable for distributing a copyrighted work to everyone after the first downloader. And even if the first downloader did receive a legal transfer, the sharer would then lose his ability to legally display or perform the work.

The downloader would not be liable for initially downloading a copy of a media file again due to the lack of a reproduction right. However, when the downloader listened to (“performed”) or read (“displayed”) a file, then Model Section 106 would be implicated. Because the downloader did not acquire a copy of the work that was “lawfully distributed,” she does not gain any of the rights specified in Model Section 109. As a result, any attempt to make a consumptive use of the file would mean that the downloader had *prima facie* violated the copyright statute.

### C. De Minimis Uses

Violations of the copyright statute that are considered *de minimis* are not infringing.<sup>54</sup> This rule is well positioned to provide for a key behavior in the digital realm—checking a file to see what it is. The act of looking at a copy, and displaying or performing a brief part of it in order to recognize it, should not count as a violation of copyright.

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<sup>52</sup> See, e.g., *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997); *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Universal City Studios Productions LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006).

<sup>53</sup> See, e.g., *Nat'l Car Rental Sys. v. Computer Assoc. Int'l*, 991 F.2d 426, 434 (8th Cir. 1993); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); *Bolensky v. G.P. Putnam's Sons*, 628 F. Supp. 1552 (S.D.N.Y. 1986).

<sup>54</sup> See, e.g., *Castle Rock Ent., Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 137–38 (2d Cir. 1998) (noting that copying must be “more than ‘*de minimis*’” to be infringing).

#### D. *Lending and Reselling*

The Model Sections 106 and 109 effectively create a “first sale doctrine” for digital works, and although the change in exclusive rights renders the structure of the law very different than most existing “digital first sale” proposals, the model sections carry the same two effects that worry many creators: the possibility of close-in-time lending destroying the market for new sales, and the possibility that parties will lie about whether they have sold their interests in particular copies in order to “re-sell” them repeatedly.

Neither of these concerns need present a problem for revising sections 106 and 109. The “problem” of lending is a particularly vexing one philosophically. On the one hand, if we value physical libraries, it would seem that policymakers should support digital lending libraries as well: they would make more materials available to more people more efficiently, improving the public’s access to knowledge. On the other hand, one might worry that “too much” lending could limit creators’ ability to monetize their works. We can easily imagine how: someone designs a system to “rent” mp3s for exactly five minutes, and as a result twelve people can rent the song per hour, 288 people per day, each by borrowing and returning the song in a miniscule amount of time.

To the extent those who are concerned about digital lending would worry that revised sections 106 and 109 would open the door to “too much” sharing, the existing copyright statute already illustrates how different policy choices about lending can be made while preserving a robust first sale doctrine. The changes proposed here could be modified to embrace or reject digital lending, by taking a cue from existing section 109(b)(1)(A).<sup>55</sup>

In its current form, section 109(b) limits the first sale doctrine by stating that owners of particular copies of sound recordings and computer programs cannot rent them without permission of the copyright holder.<sup>56</sup> The section also limits the limitation: nonprofit libraries and schools can rent sound recordings, although commercial ventures still cannot.<sup>57</sup> Notably absent from section 109(b) is a limitation on renting audiovisual

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<sup>55</sup> 17 U.S.C. § 109(b)(1)(A) (2012). Currently, section 109(b)(1)(A) reads: Notwithstanding the provisions of subsection (a), unless authorized by the owners of [the relevant] copyright . . . neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program . . . may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program . . . by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

works, which is why in the 1980s and 1990s there were so many video rental stores.

Just as section 109(b) currently allows for some but not all instances of lending lawfully-acquired works, sections 106 and 109 could be revised to omit the reproduction right while still preserving a copyright holder's control over commercial lending of digital works. A pro-lending policy would list very few, if any, categories of work or lender in section 109(b); an anti-lending policy could list many more varieties. Parties with diverging visions of the scope of intellectual property protections will have different preferred outcomes, but both a "minimalist" and "maximalist" vision remain compatible with removing the reproduction right.

False resale is potentially more challenging because it is harder to identify "pirated" digital goods, but the potential harm is also less significant than one might expect. The primary concern is quite specific: a commercial venture like ReDigi whose business model is facilitating digital resale between seller and buyer.<sup>58</sup> Parties who are inclined to illegally acquire media won't be attracted to such ventures as buyers, but potential sellers might be inclined to pretend to sell the same work multiple times. Any company in the intermediary position could take measures to make repeated "sales" more trouble than they are worth—most easily, by disallowing the same account from selling the same piece of media twice, and requiring accounts to be tied to particular bank accounts or credit cards. Failure to do so while taking a cut of sales could subject intermediaries to secondary liability. Moreover, given the growing popularity of on-demand streaming services like Spotify and, now, Apple Music, the potential commercial market for second-hand digital media seems like it may not be sizable enough to have a significant effect on copyright holders' ability to monetize their work, compared to the negative effects of illegal downloading and sharing, and the benefits of royalties from streaming services and new sales. Here, again, however, small legislative fixes could be written to sidestep the problem. For example, commercial intermediaries could be required to have a copyright holders' permission before facilitating second-hand sales, while preserving digital media owners' legal right to transfer their files to friends and heirs.

### *E. The Cloud*

Revised sections 106 and 109 would also eliminate many of the legal concerns surrounding cloud storage systems like Amazon Cloud and Google Drive. Under the revised sections 106 and 109, any copies of

<sup>58</sup> See *Capitol Records LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

the work in the cloud storage system would be not infringing, because there would be no reproduction right.

The question over which party to a transmission engages in a performance following *Am. Broadcasting Co. v. Aereo, Inc.*<sup>59</sup> would remain open under the model statutes. If Amazon were considered to be making performances of the work, then cloud storage streaming systems would probably be infringing. But if, as would follow from the pre-*Aereo* case law,<sup>60</sup> the performer would be considered the user or the person who uploaded or placed the file into storage, no exclusive rights would be violated. Having acquired the file in a legal distribution, the user would be able to make private performances and displays of the work regardless of device, and so re-accessing a file put into cloud storage would not be a copyright infringement.

#### F. Adverse Possession and Bad Title

Even the most well-meaning person has borrowed a book or DVD from a friend or taken one from a roommate and forgotten to return it. Under current law, this phenomenon generally raises no copyright issues: acts of private consumption do not implicate the section 106 rights. However, under the Model Sections 106 and 109, the private display or performance of a work one did not acquire in a legal distribution would be a violation of the statute. In principle, this reform is meant to prevent the use of illegally downloaded works. However, it would also create copyright liability for reading a physical book or playing a record that belonged to a friend without that friend's permission. Copyright law's statutory damages provisions permit copyright holders to demand up to \$30,000 for each infringed work, and up to \$150,000 if the infringement was willful.<sup>61</sup> If private display or performance qualifies as an infringement, the application of statutory damages to an illegal use of a work could be manifestly unjust (though notably, under current law, the same potential application of statutory damages to infringing uses and reproductions of digital works already exists).

At present, the size of statutory damages is unmoored from the degree of harm incurred by the copyright holder from an infringing personal use.<sup>62</sup> If copyright remedies were proportional to the harm felt or loss incurred by a copyright holder, there would be less concern over the expansion of exclusive rights into the private sphere.

<sup>59</sup> 134 S. Ct. 2498 (2014).

<sup>60</sup> See, e.g., *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

<sup>61</sup> 17 U.S.C. § 504(c)(1), (2) (2012).

<sup>62</sup> Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

But if one wanted to leave the statutory damages provisions largely intact, three narrower revisions to the law could still be beneficial. First, one could limit or eliminate statutory damages for private acts of display or performance, making it more palatable to render someone who reads a stolen, physical book open to the same liability currently faced by those who read infringing e-books. Second, section 507 of the Copyright Act,<sup>63</sup> which places a time limit on when suits for copyright infringement can be brought, could be amended to allow an infringer to adversely possess good title to a copy of a work that has been in one's possession for a statutorily determined period of years following an illegal distribution. Third, the law could take *mens rea* into account in cases of potentially infringing acts of display or performance, by either severely limited damages or exempting from infringement private acts of display or performance that were undertaken with a good-faith belief that the activity was not infringing.

#### IV. TRANSITION TO THE REVISED REGIME

##### A. *Application to Existing Works*

This Essay makes a proposal that can only be accomplished with new legislation. But beyond convincing the legislature that eliminating the reproduction right is the wisest way forward, the additional challenge of how to transition from the existing regime to a new one must also be addressed. One option would be for only newly created works to be affected by the change. This is the easiest choice in terms of handling retroactivity, but it is highly undesirable. Administratively, it would create two parallel copyright regimes for well over a hundred years. Completely different rules would apply to copyrighted works created before and after the change, and the difference would be likely to sow confusion among users, when a primary purpose of reform would be to create elegance and clarity in the digital legal environment.

A far more preferable option would be to change the exclusive rights retroactively, which would open up the federal government to challenges under the takings clause for removing certain rights of copyright holders. Although fighting takings challenges would be an issue, the Supreme Court's regulatory takings jurisprudence indicates that revising copyright's exclusive rights need not create liability on the part of the federal government. Assuming that intellectual property would be afforded the same level of protection against eminent domain as real and personal property,<sup>64</sup> changes to the scope of intellectual property protec-

<sup>63</sup> 17 U.S.C. § 507 (1998).

<sup>64</sup> See *Home v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (stating that the Takings Clause "protects 'private property' without any distinction between different types").

tion would be properly characterized as a non-compensable regulatory taking. “[T]he government’s power to redefine the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits.”<sup>65</sup> Resultingly, regulations that “go too far” will result in a compensable taking.<sup>66</sup> There is no set formula to determine when a regulation goes “too far,” although the Supreme Court has categorically found regulations compensable as takings when they involve physical invasions of property or when they remove all economic value from a piece of land.<sup>67</sup> Notably, the proposed revisions to the copyright statute both take away and grant rights. While the reproduction right is eliminated, rights to perform and display a work privately are created. The goal of the regulation is to preserve the value of a copyright, not to diminish it. As *Lucas v. South Carolina Coastal Council* observed, “the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis.”<sup>68</sup> In a case such as this, where the value of title in a copyright quite possibly remains the same, it is most appropriate to view a change in the law as a non-compensable regulatory taking. Because the change in the constellation of exclusive rights need not create government liability to current copyright holders, it would be possible to make the proposed changes, both prospectively and retroactively.

### B. *International Agreements*

Enacting material reforms to copyright and other intellectual property laws has the potential to create conflicts with international intellectual property agreements that the United States has acceded to. For some, these conflicts present no philosophical problem: if an international agreement has become antiquated or no longer serves American interests, there should be no hesitation to leave it and try to re-negotiate an improvement. For many others, the issue is thornier. The United States has had a major role in negotiating international intellectual property agreements—leaving them after having cajoled others to accede to them is politically challenging, to state the issue mildly.<sup>69</sup>

Eliminating the reproduction right presents particularly clear challenges for continued compliance with the Berne convention. Article IX

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<sup>65</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922)).

<sup>66</sup> *Pennsylvania Coal*, 260 U.S. at 415.

<sup>67</sup> *Lucas*, 505 U.S. at 1015–16.

<sup>68</sup> *Id.* at 1026.

<sup>69</sup> See Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S.C. L. REV. 977, 985–87, 1034 (2014) (describing the United States’s role in negotiating trade agreements and the difficulty of withdrawing from them).

provides, “(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”<sup>70</sup> The following clause provides an exception that gives nations some ability to maneuver within this requirement: “(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>71</sup> The specification of “special cases” would suggest that the convention authors were contemplating measures like fair use and other exceptions. However, one could argue that the advent of digital copies ought to qualify as “special,” given how far they are in nature from copies as understood at the time of the treaty’s enactment. More importantly, the second part of the clause suggests a spirit of the Article that the proposed change would preserve—“provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>72</sup> The goal of the revision is not to make copyrighted works more difficult for creators to exploit, but to preserve the ability to exploit and control works while eliminating the confusion, absurdity, and counterintuitive developments in digital copyright law.

But certainly, it is more palatable to call this situation as it is. As with the 1976 Act, the Berne Convention was adopted before digital content was omnipresent. And like our national reproduction right, the reproduction right as conceived in the convention now produces absurd and unintuitive results in a digital environment. The United States and other nations should endeavor to find a politically feasible way to revisit the issue.

### CONCLUSION

When people legally acquire digital content, they have certain intuitive expectations about how it can be used. It’s not uncommon to hear someone say, “I paid for it, I can use it how I want to.” Although expectations are mutable and need not necessarily correspond to legal rights, law is and is seen as more legitimate when it makes internal, logical sense, when it corresponds to intuitions, and when the reasons for laws can be articulated. Digital copyright law has failed to correspond to expectations and reason, and understandably—so long as the reproduction right is central to copyright jurisprudence, it is nearly impossible to con-

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<sup>70</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. IX.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

ceive of how to shape the law to be elegant, intuitive, reasonable, and sufficiently protective.

In a different context, James Grimmelmann has remarked that “the wheels are coming off the bus of copyright law’s conceptual framework.”<sup>73</sup> In these circumstances, the only sensible solution is to change the framework. The reproduction right—once a useful tool for preserving control over a work and internalizing its value—has ceased to be useful in the digital age. We are left with a surprising but necessary conclusion. In order for copyright to be saved, the copy right must be eliminated.

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<sup>73</sup> James Grimmelmann, *Copyright Arbitrage in Action*, PRAWFSBLAWG (Feb. 27, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/copyright-arbitrage-in-action.html>.

