PRELIMINARY THOUGHTS ON COPYRIGHT REFORM

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Myriad reasons can be proffered for undertaking a copyright reform project. For one thing, the current U.S. copyright law is much too long, now weighing in at approximately two hundred pages. The statute is also far too complex, incomprehensible to a significant degree, and imbalanced in important ways. Moreover, it lacks normative heft—that is, the normative rationales for granting authors some protections for their works and for limiting the scope of those protections is difficult to extract from the turgid prose of its many exceptionally detailed provisions.

I. THE COPYRIGHT ACT OF 1976: AN OBSOLETE AMALGAM?

The drafters of the Copyright Act of 1976 (1976 Act) intended it to be flexible and adaptable as new technologies enabled the creation of new kinds of works. Thirty years of experience with the 1976 Act has shown that this was an overly optimistic hope. The only new subject matters added to the copyright realm since 1976 have arrived through statutory amendments, not through common law

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3 Among the most turgid provisions of the 1976 Act are 17 U.S.C. § 111 (limiting exclusive rights for secondary transmissions of performances by cable systems); § 119 (limiting exclusive rights for secondary transmissions of superstations and network stations for private home viewing); § 304(c)-(d) (allowing individual authors or their heirs to terminate transfers of rights).

4 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (adopting expansive subject matter and exclusive rights provisions); H.R. REP. No. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (acknowledging the impossibility of foreseeing all new forms of creative expression and thus the bill’s intent to create neither a strictly limited nor unlimited range of copyrightable subject matter).
interpretation of the 1976 Act’s broad subject matter provision.\(^5\) Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.

Google, Inc., for example, has been at the center of several challenging cases. Some writers and publishers have sued Google because it is scanning the texts of thousands of books, including books still in copyright, obtained from university libraries in order to prepare indices of their contents so that snippets can be made available to researchers making pertinent queries.\(^6\) On the one hand, the scanning of books seems like a prima facie violation of the exclusive right to reproduce works in copies. On the other hand, this scanning was necessary to prepare the indices, Google only makes snippets from the books available in response to queries, and authors benefit when more readers know about their works.\(^7\)

Google has also been sued for copyright infringement because, unbeknownst to it, some infringing copies of photographs on other firms’ servers have been made accessible to users of its search engine.\(^8\) Because Google does not maintain copies of full-size images on its servers\(^9\) and because it has not acted in league with infringers, Google argues that it should not be treated as a direct or contributory infringer.\(^10\) However, Google does provide reduced-size images of the photographs when they are responsive to search requests. Further, it is hard to say that the infringing images are not publicly displayed on the users’ computer screens when they are selected from responses to a Google search request.\(^11\)

Google and its popular subsidiary, YouTube, have also been sued for copyright infringement because users sometimes upload copies of other peoples’

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\(^8\) See Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006), aff’d in part, rev’d in part, Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877, 2007 WL 1428632, at *1, *2-3 (9th Cir. May 16, 2007) (dismissing some claims, but upholding one claim of infringement).


\(^11\) Perfect 10, 2007 WL 1428632, at *6 (finding infringement of public display right). Google had sought shelter under a Ninth Circuit ruling, Kelly v. Arriba Soft Corp., which held in favor of a search engine that made reduced size images of photographs available to users. 336 F.3d 811, 815 (9th Cir. 2003).
copyrighted works, including television programs and remixes of motion pictures to YouTube, which then makes them available to millions of other users. Viacom argues that infringements of its copyrights are so rampant on YouTube that Google has a duty to be more proactive in deploying filtering technologies to detect infringing copies. Google argues that it qualifies for a statutory safe harbor from liability as long as it takes down infringing materials after receiving notice from the relevant copyright owners.

Apart from cumbersome and very expensive litigation, which may lead to common law evolution of copyright concepts, or legislative amendments, which only Hollywood seems to have the clout to bring about, there is no straightforward way to address challenging questions such as those the Google lawsuits raise. Litigation and legislation are not only expensive, but uncertain mechanisms for resolving ambiguities in the statute.

The 1976 Act has been amended more than twenty times since 1976. As a result, it has become an amalgam of inter- and intra-industry negotiated compromises and a hodgepodge of law. Although Congress has occasionally given the U.S. Copyright Office (Copyright Office) rule-making authority, most of the controversial issues have been left for the Congress or the courts to resolve. This has given rise to serious public choice problems with the copyright law and policymaking process. The copyright industries have become accustomed to drafting legislation that suits their perceived needs and to having that legislation adopted without careful scrutiny.

The 1976 Act is, moreover, the intellectual work product of a copyright reform process that was initiated in the mid-1950s. This legislation was written

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13 Id. at ¶¶ 6, 10, 39, 45.
15 See, e.g., JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 28–29 (2d ed. 2006).
16 See, e.g., LITMAN, supra note 2, at 35–69 (discussing the history of copyright negotiated compromises).
19 See, LITMAN, supra note 2, at 22–32.
20 The first six years of the copyright statutory revision process that led to enactment of the 1976 Act, from 1955 to 1961, were largely spent commissioning studies on various revision-related issues. See, e.g., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG. STUDIES 1–4 (1960) [hereinafter COPYRIGHT LAW REVISION STUDIES Nos. 1–4]. The studies can be found in OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY: COPYRIGHT LAW REVISION STUDIES 1–19 (1960) (George S.
without giving serious thought to how it would apply to computers, computer programs, or computer networks. When questions began to arise in the early to mid-1960s about the implications of computers for copyright, the Register of Copyrights deliberately decided against addressing them. During a 1965 hearing, for example, he stated that "it would be a mistake . . . in trying to deal with such a new and evolving field as that of computer technology, to include an explicit provision [on computer-related uses] that could later turn out to be too broad or too narrow." Technology developers, educational institutions, and libraries were understandably displeased at the prospect of having to resolve foreseeable disputes over computer use questions through litigation based on a statute that was intentionally not clarified to deal with them. Because of the intense controversy over the new technology questions, the copyright revision process was stalled for most of the next decade while various stakeholders debated how the revised law should handle these new technology issues.

To break this logjam and move copyright revision forward, Congress ultimately decided in 1974 to spin off the challenging new technology copyright issues to a newly created commission, asking it to report back whether the law should be amended to address the controversial new technology questions.

Professor Benjamin Kaplan presciently warned that a commission would not be
able to resolve new technologies questions within the framework of the copyright act then under consideration by merely adding a few amendments; Kaplan suggested that the revised bill should be rethought from scratch.\textsuperscript{26} Congress and other actors involved in the copyright revision process were by then already weary of a revision process that seemed to be endless and in no mood to rethink how the contours of the law should be changed in light of these new technologies. So the 1976 Act was passed with a 1950s/60s mentality built into it, just at a time when computer and communication technology advances were about to raise the most challenging and vexing copyright questions ever encountered.

It was, in truth, too early in the evolution of these technologies for the Congressional Commission, anyone in Congress, or the copyright policymaking community to figure out how to adapt copyright law to meet and withstand these challenges. Might it have been preferable to stick with the 1909 Act instead of enacting a law in 1976 that was already unsuited to the new technology challenges of the day? There is reason to think that the public as a whole would have been better off under the rubric of the 1909 Act, not the least because so many more works would be in the public domain and available for free reuse and creative remixes. I suspect, moreover, that U.S. copyright industries would have fared just fine had the legislative stasis over new technology issues continued for another few decades.

The 1976 Act was also drafted in an era when it mainly regulated the copyright industries and left alone the acts of ordinary people and non-copyright industries that use copyrighted works. It didn’t matter that much if the law was incomprehensible as long as the copyright industries that negotiated the fine details of the statute knew what the provisions meant, even if no one else did.\textsuperscript{27} But today, copyright law applies to all of us and to many common uses of copyrighted works. Advances in digital technologies have, moreover, democratized the creation and dissemination of new works of authorship and brought ordinary persons into the copyright realm, not only as creators, but also as users of others’ works.\textsuperscript{28} One reason why a simpler copyright law is needed is to provide a comprehensible normative framework for all of us who create, use, and disseminate works of authorship.

Thirty years after enactment of the 1976 Act, with the benefit of considerable experience with computer and other advanced technologies and the rise of amateur creators, it may finally be possible to formulate a more comprehensive approach to adapting copyright to digital networked environments and maintaining copyright’s integrity as to existing industry products and services that do not exist outside of the digital realm. If one considers, as I do, that the 1976 Act was the product of

\textsuperscript{26} Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 90th Cong. 571–73 (1967) [hereinafter 1967 Senate Hearings] (statement of Benjamin Kaplan, Professor of Law), reprinted in 9 Omnibus Legislative History, supra note 20, at 571–73.

\textsuperscript{27} Litman, supra note 2, at 36–37.

\textsuperscript{28} See, e.g., Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity 9 (2004).
1950s/60s thinking, then a copyright reform process should be well underway because copyright revision projects have occurred roughly every forty years in the United States.\textsuperscript{29} It is particularly important to get started because a copyright reform project will take years of careful thought, analysis, and drafting before facing the daunting challenge of persuading legislators to enact it.

As enthusiastic as I am about copyright reform, I am not so naïve as to think that there is any realistic chance that a copyright reform effort will be undertaken in the next decade by the Copyright Office, the U.S. Congress, or any other organized group. There are many reasons why a copyright reform project is infeasible at the present time.

Perhaps the most important reason copyright reform is infeasible is that the U.S. Congress has a lot of other vexing challenges to deal with in the next decade, including the Iraq war, global warming, immigration reform, and tax policy reform, just to name a few. In the grand scheme of things, copyright law just isn’t very important. U.S. copyright industries have, moreover, largely prospered under the rubric of the 1976 Act.\textsuperscript{30} It may be a flawed statute, but it is not so flawed that it is completely dysfunctional for the industries that it principally regulates. Copyright industry players and the copyright bar, furthermore, may well prefer the devil they know to the devil that might emerge from a copyright reform project. Hundreds of thousands, if not millions, of licenses have been negotiated in light of the contours of the 1976 Act. Those with the most clout in the copyright legislative process are unlikely to perceive the present copyright law as disadvantageous and would almost certainly resist attempts to recalibrate the copyright balance in a way that might jeopardize the advantages that the present statute provides them.

Further, a copyright reform project focused on revision of the 1976 Act would require a considerable investment of effort from many people, would cost a good deal of money, and would bring to the surface many highly contentious issues, such as those that manifested themselves in the legislative struggles that led to the Digital Millennium Copyright Act of 1998.\textsuperscript{31} Even modest reform efforts, such as one recently undertaken to update library copying privileges now codified in 17 U.S.C. § 108, have encountered difficulties in reaching consensus.

II. MOVING TOWARD A NEW MODEL COPYRIGHT LAW

The prospects of copyright reform are perhaps so dim that a reasonable person might well think it a fool’s errand to contemplate a reform project of any sort. It is, however, worth considering the feasibility of a model copyright law, along the lines of model law projects that the American Law Institute has frequently

\textsuperscript{29} See Copyright Office Circular: United States Copyright Office: A Brief Introduction and History 1a (2005), http://www.copyright.gov/circs/circla.html (stating that the first copyright statute was enacted in 1790, first revision in 1831, second revision in 1870, and the third revision was effective in 1909).


\textsuperscript{31} See, e.g., Litman, supra note 2, at 122–50.
promulgated. Such a model copyright law could provide interpretive comments and citations to relevant case law, or at least a set of copyright principles that would provide a shorter, simpler, more comprehensible, and more normatively appealing framework for copyright law.32

There are several reasons why such a copyright reform project would be worthwhile. First, many copyright professionals agree that the current statutory framework is akin to an obese Frankensteinian monster, even if they do not agree on every detail about the problems with the 1976 Act. At least some copyright professionals would welcome a model law or principles project as a way to restore a positive and more normatively appealing vision of copyright as a “good” law. Implicit in the criticism that many of us level at the 1976 Act, proposals to amend it, or otherwise add other provisions on an ad hoc basis, is that we have an inchoate vision of a “good” copyright law that a model law or principles project could potentially bring to light.

Second, a model law or principles document could provide a platform from which to launch specific copyright reforms, for example, amendments to the 1976 Act to address the orphan works problem, or to object to proposed amendments to the 1976 Act that would either further imbalance or clutter that statute. In order to say “no” in a more principled way to certain entertainment industry proposals to amend copyright law, it would be helpful to articulate a positive conception of copyright in a model law or principles document.

Third, a model law or principles document might, over time, prove useful as a resource to courts and commentators as they try to interpret ambiguous provisions of the existing statute, apply the statute to circumstances that Congress did not and could not have contemplated in 1976, or extract some principled norm from provisions that as codified are incomprehensible or nearly so.

Fourth, a model law or principles document could stimulate valuable discourse about what a “good” (or at least a better) copyright law might look like, which could serve as a potential resource to whoever might undertake a more officially sanctioned copyright law reform project in the future. A model law or principles document could provide an alternative conception of a legal framework that would serve as a contrast to the turgidity of the 1976 Act.

Fifth, it seems to me the right thing to do. Copyright law used to be much simpler than it is today; it can be made simple again; maybe not as simple as the Statute of Anne,33 but definitely simpler. If it needs to be done, then someone needs to get started with it.

32 See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995) §§ 9–17, 39–45 (articulating principles of trademark and trade secret law with interpretive comments and citations to case law).

A. Framing a Model Copyright Law

Here are some preliminary thoughts about what a model copyright law might include and how one might go about getting rid of some of the clutter in the existing statute. The latter goal can probably best be achieved by developing a rule-making procedure so that many of the industry- and situation-specific provisions can be spun out of the statute and so that future advanced technology questions can be addressed through an administrative process.

Let's start with the core components of copyright law. In the course of teaching intellectual property law for more than twenty-five years, I have developed a framework for introducing students to the core components of an intellectual property regime, which I then use as a framework for introducing copyright law.

The core elements of an IP regime, as I have articulated them, include:

1. A statement of the subject matter(s) that a particular IP regime may be used to protect (i.e., what kinds of intellectual creations are eligible for protection).
2. Eligibility criteria for specific people and works:
   a. Who is eligible for any IP right that might exist?
   b. What qualitative or other standards does a particular instance need to satisfy to qualify for those IP rights?
   c. What if any procedures need to be followed to obtain the rights (or effectively maintain them)?
3. A set of exclusive rights (this is what the IP owner owns).
4. A duration for the exclusive rights.
5. A set of limitations and/or exceptions to those exclusive rights.
6. An infringement standard.
7. A set of remedies against infringers.

A model copyright law out to include, at a minimum, these core elements. While it is too early to say what substantive changes a model copyright law should make as compared with current law, it is helpful to illustrate how one might trim down the obesity of today's copyright law by breaking it down into similar core components.

1. Subject matter: works of authorship.\(^{34}\)
2. Eligibility criteria for specific people and works:
   a. Who is eligible: the author (but special rule for works made for hire);
   b. Qualitative or other standards: original; fixed in a tangible medium; not a useful article;

c. Procedures: rights attach automatically as a matter of law from first fixation in a tangible medium; deposit is required but not as condition of protection; notice and registration are advisable for effective protection; registration is necessary for U.S. authors to bring infringement suits; prompt registration is necessary for recovery of attorney fees and statutory damages.

3. Exclusive rights: reproduce the work in copies; make derivative works; distribute copies to the public; publicly perform the work; publicly display the work; importation; attribution and integrity rights for works of visual art.

4. Duration: life of the author plus 70 years; 95 years from first publication for corporate authored works.

5. Limitations and/or exceptions to those exclusive rights: includes fair use, first sale, certain educational uses, and backup copying of computer programs, among others.

6. Infringement standard: infringement occurs when someone violates one of the exclusive rights, and the activities do not fall within one of the exceptions or limitations to copyright; usual test applied for non-literal infringements is whether there is substantial similarity in protected expression that the alleged infringer appropriated from the copyright owner.

7. Remedies: preliminary and permanent injunctive relief; money damages; destruction of infringing copies; attorney fees; costs; criminal sanctions.

In addition to addressing these core components, a model copyright law should also be written in plain English so ordinary people—and not just the high

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36 Id. § 407.
37 Prompt registration enables copyright owners to qualify for awards of statutory damages and attorney fees. Id. § 412. Failure to provide adequate notice of infringement affects remedies. Id. § 405(b).
38 Id. § 411.
39 Id. § 106.
40 Id. § 601.
41 Id. § 106A.
42 Id. §§ 302(a) (individual authors), 302(c) (works for hire).
43 Id. § 107.
44 Id. § 109(a).
45 Id. § 110(1)–(2).
46 Id. § 117.
47 Id. § 501(a).
48 Id. §§ 107–122.
49 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 7.1, 7.3 (2002).
priests of copyright—can understand what the law means. 51 Further, a model copyright law should also articulate the purposes that it seeks to achieve and offer some guidance about how competing interests should be balanced, perhaps through a series of comments on the model law or principles. 52

B. Some Substantive Suggestions

1. Clarify the Scope of Subject Matter Protection

If one reflects on experiences with the 1976 Act, it is clear that some parts of the Act have been more successful than others in attaining their stated objectives. Section 102(a), which provides that “[c]opyright subsists ... in original works of authorship fixed in any tangible medium of expression,” 53 was thought preferable as compared with its predecessor provisions because it was simpler and believed flexible enough so that the statute would not need to be amended every time a new category of work came into being. 54 The simplicity argument for 102(a) is somewhat belied by the fact that it goes on to recite eight specific categories of works that copyright protects. 55 The flexibility argument for 102(a) has not been borne out by thirty years of experience with the Act. The only subject matters to be added to the copyright regime in the last thirty years—architectural works and computer programs—were accomplished by statutory amendments. 56 Perhaps there should be an administrative process for determining whether any future classes of innovations should be eligible for copyright protection rather than expecting an open-ended subject matter provision will perform this function well.

51 See, e.g., Litman, supra note 2, at 22–34.
52 See, e.g., Restatement (Third) of Unfair Competition §§ 9–17, 39–45 (1995) (articulating principles of trademark and trade secret law with interpretive comments and citations to case law).
55 The 1976 Act initially listed the following as qualifying works of authorship: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, sculptural or graphic works, motion pictures and other audiovisual works, and sound recordings. 17 U.S.C. § 102(a) (1976 & Supp. 1979).
2. Clarify the Eligibility Criteria

The congressional intent underlying a key limitation on the scope of copyright protection now set forth in section 102(b)\(^5\) was to codify the holdings of *Baker v. Selden*\(^6\) and its progeny.\(^8\) Congress intended section 102(b) to clarify that methods and systems embodied in copyrighted works cannot be protected by copyright.\(^9\) Congress also intended the section to ensure that the scope of copyright protection in computer programs would consequently be “thin,” such that only exact or near-exact copying would infringe.\(^7\) This intent has been undermined by the undue deference that some courts have given to an influential treatise which criticized *Baker*, and misconstrued its holding and the policies embodied in the decision.\(^10\) This treatise contends that *Baker* merely holds (which it does not) that abstract ideas are excluded from the scope of copyright and reads the other seven words of exclusion out of the statute.\(^11\)

Something akin to 102(b) should be in a model copyright law. Yet, a better provision would make three things clearer: (1) that ideas, concepts, and principles are in the public domain and can never be protected by copyright or any other intellectual property law once they have been revealed to the public; (2) that facts, data, information, and knowledge are similarly excluded from the scope of copyright protection, and as with ideas, they are in the public domain and incapable of becoming intellectual property once publicly disclosed; and (3) that processes, procedures, systems, methods of operation, functions, and useful discoveries are excluded from the scope of copyright protection in any work describing or explaining them, although some of these innovations may be eligible for patent or other forms of intellectual property protection.\(^12\)

A model copyright law should also retain key provisions of the 1976 Act. This includes the originality requirement of the 1976 Act,\(^13\) particularly since the Supreme Court endorsed the “modicum of creativity” standard for originality.\(^14\)

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\(^6\) 101 U.S. 99, 104 (1879).

\(^7\) See Samuelson, supra note 56.

\(^8\) Id.

\(^9\) Id.

\(^10\) 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18 (2006). The Nimmer treatise’s interpretation of *Baker* is criticized at length in Samuelson, supra note 56, at Part III.

\(^11\) NIMMER & NIMMER, supra note 62, § 2.03[D]–[E], § 2.18 (dissecting the exclusions from the scope of copyright law in § 102(b) and the policy rationales for these exclusions).

\(^12\) Samuelson, supra note 36, Part I.


Additionally the fixation requirement, which requires a work to be “fixed into a tangible medium of expression” for copyright protection to begin, has a number of benefits, including the proof it provides that a tangible instance of the work exists and is available for examination and comparison with other works. Fixation also means that there will be artifacts in existence so that when the copyright term expires, the work of authorship embodied in the artifact will be available for others to reuse and draw upon.

I also think that authors should continue to be the initial owners of any copyrights that might exist in their works. Yet, to avoid transactions costs and avert the risks of fragmentation of rights, it makes sense for employers to own copyrights in works made for hire by employees, although perhaps more might be done to articulate circumstances in which that rule ought not to apply (for example, as to the writings of professors). Similar policy considerations may support vesting initial ownership of copyright in certain specially commissioned works, but this should be done by articulating criteria for determining which works qualify rather than naming specific categories of works eligible for treatment as the 1976 Act does.

3. Refine Copyright “Formalities”

Additionally, the model copyright law should give more thought than the 1976 Act does to “formalities,” such as copyright notice, registration, and deposit. For almost two hundred years, the United States limited the availability of copyright protection to works whose authors or publishers had sufficient interest in copyright that they took the trouble to comply with some simple rules that gave notice to the world about what works were protected and for how long. Courts presumed that if a work didn’t have a copyright notice, it was in the public domain and available for free copying and derivative uses. The 1976 Act continued this

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70 See 17 U.S.C. § 101(2) (defining “work made for hire” and identifying specific categories of specially commissioned works that may qualify as works made for hire).
71 The notice provisions of U.S. copyright law can be found at 17 U.S.C. §§ 401–406, the deposit provision at § 407, and registration provision at § 408.
73 See, e.g., Advertisers Exch., Inc. v. Anderson, 144 F.2d 907, 908–09 (8th Cir. 1944) (holding that plaintiff could not recover for copyright infringement of manuals because copyright notice was insufficient where it was labeled with “©” instead of the required “Copyright” or “Copr.” and was thus in the public domain); Lichtman, supra note 68, at 719–20 (discussing this presumption under the 1909 Act).
tradition, although it allowed authors to cure defective notice to some extent. Not until 1988, when Congress passed legislation to conform its law to the requirements of the Berne Convention, did U.S. copyright law flip this presumption. Currently, a work may not be used unless a person has certain knowledge that it is in the public domain, even if the person seeking to use the work cannot locate the author in order to take a license. This has created a rights-clearance nightmare for any conscientious person who wants to build upon pre-existing works or make them available to others.

The Copyright Office has proposed legislation to limit remedies for reuse of works whose copyright owner cannot be located after a reasonably diligent effort. This "orphan works" legislation is a step in the right direction, but the problems of too many copyrights and not enough notice of copyright claims and ownership interests run far deeper than that. With the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded. Creative Commons has done a useful service in providing a lightweight mechanism for allowing sharing and reuses of amateur creations, but copyright formalities may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years. More needs to be done to develop centralized repositories for locating copyright owners so that rights clearances can be done without undue transaction costs.

4. Carefully Tailor Exclusive Rights

The exclusive rights of the 1976 Act may also need some renewed attention. The reproduction right, in particular, has proven particularly vexing. At least one appellate court, interpreting the 1976 Act, has opined that every temporary copy

79 See Creative Commons, http://creativecommons.org/ (last visited Nov. 28, 2007). Creative Commons offers a variety of licenses to enable sharing and reuses of copyrighted content. See Creative Commons, License Your Work, http://creativecommons.org/license/ (last visited Nov. 28, 2007).
made in the random access memory of a computer triggers the reproduction right.\textsuperscript{80} In that case, a computer repair firm was held liable for infringement of computer program copyrights because of RAM copies made when the firm turned on the computer in question to repair it.\textsuperscript{81} Congress reacted to this specific ruling by amending the statute to clarify that making copies of digital information contained on computers does not violate copyright law when the copies are made in conjunction with the repair or maintenance of a computer.\textsuperscript{82} However, Congress did not at the same time expressly repudiate the dicta that RAM copies infringe unless they have been authorized.\textsuperscript{83} It is, of course, impossible to access, use, read, view, or listen to copyrighted works in digital form without making numerous RAM copies of the work.\textsuperscript{84} The 1995 Clinton Administration White Paper on Intellectual Property and the National Information Infrastructure took the position that this was and should be the law and sought to inject this rule in the WIPO Copyright Treaty of 1996.\textsuperscript{85} This stratagem did not succeed.\textsuperscript{86} But the fact remains that the reproduction right needs to be reconsidered in light of post-1976 Act developments and either clarified or more carefully tailored.\textsuperscript{87} The derivative work and public display rights may also need to be reconsidered.\textsuperscript{88}

\textsuperscript{80} MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993), cert. denied, 510 U.S. 1033 (1994).
\textsuperscript{81} Id. at 519–20.
\textsuperscript{82} Digital Millenium Copyright Act, 17 U.S.C. § 117(d) (2006).
\textsuperscript{83} MAI Systems Corp., 991 F.2d at 519.
\textsuperscript{84} For a thorough discussion of this issue, see Jessica Litman, \textit{The Exclusive Right to Read}, 13 CARDOZ ARTS & ENT. L.J. 29 (1994).
\textsuperscript{86} Samuelson, supra note 85, at 390.
\textsuperscript{87} NATIONAL RESEARCH COUNCIL, \textit{THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY RIGHTS IN THE INFORMATION AGE} 140–45 (2001) (questioning whether the reproduction right is a sound benchmark given the nature of digital information).
\textsuperscript{88} The derivative work right should be clarified to resolve certain conflicts in the case law about its scope and questions about its applicability in digital networked environments. \textit{Compare} Mirage Editions, Inc., v. Albuquerque A.R.T. Co., 856 F.2d 1341,1343–44 (9th Cir. 1988) (framing art print held to infringe derivative work right), and \textit{Lee} v. A.R.T. Co., 125 F.3d 580, 581–82 (7th Cir. 1997) (framing picture held non-infringing), and \textit{Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.}, 964 F.2d 965, 968 (9th Cir. 1992) (taking a narrow view of the derivative work right as applied to add-on software), with \textit{MicroStar v. FormGen, Inc.}, 154 F.3d 1107, 1111–12 (9th Cir. 1998) (taking a broad view of the derivative work right as applied to add-ons). There was no counterpart to the public display right in the 1909 Act, and there has been very little case law on what the 1976 Act means by conferring this right on authors. As a consequence, the scope of the public display right is unclear. For a valiant effort to breathe some normative life into the public display right,
Under previous copyright statutes, an author's exclusive rights were, for the most part, narrowly tailored and narrowly construed; moreover, acts that did not fall within the contemplated scope of those exclusive rights were considered to be unregulated and consequently free from copyright constraints. Common law interpretation of copyright also led to the creation of some limitations and exceptions, such as the fair use and the first sale exceptions, as necessary to achieving a balance between rights holders and public interests in copyright law. The 1976 Act, in the guise of simplifying the exclusive rights provision, arguably broadened the rights substantially. It further set forth a considerable number of exceptions and limitations, few of which seem based on normative principles. They seem more to reflect who showed up—and who didn't—at the legislative hearings at which carve-outs were up for grabs.

This manner of articulating exclusive rights implies that if the 1976 Act does not specifically provide an exception for a particular activity that falls within one or more of the broadened exclusive rights, then the activity, no matter how economically trivial, will be deemed illegal unless it can somehow be shoe-horned into the fair use rubric or some other specific exception. The broadening of exclusive rights and the articulation of very detailed and often narrowly tailored exceptions and limitations seemingly mean that the unregulated spaces of

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See 17 U.S.C. § 1 (1947) (exclusive rights under 1909 Act) (revised 1976 in 17 U.S.C. § 106). Public performances of musical works under the 1909 Act, for example, were unregulated unless they were “for profit.” Id. § 1(e).

See 17 U.S.C. § 106 (1976 & Supp. 1979). Under the 1909 Act, only specific derivatives were within the reach of the statute. See 17 U.S.C. § 1(b) (1947) (“To translate the copyrighted work into other languages or dialects, or make any other version of, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it to a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.”). The public performance right was similarly narrower under the 1909 Act than under the 1976 Act. Compare 17 U.S.C. § 1(d)–(e) (1947), with 17 U.S.C. § 106(4) (1976 & Supp. 1979).

17 U.S.C. §§ 107–122. The fair use provision is one of the few exceptions and limitations that gives the reader some sense of the normative purpose for its existence. Id. § 107 (fair use “for purposes as criticism, comment, news reporting, teaching . . . , scholarship, or research” is noninfringing).

How else can one account for the fact that agricultural and horticultural fairs got exceptions to enable them to publicly perform certain classes of copyrighted works, whereas other seemingly equally socially valuable gatherings (for example, girl scout rallies) did not?

copyright have shrunk considerably. This flipped another presumption of previous laws. Under predecessor laws, that which was not forbidden was permitted. Under the 1976 Act, arguably only those uses expressly permitted were lawful.\textsuperscript{94} As Jessica Litman has recently shown, there are many personal uses of copyrighted works that may trip one of the exclusive rights and fail to qualify for one of the statutory exceptions, even though reasonable people would agree they should be considered lawful personal uses. For example, an individual who makes a backup copy of her digital music files may be infringing the reproduction right under a very strict interpretation of the 1976 Act.\textsuperscript{95} Additional work on user rights should be part of a model copyright law project.\textsuperscript{96}

5. Reduce the Duration of Copyright

In addition, drafters of a model copyright law should consider modifying the duration of copyright. This topic has been the subject of contentious debate in recent years, indeed of constitutional challenges and popular protests.\textsuperscript{97} It would be in the public interest for more copyrighted works to get in the public domain sooner than currently required by copyright law.\textsuperscript{98} Shortening the duration of the copyright term would be one way to achieve this objective. Another would be to require periodic renewals of copyright claims for a small registration fee. International treaty obligations will surely be asserted as a reason not to make structural changes to the life + X years approach to copyright duration,\textsuperscript{99} but it is worth thinking more carefully about durational limits. A model copyright law should make it easier for works to be dedicated to the public domain.\textsuperscript{100} Drafters


\textsuperscript{95} LITMAN, supra note 2.


might also want to consider whether a feature such as the 1976 Act termination of transfer provisions is the best way to give authors a second chance to share in the value of works they created which were assigned or licensed to others.\footnote{See, e.g., 17 U.S.C. § 304(c) (2006); see Peter S. Menell & David Nimmer, Defusing the Termination of Transfers Time Bomb, (2005) http://www.idc.ac.il/ipatwork/PUBLICATION/Defusing.pdf.}

6. Clarify Infringement Standards

Drafters of a model law should also consider clarifying the standard for judging infringement. Under the 1976 Act, infringement occurs when someone trespasses on an exclusive right, and this trespass is not excused by an exception or limitation.\footnote{See 17 U.S.C. § 501(a).} The statute is silent, however, about how judges or juries should determine whether an infringement has occurred. The courts have, of course, developed tests for judging when infringement has occurred and for determining on which issues experts can testify.\footnote{See, e.g., Arnstein v. Porter, 154 F.2d 464, 469, 473 (2d Cir. 1946) (discussing infringement standards and roles of experts); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121–23 (2d Cir. 1930) (discussing infringement standards and roles of experts).} Infringement standards based on case law are neither satisfactory nor consistent with one another.\footnote{Compare infringement standards set forth in Arnstein, 154 F.2d at 469 (substantial similarity to be judged based on dissection and lay observer impression), with those set forth in Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164–66 (9th Cir. 1977) (extrinsic/intrinsic test), and Computer Assoc. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 706–711 (2d Cir. 1992) (abstraction/filtration/comparison test).} Courts are especially confused over the extent to which a dissective analysis of the component parts of the work or a gestalt-like impression test should be used, and whether the tests should be applied separately or together.\footnote{The Altai test, 982 F.2d at 706–11, for example, is highly dissective and seems to leave no room for lay observer impressions, while Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 482, 489 (2d Cir. 1960) relies heavily on lay observer impression and almost not at all on dissection.} It would be worth considering whether a model copyright law could give greater guidance on this score than prior statutes have done.

Drafters of a model copyright law should also consider whether infringements should only be found where the defendant had some wrongful knowledge or intent, or whether certain remedies should only be available based on wrongful knowledge or intent. Codification of secondary liability rules and standards for judging indirect infringements should also be part of a model copyright law. The 1976 Act is deficient in this respect,\footnote{See 17 U.S.C. § 106 (setting forth exclusive rights conferred on copyright owners). This provision allows authors to exercise or “to authorize” these exclusive rights. The “to authorize” language is said to provide a statutory basis for secondary liability, but how far this authorizes secondary liability is questionable. See Brief of Amici Curiae of Sixty} although courts have evolved some standards for secondary liability over the years.\footnote{See, e.g., 17 U.S.C. § 501(a).}
7. Rethink Certain Remedies

Finally, a model copyright act should address remedies for copyright infringement. I have no quarrel with preserving injunctive relief and actual damage recoveries when copyrights have been infringed.108 But, more thought should perhaps be given to articulating under what circumstances defendants' profits should be awarded.109 Drafters should also consider whether preliminary injunctions should be as easy to obtain in copyright cases as they have been in recent years.110 Also worth considering is whether in close cases, greater use should be made, as the Supreme Court has more than once endorsed, of damage awards in lieu of injunctive relief.111

The remedy issue most in need of serious rethinking is statutory damages. Under the 1976 Act, copyright owners can ask for an award of statutory damages in amounts ranging from $200 to $150,000 per infringed work, even if the copyright owner has actually suffered no damages.112 The willfulness or innocence of an infringement has some bearing on the range for such damages,113 but due process considerations argue strongly for development of more refined criteria. One factor that seemingly tipped a majority of the Supreme Court to the fair use ruling in the Sony114 case was the prospect that ordinary people who had used their VCRs to make copies of television programs could be liable for statutory damages amounting to multiple thousands of dollars just for taping a show to watch it at a later time than it was broadcast.115 Thought should also be given to circumstances under which those charged with secondary liability for user infringements should

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108 17 U.S.C. §§ 502 (injunctive relief), 504(b) (actual damages).

109 Id. § 504(b). Unjust enrichment may justify an award of profits in some cases, as where the defendant has willfully infringed, but query whether such an award is always justified, given that copyright infringement under U.S. law is today a strict liability offense.


112 17 U.S.C. § 504(c).

113 Statutory damages can be as low as $200 for an innocent infringer and as high as $150,000 for willful infringement. The range is $750 to $30,000 for other infringements. Id. § 504(b).


have to pay statutory damages, and if so, how much. Criminal copyright rules should also be revisited and clarified.\(^{116}\)

By focusing on these core elements of copyright, I do not mean to suggest that nothing but these elements should be in a model copyright law or principles document. Yet perhaps anything else nominated for inclusion in the model law or principles should be accompanied by a justification as to why it needs to be there, and why it should not be achieved through common law evolution of copyright law by judges or delegated to an administrative rulemaking process.\(^{117}\)

**III. OTHER CHALLENGING ASPECTS OF COPYRIGHT REFORM**

Equally challenging to drafting a substantive model of copyright law is conceiving a way to restructure institutions and policymaking processes so that the dysfunctions that currently beset copyright lawmaking can be averted or at least mitigated to some degree. It makes little sense to develop a model copyright law that is simple, comprehensible, and coherent if there is no mechanism to prevent it from getting cluttered by the same kinds of industry-specific "fixes" and compromises that have made the 1976 Act so bloated and ugly.

The simplest way to achieve this objective would be a legislative delegation of rulemaking authority to the government office responsible for carrying out copyright-related responsibilities.\(^{118}\) Many of the industry-specific exceptions now in the 1976 Act,\(^{119}\) for example, would probably be better implemented as the by-product of agency rulemaking rather than by legislative amendment. An advantage of ongoing rulemaking authority would be that it would be possible to update complex provisions of this sort, as technology and the industry adapted to new developments. Perhaps a restructured, more administratively rigorous government copyright office could take on some adjudicative and policymaking functions as well.\(^{120}\)


\(^{117}\) Misuse of copyright is an example of a copyright doctrine not already in the copyright statute that might be worth codifying in a copyright law. See, e.g., Tom W. Bell, *Codifying Copyright's Misuse Doctrine*, 2007 UTAH L. REV. 573.


\(^{120}\) This has been suggested by several commentators. See, e.g., Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (proposing establishment of fair use board as part of the Copyright Office); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J. L. & TECH. 111, 120–24, 146–59 (2005) (suggesting that the Copyright Office develop an administrative procedure for dealing with fair use defenses as to technically protected content); see also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright*
A model copyright law or principles project will be faced with other challenges besides what substantive rules to propose and what kinds of institutional and process reforms might help maintain the integrity of the law or principles. One such challenge is to what extent the drafters should feel constrained in their thinking by international treaty obligations.\(^\text{121}\) International obligations should be considered as a constraint, it seems to me, but not so much of a constraint that the drafters cannot deliberate about what the right rule might be and then consider whether it can be reconciled with international obligations. There may be more flexibility in international norms than some may perceive. Drafters of a model copyright law or principles document might also find it useful to articulate what they believe to be the “best” rule on a particular subject, even if it may seem to conflict with an international norm, but then consider whether a second-best rule might accommodate the desired policies reasonably well.

A second challenge is whether to draft U.S.-centric or more internationally acceptable rules. There are several reasons why this is an especially challenging task. First, any drafting group is likely to be largely, if not entirely, American in training and expertise, and it will be difficult for them to set aside the American mindset on copyright law. Second, there are significant substantive and philosophical differences between the two principal traditions for intellectual property rights for literary and artistic works, namely, the economically oriented, utilitarian approach of the United States and the European authors’ rights approach.\(^\text{122}\) While some commonalities can be identified among the rules embodied in these legal traditions, differences may be more profound than their commonalities.

One possible way to manage these differences would be for drafters of a model copyright law to articulate rules both traditions have in common and then to offer policy options where they differ. For example, the rules as to whom should be considered “the author,” and therefore, the owner of rights conferred under the law, might be structured with a set of policy options. Jurisdictions with a more economic or utilitarian tradition might choose to adopt work-for-hire rules such as those embodied in U.S. copyright law,\(^\text{123}\) whereas jurisdictions inclined to protect authors’ rights might choose a policy option that always confers rights on authors.

A third challenge is to what extent the drafting should be constrained by existing interests of rights holders, licensing practices, and institutional structures.

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such as collecting societies.124 At a minimum, serious consideration should be
given to how to achieve a kind of policy interoperability for transitioning from
existing statutory frameworks to the model law framework.

Finally, there is the challenge of even contemplating how such a project might
be transitioned to an implemented legal framework. As noted earlier, the prospects
for meaningful copyright reform in the near future are at the moment very dim.
Since many copyright industry representatives know how to navigate the current
copyright regime and at least at times enjoy some benefits from its
dysfunctionalities, there are formidable hurdles to implementing a reformed
copyright law. The obstacles are perhaps so formidable that many would think it
not worth the investment of intellectual effort to draft a model law. Still, few
would contest the idea that a simpler, more comprehensible, and more balanced
copyright law would be a good idea. Perhaps the preliminary thoughts offered in
this essay and in other articles in this symposium issue will spark a new round of
copyright reform discourse.

124 See, e.g., Glynn S. Lunney, Jr., Copyright Collectives and Collecting Societies: The United States Experience, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 311–13 (describing the practices of collecting societies and copyright collectives in the United States) (Daniel Gervais ed., 2006); see also Daniel Gervais, The Evolving Role(s) of Copyright Collectives, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 27, 56 (Christoph Beat Graber et al. eds., 2005) (discussing the implications of technology changes on collecting societies).