The Current State of Digitized Images Necessitates Congressional Action to Protect Authors and Content Providers from Online Infringement

"The evolving scope of American copyright law . . . encompassing almost every conceivable work of authorship, reflects a steady legislative effort to adjust copyright's reach to contemporary technologies of literary and artistic production."[1]

I. INTRODUCTION

Congress continually adjusts copyright law to correspond with the advent of new technologies, such as the World Wide Web.[2] Through copyright law, Congress aims to incentivize authors to create and disseminate new works without stifling their creativity by providing copyright holders with too much protection.[3] The United States Constitution states copyright protection's goal: "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[4] Determining the scope of copyright protection, however, is difficult; some authors want perpetual monopolies in their works while others are willing to allow free access to their works after recouping their initial investment.[5]

1. PAUL GOLDSTEIN, COPYRIGHT § 1.13, 1:27 (3d ed. 2014).

2. *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 3-5 (David Stanford Burr ed., 1st ed. 2000) (discussing how new technology affected various industries throughout twentieth century). The World Wide Web enables users to instantaneously access a range of visual media and computer programs posted by other users, which has undoubtedly affected copyright law. *See id*. at 108.

3. *See* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485-86 (1996) (noting copyright scholars abide by incentives-access paradigm when conceptualizing copyright scope); Christopher T. Wheatley, Note, *Overreaching Technological Means for Protection of Copyright: Identifying the Limits of Copyright in Works in Digital Form in the United States and the United Kingdom*, 7 WASH. U. GLOBAL STUD. L. REV. 353, 354 (2008) (posing issue of authors' rights in relation to societal benefit).

4. U.S. CONST. art. I, § 8, cl. 8; *see also* SAMUELS, *supra* note 2, at 13 (describing original constitutional copyright justifications). The framers of the Constitution intended to create a system that gave authors property rights in their work in order to create commercialized creativity as opposed to immediate payment. *See* SAMUELS, *supra* note 2, at 13.

5. *See* GOLDSTEIN, *supra* note 1, at 1.31 (discussing landmark case, *Millar v. Taylor* (1769) 98 Eng. Rep. 201 (K.B.) that established authors' perpetual copyrights). *Compare* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 7 (2008) (advocating against copyright monopolies), *with* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 792-93 (2006) (noting Supreme Court has endorsed Congress's "virtually perpetual copyright").

Under the 1976 United States Copyright Act and its later amendments, authors have exclusive rights to their work; this protection exists for the author's life plus an additional seventy years.[6] There is a passionate debate, however, over the extent and longevity of copyright owners' control.[7] Congress, over the last two centuries, has expanded copyright protection for authors and encouraged new forms of expression.[8] Still, the scope of copyright protection remains a contentious topic between advocates for a broader public domain and those who hope to control and monetize their work for longer time periods.[9]

The law requires any given work to meet a minimum originality requirement to receive copyright protection.[10] The originality requirement's boundaries are tested anew as novel forms of technology arise.[11] Most recently, online

6. *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 160 (Vicki Been et al. eds., 3d ed. 2010) (describing complex rules governing copyright duration). Copyright laws afford protection to "works of authorship *fixed* in *any* tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102 (2012) (emphasis added). A computerized image is "fixed" in a tangible medium of expression when it is stored on a computer's server. *See* Perfect 10, Inc., v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007). In addition, digitally stored images are "copies" under the Copyright Act of 1976. *See id.* Therefore, a computer user displays a "copy" of a digitized image when the user's computer depicts the image onscreen, and a copy of the image is stored, or "fixed," in the computer's memory. *See id.*

7. *Compare* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973 (2007) (contending law should require copyright owners to prove actual harm to negate fair use), *and* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1920 (2007) (arguing affirmatively for consumer and user rights), *with* Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) (advancing copyright owners' rights, asserting user rights should remain secondary).

8. *See* Eldred v. Ashcroft, 537 U.S. 186, 194-95 (2003) (discussing copyright legislation history); Deborah Tussey, *Technology Matters: The Courts, Media Neutrality, and New Technologies*, 12 J. INTELL. PROP. L. 427, 427 (2005) (noting Congress's inclination to expand copyright protection to account for technological progress); *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: CONGRESSIONAL COMMITTEE REPORTS ON THE DIGITAL MILLENNIUM COPYRIGHT ACT AND CONCURRENT AMENDMENTS CR 1:1-5 (Ed Berger et al. eds., 2000) (recounting copyright law's early constitutional roots). During revisions of the Copyright Act in the years 1831, 1870, and 1909, Congress augmented copyright protection to ensure authors retained the economic benefit of their works. *See* NIMMER & NIMMER, *supra*, at CR 1:1-5.

9. *See* COHEN ET AL., *supra* note 6, at 166 (discussing *Eldred* and controversy between copyright and free-access advocates). Copyright interest groups lobbied during the congressional hearings for the Sonny Bono Copyright Term Extension Act of 1998, which proposed a twenty-year extension of copyright protection. *See id.* at 160. Eric Eldred developed a website dedicated to providing public access to public-domain works. *See id.* at 166. This proposed Act, however, would require him to wait twenty years to publish new material. *See id.* Despite the setback for Eldred, the Supreme Court deferred to Congress and supported the longer duration of copyright protection. *See Eldred*, 537 U.S. at 221-22.

10. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (stating copyright law requires originality for copyright). Under copyright law in the United States, independently created materials are original works, even when designed with minimal creativity. *See id.*

11. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (determining photographs constitute authors' original works due to photographer's "intellectual innovation"); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104-05 (2d Cir. 1951) (deciding mezzotint reproductions constitute copyrightable works). Computer programs have also forced Congress and courts to reconsider traditional

databases containing digital images challenged the traditional "originality" paradigm.[12] Digital images arguably do not meet the standard originality requirements for original works of authorship or derivative works.[13] Consequently, digital image distributors such as Corbis and Getty Images (Getty) make steep financial investments to obtain physical, copyrighted works that are then digitized, uploaded, and licensed as online content available around the world—however, this investment returns little reward.[14]

Under present law, companies like Corbis and Getty possess copyright protection on the underlying physical work; this protection, however, does not encompass the *digitized* images uploaded online.[15] Despite that online facilitators such as Google reproduce, display, and distribute images online—an exclusivity violation for copyright owners like Getty—courts almost always rule in favor of the infringing facilitator due to the fair use doctrine.[16] This

originality boundaries for copyright protection. *See* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 983-84 (1993) (arguing originality involved in programming analogous to "timehonored literary works"). Some commentators contend that although computer programs are intrinsically functional and utilitarian, copyright law should still protect such programs' original and expressive elements. *See id.* at 986-87.

12. *See* Tanya Assim Cooper, *Corbis & Copyright?: Is Bill Gates Trying to Corner the Market on Public Domain Art?*, 16 INTELL. PROP. L. BULL. 1, 22 (2011) (discussing whether Corbis Corporation's (Corbis) public domain works digitization satisfies originality requirement). Cooper argues Corbis's public domain art digitization fails to satisfy the originality requirement because the digital reproduction "strives to create an exact digital reproduction" of the underlying work. *See id.*; *see also* Edward Lee, *Digital Originality*, 14 VAND. J. ENT. & TECH. L. 919, 922-25 (2012) (discussing originality doctrine broadly); James Bongiorno, *Fair Use of Copyrighted Images After* Perfect 10 v. Amazon.com*: Diverging from Constitutional Principles & United States Treaty Obligations*, 12 TOURO INT'L L. REV. 107, pt. III, § D. ii. (2009) (stating digital images' copyrightabilty warrants dedicated analysis).

13. *See infra* Part III.B.1 and accompanying text (analyzing digital images and originality requirements).

14. *See* Cooper, *supra* note 12, at 8 n.42 (revealing Corbis's unprofitability); *see also* Tim Wu, *On Copyright's Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 335 (2008) [hereinafter *Authorship Policy*] (describing distributors' copyrights as their "life-sustaining protection").

15. *See* Marilyn Phelan, *Digital Dissemination of Cultural Information: Copyright, Publicity, and Licensing Issues in Cyberspace*, 8 SW. J. L. & TRADE AMERICAS. 177, 185-86 (2002) (stating seminal copyright case, *Bridgeman Art Library v. Corel*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999), considered digital images of artwork uncopyrightable); *see also* Cooper, *supra* note 12, at 29 (asserting "digital reproductions are *not* original works of authorship") (emphasis added); Eric D. Keller, Note, *Scan Now, Pay Later: Copyright Infringement in Digital Document Storage*, 26 J. CORP. L. 177, 177-78 (2000) (acknowledging indistinguishability between digitally reproduced images and originals); *infra* Part III.B.1 and accompanying text (asserting originality does not exist in digitized images).

16. *See infra* note 100 and accompanying text (citing court ruling holding fair use valid defense against infringement). Fair use is a defense to copyright infringement based on the principle that the public should be able to access copyrighted works and make reasonable uses of them, such as parodying a song. *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539 (2009). Case law illustrates that the supposed "transformative" nature of online service providers' use of original works constitutes fair use and is acceptable because it does not supersede the author's original purpose. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (holding Google's use of Perfect 10's thumbnails did not violate copyright laws); Kelly v. Arriba Soft Corp., 336 F.3d 811, 819-20 (9th Cir. 2002) (holding photograph's copy appearing in newspaper created new purpose for image). The effect on the value of the original copyright owner's work in the commercial market is the crux of fair use analyses. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). Importantly, "every commercial use of copyrighted material is

precedent not only opens the door to infringement on content providers and copyright owners with no legal recourse, but also undercuts copyright law's fundamental goal: to incentivize authors through guaranteed compensation for their creative efforts.[17]

Because current protections for digital image copyright owners leave creators and content providers vulnerable to mass infringement, legislative action is required to prevent further copyright transgressions and to ensure creative output thrives.[18] Furthermore, copyright owners like Getty may be able to better protect their online content if digital images became copyright protected under Title 17 of the United States Code.[19] This Note argues that the historical practice of safeguarding authors and publishers, coupled with

presumptively an unfair exploitation of the monopoly privilege that belongs to the" copyright owner. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). Google, for example, earns hundreds of millions of dollars each year in advertising and is therefore incentivized to continue incorporating higher quality works to generate greater revenue. *See* Amended Complaint at 20, Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006) (No. CV 04-9484), 2005 WL 4705032 (noting "Google sells hundreds of millions of dollars each year in advertising to websites").

17. *See* Plaintiff Perfect 10, Inc.'s Notice of Motion and Motion for Preliminary Injunction against Defendant Google Inc. at 7, Perfect 10, Inc., v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (No. CV 04-9484), 2010 WL 2171545 (stating Google provides millions of links to known massive infringers); *Managing Valuable Image Assets: Using Digital Watermarking for Copyright Communication and Image Search*, DIGITAL WATERMARKING ALLIANCE, http://www.digitalwatermarkingalliance.org/docs/papers/dwa_whitepaper_managingassets.pdf (last visited Sept. 13, 2016) [http://perma.cc/C6G6-5XKW] (noting direct and indirect lost revenues on digital assets from digital image copyright issues); *Protect Your Valuable Image Assets*, DIGIMARC, http://www.digimarc.com/docs/default-source/digimarc-for-images-resources/dmrc_digimarc-for-images-enterprise.pdf?sfvrsn=16 (last visited Sept. 13, 2016) [http://perma.cc/ZJ72-8DQ3] (mentioning Digimarc service helped customers save and recoup millions of potentially lost revenue); *see also* Joshua J. Dubbelde, Note, *A Potentially Fatal Cure: Does Digital Rights Management Ensure Balanced Protection of Property Rights?*, 2010 U. ILL. J.L. TECH. & POL'Y 409, 412 (2010) (stating assuring creator compensation satisfies copyright law's goal of incentivizing creativity).

18. *See Perfect 10*, 508 F.3d at 1156, 1176-77 (holding defendant's infringement acceptable despite defendant indirectly deriving revenue from plaintiff's digital images); Lara Ortega, Note, *How to Get the Mona Lisa in Your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections*, 18 J. INTELL. PROP. L. 567, 585 (2011) (calling for copyright reform so museums can financially exploit online exhibits and disseminate works).

19. *See* 17 U.S.C. § 102 (2012) (enumerating works intrinsically deserving copyright protection); Complaint for Injunctive Relief and Damages at 3, Getty Images (US), Inc. v. Microsoft Corp., 61 F. Supp. 3d 296 (S.D.N.Y. 2014) (No. 14 CV 7114), 2014 WL 4373701 [hereinafter Getty Complaint] (alleging Microsoft turning world's online images into vast "unlicensed 'clip art' collection"). According to Getty, it pursues roughly 40,000 infringement claims each year; however, Getty only files suit in a few cases because of considerable litigation costs. *See* Getty Images, *Comments on Remedies for Small Copyright Claims*, COPYRIGHT.GOV (Oct. 19, 2012), http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/getty_images.pdf [http://perma.cc/23ZL-MHQB] [hereinafter *Comments on Remedies*] (stating, "[D]efendants are emboldened to infringe because they are aware that litigation is rarely pursued"). While the judicially enhanced secondary liability doctrines such as vicarious liability and contributory infringement operate to "deter extraterritorial would-be copyright infringers," statutorily providing for digital image copyright protection could function as a similar deterrent. *See* Brandon Dalling, Comment, *Protecting Against International Infringements in the Digital Age Using United States Copyright Law: A Critical Analysis of the Current State of the Law*, 2001 B.Y.U. L. REV. 1279, 1279 (2001) (emphasizing usefulness of enhanced liability doctrines as deterrents against prospective copyright infringers).

compelling policy concerns, provide ample justification for extending *sui generis* copyright protection to digital images.[20]

Part II of this Note outlines the history, scope, and purpose of United States copyright law, highlighting the digitization problem and explaining how previously "new" technologies folded into the scope of copyright law.[21] Part III of this Note analyzes how digital images fare under copyright law, given that they lack originality and often fall under the fair use doctrine.[22] Part III further examines whether digital images fall within traditional copyright law, and recommends extending copyright protection to digital images.[23] Finally, Part IV of this Note concludes that Congress must develop a new approach for handling the infringement of digital images.[24]

II. HISTORY

A. The Scope of Copyright Protection

All new works of authorship must meet three established requirements under section 102 of the 1976 Copyright Act before federal copyright protection attaches.[25] First, the author must contribute some modicum of originality to the work.[26] The Supreme Court has formulated a two-part test to determine originality: the work must be "independently created," and the work must exhibit a minimal degree of ingenuity, a "creative spark."[27] Next, if deemed

20. *See infra* Part III-IV; *see also* R. Anthony Reese, *Photographs of Public Domain Paintings: How, If at All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1034 (2009) (proposing analogous conceptual idea for protecting photographs of public domain paintings). *But see* Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 45 (2007) (advocating for broadening fair use doctrine to Google's digitized Library Project); Jonathan Hudis, *Fair Use and Attorneys' Fees: The Supreme Court Levels (or Tilts?) the Copyright Playing Field*, 67 N.Y. ST. B.J. 44, 44 (1995) (noting defendants may utilize fair use doctrine to combat overly broad copyright protection).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See id*.

24. *See infra* Part IV.

25. *See* 17 U.S.C. § 102 (2012) (detailing requisite "subject matter" and requirements to qualify for copyright protection).

26. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345-46 (1991) (explaining originality requirement). In *Feist Publications, Inc. v. Rural Telephone Service Co, Inc.*, the Court specified that original means "only that the work was independently created by the author [but] . . . the requisite level of creativity is extremely low; even a slight amount will suffice." 499 U.S. 340 345-46 (1991); *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 50 (1884) (describing low originality threshold). In a precursor case to *Feist*, the *Burrow-Giles Lithographic Co. v. Sarony* court defended a photograph's copyrightability, reasoning that in deciding how to manifest his own original mental conception through selecting and arranging the background, lighting, positioning, and character of the photo, the photographer contributed a constitutionally sufficient amount of originality. *See* 111 U.S. 53, 60 (1884).

27. *See Feist*, 499 U.S. at 345 (noting "vast majority of works make the [originality] grade quite easily"); *see also* Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1490 (2011) (explaining *Feist* court ruling). Although *Feist* requires only a minimal showing of

"original," courts also require the work to be in a medium of expression that exists for more than a transient amount of time.[28] The final requirement is that copyright protection does not extend to elements of the work that constitute ideas, systems, methods, or facts.[29] A copyright holder can demonstrate a copyright violation by presenting ownership of the valid copyright and the alleged item that violated their copyright.[30]

Upon demonstrating these requirements, the law protects many expressive forms, including literary, musical, pictorial, graphic, and sculptural works.[31] Copyright protection grants exclusive rights to authors, including reproduction rights, derivatives preparation, and the distribution, display, and performance of the work.[32] These rights, however, are far from absolute; the fair use doctrine dramatically limits the extent to which authors may claim protection.[33] The

creativity for protection, "it does seem to require something beyond the mere fact of creation." Subtonik, *supra*, at 1529.

28. *See* Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982) (describing how arcade game passes fixation requirement). The *Williams Electronics, Inc. v. Artic International, Inc.* court found that although player interaction with an arcade game altered the audiovisual presentation in some respects, a substantial portion of the game's visual and sound effects continuously repeated. *See id*. The court reasoned that the longevity and consistency of such audiovisual work was "'sufficiently permanent or stable to permit it to be . . . reproduced, or otherwise communicated' for more than a transitory period." *Id.*; *see also* H.R. REP. No. 94-1476, at 52 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stressing legislative impartiality on expressive work forms). Congress intended the flexible language of the 1976 Copyright statute to avoid applying copyright to only narrow interpretations of specific copyrightable forms, as well as to leave open the possibility for further inclusion of new forms of expression. *See Williams*, 685 F.2d at 877 n.8.

29. *See* 17 U.S.C. § 102(b) (2012) (listing explicitly matters not qualifying for copyright protection); *see also* A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir. 1980) (holding idea about historical events not copyrightable expression).

30. *See* Keller, *supra* note 15, at 183 (explaining plaintiff's burden to prove copyright infringement and noting harm not necessary for infringement claim); *see also* Brandon K. Murai, Comment, *Online Service Providers and the Digital Millennium Copyright Act: Are Copyright Owners Adequately Protected?*, 40 SANTA CLARA L. REV. 285, 292 (1999) (explaining requirements for proving direct copyright infringement). In order for a plaintiff to succeed in a direct copyright liability claim, the defendant must have committed some form of volitional conduct. *See* Naoya Isoda, *Copyright Infringement Liability of Placeshifting Services in the United States and Japan*, 7 WASH. J.L. TECH. & ARTS 149, 159 (2011) (explaining volitional conduct parameters). Additionally, case law has evolved to create a form of secondary liability, including "vicarious, contributory, and inducement liability," however, these secondary liability forms are outside the scope of this Note. *See id.* at 160.

31. *See* 17 U.S.C. § 102 (noting categories for works of authorship). Copyright law only protects the expressive elements of these works. *See* Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1397 (1996) (describing delineations of copyright protections).

32. *See* 17 U.S.C. § 106 (listing exclusive rights for copyright owners); Cate, *supra* note 31, at 1400 (specifying bundle of exclusive rights under federal copyright protection). In theory, it is impossible to access digital information without violating the reproduction right because the creation of a digital copy is inherent to the use of digital technology. *See* Cate, *supra* note 31, at 1421 (explaining technological pressures on copyright law); *see also* Ginsburg, *supra* note 7, at 1476 (discussing copyright problems basic technology use presents).

33. *See* 17 U.S.C. § 107 (pronouncing permissibility for fair use of copyrighted materials). Archetypal examples of fair use include, "criticism, comment, news reporting, teaching (including multiple copies for classroom use), [and] scholarship or research." *Id.* Individuals often invoke fair use to defend allegations of infringement. *See* Samuelson, *supra* note 16, at 2539 (demonstrating expansiveness with which defendants

Second Circuit's seminal case, *Bill Graham Archives v. Dorling Kindersley Ltd.*[34] considered the fair use doctrine in connection with images in a book.[35] Although the defendant exclusively used entirely copyrighted posters in its book, the court held that the fair use defense was applicable for a several reasons, including that the defendant reduced the posters' sizes in the book and that the posters were biographical in nature, causing the plaintiff to suffer no market harm.[36]

In addition to sheltering purely original works, copyright protection also extends to compilations and derivative works.[37] Copyright law's primary objective, however, is to safeguard creative expression, as opposed to protecting works that encompass general ideas or factually-based material.[38] Accordingly, copyright law offers the most protection to original works, which

invoke fair use doctrine in copyright infringement cases). To determine whether the use of a work is fair, courts consider several factors, including: (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; (4) and the effect of the use upon the potential market for or value of the copyrighted work. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 557-58 (2008). Professor Beebe asserts that some legal scholars suggest the "purpose and character" prong has "essentially superseded section 107 as the backbone of our fair use doctrine." *See id.* at 604. A defendant invoking fair use acknowledges infringement, but contests liability by asserting fair use as an affirmative defense. *See* Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 159 (2011) (explaining fair use paradigm shift and consequences).

34. 448 F.3d 605 (2d Cir. 2006).

35. *See id.* at 608-10 (considering fair use of images in copyright challenge). In *Bill Graham*, the defendant created and sold a biographical book about the Grateful Dead by compiling chronological images of the band's existence. *See id.* at 607. Bill Graham Archives asserted that it owned the copyrights to several of the images used throughout the book, which were former promotional posters for the band's concerts. *See id.* The court held that the defendant's biography fell within the walls of fair use. *Id*. at 615. The court reasoned that although the images were identifiable to readers as the former concert posters, their minimized size, in combination with a "prominent timeline, textual material, and original graphical artwork . . . creat[ing] a collage of text and images," constituted fair use of the images. *See id*. at 611.

36. *See id*. at 615 (balancing factors in fair use test to hold defendant's poster image use constituted fair use). A court is justified in overlooking potential market harms if it finds that the purpose and use of the new content is "sufficiently transformative" from the original content's purpose and use. *See* Khoi D. Dang, Note, Kelly v. Arriba Soft Corp.*: Copyright Limitations on Technological Innovation on the Internet*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 389, 397 (2002).

37. *See* 17 U.S.C. § 103 (extending copyright subject matter to include compilations and derivative works). "Compilations" are works constructed by collecting and assembling preexisting material that is "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. "Derivative works" are created from preexisting works; however, they "recast, transform[], or adapt[]" the original work into a new, distinguishable piece of art. *See id.*

38. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (recognizing copyright's protective purpose originally intended to advance creative expression). The *Campbell v. Acuff-Rose Music, Inc.*, Court held that the nature of Roy Orbison's "Oh, Pretty Woman" song fell within "works [that] are closer to the core of intended copyright protection." *See id*. Furthermore, *Baker v. Selden* highlighted the dichotomy between copyrightable expression and uncopyrightable ideas. *See* 101 U.S. 99, 101-02 (1879). In this case, the Court held that the methodology and form of a particular style of bookkeeping was not copyrightable because authors may not copyright *how to use or do something*. *See id.* at 105.

incorporate a greater amount of ingenuity, novelty, and creativity.[39] Conversely, derivative works, which merely add copyrightable variation to preexisting works, merit only minimal protection.[40]

To receive copyright protection for a derivative work, an author must undergo a number of procedural steps, such as obtaining consent from the original copyright owner, including, in part or whole, one or more preexisting works, and introducing an element of originality that distinguishes the derivative work from the underlying work.[41] The originality requirement for derivative works demands that authors contribute a distinguishable variation from an original work to create something that is "recognizably [their] own."[42] This more stringent originality standard for derivative works ensures that the derivative copyright does not inhibit public domain access, or conflict with the original copyright owner's exclusive rights.[43] Some express great concern about original copyright protection when licensing works to future parties for

39. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524 (9th Cir. 1992) (juxtaposing fiction and historical works, and noting former worthy of greater protection); *see also* Jihan Joo, Note, *Public Video Gaming As Copyright Infringement*, 39 AIPLA Q.J. 563, 590 (2011) (asserting more copyright protection rendered to "creative, fictional, or fantastical work" than to factual work).

40. *See* 17 U.S.C. § 103 (stating copyright for derivatives extends only to new material derivative author contributed); *see also* Colin T. Cameron, Article, *In Defiance of* Bridgeman*: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 36 (2006) (describing derivative works' relatively limited copyright protection). Cameron notes, "Derivative works receive thin copyright protection that only prohibits exact copying of the expression contributed by the author of the [derivative work]." Cameron, *supra*, at 36.

41. *See* 17 U.S.C. § 103 (excluding unlawfully appropriated material from scope of copyright statute). Section 103 requires that the derivative work be based on some portion of the original. *See* 17 U.S.C. § 101 (outlining requirement for derivative works basis in preexisting work); *see also* Patrick W. Ogilvy, Note, *Frozen in Time? New Technologies, Fixation, and the Derivative Work Right*, 8 VAND. J. ENT. & TECH. L. 687, 694 (2006) (exploring creation of derivative works from technological advancements, highlighting current copyright liability ambiguities). Indeed, "[C]opyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work." 17 U.S.C. § 103(b). Derivative works are derived from the underlying work and must add additional copyrightable material. *See* Llewellyn Joseph Gibbons, *Digital Bowdlerizing: Removing the Naughty Bytes*, 2005 MICH. ST. L. REV. 167, 176 (2005) (noting derivative works must transform existing works in some way).

42. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (requiring recognizable contribution from derivative author and more than trivial variation from original work); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999) (holding precise photographic replicas constitute "slavish copying"); Cameron, *supra* note 40, at 37 (asserting higher standard of substantial variation meets originality requirement for derivative works). In *Bridgeman Art Library, Ltd. v. Corel Corp.*, the plaintiff, Bridgeman Art Library, acquired marketing rights to reproduce public domain works of art that museums and other institutions legally owned. *See* 25 F. Supp. 2d 421, 423 (S.D.N.Y. 1998). The *Bridgeman* court held that changing the medium of two-dimensional art to photographs did not create the originality required for derivative work copyright protection because exact copies of original works, no matter how laborious the task, are the antithesis of originality. *See Bridgeman*, 36 F. Supp. 2d at 198-99; *see also* Subotnik, *supra* note 27, at 1521 (reiterating precise photographic reproductions as "slavish copies" and insufficiently creative).

43. *See* Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM./ENT. L.J. 55, 79 (1998) (stating Copyright Act inhibits derivatives from infringing on underlying copyrights and public domain status); *see also* Subotnik, *supra* note 27, at 1525 (pointing out derivative works frequently subject to higher originality threshold).

derivative works.[44] An additional concern stems from the misappropriation of public domain artwork, where this artwork is ultimately used to create derivative works receiving copyright protection.[45]

The public domain collectively consists of artistic material universally available for reproduction, adaptation, performance, distribution, or display.[46] Copyright law considers broad public domain conservation fundamental to inspire authorial innovation, ingenuity, and democratic involvement.[47] Preserving an abundant public domain of raw material benefits the general public by providing authors with a universe of inspiring material for creating new works.[48] Thus, a public domain with wide-scale distribution and access furthers copyright law's policy goal of promoting innovation.[49]

B. Purpose and Theory Behind Copyright Law

The purpose of the Intellectual Property Clause of the United States Constitution rests on the idea that authors deserve exclusive rights so that they

44. *See* Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1219 (9th Cir. 1997) (rejecting plaintiff-proposed test excluding consideration of rights of copyright holder). The *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* court explicitly rejected a test that failed to consider an original copyright owner's rights when determining whether a subsequent derivative work contained a valid copyright. *See id.* The court observed that the language of 17 U.S.C. § 103(b) protects the scope of original authors' rights by not granting copyrights to derivative authors. *See id.* at 1219-20.

45. *See L. Batlin & Son*, 536 F.2d at 492 (declining to uphold copyright in trivial variation of public domain art). *L. Batlin & Son Inc. v. Snyder* recognized granting copyrights for diminutive alterations would create a tool for plagiarists to appropriate public domain works. *See* 539 F.2d 486, 492 (2nd Cir. 1976); *see also* Cooper, *supra* note 12, at 5 (asserting art belongs in public domain and not digitally reproduced for money).

46. *See* Butler, *supra* note 43, at 61-62 (summarizing legal concept of public domain). The public domain includes a plethora of diverse subject matter, such as the Bible, inspirational writings, transcendent pieces of art, captivating music, antiquated newspaper articles, and published court opinions. *See* Cooper, *supra* note 12, at 3 n.14. The public domain consists of a common space where all uncopyrighted and uncopyrightable works exist. *See* Laura N. Gasaway, *A Defense of the Public Domain: A Scholarly Essay*, 101 LAW LIBR. J. 451, 452 (2009) (discussing importance of public domain for default creative work common space); *see also* Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 215 (2002) (noting pervasive use of public domain material throughout all segments of society).

47. *See* Cooper, *supra* note 12, at 2 (describing significance of public access to creative materials). Curbing accessibility to creative works will undoubtedly restrain and reduce future artists' abilities to generate new works of art. *See* Sharon Appel, Article, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 216-17 (1999) (highlighting shrinking public domain issue's negative impact on art museums).

48. *See* Gasaway, *supra* note 46, at 452 (stating advantages of public domain). Conversely, allowing works to fall into the public domain causes original authors, publishers, and producers to lose copyright protection, thus terminating any future possibility for them to receive remuneration. *See id.*

49. *See* U.S. CONST. art. I, § 8, cl. 8 (establishing Constitution's Intellectual Property Clause); *see also* Ogilvy, *supra* note 41, at 707 (promoting greater public access to works vital for proliferation of knowledge and new creative works). This policy goal is not mutually exclusive from a robust copyright-owner rights standpoint. *See* Raymond T. Nimmer, *Information Wars and the Challenges of Content Protection in Digital Contexts*, 13 VAND. J. ENT. & TECH. L. 825, 828 (2011) (noting "content creation and distribution thrived when rights . . . [were] reinforced to reflect the developing digital systems"). Dean Nimmer suggests a need to strike balance between inventors' and consumers' varying interests. *See id*.

may recoup their monetary investment in creating their original works.[50] In addition to authors, distributors rely on copyright protection against infringement because they themselves control copyrights and engage in copyright litigation.[51] Further, the Intellectual Property Clause presupposes that the creation of new works promotes progress, thereby serving the greater public good.[52] In *Eldred v. Ashcroft*,[53] the Supreme Court acknowledged this overarching goal through its emphasis on rewarding authors' creative endeavors and enabling the public to access those endeavors.[54] Hence, copyright protection evolved into a limited monopoly concept, granting authors and copyright holders' strong protection to ensure they would be comfortable disseminating their works publicly for sale or licensure, and eventually for free, after their monopoly term expired.[55]

Two theories have emerged for copyright protection: the utilitarian theory

50. *See* COHEN ET AL., *supra* note 6, at 6 (describing incentives for authors' copyright protection). Copyright laws protection promotes disclosure and dissemination of works because the legal system assures authors a remedy to stop unauthorized copying and remuneration for lost revenue. *See id.* at 6-7. Congress based U.S. copyright on a bargain between creators of works and the public. *See* Lee A. Hollaar, *Chapter 1: An Overview of Copyright*, DIGITAL LAW ONLINE (2002), http://digital-law-online.info/lpdi1.0/treatise4.html#secI [https://perma.cc/3Z3M-TNCF]. Copyright law grants protection to authors for a limited time, allowing them to commercially exploit their work, and in exchange, the creator gives the public free access and utilization of the work after the term of protection expires. *See id.* Authors are not the only parties in need of protection, however; more often, the content distributors require protection from copyright law. *See Authorship Policy*, *supra* note 14, at 335.

51. *See Authorship Policy*, *supra* note 14, at 335 (recognizing much of copyright law involves distributors). A former executive at Getty expressed the industry's concerns over mass content provider infringement by asking "creative agencies" to fight search engines that assist theft. *See* Zoe Mintz, *Former Getty Images Executive Proposes 'Micro-Royalties' Model to Combat Google 'Theft,'* INT'L BUS. TIMES (Sept. 12, 2014), http://www.ibtimes.com/former-getty-images-executive-proposes-micro-royalties-model-combat-google-theft-1687436 [http://perma.cc/U7CE-HMPS].

52. *See* HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 1:3 (2014) (assuming incentivizing authors to create serves copyright's constitutional mission); *Authorship Policy*, *supra* note 14, at 335-36 (explaining authorial copyright protection also advances common market good); *see also* Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L & POL'Y 565, 567 (2006) (arguing lack of authorial inducements results in diminished marketplace for new works). Copyright's function is synonymous with an incentive-based, utilitarian theory, because enticing authors to create and disseminate their work publicly promotes progress. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009) (emphasizing continued utilitarian justification for copyright law amongst "scholars, judges, and policymakers").

53. 537 U.S. 186 (2003).

54. *See id.* at 216 (elucidating copyright policy goals of benefiting public). The Supreme Court evaluated the twin purposes of copyright law, which are the encouragement of new works and the competing interest of advancing progress by releasing those works to the public. *See id.* at 227. Copyright law grants a "marketable right" for authors and distributors of copyrighted works. *See* COHEN ET AL., *supra* note 6, at 7 (detailing protected class of copyright law). This creates incentives for the "production and dissemination of more new works," but also prevents against the "underproduction of creative works" to foster the public good. *See id.* at 6-7 (demonstrating authors' and public's interest in copyright protection).

55. *See* 17 U.S.C. § 302(a) (2012) (explaining duration of copyright term after enactment of Copyright Act of 1976); *see also* Ekstrand, *supra* note 52, at 567 (describing Copyright Act of 1976's grant of limited monopoly to copyright holder).

and the natural rights theory.[56] The utilitarian theory is predominant in United States copyright law.[57] Although copyright's purpose is utilitarian in nature because it seeks to broaden public knowledge, a delicate balance still exists seeking to find the optimal scope of protection.[58]

C. Background and Extension of Copyright Scope

Over the course of copyright law history, Congress and courts have continued to expand copyright protection to include new works of art.[59] American copyright law derives from the English statutory copyright, known as the Statute of Anne.[60] Petitioned for by English printing companies and booksellers, the Statute of Anne was a legal response to the revolutionary impact of the movable-type-printing press.[61] This law was the first codification

56. *See* Ogilvy, *supra* note 41, at 706-07 (explaining two overarching U.S. copyright theories). The utilitarian theory suggests that copyright protection is warranted only insofar as it motivates authors to create new works for broad public access. *See id.* at 707. Natural rights theory is based on the notion that authors' rights are inherent in the mere fact that they are the creators of their work. *See id.* at 706.

57. *See* Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 74 (2014) (discussing dominant utilitarian theory underlying copyright law). Under the utilitarian theory, copyright's purpose is to serve the public good. *See id.* at 75. Utilitarians believe that copyright law achieves its ultimate goal of furthering knowledge and learning by maximizing the creative output of new works. *See id*.

58. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (determining scope of copyright's limited monopoly). The "task involves a *difficult balance* between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Id.* (emphasis added); Lunney, *supra* note 3, at 485-86 (criticizing "incentive-access balance" paradigm of copyright law). In analyzing a revision recommended for U.S. copyright law, the Committee of the Judiciary acknowledged that history has demonstrated a steady expansion of protection to new types of works. *See* H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664. Authors always find new forms of expression, making it necessary to leave the scope of copyright adaptable. *See id.* at 52. In essence, the Committee recognizes the indefinite and flexible scope copyright must take to provide for future forms of expression. *See id.*

59. *See* H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (summarizing expansion of copyrightable subject matter). Two types of subject matter have emerged from the expansion of copyright: works to which protection could be easily extended because Congress considered them to be of the intended protected subject matter; and works that required new legislation to qualify for protection. *See id.* The former represents original creative expression made possible by newer technologies, such as electronic music and computer programs. *See id.* The latter constitutes works like photographs, sound recordings, and motion pictures. *See id*.

60. *See* COHEN ET AL., *supra* note 6, at 23 (describing parallel structure between Statute of Anne and U.S. Intellectual Property Clause). *Compare* Statute of Anne 1710, 8 Ann. c. 19 (encouraging advancement of knowledge by vesting authors with copyright), *with* U.S. CONST. art. I, § 8, cl. 8 (granting authors with copyright to "promote the Progress of Science and useful Arts"). Both legislative acts contain three salient features: durational limits imposed on authors' copyrights, the goal of fostering "Science," meaning knowledge and learning, and cultivating new works for a utilitarian purpose. *See* COHEN ET AL., *supra* note 6, at 22, 25.

61. *See* ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF SCIENCE AND THE USEFUL ARTS 66-67 (Peter K. Yu ed., 2011) (explaining social and political pressures leading to Anglo-American copyright law). Prior to the enactment of the Statute of Anne, the English Crown established exclusive print privileges for "the Stationers' Company"—a "medieval publishers' guild." *See id.* at 68. These publishing companies, as well as booksellers, enjoyed complete domination in the market place through an "exclusive and perpetual right over

of authors' rights in their respective works.[62] Publishers and booksellers lobbied to enact this law, reasoning copyright protection would benefit the public and encourage learning.[63] Parliament embraced this philosophy by granting authors a limited statutory right of two, fourteen-year periods.[64] Since this decision, copyright law continually reacts to encompass the most recent technological inventions.[65]

The language of the Intellectual Property Clause and the Copyright Act of 1790 embraces the notion that copyright law should foster learning.[66] Copyright protection started from modest beginnings; the original 1790 Copyright Act was very narrow in scope and offered protection to only a short list of enumerated categories including maps, charts, and books.[67] Over time, copyright law expanded to include a myriad of other works including "[p]hotographs (1865), . . . [m]otion pictures (1912), sound recordings (1972)", and computer programs (1980).[68] Historically, copyright law has responded to

the printing of books." *See id.* at 69. While exponentially increasing business for the Stationers' Company, the new printing press simultaneously helped undercut their print monopoly by allowing for competitors to easily and efficiently steal the company's published works. *See id.* at 66. Power shifts in royalty and expiring legislation led to a decline in the Stationers' Company's power over book publishing. *See id.* at 71-72. The culmination of these forces caused the Stationers' Company to formulate a new argument for copyright protection. *See id.* at 72-73.

62. *See* Craig Joyce, *Prologue: The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 779, 783 (2010) (noting first formal recognition of authorial rights).

63. *See id.* at 783 (explaining additional motivation of Stationers' Company's self-interest in helping authors secure copyright). The Stationers' Company also advanced the notion that authors owned the literary property of their work, similar to land owners possessing their estates, and thus, introduced the concept that authors had a natural right in their work. *See* NG, *supra* note 61, at 73 (tracking naissance of authorial ownership rights over work).

64. *See* NG, *supra* note 61, at 73-76 (describing authors' rights under Statute of Anne). Before the Statue of Anne, an author's legal claim in his respective works had not been recognized. *See id.* at 77 (explaining booksellers' exclusive rights to written pieces). The Statute of Anne granted authors new rights and effectively created a new principle in copyright law: authorial rights. *See id*. The statute vested authors with a literary property right for originating a creative new work. *See* Joyce, *supra* note 62, at 783. Additionally, the temporal limit of copyright—from perpetual to a set number of years—produced for the first time, a "repository for creative materials" known as the "public domain." *See* NG, *supra* note 61, at 76-77.

65. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (noting copyright law has continuously changed since early printing press days resulting from technological advances); Hollaar, *supra* note 50 (covering overview of copyright history, beginning with printing press and adapting as technology expands).

66. *See* COHEN ET AL., *supra* note 6, at 23 (emphasizing Intellectual Property Clause wording, "[t]o promote the Progress of Science and useful Arts"). When the United States adopted the Constitution, the word "Science" had an all-encompassing meaning of "knowledge and learning." *See id.* The original Copyright Act of 1790 secured "the copies of maps, [c]harts, [a]nd books, to authors and proprietors of such copies." Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

67. *See* COHEN ET AL., *supra* note 6, at 25-26 (comparing scope of 1790 Copyright Act with 1976 Copyright Act and characterizing former narrower). Congress passed the 1790 Act as a statutory provision to acknowledge its power to grant such a right, which also established authors' rights to monopolies over their work. *See* Jonathan L. Kennedy, Note, *Double Standard and Facilitated Forum Shopping: A Historical Approach to Resolving the Circuit Split on Copyright Registration Timing*, 60 DRAKE L. REV. 305, 317 (2011).

68. *See* Christopher M. Holman, *Copyright for Engineered DNA: An Idea Whose Time Has Come?*, 113 W. VA. L. REV. 699, 707, 710 (2011) (noting expansion of copyright protection dictated by technological

technological advancements that reduced overall reproduction costs.[69] Without broadening the scope of copyright law to account for new technologies, the infringement of original works would stifle the incentive to create.[70]

In *Burrow-Giles*, the defendant reproduced, marketed, and sold 85,000 copies of the plaintiff's picture, *Oscar Wilde No. 18*.[71] Sarony claimed that Burrow-Giles violated the copyright in his photograph by reproducing his work.[72] Burrow-Giles argued that an individual could not copyright a photograph because it is not "writing" by an "author" within the meaning of the Intellectual Property Clause.[73] Burrow-Giles contended that photographs lacked the creativity and novelty to qualify for copyright, and noted that photographs are "mere mechanical reproduction[s] of the physical features or outlines of some object, animate or inanimate."[74]

The Supreme Court, however, disagreed, and held instead that photographs

advances). Due to the ever increasing ways technology enables expression, the Copyright Act of 1976—specifically the fixation requirement—implies courts should protect new forms and art mediums despite congressional slowness to embrace new forms into copyright law. *See* Tussey, *supra* note 8, at 430-35 (discussing media neutrality principle in copyright law). Changing art from one form to another should not exclude copyright protection, because Congress's goal is to make copyright law adaptable to new technologies. *See id*. at 434.

69. *See* Holman, *supra* note 68, at 707 (emphasizing importance of technological expansion leading to low copying costs); Jayashri Srikantiah, Note, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology*, 71 N.Y.U. L. REV. 1634, 1637-38 (1996) (analyzing copyright's reaction to inexpensive copying technology).

70. *See* Holman, *supra* note 68, at 707 (describing adaptation of copyright as necessary to continue serving its function). Digital media and new forms of content distribution challenge the traditional profile of copyright law. *See id.* There is concern that digitization is a disincentive to creation due to uncertain compensation. *See* Anne K. Fujita, *The Great Internet Panic: How Digitization Is Deforming Copyright Law*, 2 J. TECH. L. & POL'Y 1, 1 (1996) (noting digitized "Information Age" incites fear authors will refuse to create if not remunerated).

71. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884) (restating lower court's finding of fact). Photography offers an established example of a statutory modification due to advancements in technology. *See* Brief of the American Society of Media Photographers, Inc. et al. as Amici Curiae in Support of Plaintiff-Appellant Leslie A. Kelly at 7-8, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (No. 00-55521), 2000 WL 34004384 [hereinafter Brief for American Society of Media Photographers] (describing photography's transformative copyrightable status following Civil War).

72. *See Burrow-Giles*, 111 U.S. at 54 (detailing case facts). To show a prima facie case for copyright infringement, a plaintiff must demonstrate "ownership of a valid copyright" and prove the "defendant violated one of the exclusive rights reserved for the copyright owner." *See* COHEN ET AL., *supra* note 6, at 290.

73. *See Burrow-Giles*, 111 U.S. at 56 (addressing defendant's argument). Burrow-Giles claimed a photograph is not similar to writing because it is an exact reproduction of an object of which the producer is not also the author. *See id.* Prior to the inclusion of photographs as copyright-worthy artwork, most people considered photographs as purely a mechanical reproduction of reality rather than an art form. *See* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 327, 351 (2012) (speculating early people originally thought photography amounted to tracking reality than artistic expression).

74. *See Burrow-Giles*, 111 U.S. at 59 (stating essence of defendant's position disclaiming photography's copyrightability). Some legal skeptics contend that the close resemblance between photographs and their subjects cause photographs to be unoriginal copies without creativity. *See* Terry S. Kogan, *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J.L. & ARTS 445, 447 (2012) (describing justifications for disclaiming photography's copyrightability, including minimal creativity degree).

shared fact-recording expressions, like "maps, charts, designs, [and] engravings," all of which Congress authorized as deserving of copyright protection.[75] The Court concluded that the 1802 Copyright Act did not encompass photographs simply because that medium did not exist at the time of its enactment.[76] This case exemplifies the willingness to expand copyright protection to new mediums of technology.[77]

Sound recordings illustrate another instance in which copyright law adapted to embrace technological advancements.[78] Initially, courts held that works only warranted copyright protection if people could visually perceive and understand the work.[79] In *White-Smith Music Publishing Co. v. Apollo Co.*,[80] the Supreme Court reinforced this restrictive definition in holding that piano rolls did not warrant protection because "copies" of the rolls were not "in a form which others [could] see and read."[81]

One year after the *White-Smith* decision, Congress embraced this definition of a "copy" in the 1909 Copyright Act.[82] By adopting *White-Smith*'s definition, Congress effectively excluded copyright protection for later audio technologies, like sound recordings.[83] Although state laws provided some protection against piracy for record companies, legislative reports estimated that piracy activity surpassed one hundred million dollars by 1971, and projected the spread of unauthorized copying to grow along with the growth of technology.[84]

The unprecedented sound recording piracy incidents eventually led to

75. *See Burrow-Giles*, 111 U.S. at 57 (listing copyrightable works of 1802 Act and comparing them to photographs).

76. *See id.* at 58 (finding Congress would have included photographs had they existed at time of enactment). The Court held that photographs are original works that the Constitution envisioned would be protected. *See id.* at 60.

77. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (affirming circuit court in holding plaintiff possessed valid copyright). Technologies enabling multiple copies of graphical works, such as etchings, lithography, and photographs, resulted in eventual copyright protection. *See* Holman, *supra* note 68, at 707.

78. *See* Holman, *supra* note 68, at 708 (tracing evolution of copyright law through the Sound Recording Amendment of 1971).

79. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 11-12 (1908) (citing precedent confining copyright protection to works capable of visual depiction).

80. 209 U.S. 1 (1908).

81. *See id.* at 17.

82. *See* Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, (1909) (current version at 17 U.S.C. (2012)) (expanding copyright definition to "all writings of an author").

83. *See* Holly M. Sharp, Comment, *The Day the Music Died: How Overly Extended Copyright Terms Threaten the Very Existence of Our Nation's Earliest Musical Works*, 57 EMORY L.J. 279, 285 (2007) (noting sound recordings not copyrightable works under Copyright Act of 1909).

84. *See id.* at 286-87 (indicating limited protection for sound recordings presented economic issues for record companies). Given that sound recordings were initially uncopyrightable, piracy was very lucrative because of considerable financial savings resulting from bypassing the "creator . . . studio expenses, musicians' fees, and royalties to featured artists." *See id.* at 286.

congressional intervention.[85] In 1971, Congress passed the Sound Recording Amendment, which extended federal copyright protection to sound recordings.[86] Five years later, the Copyright Act of 1976 repealed the antiquated *White-Smith* ruling by including sound recordings in its protected media definition.[87]

D. Digitial Image Precedent

The Ninth Circuit evaluated whether copying and displaying copyrighted images as lower resolution thumbnails constituted fair use under copyright law in *Kelly v. Arriba Soft Corporation*.[88] Arriba maintained a search engine whereby a program would "crawl" the web and download full-sized images that were then displayed as thumbnails for search results.[89] If clicked on, Arriba's thumbnail linked back to display the original, full-sized image alongside an Arriba banner and advertising; however, the searcher was not made aware that the image resided on a third-party website.[90] Arriba's strategy affected Kelly, a professional photographer who posted his images on a

85. *See id*. at 286-87 (noting record companies' lobbying in conjunction with litigation effectuated more favorable legislation).

86. *See* H.R. REP. NO. 92-487, at 1 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1566, 1567 (amending title 17 of U.S. Code to include sound recordings); *see also* Sharp, *supra* note 83, at 287 (recounting Sound Recording Amendment of 1971's ameliorating copyright protection for sound recordings). After ten years of polemic, Congress enacted the Sound Recordings Act of 1971. *See* Abbott Marie Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127, 129-30 (2008) (explaining Congress acknowledged works comprising of collection of sounds deserved constitutional protection).

87. *See* the Copyright Act of 1976, 17 U.S.C. § 102 (2012) (listing sound recordings under enumerated categories of copyright's subject matter). The Copyright Act of 1976 stipulates that any fixed medium of expression capable of being perceived with the help of *any* machine or device "now known or later developed," qualifies for protection; thus, the law extended copyright to incorporate machine-readable works in 1976. *See id.*; *see also* COHEN ET AL., *supra* note 6, at 48 (questioning workability of fixation requirement regarding new technologies). Congress explicitly clarified that the new statutory definition was intended to provide a flexible framework for incorporating new technologies, hence the broad, ambiguous language. *See* COHEN ET AL., *supra* note 6, at 48.

88. *See* 336 F.3d 811, 811-12 (9th Cir. 2003) (outlining issue before court); *see also* MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 517-18 (9th Cir. 1993) (stating digitally stored images considered "copies" under Copyright Act of 1976). Thumbnails, regardless of the online display format, may constitute infringement, because they supply copyright violators with images that normally require a license. *See* Elena Kravtsoff, Getty v. Microsoft: *Flagrant Infringement or a New Fair Use Frontier?* CENTER FOR ART LAW (Oct. 20, 2014), http://itsartlaw.com/2014/10/20/getty-v-microsoft-flagrant-infringement-or-a-new-fair-use-frontier/ [http://perma.cc/LV62-X4YV] (exploring copyright violators' use of thumbnails in infringement cases).

89. *See Arriba*, 336 F.3d at 815 (explaining how "crawling" program works to create image thumbnails). Arriba would then delete the full-sized originals from its servers and use an in-line linking method. *See id*. at 815-16.

90. *See id.* (explaining technical facts of case). This kind of linking extricates the image from its original site and couples the linked image with Arriba's advertisements, which is a process drastically different than standard ways of linking different pages on the Internet. *See* Matthew C. Staples, Kelly v. Arriba Soft Corp., 18 BERKELEY TECH. L.J. 69, 81 (2003) (noting additional Internet service provides could face liability for actual transmitting protected content).

personal website, in addition to licensing them to other websites.[91] Without permission from Kelly, Arriba copied thirty-five of Kelly's photographs and utilized them in its search engine, which subsequently led to this infringement action.[92] The lower court ruled for Arriba, holding its use of Kelly's photographs was merely transformative and did not create harm to the marketplace for Kelly's work.[93] The Ninth Circuit upheld this ruling, leaving Kelly with no legal recourse for the unauthorized display of his photos online.[94]

The problem of unauthorized copying and displaying of digital images arose again in *Perfect 10, Inc. v. Google, Inc*.[95] Perfect 10, a subscription-based website, markets and sells copyrighted pictures of nude models.[96] Google, Inc. (Google), an Internet search engine, operates in a way that enables users to freely access images illegally hosted by third-party websites.[97]

Google's search engine indexes infringing websites that host unauthorized images, and then displays these images in thumbnail form according to users' image inquiries.[98] Similar to *Arriba*, if clicked on, the thumbnail image took the user's browser to the third-party webpage, where the infringing, full-sized image was stored.[99] The Ninth Circuit again determined this process to constitute fair use despite Google's displaying of complete images owned by Perfect 10, and the resulting potential decrease of Perfect 10's market for reduced-sized images that were popular for cell phones.[100] The court believed

91. *See Arriba*, 336 F.3d at 816.

92. *See id*. (describing events leading to current action).

93. *See id.* at 817 (stating lower court agreed Arriba's thumbnail use constituted fair use); *see also* Samuelson, *supra* note 16, at 2539 (describing fair use doctrine used to counter copyright infringement claims).

94. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (holding fair use factors favoring Arriba, finding no copyright violation for thumbnail use).

95. *See* 416 F. Supp. 2d 828, 833 n.4 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 508 F.3d 1146 (9th Cir. 2006); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1164 (9th Cir. 2006) (noting similarity of issue between *Arriba* case and present case); *see also* Amended Complaint at 38, Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006) (No. CV 04-9484), 2005 WL 4705032 (alleging defendant directly infringed Perfect 10's copyright).

96. *See Perfect 10*, 508 F.3d at 1157 (describing Perfect 10's website arrangement).

97. *See id.* (detailing process by which Google provides images in response to user inquiries).

98. *See id.* at 1156-57. Although referred to as "thumbnails," Perfect 10 objected to the term because the images stored on Google's servers could be up to eight times larger than a human thumbnail. *See Perfect 10*, 416 F. Supp. 28 at 833 n.4 (describing thumbnails' expansive capacities in lower court case).

99. *See Perfect 10*, 508 F.3d at 1156 (comparing in-line linking process in *Perfect 10* to that used in *Arriba*). After third-party websites republished Perfect 10's copyrighted, full-sized images, Google's indexing program automatically processed those images and continued to allow users to view the infringing content. *See id.* at 1155-56.

100. *See id.* at 1168 (accepting Google's fair use defense). Although the Ninth Circuit recognized that Google thumbnail images likely constituted direct infringement, because Google stored the copies on its servers and displayed them to users, the court still ruled in Google's favor because of the fair use doctrine. *See id*. at 1159-60, 1166-68. The Ninth Circuit also commended the lower court for enjoining Google from creating and displaying the thumbnails, stating, "[t]he district court handled this complex case in a particularly thoughtful and skillful manner," but subsequently reversed its decision in part, finding that Google's thumbnail use was significant rather than merely incidental. *See id.* at 1155. Indeed, Perfect 10 had already exploited the thumbnail-sized image market through a licensing agreement with Fonestarz Media Limited, a company that

Google's use was "highly transformative" because the original work served an entertainment or aesthetic purpose, while the search engine's use of the work was in the form of a reference tool.[101] Like Kelly in *Arriba*, this holding left Perfect 10 with no legal remedy, and it continued to pave the way for unauthorized copying and violation of copyright holders' reproduction and display rights.[102]

Following *Arriba* and *Perfect 10*, Getty filed a lawsuit against Microsoft, exemplifying problems that search engine giants cause, which digital content providers attempt to combat by enforcing copyright protection.[103] Getty is a global leader in providing online content, and they supply creative work that appears in the world's most influential newspapers, magazines, advertising campaigns, films, television programs, books, and websites.[104] Although Getty is the sole proprietor of most of the content it offers, it is also the distributor of over 150,000 other content suppliers including photographers, illustrators, and other media companies.[105] Getty derives its primary income from licensing its content online.[106] In addition to maintaining websites that host millions of licensable images, Getty also offers content on noncommercial websites, where social media users can access approximately fifty million copyrighted images for free.[107] Getty's business model and mission to make digital works available

sold reduced-sized images for cellphone-screen displays. *See Perfect 10*, 416 F. Supp. 2d at 849.

101. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2006) (analyzing purpose and character of Google's thumbnail use).

102. *See id.* at 1168 (ruling in Google's favor despite holding direct infringement by displaying and creating thumbnails). The scope of infringement was substantial; Google displayed over 22,000 of Perfect 10's thumbnails that it linked to other websites, thereby infringing hundreds of thousands of Perfect 10's images. *See* Plaintiff Perfect 10, Inc.'s Notice of Motion and Motion for Preliminary Injunction against Defendant Google Inc., *supra* note 17, at 9 (describing vast scope of Google's blatant infringement of Perfect 10's thumbnails).

103. *See* Getty Complaint, *supra* note 19, at 1-2 (discussing "Bing Image Widget" infringing upon Getty's copyrighted images); *see also* Mintz, *supra* note 51 (discussing Getty Images' attempts to combat copyright infringement). People will frequently utilize search engines, like Google, to obtain copyrighted images without permission, and then use the work without ever compensating the image's owner. *See* Andrew Chung, *Microsoft, Getty Images Settle Dispute over Online Photo Tool*, REUTERS (Apr. 7, 2015), http://www.reuters.com/article/getty-images-microsoft-settlement-idUSL2N0X411420150407 [https://perma.cc/6L6Q-DU2N] (articulating Getty's claim asserting Google's image use results in no remuneration or attrition to Getty).

104. *See* Getty Complaint, *supra* note 19, at 10.

105. *See id*. at 11 (describing Getty's business model). "Getty Images owns or represents more than 80 million unique works of digital imagery." *Id.* The authors Getty represents rely on Getty for the distribution of their works and royalty payments. *See id.* In a recent interview, the co-founder and chief executive of Getty remarked that since the company's inception, it has been his obligation as an industry leader to find the best way to ensure Getty and their content providers get paid for their work. *See* James Estrin, *Giving Away Photos to Make a Profit*, N.Y. TIMES (Aug. 27, 2014), http://lens.blogs.nytimes. com/2014/08/27/giving-away-photos-to-make-a-profit/?_r=0 [https://perma.cc/48LR-LXAW] (explaining Getty's business model goals).

106. *See* Getty Complaint, *supra* note 19, at 4 (describing importance of licensing images to Getty's income derivation).

107. *See id*. at 13 (articulating Getty's "Embed" offering for social media users). Getty's offering of free, professional-grade online images complements copyright law's goal of a richer "cultural commons" that new

worldwide effectuates copyright's utilitarian goals and exemplifies why Congress should offer better protection to digital images.[108]

On August 21, 2014, Microsoft launched a new service called the "Bing Image Widget."[109] Similar to Google and Arriba's image search, Microsoft's Bing creates an index of content, downloads copies of images, and stores these images in reduced-size to supply its search results.[110] The Widget enables third-party, commercial websites to showcase Bing Image results on their websites in a display panel with Bing's logo.[111] Getty brought suit after its copyrighted images appeared in the Widget that some commercial websites utilize worldwide.[112]

E. The Digitization Problem

Since the printing press, the most revolutionary copyright law problem is the digitization of content in conjunction with the public's insatiable desire to access and share that content online.[113] Digitalization's ease, speed, and low cost, combined with the permanence of Internet posts and effortlessness of online distribution, create significant concern for copyright holders.[114] Technology's affordability and Internet's breadth give users "unprecedented power to access, store, manipulate, reproduce, and distribute content."[115] With

artists can draw upon to create new works. *See supra* notes 45-49 and accompanying text (discussing importance of public domain).

108. *See supra* Part II.B (explaining copyright policy goals).

109. *See* Getty Images (US), Inc. v. Microsoft Corp., 61 F. Supp. 3d 296, 297 (S.D.N.Y. 2014) (describing "Bing Image Widget's" inception leading to *Getty Images* suit).

110. *See id.* at 298-99 (providing background information on Getty's copyright action).

111. *See id.* (explaining widget's function). Intellectual Property Attorney Elena Kravtsoff explained that the Widget is a series of code that a person creating a website can implement into his or her webpage. *See* Kravtsoff, *supra* note 88. The resulting images "are funneled through the Widget from the websites that host them and are not copied or stored by Microsoft." *Id.*

112. *See Getty*, 61 F. Supp. 3d at 297-98 (providing background information about Microsoft's infringing appropriation of digital images).

113. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y. L. SCH. L. REV. 63, 63 (2003) (highlighting digital technology's significant effect on copyright law). The Internet's empowerment of any computer user to perfectly, inexpensively, and immediately reproduce and distribute works, represents one of the most overwhelming challenges to copyright law. *See id.*; Fujita, *supra* note 70, at 20 (emphasizing digitized content's effect on copyright issues through highlighting Internet's profound speed and reach); Tonia Pever, Comment, *The Transfer of Media to Digital Form: Redefining the Copyright Infringement Test to Include Commercial Use As a Solution to Digital Copyright Infringement*, 31 CAP. U. L. REV. 109, 113 (2003) (mentioning digitized media, in conjunction with Internet's properties, hinder author's creative incentives).

114. *See* Menell, *supra* note 113, at 108-09 (recognizing broadcast of content via Internet lessens authors' control); Fujita, *supra* note 70, at 20 (analyzing how new technology affects tenuous balance of copyright law). Although some creators and artists support wide dissemination of their works by endorsing free copying, most entities holding copyrights need the lure of copyright protection to shoulder the economic risks and downsides of distributing, as well as producing, easily reproducible works. *See* Srikantiah, *supra* note 69, at 1643 (emphasizing need for copyright protection for digitalized works).

115. *See* Menell, *supra* note 113, at 118 (describing how digitization will change entertainment industry). The Internet's digital platform circumvents traditional reproduction restrictions and offsets distribution that previously guaranteed consistent revenue to creators and content publishers. *See id.* at 118-19. This "digital

this evolutionary leap in technology, the law must adapt to make digital networks a place for authors to disseminate, and still profit from, their copyrighted works.[116]

Copyright law attempts to address digital copyright infringement through various forms of legislation.[117] In 1998, Congress passed the DMCA to protect proprietors and authors against anti-circumvention techniques and devices.[118] More recently, to regulate digital technologies and combat intellectual property infringement, congressional representatives introduced the Stop Online Piracy Act (SOPA) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA).[119] Representatives created these

shift" has created significant financial burdens on burgeoning photographers. *See* Russell Brandom, *The World's Largest Photo Service Just Made Its Pictures Free to Use: Getty Images Is Betting Its Business on Embeddable Photos*, VERGE (Mar. 5, 2014), http://www.theverge.com/2014/3/5/5475202/getty-images-made-its-pictures-free-to-use [https://perma.cc/TXE2-SQXZ] (discussing financial challenges photographers have faced in wake of increased digitalization).

116. *See* Nimmer, *supra* note 49, at 827 (calling for "legal structure that supports information content industries" on Internet); Staples, *supra* note 90, at 69 (noting technological innovators actively seek ways to effectively control and disseminate their work); Melis Atalay, Note, *Regulating the Unregulable: Finding the Proper Scope for Legislation to Combat Copyright Infringement on the Internet*, 36 HASTINGS COMM. & ENT. L.J. 167, 191 (2014) (noting need for resolution of problems spurred by Internet copyright infringement). Content industries "generate the investment and maintain the resources often necessary to ensure quality in . . . the information content distributed." *See* Nimmer, *supra* note 49, at 827.

117. *See* Laura J. Robinson, *Anticircumvention Under the Digital Millennium Copyright Act*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 957, 958 (2003) (analyzing Digital Millennium Copyright Act's (DMCA) impact on copyright law). Congress enacted the DMCA because of concerns regarding the ease of copying in the digital age. *See id.* The DMCA expanded legal protection for digital media by combining traditional infringement protections with novel anti-circumvention and anti-trafficking protections. *See* Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L. 1, 15 (2001) (discussing DMCA's contribution to digitized media copyright protection).

118. *See* S. REP. NO. 105-190, at 11 (1998) (supporting copyright holders' use of technological protection measures against piracy); Menell, *supra* note 113, at 134 (discussing DMCA's history). Copyright owners argued in front of Congress that without more protection against online infringement, the current state of the law would discourage them from releasing Internet-based content. *See* Menell, *supra* note 113, at 133. Other interested parties, such as Internet service providers and telecommunications companies, alternatively expressed concern about expanding copyright law's reach because of the expansion's potential negative effect on those who wanted to make "fair use" of original works for online distribution. *See id.* at 134. Since the implementation of DMCA, courts have interpreted legislation differently, leading to uncertainty as well as wasted time and money at the copyright holders' expense. *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 818-19 (2001) (predicting complications of digital copying that became reality). Lunney notes that the DMCA reflected congressional trepidation that if digital technology were not properly addressed, it would enable the public to make exact, inexpensive copies in their homes and offices. *See id*. at 818. Even though individual copying may seem inconsequential, in the aggregate, the impact could dramatically decrease the incentive to create. *See id.* Given the high costs of litigation, it is ineffective to pursue individual infringers and thus, digital technology poses a unique threat to the incentives necessary to foster innovation. *See id*. at 818-19; *see also* Sam Castree, III, Note, *Cyber-Plagiarism for Sale!: The Growing Problem of Blatant Copyright Infringement in Online Digital Media Stores*, 14 TEX. REV. ENT. & SPORTS L. 25, 27 (2012) (stressing DMCA interpretation ambiguities additionally create litigation uncertainties).

119. *See* Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011) (attempting to curb online infringement); Stop Online Piracy Act, H.R. 3261,

acts to address foreign sites, such as Pirate Bay, that hosted unauthorized content and facilitated infringement.[120]

Modern legislative efforts draw staunch opposition from users and Internet companies, which claim Acts like SOPA and PIPA could stifle innovation and encourage frivolous lawsuits against host sites.[121] As evidenced by the numerous attempts to legislate a solution for digitized content, copyright law is still in the process of striking a balance that protects copyright owners and safeguards the public's access to digitized content.[122] As a result, copyrighted digital images remain at the center of litigation and daily unauthorized use.[123]

III. ANALYSIS

A. Examining Digital Images Cases

The final decision in *Arriba* indicates a deviation from the rational scope of the fair use doctrine relating to digital images, and represents a noticeable shift from online infringement protection for copyright holders.[124] It is unlikely that Congress intended the fair use doctrine to shelter for-profit corporations that annex and display others' copyrighted works.[125] In choosing not to protect

112th Cong. (2011) (representing another failed congressional attempt to protect online copyrights); Atalay, *supra* note 116, at 168 (describing ineffective congressional attempts to combat online piracy).

120. *See* Stephanie Condon, *SOPA, PIPA: What You Need to Know*, CBS NEWS (Jan. 18, 2012), http://www.cbsnews.com/news/sopa-pipa-what-you-need-to-know [http://perma.cc/M7PG-TC4E] (discussing SOPA and PIPA's anticipated effects).

121. *See* Atalay, *supra* note 116, at 168 (stating opponents' reasoning for challenging SOPA and PIPA); Condon, *supra* note 120 (describing opposition to SOPA and PIPA bills).

122. *See id.* at 169 (addressing proper scope of copyright to combat infringement); *see also* John P. Uetz, Note, *The Same Song and Dance:* F.B.T. Productions, LLC v. Aftermath Records *and the Role of Licenses in the Digital Age of Copyright Law*, 57 VILL. L. REV. 177, 186 (2012) (noting digital age frustrated balance of copyright law); Pever, *supra* note 113, at 116 (questioning adequacy of current law relating to digital copyright infringement).

123. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1154-55 (9th Cir. 2007) (representing contemporary fair use case adjudication); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (ruling in favor of copyright holder in authorial rights case). Digital infringement continues to be pervasive. *See* Jay Lee, *Using the DMCA to Stop the Copyright Infringement of Your Photos*, PETAPIXEL (July 10, 2013), http://petapixel.com/2013/07/10/using-the-dmca-to-stop-the-copyright-infringement-of-your-photos/ [https://perma.cc/U5D3-FE2B] (attesting to personal experience of copyright infringement).

124. *See Arriba*, 336 F.3d at 819-20 (holding exact duplicates "transformative" because used for different purpose). The established application of transformativeness focuses on a new message, meaning, or expression; this definition does not, however, coincide with *Arriba*'s conclusion. *See* Staples, *supra* note 90, at 86-87. The Ninth Circuit misapplied and expanded the definition of transformative use, and Arriba's search engine added no new expression or meaning to Kelly's photographs. *See* Brief for American Society of Media Photographers, *supra* note 71, at 18-19 (criticizing *Arriba* decision). Rather Arriba's search engine merely displayed and duplicated Kelly's photographs. *See id.* at 19 (adding court cited no precedent "to support its extraordinary misinterpretation of the transformative test").

125. *See* H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79 (discussing purpose of fair use). Some examples of the types of activities courts might regard as fair use include, quotations in reviews or critiques, scholarly quotations, parodies, and news reports. *See id.* Noticeably absent from this list and the statutory intent is the possibility for search engines to appropriate

Kelly's images, the Ninth Circuit gave infringers a means to exploit copyrighted works under the guise of fair use.[126] Furthermore, the *Arriba* decision is contrary to copyright law's policy objectives, and in turn, reveals the need for more expansive digital image protection.[127]

Likewise, the *Perfect 10* decision failed to evaluate fair use properly, resulting in a strained application of the doctrine and a contravention of Perfect 10's copyright.[128] Google contributed no new meaning or expression to Perfect 10's original images—it simply displayed the thumbnails and directly enabled users to find full-sized infringing copies.[129] So-called "rights restrictors" view the *Arriba* and *Perfect 10* decisions favorably as a win against greedy content industries who attempt to control access to digital content, consequently inhibiting the flow of material to average people.[130] In reality, this viewpoint yields a value shift from creators of new works and their distributors to online facilitators like search engines, thus limiting the reward to actual creators of valuable works and their agents.[131]

Similar to the other cases involving thumbnails, the Bing Widget's thumbnail use seems like flagrant infringement because it supplies for-profit

copyrighted images in their entirety to profit from users choosing to utilize their services. *See id.*; *see also* Brief for American Society of Media Photographers, *supra* note 71, at 14-18 (detailing adverse economic impact on duplicated photographs, highlighting issue of lack of statutory protection).

126. *See* Rogers, *supra* note 20, at 35 (analyzing *Arriba* decision's negative aspects). The court ignored the negative economic impact Arriba's actions would have on Kelly if he were to enter a thumbnail images market. *See id.* Although the Ninth Circuit's decision suggested otherwise, it is possible users may continue to use or enlarge Kelly's thumbnail-sized images for infringing purposes. *See* Dang, *supra* note 36, at 396 (noting court's reasoning shift from legal analysis to emphasis on stark reality in reaching decision). Lastly, Arriba, motivated by profit, copied Kelly's works in their entirety—a fact courts should strongly weigh against defendants. *See* Staples, *supra* note 90, at 84 (stressing court should have considered Arriba's use and nature of copyrighted work).

127. *See supra* Part II.B (explaining policy objectives of copyright law).

128. *See Perfect 10*, 508 F.3d at 1165-66 (evaluating and accepting Google's fair use defense). The court attempted to adopt the Supreme Court's former reasoning in *Campbell* by analogizing a search engine to a parody—a well accepted fair-use purpose—claiming, "a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work." *Id.* at 1165 (relying on reasoning in *Campbell*). This reasoning, however, misconstrues why the Court in *Campbell* deemed the parody transformative; the Court's underlying justification for fair use was that the parody only "use[d] . . . *some elements of a prior author's* composition to create a new one that, at least in part, comment[ed] on that author's works." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994) (emphasis added). This reality calls into question whether Google's wholesale copying and display of thumbnails is genuinely a transformative, new work. *See Perfect 10*, 508 F.3d at 1159-60.

129. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1155-56 (9th Cir. 2007) (describing Google's image use).

130. *See* Nimmer, *supra* note 49, at 839-40 (describing different copyright theories).

131. *See id.* at 843 (revealing massively wealthy search engine companies' strong support of "rights restrictor" position). The *Perfect 10* decision, which did not protect thumbnail images, is at odds with copyright law's purposes of motivating authors and fostering creativity by preserving their ability to benefit individually and monetarily. *See Perfect 10*, 508 F.3d at 1163.

websites with images that would otherwise require a license for use.[132] If the *Getty* case had not settled, the court should have considered whether Microsoft's use of Getty's images qualified as fair use in light of the website's commercial nature, its lack of transformativeness, and the importance of enforcing strong copyright protections.[133]

B. Digitization in Original Contours

1. Should Digital Images Fall Within Traditional Copyright Protection?

Under copyright law's traditional framework, a digital image likely does not qualify as an *original* work of authorship.[134] Digitized images embody a plethora of different types of art, and can exist for periods of time long enough to be copyrightable; however, their lack of originality is problematic.[135] By digitizing an image, such as a photograph, the digitizer creates an almost identical replica, thus causing the resulting image to fail in meeting the requisite level of originality for copyright protection.[136] Copyright law's highest degree of protection, therefore, remains unavailable to digital image owners, like Getty, who offer solely digital content and in turn are subject to greater risk of online infringement.[137] To thwart infringement, some digital image owners proclaim they possess valid copyrights in the work despite close similarity to the original, nondigital work.[138]

Not only do digital images not likely meet the originality standard, but they also likely do not qualify as a derivative work under the substantial,

132. *See* Kravtsoff, *supra* note 88 (debating whether thumbnail use in *Getty* case constituted fair use); *see also supra* note 30 and accompanying text (describing infringement).

133. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (holding commercial use weighs against fair-use defense); Brief for American Society of Media Photographers, *supra* note 71, at 18 (indicating courts should not consider thumbnails transformative); Nimmer, *supra* note 49, at 877-79 (advocating for strong copyright protections).

134. *See supra* notes 27-28 and accompanying text (explaining meaning of original works). Although digital images exist in a tangible medium of expression and do not constitute facts or ideas, they still do not contain sufficient originality to warrant copyright protection. *See id.*

135. *See supra* notes 28-29 and accompanying text (explaining copyright requirements).

136. *See* Kramarsky, *supra* note 117, at 4-5 (describing digital capability of infinite number of exact copies). Digitizing an analog work creates an indistinguishable copy of the original. *See id.* at 4. Additionally, after a digitized image exists, it can be copied continually without loss of quality. *See id.* at 4-5.

137. *See supra* note 39 and accompanying text (noting copyright law affords greater protection to certain classes of works).

138. *See* Appel, *supra* note 47, at 222 (claiming copyright in digital works despite lack of actual legal authority); Cameron, *supra* note 40, at 49 (noting Bridgeman Art Library website claims copyright in public domain images despite uncopyrightability). Cameron observes that Bridgeman and other museums, like New York's Metropolitan Museum of Art, assert copyright claims for every image on their websites, which may be in effort to spur deterrence. *See* Cameron, *supra* note 40, at 51-52; *see also* Butler, *supra* note 43, at 122 (recognizing artwork digitizers may start to claim originality based on level of digitalization skill). Despite the claim that digitalization amounts to originality, digitally created reproductions, like scanning, resemble copy photography, and thus likely fall outside the protection of traditional copyright. *See* Butler, *supra* note 43, at 123.

distinguishable variation test.[139] The conundrum presented by digital images is almost identical to that considered in the *Bridgeman* case, where the court reaffirmed that changing a copyrighted work's medium does not make it a derivative work.[140] Consequently, judicial precedent suggests the law should not warrant copyright protection for digitized images under the category of derivative works.[141]

2. Recommending Protection: Extending Statutory Copyright to Include Digitized Images

Congress possesses both the willingness and authority to expand the boundaries of copyright law, and they should do just that.[142] Digitization of previously tangible works challenges the traditional boundaries of copyright law and merits a new form of protection.[143] Similar to the widespread infringement of sound recordings and photographs, Congress should again recognize the vulnerability of online digital images and enact legislation to create heightened protection for these works.[144]

139. *See supra* note 40 and accompanying text (describing more limited copyright protection for derivative works).

140. *See supra* note 42 (examining *Bridgeman* holding). In *Bridgeman*, the museum attempted to claim copyright protection for exact photographic reproductions of public domain works. *See* Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 423-24 (S.D.N.Y. 1998). Similar to these photographic reproductions, digital images do not possess originality or a distinguishable variation that justifies copyright protection. *See* Butler, *supra* note 43, at 124 (noting technical knowledge and skill required for digitization copyright).

141. *See* Cameron, *supra* note 40, at 46-48 (emphasizing no originality and no distinguishable variation means no valid copyright); *see also* Bongiorno, *supra* note 12, pt. III § D. ii (noting lack of unequivocal copyright protection standards surrounding digital images). Bongiorno comments on the importance of a judicial obligation to create a solidified legal foundation that recognizes the difficulty authors face in protecting their works online. *See* Bongiorno, *supra* note 12, pt. III § D. ii.

142. *See* Appel, *supra* note 47, at 156-57 (stating congressional powers related to intellectual property rights). The U.S. Constitution directly authorizes Congress to legislate copyright protection. U.S. CONST. art. I, §8, cl. 8. Historically, Congress has willingly utilized this power to expand copyright protection to new technological improvements. *See supra* Part II.C (outlining Congress's historical involvement with implementing copyright protections).

143. *See* Bongiorno, *supra* note 12, pt. III § D. ii. a. (stating difficulties of protecting digital online images). Courts may continue to refrain from extending protection to digital images in the absence of further legislative guidelines. *See id.* The decisions of *Arriba* and *Perfect 10* laid the foundation for curtailing the rights of copyright holders as to online digital images, and in effect, granted new privileges to infringers who can simply copy an artist and outrace them in the online market. *See id.* at pt. III § D. (describing implications of digital image case law).

144. *See supra* Part II.C (discussing congressional and judicial copyright extensions to expand protection to new technologies). The common activities of an Internet user, including downloading, uploading, and forwarding material, all technically constitute copyright infringement absent the copyright owner's authorization. *See* Litman, *supra* note 7, at 1898. The Internet enables pervasive copying of material without boundaries or expense to the infringer, and results in owners losing both control over their works, as well as the incentive to innovate. *See* Pever, *supra* note 113, at 113. Low risk of the copier's legal culpability likely reinforces infringing behavior without consequence. *See Comments on Remedies*, *supra* note 19 (noting content providers avoid litigation due to costliness).

If Congress adopted a *sui generis* system of copyright protection for digital images, it would offer another layer of protection to authors and content providers, thereby helping prevent infringement by those who are unsympathetic to copyright owners' rights.[145] Currently, digital copyright owners rely heavily on the display right and reproduction right in an attempt to prove infringement of their work online.[146] As previously noted, these copyright holders lose on reproduction and display right theories because courts tend to hold that the defendants sufficiently transformed their work, which qualifies the defendants' appropriation as fair use.[147] Including digital images as perambulatory works under the 1976 Copyright Act would open up a new theory of derivative work infringement for digital copyright holders.[148] For example, if Perfect 10's digital images had been copyrighted it could have argued that Google's infringement violated its derivative work right because Google did not adapt the original work into a new, distinguishable, copyrightable variation.[149]

Additionally, enabling digital-image plaintiffs to bring derivative infringement actions would help these plaintiffs combat any fair use defenses.[150] Not only has Congress historically extended copyright protection

145. *See* Srikantiah, *supra* note 69, at 1643 (discussing authors' need to feel their work receives online protection). Robust intellectual property protection is especially important because of the substantial effort, cost, and time involved in creating new works or collecting and promoting them. *See* Nimmer, *supra* note 49, at 842. While prevailing technology facilitates creating and distributing new works, it also makes it more challenging for copyright holders to enforce their rights. *See id*.; *see also supra* note 19 and accompanying text (recommending preambulatory inclusion of digital images).

146. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003) (stating copyright holder suing for infringement of display right and reproduction right); Amended Complaint at 38, Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006) (No. CV 04-9484), 2005 WL 4705032 (noting plaintiff alleging infringement of display and reproduction right).

147. *See Arriba*, 336 F.3d at 822 (ruling against plaintiff based on fair use defense); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (stating Google's transformative use and other factors weigh in favor of fair use).

148. *See supra* notes 37-45 and accompanying text (explaining copyrightable derivatives). Fair use should arguably not extend to uses that encompass whole-sale appropriation of digital images for profit. *See* Getty Complaint, *supra* note 19, at 3. Listing digital images as enumerated protected subject matter under 17 U.S.C. § 102 would arm copyright holders with a legal avenue to more easily pursue and prove derivative work infringement actions. *See* 17 U.S.C. § 103 (2012); *supra* note 37 (defining derivative work right infringement).

149. *See* H.R. REP. NO. 94-1476, at 62 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5675 (describing derivative work right infringement); *see also* 17 U.S.C. § 103 (declaring derivatives must include copyrightable variation); Keller, *supra* note 15, at 183 (noting copyright owner must first prove ownership before proceeding with infringement claim).

150. *See Perfect 10*, 508 F.3d at 1168 (detailing fair use doctrine); *Arriba*, 336 F.3d at 819-20 (addressing fair use); *supra* note 43 and accompanying text (noting derivative must add copyrightable material to avoid infringing original copyright). It is crucial to note that any new online infringer would have greater difficulty proving fair use because they would be utilizing copyrighted digital images online for economic gain, which is the exact type of derivative marketplace courts are concerned about protecting for original creators. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556-57 (1985) (exclaiming effect on original creators' commercial marketplace most important factor weighing against fair use); *supra* note 44 and accompanying text (emphasizing judicial concern about protecting licensing of derivative works).

to new technologies, but doing so for digitized images furthers the policy goals of copyright law.[151] In a digital, globalized society, where direct infringement occurs millions of times every second, it is critical to grant digital image providers a new defense mechanism against infringement.[152]

IV. CONCLUSION

The constant tension between technological advances and now-obsolete copyright law has jeopardized the law's inherent policy goals. There is also tension between artists, photographers, and content providers, who continuously battle for control over their creative outputs with online facilitators. The advocates for online-free access overlook the fact that copyright owners require compensation to pursue additional creative endeavors.

Our society expects everything online for free, and to some extent, unrestricted content is vital to flourishing cultural commons—however, a balance is necessary. Search engines and other online facilitators hide behind the respectable goal of a cultivated commons, all the while earning billions of dollars in profit off others' creative efforts. This practice undermines copyright law's core principles and masks the value shift between copyright holders and search engines. Without additional congressional and judicial support, copyright protection for digital images will likely continue to be overlooked, prolonging the concerns of copyright holders everywhere.

Kris McMahon

151. *See supra* Part II.B (discussing rationales and incentives of copyright law). Because large distributors, like Getty, often own copyrights and protect authors, copyright laws should ensure protection for these corporations and the authors they represent to incentivize online publication of new works. *See id.* Enhancing rights are reasonable, and perhaps necessary, for encouraging and supporting innovation, which requires substantial commitments of time and money. *See* Nimmer, *supra* note 49, at 844 (noting higher artistic quality in works coincides with greater authorial protection). In a digital world, granting Internet users vast and unchecked freedom to make and distribute copies undermines the spirit of copyright law and runs contrary to intellectual property law's goals. *See id.*

152. *See* Nimmer, *supra* note 49, at 879 (arguing for enhanced online copyright enforceability); Murai, *supra* note 30, at 292 (stating succeeding on infringement claim requires valid copyright showing). Facing the relentless and fast-paced improvements of technological distribution, "no silver bullet" exists that will stabilize copyright law for the Internet, however, a framework with appropriate legal recourse and content-provider protection is a step in the right direction. *See* Nimmer, *supra* note 49, at 879.