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.”

I. INTRODUCTION

Congress continually adjusts copyright law to correspond with the advent of new technologies, such as the World Wide Web. 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. 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.” 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.

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.
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.
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

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\(^6\) 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).


\(^9\) 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. Digital images arguably do not meet the standard originality requirements for original works of authorship or derivative works. 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.

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. 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.
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”).


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).

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

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. 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. Part III further examines whether digital images fall within traditional copyright law, and recommends extending copyright protection to digital images. Finally, Part IV of this Note concludes that Congress must develop a new approach for handling the infringement of digital images.

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. First, the author must contribute some modicum of originality to the work. 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.” Next, if deemed


21. See infra Part II.

22. See infra Part III.

23. See id.

24. See infra Part IV.


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.


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.


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. Conversely, derivative works, which merely add copyrightable variation to preexisting works, merit only minimal protection.

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. 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.” 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. 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. INT’L 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.


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 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.\textsuperscript{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.\textsuperscript{45}

The public domain collectively consists of artistic material universally available for reproduction, adaptation, performance, distribution, or display.\textsuperscript{46} Copyright law considers broad public domain conservation fundamental to inspire authorial innovation, ingenuity, and democratic involvement.\textsuperscript{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.\textsuperscript{48} Thus, a public domain with wide-scale distribution and access furthers copyright law’s policy goal of promoting innovation.\textsuperscript{49}

\section*{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

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\item See Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1219 (9th Cir. 1997) (rejecting plaintiff-proposed test excluding consideration of rights of copyright holder). The \textit{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. \textit{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. \textit{See id.} at 1219-20.
\item See L. Batlin & Son, 536 F.2d at 492 (declining to uphold copyright in trivial variation of public domain art). \textit{L. Batlin & Son Inc. v. Snyder} recognized granting copyrights for diminutive alterations would create a tool for plagiarists to appropriate public domain works. \textit{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).}
\item 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. \textit{See Cooper, supra note 12, at 3 n.14.} The public domain consists of a common space where all uncopyrighted and uncopyrightable works exist. \textit{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).}
\item 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. \textit{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).}
\item 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. \textit{See id.}
\item 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. \textit{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. \textit{See id.}
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may recoup their monetary investment in creating their original works.\textsuperscript{50} In addition to authors, distributors rely on copyright protection against infringement because they themselves control copyrights and engage in copyright litigation.\textsuperscript{51} Further, the Intellectual Property Clause presupposes that the creation of new works promotes progress, thereby serving the greater public good.\textsuperscript{52} In \textit{Eldred v. Ashcroft},\textsuperscript{53} the Supreme Court acknowledged this overarching goal through its emphasis on rewarding authors’ creative endeavors and enabling the public to access those endeavors.\textsuperscript{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.\textsuperscript{55}

Two theories have emerged for copyright protection: the utilitarian theory

\textsuperscript{50} See Cohen \textit{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. \textit{See id.} at 6-7. Congress based U.S. copyright on a bargain between creators of works and the public. \textit{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. \textit{See id.} Authors are not the only parties in need of protection, however; more often, the content distributors require protection from copyright law. \textit{See Authorship Policy, supra note 14, at 335.}


\textsuperscript{52} See Howard B. Abrams, \textit{THE LAW OF COPYRIGHT § 1:3} (2014) (assuming incentivizing authors to create serves copyright’s constitutional mission); \textit{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. \textit{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”).}

\textsuperscript{53} 537 U.S. 186 (2003).

\textsuperscript{54} \textit{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. \textit{See id.} at 227. Copyright law grants a “marketable right” for authors and distributors of copyrighted works. \textit{See Cohen \textit{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. \textit{See id.} at 6-7 (demonstrating authors’ and public’s interest in copyright protection).

\textsuperscript{55} \textit{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. The utilitarian theory is predominant in United States copyright law. 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.

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. American copyright law derives from the English statutory copyright, known as the Statute of Anne. 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. 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. Publishers and booksellers lobbied to enact this law, reasoning copyright protection would benefit the public and encourage learning. Parliament embraced this philosophy by granting authors a limited statutory right of two, fourteen-year periods. Since this decision, copyright law continually reacts to encompass the most recent technological inventions.

The language of the Intellectual Property Clause and the Copyright Act of 1790 embraces the notion that copyright law should foster learning. 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. 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). Historically, copyright law has responded to
technological advancements that reduced overall reproduction costs. Without broadening the scope of copyright law to account for new technologies, the infringement of original works would stifle the incentive to create.

In Burrow-Giles, the defendant reproduced, marketed, and sold 85,000 copies of the plaintiff’s picture, Oscar Wilde No. 18. Sarony claimed that Burrow-Giles violated the copyright in his photograph by reproducing his work. 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. 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.”

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).


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. 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. This case exemplifies the willingness to expand copyright protection to new mediums of technology.

Sound recordings illustrate another instance in which copyright law adapted to embrace technological advancements. Initially, courts held that works only warranted copyright protection if people could visually perceive and understand the work. In *White-Smith Music Publishing Co. v. Apollo Co.*, 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.”

One year after the *White-Smith* decision, Congress embraced this definition of a “copy” in the 1909 Copyright Act. By adopting *White-Smith*’s definition, Congress effectively excluded copyright protection for later audio technologies, like sound recordings. 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.

The unprecedented sound recording piracy incidents eventually led to

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

D. Digital 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. 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. 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. 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).
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.
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 providers could face liability for actual transmitting protected content).
personal website, in addition to licensing them to other websites.\textsuperscript{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.\textsuperscript{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.\textsuperscript{93} The Ninth Circuit upheld this ruling, leaving Kelly with no legal recourse for the unauthorized display of his photos online.\textsuperscript{94}

The problem of unauthorized copying and displaying of digital images arose again in \textit{Perfect 10, Inc. v. Google, Inc.}\textsuperscript{95} Perfect 10, a subscription-based website, markets and sells copyrighted pictures of nude models.\textsuperscript{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.\textsuperscript{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.\textsuperscript{98} Similar to \textit{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.\textsuperscript{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.\textsuperscript{100} The court believed

\begin{itemize}
\item \textsuperscript{91} See \textit{Arriba}, 336 F.3d at 816.
\item \textsuperscript{92} See id. (describing events leading to current action).
\item \textsuperscript{93} See \textit{id.} at 817 (stating lower court agreed Arriba’s thumbnail use constituted fair use); see also Samuelson, \textit{supra} note 16, at 2539 (describing fair use doctrine used to counter copyright infringement claims).
\item \textsuperscript{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).
\item \textsuperscript{95} See 416 F. Supp. 2d 828, 833 n.4 (C.D. Cal. 2006), \textit{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 \textit{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).
\item \textsuperscript{96} See \textit{Perfect 10}, 508 F.3d at 1157 (describing Perfect 10’s website arrangement).
\item \textsuperscript{97} See id. (detailing process by which Google provides images in response to user inquiries).
\item \textsuperscript{98} See \textit{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 \textit{Perfect 10}, 416 F. Supp. 28 at 833 n.4 (describing thumbnails’ expansive capacities in lower court case).
\item \textsuperscript{99} See \textit{Perfect 10}, 508 F.3d at 1156 (comparing in-line linking process in \textit{Perfect 10} to that used in \textit{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 \textit{id.} at 1155-56.
\item \textsuperscript{100} See \textit{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 \textit{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 \textit{id.} at 1155. Indeed, Perfect 10 had already exploited the thumbnail-sized image market through a licensing agreement with Fonesterz Media Limited, a company that
\end{itemize}
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.\textsuperscript{101} Like Kelly in \textit{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.\textsuperscript{102}

Following \textit{Arriba} and \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{105} Getty derives its primary income from licensing its content online.\textsuperscript{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.\textsuperscript{107} Getty’s business model and mission to make digital works available

\textsuperscript{101} See \textit{Perfect 10, Inc. v. Amazon.com, Inc.}, 508 F.3d 1146, 1165 (9th Cir. 2006) (analyzing purpose and character of Google’s thumbnail use).

\textsuperscript{102} See \textit{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. \textit{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).

\textsuperscript{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. \textit{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).

\textsuperscript{104} See Getty Complaint, supra note 19, at 10.

\textsuperscript{105} See \textit{id.} at 11 (describing Getty’s business model). “Getty Images owns or represents more than 80 million unique works of digital imagery.” \textit{id}. The authors Getty represents rely on Getty for the distribution of their works and royalty payments. \textit{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. \textit{See James Estrin, Giving Away Photos to Make a Profit, N.Y. TIMES (Aug. 27, 2014), http://kens.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).

\textsuperscript{106} See Getty Complaint, supra note 19, at 4 (describing importance of licensing images to Getty’s income derivation).

\textsuperscript{107} See \textit{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).
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.\textsuperscript{116} 

Copyright law attempts to address digital copyright infringement through various forms of legislation.\textsuperscript{117} In 1998, Congress passed the DMCA to protect proprietors and authors against anti-circumvention techniques and devices.\textsuperscript{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).\textsuperscript{119} Representatives created these
acts to address foreign sites, such as Pirate Bay, that hosted unauthorized content and facilitated infringement.\footnote{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.\footnote{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.\footnote{122} As a result, copyrighted digital images remain at the center of litigation and daily unauthorized use.\footnote{123}

III. ANALYSIS

A. Examining Digital Images Cases

The final decision in \textit{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.\footnote{124} It is unlikely that Congress intended the fair use doctrine to shelter for-profit corporations that annex and display others’ copyrighted works.\footnote{125} In choosing not to protect

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


\footnote{124} \textit{See} Arriba, 336 F.3d at 819-20 (holding exact duplicates “transformative” because used for different purpose).

\footnote{125} \textit{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. \textit{See} id.
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).


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.*


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. 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.

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. 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. 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. 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. To thwart infringement, some digital image owners proclaim they possess valid copyrights in the work despite close similarity to the original, nondigital work.

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).


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 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 uncopiablebility). 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 digitization skill). Despite the claim that digitization 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.
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. Consequently, judicial precedent suggests the law should not warrant copyright protection for digitized images under the category of derivative works.

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. Digitization of previously tangible works challenges the traditional boundaries of copyright law and merits a new form of protection. 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.

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. Currently, digital copyright owners rely heavily on the display right and reproduction right in an attempt to prove infringement of their work online. 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. 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. 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.

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