

## Preliminary Thoughts on Copyright Reform

by  
Pamela Samuelson\*

Myriad reasons can be proffered for undertaking a copyright reform project. For one thing, the current U.S. copyright law is way too long, now weighing at approximately two hundred pages long.<sup>1</sup> The statute is also far too complex, incomprehensible to a significant degree, and imbalanced in important ways.<sup>2</sup> It lacks, moreover, normative heft. That is, the normative rationales for granting authors some protections for their works and for limiting the scope of that protection are difficult to extract from the turgid prose of its many exceptionally detailed provisions.<sup>3</sup>

The drafters of the Copyright Act of 1976 intended it to be flexible and adaptable as new technologies enabled the creation of new kinds of works.<sup>4</sup> Thirty years of experience with the 1976 Act has shown that this was an overly optimistic hope. The only new subject matters added to the copyright law since 1976 have arrived through statutory amendments, not through common law interpretation of the 1976 Act's broad statutory subject matter provision.<sup>5</sup> Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.

Google, Inc., for example, has been at the center of several challenging cases. Some writers and publishers have sued Google because it is scanning the texts of thousands of books, including books still in copyright, obtained from university libraries in order to prepare indices of their contents so that snippets can be made available to

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\* Richard M. Sherman Distinguished Professor of Law and Information, University of California at Berkeley. This paper builds on the insights of many thoughtful commentators on copyright law and policy, including (but certainly not limited to) Yochai Benkler, James Boyle, Michael Carroll, Julie E. Cohen, Rochelle Cooper Dreyfuss, Terry Fisher, Peter Jaszi, Lawrence Lessig, Jessica Litman, Joseph Liu, Lydia Loren, Mark Lemley, Tony Reese, Jerry Reichman, and Christopher Sprigman.

<sup>1</sup> See, e.g., *SELECTED INTELLECTUAL PROPERTY AND UNFAIR COMPETITION STATUTES, REGULATIONS, AND TREATIES* (Roger E. Schechter, ed. 2006) (cited hereinafter as "Selected Statutes"). The Copyright Act of 1976 runs from pp. 259-433, the criminal copyright 434-42, and the anti-circumvention provisions from 466-81. Three other copyright-like acts have been incorporated in Title 17 of the U.S. Code, including the Semiconductor Chip Protection Act, 17 U.S.C. sec. 901 et seq., the Audio Home Recording Act, 17 U.S.C. sec. 901 et seq., and the Vessel Hull Protection Act, 17 U.S.C. sec. 1301 et seq. The Copyright Act of 1909, by contrast, is approximately twenty-five pages in length. See *Selected Statutes*, supra, at 235-58.

<sup>2</sup> See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* (2000).

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

<sup>4</sup> Pub. L. No. 94-553, 90 Stat. 2541 (1976); H.R. Rep. No. 94-1476 at 51, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5664.

<sup>5</sup> Pub. L. No. 101-650 (1990) (adding architectural works to the subject matter of copyright); H.R. Rep. No. 1307, 96<sup>th</sup> Cong., 2d Sess. 23, reprinted in 1980 U.S.C.C.A.N. 6460, 6482 (noting that the 1980 amendments implemented recommendations of the National Commission on New Technological Uses of Copyrighted Works as to copyright protection for computer programs). See also *infra* note xx.

researchers making pertinent queries.<sup>6</sup> On the one hand, the scanning of books seems like a prima facie violation of the exclusive right to reproduce works in copies; on the other hand, this scanning was necessary to prepare the indices, Google only makes snippets from the books available in response to queries, and authors benefit when more readers know about their works.<sup>7</sup>

Google has also been sued for copyright infringement because, unbeknownst to it, some infringing copies of photographs on other firms' servers have been made accessible to users of its search engine. Because Google does not maintain copies of full-size images on its servers and because it has not acted in league with infringers, one can argue, as Google has, that it should not be treated as a direct or contributory infringer.<sup>8</sup> On the other hand, it is hard to say that the infringing images are not publicly displayed on users' computer screens when they pop up in response to a Google search request, and Google does provide reduced-sized images of the photographs when they are responsive to search requests.<sup>9</sup>

Google and its popular subsidiary, YouTube, have also been sued for copyright infringement because YouTube makes available to millions of users copies of videos of copyrighted works, including television programs and remixes of motion pictures, that users uploaded to the YouTube site. Google argues that it qualifies for a statutory safe harbor from liability as long as it takes down infringing materials after receiving notice from the relevant copyright owners; Viacom argues that infringements of its copyrights are so rampant on YouTube that Google has a duty to be more proactive in averting infringement by deployment of filtering technologies.<sup>10</sup>

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

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<sup>6</sup> McGraw-Hill Co. v. Google, Inc., No. 05 CV 8881 (S.D.N.Y., filed Oct. 19, 2005); The Authors' Guild v. Google, Inc., No. 05 CV 8136 (S.D.N.Y., filed Sept. 20, 2005). For a Congressional Research Service report on this litigation, see Robin Jeweler, *The Google Book Search Project: Is Online Indexing a Fair Use Under Copyright Law?*, available at [http://openers.com/rpts/RS22356\\_20051228.pdf](http://openers.com/rpts/RS22356_20051228.pdf)

<sup>7</sup> See, e.g., Jonathan Band, *The Google Print Library Project: A Copyright Analysis*, available at <http://www.policybandwidth.com/doc/googleprint.pdf>.

<sup>8</sup> See *Perfect 10 v. Google, Inc.*, 416 F.Supp.3d 828 (C.D. Cal. 2006)(dismissing some claims, but upholding one claim of infringement). This ruling is on appeal to the Ninth Circuit Court of Appeals.

<sup>9</sup> *Id.* at 838-51 (finding infringement of public display right). Google had sought shelter under a Ninth Circuit ruling, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9<sup>th</sup> Cir. 2003), which had held in favor of a search engine that made reduced sized images of photographs available to users.

<sup>10</sup> See *Complaint for Declaratory and Injunctive Relief and Damages, Viacom Int'l, Inc. v. YouTube, Inc.*, available at <http://wendy.seltzer.org/media/ViacomYouTubeComplaint3-12-07.pdf>.

The 1976 Act has been amended more than twenty times since 1976.<sup>11</sup> As a result of these many amendments to its text, the 1976 Act has become an amalgam of inter- and intra-industry negotiated compromises.<sup>12</sup> As a consequence, it has become a hodgepodge law. Although Congress has occasionally given the Copyright Office rule-making authority,<sup>13</sup> most of the controversial issues have been left for the Congress or the courts to resolve. This has given rise to serious public choice problems with the copyright law and policy making process.<sup>14</sup> The copyright industries have become accustomed to drafting legislation that suits their perceived needs and to having that legislation adopted without careful scrutiny.<sup>15</sup>

The '76 Act is, moreover, the intellectual work product of a copyright reform process that was initiated in the late 1950's.<sup>16</sup> This legislation was written without giving serious thought to how it would apply to computers, computer programs, or computer networks. When questions began to arise in the early to mid-1960's about the implications of computers for copyright, the Register of Copyrights, more or less, threw up his hands about how to address them.<sup>17</sup> In the course of a 1965 hearing, for example, he stated that "it would be a mistake, in trying to deal with such a new and evolving field as that of computer technology to include an explicit provision [on computer-related uses] that could later turn out to be too broad or too narrow."<sup>18</sup> Technology developers, educational institutions and libraries were understandably not pleased at the prospect of

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<sup>11</sup> See, e.g., JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 28-29 (2d Ed. 2006).

<sup>12</sup> See, e.g., Litman, *supra* note 2, at 35-69 (discussing the history of copyright negotiated compromises).

<sup>13</sup> See, e.g., 17 U.S.C. sec. 1201(a)(1)(B)-(D).

<sup>14</sup> See, e.g., William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 *Notre Dame L. Rev.* 907 (1997).

<sup>15</sup> See, e.g., Litman, *supra* note 2, at 22-32.

<sup>16</sup> The first six years of the copyright statutory revision process that led to enactment of the 1976 Act (i.e., from 1955 to 1961) were largely spent on commissioning studies on various revision-related issues. See, e.g., S. COMM. ON THE JUDICIARY, 86TH CONG., *COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, STUDIES 1-4* (Comm. Print 1960). [hereinafter *COPYRIGHT LAW REVISION STUDIES NOS. 1-4*]. The studies can be found in 1 & 2 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* (George S. Grossman ed., 1976) [hereinafter *OMNIBUS LEGISLATIVE HISTORY*]. Professor Walter Derenberg of New York University Law School submitted one such study to the Office in 1956. See *STAFF MEMBERS OF THE NEW YORK UNIVERSITY LAW REVIEW UNDER THE GUIDANCE OF WALTER J. DERENBERG, STUDY NO. 3: THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION* (1956), reprinted in *COPYRIGHT LAW REVISION STUDIES NOS. 1-4, supra*, at 61, and in 1 *OMNIBUS LEGISLATIVE HISTORY, supra*, at 61. This study was originally published as Stephen Lichtenstein et al., Note, *Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 *N.Y.U. L. REV.* 1263 (1956).

<sup>17</sup> In the mid-1960's, the Copyright Office, for instance, decided to allow computer programs to be registered as original works of authorship, but only under its so-called "rule of doubt." That is, program authors could obtain registration certificates, but would have to persuade courts that their works were actually copyrightable subject matter, thereby overriding the Office's doubts. See *COPYRIGHT OFFICE CIRCULAR 31D* (Jan. 1965), reprinted in Duncan M. Davidson, *Protecting Computer Software: A Comprehensive Analysis*, 1983 *ARIZ. ST. L.J.* 611, 652 n.72.

<sup>18</sup> See H. COMM. ON THE JUDICIARY, 89TH CONG., *COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL*, at 18-19 (Comm. Print 1965), reprinted in 4 *OMNIBUS LEGISLATIVE HISTORY, supra* note xx, at 18-19.

having to resolve foreseeable disputes over these questions through litigation based on a statute that was intentionally not clarified to deal with them.<sup>19</sup> Because of the intense controversy over the new technology questions, consequently, the copyright revision process was stalled for most of the next decade while various stakeholders debated how the revised law should handle the computer and other new technology issues.<sup>20</sup>

To break this logjam and move copyright revision forward, Congress ultimately decided in 1974 to spin off the challenging new technology copyright issues to a newly created Commission, asking it to report back whether the law should be amended to address the controversial new technology questions.<sup>21</sup> Professor Benjamin Kaplan presciently warned that the copyright act then under consideration would not be up to the task of adequately addressing these questions by a few amendments here and there which a commission might recommend. He suggested that the revision bill should be rethought from scratch to take these new technologies into account.<sup>22</sup> Congress and other actors in the copyright revision process were by then already weary of a revision process that seemed to be endless and in no mood to rethink how these technologies should change the contours of the law. So the '76 Act was passed with a 1950's/1960's mentality built into it, just at a time when computer and communication technology advances were about to start the most challenging and vexing copyright questions ever.

It was, in truth, too early in the evolution of these technologies for the Congressional Commission, anyone in Congress, or the copyright policymaking community to figure out how to adapt copyright law to meet and withstand these challenges. Might it have been preferable to stick with the 1909 Act instead of enacting a law in 1976 that was already unsuited to the new technology challenges of the day? There is reason to think that the public as a whole would have been better off under the rubric of the '09 Act, not the least because so many more works would be in the public domain and available for free reuse and creative remixes; I suspect, moreover, that U.S. copyright industries would have fared just fine had the legislative stasis over new technology issues continued for another few decades.

The '76 Act was also drafted in an era when it mainly regulated the copyright industries and left alone the acts of ordinary people and non-copyright industries who might interact with copyrighted works. The copyright industries had negotiated many of the fine details of the statute and knew what they meant, even if no one else did.<sup>23</sup> Advances in digital technologies have, among other things, democratized the creation and dissemination of new works of authorship and brought ordinary persons into the

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<sup>19</sup> I tell some part of this story in Part II of Pamela Samuelson, *Why Copyright Excludes Systems and Processes From the Scope of Its Protection*, 85 *Tex. L. Rev.* (forthcoming 2007).

<sup>20</sup> See NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT (1979)(relating this history).

<sup>21</sup> *Id.*

<sup>22</sup> *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 571-73 (1967) [hereinafter *1967 Senate Hearings*] (statement of Benjamin Kaplan), reprinted in 9 *OMNIBUS LEGISLATIVE HISTORY*, *supra* note xx, at 571-73.

<sup>23</sup> Litman, *supra* note 2, at 36-37.

copyright realm not only as creators but also as users of others' works.<sup>24</sup> One reason why a simpler more copyright law is needed is to provide a comprehensible normative framework for all of us who create, use, and disseminate works of authorship.

Thirty years after enactment of the '76 Act, with the benefit of considerable experience with computer and other advanced technologies and the rise of amateur creators, it may finally be possible to think through in a more comprehensive way how to adapt copyright to digital networked environments as well as how to maintain its integrity as to existing industry products and services that do not exist outside of the digital realm. If one considers, as I do, that the 1976 Act was the product of 1950/1960's thinking, then a copyright reform process should be well underway, for copyright revision projects have occurred roughly every 40 years in the U.S.<sup>25</sup> A copyright reform project would, moreover, take years of careful thought, analysis, and drafting, and would then face the daunting challenge of persuading legislators to enact it. Viewed in this light, time's a-wasting, and someone should get on with it.

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

Perhaps the most important reason copyright reform is infeasible is that the U.S. Congress has a lot of other challenges to deal with in the next decade, including the Iraq war, global warming, immigration reform, tax policy reform, just to name a few. In the grand scheme of things, copyright law just isn't very important. U.S. copyright industries have, moreover, largely prospered under the rubric of the 1976 Act.<sup>26</sup> It may be a flawed statute, but it is not so flawed that it is completely dysfunctional for the industries which it principally regulates. Copyright industry players and the copyright bar, furthermore, may well prefer the devil they know to the devil that might emerge from a copyright reform project. Hundreds of thousands, if not millions, of licenses have been negotiated in light of the contours of the 1976 Act. Those with the most clout in the copyright legislative process are unlikely to perceive the present copyright law as imbalanced in their favor, and would almost certainly resist with vigor attempts to recalibrate the copyright balance in a way that might jeopardize the advantages that the present statute provides them.

A copyright reform project focused on revision of the 1976 Act would require a very considerable investment of effort on the part of many people, would cost a good deal of money, and would bring to the surface many highly contentious issues, such as those that manifested themselves in the legislative struggles that led to the Digital Millennium

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<sup>24</sup> See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>25</sup> See Copyright Office Circular 1a, available at <http://www.copyright.gov/circs/circ1a.html> (first copyright statute enacted in 1790, first revision in 1831, second revision in 1870, and third revision effective in 1909).

<sup>26</sup> STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT*, prepared for the International Intellectual Property Alliance (IIPA), November 2006, available at [www.iipa.com](http://www.iipa.com).

Copyright Act of 1998.<sup>27</sup> Even modest reform efforts, such as one recently undertaken to update library copying privileges now codified in 17 U.S.C. sec. 108, have found it difficult to reach consensus.<sup>28</sup>

The prospects of copyright reform are perhaps so dim that a reasonable person might well think it a fool's errand to contemplate a reform project of any sort. It is, however, worth considering whether it would be a valuable project to draft a model copyright law, along the lines of model law projects that the American Law Institute has frequently promulgated, with interpretive comments and citations to relevant caselaw, or a set of copyright principles that would provide a shorter, simpler, more comprehensible, and more normatively appealing framework for copyright law.<sup>29</sup>

There are several reasons why such a copyright reform project would be worthwhile. First, I believe that many copyright professionals share my view that the current statutory framework is akin to an obese Frankensteinian monster, even if we would not necessarily agree on every detail of the problems with the 1976 Act. At least some copyright professionals would welcome a model law or principles project as a way to restore a positive and more normatively appealing vision of copyright as a "good" law. Implicit in the criticism that many of us level at some aspects of the 1976 Act or at proposals to amend it to further strengthen author's rights or otherwise add another provision on an ad hoc basis is that we have an inchoate vision of a "good" copyright law that a model law or principles project could potentially bring to light.

Second, a model law or principles document could provide a platform from which to launch specific copyright reforms (e.g., amendments to the 1976 Act to address the orphan works problem) or to object to proposed amendments to the 1976 Act that would either further imbalance that statute or contribute further to the clutter from which it currently suffers. In order to say "no" in a more principled way to certain entertainment industry proposals to amend copyright law, it would be helpful to articulate a positive conception of copyright that a model law or principles document might bring to light.

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

Fourth, a model law or principles could stimulate discourse about what a "good" (or at least a better) copyright law might look like. That, in itself, would be valuable. It might also be a potential resource to whoever might undertake in the future a more officially sanctioned copyright law reform project. If history is any guide, the 1976 Act

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<sup>27</sup> See, e.g., Litman, *supra* note 2, at 122-50.

<sup>28</sup> See, e.g., Siva Vaidhyanathan, [article in this volume].

<sup>29</sup> See, e.g., AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) ON THE LAW OF UNFAIR COMPETITION (1993)(articulating principles of trademark and trade secret law with interpretive comments and citations to caselaw).

will come to be seen as due for revision at some point. A model law or principles document could provide an alternative conception of a legal framework that would serve as a contrast to the turgidity of the 1976 Act.

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

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

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

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

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

A model copyright law ought to include, at a minimum, these core elements. While it is too early to say how to change any substantive provisions, it is helpful to illustrate how one might trim down the obesity of copyright law by putting the core components of current copyright into the core IP framework just articulated.

1. subject matter: works of authorship<sup>30</sup>
2. eligibility criteria for specific people and works:
  - a. who is eligible: the author (but special rule for works made for hire)

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<sup>30</sup> 17 U.S.C. sec. 102(a). The constitutional subject matter of copyright is the "writings" of "authors." U.S. Const., Art. I, sec. 8, cl. 8.

- b. qualitative or other standards: original; fixed in a tangible medium; not a useful article
  - c. procedures: rights attach automatically as a matter of law from first fixation in a tangible medium;<sup>31</sup> deposit is required but not as condition of protection;<sup>32</sup> notice and registration are advisable for effective protection;<sup>33</sup> registration necessary for US authors to bring infringement suits<sup>34</sup>
3. exclusive rights: reproduce the work in copies; make derivative works; distribute copies to the public; publicly perform the work; publicly display the work;<sup>35</sup> importation;<sup>36</sup> attribution and integrity rights for works of visual art<sup>37</sup>
  4. duration: life of the author plus 70 years; 95 years from first publication<sup>38</sup>
  5. limitations and/or exceptions to those exclusive rights, including fair use,<sup>39</sup> first sale,<sup>40</sup> certain educational uses,<sup>41</sup> and backup copying of computer programs,<sup>42</sup> among others
  6. infringement standard: infringement occurs when someone violates one of exclusive rights,<sup>43</sup> and the activities do not fall within one of the exceptions or limitations to copyright;<sup>44</sup> usual test applied for non-literal infringements is whether there is substantial similarity in protected expression that the alleged infringer appropriated from the copyright owner<sup>45</sup>
  7. remedies: preliminary and permanent injunctive relief; money damages; destruction of infringing copies; attorney fees; costs; criminal sanctions<sup>46</sup>

If one reflects on experiences with the 1976 Act, it is clear that some parts of the Act have been more successful than others in attaining their stated objectives. Section 102(a), which provides that “[c]opyright subsists...in original works of authorship that have been fixed in a tangible medium of expression,”<sup>47</sup> was thought preferable as compared with its predecessor provisions because it was simpler and believed flexible enough so that the statute would not need to be amended every time a new category of work came into being.<sup>48</sup> The simplicity argument for 102(a) is somewhat belied by the fact that it then goes on to recite eight specific categories of works that copyright

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<sup>31</sup> 17 U.S.C. sec. 102(a).

<sup>32</sup> Id., sec. 407.

<sup>33</sup> Prompt registration enables copyright owners to qualify for awards of statutory damages and attorney fees. Id., sec. 408. Failure to provide adequate notice of infringement affects remedies. Id., sec. 405(b).

<sup>34</sup> Id., sec. 411.

<sup>35</sup> Id., sec. 106.

<sup>36</sup> Id., sec. 601.

<sup>37</sup> Id., sec. 106A.

<sup>38</sup> Id., sec. 302(a) (individual authors), 302(c)(works for hire).

<sup>39</sup> Id., sec. 107.

<sup>40</sup> Id., sec. 109(a).

<sup>41</sup> Id., sec. 110(1)-(2).

<sup>42</sup> Id., sec. 117.

<sup>43</sup> 17 U.S.C. sec. 501(a).

<sup>44</sup> Id., secs. 107-122.

<sup>45</sup> 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.1, 7.3 (2002).

<sup>46</sup> 17 U.S.C. secs. 502-506, 509. See also 18 U.S.C. sec. 2319.

<sup>47</sup> 17 U.S.C. sec. 102(a).

<sup>48</sup> See H.R. Rep. No. 94-1476 at 51, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5664.

protects.<sup>49</sup> The flexibility argument for 102(a) has not been borne out by thirty years of experience with the Act. The only subject matters to be added to the copyright regime in the last thirty years—architectural works and computer programs—were accomplished by statutory amendments.<sup>50</sup>

The Congressional intent underlying a key limitation on the scope of copyright protection now set forth in section 102(b) was to codify the holdings of *Baker v. Selden* and its progeny as to the unprotectability of methods and systems embodied in copyrighted works and to ensure that the scope of copyright protection in computer programs would consequently be “thin” such that only exact or near-exact copying would infringe.<sup>51</sup> This intent has been significantly undermined by the undue deference that courts have sometimes given to an influential treatise which criticized *Baker*, misconstrued its holding and the policies embodied in the decision, and contended that *Baker* merely holds (which it does not) that abstract ideas are excluded from the scope of copyright and reads the other seven words of exclusion out of the statute.<sup>52</sup>

Something akin to 102(b) should be in a model copyright law, but a better provision would make three things clearer: (1) that ideas, concepts, and principles are in the public domain and can never be protected by copyright or any other intellectual property law once they have been revealed to the public; (2) that facts, data, information, and knowledge are similarly excluded from the scope of copyright protection, and as with ideas, these things are in the public domain and incapable of becoming intellectual property once publicly disclosed; and (3) that processes, procedures, systems, methods of operation, functions, and useful discoveries are excluded from the scope of copyright protection, although some may be eligible for patent or other forms of intellectual property protection.<sup>53</sup>

The originality requirement of the '76 Act seems sound to me,<sup>54</sup> particularly since the Supreme Court endorsed the “modicum of creativity” standard for originality.<sup>55</sup> The

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<sup>49</sup> The 1976 Act initially listed the following as qualifying works of authorship: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, sculptural or graphic works, motion pictures and other audiovisual works, and sound recordings.

<sup>50</sup> Architectural works became statutory subject matter of copyright protection as of 1991. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 706, 104 Stat. 5133, 5134 (1990). While there is some evidence that Congress intended for computer programs to be copyrightable subject matter under the 1976 Act, the evidence on this point is somewhat equivocal. See Pamela Samuelson, CONTU Revisited: *The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 727–53 (1984). Only after Congress passed legislation recommended by the National Commission on New Technological Uses of Copyrighted Works (CONTU) was there firm evidence of Congressional intent to protect machine-executable forms of programs by means of copyright law. See National Commission on New Technological Uses of Copyrighted Works, Final Report (1979); Pub. L. No.

<sup>51</sup> See Samuelson, *supra* note xx.

<sup>52</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18 (2006). The Nimmer treatise’s interpretation of *Baker* is criticized at length in Samuelson, *supra* note xx, Part III.

<sup>53</sup> *Id.* at xx (dissecting the exclusions from the scope of copyright law in sec. 102(b) and the policy rationales for these exclusions).

<sup>54</sup> 17 U.S.C. sec. 102(a) (“original works of authorship” qualify for copyright protection).

<sup>55</sup> *Feist Pub., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (white pages listings of telephone directory lacked modicum of creativity necessary to satisfy copyright standards).

fixation requirement has a number of benefits, including the proof it provides that a tangible instance of the work exists and is available for examination and comparison with other works.<sup>56</sup> I also have no quarrel with the idea that authors should be the initial owners of any copyrights that might exist in their works. To avoid transactions costs and avert the risks of fragmentation of rights, it makes sense that employers should own copyrights in certain works that are works for hire, although perhaps more might be done to articulate circumstances in which that rule ought not to apply (e.g., writings of professors).<sup>57</sup> Similar policy considerations may support vesting initial ownership of copyright in specially commissioned works, but this should be done in a more principled way than the 1976 Act does.<sup>58</sup>

More thought needs, however, to be given to “formalities,” such as copyright notice, registration, and deposit.<sup>59</sup> For almost two hundred years, the U.S. limited the availability of copyright protection to works whose authors and/or publishers had sufficient interest in copyright that they took the trouble to comply with some simple rules to give notice to the world about what works were protected and for how long.<sup>60</sup> The presumption was that if a work didn’t have a copyright notice, it was in the public domain and available for free copying and derivative uses. The 1976 Act continued this tradition, although it allowed authors to cure defective notice to some extent.<sup>61</sup> Not until 1988, when the U.S. passed legislation to conform its law to the requirements of the Berne Convention,<sup>62</sup> did U.S. copyright law flip this presumption; now, unless you know for sure that something is in the public domain, you dare not use it, even if you can’t locate the author in order to take a license. This has created a rights-clearance nightmare for any conscientious person who wants to build upon pre-existing works or make them available.<sup>63</sup>

The Copyright Office has proposed legislation to limit remedies for reuse of works whose copyright owner cannot be located after a reasonably diligent effort.<sup>64</sup> This “orphan works” legislation is a step in the right direction, but the problems of too many copyrights and not enough notice of copyright claims and ownership interests run far

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<sup>56</sup> See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 Va. L. Rev. 149 (1992) (discussing fixation as an evidentiary matter).

<sup>57</sup> See, e.g., Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. Chi. L. Rev. 590 (1987).

<sup>58</sup> The 1976 Act names specific categories of works eligible for treatment for the specially commissioned work branch of the work for hire doctrine, rather than articulating criteria for determining which specially commissioned works qualify. See 17 U.S.C. sec. 101(2) (defining “work made for hire” and identifying specific works that qualify).

<sup>59</sup> The notice provisions of U.S. copyright law can be found at 17 U.S.C. sec. 401-06, the deposit provision, at sec. 407, and registration at sec. 408.

<sup>60</sup> See Christopher Sprigman, *(Re)formalizing Copyright*, 57 Stan. L. Rev. 485, 487-88 (2004).

<sup>61</sup> See H.R. Rep. No. 94-1476 at 143-48, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5759-64 (discussing notice requirements and ability to cure under 1976 Act).

<sup>62</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>63</sup> Christopher Sprigman, *Ninth Circuit Rejects Constitutional Challenge to Copyright Laws in Kahle v. Gonzales*, Jan. 23, 2007, <http://www.publicknowledge.org/node/799> (discussing implications of repeal of copyright formalities).

<sup>64</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 127 (Jan. 2006).

deeper than that. With the rise of amateur creators and the availability of digital networked environments as media for dissemination,<sup>65</sup> the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded. Creative Commons has done a useful service in providing a lightweight mechanism for allowing sharing and reuses of amateur creations,<sup>66</sup> but copyright formalities may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years.

The exclusive rights of the 1976 Act may also need some renewed attention. The reproduction right, in particular, has proven particularly vexing. At least one appellate court, interpreting the 1976 Act, has opined that every temporary copy made in the random access memory of a computer triggers the reproduction right.<sup>67</sup> In that case, a computer repair firm was held liable for infringement of computer program copyrights because of RAM copies made when the firm turned on the computer in question to repair it.<sup>68</sup> This was such an outrageously wrong-headed decision that Congress overruled it by amending the statute,<sup>69</sup> but Congress did not at the same time expressly repudiate the dicta that RAM copies infringe unless they have been authorized. It is, of course, impossible to access, use, read, view, or listen to copyrighted works in digital form without making numerous RAM copies of the work.<sup>70</sup> The 1995 Clinton Administration White Paper on Intellectual Property and the National Information Infrastructure took the position that this was and should be the law and sought to inject this rule in the WIPO Copyright Treaty of 1996.<sup>71</sup> This stratagem did not succeed.<sup>72</sup> But the fact remains that the reproduction right needs to be reconsidered in light of post-1976 Act developments and either clarified or more carefully tailored.<sup>73</sup> The derivative work and public display rights may also need some refinement.<sup>74</sup>

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<sup>65</sup> See, e.g., Molly Shaffer van Houweling, *Distributive Values in Copyright Law*, 83 Tex. L. Rev. 135 (2005) (discussing amateur creations disseminated via the Internet).

<sup>66</sup> See <http://creativecommons.org/>. Creative Commons offers a variety of licenses to enable sharing and reuses of copyrighted content. See <http://creativecommons.org/license/>.

<sup>67</sup> *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.3d 511 (9<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1033 (1994).

<sup>68</sup> *Id.* at 519-20.

<sup>69</sup> DMCA, codified at 17 U.S.C. sec. 117(d).

<sup>70</sup> For a thorough discussion of this issue, see, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Ent. L.J.* 29 (1994).

<sup>71</sup> WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 64-66 (Sept. 1995). The effort to include a temporary copy norm in the WIPO Copyright Treaty is related in Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 *Va. J. Int'l L.* 369, 380-92 (1997).

<sup>72</sup> *Id.* at 390.

<sup>73</sup> NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY RIGHTS IN THE INFORMATION AGE 140-45 (2001)(questioning whether the reproduction right is a sound benchmark given the nature of digital information).

<sup>74</sup> The derivative work right should be clarified to resolve certain conflicts in the caselaw about its scope and questions about its applicability in digital networked environments. Compare *Mirage Editions, Inc., v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9<sup>th</sup> Cir. 1988)(framing art print held to infringe derivative work right); *Lee v. A.R.T. Co.*, 125 F.3d 580 (7<sup>th</sup> Cir. 1997)(framing picture held noninfringing); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9<sup>th</sup> Cir. 1992) (taking a narrow view of the derivative work right as applied to add-on software) with *MicroStar v. FormGen, Inc.*, 154 F.3d 1107 (9<sup>th</sup> Cir. 1998) (taking a broad view of the derivative work right as applied to add-ons). There was no counterpart to the

A more general point about the exclusive rights of copyright also needs to be made. Under previous copyright statutes, the exclusive rights were narrowly tailored and generally narrowly construed; moreover, acts that did not fall within the contemplated scope of those exclusive rights were considered to be unregulated and consequently free from copyright constraints.<sup>75</sup> Common law interpretation of copyright also led to the creation of some limitations and exceptions, such as the fair use and the first sale exceptions, as necessary to achieving a balance between rights holder and public interests in copyright law. The 1976 Act, in the guise of simplifying the exclusive rights provision, broadened the rights substantially.<sup>76</sup> It further set forth a considerable number of exceptions and limitations,<sup>77</sup> few of which seem based on normative principles. They seem more to reflect who showed up (and didn't) at the legislative hearings at which carve-outs were up for grabs.<sup>78</sup>

The seeming implication is that if the 1976 Act does not specifically provide an exception for a particular activity that fell within one or more of the broadened exclusive rights, then the activity, no matter how economically trivially, will be deemed illegal unless it can somehow be shoe-horned into the fair use rubric.<sup>79</sup> This broadening of the exclusive rights and the articulation of very detailed and often narrowly tailored exceptions and limitations seemingly meant that the unregulated spaces of copyright shrunk considerably. This flipped another presumption under previous laws. Under predecessor laws, that which was not forbidden was permitted. Under the 1976 Act, only those uses expressly permitted were arguably lawful.<sup>80</sup> As Jessica Litman has recently

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public display right in the 1909 Act, and there has been very little caselaw on what the 1976 Act means by conferring this right on authors. As a consequence, its scope is as yet unclear. For a valiant effort to breathe some normative life into the public display right, see R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 Ill. L. Rev. 83. But see *Perfect 10 v. Google, Inc.*, 416 F. Supp.2d 828 (C.D. Cal. 2006) (search engine held to violate public display right even though infringing information was not on its servers).

<sup>75</sup> See 17 U.S.C. sec. 1 (exclusive rights under 1909 Act)(superseded). Public performances of musical works, for example, were unregulated unless they were "for profit." *Id.*, sec. 1(e).

<sup>76</sup> The 1976 Act, for instance, grants authors a generalized exclusive right to prepare derivative works. See 17 U.S.C. sec. 106. Under the 1909 Act, only specific derivatives were within the reach of the statute. See 17 U.S.C. sec. 1(b) (superseded) ("To translate the copyrighted work into other languages or dialects, or make any other version of, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it to a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art....") The public performance right was similarly narrower under the 1909 Act than under the 1976 Act. Compare 17 U.S.C. sec. 1(d),(e) (superseded) with 17 U.S.C. sec. 106(4).

<sup>77</sup> 17 U.S.C. sec. 107-122. The fair use provision is one of the few exceptions and limitations that gives the reader some sense of the normative purpose for its existence. *Id.*, sec. 107 (fair use for such purposes as "criticism, comment, news reporting, teaching [], scholarship or research" is noninfringing).

<sup>78</sup> How else can one account for the fact that agricultural and horticultural fairs got exceptions to enable them to publicly perform certain classes of copyrighted works, whereas other seemingly equally socially valuable gatherings (e.g., girl scout rallies) did not?

<sup>79</sup> See, e.g., Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. (forthcoming 2007) (discussing this phenomenon).

<sup>80</sup> This was certainly the premise of Justice Blackmun's dissent in the *Sony* case. See *Sony*, 464 U.S. at 457-500 (Blackmun, J. dissenting). The Blackmun dissent and its implications are discussed in Pamela

shown, there are many personal uses of copyrighted works that arguably trip one of the exclusive rights and fail to qualify for one of the statutory exceptions, although reasonable people would agree they should be considered lawful personal uses (e.g., making a backup copy of one's digital music files).<sup>81</sup> Further work on user rights should be part of a model copyright law project.<sup>82</sup>

The duration of copyright terms has been the subject of contentious debate in recent years, indeed of constitutional challenges and popular protests.<sup>83</sup> For the overwhelming majority of copyrighted works, the current term of U.S. copyrights is much too long.<sup>84</sup> It would be in the public interest for more of these works to get in the public domain sooner. Shortening the duration of the copyright term would be one way to achieve this objective. Another would be to require periodic renewals of copyright claims for a small registration fee. International treaty obligations will be surely be asserted as a reason not to make structural changes to the life + X years approach to copyright duration,<sup>85</sup> but it is worth thinking more carefully about durational limits. Perhaps a model copyright law could make it easier for works to be dedicated to the public domain.<sup>86</sup> Drafters of a model copyright law might also want to consider whether a feature such as the '76 Act termination of transfer provisions is an appropriate or optimal way to limit the ability of assignees and licensees to capture the full value of copyrighted works to the seeming detriment of their authors.<sup>87</sup>

Infringement occurs, according to the 1976 Act, when someone trespasses on an exclusive right (and this trespass is not excused by an exception or limitation).<sup>88</sup> The statute is silent, however, about how judges or juries should determine whether an infringement has occurred. The courts have, of course, developed tests for judging when infringement has occurred and for determining on which issues experts can testify (or not).<sup>89</sup> Frankly, caselaw-based infringement standards are not all that satisfactory, let

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Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *Harvard Law Review* 1831, 1846-50, 1875 (3006).

<sup>81</sup> Litman, *supra* note xx.

<sup>82</sup> See, e.g., Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 *U. Chi. L. Rev.* 21 (2004).

<sup>83</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003)(rejecting constitutional challenge to Copyright Term Extension Act). Lawrence Lessig, who was counsel for Eldred in this case, inspired protests against the CTEA. See, e.g., OpenLaw: *Eldred v. Ashcroft*, <http://cyber.law.harvard.edu/eldredvreno/>.

<sup>84</sup> See, e.g., Brief Amicus Curiae of George Akerlof, et al., to the U.S. Supreme Court in *Eldred v. Ashcroft*, available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf> (discussing excessive duration of copyright terms in light of copyright incentives).

<sup>85</sup> Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971), reprinted in *Selected Statutes*, *supra* note xx, at 553-73. Art. 7(1) requires member states of the Berne Union to protect works for life of the author plus fifty years after the author's death.

<sup>86</sup> See, e.g., Robert P. Merges, *A New Dynamism in the Public Domain*, 71 *U. Chi. L. Rev.* 183, 201-02 (2004).

<sup>87</sup> See, e.g., 17 U.S.C. sec. 304(c). See Peter S. Menell & David Nimmer, *Defusing the Termination of Transfers Time Bomb*, available at <http://www.idc.ac.il/ipatwork/PUBLICATION/Defusing.pdf>.

<sup>88</sup> See 17 U.S.C. sec. 501(a).

<sup>89</sup> See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)(discussing infringement standards and roles of experts); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)(same).

alone consistent with one another.<sup>90</sup> There is especial confusion over the extent to which dissective analysis of the component parts of the work or a gestalt-like impression test should be used, either separately or together.<sup>91</sup> It would be worth considering whether a model copyright law could give somewhat greater guidance on this score than prior statutes have done. Consideration should also be given to whether infringements should only be found where the defendant had some wrongful knowledge or intent, or whether certain remedies should only be available based on wrongful knowledge or intent. Codification of secondary liability rules and standards for judging indirect infringements should also be part of a model copyright law. The 1976 Act is deficient in this respect,<sup>92</sup> although courts have evolved some standards for secondary liability over the years.<sup>93</sup>

Injunctive relief and actual damage recoveries are remedies for infringement that should, of course, be preserved.<sup>94</sup> More thought should, perhaps, be given to articulating under what circumstances defendants' profits should be awarded.<sup>95</sup> Whether preliminary injunctions should be as easy to obtain in copyright cases as they have been in recent years is worth closer scrutiny, for reasons detailed by Professors Lemley and Volokh.<sup>96</sup> Also worth considering is whether in close cases, greater use should be made, as the Supreme Court has more than once endorsed, of damage awards in lieu of injunctive relief.<sup>97</sup>

The remedy issue most in need of serious rethinking is statutory damages. Under the 1976 Act, copyright owners can ask for an award of statutory damages in amounts ranging from \$200 to \$150,000 per infringed work, even if the copyright owner has actually suffered no damages.<sup>98</sup> The willfulness or innocence of an infringement has

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<sup>90</sup> Compare infringement standards set forth in *Arnstein*, 154 F.2d 464 (substantial similarity to be judged based on dissection and lay observer impression), with those set forth in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9<sup>th</sup> Cir. 1977)(extrinsic/intrinsic test) and *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992)(abstraction/filtration/comparison test).

<sup>91</sup> The *Altai* test, for example, highly dissective and seems to leave no room for lay observer impressions, while *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 482, 489 (2d Cir. 1960) relies heavily on lay observer impression and almost not at all on dissection.

<sup>92</sup> See 17 U.S.C. sec. 106 (setting forth exclusive rights conferred on copyright owners). This provision allows authors to exercise or "to authorize" these exclusive rights. The "to authorize" language is said to provide a statutory basis for secondary liability, but how far this authorizes secondary liability is questionable. See Brief Amicus Curiae of Sixty Intellectual Property and Technology Law Professors and US-ACM Public Policy Committee, to the U.S. Supreme Court in *MGM v. Grokster*, 20 Berkeley Tech. L.J. 535 (2005).

<sup>93</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2006) (borrowing inducement liability rule from patent law); *Sony*, 464 U.S. at 434-42 (borrowing contributory infringement liability from patent law).

<sup>94</sup> 17 U.S.C. sec. 502 (injunctive relief), 504(b)(actual damages).

<sup>95</sup> *Id.*, sec. 504(b). Unjust enrichment may justify an award of profits in some cases, as where the defendant has willfully infringed, but query whether such an award is always justified, given that copyright infringement under U.S. law is today a strict liability offense.

<sup>96</sup> Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Preliminary Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1999).

<sup>97</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, n. 10 (1994).

<sup>98</sup> 17 U.S.C. sec. 504(c).

some bearing on the range for such damages,<sup>99</sup> but due process considerations argue strongly for development of more refined criteria. One factor that seemingly tipped a majority of the Supreme Court to the fair use ruling in the *Sony Betamax* case was the prospect that ordinary people who had used their VCRs to make copies of television programs would be liable for statutory damages amounting to multiple thousands of dollars just for taping a show to watch it at a later time than it was broadcast.<sup>100</sup> Thought should also be given to circumstances under which those charged with secondary liability for user infringements should have to pay statutory damages, and if so, how much. Criminal copyright rules should also be revisited and clarified.<sup>101</sup>

By focusing on these core elements of copyright, I do not mean to suggest that nothing but these elements should be in a model copyright law or principles document. Yet perhaps anything else nominated for inclusion in the model law or principles should have to be accompanied by a justification as to why it needs to be there, and why it should not be achieved through common law evolution of copyright law by judges or delegated to an administrative rule-making process.<sup>102</sup>

A model copyright law should also be written in plain English so ordinary people, and not just the high priests of copyright, can understand what it means and the normative reason that it should be part and parcel of the basic statutory framework.<sup>103</sup> A model copyright law should also articulate the purposes that it seeks to achieve and offer some guidance about how competing interests should be balanced, perhaps through a series of comments on the model law or principles.<sup>104</sup>

At least as challenging as trying to decide what substantive rules should be part of a model copyright law or principles document would be conceiving a way to restructure institutions and policymaking processes so that the dysfunctions that currently beset copyright lawmaking can be averted or at least mitigated to some degree. It makes little sense to develop a model copyright law that is simple, comprehensible, and coherent if there is no mechanism to prevent it from getting cluttered by the same kinds of industry-specific “fixes” and compromises that have made the 1976 Act so bloated and ugly. The simplest way to achieve this objective would be a legislative delegation of rule-making authority to the government office responsible for carrying out copyright-related

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<sup>99</sup> Statutory damages can be as low as \$200 for an innocent infringer and as high as \$150,000 for willful infringement. The range is \$750 to \$30,000 for other infringements.

<sup>100</sup> See Jessica Litman, *The Sony Paradox*, 55 Case Western Res. L. Rev. 917, xx (2005).

<sup>101</sup> See, e.g., Lydia Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 Wash. U. Q'ly 835 (1999).

<sup>102</sup> Misuse of copyright is an example of a copyright doctrine not already in the copyright statute that might be worth codifying in a copyright law. See, e.g., Tom Bell, *Codifying Copyright's Misuse Doctrine*, Utah L. Rev. (forthcoming 2007).

<sup>103</sup> See, e.g., Litman, *supra* note xx, at 22-34.

<sup>104</sup> See, e.g., AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) ON THE LAW OF UNFAIR COMPETITION (1993)(articulating principles of trademark and trade secret law with interpretive comments and citations to caselaw).

responsibilities.<sup>105</sup> Many of the industry-specific exceptions now in the '76 Act,<sup>106</sup> for example, would probably be better implemented as the byproduct of agency rule-making rather than being in the statute. An advantage of ongoing rulemaking authority would be that it would be possible to update complex provisions of this sort, as technology and the industry adapted to new developments. Perhaps a restructured, more administratively rigorous government copyright office could take on some adjudicative and policymaking functions as well.<sup>107</sup>

A model copyright law or principles project will be faced with other challenges besides what substantive rules to propose and what kinds of institutional and process reforms might help maintain the integrity of the law or principles. One such challenge is to what extent the drafters should feel constrained in their thinking by international treaty obligations.<sup>108</sup> My sense is that international obligations should be considered as a constraint, but not so much of a constraint that the drafters cannot deliberate about what the right rule might be and then consider how the right rule can be reconciled (or not) with international obligations. There may be more flexibility in international norms than some may perceive. Drafters of model copyright rules or principles might also find it useful to articulate what they believe to be the “best” rule on a particular subject, even if it may seem in conflict with an international norm, but then consider whether a second-best rule might accommodate reasonably well the desired policies.

A second challenge is whether to draft US-centric or more internationally neutral or acceptable rules. There are several reasons why this is an especially challenging task. First, any drafting group is likely to be largely, if not entirely, American in training and expertise, and it is difficult for Americans to set aside the mind-set with which they are used to looking at something like copyright law. Second, there are significant substantive and philosophical differences between the two principal traditions for intellectual property rights for literary and artistic works, namely, the economically oriented, utilitarian approach of the US and the European authors' rights approach.<sup>109</sup> While some

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<sup>105</sup> Congress gave the Library of Congress (in which the Copyright Office is located) rule-making authority as part of the Digital Millennium Copyright Act of 1998. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

This rule-making authority is codified as 17 U.S.C. sec. 1201(a)(1)(B)-(D).

<sup>106</sup> See, e.g., 17 U.S.C. sec. 111 (exception for secondary transmissions of television programming by cable systems).

<sup>107</sup> This has been suggested by several commentators. See, e.g., Michael Carroll, *Fixing Fair Use*, 85 N.C. L. Rev. (forthcoming 2007) (proposing establishment of fair use board as part of the Copyright Office); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 Harv. J. L. & Tech. 111 (2005) (suggesting that the Copyright Office develop an administrative procedure for dealing with fair use issues arising from technically protected content). See also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004) (proposing lightweight administrative process for resolving disputes about peer to peer file sharing).

<sup>108</sup> See Berne Convention for the Protection of Artistic and Literary Works (Paris Act, 24 July 1971), republished in Selected Statutes, supra note xx, at 553-580, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), id. at 1023-61. Art. 9 of TRIPs requires member nations of the World Trade Organization to abide by Article 1 through 21 of the Berne Convention.

<sup>109</sup> See, e.g., Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23 Eur. Intell. Prop. Rev. 409 (Sept. 2001) (contrasting US and EU approaches to copyright law).

commonalities can be identified among the rules embodied in these legal traditions, differences may be more profound than their commonalities.

One possible way to manage these differences would be for drafters of a model copyright law or principles document to articulate rules both traditions have in common and then to offer policy options where they differ. For example, the rules as to who should be considered “the author,” and therefore, the owner of rights conferred under the law, might be structured with a set of policy options. Jurisdictions with a more economic or utilitarian tradition might choose to adopt work-for-hire rules such as those embodied in US copyright law,<sup>110</sup> whereas jurisdictions inclined to protect authors’ rights might choose a policy option that always confers rights on authors.

A third challenge is to what extent the drafting should be constrained by existing rights holder licensing practices and institutional structures such as collecting societies.<sup>111</sup> At a minimum, serious consideration should be given to how to achieve a kind of policy interoperability for transitioning from existing statutory frameworks to the model law framework.

Finally, there is the challenge of even contemplating how such a project might be transitioned to an implemented legal framework. As noted earlier, the prospects for meaningful copyright reform in the near future are at the moment very dim. Since many copyright industry representatives know how to navigate the current copyright regime and at least at times enjoy some benefits from its dysfunctionalities, there are formidable hurdles to implementing a reformed copyright law. The obstacles are perhaps so formidable that many would think it not worth the investment of intellectual effort that would be required to draft a model law. Still, no reasonable person could contest the idea that a simpler, more comprehensible, and more balanced copyright law would be a good idea. Perhaps the preliminary thoughts offered in this essay and in other articles in this symposium issue will spark a new round of copyright reform discourse.

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<sup>110</sup> 17 U.S.C. sec. 201(b).

<sup>111</sup> See, e.g., COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais, ed. 2006). See also DIGITAL RIGHTS MANAGEMENT - THE END OF COLLECTING SOCIETIES? (Christoph Beat Graber, et al., eds. 2005).