Is Copyright Dead in the Digital Age?

Crystal Pound*

* J.D. Candidate, University of Iowa College of Law, 2016; B.A., English and Mass Communications, Minnesota State University Moorhead, 2011. I would like to thank my significant other, Michael Crawford, for putting up with my long hours of work. I would also like to thank my family, especially my mom, Tammy Pound, for her never-ending patience with late night calls to act as a human thesaurus.

I. INTRODUCTION

In April 2013, a federal judge closed the promising door on the resale of digital music in the case *Capitol Records, LLC v. ReDigi Inc.*[1] ReDigi was a service that allowed users to sell digital copies of songs bought from either iTunes or previously bought ReDigi music—effectively a used market for unwanted digital music.[2] By invalidating the site structure, the court has essentially frustrated the market's attempt at a legal way to dispose of legally-gained digital content.

Among numerous rights, copyright protection "literally . . . [protects] the right to copy."[3] However, the idea of what is a copy is not stagnant.[4] It has changed over time based on what technology is widely available—this is true both statutorily and in case law.[5]

This Note argues that the way digital "copies" are legally dealt with in the United States no longer works. Congress needs to reevaluate the Copyright Act because more content is available in a digital format than ever before. Part II establishes the history and foundation of both the Copyright Act and traces the evolution of the idea of what constitutes a copy. Part III then examines the type of transaction occurring with digital "sales" and analyzes how a copyright holder's rights are dealt with. Lastly, Part IV recommends major revisions within the Copyright Act of 1976 of the definitions of both "copy" and "phonorecord" or, alternatively, addition of a definition of "material object."

II. BACKGROUND

This Part looks both at the past and present of copyright law. First, this Part examines the foundation of copyright law in the Copyright Clause of the United States Constitution. Second, this Part considers the numerous components of the Copyright Act of 1976 (1976 Act). Finally, this Part lays the framework for the major cases defining where copyright law has been and where it seems to be heading.

A. Copyright Clause of the United States Constitution

The concept of copyright protection in the United States stems from a single clause in the text of the Federal Constitution. Out of 27 words comes the entire cannon of copyright—"To 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."[6] Understanding the purpose of copyright law requires interpreting the

1. Ben Sisario, *A Setback for Resellers of Digital Products*, N.Y. TIMES (Apr. 1, 2013), http://www.nytimes.com/2013/04/02/business/media/redigi-loses-suit-over-reselling-of-digital-music.html?_r=0.

2. Matt Peckham, *ReDigi CEO Says the Court Just Snatched Away Your Right to Resell What You Legally Own*, TIME (Apr. 25, 2013), http://techland.time.com/2013/04/25/redigi-ceo-says-the-court-just-snatched-away-your-right-to-resell-what-you-legally-own/.

3. *A Brief Introduction and History*, COPYRIGHT, http://www.copyright.gov/circs/circ1a.html (last visited Nov. 1, 2015).

4. *See* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1256 (2001) ("In MAI, a panel of the Ninth Circuit held that the act of loading a computer program into a computer's RAM resulted in the creation of a copy of that program, implicating the copyright owner's exclusive right to reproduce the work.").

5. *Id.*

6. U.S. CONST. art. 1, § 8, cl. 8.

clause's language.[7]

Above all else, copyright provisions are meant to "benefit the public interest"[8] by "promot[ing] the [p]rogress"[9] of society.[10] Society receives innovation as a benefit from enabling public access to ideas and expressions of those ideas.[11] However, in science and literature, copyright never extends to the idea itself, only the particular expression of that idea.[12]

Copyright protection does not last indefinitely.[13] Controversy surrounds the designation of what constitutes a "limited [time]" and how extensions on copyright should occur and apply.[14] If copyright were to go on for an unrestricted amount of time, the work would never pass into the public domain and the public could never build upon it freely.[15] In the same vein, authors have "exclusive right[s]" to their products because it is essential that there be incentive for authors to create "writings" or "discoveries."[16] Without it, no one would create innovations that someone else could reproduce at a fraction of the cost and reap the full benefit.[17]

---

7. *See* L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y USA 365, 367 (2000) (describing how to interpret the language within the Copyright Clause).

8. Carrie Russell, *Users' Rights in Copyright: An Interview with Ray Patterson*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/copyright/copyrightarticle/usersrightscopyright (last visited Nov. 1, 2015).

9. U.S. CONST. art. 1, § 8, cl. 8.

10. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

11. Mike Masnick, *Yes, Copyright's Sole Purpose Is To Benefit The Public*, TECHDIRT (Apr. 10, 2012, 10:07 AM), https://www.techdirt.com/articles/20120407/00171418416/yes-copyrights-sole-purpose-is-to-bene fit-public.shtml.

12. *See* 17 U.S.C. § 102(b) (2015) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principles, or discovery regardless of the form in which it is described, explained, illustrated, or embodied in such work."). This applies to all areas where copyright may be applicable. *See also* Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966) ("Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.'"). Despite generally being referred to as the Copyright Clause, it actually protects an author's right to both "[s]cience," which refers to copyright, as a form of "learning," as well as "useful [a]rts," referring to patents. *Id.*

13. U.S. CONST. art. 1, § 8, cl. 8. Protection applies only for a "limited time," and only to the "authors" or "inventors" of those works. *Id.*

14. *See* Timothy B. Lee, *15 Years Ago, Congress Kept Mickey Mouse Out of the Public Domain. Will They Do It Again?*, WASH. POST (Oct. 25, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/ (discussing Disney's previous push to extend copyright protection and questioning whether they will attempt the same action to extend protection further); *see also* Karl Smallwood, *Why Isn't Mickey Mouse in the Public Domain?*, MENTAL FLOSS (June 17, 2012, 7:20 PM), http://mentalfloss.com/article/30946/why-isnt-mickey-mouse-public-domain (positing that the push in 1998 was largely due to Disney's imminent loss of the character of Mickey Mouse).

15. *See* Patterson, *supra* note 7, at 368–69 ("It is reasonable to assume that if a purpose of copyright is to promote learning, the copyrighted work must be accessible to be learned, and it is certain that access to writings can be ensured by publishing them, which explains why the copyright clause gives Congress the power to grant to authors the exclusive right to publish their writings."). In essence, it would stunt the growth of the base of knowledge that the American people have access to.

16. *Id.* at 368.

17. *Id.* at 369.

B. Copyright Act of 1976

1. Sections

The United States has a long history in copyright. The U.S. Constitution was adopted on September 17, 1787,[18] and the first national statutory act was the Copyright Act of 1790 (1790 Act).[19] Since 1790, Congress has made major revisions to the Copyright Act three times,[20] the last being the currently effective 1976 Act.[21]

The five most relevant sections of the 1976 Act to this Note are sections 101, 102, 106, 107, and 109. Section 101 sets out the relevant definitions within the Act.[22] Section 102 gives an illuminative, though not exhaustive, list of copyrightable subject matter.[23] Section 106 sets out the exclusive rights of all copyright holders.[24] Section 107 gives the confines of the Fair Use Doctrine.[25] Lastly, section 109 explains the concept of the First Sale Doctrine.[26]

Most important to this Note is how the 1976 Act defines copies, phonorecords, and material objects. Copies are "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated."[27] Phonorecords are "material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated."[28] Definitions are paramount with statutory interpretation—fitting within or falling outside means the difference between finding a product permissible or infringing.[29] The 1976 Act fails to define "material

18. *Teaching With Documents: The Ratification of the Constitution*, NAT'L ARCHIVES, http://www.archives.gov/education/lessons/constitution-day/ratification.html (last visited Nov. 1, 2015).

19. *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBR., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.VDSe4L63l94 (last visited Nov. 1, 2015) [hereinafter *Copyright Timeline*].

20. *Id.* The Copyright Act was also revised in 1831 and 1909. In both 1831 and 1909, the term limits for how long a copyright would last for the copyright holder were slightly revised, among other changes. *Id.*

21. *Id.*

22. 17 U.S.C. § 101 (2002).

23. *See id.* § 102 (listing literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architectural works as protected).

24. *See id.* § 106 (giving owners of a copyright the exclusive right to reproduce the work, prepare derivative works, distribute copies, perform and display literary, musical, dramatic, and choreographic work, and perform sound recordings publicly).

25. *See id.* § 109 (giving the basic (non-exhaustive) reason for Fair Use as well as a basic four part test for applying it). The non-exhaustive list includes criticism, comment, news reporting, teaching, scholarship, and research. *Id.* The Fair Use Doctrine gives an exception from the exclusive rights listed in section 106, where people can use a copyrighted work without infringing. *Id.*

26. *See id.* (setting out the limitations of those exclusive rights. Most important to this Note is the first sale doctrine, which holds that once a person buys a particular copy of a work, they are free to dispose of the work as they see fit without the permission of the copyright holder).

27. 17 U.S.C. § 101 (2010).

28. *Id.*

29. *See* RayMing Chang, *"Publication" Does Not Really Mean Publication: The Need to Amend the Definition of Publication in the Copyright Act*, 33 AIPLA Q.J. 225, 226 (2005) (suggesting that the definition of "publication" needs to be amended because it "is at odds with other reputable sources" and needs to change to reflect the digital age we live in).

object," so it is necessary to look at case law.[30]

It is equally important to know what subject matter can be protected under copyright. The list includes, but is not limited to, literary, musical, dramatic, and sculptural works, as well as sound recordings.[31] Copyright owners have certain exclusive rights in their works.[32] The rights relevant to this Note are the right to reproduce and the right to distribute copies or phonorecords.[33]

The First Sale Doctrine and Fair Use Doctrine play important roles in copyright law.[34] Basically, the First Sale Doctrine holds that once a copyright holder sells a copy of their work, their exclusive right to distribute terminates, and they cannot keep the person who bought that copy from selling it to a third party.[35] The entire concept gets murky when dealing with digital copies of works because it is harder to know how the idea of "material object" will ultimately meld with digital copies, an issue courts have acknowledged.[36] The Fair Use Doctrine essentially sets out the limits of the exclusive rights set out in section 106.[37] There are certain situations where, even though there is a valid copyright, another entity can use the copyrighted material without the use being infringement.[38]

2. Amendments

Statutorily, copyright is not static. As previously stated, the Copyright Act's four different incarnations have varied significantly based on differing societal needs.[39] The 1976 Act amendments occurred most recently.[40] International, corporate, and technological pressures brought about amendments.[41]

---

30. *See infra* Part II.C (introducing *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 173 (D. Mass. 2008), where the court defined material objects).

31. 17 U.S.C. § 102 (1990).

32. 17 U.S.C. § 106 (2002).

33. *Id.*

34. *See* John T. Soma & Michael K. Kugler, *Why Rent When You Can Own? How Redigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-Books, Games, and Movies*, 15 N.C. J. L. & TECH. 425, 429 (2014) ("The first sale doctrine has allowed the market in sales of used records, CDs, DVDs, and video games to flourish over the past few decades."). Without the advent of the First Sale Doctrine, there would not be a market for used intellectual property.

35. *See* 17 U.S.C. § 109 (2008) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."). Essentially, when a consumer buys a copy of a work, the consumer can do with that copy as they wish.

36. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) (explaining that "while technological change may have rendered section 109(a) unsatisfactory to many contemporary observers and consumers" the "amendment of the Copyright Act in line with ReDigi's proposal is a legislative prerogative that courts are unauthorized and ill-suited to attempt").

37. 17 U.S.C. § 107 (1992).

38. *Id.* As previously noted, this could be, for example, criticism, comment, news reporting, teaching, scholarship, or research.

39. *Copyright Timeline*, *supra* note 19.

40. *Id.*

41. *See* Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 449 (2002) ("Despite opposition by many intellectual property scholars and public interest groups, and despite extremely strong arguments against extension, Congress recently extended the term and applied it retroactively, largely in response to heavy lobbying pressure from the copyright industries."); *see also* Ann M. Garfinkle et al., *Art Conservation and the Legal Obligation to Preserve Artistic Intent*, 36 J. AM. INST. FOR CONSERVATION 165, 165–66 (1997) ("The primary motivation for the United States to sign the Berne Convention arose from increasing pressures of

In 1988, the United States signed the Berne Convention (Berne), which, among its main goals, recognized copyrights in numerous foreign countries that were previously unrecognized.[42] Ten years later, in 1998, Congress passed the Copyright Extension Act, also known as the Sonny Bono Act (Sonny Bono Act).[43] The Sonny Bono Act extended the copyright term an additional 20 years both for works held by individuals and corporations.[44] Some believe that the driving forces behind the Sonny Bono Act were corporations such as Walt Disney, which was able to hold onto the copyright for the character Mickey Mouse, though even that extension is soon to expire.[45]

The day after the Sonny Bono Act passed, Congress passed the Digital Millennium Copyright Act (DMCA).[46] The DMCA, among other things, "established safe harbors for online service providers; permitted temporary copies of programs during computer maintenance; [and] made miscellaneous amendments to the Copyright Act," such as a section that prohibited an individual from circumventing technological safeguards used to protect a copyrighted work.[47] The DMCA was Congress's attempt to deal with the newly emerging and rapidly essential nature of the digital presence in copyright.[48] However, the DMCA has recently been used by several car and farm equipment manufacturers, such as John Deere, to justify keeping consumers, such as farmers, from having access to the underlying software in their tractors.[49] The Copyright Office was expected to decide by July 2015 "which high-tech devices we can modify, hack, and repair,"[50] but as of August 2015, it has yet to come to a decision.[51]

C. Cases Dealing with "Copies"

One must understand the case law underlying Congress's and the courts definition of a digital copy to truly discern the importance of that definition. In 1908, the Supreme Court first dealt with the question of what constitutes a "copy" when dealing with emerging technology.[52] In *White-Smith Music Public Co. v. Apollo*, a piano was constructed that

---

the growing world economy to develop a more active stance on international intellectual property enforcement, particularly with the thriving piracy of U.S. copyrighted products."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology.").

42. *See Copyright Timeline*, *supra* note 19 (discussing the Berne Convention).

43. *See id.* (discussing the Sonny Bono Act).

44. *See* Linda Greenhouse, *Justices to Review Copyright Extension*, N.Y. TIMES (Feb. 20, 2002), http://www.nytimes.com/2002/02/20/national/20RIGH.html (discussing the provisions of the Sonny Bono Act). However, the Sonny Bono Act only applied to copyrights that were valid at time of the Act's passing.

45. *See* Lee, *supra* note 14 (discussing Disney's previous push to extend copyright protection and questioning whether they will attempt the same action to extend protection further).

46. *See Copyright Timeline*, *supra* note 19 (noting passage of the DMCA).

47. *Id.*

48. *See* Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES (Jan. 25, 2004), http://www.nytimes.com/2004/01/25/magazine/the-tyranny-of-copyright.html (discussing the purpose of the DMCA).

49. *See* Kyle Wiens, *We Can't Let John Deere Destroy the Very Idea of Ownership*, WIRED (Apr. 21, 2015, 9:00 AM), http://www.wired.com/2015/04/dmca-ownership-john-deere/ (discussing Deere's attempt to keep their software private).

50. *Id.*

51. Laura Sydell, *DIY Tractor Repair Runs Afoul Of Copyright Law*, NPR (Aug. 17, 2015, 4:20 PM), http://www.npr.org/sections/alltechconsidered/2015/08/17/432601480/diy-tractor-repair-runs-afoul-of-copyright-law.

52. *See generally* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908) (discussing how player

could read sheet music that could not be read by the human eye.[53] The music fed into the piano and played automatically.[54] The Court looked at the Copyright Act of 1831 (1831 Act) as well as what a "copy" of sheet music meant at the time and came up with "a written or printed record of it in intelligible notation."[55] Since a person could not perceive the copy and gain anything from it, the Court found the sheet music did not infringe upon the original copyright holder's rights.[56] This case was later overturned when Congress added the phrase "either directly or with the aid of a machine or device" to the definition of copies and phonorecords.[57]

Nearly 75 years later, the Supreme Court dealt once more with the idea of making infringing copies, this time in an electronic medium.[58] In *Sony Corporation of America v. Universal City Studios, Inc.*, the Court held that consumer use of video cassette recorders was not an infringing use, but instead used for "time-shifting"—which is recording a program to view at a later time—and that it "merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge."[59] The Court applied the Fair Use Doctrine and held that not all unauthorized copying is infringing.[60] The Court describes fair use in section 107 as being an "equitable rule of reason" that courts use to know if a particular instance of alleged infringement falls under the doctrine and is therefore permissible.[61] However, when the use is commercial, it is presumed unfair.[62] Non-commercial uses, such as in *Sony*, are not presumptively unfair and require, among other things, a showing of the effect on the market.[63] When there is no "demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."[64] Even though one could argue that without being able to record and watch later, a consumer would be more likely to buy an authorized copy of the product, the Court still found time shifting permissible under the 1976 Copyright Act.[65]

In 2001, the Ninth Circuit dealt with a case that is now considered preeminent in the field, *A&M Records, Inc. v. Napster, Inc*.[66] At the infancy of file sharing, Napster was engaged in facilitating peer-to-peer file sharing of copyrighted music files by allowing users to upload separate copies onto their site for others to download while keeping their own copy.[67] Napster tried using a fair use defense by arguing that users were merely

---

pianos were constructed under the 1831 Copyright Act).

53. *Id.* at 9–10.
54. *Id.*
55. *Id.* at 17.
56. *Id.* at 18.
57. 17 U.S.C. § 101 (2010).
58. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 417 (1984).
59. *Id.* at 449.
60. *Id.* at 447.
61. *Id.* at 448.
62. *Id.* at 449.
63. *Sony*, 464 U.S. at 450.
64. *Id.*
65. *Id.* at 456.
66. *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *as amended* (9th Cir. 2001) (discussing impact of peer-to-peer file sharing when facilitator does not own the copyright and has paid no license).
67. *Id.* at 1011.

engaged in sampling and space shifting.[68] The court rejected the fair use defense and stated "[h]aving digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads."[69] While discussing sampling, the court held that even downloading the songs long enough to sample them is commercial enough to take out any fair use.[70] The court also decided that space-shifting is different from time-shifting because time-shifting simply changes when a private user views the material, whereas space-shifting distributes copyrighted material to the general public.[71]

Seven years later, in *London-Sire Records, Inc. v. Doe 1*, the court found that materiality refers to "a medium in which a copyrighted work can be 'fixed'"[72] and that "any object in which a sound recording can be fixed is a 'material object.' That includes . . . electronic files."[73] The court drew its distinction in that one "material object" existed at the start of the transaction, and a different "material object" existed at the end.[74]

The issue of digital copying came to a head in the Southern District of New York in *Capital Records, LLC v. ReDigi, Inc.*, where ReDigi ran a business selling second-hand digital music files.[75] Of paramount importance, the court found that because selling a digital file over the Internet requires a different "copy" of that file be made, the sale is infringing on the original copyright holder's right to make copies.[76] Specifically, the court stated that even though the consumer possessed the phonorecord of the particular song, selling the song on ReDigi necessarily requires her to "produce a new phonorecord" and that it is "impossible for the user to sell her 'particular' phonorecord on ReDigi," and as such, "the first sale statute cannot provide a defense."[77]

Shortly after ReDigi, the Supreme Court heard *American Broadcasting Companies, Inc. v. Aereo, Inc*.[78] In that case, Aereo provided individuals with antennas to sell television streams that Aereo acquired from the airwaves and streamed through the Internet to its subscribers.[79] While the Court ultimately found that streaming the programming constituted an infringing "public performance,"[80] it declined to apply their reasoning to cloud computing or any other technologies, and instead said they "cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us."[81]

---

68. *Id.* at 1014. Sampling is "where users make temporary copies of a work before purchasing;" space-shifting in this case was "where users access a sound recording through the Napster system that they already own in audio CD format." *Id.*

69. *Id.* at 1017.

70. *Id.* at 1018.

71. *Napster*, 239 F.3d at 1019.

72. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

73. *Id.*

74. *See id.* at 173 ("[T]here is no reason to limit 'distribution' to processes in which a material object exists throughout the entire transaction—as opposed to a transaction in which a material object is created elsewhere at its finish.").

75. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013).

76. *Id.* at 655.

77. *Id.*

78. Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2500 (2014).

79. *Id.* Public performance is just one of a bundle of rights a copyright holder possesses—another being the right to reproduce the copyrighted work.

80. *Id.* at 2506.

81. *Id.* at 2511.

III. ANALYSIS

The issue of how the definition of "copies" fits into the digital world—such as with cloud computing—is exceedingly complex and encompasses numerous smaller issues. The Southern District of New York dealt with it in *Capital Records v. ReDigi, Inc.*,[82] which has yet to make its way to the Second Circuit. First, this Part considers whether a consumer paying for a digital version, such as a song or e-book, has been found to be either a sale or license. Second, this Part scrutinizes how the rights to reproduction and distribution of copies have been applied to intangible items in the past. Finally, this Part analyzes how courts are currently applying those same rights to digital content.

A. Does the Purchase of Digitally Copyrighted Goods Constitute a Sale or a License?

As a threshold issue, there is disagreement in the courts about whether the purchase of a digital version of a copyrighted work constitutes a sale, and thus a transfer of ownership, or a license with no transfer of ownership.[83] When deciding whether a sale or license took place, courts look at the contract terms as well as the "economic realities of the exchange."[84] Generally, a license consists of periodic payments, while a sale is one lump sum payment.[85] If a consumer owns a copy of a work, that consumer is then free to "sell or otherwise dispose" of the copy without the permission of the copyright holder—otherwise known as the First Sale Doctrine.[86] This does not apply if the consumer merely has a license.[87]

1. Computer Software

Most often, courts have dealt with the sale or license issue in the form of computer software.[88] In *SoftMan Products Co. v. Adobe Systems, Inc.*, the court found that due to the circumstances, it was a sale that took place, and with it, a transfer of ownership.[89] The court used the fact that consumers paid a single price per single copy for an "indefinite term without provisions for renewal" as strongly suggesting a sale and not a license, regardless of how Adobe framed the contract.[90] However, courts have also held that the

82. *See generally* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (holding ReDigi's service infringed on copyright owner's rights).

83. *Compare* SoftMan Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001) (holding that transaction is a sale and not a license), *with* Vernor v. Autodesk, Inc., 621 F.3d 1102, 1112 (9th Cir. 2010) (holding that Vernor only received a license and not a transfer of ownership in purchase), *and* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011) (finding that due to the way the promotional CDs are distributed, each recipient now owns each copy).

84. *SoftMan Prods.*, 171 F. Supp. 2d at 1084.

85. *Id.*

86. 17 U.S.C. § 109 (2008).

87. Alice J. Won, *Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 386, 400 (2013).

88. *See SoftMan Prods.*, 171 F. Supp. 2d at 1085 (holding that sale of software was an actual sale); *see also Vernor*, 621 F.3d at 1112 (holding that sale of software was a license).

89. *SoftMan Prods.*, 171 F. Supp. 2d at 1085. Here, Adobe sued Softman for illegally selling copies of Adobe software, alleging Adobe gave out mere licenses, and not true transfer of ownership. *Id.* at 1080.

90. *Id.* at 1085.

software purchaser merely has a license and is not an owner.[91] In *Vernor v. Autodesk*, the court focused on whether the copyright owner "(1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions" before ultimately holding that a license existed.[92] At the very least, there is disagreement among the courts about how to deal with computer software purchases.

2. E-Books

Occasionally, courts have examined the sale of e-books, though only in dicta.[93] The real world result for e-book owners is less promising than for those litigating software disputes.[94] Amazon's conditions of use specifically state that "Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license . . . ."[95] While this seems to create a clear-cut license agreement dealing with digital content, it states that it applies to all "Amazon services" and not just digital content.[96] It goes on to state, "[t]his license does not include any resale or commercial use of any Amazon Service, or its contents . . . ."[97] It stretches the imagination to suggest that Amazon's terms mean that a consumer who buys a paperback book on Amazon is not allowed to resell that physical book. This is especially hard to believe since Amazon buys used books from consumers.[98] As such, it cannot be saying that literally *all* content purchased from Amazon is simply licensed. While Apple has not been sued on this e-book issue, there have been settlements for e-book pricing[99] and determining whether an e-book is a derivative work, which the court has held that it is not.[100] Perhaps this will be the next matter litigated. Drawing an analogy between e-books and software cases, it is possible

91. *Vernor*, 621 F.3d at 1111.

92. *Id.*

93. *See* Keiler v. Harlequin Enterps. Ltd., 751 F.3d 64, 67 (2d Cir. 2014) ("As the market for e-books expanded, Harlequin Enterprises sold and licensed e-books and e-book rights directly to consumers on its website and . . . to e-book licensees such as Amazon."). The fact that both the court and the parties to the suit describe what occurs, depending on the specific circumstances, as both sales and licenses, suggests that occasionally, when a consumer purchases an e-book, a sale takes place.

94. *See* Meghan Neal, *Do You Ever Own Your E-Books?*, MOTHERBOARD (Aug. 19, 2013, 1:40 PM EST), http://motherboard.vice.com/blog/do-you-ever-own-your-e-books (discussing how e-book sellers still own purchased e-books); *see also* Joel Johnson, *You Don't Own Your Kindle Books, Amazon Reminds Customer*, NBC NEWS (Oct. 24, 2013, 10:43 AM EST), http://www.nbcnews.com/tech/gadgets/you-dont-own-your-kindle-books-amazon-reminds-customer-f1C6626211 (detailing the experience of an Amazon customer whose e-books were erased and account deleted).

95. *Conditions of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 (last updated June 22, 2015).

96. *Id.*

97. *Id.*

98. *Sell Us Your Books*, AMAZON, http://www.amazon.com/Sell-Books/b?node=2205237011 (last visited Nov. 1, 2015).

99. Brid-Aine Parnell, *Publishers Fork Out $52m in Apple Ebook Pricing Settlement*, REGISTER (Apr. 12, 2012, 4:29 PM), http://www.theregister.co.uk/2012/04/12/us_states_ebook_suit_for_cash/. Two publishers, Hachette and HarperCollins, had to pay 52 million dollars for fixing the price of e-books. Colin Lecher, *Apple Will Pay $450 Million After Losing Ebooks Price-fixing Appeal*, VERGE (June 30, 2015, 12:11 PM), http://www.theverge.com/2015/6/30/8870061/apple-450-million-ebooks-price-fixing-appeal. Apple lost its appeal in the Second Circuit and will have to pay the fine imposed by the trial court.

100. Peter Mayer Publishers, Inc. v. Shilovskaya, 11 F. Supp. 3d 421, 431 (S.D.N.Y. 2014).

that the court could find that simply classifying a purchase as a license does not necessarily make it such.[101]

3. Digital Music

Currently, the Ninth Circuit is deciding whether the sale of digital music on platforms like iTunes constitutes a sale or license.[102] In *James v. UMG Recordings, Inc.*, various recording artists are arguing that such sales are in fact licenses, and as such, the recording label owes them higher royalties on those licenses.[103] Conversely, the record label considers each act of consumers buying digital music as a sale constituting a transfer of ownership, and therefore, subject to lower royalties.[104] For several years this case has wound its way through the court system without a trial occurring. The outcome will illuminate how at least one court classifies the sale of digital music—an answer crucial to the question of transfer.[105]

B. How Has an Author's Statutory Right to Reproduction and Distribution Been Applied to Intangible Items in the Past?

Previous court decisions have suggested that intangible objects do not necessarily infringe an author's rights.[106] That concept has recently come into doubt.[107] Two of the most basic rights each copyright owner possesses are the rights to reproduce the copyrighted work and distribute those copies to the public.[108] However, both of these rights have limitations.[109]

1. Case of First Impression

When the Supreme Court first dealt with a company illegally reproducing and distributing a copy in *White-Smith Music Publishing Co. v. Apollo Co.*, the Court construed the 1831 Act against the copyright holder.[110] In addition to the statutory language, the

101. *See* SoftMan Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1086 (C.D. Cal. 2001) ("Ownership of a copy should be determined based on the actual character, rather than the label, of the transaction by which the user obtained possession.") (quoting RAYMOND NIMMER, THE LAW OF COMPUTER TECHNOLOGY § 1.18 (1992)).

102. James v. UMG Recordings, Inc., No. C 11-01613 SI, 2012 WL 1376977, at *1 (N.D. Cal. Apr. 19, 2012).

103. *Id.*

104. *Id.*

105. *See* Won, *supra* note 87, at 401 ("Therefore, the first sale doctrine depends largely on whether the person obtaining a copy of the software is an owner or a licensee of that particular copy.").

106. *See generally* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that a copy of music unreadable to human eyes is not a copy under the 1831 Act); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that "time-shifting" is a permissible exercise of fair use).

107. *See generally* Capitol Records, L.L.C. v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (holding that since the new incarnation of the song would have to be fixed on a new material object (ReDigi's hard drive) it was an infringing activity).

108. 17 U.S.C. § 106(1)–(3) (2002).

109. *See id.* § 108 (stating that libraries are allowed, within limits, to make a copy of a work); *see also id.* § 109 (stating that, within limits, an owner of a particular copy or phonorecord is able "to sell or otherwise dispose of" that copy).

110. *See White-Smith Pub. Co.*, 209 U.S. at 16 ("When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of

Court paid extra attention to the contemporary definitions of "copy"—both the common understanding as well as those provided by experts.[111] The Court felt out the confines of what items fell within the definition and concluded that a human's inability to read the item made it not a copy.[112] It is also telling that the congressional response to this ruling was a change in the definition of "copy" in the 1909 Act.[113]

2. Evolving Rationales with Intangible Content

Later, when the copy being produced was less tangible, the Court still upheld a consumer's right to reproduce a work as long as they were only time-shifting.[114] This same rationale has proved successful in suits over digital video recorders.[115] The Court in *Sony* reaffirmed how important understanding the Copyright Clause is by beginning its analysis with looking at and construing its purpose.[116] The Court also acknowledged "the law of copyright has developed in response to significant changes in technology."[117] Further, "as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary."[118] The Court, while acting within the contours of the 1976 Act as well as being "circumspect in construing the scope of rights created by a legislative enactment which never contemplated such . . . interests,"[119] applied the Fair Use Doctrine and found that there were enough non-infringing uses in the technology to allow its general use.[120] Even when users are making copies, judges must look beyond that fact and ascertain if this is the type of activity the Copyright Act was meant to protect. Fair use is one way to allow users to side step the

---

Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original.").

111. *See id.* at 17 ("We have already referred to the common understanding of it as a reproduction or duplication of a thing . . . . 'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.' Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be 'a written or printed record of it in intelligible notation.'").

112. *Id.*

113. *See* Kenneth M. Alfano, *Copyright in Exile: Restoring the Original Parameters of Exclusive Reproduction*, 11 J. TECH. L. & POL'Y 215, 217 (2006) ("Almost a century ago, the U.S. Supreme Court crystallized a highly constrained definition for 'copying.' . . . Congress opted to work around the construed meaning rather than tinker with it . . . .").

114. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984) (upholding the practice of time shifting and finding that this attempt to impose copyright liability on distributors of VCR's was "unprecedented").

115. *See* Fox Broad. Co. Inc. v. Dish Network, L.C.C., 905 F. Supp. 2d 1088, 1102 (C.D. Cal. 2012), *aff'd* 723 F.3d 1067 (9th Cir. 2013), *aff'd* 747 F.3d 1060 (9th Cir. 2014) (finding that because the consumer is essentially deciding when and under what parameters the copy is made, Dish is not ultimately responsible for the copy being made).

116. *See Sony*, 464 U.S. at 429 ("[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors . . . to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

117. *Id.* at 430.

118. *Id.* at 430–31.

119. *Id.* at 431. In this same way, the Court notes that it is the place of Congress to make changes to the Copyright Act. *Id.* at 429.

120. *See Sony*, 464 U.S. at 456 ("[R]espondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses.").

otherwise strict enforcement of an author's exclusive rights and add to the public consciousness.[121]

The Ninth Circuit followed the *White-Smith* and *Sony* rulings and dicta as to "copies" in *Napster*, when it held there was no fair use in Napster's use of peer-to-peer file sharing.[122] In that case, the users were truly disseminating "copies" of the songs because they were also keeping their own personal copy of the song, which differs drastically from the *ReDigi* deletion scheme.[123] The court declined to apply the "shifting" framework of *Sony* because Sony did not bring the copied material into the public realm, available to everyone simultaneously.[124] Between *Napster* and *Sony*, the courts introduced a very important concept—shifting, whether through space or time, is a valid exercise of fair use.[125] *Sony* gave us the concept and *Napster* showed the limits.[126] *Napster* contrasts starkly with the most recent incarnation of file sharing.[127] Truly, *Napster* is ReDigi's past—a past where the court stated loud and clear what would not be tolerated and gave ReDigi confines to attempt to work within.

C. How are the Rights to Reproduction and Distribution Applied to Digital Media?

Given the vital role the term "material object" plays in the definition of "copy" and "phonorecord," the court has explicitly defined how it applies to digital, intangible items. As noted earlier, "any object in which a sound recording can be fixed is a 'material object' . . . ."[128] However, the court also notes that "an electronic download does not divest the sending computer of its file, and therefore does not implicate any ownership rights over the sound file held by the transferor."[129] This draws into question the court's explanation of material objects on digital media if the downloading *does* divest the transferor of the file. *Capitol Records, LLC v. ReDigi, Inc.* dealt directly with this question.[130]

ReDigi's service attempted to expand the technology surrounding digital music while staying within the confines of the law.[131] Companies like Google understood the importance and possible ramifications that this case could have on cloud computing, and

---

121. *Sony*, 464 U.S. at 478–79.

122. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) ("Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.").

123. *Id.* at 1012 ("The requesting user's computer uses this information to establish a connection with the host user and downloads a copy of the contents of the MP3 file from one computer to the other over the Internet, 'peer-to-peer.'").

124. *Id.* at 1019 ("Both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public . . . .").

125. *See* Soma & Kugler, *supra* note 34, at 434 ("Napster established an important principle related to storage of music in the cloud. The ability to time-shift, and to move copyrighted content from one location to another via copying in order to do so, is likely permissible as a fair use under Sony and Diamond.").

126. *Id.*

127. Matt Peckham, *How ReDigi Lets You Resell Digital Music (and Why It's a Big Deal)*, TIME (June 27, 2012), http://techland.time.com/2012/06/27/how-redigi-lets-you-resell-digital-music-and-why-its-a-big-deal/.

128. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

129. *Id.* at 172.

130. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013) ("ReDigi markets itself as 'the world's first and only online marketplace for digital used music.'").

131. *See generally* Peckham, *supra* note 127 (discussing how ReDigi argues it is not comparable to the unlawful practices of Limewire or Napster).

attempted to inform the court.[132] Cloud computing "enables users to store and process data remotely, in the 'cloud' of networked computer servers connected through the internet to the user's computer, thus freeing users from the need to keep physical files."[133] The court summarily rejected both Google's and Public Knowledge's attempts to file amicus briefs.[134]

ReDigi argued that instead of actual copying, their process more closely resembled a train—it migrated information from one source (the consumer) to another (ReDigi's "cloud locker").[135] The court instead took a hard line in interpreting the reproduction section of the 1976 Act.[136] The court held that regardless of whether the original owner still has their original "copy" at the end of the process, in the end, a new material object exists and thus violates the copyright owner's rights of both reproduction and distribution.[137] The *ReDigi* court failed to look critically at the relationship the *London-Sire* court made between the original owner retaining access to the digital file and the new object being an infringing material object.[138] While the *ReDigi* court would not necessarily be able to hold ReDigi's process non-infringing, it could have better noted the disjointed nature of case law and copyright statutes.

Even though the court rejected ReDigi's analogy to Star Trek's transporter or Willy Wonka's Wonkavision,[139] the court noted that while "physical limitations" may have been desirable in the past, "[i]t is left to Congress, and not this Court, to deem them outmoded."[140] Going forward, the question will be how the courts will apply "material object" onto digital media. *ReDigi* shows that in our increasingly digital landscape this question is vital and the true place for change is with the federal legislature, not the courts.

IV. RECOMMENDATION

The current framework being applied by courts to copyrighted works does not make sense when compared to the reality of digital works. When courts first had to reconcile

132. Letter from Kathryn J. Fritz, Fenwick & West LLP, to Hon. Richard J. Sullivan (Feb. 1, 2012), http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_120201GoogleLetterReAmicusBrief.pdf.

133. *Id.*

134. Order Denying Google's Request for Amicus Brief, Capitol Records, No. 12 Civ. 95 (S.D.N.Y. 2012), http://ia600800.us.archive.org/30/items/gov.uscourts.nysd.390216/gov.uscourts.nysd.390216.24.0.pdf. Order Denying Public Knowledge's Request for Amicus Brief, No. 12 Civ. 95 (S.D.N.Y. 2012), http://ia700800.us.archive.org/30/items/gov.uscourts.nysd.390216/gov.uscourts.nysd.390216.70.0.pdf. The court felt that the parties involved—Capital Records and ReDigi—were capable of bringing up the possible issues and could make the decision to do so.

135. *See ReDigi*, 934 F. Supp. 2d at 645 ("ReDigi asserts that the process involves 'migrating' a user's file, packet by packet—'analogous to a train'—from the user's computer to the Cloud Locker so that data does not exist in two places at any one time.").

136. *See id.* at 648 ("Thus, the plain text of the Copyright Act makes clear that reproduction occurs when a copyrighted work is fixed in a new *material object*.").

137. *See id.* at 649–50 ("Because the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object, and because digital music files must be embodied in a new material object following their transfer over the Internet, the Court determines that the embodiment of a digital music file on a new hard disk is a reproduction within the meaning of the Copyright Act.").

138. London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

139. *ReDigi*, 934 F. Supp. 2d at 645 n.2.

140. *Id.* at 656.

what a "material object" meant in the context of intangible works,[141] they attempted to balance the needs of the consuming public and copyright owners. The deeper society gets into digital media and the more entrenched the public gets within digital versions of works, the less sense court rulings make when applied to actual life.

There are far-reaching changes in how technology is used by the public on a daily basis such as cloud computing, Internet banking, e-books, and digital music. Due to the increasing prevalence of technology in every aspect of life and media, Congress needs to either revise the definitions of both "copy" and "phonorecord" within the 1976 Act or define "material object" directly within the Copyright Act. Both prior precedent and public policy dictate that when technology, international pressures, or newly realized constraints (or liberations)[142] of the human condition come into play, the legal construct of copyright law reacts to those changes.

A. Proposed Changes

Currently, the definition of both "copies" and "phonorecords" dictate that each is a "material object."[143] However, the 1976 Act never actually defines what a material object is, though courts eventually interpreted the phrase.[144] This designation strictly confines an owner's ability to alienate their digital copy and phonorecords. As a result, people willingly infringe,[145] often with burdensome penalties.[146] Congress should define "material object" differently and more expansively than has occurred in cases thus far as well as amend the definitions of "copy" and "phonorecord" directly.

1. Define "Material Objects"

At the very least, Congress needs to define "material object." First, the definition would necessarily acknowledge that digital versions of works exist. More importantly, the definition needs to spell out that a digital copy, such as an e-book, is fundamentally different than a physical copy of that same book and that transfers of each occur differently. The definition would also underline the differences in legal response to a transfer when the owner kept or relinquished possession.

The differences in medium determine the procedure for transfer of use or ownership. These changes in the definition section of the 1976 Act are required to ensure that a legal

---

141. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984) (holding that "time-shifting" is a permissible exercise of fair use).

142. *Supra* note 41 and accompanying text.

143. 17 U.S.C.A. § 101 (2010).

144. *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 173 (D. Mass. 2008) (finding that computer files are "material objects").

145. *See* Joanna Stern, *House Piracy: Over 1 Million People Watched 'Game of Thrones' Illegally*, ABC NEWS (Apr. 3, 2013), http://abcnews.go.com/blogs/technology/2013/04/house-piracy-over-1-million-people-watched-game-of-thrones-illegally/ (pointing out that people would rather risk being charged with piracy than pay for a subscription to HBO).

146. Kevin Collier, *Joel Tenenbaum, Charged with Downloading 30 Songs from Kazaa, Fined $675,000*, DAILY DOT (Aug. 24, 2012, 6:29 PM), http://www.dailydot.com/news/joel-tenenbaum-kazaa-download-675000-fine/; Amanda Holpuch, *Minnesota Woman to Pay $220,000 Fine for 24 Illegally Downloaded Songs*, GUARDIAN (Sept. 11, 2012, 5:10 PM), http://www.theguardian.com/technology/2012/sep/11/minnesota-woman-songs-illegally-downloaded; Elianne Friend, *Woman Fined to Tune of $1.9 Million for Illegal Downloads*, CNN (June 18, 2009, 9:50 PM EDT), http://www.cnn.com/2009/CRIME/06/18/minnesota.music.download.fine/.

digital market exists, because America has shown that regardless of whether or not that market exists, they are willing to find the content despite the possible punishments and fines.

2. Change Definitions of "Copy" and "Phonorecords"

The definitions of "copy" and "phonorecord" should be amended so they highlight a congressional and judicial understanding of the differences between hard copies and digital copies of the same works. The Act should word the definitions in such a way as to allow courts more discretion in deciding if the allegedly infringing material actually violates the Copyright Act. Judges are in a better position, given the opportunity to look at the material and decide whether it's an actual reproduction, such as a bootleg copy of a movie, or just the movement of a digital copy, such as a transfer from a person's personal computer into a cloud computing network.

The new definition should acknowledge the difference between the simple movement of a copy and actual transfer of ownership between users. If a particular copy does not leave the original owner's possession and is merely that owner moving or designating the copy, it would be considered the same "copy"—this would assure the legality of growing technology like cloud computing. Consumers need to be able to move their digital copies without being accused of violating copyright law. Otherwise, a consumer who moves legally obtained copyrighted professional photos from their desktop to their cloud and onto another desktop is in violation of the 1976 Act. It is ludicrous that merely moving where the copy is stored is enough to put a user in violation of a federal statute.

Additionally, if a particular copy or phonorecord does change ownership, it should be considered the same "copy" as long as the original owner no longer has possession of the same object—such as with ReDigi's website that monitors to ensure deletion of the original. Since *London-Sire* based its assertion on the idea that the original owner still has possession, that ruling would be rendered moot in this context.[147] The fact that it is now technologically possible for a system to assure that two people do not "own" the copy at the same time shows the world *London-Sire* ruled in no longer exists. Congress should amend the Copyright Act to reflect changing technology. The biggest obstacle for digital copies is currently the idea that a new copy exists at the end of the transfer. Once the change in definitions takes place, an owner would be able to legally dispose of their copy through the First Sale Doctrine since it would be the same "copy" and therefore fungible.

B. Precedent

There are numerous instances where Congress has changed the Copyright Act—either Congress has made changes wholesale[148] or amended the main components within the Act.[149] There are instances outside the Copyright Act where Congress has withdrawn an

147. *See* London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 172 (D. Mass. 2008) ("[A]n electronic download does not divest the sending computer of its file, and therefore does not implicate any ownership rights over the sound file held by the transferor.").

148. *Copyright Timeline*, *supra* note 19 (explaining that the Copyright Act has been majorly revised four times since its 1790 inception).

149. *Id.* There have also been numerous amendments made to existing versions of the Copyright Act for a plethora of reasons, including term extensions, acknowledgment of foreign copyrights, and others.

Act when, among other factors, it becomes clear Americans will not comply.[150] The changes most relevant to this Note have been the changes in response to technology.[151] There is no reason Congress could or should not take similar steps now. In the same way that the Court ruled that player pianos, under the law at the time, were not "copies,"[152] so too are courts now bound by precedent and the way the law is written. Courts have realized that they are helpless to change the law and the impetus lies with Congress.[153] Due to this reality, Congress needs to take the steps outlined above to amend the law so consumers can find a way to stay within the confines of law and judges are able to make rulings that comply with common sense.

C. Policy Rationale

In addition to the legal precedent and the necessity underlying the need to loosen the definition of "copy," there are equally important public policy reasons that make changing the definitions imperative. The numbers presented by numerous organizations in favor of strong intellectual property enforcement are under constant scrutiny by both liberals and conservatives—calling into question the validity of the numbers.[154] Despite the amount of reported damage and the high fines that can be assessed against copyright infringers,[155] consumers still download digital content, especially when that content is otherwise hard to come by.[156] However, there is some data to suggest that even when that content becomes

150. *See Prohibition Ends*, HISTORY CHANNEL, http://www.history.com/this-day-in-history/prohibition-ends (last visited Nov. 1, 2015) (explaining that after "failing fully to enforce sobriety and costing billions" prohibition was repealed).

151. *See* Miriam A. Smith, *Seven Cases That Shaped the Internet in 2001 or "The First Thing We Do, Let's Kill All the Lawyers" Part III*, 15 UTAH B.J. 22, 23 (2002) ("The piano roll decision proved unpopular and Congress recognized these 'mechanical' (reproduction) rights in the Copyright Act of 1909.").

152. *See generally* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that copy of music unreadable to human eyes not a copy under the 1831 Act).

153. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013) (noting that it is in the hands of Congress, not the court, to change the underlying law).

154. *See For Students Doing Reports*, RECORDING INDUSTRY ASS'N AMERICA, http://www.riaa.com/faq.php (last visited Nov. 1, 2015) (stating that piracy costs the global music industry $12.5 billion every year); *see also* Brad Plumer, *SOPA: How Much Does Online Piracy Really Cost the Economy?*, WASH. POST (Jan. 5, 2012), http://www.washingtonpost.com/blogs/wonkblog/post/how-much-does-online-piracy-really-cost-the-economy/2012/01/05/gIQAXknNdP_blog.html (raising questions about the accuracy of the $20.5 billion claimed as losses by the Recording Industry Association of America due to piracy); Kal Raustiala & Chris Sprigman, *How Much Do Music and Movie Piracy Really Hurt the U.S. Economy?*, FREAKONOMICS (Jan. 12, 2012, 3:09 PM), http://freakonomics.com/2012/01/12/how-much-do-music-and-movie-piracy-really-hurt-the-u-s-economy/ (stating that the "IPI estimate, as both Sanchez and tech journalist Tim Lee have pointed out, is replete with methodological problems, including double- and triple-counting, that swell the estimate of piracy losses considerably").

155. Javier Panzar, *Large Fine Upheld Against BU Grad for Illegal Song Downloads*, BOSTON GLOBE (June 27, 2013), http://www.bostonglobe.com/metro/2013/06/26/court-upholds-fine-against-former-student-for-illegal-music-downloads/aXul4dPHxzv5mrnDUehaEN/story.html.

156. *See, e.g.*, MailOnline Reporter, *What is Your State's Most Illegally Downloaded TV Show? Beauty and the Beast Ranks the Highest in New York - but Game of Thrones is the Top Torrent Across the Country*, DAILY MAIL (Aug. 14, 2014, 4:08 PM), http://www.dailymail.co.uk/news/article-2724287/What-states-illegally-downloaded-TV-Beauty-Beast-ranks-highest-New-York-Game-Thrones-torrent-country.html (graphing which states download which TV shows, games, and movies); Rhiannon Williams, *Game of Thrones still Most Pirated TV Show*, TELEGRAPH (Apr. 8, 2014, 12:27 PM), http://www.telegraph.co.uk/technology/news/10751891/Game-of-Thrones-still-most-pirated-TV-show.html (listing Game of Thrones as most pirated, Walking Dead as second,

available, people still violate the law.[157] When approximately half of consumers violate a law[158] with near disregard for punishment, there is a general disconnect between what Congress claims to be trying to accomplish and the means it chooses to implement those goals. The American public is not responding well.

IV. CONCLUSION

As digital content becomes ever more popular and easily attainable, courts are going to have to deal with people trying to alienate their digital copies. It is the American way to be able to dispose of one's personal property as they see fit. A change in the definition of "copy" will allow courts to differentiate between unlawful reproductions and a consumer attempting to sell their digital book, song, movie or whatever technology turns digital next. The stark truth is that people will traffic in digital goods—the question is whether Congress wants to be playing catch-up or leading the way to a brighter future.

---

and Homeland, Breaking Bad, Dexter, and Girls all in the top ten). It is important to note that of the six shows mentioned, not one is on a network that has historically made it difficult, if not impossible, to get their programming without a cable subscription. However, HBO has now broken the trend and now offers HBO NOW to non-cable subscribers, which is a step in the right direction. Brian Moylan, *HBO Go Without Needing Cable? Welcome to the Future of Television*, GUARDIAN (Sept. 13, 2014, 8:00 AM), http://www.theguardian.com/media/2014/sep/13/hbo-go-without-needing-cable-welcome-to-the-future-of-television.

157. James Hibberd, *Game of Thrones Piracy Hits Record High Despite HBO's Stand-Alone Service*, ENTERTAINMENT WEEKLY (Apr. 22, 2015, 7:41 AM), http://www.ew.com/article/2015/04/21/game-thrones-piracy-record. Despite HBO NOW being available, a record number of people still illegally downloaded the season five premiere of HBO's Game of Thrones. However, this could have something to do with the fact that HBO NOW became available shortly before the Game of Thrones premiere, but only through either an Apple product or very specific Internet carriers. Timothy Stenovec, *Everything You Wanted To Know About HBO Now But Were Too Afraid To Ask*, HUFFINGTON POST (Mar. 10, 2015, 4:59 PM), http://www.huffingtonpost.com/2015/03/10/hbo-now-details_n_6841654.html. Either way, HBO has responded to this increase in piracy with an increased presence of take down notices. David Nield, *HBO Sends Official Warnings to Game of Thrones Torrenters*, DIGITAL TRENDS (Apr. 19, 2015), http://www.digitaltrends.com/movies/hbo-sends-official-warnings-to-game-of-thrones-torrenters/.

158. *See* Jason Mick, *Nearly Half of Americans Pirate Casually, But Pirates Purchase More Legal Content*, DAILYTECH (Jan. 21, 2013, 5:52 PM), http://www.dailytech.com/Nearly+Half+of+Americans+Pirate+Casually+But+Pirates+Purchase+More+Legal+Content/article29702.htm (reporting that while nearly half of all American's pirate casually, they buy more content legally).