Downstream Alteration of Copyrighted Works in a World of Licensed, Digital Distribution

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INTRODUCTION

When players of the videogame "Plants vs. Zombies" loaded Steam (the digital game distribution platform they used to purchase the game) on August 10, 2010, copies of the game residing on their hard drives automatically received the latest software update for the game.[1] Such an update would not normally be noteworthy: software updates are routinely issued by developers to close security holes and improve software functionality.[2] But this particular update, issued by the game developer PopCap Games, also made a conspicuous artistic change: it altered the appearance of the game's popular "Dancing Zombie" character to eliminate its striking likeness to Michael Jackson's zombie look in the "Thriller" music video. Following the update, players found that they were unable to revert back to the previous version of the game—the version for which they had paid—even if that was the version they preferred.[3] The version of the game featuring the Michael Jackson zombie character was lost to them forever.

In a world where users own physical copies of the videogame—the world in which we have lived until recently—the developer's changes to the Dancing Zombie's appearance could not, as a matter of technological limitation, have been

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1. *See* Jason Evangelho, *Plants vs. Zombies GOTY Edition Released on Steam*, EXAMINER.COM (Aug. 10, 2010), http://www.examiner.com/article/plants-vs-zombies-goty-edition-released-on-steam; Russ Frushtick, *Michael Jackson Estate Forces 'Plants vs. Zombies' Update*, MTV MULTIPLAYER BLOG (July 27, 2010, 12:03 PM), http://multiplayerblog.mtv.com/2010/07/27/michael-jackson-estate-forces-plants-vs-zombies-update; Xav de Matos, *King of Pop-Inspired Enemy to Be Replaced in Previous, Future Versions of Plants vs. Zombies*, SHACKNEWS (July 27, 2010, 3:20 PM), http://www.shacknews.com/article/64908/king-of-pop-inspired-enemy.

2. In fact, Steam was originally conceived in 2002 by Valve Corporation as a platform that would streamline the software update (or "patching") process common for online videogames. *See Steam (Software)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Steam_(software) (last updated Jan. 13, 2013). For a discussion of the software update trend, see *infra* Part II.C.

3. *See, e.g.*, *August 10, 2010 Update. Post Bugs Here*, STEAM, http://forums.steampowered.com/forums/showthread.php?t=1396084 (last modified Sept. 13, 2010) (providing examples of users' dissatisfaction at having their versions automatically updated to replace the Dancing Zombie). A YouTube search yields pages of videos that feature nothing but clips of the Michael Jackson Dancing Zombie character from the game. *See, e.g.*, YouTube, www.youtube.com (search for "Plants vs Zombies Dancing Zombie"). This suggests that many users indeed attached an idiosyncratic value to the Michael Jackson Dancing Zombie, and, if given the option, would have chosen to keep that copy of the game.

retroactively applied to the copies already sold. Those who purchased a copy of the game before the Dancing Zombie alteration occurred would have been able to continue enjoying the original version of the game, and those purchasing the game after the change was implemented would have done so with notice of the change. Moreover, it is likely that demand for the original "Thriller" zombie version would have increased in secondary markets. But in the world of licensed, digital copies—the world to which we are shifting—that previous version may simply be overridden; the user's ability to enjoy a work as-paid-for is taken away. New methods of distribution that make it technologically possible for companies to remotely alter content for which a user has paid, coupled with broad licensing schemes that arguably make such downstream control legally permissible, will give copyright owners the ability to make instantaneous, retroactive changes to copies of works without the consent of the user who paid for them.

Because of the novelty of the issue, case law dealing with downstream alteration is practically nonexistent. The most infamous example of downstream alteration to date is perhaps Amazon's remote deletion of copies of *1984* and *Animal Farm* from users' Kindles in the summer of 2009.[4] The class-action lawsuit arising from the incident, however, was settled out of court.[5] In another recent case involving downstream remote alteration, a federal district court upheld Sony's right to subject PlayStation 3 (PS3) users to a hard choice between accepting an update that removed the "Other OS" feature of the PS3 or forgoing access to a multitude of PlayStation services and features.[6] The Other OS feature allowed users to install Linux or other operating systems on their PS3s, and Sony heavily touted this feature when it first introduced the PS3 in 2006.[7] In 2009, however, Sony eliminated the Other OS feature in the newer model of the PS3.[8] And in 2010, citing security concerns, Sony released the firmware update at issue to remove the Other OS feature on original models of the PS3—if a user refused to download the update, he would lose, among other things, access to the PlayStation Network and

4. Amazon removed copies that had been sold by a digital publisher that did not have rights to them. *See* Brad Stone, *Amazon Erases Two Classics from Kindle (One is '1984.')*, N.Y. TIMES, July 18, 2009, at B1; *see also* Joseph E. Van Tassel, *Remote Deletion Technology, License Agreements, and the Distribution of Copyrighted Works*, 97 VA. L. REV. 1223, 1223 (2011).

5. *See* Van Tassel, *supra* note 4, at 1257 (citing to Stipulation of Settlement and [Proposed] Order of Dismissal at 4, Gawronski v. Amazon.com, Inc., No. 09-cv-01084-JCC (W.D. Wash. Sept. 25, 2009); Order of Dismissal, Gawronski v. Amazon.com, Inc., No. 09-cv-01084-JCC (W.D. Wash. Oct. 7, 2009)).

6. *In re* Sony PS3 Other OS Litigation, 828 F.Supp.2d 1125, 1129 (N.D. Ca. 2011) ("The choice may have been a difficult one for those who valued both the Other OS feature and access to the PSN, but it was still a choice."). However, because the court found that Sony, through imposing this choice, did not "unilaterally [take] away a fundamental feature of a product after that product [was] sold to a consumer," as set out in the complaint, the court did not address whether unilateral deactivation of a feature on Sony's part would be wrongful. *Id.* (second alteration in original).

7. Matt Peckham, *Sony Zaps PlayStation 3 'Install Other OS' Feature*, PCWORLD (Mar. 29, 2010), http://www.pcworld.com/article/192731/Sony_Zaps_PlayStation_3_Install_Other_OS_Feature.html.

8. *Id.*

the ability to run newer games and Blu-Ray movies.[9]

All three of the foregoing examples—PopCap's replacement of the Michael Jackson zombie in "Plants vs. Zombies," Amazon's deletion of *1984* and *Animal Farm* from users' Kindles, and Sony's remote disabling of the PS3's Other OS feature—make clear that downstream alteration is not just a distant, abstract concern. This Note will focus specifically on issues raised by the prospect of a copyright holder making downstream changes to the artistic content of a copyrighted work. Take, for example, the recent decision of one publisher to remove "the n-word" from new editions of *The Adventures of Huckleberry Finn*.[10] What if the publisher had simply issued an update over the Kindle network that automatically replaced the word for those who had the previous edition?[11] Or what if George Lucas—who has been heavily criticized for the changes he makes to the *Star Wars* films with each new DVD or Blu-Ray release—had the ability to issue updates to override existing digital copies of the films?[12] This future may not be so far off; copyrighted works are increasingly being disseminated in digital form. In 2011, digital music sales exceeded physical sales for the first time in history, taking 50.3% of the market share of all music purchases.[13] In the same year, e-book sales comprised "15% of all trade publishing revenues versus 6% in 2010."[14] And the film industry, which has thus far derived much of its Internet revenue from video-on-demand services provided by companies such as Netflix, has recently stepped up its efforts to transition into the realm of digital movie sales with Ultraviolet, a digital locker system that would make films available, once paid for, on any of a consumer's entertainment devices.[15]

The prospect of downstream alteration raises questions about the appropriate scope of licensing terms, the objectives of copyright law and even the meaning of art. It provides an impetus to tackle these questions by concretizing what was once but a thought experiment. Part I introduces the notion of copy ownership and contrasts it with the increasingly popular method of licensing copyrighted works.

9. *Id.*; *see also* Patrick Seybold, *PS3 Firmware (v3.21) Update*, PLAYSTATION.BLOG (Mar. 28, 2010), http://blog.us.playstation.com/2010/03/28/ps3-firmware-v3-21-update/ ("[D]isabling the 'Other OS' feature will help ensure that PS3 owners will continue to have access to the broad range of gaming and entertainment content from SCE and its content partners on a more secure system.").

10. Julie Bosman, *Publisher Tinkers with Twain*, N.Y. TIMES, Jan. 5, 2011, at A12.

11. In fact, Google Play, another digital distribution service, appears to expressly provide for this ability on the part of the copyright holder in its Terms of Service. *See infra* Part I.B.

12. See *infra* Part I.A.2 for a discussion of Lucas' changes. Lucas' penchant for making retroactive digital alterations to his films was even lampooned in a "South Park" episode. *See Free Hat*, WIKIPEDIA, http://en.wikipedia.org/wiki/Free_Hat (last modified Jan. 1, 2013).

13. Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME (Jan. 6, 2012), http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011.

14. Jeremy Greenfield, *E-Book Revenues Double in 2011, Top $2 Billion*, DIGITALBOOKWORLD (July 17, 2012), http://www.digitalbookworld.com/2012/e-book-revenues-double-in-2011-top-2-billion/.

15. Michael Cieply, *Fox to Offer Digital Movies Closer to Theatrical Release*, N.Y. TIMES, Sept. 7, 2012, at B3; *see also* Stephanie Prange, *Digital: The New Frontier*, HOME MEDIA MAG. (Mar. 28, 2011), http://www.homemediamagazine.com/steph-sums-it-up/digital-the-new-frontier.

Part II argues that downstream alteration of a copyrighted work through the use of software-like updates impermissibly expands authorial control. Finally, Part III briefly outlines several ways in which licensing terms that purport to allow the copyright holder to make downstream changes to a copyrighted work can be limited.

I. COPY OWNERSHIP AND LICENSED, DIGITAL DISTRIBUTION

This Part first discusses the state of affairs in our current—but fading—world of copy ownership in which a consumer acquires title to a copy of a copyrighted work upon paying for it. In particular, it examines the role of copy ownership and the first sale doctrine in establishing the current balance between copyright owner rights and user's rights. Next, this Part provides an overview of the increasingly prevalent system of licensing for distributing copies of a copyrighted work. Licensing, in contrast to copy ownership, allows copyright holders to retain ownership of the copy; rather than purchasing title to a copy, users purchase a mere license to use the copy. This Part concludes by examining the legality of downstream alteration under various licensing schemes today.

A. COPY OWNERSHIP

1. Background on Copy Ownership and the First Sale Doctrine

As an initial matter, it is important to distinguish between the copyrighted work ("the work"), its copyright and a particular embodiment of the copyrighted work ("the copy").[16] The copyright is a series of intangible rights granted by statute to the copyright owner in relation to a given work for a limited period of time.[17] These rights are enumerated in section 106 of the Copyright Act and include the exclusive right to reproduce or distribute the copyrighted work and to prepare derivative works based on the copyrighted work.[18] The copyright ceases to exist when the copyright term ends, but the work itself continues to exist and passes into the public domain; it is the copyright to the work, and not the work itself, that the author owns.[19] A work is often disseminated to the public through the distribution

16. The copyright statute recognizes a distinction among these three things: "Ownership of a *copyright* . . . is distinct from ownership of *any material object* in which *the work* is embodied." 17 U.S.C. § 202 (2012) (emphasis added).

17. *See generally* U.S. CONST., art. I, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings . . . ."); 17 U.S.C. § 106 (enumerating the series of intangible rights).

18. 17 U.S.C. § 106.

19. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432–33 (1984) ("[Copyright] protection has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the copyright holder 'exclusive' rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies.") (citations omitted); Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 298 (1907) ("[T]he character of the property sought to be protected . . . is not the physical thing created, but the right of

of copies of the copyrighted work. Until recently, the distribution consisted of the *sale* of copies, typically on a physical medium (for example, a book or DVD); a user purchases and subsequently owns the copy, the book or DVD.

The most accepted view of the objective of United States copyright law is the one espoused by the Supreme Court in *Stewart v. Abend*: copyright law strives to strike "a balance between the artist's right to control [her] work . . . and the public's need for access to creative works."[20] The limited duration of the copyright term, after which a work passes into the public domain, is one example of this principle.[21] This balance between access and incentives is also embodied in the "first sale" doctrine, which bars copyright owners from relying on their intellectual property rights to restrict downstream sales of a copy of their work once they have parted with title over that copy.[22] More specifically, the first sale doctrine provides that "the owner of a particular copy or phonorecord lawfully made under [the Copyright Act] . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[23] Thus, a publisher cannot place a notice in a book restricting its resale price to a certain range.[24] Significantly, the first sale doctrine is available only to an *owner* of a copy, which poses problems as licensing becomes the prevalent form of distribution.[25]

2. Copy Ownership and the Balance of Owner and Access Rights

In 1997, the *Star Wars* trilogy was rereleased in movie theaters and on DVD to

printing, publishing, copying, etc., which is within the statutory protection.").

20. Stewart v. Abend, 495 U.S. 207, 228 (1990). Similarly, the Copyright Office has stated that "[t]he ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination." STAFF OF S. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REPORT 6 (1961) [hereinafter COPYRIGHT LAW REVISION REPORT].

21. For instance, the House Report on legislation that implemented the Berne Convention, discussed further *infra* Part II, stated: "Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain." H.R. REP. NO. 100-609, at 17 (1988).

22. The first sale doctrine was first recognized in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), and later codified in 17 U.S.C. § 109 (2012). In *Bobbs-Merrill*, the Supreme Court invalidated a copyright holder's price restriction on downstream sales of its book. *Bobbs-Merrill*, 210 U.S. 339; *see also* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011) (arguing that the first sale doctrine is but one aspect of a greater judicially created doctrine of copyright exhaustion).

23. 17 U.S.C. § 109(a).

24. This was what happened in *Bobbs-Merrill*. It is important to note, however, that the publisher in *Bobbs-Merrill* did not purport to *license* the work; rather, it attempted to argue that the copyright statute gave it the right to restrict the downstream sales price. *See Bobbs-Merrill*, 210 U.S. at 341.

25. *See, e.g.*, Quality King Distrib. v. L'Anza Research Int'l, 523 U.S. 135, 141–42 (1998); *see also* 17 U.S.C. § 109(a); *infra* Part I.B.

mark the twentieth anniversary of the theatrical release of *A New Hope*.[26] These "Special Edition" versions, however, were not the same as the original film versions.[27] At Lucas' behest, the films were digitally remastered to achieve visuals that were unachievable in 1977.[28] Lucas also made substantive alterations that provoked fan controversy, the most notable of which was the "Han Shot First" controversy.[29] In the original theatrical version of the film, Han Solo preemptively shoots the bounty hunter Greedo during a tense exchange; in the 1997 Special Edition version, however, Lucas altered the scene to show Greedo firing first at Han, with Han shooting Greedo only in self-defense.[30] By making the change, Lucas sought to portray Han in a more heroic light instead of as a "cold-blooded killer," but fans felt that the revision detracted from Han's initially morally ambiguous character.[31] And despite strong fan pressure, Lucas refused to release the original theatrical versions of the first *Star Wars* trilogy.[32] Tellingly, when asked which version he hoped audiences would be watching in twenty years—the 1977 version or the 1997 Special Edition version—Lucas responded:

> [W]hat ends up being important in my mind is what the DVD version is going to look like, because that's what everybody is going to remember. The other versions will disappear. Even the 35 million tapes of *Star Wars* out there won't last more than 30 or 40 years. A hundred years from now, the only version of the movie that anyone will remember will be the [Special Edition] DVD version.[33]

Lucas' response aptly illustrates an important incident of copy ownership—protection against the overcentralization of access to copyrighted works. Once title of the videotape passed from Lucas to the owner upon the owner's purchase of the videotape, Lucas could not rely on his intellectual property rights to exert control

26. *See, e.g.*, Gary Arnold, *The Force Returns: 'Star Wars' Special Edition Features Some New Tinkering but Same Old Thrills*, WASH. TIMES, Jan. 27, 1997, at D1.

27. *See id*.

28. *Id.*

29. Peter Howell, *At Last, Han Shot First*, TORONTO STAR, May 12, 2006, at B01.

30. *Id*.

31. *Id.*; *see also* Alex Ben Block, *5 Questions with George Lucas: Controversial 'Star Wars' Changes, SOPA and 'Indiana Jones 5,'* HOLLYWOOD REP. (Feb. 9, 2012, 1:21 PM), http://www.hollywoodreporter.com/heat-vision/george-lucas-star-wars-interview-288523. The revisions to the *Star Wars* films did not end with the Special Edition cut. When all six *Star Wars* films were released on Blu-ray in September 2011, fans revolted again when they discovered that Darth Vader now shouted "No!" when he hurls the evil Emperor to his death on the Death Star in *Return of the Jedi*, when he formerly committed the deed in silence. *See* Dave Itzkoff, *Lucasfilm Confirms Change to Blu-ray Release of 'Return of the Jedi,'* N.Y. TIMES (Aug. 31, 2011, 2:05 PM), http://artsbeat.blogs.nytimes.com/2011/08/31/lucasfilm-confirms-change-to-blu-ray-release-of-return-of-the-jedi; *see also* James Poniewozik, *The Blu-Ray Menace; or, Who Really Owns Star Wars?*, TIME (Aug. 31, 2011), http://entertainment.time.com/2011/08/31/the-blu-ray-menace-or-who-really-owns-star-wars.

32. It was not until nearly a decade later, in May 2006, that Lucas finally succumbed to fan pressure to release the original Star Wars trilogy on DVD in its unaltered form. *See* Howell, *supra* note 29, at B01. A poll on the Internet Movie Database "showed 41 per cent of more than 8,000 respondents" were planning to buy the unaltered versions on DVD, "compared with 32 per cent who [were] happy with the special edition version." *Id.*

33. Ron Magid, *An Expanded Universe*, AM. CINEMATOGRAPHER MAG., Feb. 1997, at 60, 70.

over the physical media and demand its return.[34] Lucas cannot force the owner of a *Star Wars* videotape to exchange his videotape for the newest cut of the film. And because of the distributed circulation resulting from a system of copy ownership, members of the public have an alternative channel to obtaining access to the original *Star Wars* videotape (the secondary market) that does not depend on going through the copyright holder who, in this case, has decided to stop circulating that version.[35] If Lucas wanted a new cut of *Star Wars* to become the definitive version, he would have no choice but to hope that "the 35 million tapes of *Star Wars* out there won't last more than 30 or 40 years."[36] This is just one way in which physical copy ownership has operated to limit the rights of the copyright holder.

The fact that a copyrighted work is distributed as a digital file rather than on a physical medium like a book should not, by itself, change anything. The distinction between the work and a particular embodiment of the work continues to exist in digital distributions models: e-books, for example, merely "trade one form of tangible embodiment (ink, paper and binding) for another (magnetic charges in memory media, for example, or pixels on a screen)."[37] The question, then, is whether the particular feature of physical copy ownership that allows users to preserve and enjoy the copy of the work as-paid-for is but an accident of technology—a result of the limitations of print-based distribution that should be left by the wayside now that those limitations can be transcended—or whether it is a feature integral to maintaining copyright law's balance of access and incentives, in which case the feature should be preserved as we transition to a digital distribution world.[38]

34. *See* Van Tassel, *supra* note 4, at 1226–28 (examining the mechanisms for judicial impoundment and destruction of infringing copies under 17 U.S.C. § 503 and extrajudicial methods of recall and destruction); *see also* Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 93 (2006).

35. *See* R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 592–610 (2003); *id.* at 607 ("Copy ownership thus leads to preservation, and distributing copies of a work to the public increases, perhaps significantly, the likelihood that a work will survive into the future. The first sale doctrine plays a key role in this 'preservation effect' of diverse copy ownership."); *see also* Letter from Thomas Jefferson to Ebenezer Hazard (Feb. 18, 1791), *in* THOMAS JEFFERSON, WRITINGS 973, 973 (Merrill Peterson ed., 1984) ("[L]et us save what remains; not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but by such a multiplication of copies, as shall place them beyond the reach of accident."). The LOCKSS Program is a digital preservation system built on the principle that "lots of copies keep stuff safe." *Preservation Principles*, LOCKSS, http://www.lockss.org/about/principles (last visited Nov. 11, 2012).

36. Magid, *supra* note 33, at 70.

37. Michael Seringhaus, *E-Book Transactions: Amazon "Kindles" the Copy Ownership Debate*, 12 YALE J.L. & TECH 147, 156 (2009). Indeed, in order to receive copyright protection at all, works must, by definition, be fixed in "tangible medium." 17 U.S.C. § 102(a) (2012). For a discussion of fixation, see *infra* Part II.A.2.

38. *See* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245 (2001). Among the incidents of copy ownership identified by Liu are the unlimited ability to access (to read, view, or play) their copies anytime they want and as many times as they want. *Id.* at 1286. Also, copy owners can freely transfer their copies to others, whether lending a book to a friend or selling a used DVD on eBay; this incident of copy ownership is

B. ENTER LICENSING

Today, copies of copyrighted works are increasingly being licensed to consumers rather than sold, which allows copyright holders to retain ownership of the copy.[39] The manner in which the user can use the copy is dictated by the terms of the licensing agreement, thus allowing the copyright holder to retain downstream control over the copy. For example, iTunes users do not purchase a copy of a song or album; instead, they purchase a limited use license to play the song or album for "personal, noncommercial use."[40] Under the first sale doctrine, the owner of an album in CD form would be free to resell the album. However, an iTunes user who has licensed that same album would not be, under the terms of the license.[41] Licensing thus effectively allows copyright holders to circumvent the first sale doctrine—applicable only to *owners* of copies—by privately contracting around them.

The practice of licensing copies originated in the software industry in 1960s; at the time, the applicability of copyright or patent law to software was uncertain, and software producers resorted to private contracting to protect their software.[42] However, copyright holders in other industries have increasingly employed end-user licensing agreements (EULAs) in association with digital goods to characterize the distribution of a copy to a consumer as a license rather than as a sale.[43] Despite its prevalence, the practice of licensing continues to exist in a legal gray area, particularly where extended beyond the computer software context. Perhaps most prominently, there currently exists a circuit split on whether the mere assertion that the distributor "licenses but does not sell" its copies is sufficient to transform a transaction that otherwise has the trappings of a sale into a license.[44] Although some courts have relied largely (sometimes unquestioningly) on the language of the license to make this determination, others have looked instead to

expressly recognized in the first sale doctrine. *Id.*

39. *See generally* Winston, *supra* note 34 (examining the increasing prevalence of licensing chattels over selling them in order to circumvent public legislation).

40. *iTunes Store Terms and Conditions*, APPLE, http://www.apple.com/legal/itunes/us/service.html (last updated Dec. 3, 2012).

41. *See* Winston, *supra* note 34, at 97–98.

42. *Id.* at 100–01. For a detailed history of software licensing, see Christian H. Nadan, *Software Licensing in the 21st Century: Are Software "Licenses" Really Sales, and How Will the Software Industry Respond?*, 32 AIPLA Q.J. 555 (2004).

43. But the practice continued even after the statutory scheme as it applied to software became clearer in the 1980s and 1990s. *See* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1473–76 (2004) (noting also that software licensing restrictions have essentially become a form of property servitude). An example of EULA language may be found in Steam's Subscriber Policy: "All title, ownership rights and intellectual property rights in and to the Software *and any and all copies thereof* are owned by Valve and/or its affiliates' licensors." *Steam Subscriber Agreement*, STEAM (emphasis added), http://store.steampowered.com/subscriber_agreement/ (last visited Nov. 25, 2012). While the first part of this provision is simply a restatement of the statutory rights conferred by copyright law, the italicized portion extends Valve's ownership rights to copies of the copyrighted work.

44. For a history of the case law on this issue, see Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887 (2010).

the economic realities of the transaction.[45] Furthermore, there is no clear consensus on the application of the copyright preemption doctrine to license agreements.[46]

As it stands, if we assume the legality of licensing digital content, it would appear that the broad language in typical licensing agreements today would indeed allow for downstream alteration. Returning to "Plants vs. Zombies," for example, Steam's automatic update replacing the Dancing Zombie appears to be fully within the terms of its Subscriber Agreement, which specifically provides for automatic updates at Steam's discretion:

> Steam and your Subscription(s) require the automatic download and installation of Software onto your computer . . . . You understand that for reasons that include, *without limitation*, system security, stability, and multiplayer interoperability, Steam may need to automatically update, pre-load, create new versions of or otherwise enhance the Software . . . .[47]

Again, the use of automatic updates is not in itself necessarily problematic; as previously noted, it is often used to fix bugs and improve functionality. But nothing limits the language of Steam's licensing agreement to fixing bugs and improving functionality—in fact, the language expressly provides that automatic updates can be issued for *any* reason. More troublingly, the type of language found in Steam's licensing agreement providing for automatic updates is not limited to videogames, an inherently more dynamic form of content.[48] For example, Google Play's Terms of Service regarding e-book purchases from Google provides:

> [T]he copyright holders of Books Products *may update such Books Products* . . . from time to time. For example Google or the copyright holders *may correct errors in the Books Products* or may add additional features . . . . *Where these changes are made the Books Products that you see will automatically update*, except where you have downloaded a copy of the Books Products to a Device.[49]

Thus, under a licensing scheme such as Steam's or Google Play's, Lucas could make substantive changes to a digital copy of *Star Wars* by issuing a "Plants vs.

45. *See id.* at 1898–99 (arguing that whether the right to perpetual possession of a copy exists should be the controlling factor for determining whether a sale has taken place).

46. *See id*. at 1949–51; *see also infra* notes 95–96.

47. *Steam Subscriber Agreement*, *supra* note 43. The term "Software," as defined earlier in the agreement, does not simply include the Steam client software (the distribution platform itself) but also "any other software, content, and updates you download or access via Steam, including but not limited to Valve or third-party video games and in-game content . . . ." *Id.*

48. *See id.* For a discussion of how videogames straddle the line between software and art, see *infra* Part II.C.

49. *Google Play Terms of Service*, GOOGLE PLAY (emphasis added), https://play.google.com/intl/en_us/about/play-terms.html (last visited Nov. 25, 2012). The last sentence does not seem to mean that once downloaded onto a device, the e-book escapes any updates—merely that the update is delayed until the next time the Device communicates with Google servers. A term of agreement common to all Google products further provides: "Products originating from Google may communicate with Google servers from time to time to check for available updates to the Products . . . . By using the Google Play store and installing these Products, you agree to such automatically requested and received Updates." *Id.*

Zombies"-like update and yet be acting fully within the terms of the agreement—the effective equivalent of forcing the owner of a *Star Wars* videotape to exchange his copy for another one.

II. THE PROBLEMS WITH DOWNSTREAM ALTERATION

Lucas, delivering an impassioned speech on the importance of film preservation before a Senate Subcommittee on March 3, 1988, stated:

> Today, engineers with their computers can add color to black-and-white movies, change the soundtrack, speed up the pace, and add or subtract material to the philosophical tastes of the copyright holder. Tomorrow, more advanced technology will be able to replace actors with "fresher faces," or alter dialogue and change the movement of the actor's lips to match. It will soon be possible to create a new "original" negative with whatever changes or alterations the copyright holder of the moment desires . . . . In the future it will become even easier for old negatives to become lost and be "replaced" by new altered negatives. This would be a great loss to our society. Our cultural history must not be allowed to be rewritten.[50]

Lucas, joined by numerous other filmmakers, was speaking in support of Congressional ratification of the Berne Convention, an international copyright agreement that, among other things, recognizes and protects the "moral right" of artists to claim authorship of their work and to object to defacement of it.[51] The moral rights doctrine, a fundamental feature of the copyright law of many European countries, embodies the belief that artists retain a parental prerogative (and a corresponding bundle of legal rights) over their work even after the artist has released the work into the stream of commerce—and sometimes even after sale.[52] The push for ratification of the Berne Convention was spurred in part by the colorization of classic films by movie studios at the time, a trend that was met with great hostility by the creative artists of Hollywood.[53] Hollywood artists testifying

50. *The Berne Convention: Hearings on S.1301 and S.1971 Before the Subcommittee on Patents, Copyrights & Trademarks of the S. Committee on the Judiciary*, 100th Cong. 484–85 (1988) [hereinafter *Berne Convention Hearings*].

51. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, *revised* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention], *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. The United States declined to join the Convention for a century, even though seventy-six other nations were signatories. *See* Hal Hinson, *Auteur! Auteur!; On the Hill, Spielberg & Lucas Plead for Artists*, WASH. POST, Mar. 4, 1988, at D1.

52. *See generally* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States*, 22 COLUM. J.L. & ARTS 361 (1998).

53. Craig A. Wagner, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 648–49 (1989) (expressing concern that the colorized films would displace the original black-and-white films and that continued public access to the original black-and-white films may not be secured). Unlike novelists or playwrights, directors are not recognized under U.S. copyright law as the creative author; rather, it is the studio or production company that is typically deemed to be the "author" of the motion picture made-for-hire. *See id.* at 654–56 (explaining the works made-for-hire doctrine in U.S. copyright law); *see also* 17 U.S.C. § 101 (2012) (defining a "work made for hire" and including motion pictures among the categories of work that can be so designated).

before the Senate Subcommittee hoped that ratification of the Berne Convention would result in stronger protection of their moral rights, which would give them the ability to object to modifications to their works by the studios who owned the copyrights.[54]

Lucas' concerns about the arrival of technologies that would make retroactive alteration of films possible proved prescient—and ironic, given his own later controversial revisions of the *Star Wars* films. Although he objected to the alteration of films on the part of movie studios, he apparently had no qualms about directors taking advantage of new technology to make the same types of revisions, believing it to be the director's prerogative to do so.[55] But the pleas of the filmmakers at the hearings, which centered on the importance of ensuring that the public had access to classic films in the original form—and even Lucas' own caution against rewriting "cultural history"—would seem to apply equally to retroactive alterations by directors. "Let generations yet unborn see the films produced by our film artists as they were released," director Steven Spielberg urged.[56] Similarly, screenwriter Bo Goldman testified: "Remember the first time you went with your parents to *Snow White*, with your girl to *Singin' in the Rain*, with your children to *E.T.* You have the right to see it that way and only that way forever."[57] They were speaking to the right of the public.

Broadly speaking, there are three possible motivations for remote alteration. In the first category of cases—the most problematic of the three—an author may seek to take advantage of remote alteration technology to make artistic changes to a work that he views as his own and to which he believes he has every right to make changes—even after copies of the work have been disseminated to the public at large. In the second category of cases, a copyright holder may wish to retroactively alter a work in order to avoid legal liability—for example, in instances where the copyrighted work is discovered to contain libel or plagiarized passages or even implicate matters of national security.[58] Finally, the third category of cases involves alterations that are more functional in nature—for example, the updating of an electronic textbook or of computer software. In such cases, the user may even *desire* regular, automatic updates for the sake of convenience, security or up-to-date accuracy. This Note focuses on the first category—cases in which authors use licenses to expand artistic control over their works post-dissemination, but also

54. *See* Hinson, *supra* note 51, at D1. Article 6*bis* encompasses both the right of attribution and the right of integrity: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or another derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention, *supra* note 51, art. 6*bis*.

55. In a later interview, Lucas stated: "I think it's the director's prerogative, not the studio's, to go back and reinvent a movie." Magid, *supra* note 33, at 70.

56. *Berne Convention Hearings*, *supra* note 50, at 510.

57. *Id.* at 496.

58. *See infra* Part II.B. In the fall of 2010, the Department of Defense bought the entire first printing of *Operation Dark Heart* for the purposes of destroying it. Scott Shane, *Pentagon Plan: Buying Books to Keep Secrets*, N.Y. TIMES, Sept. 10, 2010, at A16.

briefly discusses the considerations that arise in the other two.

A. CATEGORY ONE: DOWNSTREAM ALTERATION MOTIVATED BY THE AUTHOR'S ARTISTIC VISION OR THE PRESSURES OF POLITICAL CORRECTNESS

That authors or creators will be motivated to take advantage of downstream alteration technologies to make downstream changes to their works is quite conceivable. For example, Lucas, in defending his revisions to the *Star Wars* films, has stated that the original theatrical versions "only came out to be 25 or 30 percent of what I wanted it to be," given the technological limitations and time constraints of the time.[59] Another area of concern is revisions made for the sake of political correctness—such as the removal of "the n-word" from *The Adventures of Huckleberry Finn* mentioned earlier or the substitution of guns with walkie-talkies in the climactic escape scene in the 20th anniversary edition of *E.T. the Extra-Terrestrial*, which was thought to be more appropriate for a scene involving child protagonists.[60]

This category of revisions is the most problematic because it both threatens the preservation of cultural history and amounts to private censorship. While it is the author's prerogative to release different versions of a work, this Note is concerned with the scenario in which a digital copy of a copyrighted work that has been released to the public is overridden by a copyright holder through a later software update—as if saving over a Microsoft Word document.[61] Where the original version of the work is overridden by the retroactive alteration, such action on the part of the copyright holder essentially erases a part of history.[62] This section argues that both the United States' historical rejection of the moral rights doctrine and the fixation requirement under current copyright law reflect a policy to limit an

59. *Lucas Talks as 'Star Wars' Trilogy Returns*, TODAY (Sept. 15, 2004, 2:51 PM), http://today.msnbc.msn.com/id/6011380/ns/today-entertainment/t/lucas-talks-star-wars-trilogy-returns. One notable example in literature is the change in Gollum's character from the first to second edition of *The Hobbit*. By the time the second edition was to be released, J.R.R. Tolkien had begun work on *The Lord of the Rings*, which changed the entire context of the original story and, in particular, led to substantial changes to the character of Gollum, who would become a key character in the later books. Press Release, Houghton Mifflin Harcourt, The Annotated Hobbit (2003), *available at* http://www.hmhbooks.com/booksellers/press_release/annohobbit/.

60. *See* Howell, *supra* note 29, at B01. Years later, Spielberg expressed regret for the alteration, commenting that "[a]t this point right now I think letting movies exist in the era, with all the flaws and all of the flourishes, is a wonderful way to mark time and mark history" and that "[w]hen people ask me which *E.T.* they should look at, I always tell them to look at the original 1982 *E.T.*" Eric Vespe, *Spielberg Speaks! Jaws Blu-Ray in the Works with No "Digital Corrections!,"* AIN'T IT COOL NEWS (Jun. 3, 2011, 4:16 PM), http://www.aintitcool.com/node/49897.

61. One notable example of a work that exists in several different versions is *Blade Runner*, of which six different versions have been released to the public since its original theatrical run. *See FAQ for Blade Runner*, IMDB, http://www.imdb.com/title/tt0083658/faq#.2.1.7. (last visited Nov. 18, 2012).

62. *See* Laura A Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 862 (2009) (suggesting that the fixation requirement gives the work "not only legal significance but historical significance—it enables copyrighted works to become 'themselves 'facts' or events of history'") (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 68 (1967)).

author's downstream control over his work—and that this policy would be subverted by allowing an author the ability to retroactively alter his work once that work has been released to the public.

1. Limited Moral Rights Protection in the United States

Countries recognizing the moral rights doctrine provide the author with a bundle of noneconomic rights in his works for the purpose of allowing him to safeguard his reputation and the integrity of his works.[63] Moral rights maintain for society "the opportunity to see the work as the artist intended it, undistorted and 'unimproved' by the unilateral actions of others."[64] Unlike many European countries, the United States has long rejected any form of robust statutory protection for the moral rights of artists within the copyright framework.[65] And even countries with expansive moral rights doctrines limit just how far downstream an author may reach. For example, the right of withdrawal in France copyright law permits the author of a literary work to withdraw his work from publication, either permanently or temporarily, to make modifications.[66] However, the author cannot invoke the right of withdrawal to make corrections to a work after ownership of the work has been transferred.[67] The limits of the moral rights doctrine even in countries that recognize it and the United States' reluctance to adopt it as a feature

63. The heading of moral rights typically includes the right of attribution (to have his name associated with all his creations), right of integrity (to prevent mutilation, distortion, or other modification of the art), right of disclosure (giving the author the final decision on when and where to publish), and right of retraction or withdrawal (the right to buy back all of the remaining copies of his work and to prevent the printing of more copies). Swack, *supra* note 52, at 365-66.

64. *Id.* at 361(quoting indirectly John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 n.5 (1976)).

65. *See, e.g.*, COPYRIGHT LAW REVISION REPORT, *supra* note 20, at 4 ("In the United States the moral rights of authors have never been treated as aspects of copyright."). This was the case even following the United States' ratification of the Berne Convention in 1989. Instead of expressly recognizing the rights of attribution and integrity, as mandated by the Berne Convention, the United States maintained that its existing law (specifically, unfair competition, copyright, contract, defamation and privacy) sufficed to protect those two rights. *See* Swack, *supra* note 52, at 362–63. A notable exception is the Visual Artists Rights Act of 1990 (VARA), which provides limited recognition of moral rights where the work involved is "a painting, drawing, print or sculpture, existing in a single copy, [or] in a limited edition." Pub. L. No. 101-650, § 602, 104 Stat. 5128, 5128 (amending 17 U.S.C. § 101).

66. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. 121, § 4 (Fr.) (requiring the artist to compensate the publisher); W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1149, 1161 (2005). The artist may, for example, invoke this right if he feels his work no longer represents his opinions or if it was not well-received. Kowalski, *supra*, at 1161. No such analog exists in United States copyright law. *See, e.g.*, WILLIAM STRAUSS, COPYRIGHT LAW REVISION STUDY NO. 4: THE MORAL RIGHT OF THE AUTHOR 137 (1959), *available at* http://www.copyright.gov/history/studies/study4.pdf ("There is no provision in the United States copyright statute nor has any court decision been found permitting an author to withdraw his work from circulation after it has been published. The author must find relief, if any, either in an action in contract or tort.").

67. *See* Kowalski, *supra* note 66, at 1161. A French court has held that such a right would be tantamount to expropriation. *Id.* (citing Cour d'appel [CA] [regional court of appeal], Paris, 1e ch., Apr. 19, 1961, J.C.P. 1961, III, 12183 (Fr.) (denying the right of withdrawal to a painter named Vlaminck).

of its copyright statutory scheme militate against permitting an author to exert downstream control over his work once that work is already in the hands of the public.

2. The Fixation Requirement

The fixation requirement is another aspect of United States copyright law that serves to limit the author's control over their work. To receive copyright protection in the United States, a work must be both original and fixed.[68] The fixation requirement provides that a work must be "fixed in [a] tangible medium of expression."[69] Thus, a live dance performance would not be protected by copyright; however, if simultaneously recorded onto a DVD, then it would be. In addition, the fixation must occur "by or under the authority of the author."[70] So if the dance performance were surreptitiously recorded by an audience member, it would also not be entitled to copyright protection. This section argues that allowing an author to retroactively make changes to a work would subvert the purposes of the fixation requirement.

Notably, the Copyright Act expressly contemplates a scenario in which multiple versions of a work are created: "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work *as of that time*, and where the work has been prepared in different versions, *each version constitutes a separate work*."[71] The fact that the Copyright Act treats each new version of a work as a separate and distinct one supports the notion that a newer version of a work does not simply replace the old work, either practically or conceptually. Indeed, Laura Heymann notes that fixation allows a later version of a copyrighted work to be "compared to the original work, which retains its position at the origin"—in contrast to other forms of art such as oral storytelling or jazz performances, where "the official 'text' becomes whatever accretes over time."[72] Moreover, the statutory requirement that a work must be fixed "by or under the

68. 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . ."). A work that is not eligible for copyright protection may nonetheless be entitled to protections under state or common law. *See* Goldstein v. California, 412 U.S. 546, 558–60 (1973) (holding that states may grant copyright protection where the state law does not conflict with federal action); *see also* Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1375 (1997) (examining state copyright protections available to improvisational performers, who do not receive federal copyright protection). The fixation requirement was added in the Copyright Act of 1976. *See* Heymann, *supra* note 62, at 844–56 (citing as reasons the arguments that fixation is a constitutional imperative, enables the assessment of originality by providing a tangible form, serves an evidentiary purpose in an infringement analysis, and indicates a definite starting time for the term of federal protection).

69. 17 U.S.C. § 102.

70. *Id.*

71. *Id.* § 101 (emphasis added). Similarly, section 6 of the 1909 Copyright Act specified that new versions "shall be regarded as new works subject to copyright." Copyright Act of 1909, Pub. L. No. 60-349, § 6, 35 Stat. 1075, 1077, *amended by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

72. Heymann, *supra* note 62, at 858–59.

authority of the author" suggests that the act of fixation has the additional function of conferring authority upon the work—the author must *choose* which draft, performance or cut of a film becomes the fixed work.[73] As Heymann puts it, copyright law "grants legal rights as it takes away artistic freedom; it requires the author to say, 'This is the work.'"[74] Fixation transforms the creative process "from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation."[75]

The fixation requirement thus in a way ensures that a work is in an accessible form—one with which the public can interact—before conferring legal rights upon the author.[76] This notion is supported by the statutory language, which defines fixation in terms that relate to the use of the work by someone other than the copyright holder. Specifically, section 101 defines a work as "fixed" in a tangible medium of expression when "its embodiment in a copy or phonorecord is . . . sufficiently permanent or stable to permit it to be *perceived*, *reproduced*, or *otherwise communicated* for a period of more than transitory duration."[77] The language suggests that the copyright law is concerned with degree of permanence insofar as that permanence enables future use of the work by others.[78] The act of fixation, coupled with public dissemination, marks the point at which the public gains an interest in access to the work.[79] It is at that point that an author's creation

73. 17 U.S.C. § 101.

74. Heymann, *supra* note 62, at 859 (emphasis omitted).

75. *Id.* at 830.

76. *See* Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to be Archived to Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 131 ("By way of illustration, Mozart's composition of a work did not fully enrich society, as long as the composition remained solely in Mozart's head. It was the act of writing down the composition, in some tangible form, which enabled society to be fully enriched by the work."). For literature on the role of the user in copyright law, see Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Michael Grynberg, *Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*, 79 FORDHAM L. REV. 435, 466 (2010); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003).

77. 17 U.S.C. § 101 (emphasis added).

78. *See* Heymann, *supra* note 62, at 842.

79. The Copyright Act of 1976, while introducing the fixation requirement, simultaneously eliminated the requirement that a work be "published" before receiving copyright protection. Previously, it was the publication requirement that ensured a certain degree of public accessibility to copyrighted works. *See, e.g.*, Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 299–300 (1907) ("It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property.") (internal quotation marks omitted). But legislative documents leading up to the Copyright Act of 1976 continued to emphasize public dissemination; they also indicate that the publication requirement was eliminated because it was seen as outdated in the sense that print was no longer the only way a work could be disseminated. *See, e.g.*, H.R. REP. NO. 94-1476, at 129–30 (1976) ("'Publication,' perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, 'publication' could serve as a practical dividing line between common law and statutory protection, this is no longer true."); COPYRIGHT LAW REVISION REPORT, *supra* note 20, at 40 ("In the 19th century copyright was concerned principally with printed material, and the publication of copies was virtually the only means of making a work available to the public. At that time it was justifiable to

becomes "an object of cultural discourse with fixed boundaries."[80] In this sense, fixation functions as a line demarcating the end of the author's control over his work and signaling the beginning of the public's interest in the work.

B. CATEGORY TWO: TO AVOID LEGAL LIABILITY

The United States' reluctance to adopt a strong moral rights doctrine and the existence of the fixation requirement represent implicit limitations on the author's right to control his work in favor of the public's need for access. But does the public have a legitimate interest in preserving access to a work that infringes upon another's copyright?[81] Or a work that includes unfounded, libelous statements? Remote alteration technology allows for perfect enforcement of copyright law and libel law by allowing the full retraction of something that the copyright holder did not have the right to disseminate in the first place. There is, however, an argument to be made that there is a public interest in "less-than-perfect enforcement of the copyright law."[82]

At the same time, the fact that remote alteration technology offers copyright holders additional means of avoiding or cabining liability could lower costs for younger or smaller companies and encourage experimentation with new distribution methods. For PopCap Games, a relatively small videogame developer at the time, issuing a software update to remove the Michael Jackson zombie was a low-cost and extremely effective way to preempt a possible lawsuit by the Jackson estate.[83] On the flip side, this same ease with which authors are able to oblige

make publication the event at which to terminate common law protection and apply the statute. Today the publication of copies is only one of several methods of public dissemination.").

80. Heymann, *supra* note 62, at 858; *see also* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940–66 (1999) (discussing the interests audiences have in the stabilization of a work); L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights*, 62 OHIO STATE L. J. 703, 708 n.22 (2001) ("The publication of one's writings brings the right of access into play because the publication affects ideas, opinions, and attitudes of the public. To say that one can publish his or her writings and control access to them after they have left the stream of commerce—for whatever reason, profit or politics—is to sanction private censorship.").

81. In 2006, following revelations that Kaavya Viswanathan plagiarized portions of her book, *How Opal Mehta Got Kissed, Got Wild and Got a Life*, the publisher, Little, Brown, recalled all copies of the book that had not yet been sold. Motoko Rich & Dinitia Smith, *Publisher Decides to Recall Novel by Harvard Student*, N.Y. TIMES, Apr. 28, 2006, at A16. Remote alteration would allow such a revision completely and instantaneously. It is also worth noting that the following day, first edition copies of the novel appeared on eBay for $80. Tom Zeller, Jr., *In Internet Age, Writers Face Frontier Justice*, N.Y. TIMES, May 1, 2006, at C5.

82. *See* Van Tassel, *supra* note 4, at 1254 ("Perfect enforcement can result in an amplification and lock-in of mistakes in interpreting the law. Perfectly enforced legal judgments can have too powerful and too permanent an effect. By way of example, Professor Zittrain wrote: 'Imagine a world in which all copies of once censored books like *Candide*, *The Call of the Wild*, and *Ulysses* had been permanently destroyed at the time of the censoring and could not be studied or enjoyed after subsequent decision-makers lifted the ban.'") (quoting JONATHAN L. ZITTRAIN, THE FUTURE OF INTERNET AND HOW TO STOP IT 115 (2008)).

83. Similarly, before discovering the extent of the plagiarism, the publisher of Viswanathan's

copyright holders who threaten to sue could produce a chilling effect of sorts, leading to over-removal of potentially infringing elements. Had PopCap Games not responded to the Jackson estate's letter, perhaps the Jackson estate ultimately would not have sued at all in light of the potential fair use defense available to the game developer.[84] Any legislative or judicial solution to curb downstream alteration technology must also take into account these special issues that arise when the copyright holder seeks to make changes to remove content that it did not have the right to disseminate in the first place.

C. CATEGORY THREE: FUNCTIONAL UPDATES

Special issues also arise when a copyrighted work has both artistic and functional components. The clearest example of works falling into the latter category would be computer software.[85] But one could also argue that electronic textbooks or treatises that receive annual patches in lieu of physical supplements or new editions also fall into this category. Most software today is subject to constant update and revision for the purposes of improving its functionality and security—a constant work in progress.[86] And because of this, automatic software updates may even be desirable; for example, approximately ninety percent of Windows Update clients using Windows 7 opt for automatic updates to initiate software updates over manual installation from the Microsoft website.[87] The tension between art and software updates is perhaps best highlighted in videogames, as in the opening "Plants v. Zombies" example. Although videogames have increasingly become recognized as a form of art—by both the Supreme Court[88] and art museums[89]—the

book had initially planned only to revise future printings of the novel to "eliminate any inappropriate similarities" between Viswanathan's book and Megan McCafferty's. The Crimson Staff, *Kaavya Speaks: 'I Sincerely Apologize,'* HARV. CRIMSON (Apr. 24, 2008), http://www.thecrimson.com/article/2006/4/24/kaavya-speaks-i-sincerely-apologize-kaavya.

84. *See, e.g.*, Eric D. Gorman, *Who Gets the Last Laugh? Satire, Doctrine of Fair Use, and Copy*wrong *Infringement*, 29 TEMP. ENVTL. L. & TECH. J. 205 (2010) (discussing the legality of "celebrity character" images under the fair use doctrine).

85. For example, the ALI's *Principles of the Law of Software Contracts*, unanimously approved in May 2009, distinguishes between software and digital content primarily based on the fact that software is "digital information performing a utilitarian function." AM. LAW INST., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.01(j) cmt. a (2010).

86. *See* Stephen Shankland, *It's Time to Embrace Software's Auto-Update Era*, CNET (Dec. 20, 2010, 4:00 AM), http://news.cnet.com/8301-30685_3-20025836-264.html ("Many of the updates address emerging security threats rather than simply adding 'nice-to-have' feature extensions.") (internal quotation marks omitted).

87. Steven Sinofsky, *Minimizing Restarts After Automatic Updating in Windows Update*, MICROSOFT DEVELOPER NETWORK BLOGS (Nov. 14, 2011, 1:00 PM), http://blogs.msdn.com/b/b8/archive/2011/11/14/minimizing-restarts-after-automatic-updating-in-windows-update.aspx.

88. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011). In concluding that videogames are entitled to protection under the First Amendment, the Court highlighted the expressive and artistic aspects of videogames, noting that "[l]ike the protected books, plays, and movies that preceded them, videogames communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." *Id.* at 2733. The Court rejected California's claims that

more recent trend towards more software-like distribution model of videogames, in which a game is released in a less-than-final form subject to debugging in later software patches, comes into some tension with its artistic aspects.[90] It is likely that the future will see an even greater shift to dynamic forms of art such as videogames.

III. POSSIBLE PATHS GOING FORWARD

This Note has attempted to examine the issues that come with the feasibility of remote downstream alteration; in particular, it has argued that licensing terms that allow copyright owners to make downstream alterations to works that have been made available to the public upset the balance of owner right and user access struck by U.S. copyright law. The feature of copy ownership that guarantees users the ability to enjoy their copy of the work as-paid-for should be preserved as we move into a digital world. This Part briefly outlines a few ways in which licensing terms that threaten this ability can be restricted:

A. RELIANCE ON COPYRIGHT HOLDERS

Currently, many licensing models attempt to recreate the way things were in the analog world, for example, by allowing consumers to access a copy of a work they have licensed on multiple devices.[91] And following the Kindle remote deletion

videogames present special problems simply because of their "interactive" nature, citing "choose-your-own-adventure stories" and interactive facets of other forms of art. *Id.* at 2337–38 (citing Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

89. In 2012, the Smithsonian American Art Museum opened an exhibition entitled "The Art of Video Games," self-described as "one of the first exhibitions to explore the forty-year evolution of videogames as an artistic medium, with a focus on striking visual effects and the creative use of new technologies." *Exhibitions: The Art of Video Games*, SMITHSONIAN AM. ART MUSEUM, http://www.americanart.si.edu/exhibitions/archive/2012/games (last visited Nov. 20, 2012). The description for the exhibition notes: "Video games use images, actions, and player participation to tell stories and engage their audiences. In the same way as film, animation, and performance, they can be considered a compelling and influential form of narrative art." *Id.* A few months later, the Museum of Modern Art announced that it was adding videogames to its collection. Allan Kozinn, *MoMA Adds Video Games to Its Collection*, N.Y. TIMES (Nov. 29, 2012, 1:45 PM), http://artsbeat.blogs.nytimes.com/2012/11/29/moma-adds-video-games-to-its-collection.

90. *See* Sam Machkovech, *Why Video Games Aren't Art (At Least Not All of Them)*, ATLANTIC (Oct. 21, 2010, 3:00 PM), http://www.theatlantic.com/culture/archive/2010/10/why-video-games-arent-art-at-least-not-all-of-them/64927 ("Patches and fixes have just about become the norm, whether to add new content or to fine-tune balance issues in versus games."); *see also id.* ("[I]n terms of buggy, incomplete games reaching the marketplace, the hobby is doing great damage to itself. When video games depend on patches, they lose all artistic potential and become broken advertisements for their future selves.").

91. Both Valve Corporation (the developer of Steam videogame distribution platform) and Digital Entertainment Content Ecosystem (the developer of the Ultraviolet digital storage locker), *see supra* text accompanying note 15, have openly stated this philosophy. Valve's Vice President of Marketing, Doug Lombardi, has declared: "The goal is to give a Portal 2 customer access to their game on as many devices as possible. . . . From our perspective, it's not two copies of a game; it's the same game." Ben Kuchera, *Valve Talks* Portal 2 *on PlayStation 3, Steam on 360*, ARS TECHNICA (Jan. 19, 2011, 12:19

incident, Amazon promised to "chang[e] our systems so that in the future we will not remove books from customers' devices in these circumstances."[92] But relying on the good will of private owners to recreate the features of copy ownership in the analog world in their licensing arrangements risks creating the impression that such protections exist only as the "product of benevolence" on their parts rather than as guarantees of copyright law.[93] Repeated assertions by copyright holders that they are doing favors for the consumer may gradually erode or distort copyright policy. At the very least, copyright holders must make clear to the consumer what it is they are actually purchasing—a digital copy of a movie or a license to access to that movie.[94] Ultimately, however, if we believe that the downstream alteration skews the current balance struck by copyright law between author's rights and the public's access, a user's right to enjoy a copy of a copyrighted work as-paid-for should be enshrined in legal recognition.

B. JUDICIAL SOLUTIONS

Where a conflict between state contract law and federal copyright law exists, a court may find that federal copyright law preempts, or displaces, the contractual provision.[95] However, the licensing provisions with which this Note is concerned—those that would allow downstream alteration—do not expressly conflict with any provision found within the Copyright Act, making preemption in this instance an unlikely solution.[96]

PM), http://arstechnica.com/gaming/news/2011/01/portal-on-playstation-3. Similarly, Mitch Singer, President of Digital Entertainment Content Ecosystem, has stated: "When consumers see the UltraViolet logo on a DVD or Blu-ray Disc it means that they will be able to watch that movie not only from their Blu-ray player, but also on other devices, such as mobile phones or other Web-enabled devices with apps from UltraViolet partners." Chris Tribbey, *Six Questions: Ultraviolet's Mitch Singer*, HOME MEDIA MAG. (Sept. 3, 2010), http://www.homemediamagazine.com/electronic-delivery/six-questions-ultraviolet%E2%80%99s-mitch-singer-20510.

92. Stone, *supra* note 4, at B1.

93. *See* Grynberg, *supra* note 76, at 447.

94. The lack of clarity in what consumers are actually purchasing when they "buy" a digital copy of a film is exemplified by the provision in Google Play's Terms of Service, which state: "When you purchase a Product, you are buying a service." *Google Play Terms of Service*, *supra* note 49.

95. Two possible grounds for copyright preemption exist: statutory preemption and constitutional preemption. First, the federal copyright statute, in section 301(a), provides grounds for preemption if its "subject matter" and "equivalent rights" prongs are met. *See* 17 U.S.C. § 301(a) (2012). Second, general constitutional preemption by way of the Supremacy Clause is also available where state enforcement of private licensing terms would "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (as reflected in the Copyright Act) or of the fundamental purposes of the Copyright Clause. *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

96. Moreover, the leading case of *ProCD v. Zeidenberg* has largely diminished the applicability of section 301 in the licensing context by holding that contractual rights, by their very nature, are rarely "equivalent" to any of the exclusive rights in copyright. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) ("[W]hether a particular license is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced."); *see also* Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1324 (Fed. Cir. 2003) (citing *ProCD* and stating that "most courts to examine this issue have found that the Copyright

In addition to preemption, courts have also sometimes characterized license agreements as transfers of ownership in cases involving license agreements that restrict the right of resale by end-users.[97] There is an argument to be made that nonsoftware, digital content transactions (such as e-books or digital copies of traditional copyrighted media) should always be characterized as sales, regardless of what the terms of the transactions purport.[98]

C. LEGISLATIVE SOLUTION

Courts have tended to be reluctant in limiting copyright holder control where the copyright holder does not expressly run afoul of copyright law, choosing instead to leave such balance-striking tasks to the legislature.[99] A legislative solution could come in the form of recognizing a right on the part of the user to maintain and enjoy a copy of a work as-paid-for (a right of preservation), similar to the right of resale currently recognized in the first sale doctrine. However, such a new right, if limited to owners of copies, will run into the same problems as the first sale doctrine whereby copyright holders could circumvent it by purporting to license, rather than sell, copies of copyrighted works. It is thus ultimately necessary for Congress to grapple with the larger issue surrounding the transactional status of digital content, whether in the form of a categorical ban on the licensing of digital content or of restrictions on the scope of any such licensing agreements.

IV. CONCLUSION

While Hollywood artists of the 1980s believed that they were best placed to safeguard the integrity of their works against movie studios in the name of cultural preservation, the technological ease with which authors can make downstream alterations these days militates in favor of putting such safeguards instead in the hands of the public. Such safeguards can take the form of restricting licensing terms that expand authorial control over publicly disseminated works in the guise

Act does not preempt contractual constraints on copyrighted articles").

97. *See generally* Carver, *supra* note 44 (surveying such cases in the first sale context and arguing that whether a user is entitled to perpetual possession of the copy should control whether a transfer of ownership has occurred).

98. *See generally* Seringhaus, *supra* note 37. In addition, many such "license versus sale" cases nominally apply only to software licenses and not licenses covering other forms of copyrighted digital content. *See, e.g.*, Vernor v. Autodesk, Inc., 621 F.3d 1102, 1110–11 (9th Cir. 2010). This provides some leeway for courts to take a more active role in curbing the scope of agreements that purport to license digital content.

99. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 212–13 (2003) ("We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.") (citing Stewart v. Abend, 495 U.S,. 207, 230 (1990) ("[I]t is not our role to alter the delicate balance Congress has labored to achieve."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product.")).

of allowing for software-like updates. This Note has suggested looking to the fixation requirement as a source of guidance and as a target for any legislative solution. But downstream alteration technology will also alter the existing landscape in other ways: it may give rise to novel forms of dynamic art more akin to videogames and it could encourage the development of experimental methods of distribution for smaller authors by allowing for an easy means to guard against liability. Thus, any legislative reform must also take care not to hinder the development of new forms of art or distribution methods.