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# Super Bowl I, Jazz Radio, and *The Glass Menagerie*: Copyright, Preservation, and Private Copies

R. Anthony Reese

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**SUPER BOWL I, JAZZ RADIO, AND *THE GLASS*  
*MENAGERIE*:  
COPYRIGHT, PRESERVATION, AND PRIVATE COPIES**

*R. Anthony Reese\**

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#### ABSTRACT

*Copyright law is often described as providing incentives to make and disseminate creative works. Copyright law should also seek to foster the preservation of creative works so that people can enjoy, use, study, critique, and build upon them long after they are first created. Traditionally, copyright law fostered preservation largely because most copyright owners principally exploited their works by making and distributing many tangible copies of those works. Those copies could end up in many different hands, and each copy could potentially survive into the future. Some kinds of works, though, were disseminated principally by performance, and as a result, the audiences for those works generally did not acquire a copy that they could preserve. As a result, most of the time the burden of preserving such works fell entirely on the author or copyright owner, and not all copyright owners expended the resources necessary to preserve their works.*

*In some instances when a copyright owner has not preserved a copy of her work, a copy made privately by an audience member, usually without the copyright owner's knowledge, may become the only existing copy of the work. Many examples of this situation involve radio and television broadcasts, including broadcasts of major sporting events, such as Super Bowl and World Series games, and broadcasts of important musical performances by significant artists, ranging from the Metropolitan Opera to jazz greats such as Ella Fitzgerald to The Beatles. In these situations, a stalemate can result because the owner of the privately made copy owns the only remaining copy of the work, while a copyright owner may own copyright rights in the work embodied in that copy, and neither owner alone can exploit the work. A current standoff over the only known recording of the telecast of Super Bowl I is an example of such a stalemate.*

*Such a stalemate can threaten copyright's goal of preserving creative works. In these situations, that goal can probably best be achieved if the privately made copy ends up in the hands of an archive that can preserve the work. But current copyright law leaves unclear the question of whether transferring the privately made copy to an archive would infringe any copyright in the work embodied in the copy. That*

*uncertainty may deter parties from transferring a private copy to an archive and may thereby contribute to the complete loss of the work itself.*

*Congress should eliminate this uncertainty by amending the Copyright Act to provide that transferring a copy of a copyrighted work to an archive for preservation purposes does not infringe the work's copyright, even if that copy was made without the copyright owner's authorization. Such an amendment would be simple to craft and would not interfere with the legitimate interests of copyright owners. And as copyright owners disseminate an increasing amount of copyrighted material by online transmission rather than by distributing tangible copies, this exemption for archival transfers could become increasingly important in allowing privately made copies to help preserve such material for posterity.*

## I. INTRODUCTION

When we think about the goals of copyright law, we may not always identify preservation as one of them, but preservation should be an important goal of copyright law. Copyright law exists in substantial part to provide incentives for authors and disseminators to create and disseminate works of authorship. The law encourages such creation and dissemination not merely to bring those works into existence but rather in service of a belief that the general public benefits from being able to experience those works. As Jessica Litman has reminded us, “[i]n order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, and build and inhabit the architecture.”<sup>1</sup> The most immediate public beneficiaries of copyright law are audiences who are roughly contemporary with a work's creation and dissemination. But copyright law also embodies a concern for future audiences. Why else would the law now grant copyright protection for as long as the life of the author plus an additional 70 years, allowing the copyright for most works to outlive much of the audience that the work attracts when it is first created?<sup>2</sup> And what value would be offered by copyright's promise that works will enter the public domain when the long copyright term expires unless the law reflected a belief that future audiences would still be able to experience works created decades earlier?

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1. Jessica D. Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1880 (2007).

2. 17 U.S.C.A. § 302(a)–(b) (Westlaw through Pub. L. No. 115-140). For certain kinds of works, the term is the shorter of 95 years from publication or 120 years from creation. *Id.* § 302(c).

As I have previously written about this question, “copyright law makes a promise to future generations” that “if an author today creates a work—a book, a song, a film, a play, a photograph, a painting—then sometime, a long way down the road, that work will pass out of copyright protection.”<sup>3</sup> That promise would be illusory if works of authorship did not survive until the end of the copyright term. So “copyright law and the copyright system owe the future an obligation to do whatever they can to help ensure that many works of authorship survive for future audiences to read, to listen to, to watch.”<sup>4</sup> Preserving copyrighted works obviously benefits future audiences, who will have the opportunity to enjoy those works.<sup>5</sup> It also benefits future authors who can, as authors have done for millennia, draw on earlier works to create new works.<sup>6</sup>

This Article looks at how privately made copies of copyrighted works can contribute to preserving those works. Section II considers the relationship between preservation and copies in general, including the way in which digital dissemination is altering that relationship. Section III looks at situations in which copyright owners did not distribute copies of their works to the public and did not retain a copy of those works, but some member of the public made a copy of the work, and the work would have been lost but for the existence of such a privately made copy. Section IV explores a danger that arises where a copyright owner owns the copyright in a work and someone else owns the only remaining physical copy of that work. This ownership divide between copy and copyright might result in a stalemate in which the copyright owner does not have access to a copy of the work needed to exploit the work, and the copy owner does not have the copyright rights needed to exploit the work embodied in that copy. Section V examines the consequences of such a stalemate for preserving copyrighted works that exist only in privately made copies held by someone other than the copyright owner. Section VI argues that the best outcome in such a stalemate may be for an archive to acquire the private copy, but that the copy might not be transferred to an archive because of uncertainty over whether the transfer would violate copyright law. Section VII proposes amending the Copyright Act to expressly permit such transfers in order to facilitate the preservation of

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3. R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUSTON L. REV. 287, 288 (2012).

4. *Id.*

5. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 608 (2003).

6. Reese, *What Copyright Owes the Future*, *supra* note 3, at 289–90; Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 609.

privately made copies when such a stalemate occurs. Finally, Section VIII examines the potential importance of the proposed amendment to preserving private copies of works disseminated online.

## II. PRESERVATION AND COPIES

Preserving a work of authorship so that future generations can enjoy it has long depended on preserving copies of that work.<sup>7</sup> A few types of works—such as poems or songs—can be committed to memory and transmitted from generation to generation via an oral tradition. For most works of authorship, however, preserving a work for the future requires that the work be embodied in a physical object (a copy) and that this copy be preserved, or at least reproduced in some other copy before it deteriorates or is destroyed.

For many kinds of works—those that are primarily exploited by making and disseminating copies—traditionally the copyright system itself has directly fostered the preservation of copies. At its inception, U.S. copyright law protected only works that existed in copies—specifically, maps, charts, and books.<sup>8</sup> Indeed, the first U.S. copyright statute granted the owners of copyrights in such maps, charts, and books only two rights: the right to make tangible copies of those works (to print or reprint them) and to sell those copies to the public.<sup>9</sup> As copyright's subject matter gradually expanded over the last two centuries, the law granted copyright protection to many other types of works that were exploited principally by making and distributing copies (such as prints and engravings, photographs, paintings, statues, and periodicals).<sup>10</sup>

Even for works that were experienced primarily by performance (music and drama, for example), commercially exploiting those works often included making and disseminating tangible copies. Musical works were embodied first in printed sheet music, and later in phonorecords (from piano rolls to vinyl discs to cassette tapes to digital compact discs), sold to the public.<sup>11</sup> Dramatic works were only sometimes published as

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7. For purposes of this Article, I am using the term “copy” to include any tangible material object in which a work of authorship is fixed, regardless of whether that object qualifies as a “copy” or a “phonorecord” under copyright law’s statutory definitions. See 17 U.S.C.A. § 101 (Westlaw through Pub. L. No. 115-140) (providing the statutory definitions of “copies” and “phonorecords”).

8. Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

9. *Id.* (granting “the sole right and liberty of printing, reprinting, publishing and vending” copyrighted works).

10. R. Anthony Reese, *Copyrightable Subject Matter in the “Next Great Copyright Act,”* 29 BERKELEY TECH. L.J. 1489, 1492–96 (2014).

11. On the printing and publishing of music prior to the development of recorded sound, see generally Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA L. REV. 907 (2005). On the

books, but often circulated in copies that could be sold or rented to theatrical companies to be performed.<sup>12</sup>

Thus, from the very beginning of copyright law in the United States, the law was structured so that authors and publishers would, in most cases, create and disseminate to the public tangible copies of copyrighted works. Copyright owners made multiple copies of their works in order to commercially exploit them and, if the works were successful, distributed those copies to many different people and institutions. This contributed greatly to preservation.<sup>13</sup> “It turns out that distributing a work in multiple copies to a variety of owners can be one of the best mechanisms to ensure that the work will survive into the future.”<sup>14</sup> Each copy sent out into the world is a copy that might survive over time, thus preserving the work embodied within it.<sup>15</sup> The more copies of a work that exist, the more likely it is that one or more of those copies will survive as decades or centuries pass.<sup>16</sup> The name of one current preservation project pithily sums up this principle: “Lots of Copies Keeps Stuff Safe.”<sup>17</sup>

For most kinds of copyrighted works, making and distributing copies remained the principal method by which copyright owners could exploit their rights for the last two centuries. Only in the past decade or so has digital dissemination started to allow many copyright owners to exploit their works by digital transmission rather than by distributing physical copies. Think about online reading, streaming audio and video, navigation apps, and so forth: in this model, “[p]eople may view, or read, or listen to

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grant to musical work copyright owners of the right to reproduce their works in recordings, see PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 64–67 (1st ed. 1994).

12. Jessica Litman, *The Invention of Common Law Play Right*, 25 *BERKELEY TECH. L.J.* 1381, 1383–84, 1400–05 (2010).

13. See Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 604–08. Another aspect of copyright law that has contributed to preservation is the requirement, which has been part of U.S. law since 1790, that a copyright claimant deposit a copy of the work in which copyright is claimed with a federal agent (originally with the federal district court in the district in which the claimant resided, and now with the Library of Congress). Copyright Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124 (repealed 1831); 17 U.S.C.A. § 407 (Westlaw through Pub. L. No. 115-140). A deposit provision dates back to the first enacted Anglo-American copyright legislation, the Statute of Anne, which required the deposit of nine copies of a copyrighted work for the collections of various English and Scottish libraries. Statute of Anne, 1710, 8 Ann., ch. 19 (Eng.). For an example of how the deposit requirement contributed to the preservation of very early motion pictures, see Reese, *What Copyright Owes the Future*, *supra* note 3, at 312–13.

14. Reese, *What Copyright Owes the Future*, *supra* note 3, at 297.

15. See *id.* at 297–300.

16. See Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 605–06.

17. *What is LOCKSS?*, LOCKSS, <https://www.lockss.org/about/what-is-lockss/> [https://perma.cc/C3WZ-DXPF].

a work online, but they won't retain any copy of it."<sup>18</sup> As a result, far fewer copies of such transmitted works will be distributed among the public, and thus "many fewer copies will likely exist to keep the work[s] safe."<sup>19</sup>

In many instances, of course, copyright owners in this new era of digital dissemination will themselves expend the resources necessary to preserve copies of their works, even when they do not distribute tangible copies to the public at large. After all, the copyright owner usually has an interest in ensuring that copies of her works survive: in most cases, she herself will need a copy in order to exploit her work in the future.

History shows, however, that copyright owners do not always make the efforts or spend the money necessary to preserve copies of their works. Two examples come from the early decades of motion pictures and television. With respect to movies, an estimated 80% of the films made in the United States during the silent film era no longer exist.<sup>20</sup> Indeed, of American feature films produced before 1950, only about half still exist, and "[a]necdotal evidence suggests that survival rates for other film types, even major studio newsreels and shorts, are lower."<sup>21</sup> With respect to television, in the medium's early years, broadcasters who recorded their programs often later erased those recordings,<sup>22</sup> resulting in "yawning gaps" in television's historical record.<sup>23</sup> A more recent example involves the World Wide Web. One commentator has noted that "[m]any Web pages created before 1996 have been lost because no one thought to take periodic snapshots for archival purposes until then."<sup>24</sup>

In at least some instances, however, even if the copyright owner has failed to keep a copy of her work, someone else may well have done so. Again, film history offers a number of dramatic examples. Early film studios produced copies of their movies—physical prints of the films—that were sent to cinemas to be shown to ticket-buying audiences. Once a film had completed its run in one cinema, the print would be sent on to the next location, and so on until the film had reached all of the cinemas

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18. Reese, *What Copyright Owes the Future*, *supra* note 3, at 311.

19. *Id.*

20. 1 LIBRARIAN OF CONGRESS, *FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION* 3–4 (1993).

21. *Id.*

22. Reese, *What Copyright Owes the Future*, *supra* note 3, at 292–93; 1 LIBRARIAN OF CONGRESS, *TELEVISION AND VIDEO PRESERVATION 1997: A STUDY ON THE CURRENT STATE OF AMERICAN TELEVISION AND VIDEO PRESERVATION* 6–7 (1997); Jeff Martin, *The Dawn of Tape: Transmission Device as Preservation Medium*, *MOVING IMAGE*, Spring 2005, at 46, 49, 56.

23. Reese, *What Copyright Owes the Future*, *supra* note 3, at 292.

24. Katie Hafner, *Saving the Nation's Digital Legacy*, *N.Y. TIMES*, July 27, 2000, at D1.



in the area.<sup>25</sup> But studios didn't always *keep* copies of those films. Safely storing volatile nitrate film prints was expensive, and in the early years of cinema there was little or no market for reissuing films that had already been shown in cinemas.<sup>26</sup> As a result, many studios did not keep copies of their films.

Many studios were also unwilling to bear the cost of transporting film prints back to the studio's home office once a film had finished its run in theaters, particularly for copies shown in faraway locations. And this unwillingness to pay to ship film prints back to the studio has proven fortunate for film history. As a result, copies of some silent films that had long been lost because the copyright owner failed to preserve a print of the film have been discovered in places far from Hollywood. Prints of around 200 U.S. silent films, otherwise lost, have been found in the Russian State film archive, "where they ended up after being shown in Russian cinemas when they were released."<sup>27</sup> Another 75 U.S. silent films now exist only because copies shown in New Zealand made their way to the New Zealand Film Archive and were later rediscovered there.<sup>28</sup> And perhaps most unusually, in 1978, over 400 salvageable reels of U.S. silent films, the majority of which had been considered lost, were discovered in the remote town of Dawson City in Canada's Yukon. Half a century earlier, they had been used to fill in a swimming pool that was being converted to an ice rink, after having been shown in the cinema in Dawson City, the last town in the Yukon's film distribution chain.<sup>29</sup>

Thus, in the past, when authors or copyright owners have not maintained copies of their copyrighted works, the works would have disappeared entirely except for the fact that someone to whom a copy was distributed or entrusted retained that copy and thereby preserved the work.

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25. See, e.g., Sam Kula, *Rescued from the Permafrost: The Dawson Collection of Motion Pictures*, ARCHIVARIA, Summer 1979, at 141, 142.

26. David Pierce, *The Legion of the Condemned—Why American Silent Films Perished*, 9 FILM HIST. 5, 6–10, 9–14 (1997).

27. Reese, *What Copyright Owes the Future*, *supra* note 3, at 302; *Russia Presents Library of Congress with Digital Copies of Lost U.S. Silent Films*, LIBR. CONG. (Oct. 21, 2010), <http://www.loc.gov/today/pr/2010/10-239.html> [<https://perma.cc/P6G3-HAUD>].

28. Howie Movshovitz, *A Happy Homecoming for Long-Lost Silent Films*, NPR (June 7, 2010), <https://www.npr.org/templates/story/story.php?storyId=127530994> [<https://perma.cc/A29P-K39X>]; *NFPF Receives Save America's Treasures Grant to Preserve "Lost" American Silent Films Discovered in New Zealand*, NAT'L FILM PRESERVATION FOUND. (Feb. 1, 2011), <https://www.filmpreservation.org/about/PR-2011-02-01> [<https://perma.cc/48AS-BRE2>].

29. See Reese, *What Copyright Owes the Future*, *supra* note 3, at 300-02.

### III. PRIVATE COPIES AND PRESERVATION

#### A. *Privately Recorded Copies*

The situation is more complicated where the copyright owner hasn't distributed *any* copies of the work. In such instances, if the copyright owner doesn't preserve a copy of the work, no one else will be able to keep a copy acquired from the copyright owner. The copyright owner's failure to preserve the work herself would ordinarily lead to the work disappearing. In at least some of these instances, however, the work may live on. Without the copyright owner's knowledge, someone else may have made and maintained a copy of the work, which I call a "private" copy. In practice, private copying turns out to be an important mechanism for preserving works of authorship.

In recent decades, the most notable instances of private copying aiding preservation have been privately recorded copies of works originally presented to the public by radio or television broadcast, rather than by distributing tangible copies.<sup>30</sup> In the most extreme instances, the privately recorded copy at some point becomes the only known remaining copy of the work. The following sections illustrate how vital private copies can be to preservation.

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30. The works discussed in these examples are all works subject to copyright protection, but the actual copyright status of these particular works is unclear. Until January 1, 1978, obtaining federal copyright protection for these works would have required either publishing copies of the work with a proper copyright notice or registering the work with the Copyright Office by depositing a copy with the Office. Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, § 9 (“[A]ny person entitled thereto . . . may secure copyright for his work by publication thereof with the notice of copyright required by this Act. . . .”), § 11 (“[C]opyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit . . . of one complete copy of such work . . .”) (repealed 1976). It does not appear that the jazz performances recorded by William Savory, the opera performances broadcast by the Met, the orchestra performances broadcast by the New York Philharmonic, most of The Beatles performances at the BBC, or the telecast of the 1960 World Series were ever recorded by those who could claim copyright in them. So it is not clear that those works ever obtained federal copyright protection (though, of course, the underlying musical works performed might already have been copyrighted). Prior to January 1, 1978, state common-law copyright offered protection to unpublished works, and publicly performing a work did not generally constitute publication. *See, e.g.*, *Ferris v. Frohman*, 223 U.S. 424 (1912); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999). Few if any cases, though, have addressed the availability and extent of protection for a performance that was not fixed with the authority of the author while it was being made or that was fixed but the fixation was discarded or lost without ever having been published.

### B. *Preservation of Musical Performances*

William Savory was a talented audio engineer and amateur jazz musician who helped create the 33-1/3 rpm long-playing recording format that was introduced in the late 1940s.<sup>31</sup> Earlier in his career, though, he worked in New York in the late 1930s and early 1940s for a transcription service that recorded live radio broadcasts onto acetate or metal discs for clients.<sup>32</sup> In addition to his official duties, he apparently spent evenings at his workplace making recordings for himself of live jazz performances being broadcast over the radio from major nightclubs.<sup>33</sup>

In all, Savory made nearly 1,000 such recordings of jazz broadcasts.<sup>34</sup> The quality of his recordings was much higher than off-the-air recordings made by home listeners, because Savory was an experienced audio engineer using professional equipment in a recording studio with direct lines from the radio stations broadcasting the performances.<sup>35</sup> Moreover, studio recordings of the time, made at a speed of 78 rpm on ten-inch discs, could only capture about three minutes of music. Savory used larger discs and slower recording speeds and could therefore record longer performances.<sup>36</sup> One critic explained that, as a result, Savory's recordings capture "longer, more relaxed performances"<sup>37</sup> and "a more authentic side of these musicians"<sup>38</sup> than are heard on contemporary studio recordings. As the director of the National Jazz Museum explained, "[i]n the studio, people played it safe," but on the live recordings "[y]ou hear them how they really sounded when they were playing live in person."<sup>39</sup>

The Savory discs "feature[] hundreds of live performances of jazz legends at the heights of their careers," including Ella Fitzgerald, Duke

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31. Tom Vitale, *Once the Stuff of Jazz Legend, 1930s Recordings Are Finally Out*, NPR MORNING EDITION, Dec. 8, 2016, <https://www.npr.org/2016/12/08/504696831/once-the-stuff-of-jazz-legend-1930s-recordings-are-finally-out> [<http://perma.cc/KDU9-2XYD>]; Steven Seidenberg, *Orphaned Treasures: A Trove of Historic Jazz Recordings Has Found a Home in Harlem, But You Can't Hear Them*, ABA JOURNAL, May 2011, at 47; Tom Vitale, *Sweet, Hot and Savory: Swing Era Jazz Archive Unearthed*, ALL THINGS CONSIDERED (Aug. 20, 2010), <https://www.npr.org/templates/story/story.php?storyId=129327625> [<https://perma.cc/HTV3-RLKL>]; Ben Ratliff, *Jazz Master Outplays Himself*, N.Y. TIMES, Aug. 18, 2010, at C1; Larry Rohter, *Great Jazz, Long Unheard, Is Rediscovered*, N.Y. TIMES, Aug. 17, 2010, at C1.

32. Vitale, *Sweet, Hot and Savory*, *supra* note 31.

33. *Id.*

34. *Id.*

35. *Id.*

36. Seidenberg, *supra* note 31, at 49.

37. Vitale, *Sweet, Hot and Savory*, *supra* note 31.

38. Vitale, *Once the Stuff of Jazz Legend*, *supra* note 31.

39. *Id.* (quoting Loren Schoenberg).

Ellington, Cab Calloway, Billie Holiday, Fats Waller, and Benny Goodman.<sup>40</sup> The 100 hours of music<sup>41</sup> contained on Savory's recordings has been described as "an extraordinary archive of swing-era jazz,"<sup>42</sup> "historic," and "a cultural treasure."<sup>43</sup>

In 2010, the National Jazz Museum in Harlem acquired Savory's recordings from his son. Unfortunately, by that time, some of the 50 boxes in which the discs were stored were water-damaged or moldy, and only about a quarter of the discs were in excellent condition.<sup>44</sup> About half of the discs had suffered "significant deterioration," although they could be fixed, and the remaining quarter were in "very poor shape."<sup>45</sup> The museum has been preserving and digitizing those discs that were salvageable, as well as negotiating for the permissions needed to make them available to the public.<sup>46</sup> The first set of recordings from the Savory Collection was released on iTunes in 2016.<sup>47</sup>

Another example of private copying preserving musical performances involves opera. Starting on Christmas Day in 1931, New York's Metropolitan Opera (the Met) has made periodic live radio broadcasts of performances from its stage, usually on Saturday afternoons.<sup>48</sup> The broadcasts have won multiple Peabody awards.<sup>49</sup> According to the Met, this is "the longest-running continuous classical radio series in American broadcast history."<sup>50</sup> With an average of about 20 broadcasts per season, by 2005 the Met had made nearly 1,400 broadcasts.<sup>51</sup> The broadcasts have included performances by many of the twentieth century's leading opera singers and conductors; the recordings feature rarities such as the only known recording of Marian Anderson in a complete opera.<sup>52</sup>

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40. Vitale, *Sweet, Hot and Savory*, *supra* note 31.

41. *Id.*

42. *Id.*

43. Seidenberg, *supra* note 31, at 48 (quoting Dan Morgenstern, director of the Institute of Jazz Studies).

44. Vitale, *Once the Stuff of Jazz Legend*, *supra* note 31; Vitale, *Sweet, Hot and Savory*, *supra* note 31; Seidenberg, *supra* note 31, at 49.

45. Seidenberg, *supra* note 31, at 49.

46. *Id.*

47. Vitale, *Once the Stuff of Jazz Legend*, *supra* note 31.

48. Daniel J. Wakin, *Push to Rescue Met Recordings*, N.Y. TIMES, Dec. 16, 2005, at B1, B30.

49. DON FRANKS, ENTERTAINMENT AWARDS: A MUSIC, CINEMA, THEATRE AND BROADCASTING GUIDE, 1928 THROUGH 2003, at 313, 315, 317, 329, 335 (3d ed. 2005).

50. *Saturday Matinee Broadcasts*, THE METROPOLITAN OPERA, <http://www.metopera.org/Season/Radio/Saturday-Matinee-Broadcasts/> [https://perma.cc/SC6F-8PWP].

51. Wakin, *supra* note 48.

52. *Id.*

By 2005, the Met recognized that its collection of recordings of its Saturday broadcasts was, as one manager put it, “one of the most important parts of the Met’s heritage” and “a potential source of income from downloading or commercial release . . . .”<sup>53</sup> That collection, however, is incomplete. Until 1950, “the Met did not maintain recordings of the broadcasts.”<sup>54</sup> As a result, the Met has had to search for privately made recordings of broadcasts from the first two decades. It has had some luck, finding recordings from a variety of different sources—singers who arranged for private recordings of their own performances, a retired radio station employee who kept recordings of some broadcasts, and so on.<sup>55</sup> It has even found “bootleg recordings” of some broadcasts in Europe.<sup>56</sup> While large gaps still exist, the Met’s director of archives has noted, “[i]t’s sort of a miracle that anything survived.”<sup>57</sup> What we do have today of the first two decades of the Met’s live performance broadcasts exists due to those who made their own copies when the Met did not make or keep its own recordings.

The Met’s experience with radio broadcasts is not unique among classical music institutions. In 1997, the New York Philharmonic released a ten-CD set entitled *New York Philharmonic: The Historic Broadcasts 1923 to 1987*. One critic described the collection as “an astonishing compendium. It includes [conductors] Toscanini, Reiner, Klemperer, Stokowski, Walter, Stravinsky and Bernstein performing works they never recorded commercially, as well as collaborations between soloists and conductors that are not otherwise preserved on disk. Because these are live recordings, they capture an electricity that more pristine studio recordings lack.”<sup>58</sup> But the New York Philharmonic did not start keeping recordings of radio broadcasts of its performances until the 1960s.<sup>59</sup> Thus, the earlier performances in the collection “survived thanks to devoted collectors, who recorded the broadcasts first on disk-cutting lathes and later on tape,” and often only in a single copy.<sup>60</sup>

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53. *Id.* (quoting Sarah Billingham, assistant manager for artistic affairs).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Allan Kozinn, *Bootlegging as a Public Service: No, This Isn’t a Joke*, N.Y. TIMES (Oct. 8, 1997), <https://www.nytimes.com/1997/10/08/arts/critic-s-notebook-bootlegging-as-a-public-service-no-this-isn-t-a-joke.html> [<https://perma.cc/JJ2E-GUCX>].

59. *Id.*

60. Allan Kozinn, *Feasting on Six Decades of the Philharmonic’s Past*, N.Y. TIMES (Dec. 14, 1997), <https://www.nytimes.com/1997/12/14/arts/recording-view-feasting-on-six-decades-of-the-philharmonic-s-past.html> [<https://perma.cc/6H4P-EJ7R>].

Symphonic music and opera are not the only music genres where private copies have preserved performances that would otherwise have been lost. Between 1962 and 1965, The Beatles played 275 unique musical performances of 88 different songs on 53 radio shows broadcast on the BBC.<sup>61</sup> This included 36 songs that “were never issued on record while the group was in existence.”<sup>62</sup> In 1982, a BBC radio producer who set out to put together a program of recordings of those performances discovered that the BBC had not kept any of the master tapes of any of those performances.<sup>63</sup> Recordings of a few songs existed on discs made at the time for distribution to radio stations in other countries, and some songs existed on recordings made contemporaneously by BBC employees for their own enjoyment.<sup>64</sup> In large part, though, the producer had to rely on recordings made by “listeners who had defied the BBC’s admonitions about the illegality of taping broadcasts” in order to compile programs (and later CDs) featuring The Beatles performing songs or versions that they had otherwise not recorded.<sup>65</sup>

### C. *Preservation of Sports and Entertainment Broadcasts*

Private copying has also preserved sports and entertainment broadcasts that have been lost. The most prominent sports example involves a baseball broadcast.<sup>66</sup> The 1960 World Series pitted the New York Yankees against the Pittsburgh Pirates.<sup>67</sup> The Series went to a seventh game at Forbes Field in Pittsburgh.<sup>68</sup> This was apparently quite a game—an entire book devoted to it is entitled *The Best Game Ever*.<sup>69</sup> The

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61. KEVIN HOWLETT, *THE BEATLES: THE BBC ARCHIVES: 1962–1970*, at 7 (2013).

62. *Id.*

63. *At the BBC, The Beatles Shocked an Institution*, FRESH AIR (Jan. 27, 2015), <https://www.npr.org/2015/01/27/381594109/at-the-bbc-the-beatles-shocked-an-institution> [<https://perma.cc/KQ8V-EWX3>]; see also Kozinn, *Bootlegging as a Public Service*, *supra* note 58 (“[The producer] discovered, to his horror, that the BBC had discarded virtually all the original tapes.”).

64. HOWLETT, *supra* note 61, at 7.

65. Kozinn, *Bootlegging as a Public Service*, *supra* note 58; see also HOWLETT, *supra* note 61, at 7–8 (noting that the 1988 series on The Beatles at the BBC used “many off-air recordings of The Beatles’ programmes”).

66. The narrative in this and the next two paragraphs comes from Reese, *What Copyright Owes the Future*, *supra* note 3, at 304–05. Another prominent sports example involves the telecast of Super Bowl I, discussed in detail below in the text accompanying notes 106–124, *infra*. For other examples, see Mike Dodd, *Telling the tale of a perfect find*, USA TODAY (Oct. 25, 2006) (describing discovery of only known copy of TV broadcast of fifth game of the 1956 World Series).

67. JIM REISLER, *THE BEST GAME EVER: PIRATES VS. YANKEES: OCTOBER 13, 1960*, at 3–4 (2007).

68. *Id.* at 16–18.

69. See *id.*

game made World Series history as the only such game without a single strikeout.<sup>70</sup> As one commentator explained, it featured “19 runs and 24 hits and was played in a brisk 2 hours and 36 minutes. It was full of managerial decisions to second-guess, clutch hits and unlikely heroes, pitchers throwing through pain, and strange, quirky plays.”<sup>71</sup> In the ninth inning, with Mickey Mantle doing some tremendous base running to avoid a double play that would have ended the game, the Yankees scored twice to tie the score at 9–9 before the Pirates came up to bat. Bill Mazeroski led off for the Pirates and hit a home run—the only game seven walk-off home run in World Series history—to win the game for the Pirates.<sup>72</sup>

But most baseball fans have probably never seen the game, unless they watched it when NBC broadcast it live in 1960. As noted above, until the 1970s, TV networks routinely erased or discarded their tapes of sporting events, even ones as important as the World Series. That apparently happened with game seven of the 1960 World Series, so the only known audiovisual record of the game existed in highlights.<sup>73</sup>

Until recently, that is. In 2009, five reels of 16-millimeter film that recorded the broadcast of the 1960 game turned up—in the cellar of the home of the late Bing Crosby.<sup>74</sup> Crosby was a part owner of the Pirates in 1960, but he was too nervous to watch the Series.<sup>75</sup> Indeed, Crosby feared that if he were even in the country during the Series, he would jinx the team, so he and his wife went to Paris and followed the action by radio.<sup>76</sup> But apparently he knew that if his team did win, he would be sorry he had not seen the games, so he arranged to have a kinescope of the broadcast made by filming off a TV monitor.<sup>77</sup> After he returned to the States and watched the game, he seems to have put the film in his cellar, along with many other films and records.<sup>78</sup> It was discovered there just a few years ago, and has since been broadcast and is now available on DVD.<sup>79</sup>

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70. *Id.* at 230.

71. David Schoenfield, *The Greatest Game Ever Played*, ESPN (Oct. 13, 2010), <http://sports.espn.go.com/mlb/playoffs/2010/columns/story?id=5676003> [https://perma.cc/24H2-KMLN].

72. *See id.*

73. REISLER, *supra* note 67, at 258–59.

74. Richard Sandomir, *In Bing Crosby's Wine Cellar, Vintage Baseball*, N.Y. TIMES, Sept. 24, 2010, at A1.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*; BASEBALL'S GREATEST GAMES: 1960 WORLD SERIES GAME 7 (A&E Television Networks, LLC 2011).

Private copies have also proved important in preserving television broadcasts of entertainment programming, even when that programming was not originally transmitted in a live broadcast (as most sporting events are). In December 1966, the television program *CBS Playhouse* broadcast a made-for-TV movie of Tennessee Williams's play *The Glass Menagerie* starring Shirley Booth as the matriarch of the Wingfield family.<sup>80</sup> While Shirley Booth is perhaps best known for her Emmy-award winning 1960s sitcom *Hazel*,<sup>81</sup> she worked primarily in the theater and often in dramatic roles. She won three Tony Awards, including for her performance in *Come Back Little Sheba* (and she later won an Oscar for reprising that performance in the film version).<sup>82</sup> The *CBS Playhouse* production also featured Hal Holbrook and Barbara Loden as the Wingfield children, Tom and Laura.<sup>83</sup> The *New York Times* called the broadcast "an evening of superb theater," and the performance reportedly "stuck in viewers' minds."<sup>84</sup> Shirley Booth was nominated for an Emmy for her performance<sup>85</sup> and the film was nominated for Outstanding Dramatic Program.<sup>86</sup> But for decades after its initial broadcast, the performance went unseen: the master videotape from which the show was originally broadcast was lost.<sup>87</sup>

Nearly 50 years later, Jane Klain, an enterprising film archivist at the Paley Center for Media, located several "forgotten reels of videotape" that contained six hours of raw footage from which the master videotape for the broadcast had originally been made.<sup>88</sup> Fortunately, only one reel was damaged.<sup>89</sup> However, the reels contained take after take of the play's scenes, with no indication of which takes had been used in the broadcast version.<sup>90</sup>

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80. Michael Schulman, *A Lost "Glass Menagerie" Rediscovered*, THE NEW YORKER, Dec. 7, 2016.

81. Katherine Laris, *Shirley Booth*, in NOTABLE WOMEN IN THE AMERICAN THEATRE: A BIOGRAPHICAL DICTIONARY 85, 87 (Alice M. Robinson et al. eds. 1989).

82. *Id.* at 86.

83. James Barron, *Vintage 'Glass Menagerie' Performance Will Return to Air*, N.Y. TIMES, Dec. 8, 2016, at A24; Schulman, *supra* note 80.

84. Barron, *supra* note 83.

85. Schulman, *supra* note 80.

86. Hal Humphrey, *Nominees Announced in Annual Race for Emmys*, L.A. TIMES, May 2, 1967, at D1.

87. Schulman, *supra* note 80.

88. Barron indicates that four reels were found. Barron, *supra* note 83. However, other reports indicate either five or six tapes were found. Schulman, *supra* note 80.

89. Schulman, *supra* note 80.

90. *Id.*



In this instance, a private copy came to the rescue. Klain discovered “an audio recording of the broadcast, apparently made on a home tape recorder” when the performance was originally broadcast.<sup>91</sup> The audio recording had been uploaded to the Internet Archive.<sup>92</sup> Dan Wingate, a video restorer, was able to match the sound signatures from the privately made audio recording to determine which portions of the raw footage were used in the broadcast version.<sup>93</sup> The process, according to Wingate, was “daunting,” because the broadcast version “would use a part of [one] take [of a scene] and then . . . would use a part of [another] take [of the same scene].”<sup>94</sup> In addition, the privately made audio recording supplied the musical score, which was otherwise missing, for the reconstructed version.<sup>95</sup> Turner Classic Movies broadcast the reconstructed recording on the fiftieth anniversary of the original broadcast.<sup>96</sup> It seems highly unlikely that the rediscovered raw footage could have been used to reconstruct the broadcast version if the privately made audio recording had not existed.

All of these examples show that it is not unknown for a copyright owner to fail to keep a copy of a performance that has been broadcast by radio or television, but for someone in the audience to have made and kept a copy. In many instances, as with the Metropolitan Opera, copyright owners are happy (and no doubt relieved) to discover that a third party made and kept a copy of a work where the copyright owner itself failed to do so. But as the next section shows, copyright owners in those circumstances might not always enthusiastically embrace the discovery of private copies of their works.

#### IV. DIVIDED OWNERSHIP: COPYRIGHT AND PRIVATE COPIES

The private audio recording of the telecast of *The Glass Menagerie* served as a complement to the rediscovered original raw footage. But in many instances, a private copy will be the *only* surviving copy of a work of authorship. Situations where the only known copy of a copyrighted work is a privately made copy present a problem of divided ownership.<sup>97</sup>

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91. Barron, *supra* note 83. The audio is available at <https://archive.org/details/TennesseeWilliamsTheGlassMenagerie/Act1.mp3> [<https://perma.cc/NW2D-9XZT>].

92. Schulman, *supra* note 80.

93. Barron, *supra* note 83, at A24–25.

94. *Id.* at A25.

95. Schulman, *supra* note 80.

96. Barron, *supra* note 83, at A24.

97. See, e.g., Rohter, *supra* note 31 (“While the [National Jazz] museum has title to Mr. Savory’s discs as physical objects, the same cannot be said of the music on the discs.”). For convenience, I am describing the situation as involving the owner of the private copy and a single

The person who made the copy, or someone to whom the copy-maker has transferred the copy, owns the copy—the tangible object in which the copyrighted work is embodied.<sup>98</sup> The copyright owner—the author or her transferee—owns the copyright in the work embodied in the copy.<sup>99</sup>

Such divided ownership is very familiar in copyright law generally. The 1976 Act expressly provides that “[o]wnership of a copyright . . . is distinct from ownership of any material object in which the [copyrighted] work is embodied.”<sup>100</sup> In ordinary circumstances, this division means that, for example, when a customer buys a bound printed volume (a “book”) of an author’s novel (a “literary work”) from a bookstore, the customer acquires ownership of the printed volume—free from any claims of the owner of copyright in the novel—but does not acquire any rights in the copyrighted literary work. The book-buyer owns her copy, not the copyright. The owner of the novel’s copyright has no rights in the particular printed volume owned by the book-buyer. But that generally poses little obstacle to the copyright owner’s ability to exploit the copyrighted work. If she wants to sell additional copies, she can simply exercise her exclusive right to reproduce her literary work in copies and print more books.<sup>101</sup>

Divided ownership has somewhat different consequences when one party owns a work’s copyright and another party owns the *only* remaining material object embodying the work. In this situation, the copyright owner may want to exploit the copyrighted work but likely cannot do so because she has no copy of the work. Of course, if the work is a haiku and the copyright owner has committed the poem to memory, the lack of a tangible copy would not prevent the copyright owner from using the work. For most works, though, the copyright owner needs a tangible

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copyright owner of a single work embodied in that copy. In many instances, of course, the private copy will embody multiple copyrighted works. For example, the audio recording of the telecast of *The Glass Menagerie* would embody both Tennessee Williams’s dramatic work (the play) and the audio portion of the 1966 audiovisual work (the made-for-TV movie).

98. Even if making the copy infringed on the copyright of the work recorded, that would not itself deprive the person who made the copy of ownership of that particular material object. Even a successful copyright infringement suit against the person who made the copy would not necessarily deprive the adjudged infringer of ownership of the infringing copy, though the court would have the discretionary power as part of the final judgment in the case to “order the destruction or other reasonable disposition” of the copy. 17 U.S.C.A. § 503(b) (Westlaw through Pub. L. No. 115-140).

99. *Id.* § 201.

100. *Id.* § 202. The 1909 Copyright Act similarly provided that “the copyright [in a work] is distinct from the property in the material object copyrighted.” Copyright Act of Mar. 4, 1909, ch. 320, § 41, 35 Stat. 1075 (repealed 1976).

101. 17 U.S.C.A. § 106(1). Having printed the novel in additional copies, the copyright owner could then exercise her exclusive right to distribute those copies. *Id.* § 106(3).

embodiment of the work in order to be able to make and sell copies of it, or even to perform it publicly. This is particularly true for audiovisual works and sound recordings.<sup>102</sup>

The person who owns the single extant copy of the work also likely cannot commercially exploit the work embodied in that copy. The copy owner *does* possess a tangible embodiment of the copyrighted work, but exploiting the work would generally involve activities—reproduction, distribution, and/or public performance—that copyright law reserves exclusively to the copyright owner.<sup>103</sup>

Thus, in the context of a *single* private copy of a work, divided ownership creates a risk of stalemate. For the work to become widely available, the copyright owner and the copy owner must reach an agreement, so that the party with the right to engage in copyright-protected activities using the work can get access to the copy of the work needed to engage in those activities. Reaching such an agreement will not always be simple, as the rebroadcast of the reconstructed 1966 television movie of *The Glass Menagerie* demonstrates. After finding the original footage and producing the reconstructed version, “[t]racking down who owned the rights and getting all the lawyers to sign off was a whole other headache, one that was resolved just” days before the fiftieth-anniversary broadcast of the reconstructed version.<sup>104</sup> But if the work has continuing commercial value, we might expect the copyright owner and the copy owner usually will reach some agreement, including on some split of the proceeds to be made from exploiting the work.<sup>105</sup>

102. By definition, audiovisual works and sound recordings cannot exist without a tangible copy. See *id.* § 101, which defines “audiovisual works” as “works that consist of a series of related images . . . together with accompanying sounds, if any, *regardless of the nature of the material objects, such as films or tapes, in which the works are embodied,*” and defines “sound recordings” as “works that result from the fixation of a series of . . . sounds . . . , *regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied*” (emphasis added). For other types of works, including literary works, musical works, and dramatic works, a work can exist even without a tangible copy, though of course the work would need to be fixed in a copy in order to be protected by federal copyright. *Id.* § 102(a).

103. *Id.* § 106(1)–(6). The owner of the copy might be able to make some exploitation of the work. For example, the owner could engage in exploitation that falls outside the scope of the copyright owner’s exclusive rights, such as performing the work privately (or, in the case of sound recordings, performing the work publicly by any means other than a digital audio transmission). See *id.* § 106(4), § 106(6). The owner could also engage in exploitation that comes within one of the limitations on exclusive rights provided in the copyright statute, *id.* §§ 107–122, such as a fair use.

104. Schulman, *supra* note 80.

105. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (noting that in situations of potential stalemate between the owner of the renewal-term copyright in an underlying work and the owner of the copyright in a derivative work based on that underlying work, the parties can be expected to bargain to an agreement allowing use of the underlying work in the derivative work because the

A negotiated resolution between the different owners may be the expected outcome in these situations, but it may not *always* be the outcome. Recent experience involving a Super Bowl broadcast offers one counter-example at the intersection of sports and television history. In January 1967, the NFL champion Green Bay Packers played the AFL champion Kansas City Chiefs at the Los Angeles Coliseum in what is now known as Super Bowl I (though at the time it was officially the “NFL–AFL World Championship Game”).<sup>106</sup> The Packers emerged victorious, 35–10.<sup>107</sup> Both NBC and CBS broadcast the game, the only time in Super Bowl history that two networks broadcast the game simultaneously.<sup>108</sup> But apparently neither network retained a tape of the broadcast.<sup>109</sup> According to Jack Whitaker, a play-by-play announcer on the CBS broadcast, “We didn’t have [many] people who were interested in the history of our industry in those days,” and “[w]e lost a lot of important tapes and recordings of important events.”<sup>110</sup> A curator at the Paley Center for Media called the Super Bowl I broadcast “our holy grail of lost sports programs, appearing on our most-wanted list for years.”<sup>111</sup>

Decades later, it emerged that someone named Martin Haupt had recorded the CBS broadcast, which had commentary by Frank Gifford, who was just starting his broadcast career.<sup>112</sup> Before the era of home videocassette recorders, Martin Haupt’s job apparently gave him access to a professional recorder, and he used it to record most of the broadcast on two videocassettes.<sup>113</sup> (He stopped recording for most commercial breaks, and did not record during halftime and for about half of the game’s third quarter, so the copy is somewhat incomplete,<sup>114</sup> but it includes a post-game interview with Packers coach Vince Lombardi.<sup>115</sup>) Haupt’s surviving family reports not knowing his occupation at the time, or why

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renewal copyright owner will generally “want[] to profit from the distribution of the [derivative] work”).

106. Mike Penner, *Super Bowl I: A Look Back*, L.A. TIMES, Jan. 29, 2006, at D1.

107. Richard Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, N.Y. TIMES, Feb. 3, 2016, at B10.

108. Penner, *supra* note 106. NBC held the rights to broadcast AFL games, and CBS held the rights to broadcast NFL games, so both were allowed to cover the championship game. *Id.*

109. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

110. Brian Stelter, *The tale of the missing tape from Super Bowl I*, CNN MONEY (Feb. 1, 2015), <http://money.cnn.com/2015/02/01/media/super-bowl-i-missing-tape/index.html> [<https://perma.cc/X9M7-FBAM>].

111. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

112. Paul Zimmerman, *Day One*, 83 SPORTS ILLUSTRATED 15, 74 (Fall 1995).

113. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

114. *Id.*

115. Stelter, *supra* note 110.

he made the recording.<sup>116</sup> But by the mid-1970s, Haupt, dying of cancer, gave the tapes to his ex-wife, suggesting that they might eventually help pay for their children's education.<sup>117</sup> The tapes were stored in an attic in Shamokin, Pennsylvania, forgotten for several decades and suffering deterioration as the attic temperature rose and fell with the changing seasons.<sup>118</sup>

In 2005, Martin Haupt's son Troy discovered the tapes. He made a deal with the Paley Center for Media to restore them, and tried to sell the tapes to the NFL. He eventually offered to sell the tapes for \$1 million—the estimated value of a recording of Super Bowl I, according to a 2005 *Sports Illustrated* article.<sup>119</sup> The NFL reportedly counteroffered at \$30,000, and has never been willing to offer any higher price.<sup>120</sup>

The standoff has continued. The Paley Center restored the recording but keeps it “locked up in a vault.”<sup>121</sup> As Troy Haupt described it to the *New York Times*: “It’s awesome to have the tapes, but it’s frustrating that we can’t do anything with them . . . It’s like you’ve won the golden ticket but you can’t get into the chocolate factory.”<sup>122</sup> The newspaper concluded that “until the league and Haupt resolve their differences, the public will never see the game as it happened.”<sup>123</sup> The best they can do is view a reconstruction, pieced together from NFL archival film footage, with audio from a surviving NBC radio broadcast of the game.<sup>124</sup>

## V. PRESERVATION CONSEQUENCES OF OWNERSHIP STALEMATE

In a situation such as the stalemate over the Super Bowl I recording, the failure of a copyright owner<sup>125</sup> and a copy owner to reach an agreement

116. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

117. *Id.* at B12.

118. *Id.* See also David Roth & Jared Diamond, *Found at Last: A Tape of the First Super Bowl*, WALL ST. J., Feb. 5, 2011 (describing the tapes as “warped and slightly beat up” when they reached the Paley Center in 2005 for restoration).

119. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

120. *Id.*

121. Stelter, *supra* note 110.

122. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

123. *Id.*

124. *Id.*

125. With respect to Super Bowl I, the question of whether any copyright exists in the broadcast of Super Bowl I is complicated. Neither the NFL nor either broadcast network apparently took the steps then required under the 1909 Copyright Act to obtain federal copyright protection for the broadcast and did not long retain any recording of the broadcast which could have been used to obtain such protection (either by publishing copies of the recording with proper copyright notice or by depositing a copy with the Copyright Office in the course of registering the broadcast as an unpublished work). For works created on or after January 1, 1978, the issue would be more

to exploit the work raises at least two concerns. First, the work cannot reach the audience that might enjoy it. Those who might want to watch the recording of the original telecast of Super Bowl I, or buy a DVD copy of it, cannot do so. The NFL may have the rights to reproduce or transmit the broadcast, but it doesn't possess the recording that it would need to do so. Troy Haupt, conversely, has the tapes, but he doesn't have the rights to authorize anyone to transmit or reproduce the telecast. Second, and perhaps of greater consequence, such a dispute threatens to derail the work's preservation. To understand why, consider two difficulties in maintaining a usable copy for a long period of time.

The first difficulty is that copies in which copyrighted works are embodied usually deteriorate over time.<sup>126</sup> Some copies are very durable—medieval vellum manuscripts are still readable today,<sup>127</sup> as are silk manuscripts of the Chinese texts of the *I Ching* and the *Tao Te Ching* that were written over two millennia ago,<sup>128</sup> though even such durable copies are likely to survive longer if stored in appropriate conditions. Other copies are far more fragile, and fragility is particularly concerning for copies of TV and radio broadcasts (both those made by copyright owners and those that are privately made).<sup>129</sup> Recall the recordings of the Metropolitan Opera's Saturday matinee broadcasts. In the mid-1990s, the Met discovered that its own professional recordings from the late 1980s were already deteriorating. "The substance that binds the oxide compound, which captures the sound, to the tape had broken down, making the tape[s] sticky and almost impossible to play," and the problem was affecting "a whole generation of tapes" of the opera broadcasts.<sup>130</sup>

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straightforward, as federal copyright protection automatically attaches to a qualifying work upon its fixation.

126. See Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 637.

127. See, e.g., Dan Bilefsky, *Britain's Lords Turn the Page on Parchment*, N.Y. TIMES, Feb. 11, 2016, at A4.

128. See Reese, *What Copyright Owes the Future*, *supra* note 3, at 299–300.

129. With regard to the stability of the physical carrier bearing the information to be preserved: [A]udiovisual carriers are generally more vulnerable than conventional text documents to damage caused by poor handling, poorly maintained equipment or by poor storage. Many audiovisual carriers, especially magnetic recordings, laminated instantaneous discs, and nitrate film, have relatively short life expectancies due to their physical composition. . . . Due to the high density of information, digital carriers are generally more vulnerable to loss of information through damage than analogue carriers. Life expectancy concerns particularly arise in the case of the storage media used in most computer-based storage and data management systems. Their useful life is generally short—from three to ten years . . . .

INTERNATIONAL ASSOCIATION OF SOUND AND AUDIOVISUAL ARCHIVES, *THE SAFEGUARDING OF THE AUDIOVISUAL HERITAGE: ETHICS, PRINCIPLES AND PRESERVATION STRATEGY 7* (4th ed. 2017).

130. Wakin, *supra* note 48.

Those who make private copies and retain them for long periods of time may not have the resources to store those copies in optimal conditions that will maximize the life of the copies. They may simply store them in attics, basements, or garages, subject to the vagaries of whatever temperature and humidity conditions exist in those places. Recall that the Super Bowl I and *Glass Menagerie* tapes, as well as the Savory jazz recordings, had all suffered some damage by the time they reached professional archivists who could properly care for them.

The second difficulty is that even when the copy itself survives in good condition, preserving the work may require “migrating” the content on the copy to a more accessible format.<sup>131</sup> Newer formats for recording copyrighted works replace older formats with some regularity. Audiophiles are quite familiar with this process: today, for example, only those with specialized equipment could play audio recordings on eight-track tapes popular in the 1960s and 1970s.<sup>132</sup> Private copies made decades ago may likewise not be readily accessible without being migrated to a more modern format. And migration seems likely to be particularly necessary for private recordings of radio and TV broadcasts. Recording formats have routinely shifted over the course of the last century, so recordings made decades ago may be playable only on relatively obscure or obsolete equipment, and may therefore need to be transferred to a more modern format in order to be used widely. The same will likely be true for material copied from online sources: how easily can material stored a decade ago on a then-common 3-1/2-inch floppy disk be accessed today, and how much more difficult will such access be several decades from now?

Given the potential fragility of private recordings and the likely need for migration, preserving a private copy so that the work captured on it can remain accessible may often require significant resources. The owner of the private copy may not have, or may be reluctant to invest, the resources necessary to preserve that copy. This may be especially true if a stalemate with the copyright owner of the copied work prevents the copy owner from recouping that investment by participating in the commercial exploitation of the preserved work. In such a situation, the copy owner may decide simply to keep the copy in conditions that, while affordable,

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131. See Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 637–39.

132. See Stephen Becker, *8-Track Tapes Belong In A Museum*, ALL THINGS CONSIDERED (NPR) (Feb. 16, 2011), <https://www.npr.org/sections/therecord/2011/02/17/133692586/8-track-tapes-belong-in-a-museum> [<https://perma.cc/JL62-QKKC>].

might cause it to deteriorate (or may even decide simply to discard the copy).

Thus, when divided ownership results in a stalemate between the different owners, that stalemate could lead to the loss of the only existing copy of the work. Perhaps that result might seem to be a reasonable consequence to those *owners* for their inability to reach an agreement on using the work. But the loss of the only existing copy of a work essentially means the loss of the work itself. That loss, of course, is suffered not only by the copyright owner and the copy owner who fail to reach an agreement, but also by the public at large, who no longer have the possibility of experiencing the work. Copyright's goals are not best served by inflicting such a loss on potential audiences (current and future), on critics and historians, and on the larger culture.

## VI. ARCHIVES AND PRIVATE COPIES

### A. *Archival Preservation of Private Copies*

A stalemate between a copyright owner and the owner of a private copy can thus threaten the very existence of a potentially unique copy of a copyrighted work. When such a stalemate occurs, perhaps the best outcome that can be achieved is for the copy to be transferred to an archival institution with the resources to preserve the work embodied in the copy. Once the private copy is in an archive's collection, § 108 of the current copyright statute expressly allows the archive to copy the work for preservation purposes.<sup>133</sup> If the work is unpublished, which is likely the case for many works broadcast on radio and television for much of the twentieth century, given the technical definition of "publication" in copyright law,<sup>134</sup> then the archive may make up to three copies of the work for preservation once the private copy is in the archive's collections.<sup>135</sup> If

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133. The provisions allowing archives to make copies for preservation purposes apply if the archive's collections are either open to the public or available to qualified researchers unaffiliated with the archive. 17 U.S.C.A. § 108(a)(2) (Westlaw through Pub. L. No. 115-140).

134. The statute defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending," and also provides that "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication," but that "[a] public performance or display of a work does not itself constitute publication." *Id.* § 101. Thus, broadcasting a work by radio or television (a public performance) would not itself publish the work.

135. *Id.* § 108(a)–(b). As discussed in more detail below, see text accompanying notes 160–63, *infra*, if the private copy is an unauthorized fixation of the sounds, or sounds and images, of a live musical performance, § 1101(a)(1) would require an archive to obtain the performers' consent to



the work is published, the archive may make three copies “for the purpose of replacement of a copy . . . that is damaged, deteriorating, lost, or stolen” or if “the existing format in which the work is stored has become obsolete.”<sup>136</sup> For published works, such copying is allowed only if “an unused replacement [copy] cannot be obtained at a fair price,” a condition that would always be met where the archive’s copy is the only known copy of the work.<sup>137</sup>

Transferring the private copy to an archive should therefore at least ensure that some tangible, accessible copy or copies of the work would continue to exist into the future. Such preservation would not itself make the work generally available to the public, at least if the stalemate persists. But preserving the work would mean that if the copyright owner and the copy owner can later agree on terms for exploiting the work, a copy would exist to allow them to do so.<sup>138</sup> Even if the stalemate between the owners is never resolved, the work will one day enter the public domain. Copyright protection lasts a very long time, but it does eventually expire.<sup>139</sup> Preserving a copy in an archive means that when the copyright expires and no copyright owner can any longer control the work’s exploitation, the work will exist to be experienced by audiences again.<sup>140</sup> Even before the copyright term expires, placing the private copy in an archive’s collection likely means that the work will at least be available to those who come to the archive to consult its collection, since the archive

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reproduce additional copies, even for preservation purposes. Section 108 does not expressly limit performers’ rights under § 1101.

136. *Id.* § 108(c).

137. *Id.* § 108(c)(1).

138. As a number of recent technological developments have shown, it may be worth preserving copies of works even when it appears to be impossible to access the work embodied in the copy, since technology may one day allow recovery of the work stored in the copy. In some instances, technology may be able to reveal text written on scrolls or books that have been so badly burned that they cannot be opened. *See, e.g.,* Nicholas Wade, *A Fragile Text Gets a Virtual Read*, N.Y. TIMES, Jan. 9, 2018, at D3; Nicholas Wade, *Technology Unlocks Secrets of a Biblical Scroll*, N.Y. TIMES, Sept. 22, 2016, at A12. In other instances, technology may allow the recovery of text that had been scraped from an ancient manuscript in order to reuse the parchment for a different manuscript. *See, e.g.,* REVIEL NETZ & WILLIAM NOEL, *THE ARCHIMEDES CODEX: HOW A MEDIEVAL PRAYER BOOK IS REVEALING THE TRUE GENIUS OF ANTIQUITY’S GREATEST SCIENTIST* (2007).

139. 17 U.S.C.A. §§ 302–305. Even in the last 20 years of the copyright term, § 108(h) allows archives and libraries to make some reproduction, distribution, public performance, and public display of works that are not commercially available. *Id.* § 108(h). But that provision only applies to any “published work,” and, as noted in note 134, *supra*, privately made copies will often be of works that are not published under the Copyright Act’s definition.

140. A stalemate between the copyright owner and the owner of the only remaining private copy of the work seems more likely to develop well into the copyright term, so the wait for the work’s copyright to expire may be somewhat shorter than the entirety of the long copyright term.

may be able to offer a researcher access to the work at the archive without violating any of the copyright owner's exclusive rights.

### B. *Uncertainty Over Legality of Transfers to Archives*

Transfer to an archive may thus be the best result we can hope for when the copyright owner and copy owner are deadlocked. We should be concerned, though, that in these circumstances, the copyright owner might seek to prevent the copy owner even from transferring the private copy to an archive. News reports about the standoff over the Super Bowl I tapes at least raise this possibility. According to the *New York Times*, “[t]he N.F.L. . . . has warned [Troy] Haupt not to sell [the tapes] to outside parties or else the league will pursue legal action.”<sup>141</sup> The NFL may not only be threatening to use its copyright claims to prevent any transferee from using the tapes, but also alleging that the sale itself would be copyright infringement.<sup>142</sup>

And copyright's exclusive rights *might* offer a copyright owner the power to block a copy owner from transferring a private copy to an archive. That transfer would arguably fall within the scope of the distribution right. Section 106(3) reserves to the copyright owner the right “to distribute copies . . . of the copyrighted work to the public by the sale or other transfer of ownership, or by rental, lease, or lending.”<sup>143</sup> The copy owner would be transferring ownership of the copy to the archive (either by sale or by gift). While the copy owner would, by hypothesis, only be transferring ownership of a single copy and not of multiple “copies,” the use of the plural term in the statute seems to encompass the singular, so that transfer of ownership of only a single copy could potentially come within the distribution right.<sup>144</sup>

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141. Sandomir, *A Clash Unspools Out of a Recording of Super Bowl I*, *supra* note 107.

142. The NFL has been known to make expansive copyright claims in other contexts. For example, broadcasts of its games generally include an announcement along the following lines: “This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL’s consent is prohibited.” Ira S. Nathenson, *Looking for Fair Use in the DMCA’s Safety Dance*, 3 AKRON INTELL. PROP. J. 121, 154 (2009). The claims of that last sentence substantially overstate the rights of the owner of the copyright in a telecast. *Id.* at 154–55; John Tehranian, *Curbing Copyblight*, 14 VAND. J. ENT. & TECH. L. 993, 1006–08 (2012).

143. 17 U.S.C.A. § 106(3).

144. *See* 1 U.S.C.A. § 1 (Westlaw through Pub. L. No. 115-140) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the plural include the singular.”). The common understanding of the Copyright Act’s grant to the copyright owner of the exclusive right “to reproduce the copyrighted work in *copies*” seems to be that an unauthorized reproduction of a single *copy* can constitute infringement of the reproduction right.

Of course, while the transfer might come within the scope of the copyright owner's § 106(3) distribution right, it might not be an *infringing* distribution if one of the statutory limitations on that right allows the transfer. The most relevant limitation would likely be the first sale doctrine, which allows "the owner of a particular copy" to "sell or otherwise dispose of the possession of that copy."<sup>145</sup> That is precisely what the copy owner is proposing to do in selling or donating the copy to the archive. But the first sale doctrine only applies to a copy that is "lawfully made" under copyright law.<sup>146</sup>

Whether the first sale doctrine will permit the transfer will therefore likely depend on whether the private copy is a "lawfully made" copy.<sup>147</sup> There is much debate, but little express statutory guidance or court precedent, on the lawfulness of private copies.<sup>148</sup> The broad language with which the current Copyright Act grants a copyright owner the exclusive right to reproduce her copyrighted work contains no express limitation allowing private reproduction.<sup>149</sup> The statutory limitations on the reproduction right include only one provision expressly allowing private copying, but that provision only covers "noncommercial use by a consumer of [a digital or analog audio recording] device or medium for making digital musical recordings or analog musical recordings."<sup>150</sup> On the other hand, some evidence from the legislative history of the current statute's enactment indicates that the drafters did not intend for copyright law to prohibit private copying of transmissions.<sup>151</sup>

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145. 17 U.S.C.A. § 109(a).

146. *Id.*

147. In addition to the question discussed in the next paragraphs regarding whether making the private copy did or did not violate the copyright owner's reproduction right, whether the private copy is "lawfully made *under this title*" could also depend on whether making the copy violated § 1101 of title 17, as discussed in the text accompanying notes 160–63, *infra*.

148. See generally Litman, *Lawful Personal Use*, *supra* note 1; GOLDSTEIN, *COPYRIGHT'S HIGHWAY*, *supra* note 11, 129–164; see also Reese, *What Copyright Owes the Future*, *supra* note 3, at 304.

149. 17 U.S.C.A. § 106(1) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive right[] . . . to reproduce the copyrighted work in copies or phonorecords . . .").

150. *Id.* § 1008.

151. During a 1971 floor debate on an earlier version of the bill that eventually became the 1976 Copyright Act, Rep. Abraham Kazen, Jr. asked Rep. Robert Kastenmeier, chair of the IP subcommittee of the House Judiciary Committee, "if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of this bill?" Rep. Kastenmeier responded, "This is not included in the bill. I am glad the gentleman raises the point." 117 Cong. Rec. 334, 748–49 (1971). On the other hand, as Professor Goldstein notes, "[t]he House and Senate reports on the 1976 Act intimated that tape recording from a broadcast, for example, would not automatically qualify as a fair use." GOLDSTEIN, *COPYRIGHT'S HIGHWAY*, *supra* note 11, at 132.

The question of whether a private copy was “lawfully made” might ultimately turn on whether making the copy qualified under § 107 of the Copyright Act as fair use, rather than as an infringing reproduction, in which case the copy would have been lawfully made and could be transferred under § 109(a).<sup>152</sup> Making that determination, though, would require a court to apply the multi-factor balancing test of § 107, and the outcome of that analysis might be difficult to predict. The preservation value of a private copy should weigh in favor of finding fair use. Even if the copier originally made the copy largely for the purpose of enjoying the copied work, retaining the copy over time, especially when the copyright owner has not disseminated copies (or perhaps even retained any copies) indicates at least in part a preservation purpose that is distinct from the copyright owner’s exploitation of the work. That might indicate transformativeness that would weigh in favor of fair use under the first factor. And while copying an entire work ordinarily “militat[es] against a finding of fair use,”<sup>153</sup> recording the entire work is “reasonable in relation to the purpose” of preserving the work,<sup>154</sup> thus indicating that the third factor should not weigh against fair use.<sup>155</sup> Nevertheless, the unpredictability of the outcome of the fair use analysis, especially with little fair use precedent on point,<sup>156</sup> could leave the copy owner and the archive uncertain whether the private copy had been lawfully made so that the proposed transfer would not be infringing under the first sale doctrine.

Even if the private copy in question was found to be “lawfully made” because the making qualified as fair use, the Copyright Office has, in a different context, questioned whether § 109(a) allows even the owner of a private copy that was lawfully made under the fair use doctrine to transfer ownership (or possession) of that particular copy.<sup>157</sup> The

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152. 17 U.S.C.A. § 107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”).

153. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984).

154. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

155. See generally R. Anthony Reese, *How Much Is Too Much? Campbell and the Third Fair Use Factor*, 90 WASH. L.R. 755 (2015).

156. The unpredictability of the fair use analysis as applied to private copying and similar personal archiving activities is perhaps unsurprising. As Jessica Litman has explained, “[t]he tools we have developed to evaluate a claim of fair use . . . seem ill-fitted to assess the lawfulness of . . . common personal uses.” Litman, *Lawful Personal Use*, *supra* note 1, at 1898. See generally *id.* at 1901–03.

157. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001) at 156 (“Authority is unclear over the application of the first sale doctrine to lawfully made copies that have not been distributed with the copyright owner’s consent.”). This portion of the Report addressed personal archiving of computer data and concluded that “the most common archival activities by computer users would qualify as fair use.” *Id.* at 153. The Report noted that “[t]o the extent that section 107 [fair use] permits a user to make backup copies of works stored on a hard drive, those backup copies

Copyright Office acknowledged that “the statutory text [of § 109(a)] only requires that the copy be lawfully made, and makes no reference to a prior authorized sale or other distribution,” but asserted that the section “is commonly understood to codify the ‘first sale doctrine,’ which implies that an actual sale, or at least an authorized distribution, must occur before the doctrine applies.”<sup>158</sup> Thus, in the Copyright Office’s view, § 109(a) would not allow the transfer of a private copy to an archive even if a court determined that making the copy had constituted fair use and not infringement, because that private copy would not have been subject to a prior authorized transfer by the copyright owner.

If the private copy is not (or not clearly) lawfully made, or if § 109(a) does not extend to copies made pursuant to fair use, then the copy owner who wants to transfer the copy to an archival institution could not rely clearly on the first sale doctrine to permit the transfer. Fair use would then probably be the limitation on the distribution right most relevant to determining whether the copy owner’s transfer of the private copy to an archive is or is not an infringing distribution: any act of distribution that constituted fair use would not infringe, regardless of whether the first sale doctrine applied to the transfer. Again, the question of whether such a transfer is a fair use will depend on applying the statutory fair use factors to the particular facts of the case. And again, there is little precedent expressly applying fair use to claims of infringing distribution, let alone distribution in the context of transferring the only remaining copy of a work to an archive.<sup>159</sup> While there are strong arguments that transferring a private copy of a work to an archive for preservation should constitute fair use (rather than an infringing distribution), the lack of clear fair use precedent on point leaves the legality of the transfer under § 107 uncertain, which might induce risk-averse parties to forego the transfer altogether.

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are lawfully made and the user owns them.” *Id.* at 155. The Copyright Office then examined whether § 109 would “permit the user, as the owner of a lawfully made backup copy, to ‘sell or otherwise dispose of the possession’ of that backup copy.” *Id.* at 155–56.

158. *Id.* at 156. The Copyright Office found that statements in the legislative history “can be read to support both views,” *id.* at 156–57, and noted that a leading treatise concludes that § 109(a) applies to “any ‘owner of a particular copy or phonorecord lawfully made’ and not just [to] those who acquired such ownership via a prior transfer from the copyright owner.” *Id.* at 157 (quoting NIMMER ON COPYRIGHT at § 8.12(B)(3)(c)).

159. Few if any fair use opinions expressly analyze whether allegedly infringing distribution of copies or phonorecords of a copyrighted work constitutes fair use. More commonly, a copyright owner accuses a defendant of both reproducing copies of a copyrighted work and distributing those copies to the public, and the court’s fair use analysis typically treats such activities as a unified course of conduct with little attention to distribution in particular.

The legality of transferring a private copy to an archive can be even more complicated if the copy records the sounds, or sounds and images, of a live musical performance. Separate from copyright, 17 U.S.C. § 1101 grants musical performers exclusive rights in their live performances. Entirely aside from any infringement of the copyright owner's rights under § 106, distributing or trafficking in a copy that embodies a live musical performance would violate the rights of the performer(s) under § 1101(a).<sup>160</sup>

Transferring such a private copy to an archive would potentially subject the copy owner to liability, because the transfer would potentially constitute distributing or trafficking under § 1101. (The definition of "traffic" includes transferring a copy to another for purposes of "private financial gain," which might cover the sale of a private copy to an archive and might even cover donating the copy and taking a tax deduction).<sup>161</sup> In addition, § 1101 applies to any transfer after its effective date, even if the recording was made before the effective date.<sup>162</sup> Further, § 1101 does not contain any term provisions, so it apparently bars such transfers long after any copyright term in the recorded material would have expired.<sup>163</sup> Lastly, the fair use provision of § 107 does not expressly limit the rights of performers under § 1101, so it is unclear whether any activity that would come within the scope of those rights could be found to be a fair use.

The uncertainty over whether transferring a private copy of a copyrighted work to an archive would come within the scope of the distribution right, or whether that copy was lawfully made, or whether the transfer would be allowed either by § 109(a) or § 107, or whether the transfer might violate § 1101(a), might work to prevent that transfer. For

160. 17 U.S.C.A. § 1101(a) (Westlaw through Pub L. No. 115-140).

161. *See id.* § 1101(b); 18 U.S.C.A. § 2320(f)(5) (Westlaw through Pub. L. No. 115-140). The Protecting American Goods and Services Act of 2005 amended the definition of "traffic" in § 1101(b) of title 17 to incorporate by reference the definition of traffic in subsection 2320(e)(2) of title 18. Pub. L. No. 109-181, 120 Stat. 285, 288. But the definition is no longer contained in subsection 2320(e)(2) of title 18 because the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1499, moved it to subsection 2320(f)(5) of title 18 which states: "the term 'traffic' means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of." The definition in § 2320(f)(5) is the same as it was in § 2320(e)(2).

U.S. COPYRIGHT OFFICE, CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE 248 n.2 (Dec. 2016).

162. 17 U.S.C.A. § 1101(c).

163. *See* 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.6.1 at 17:55 (3d ed. 2005 & Supp. 2008) ("Since chapter 11 imposes no limitation on the term of protection, it appears that Congress intended to protect unfixed musical performances in perpetuity.").

example, an aggressive copyright owner might threaten to sue to prevent the transfer. The NFL's rhetoric over the Super Bowl I tapes suggests this possibility.<sup>164</sup> And the copyright owner might threaten to sue both the copy owner (e.g., for direct infringement of the distribution right) and the archive (e.g., for contributory infringement of the distribution right).<sup>165</sup> Neither the copy owner nor the archive might be able or willing to expend the resources needed to fight the issue in court—for example, to obtain a definitive ruling that making the copy, or transferring it to the archive, constitutes fair use—even if they might ultimately prevail. Cautious counsel for the archive might recommend not buying the copy (or accepting the donation) at all if the transaction might lead to liability. The Society of American Archivists, the Copyright Office, and even members of Congress have all expressed concern in other contexts that uncertainty about the scope of fair use can lead archivists and librarians not to undertake important preservation activities.<sup>166</sup> That uncertainty may threaten the preservation of private copies as well.

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164. The NFL, for example, in addition to the overbroad copyright claims in its telecast announcement discussed above, *supra* note 142, also used copyright law to remove from YouTube a user-posted video of that announcement. *See* Nathenson, *supra* note 142, at 154–55; Tehrani, *supra* note 142, at 1008–09.

165. An archive's purchase of a private copy, or receipt of a donated private copy, would not itself infringe on the copyright owner's distribution right. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.5.1, at 7:125 (3d ed. 2005 & Supp. 2017-1) ("The crux of the distribution right lies in the transfer, not the receipt, of a copy or phonorecord. Consequently, someone who simply buys or otherwise acquires a copy or phonorecord does not infringe the distribution right."). Any claim against the archive in this scenario would, therefore, likely be a claim of contributory infringement. The classic statement of the doctrine of contributory infringement is that "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). An archive's receipt of a private copy (not lawfully made) of a copyrighted work might be deemed to "materially contribute" to the infringing act of distributing that copy of the work, though that approach would essentially open every purchaser or donee of a private copy to liability as a contributory infringer whenever the transfer infringes on the distribution right, which seems beyond the intended scope of that right.

166. The Society of American Archivists noted that specific statutory exemptions for preservation activities "can encourage hesitant archivists who, because they are uncomfortable with their understanding of fair use or are unable to risk the cost of defending their understanding, needlessly limit public access to archival materials." *Issue Brief: Archivists and Section 108 of the Copyright Act*, SOCIETY OF AMERICAN ARCHIVISTS (May 2014), *quoted in* U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS at 15 (Sept. 2017). The Copyright Office has stated that "the ever-increasing reliance on fair use does not provide certainty to those who do not have the legal or monetary resources to analyze each potential fair use, or to litigate such issues if faced with infringement claims." U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT at 15. Rep. Bob Goodlatte stated in a House Judiciary Committee hearing that "fair use is not always easy to determine, even to those with large legal budgets. Those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today." *Preservation and Reuse*

## VII. HELPING PRIVATE COPIES REACH AN ARCHIVE

### A. *A Proposed Statutory Amendment*

Existing law thus leaves significant uncertainty about whether a copy owner may lawfully transfer a private copy of a work to an archival institution. Because that uncertainty might prevent the preservation of the only remaining copy of a copyrighted work, Congress should amend the copyright statute to make clear that such a transfer is lawful.

Allowing such transfers by statute would be simple and straightforward. Congress could add a new subsection to § 108<sup>167</sup> of the Copyright Act providing that no infringement of a copyright owner's distribution right under § 106(3) occurs when the owner of a copy of a copyrighted work transfers that copy to a library or archive, regardless of whether the copy was lawfully made under title 17.<sup>168</sup> Given the potential reach of § 1101's "trafficking" ban as discussed above, the proposed amendment should also expressly provide that the transfer of a private copy to a library or archive does not infringe any performer's right under § 1101.

This proposed amendment would eliminate the many potential uncertainties, outlined in the preceding section, that could otherwise surround a proposed transfer of a private copy of a copyrighted work to an archive. Neither the copy owner nor the archive would need to engage in the potentially complex analysis of whether making the private copy constituted fair use, whether § 109(a) applies to fair use copies, or whether the transfer to the archive would itself constitute fair use. The provision would make the transfer lawful regardless of the ultimate answer to any of those questions. In situations of stalemate between a copyright owner

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*of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Apr. 2, 2014), *quoted in* U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT at 11.

167. Although § 108 is entitled "Limitations on exclusive rights: Reproduction by libraries and archives," the current provisions cover reproduction and distribution (and, in § 108(h), also display and performance), so adding a provision related to distribution would be consistent with the current coverage of the section. 17 U.S.C.A. § 108. The proposed provision might instead comfortably be added to § 109, the provisions of which are limitations on exclusive rights related to the "[e]ffect of transfer of a particular copy or phonorecord." *Id.* § 109. However, because the proposed provision focuses on transfers to archives, including it in § 108 would make clear that the conditions listed in § 108(a) apply and that the limitation only applies to transfers to a library or archive.

168. By specifying that the copy need not be lawfully made "under this title," the provision would allow the transfer even if making the private copy infringed the copyright owner's reproduction right, *id.* § 106(1), or violated the performers' right of fixation for a live musical performance, *id.* § 1101, or involved a violation of the provisions regarding circumvention of technological protection measures or copyright management information, *id.* §§ 1201–1202.



and a copy owner, the provision should eliminate the possibility that the copyright owner could effectively forestall a proposed transfer of the copy to an archive by threatening to sue for copyright infringement. In the face of any such threat, the proposed amendment to § 108 would provide both the transferring copy owner and the receiving archive a clear statutory declaration that copyright law would allow the proposed transfer.

The proposed provision would therefore likely facilitate the transfer of private copies of copyrighted works from the owners of those copies to archives. Because an archive will almost always be in a better position than the copy owner to preserve the private copy, the provision will increase the chances that a copyrighted work that exists only in one private copy (or even in a few private copies) will survive. That will mean that the work can be exploited and enjoyed, either when the copyright owner consents to such use or at least when its copyright expires.

#### *B. Protecting Copyright Owners Against Misuse of the Limitation*

By its terms, of course, the proposed provision would apply to any transfer of a private copy to an archive, whether or not the private copy is the only remaining copy of the work. That might raise the concern that such a limitation on the distribution right would allow libraries and archives to enrich their collections and serve their patrons without buying lawfully made copies. Might a library refrain from buying authorized copies of a work and instead simply wait for a donor to make an unauthorized copy and donate that copy to the library under the proposed provision? If this happened on any scale, it could potentially undermine a substantial source of revenue for copyright owners.

This concern could be addressed by narrowing the provision so that it would only permit the transfer of an unlawfully made copy when that copy is the only known copy of the work (or perhaps one of only a handful of known copies). That approach, however, would likely be impractical. How will we determine in any particular instance how many copies of a work survive, particularly if other copies might be in private hands? How easy will it be to know whether the copyright owner has retained a copy? Allowing transfers only when very few copies of the work exist would introduce a new uncertainty about the legality of transferring a private copy to an archive, as the archive and the copy owner would need to determine how many copies of the work exist in order to know whether the limitation would apply to their proposed transfer. With *The Glass Menagerie* and Super Bowl I, it was fairly clear that no other copies existed, in part because people had been searching for such copies for a

long time and had been unable to find them. For less high-profile works, though, it will probably not be clear how many copies exist. But there is no reason to ease the transfer of private copies to an archive in order to foster preservation only for high-profile works known to exist in a single copy. Other works that might currently seem to be less important or valuable are also worth preserving and may well exist only in one (or a few) private copies.<sup>169</sup> A statutory mechanism to encourage private copies to find their way to archives should be broad enough to apply even when it is hard to tell whether those copies are the only ones in existence. Requiring parties to determine how many copies of a work exist would undermine the proposed provision's goal of making transfers to an archive clearly legal in order to reduce the barriers to such transfers occurring.

In addition, the proposed limitation is already sufficiently narrow to protect copyright owners against libraries and archives generally exploiting copyrighted works using unlawfully made copies, so limiting the provision to the only known copy of a work is unnecessary. The proposed provision would allow only one type of activity involving a private copy that was not lawfully made: transferring ownership of that copy to a library or archive. After the transfer, the library or archive would own a copy that would still not be lawfully made. The copy's status as unlawfully made would not interfere with the library or archive's ability to preserve the copy: § 108's provisions allowing limited reproduction and distribution for preservation purposes do not require that the library or archive use a lawfully made copy.<sup>170</sup> But the library would *not* be able, for example, to loan its copy to patrons. Such lending would constitute distributing a copy of the work to the public within the scope of the copyright owner's exclusive rights. And that loan would *not* be permitted under § 109(a)'s first sale doctrine because the transferred copy was not a lawfully made copy as § 109(a) requires.<sup>171</sup>

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169. See Reese, *What Copyright Owes the Future*, *supra* note 3, at 290–91 (“We should not count on our ability to predict which of today’s works will appeal to future audiences. . . . After all, tastes may change, and some creators may be ahead of their time.”).

170. None of the general conditions specified in § 108(a), the conditions for making preservation copies of unpublished works in § 108(b), or the conditions for making replacement copies of published works in § 108(c) require that the copy or phonorecord being copied must be lawfully made.

171. Any distribution of copies made by the library for preservation purposes under the provisions of § 108 would be limited by the conditions imposed in those provisions. 17 U.S.C.A. § 108(b)–(c).

### C. *Benefits Beyond Private Copies*

Narrowing the proposed limitation on the distribution right to apply to the “only known copy” of a work is thus unnecessary to protect copyright owners. And expressly allowing the transfer to an archive of an unlawfully made copy could aid in preserving works other than those embodied in a unique private copy, because it would allow other types of unlawfully made copies to enter archival collections. Consider, for example, the book *The Cat NOT in the Hat!* This book, in verse and pictures, imitates the style of the Dr. Seuss book *The Cat in the Hat* but satirizes the O.J. Simpson murder trial.<sup>172</sup> When the owner of the copyright in the Dr. Seuss original sued the authors and publisher of *The Cat NOT in the Hat!*, the Ninth Circuit decided that the defendants’ book did not likely constitute fair use of the original and could be enjoined.<sup>173</sup> That decision, of course, meant that the publisher of *The Cat NOT in the Hat!* could no longer sell copies of the book. But the decision also meant that all copies of the book that had already been sold were copies, not lawfully made, of the copyrighted Dr. Seuss original.<sup>174</sup> As a result, those existing copies of *The Cat NOT in the Hat!* would not meet the express statutory conditions of § 109(a), and distributing any of those copies to the public would not be permitted under that section. Someone who had purchased a copy of *The Cat NOT in the Hat!* when it was originally published and who wanted to donate that copy to a library or archive so that future audiences might read it would face many of the same questions about the proposed transfer that would face the owner of a private copy of a copyrighted work seeking to transfer the copy to an archive.

The proposed amendment allowing transfer of a copy that was not lawfully made to a qualifying library or archive would permit someone who owned a copy of *The Cat NOT in the Hat!* to sell or donate her copy to an archive. As with private copies, copies of infringing works are essential to preserving those works. If libraries or archives did not acquire copies of *The Cat NOT in the Hat!* when the book was available, and if people who own copies of the book cannot easily sell or donate their copies to a library or archive, then few if any library collections will have

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172. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

173. *Id.* at 1403.

174. The district court’s decision issuing a preliminary injunction against the defendants indicated that 6,000 copies had been sold before the injunction was entered. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1575 (S.D. Cal. 1996).

copies of the book. The chances of the book surviving into the future will therefore be diminished.<sup>175</sup>

Of course, the infringing nature of the book may mean that it cannot be commercially exploited during the life of the copyright on the Dr. Seuss original, and the book may not have any commercial value by the time that copyright expires.<sup>176</sup> But the book may well be of interest in the future to historians, cultural critics, and even copyright scholars. While copyright law prevents exploiting the infringing work in the ways reserved to the copyright owner during the copyright term, copyright law should not prevent copies of the infringing work from surviving in libraries and archives for the use of researchers and, potentially, future audiences. It therefore makes sense for the proposed limitation to allow transfers to libraries and archives of copies that were not lawfully made even if such a copy is not the only known copy of a work.

#### *D. Interaction with Other Proposed Copyright Amendments*

A final reason to amend § 108 to expressly permit transferring a copy to a library or archive regardless of whether the copy was lawfully made is that, while the uncertain legality of such transfers under current law may deter them, two other recent proposals to amend the Copyright Act would make such transfers even less likely. Amending § 108 as proposed in this Article would alleviate the negative consequences for preserving private copies that would otherwise result if either of these proposals actually became law.

First, the amendment proposed here would protect archives against potential changes to the first sale doctrine. As discussed above, the Copyright Office suggested in a 2001 report that the current language of § 109(a) should be read to allow the transfer of a lawfully made copy only if that copy had previously been distributed by the copyright owner.<sup>177</sup>

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175. Of course, the author and/or publisher of a work later adjudicated to be infringing may well retain a copy of that work. Because that infringing work cannot be commercially exploited, though, the author or publisher may have less incentive to retain a copy and to expend any resources necessary to preserve the copy. Such preservation resources might be minimal in the case of a printed book like *The Cat NOT in the Hat!* But where the infringing work is an audio or an audiovisual recording, or exists in a digital format, preserving the copy might demand resources to migrate the work to newer media and/or formats, perhaps repeatedly.

176. Future interest in this particular work may be limited by the timeliness of its topic. But many other works that are deemed infringing on a previously copyrighted work might well have some popular interest and commercial value at the time that the copyright on which they infringed has expired, at which point the infringing work could be used without violating any rights in the work originally infringed.

177. See text accompanying notes 157–58, *supra*.

The Copyright Office, however, went further in that 2001 report. Noting that its suggested interpretation of § 109 might not be adopted, the Office proposed that Congress should amend “section 109(a) to state that only copies that have been lawfully made *and lawfully distributed* are subject to the first sale doctrine.”<sup>178</sup> If Congress were ever to take up that proposal and amend § 109, the § 108 amendment proposed here would nonetheless allow transfers of private copies to archives, even if such a transfer would not be allowed under a § 109 that had been amended as the Copyright Office proposed.

Second, current efforts to revise § 108 itself might also make the limitation proposed in this Article even more important. A recent Copyright Office report recommended that Congress revise § 108 and the report included “model statutory language” as the basis for such revision. Under that model language, for a library or archive to be eligible to engage in *any* activity permitted under § 108, the amended statute would require that “the collections of the library, archives, or museum [engaging in those activities] are composed of lawfully acquired and/or licensed materials.”<sup>179</sup> The report explains that the provision “is aimed at ensuring that unlawfully acquired or infringing materials are not further duplicated and circulated under the guise of a copyright law exception.”<sup>180</sup>

Should the Copyright Office’s model language become law, however, libraries and archives would probably be much less likely to acquire private copies for preservation. As discussed above, current law leaves a great deal of uncertainty as to whether a private copy has been lawfully made and whether transferring that copy to an archive constitutes infringement. An archive that purchases a private copy, or accepts the donation of such a copy, therefore incurs some risk that the acquisition was not lawful. The Copyright Office’s model language would impose a severe consequence on the archive if it turns out that the transfer of the

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178. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT, *supra* note 157, at 158. The Copyright Office noted that its proposal

would not preclude the distribution of copies made pursuant to § 107 in all cases, since . . . the distribution right is subject to the fair use doctrine. It would, however, require that a separate fair use analysis be applied to the distribution of that particular copy. The fair use copy could be transferred only in those cases where the distribution itself qualified as a fair use.

*Id.* at 159. As discussed above, however, the uncertainty about whether making a private copy or transferring that copy to an archive constitutes fair use, questions that can ultimately be decided only by judicial determination, can itself be an impediment to the transfer that can hinder or prevent preservation of the private copy.

179. U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT, *supra* note 166, at 51 (§ 108(a)(4) of model statutory language).

180. *Id.* at 20.

private copy infringed the distribution right in the work embodied in the copy. In that event, because the private copy was not lawfully transferred, the archive's collections would apparently no longer be "composed of lawfully acquired" materials. As a result, it seems that the archive would not be entitled under the revised § 108 to engage in *any* of that section's permitted activities with respect to *any* of the materials in its collection.

The severity of the consequence to an archive if its acquisition of a private copy proved unlawful would probably deter the archive from acquiring private copies and expending the resources needed to preserve them. That in turn would likely reduce the chances that what is in many instances the only remaining copy of a work will survive. If the Copyright Office's model language were to become law, it would become even more important to clarify expressly in the Copyright Act that transferring a copy to a library or archive is lawful, regardless of whether the copy was lawfully made. The limitation proposed in this Article would leave no doubt that a private copy transferred to an archive was "lawfully acquired" so that its presence in the archive's collection would thus not deprive the archive of eligibility for § 108's exemptions under the Copyright Office's model language.

#### VIII. PRIVATE COPIES AND PRESERVATION OF WORKS DISSEMINATED ONLINE

Another reason to add an express limitation on the distribution right for transfers to libraries and archives is that private copies may play an increasingly important role in preserving copyrighted works that are disseminated by online transmission. The prime examples discussed above of private copies preserving works that might otherwise be lost involve works that were originally broadcast on radio and television. But similar preservation issues are likely to arise with respect to works disseminated online. Consider, for example, podcasts, which have exploded in popularity in recent years. Will the creators and copyright owners of those podcasts maintain copies of all of them? One specialist has observed that "keeping [a podcast] hosted and available usually carries a price tag, and free hosting services can go out of business anytime."<sup>181</sup> Given those costs, a current or successful podcast will "[c]ertainly . . . continue to keep its archive available," but "[w]hat about podcasts that went out of production, maybe several years ago? What

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181. Paul Riismandel, *Preserving Podcast History*, RADIO SURVIVOR (Mar. 29, 2016), <http://www.radiosurvivor.com/2016/03/29/preserving-podcast-history/> [<https://perma.cc/TBP3-ZS6S>].

incentive do those producers have to keep their old episodes online?”<sup>182</sup> And as formats and storage media evolve, will the producers who do keep copies of their episodes migrate those copies so as to maintain their accessibility?

Another commentator has noted that podcasters might understandably not maintain copies of their episodes.

[J]ust getting the audio up and running, day after day, week after week, is accomplishment enough. There are countless hosts, producers and engineers without the foresight, budgets or means to label, store and archive their audio. Also, because of the mundane nature of a lot of podcasts, many podcasters probably do not realize the audio they are making is shaping the early stages of this emerging format, and doing so in a way that media historians, scholars and hobbyists might later want to analyze, research, teach and reference.<sup>183</sup>

As happened with early radio and television broadcasting, much of the content of the early years of podcasting might not be regularly saved by those who create and disseminate it.

In at least one instance, a podcast creator’s failure to archive that podcast has already given private copies the opportunity to prove their preservation value. From 2004 to 2013, Adam Curry, “one of podcasting’s first breakout stars,” hosted and produced a podcast called *Daily Source Code*, which ran for more than 860 episodes and which was “one of the first widely popular podcasts.”<sup>184</sup> “In January 2014, [he] sent a quick tweet out to his 40,000-plus followers with a modest request: ‘Looking for a full archive of “Daily Source Code” mp3s.’”<sup>185</sup> Although Curry had produced the podcast, he did not have copies of the episodes.<sup>186</sup> Eventually, it turned out that a fan of the podcast had kept a copy of the

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182. *Id.*

183. Jeremy Wade Morris, *Saving New Sounds: Podcasts and Preservation*, FLOW (Oct. 30, 2017), <https://www.flowjournal.org/2017/10/saving-new-sounds-podcasts/> [<https://perma.cc/RWQ8-BBMA>]. See also Reese, *What Copyright Owes the Future*, *supra* note 3, at 294 (“When a new medium is in its infancy, no one knows whether it is anything more than a flash in the pan. So most people working in the industry may not see any point in worrying about preserving their creations for the future, when they don’t know whether they will be out of a job before long.”).

184. Jeremy Wade Morris, *Saving New Sounds: an Argument for Preserving Podcasts*, RADIO WORLD (Sept. 14, 2017), <http://www.radioworld.com/news-and-business/0002/saving-new-sounds-an-argument-for-preserving-podcasts/340426> [<https://perma.cc/26B4-364K>].

185. *Id.*

186. “For a number of [stupid and careless] reasons, I am not in possession of most of these.” Adam Curry, *The Daily Source Code Archive Project: Bringing the DSC Back*, <http://blog.curry.com/2014/01/15/theDailySourceCodeArchiveProject.html> [<https://perma.cc/MR62-YR2X>].

entire run of the podcast, so “one of podcasting’s first big shows wasn’t lost to time.”<sup>187</sup>

Because podcast episodes are generally downloadable, more private copies of podcasts may exist than for other types of works, such as television or radio broadcasts, that have not been distributed in copies (though it is unclear how many listeners will save copies of the podcasts they download and for how long).<sup>188</sup> But many other works that are made available online are not generally made available for download and therefore members of the public who encounter those works are not likely to routinely save them to their computers or other devices.

Websites offer a good example of this problem. Almost every user of the World Wide Web is familiar with the danger that information posted on a website that the user visits on one day might not be there the next.<sup>189</sup> Of course, any copyrightable work of authorship that is removed from a website, while no longer publicly available, might exist in a copy maintained offline by the work’s creator. As discussed above, however, copyright owners do not always maintain copies of their works. When they don’t, preserving such works will likely depend in part on private copies made by those who visited the website.

Such copies may sometimes be made directly by organizations devoted to preservation. For example, much web content is copied by the Internet Archive, which actively archives websites.<sup>190</sup> The End of Term Web Archive offers an example of a more focused web archiving project.<sup>191</sup> “With the arrival of any new president, vast troves of information on government websites are at risk of vanishing within days. The fragility of digital federal records, reports and research is astounding.”<sup>192</sup> Beginning in 2008, the End of Term Web Archive

187. Morris, *Saving New Sounds: an Argument for Preserving Podcasts*, *supra* note 184.

188. See Riisman, *supra* note 181:

[T]hink about your own podcast use. How many do you actually save? Speaking for myself, I’ve been known to save some episodes that I particularly enjoyed or would like to refer to later. Still, for the most part, I delete files after I listen to them in order to keep my smartphone or computer storage below capacity.

189. See Reese, *The First Sale Doctrine in the Era of Digital Networks*, *supra* note 5, at 631–32.

190. *About the Internet Archive*, INTERNET ARCHIVE, <https://archive.org/about/> [<https://perma.cc/RGD3-L4PL>]. See generally Jill Lepore, *The Cobweb: Can the Internet be archived?*, THE NEW YORKER (Jan. 26, 2015), <https://www.newyorker.com/magazine/2015/01/26/cobweb> [<https://perma.cc/ZTS8-NT3M>].

191. *US Federal Web Domain at Presidential Transitions*, END OF TERM WEB ARCHIVE, <http://eotarchive.cdlib.org/> [<https://perma.cc/FU5E-U4JK>].

192. Jim Dwyer, *They’re Harvesting Government History, One Web Page at a Time*, N.Y. TIMES, Dec. 2, 2016, at A22.



project—“a volunteer, collaborative effort by a small group of university, government, and nonprofit libraries”—has aimed to copy information on U.S. federal government websites near the end of a presidential administration and then to make that archived information publicly available.<sup>193</sup> In 2016, the project expanded to encompass material posted by federal entities on social media.<sup>194</sup> Another focused example comes from the Freedom of the Press Foundation, which recently began an online archive collection focusing on “content it deems at risk of being deleted or manipulated,” particularly content endangered by “what it calls the ‘billionaire problem,’ or the ability of news figures to buy publications with the intent of taking them offline.”<sup>195</sup> The project began by archiving Gawker, a website with hundreds of thousands of articles spanning 14 years before the site went bankrupt in 2016.<sup>196</sup> A bankruptcy sale of the gawker.com domain and its content attracted some potential buyers who “appear either uninterested or actively hostile to the preservation of its existing stories,” reportedly including “Peter Thiel, the very tech billionaire who bankrolled a lawsuit against the company brought by retired celebrity wrestler Hulk Hogan” that ultimately led to the site’s bankruptcy.<sup>197</sup>

In many other cases, though, material available on the Web or on social media may end up being copied only by private individuals with an interest in that material. Idiosyncratic interests have often led to substantial private copying. For example, Don Gillers amassed a collection of recordings of all but 2 of the 6,023 late-night TV shows hosted by David Letterman on NBC and CBS simply because “he just really liked the show.”<sup>198</sup> Similarly, John Miley began recording audio broadcasts of sporting events as a childhood hobby when his father bought him a wire recorder, and eventually created “perhaps the world’s largest

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193. *Id.*

194. Ruth Steinhardt, *Preserving a Presidential Administration’s Social Media Activity*, GWTODAY (Jan. 9, 2017), <https://gwtoday.gwu.edu/preserving-presidential-administration%E2%80%99s-social-media-activity> [https://perma.cc/W9F8-9VRE].

195. Daniel Victor, *Saving Gawker and Alt-Weeklies From Deletion*, N.Y. TIMES, Feb. 1, 2018, <https://www.nytimes.com/2018/02/01/business/media/gawker-archives-press-freedom.html> [https://perma.cc/2PTF-FY7N].

196. Parker Higgins, *Archiving the alternative press threatened by wealth buyers*, FREEDOM OF THE PRESS FOUND. (Jan. 31, 2018), <https://freedom.press/news/archiving-alternative-press-threatened-wealthy-buyers/> [https://perma.cc/QZH5-AUJA]; Louise Matsakis, *The Gawker Archives Aren’t Going Anywhere*, WIRED (Jan. 31, 2018), <https://www.wired.com/story/gawker-archives-freedom-of-press-foundation-toast-la-weekly/> [https://perma.cc/S4HZ-5PHH].

197. Matsakis, *supra* note 196.

198. Jason Zinoman, *David Letterman’s Unlikely Archivist*, N.Y. TIMES, Apr. 7, 2017, at D5.

sports audio library, about 100,000 highlights or complete sporting events taped from radio.”<sup>199</sup>

New tools may make such private copying of online material easier than ever before. The digital art organization Rhizome recently released an archiving tool called Webrecorder that aims to enable individuals to record and archive online activity relatively easily. Rhizome’s Artistic Director Michael Connor explained:

The things we create and discover and share online—from embedded videos to social media profiles—are often lost, or become unrecognizable with the passage of time. Webrecorder, with its ability to capture and play back dynamic web content, and its emphasis on putting tools into users’ hands, is a major step towards addressing this, and improving digital social memory for all.<sup>200</sup>

As explained on the website for the tool:

Webrecorder takes a new approach to web archiving by ‘recording’ network traffic and processes within the browser while the user interacts with a web page. . . . [T]his allows even intricate websites, such as those with embedded media, complex Javascript, user-specific content and interactions, and other dynamic elements, to be captured and faithfully re-staged.<sup>201</sup>

Preserving online art apparently motivated the creation of Webrecorder,<sup>202</sup> but the tool is freely available online<sup>203</sup> and can be used to record any browser activity. For example, the Football Museum in Liverpool, England used Webrecorder “to help archive fan-created videos of soccer matches on Vine,” before that service’s demise.<sup>204</sup> Rhizome has released a desktop player for recordings made with Webrecorder,

199. Vincent M. Mallozzi, *Let’s Go to the Audiotape*, N.Y. TIMES, Dec. 3, 2006, at SP10. See also Mark Hartsell, *John Miley’s Passion For Sports: Library Acquires Historic Radio and TV Recordings*, LIBRARY OF CONGRESS INFORMATION BULLETIN (May 2011), <https://www.loc.gov/loc/lcib/1105/sports.html> [<https://perma.cc/A3JM-UJMV>].

200. Ryan Steadman, *Now What You Put on the Internet Really Could Last Forever*, OBSERVER (Jan. 5, 2016), <http://observer.com/2016/01/web-art-institution-receives-largest-grant-in-20-year-history/> [<https://perma.cc/ZVT8-6VQV>].

201. *What’s the Magic (or How does it all work?)*, WEBRECORDER, <https://webrecorder.io/> [<https://perma.cc/E3S8-VTWA>]. See also Dragan Espenschied, *Introduction to Webrecorder*, YOUTUBE (Aug. 5, 2016), <https://www.youtube.com/watch?v=n3SqusABXEk> [<https://perma.cc/A2QP-8VNW>] (“Welcome to Webrecorder, a new tool that enables you to create high-fidelity, context rich, and interactive archives of the dynamic Web.”).

202. Frank Rose, *The Mission to Save Vanishing Pixels*, N.Y. TIMES, Oct. 23, 2016, at AR18.

203. WEBRECORDER, <https://webrecorder.io/> [<https://perma.cc/E3S8-VTWA>].

204. Maximiliano Duron, *Rhizome gets \$1M. from Mellon Foundation for Webrecorder, Its Web Preservation Tool*, ARTNEWS (Jan. 11, 2018), <http://www.artnews.com/2018/01/11/rhizome-gets-1-m-mellon-foundation-webrecorder-web-preservation-tool/> [<https://perma.cc/GV4E-SPQ8>].

explaining that it “now wants to empower regular users to take ownership of the web archiving process” by “allow[ing] anybody to archive web resources they care about with ease.”<sup>205</sup> If even a very small percentage of the population uses a tool such as Webrecorder, it could result in the proliferation of private copies of online material at least on the scale of the home audio and video recording activity that produced the private copies that preserved works such as the Metropolitan Opera and New York Philharmonic broadcasts, the performances by The Beatles on the BBC, the TV-movie version of *The Glass Menagerie*, and the telecast of Super Bowl I.

Private copying of works that are disseminated online—such as podcasts, websites, and social media feeds—will likely raise new versions of the copyright questions that were raised by earlier generations of private copying. For instance, in the case of podcasts that creators make available for download, an audience member’s download of a podcast episode will likely produce a lawfully made copy. But when the listener then backs up files of downloaded podcast episodes to an external hard drive, or to an optical storage medium such as a CD or DVD, or to an online backup service, will those copies be lawfully made,<sup>206</sup> and will the transfer of such backup copies to an archive be ruled non-infringing?

This Article’s proposed amendment to the Copyright Act should answer the most important of these questions for preservation purposes: regardless of whether a particular copy of a podcast or other work disseminated online has been lawfully made, the amendment would allow the transfer of that copy to an archive, which can preserve the work for future access. And that would be the right answer to the question, because as works are increasingly disseminated by transmission over computer networks rather than by distributing tangible copies, private copies may become even more important for preserving those works.

## XI. CONCLUSION

As we have seen, private copying has sometimes played an important role in preserving some of the copyrighted works that make up our history and cultural heritage. In some instances, works exist, or can be restored, only because someone other than the copyright owner privately made, and kept, a copy of the work. Copyright owners and those who own the only

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205. Rhizome, *Own your web archives with the Webrecorder Player desktop app*, RHIZOME (Mar. 31, 2017), <http://rhizome.org/editorial/2017/mar/31/own-your-archives-webrecorder-player/> [<https://perma.cc/K7AS-VHV7>].

206. See Litman, *Lawful Personal Use*, *supra* note 1, at 1897, 1899–1900.

remaining copy of a work will often cooperate in order to preserve the work and make it available again. But the possibility exists for a stalemate between the owners, which may threaten the continued existence of the only copy of the work. In such instances, copyright law should at the very least clear the way for the copy to reach an archive that will preserve that copy and the work it embodies. Doing so means that if the owners eventually resolve their stalemate, or at the very latest when the copyright expires, audiences will once again have the opportunity to experience the work—to watch Shirley Booth and Hal Holbrook in *The Glass Menagerie*, to listen to Ella Fitzgerald and Billy Holiday as they sang live in the 1930s, and to watch Super Bowl I as CBS originally broadcast it.