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Copyright in Exile: Restoring the Original Parameters of Exclusive Reproduction

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COPYRIGHT IN EXILE: RESTORING THE ORIGINAL PARAMETERS OF EXCLUSIVE REPRODUCTION

*Kenneth M. Alfano**

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I. INTRODUCTION

Innovation continually influences the trajectory of the law. While common law adapts gradually, statutes catch up only at discrete intervals. Lags between updates can confuse and frustrate those trying to apply dated regimes in new contexts. Epitomizing this gap-tension is copyright—once prominently termed the “metaphysics of the law.”¹ Congress created its exclusive rights before anyone contemplated today’s technology. Three decades after the latest major revision, activities like using household electronics, servicing computer systems, and scanning library archives²

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1. *See Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841). Justice Story describes the challenges of intellectual property law—even in 1841: “Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.” *Id.*

2. This refers to a pending suit against the Internet search engine Google™ by authors and publishers objecting to the unauthorized scanning and permanent storage of entire print works for digital indexing. *See Hiawatha Bray, Publishers Battle Google Book Index*, BOSTON GLOBE, Oct.

can raise vexing issues about the reach of authors' rights. Exclusive reproduction, or the sole liberty to copy, is the foundational interest. We even name this area of intellectual property for it. The methodology by which courts identify reproduction is therefore critical in determining which public liberties Congress has restricted in order to grant authors a calculated margin of dominion over their works.

Copyright law enumerates specific exclusive rights which authors enjoy in original works of authorship.³ Like patents for inventors, copyrights are monopolies that owners enjoy for a limited time.⁴ Unlike patent law, however, copyright law targets only creative expression—not practical applications or underlying ideas and facts.⁵ Copyrights now endure for seventy years beyond the life of the author, without requiring formalities, rights initiate instantly and automatically upon fixing a minimally-creative work in any stable, tangible form.⁶ In addition to reproduction (my focus in this Article), an owner's bundle of exclusive rights also includes distribution, derivation, public display, and public performance.⁷ While the term "copying" is often used as shorthand to refer to any infringement of these five exclusive rights, reproduction is actually but one of five potential grounds upon which plaintiffs can seek recourse.⁸

What does it mean to copy? Modern case law too often bypasses this question, summarily deeming copies to exist wherever creative content is reused in any way, for any purpose—imparting a broad content-activity right devoid of statutory support.⁹ The scope of the reproduction right warrants careful scrutiny, and depends upon the construction of the language Congress has employed over the years to ordain, perpetuate, and

20, 2005. Though early defenses rely on the elusive and unpredictable exception of "fair use" (arguably a tough sell here, due to the quantity and permanence of the uses as well as the magnitude of the project), my thesis would call into question whether scanning only for indexing even constitutes "reproduction" in the first place.

3. Aside from this brief paragraph, I do not provide much general background on copyright law. The U.S. Copyright Office publishes a basic primer: *Circular 1, U.S. Copyright Office, Rev: 07/2006*, <http://www.copyright.gov/circs/circ1.html>.

4. U.S. CONST. art. I, § 8, cl. 8.

5. 17 U.S.C. § 102(b) (2000). As I mention later, this is a longstanding principle of copyright theory.

6. *See supra* note 3.

7. 17 U.S.C. § 106 (1)-(5).

8. *Id.*

9. *See generally* *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908). Startlingly, many have now taken to characterizing rightsholders as "content" owners. This sleight of hand may cede the strongest grounds for defending against much alleged infringement. As I will argue, there exists no such notion under current law of "content" owners, but only owners of enumerated rights to do specific things with works which are defined as much by their manifestation and purpose as by their abstract content.

qualify it. Almost a century ago, the U.S. Supreme Court crystallized a highly constrained definition for “copying.”¹⁰ Early notions of the term (in copyright contexts) referred only to reconstructing an author’s physical creation so as to serve a like purpose. Although this understanding informed each subsequent codification—as Congress opted to work around the construed meaning rather than tinker with it—courts have proceeded to depart dramatically from this conception. No legislation has redefined it, and no legislative record indicates any intent to that effect, yet precedent increasingly holds that any activity involving protected expression somehow implicates this right. Contemporary case law neglects the traditional, narrow standard—whether through faulty analyses, efforts to divine better policy, or both. In this Article, I analyze the history and codifications of the exclusive reproduction right, urging a more limited and concrete definition predicated on the original understanding of “copy.”

Jurisprudential originalism,¹¹ a controversial doctrine in constitutional law, can also function in lower-profile statutory realms to discipline federal courts¹² to refrain from advancing policies not duly enacted by the legislative branch.¹³ The balancing of value judgments reflected in our intellectual property policy is strictly the purview of Congress, and *stare decisis* should not be sufficient to propagate any precedent demonstrably irreconcilable with legislative policy. Though one might surmise that the legislature could intervene to correct any judicial deviations, the converse is all the more compelling: Congress is free to revive illegitimate doctrines—by actually passing them. This default properly allocates the burden of achieving legislative change. Statutory originalism strives for that meaning a statute held as of its passage, unshaken by new events and changing circumstances. For Congress alone can amend what it has (validly) enacted, no matter how pressing the need or how archaic the

10. *White-Smith*, 209 U.S. at 1. The activity has been expressed over the years using various legal synonyms: the gerund “copying” in the 1870 statute, the infinitive “to . . . copy” in 1909, and the infinitive “to reproduce . . .” in 1976.

11. I am advocating a statutory application of originalist jurisprudence (explained in Part II). For a free-content encyclopedia overview: See *Wikipedia, Originalism*, <http://en.wikipedia.org/wiki/Originalism>. There are different flavors of this judicial philosophy, but most revolve around the general idea that legal language is capable of meaning which is knowable, preservable, and binding (rejecting linguistic deconstructionism).

12. Because federal courts are of limited and defined jurisdiction, the case against judicial lawmaking is arguably stronger there than at the state level, where there have always been courts of general jurisdiction.

13. See generally Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (explaining the qualitative distinction between the legislative and judicial roles). Urging interpretive restraint, Judge Easterbrook cautions courts against invoking a statute to venture beyond “cases anticipated by its framers and expressly resolved in the legislative process.” *Id.* at 544.

status quo. It is through this philosophical lens that I analyze the state of copyright's fundamental grant.

In 1710, the first codified British copyright law (often called the Statute of Anne¹⁴) prohibited the unauthorized "printing" and "reprinting" of literary works, and some notion of restricting reproduction has since remained integral to America's copyright system. As digital media becomes the dominant means of storing, experiencing, and disseminating copyrighted materials, Congress and the judiciary increasingly struggle with a system that mostly developed when these activities took place in the more conceptually intuitive analog world.¹⁵

The literary-property debates of eighteenth-century England culminated in 1774 with the House of Lords invalidating any rights in "mental labor" outside of those that Parliament provided by statute.¹⁶ Early U.S. case law settled the constitutional principle that federal copyright protection is wholly dependent upon congressional dispensation for its existence, scope, and (finite) duration.¹⁷ Such discretionary grants are often characterized as

14. 8 Anne c. 19 (1710).

15. Evaluating the nature of an analog activity (and comparing such activities) is arguably a more direct thought process, if not commonsense. The physics and engineering of computer technology, for example, require more specialized knowledge to comprehend than the more straightforward operational principles of, say, a printing press or film projector.

16. *Donaldson v. Beckett*, 98 Eng. Rep. 257 (1774). This case "overruled" a 1769 King's Bench ruling in favor of perpetual copyright for authors and assignees. *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769). Interestingly, had Lord Mansfield not recused himself in *Donaldson* (due to his prominent role in *Millar*), the House of Lords would have deadlocked 6-6—failing to invalidate perpetual copyright! There was strong support (10-2) for the notion that at least some natural law rights did exist, but were curtailed and supplanted (or at the very least their enforceability was restricted) by the Statute of Anne.

17. *Wheaton v. Peters*, 33 U.S. 591 (1834). This case is often considered the U.S. counterpart to *Donaldson*. "it would seem, that if the right of the complainants can be sustained, it must be sustained under the acts of congress." *Id.* at 662. The court relies in part on the premise that there is no federal common law at all, though a stark dissent reasons that this still need not preclude Pennsylvania (the state in question here) from inheriting the English common law—especially since that colony had been settled prior to the 1710 statute. Dissenting Justice Thompson cites James Madison in *Federalist* No. 43 and Justice Story's *Commentaries* in urging that state common-law copyright (not merely a right of first-printing) be entertained. I do not address issues of state-level copyright (common-law or statutory; temporal or perpetual). Concerning the meaning of copy, Justice Thompson echoes the majority's assurances from *Millar* that a recognition of common-law copyright in no way amounts to monopolizing content—owing partly to the narrowness of "copy!" He says,

[The dissent in *Millar*] seems to treat the question, as if the claim was to a mere idea, not embodied or exhibited in any tangible form or shape. No such pretension has ever been set up, that I am aware of, by any advocate of the right to literary property. And this view of it would hardly deserve a serious notice, had it not been taken by a distinguished judge. Lord Mansfield, in the case of *Miller v. Taylor*, in defining the nature of the right of copyright says, 'I use the word copy in the

public “bargains” between authors and the state to entice the creation of new works and ultimately further the “Progress of Science and Useful Arts.”¹⁸ The considerations which Congress should factor in striking such bargains constitute an interdisciplinary field of study unto itself, but the finiteness of the grants (in scope and in duration) leaves the public able to engage lawfully in any non-monopolized activities as a logical concomitant to those limits on the owner’s exclusive domain. The baseline starting point is that owners enjoy zero federal protection absent congressional action. So then, what actions does the reproduction right encompass? What are its parameters? To suggest that it restricts all use—on the rationale that anything less would thwart the constitutional allowance for “exclusive rights”—would be to suggest that the monopolies must always be of infinite scope, thereby invalidating every enumeration since 1790 when Congress in the first Copyright Act itemized rights to “print, reprint, publish, and vend.”

In this Article, I describe how a sound analysis of precedent—coupled with proper statutory construction—yields a meaning for reproduction that is indeed adaptable to many unforeseen practices, but far from boundless. I proceed chronologically through the history of the reproduction right: Part II first surveys the relevant tenets of originalism. Part II then traces the roots of the reproduction right back to a landmark 1908 case in which the Supreme Court synthesized a robust standard grounded in reason and history, and also shows how legislation enacted the following year incorporated this standard. Part III discusses the next (and current) revision, the Copyright Act of 1976, building on the foundation of Part II to contend that the essential criteria for copying and reproduction went unchanged. Developments since 1976 are tracked in Parts IV, V, and VI—respectively covering the 1980 amendments and their adjudication, key cases from the 1990s, and the Digital Millennium Copyright Act (DMCA) of 1998. The theme throughout is that, despite legislative

technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of something intellectual, communicated by letters;’ and this is the sense in which I understand the term copyright always to be used, when spoken of as property.

Id. at 673. This principle of concreteness does not appear contradicted by *Donaldson*, and in subsequent sections I argue that the U.S. Congress—knowingly or not—has since continued to perpetuate this very limited legal definition of copy.

18. See U.S. CONST. art. I, § 8, cl. 8. The Supreme Court has said, “The rights of a patentee or copyright holder are part of a ‘carefully crafted bargain’ . . .” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989)). This speaks only to federal protections, and not to the existence and policy of any state-level protections.

reorganizations, additions, and niche-provisions, Congress has never actually altered what it means to “copy”—so the Supreme Court’s accurate definition as of 1908 remains binding today.

In the process, I argue that intellectual property bargains implicate statutory originalist or separation-of-powers concerns as much as any congressional domain, and that repudiating baseless precedent is itself precedented for major copyright doctrine. Despite an accumulated line of cases systematically misconstruing the reach of copyright’s namesake grant, as well as indications of legislative and executive confusion on the matter, I submit that the propriety of purging erroneous precedent outweighs any advantage of persisting in such error.

II. ORIGINALISM AND THE INITIAL PARAMETERS OF EXCLUSIVE REPRODUCTION

Whatever one thinks of originalism in constitutional interpretation, its application to statutory law derives from the distinct roles allocated among the diverse branches of government. The U.S. Supreme Court has ruled that federal legislation becomes implemented only through the process of bicameralism and presentment.¹⁹ That holding defines “legislation” as changes to legal rights or duties.²⁰ Taking this at face value, any rule-making by the administration (promulgating regulations) or courts (interpreting code) is presumably for the sole purpose of implementing—not revisiting—public policy set by Congress.²¹ Hence, even if Congress passively approves of a given judicial decree or executive regulation deviating from legislated policy, it could be no less invalid; our system of government does not countenance policymakers’ escape from electoral accountability. Moreover, intellectual property’s status as a public “bargain” all the more implicates this democratic process, epitomizing the role of representative government.

How then should courts go about assigning meaning to dated statutes? Congress can, of course, be its own lexicographer, and sometimes gives definitions for its terms rather than leaving them to their common meanings. In either case, courts should seek the most objectively reasonable understanding that would have been contemporaneously induced by the statute’s enactment. Justice Scalia offers a standard in both

19. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).

20. *Id.* at 952-53.

21. Even those not philosophically opposed to judicial lawmaking for gap-filling and other minor purposes may not favor imposing, outside of the democratic process, broad new burdens on individual liberty. Also, some may find originalism more acceptable at the statutory level than at the constitutional level.

constitutional and statutory interpretation of striving for the “meaning that its words were understood to bear at the time they were promulgated.”²² This is the essence of originalism.²³

Note that general meanings for words might expand or contract after they have been codified. For example, the notion of “performing” a work once contemplated only human audiences jointly experiencing a work in real time upon the initiative of the “performer,” whereas now the concept may also subsume transmissions that are both inter-machine and recipient-driven.²⁴ The extent to which the public performance right is affected by this semantic development is another matter, but the illustration is analogous: adopting those elements of meaning acquired since codification would allow technological progress—in and of itself—to effect a substantive change in the law.²⁵ Ascertaining the interpretation most faithful to the original understanding of an enacted provision thus presents the legitimate

22. U.S. Supreme Court Justice Antonin Scalia, *A Theory of Constitutional Interpretation*, Speech at the Catholic University of America, Washington, D.C. (Oct. 18, 1996). This prioritization of the most natural and reasonable understanding over any evidence of “hidden” or otherwise inconsistent legislative intent—which at most supplements the code—is known as the textualist or original-meaning version of originalism. (There is some variance among originalists as to the value and feasibility of using legislative history at all, but general agreement that it ought never negate or preempt codified language insofar as it is objectively clear on its face.) I am not making the general case for originalism, but specifically for its application to intellectual property statutes; only a finite range of activity is plausibly captured by Congress’s use of “copy” and later “reproduce.” I do invoke legislative history to bolster and refine objective meaning, but not to contradict it.

23. I do not dwell on the general theories of originalism in this Article; I focus on applying it to copyright. If further introduction to the judicial philosophy is desired, the references I have cited should suffice for my purposes here. Legal literature abounds on both sides of this controversial jurisprudence.

24. Peer-to-peer file-sharing transmissions could possibly be deemed a form of “public performance.” Other services offering a lesser degree of consumer control (e.g., Pandora.com) are more likely to preserve the defining qualities of the initial conception—though aspects of the format could not have been anticipated. Congress also added in 1995 Section 106(6), a digital public performance right in sound-recording works. 17 U.S.C. § 106(6) (2006).

25. This would not pose a problem to the extent that certain kinds of changes may actually be consistent with the original conception. Embodying flexibility in law is both legitimate and useful, and there are indeed situations where some degree of unforeseeable change is itself contemplated from the outset. For example, I later mention that unforeseen new methods of copying would be accommodated insofar as they were fundamentally duplicative. (Regarding public performance, innovations like P2P may or may not possess the defining qualities originally understood to characterize the designated activity.) Hence, there is no problem with copyright owners enjoying any windfall benefits accruing from unanticipated value gained through their legitimate monopolies, provided the underlying activity reasonably falls within the qualitative scope of the enacted grant; people do not stop owning what they owned merely because technology heightens the demand, but technology itself ought not serve to redefine what is owned. This illustrates a (somewhat formalistic) difference between a change in the effect of a law and a change in the law itself.

possibility of excluding later-accepted meanings (or, including no-longer-accepted meanings). Of course, parties press for interpretations suiting their interests, and courts may be inclined to address valid policy concerns, but such factors ought not to override—or even supplement—findings on legislative policy.

Applying this framework to copyright, I now begin with the 1908 player-piano case of *White-Smith Music Publishing Co. v. Apollo Co.*²⁶ Though today's reproduction right comes two statutory overhauls after this Supreme Court decision, its unanimous holding settled a clear standard defining "copy"—a standard I submit Congress has retained, albeit promptly and abundantly supplemented with additional rights. The issue presented in that case was whether making piano rolls, which cause a player-piano to perform various musical works, implicated the exclusive right of "copying" such works.²⁷ The Court ultimately found that piano rolls fall outside the domain of what could plausibly be characterized as copies of the copyrighted sheet music.²⁸ Congress later amended the law to give copyright owners additional rights to fill the gap, but it did not revise a court's criteria for evaluating reproduction. This means that if the Court's reading of "copying" was correct at the time, and if Congress has preserved it since,²⁹ it should still control. This gives me two principal objectives: 1) identify this early standard, justifying it under 1908 law, and 2) establish that it has not been substantively altered—at least according to interpretive methods devoted to following the enacted meaning of legislation.

A player-piano is a machine that records piano performances by making perforations in paper rolls, and then it recreates the performances using those rolls.³⁰ Alternatively, the perforated sheet can be prepared manually. Composer Adam Geibel wrote two songs, "Little Cotton Dolly" and "Kentucky Babe," and sold the copyrights to White-Smith Music Publishing Company, which published the sheet music.³¹ Apollo Company, without permission from White-Smith, manufactured piano rolls of the two songs, prompting an infringement action. The extant statute granted musical composers the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending" their

26. 209 U.S. 1 (1908).

27. *Id.* at 8-10.

28. *Id.* at 17-18.

29. I go on to argue that the definition of "copying" was preserved in 1909 ("copy") and 1976 ("reproduce"). 17 U.S.C.A. § 1(a) (1909); 17 U.S.C. § 106(1) (1976).

30. *White-Smith*, 209 U.S. at 10.

31. *Id.* at 8-9.

works.³² The lone issue before the Court was whether the defendant's activity constituted "copying" for copyright purposes.³³

The *White-Smith* opinion favorably discusses some accumulated precedent on the matter. The Court in *Kennedy v. McTammany* had declined to classify perforated sheets as copies of sheet music, finding that the former were "not designed to be used for *such purposes* as sheet music, nor do they in any sense occupy the *same field* . . ."³⁴ *Stern v. Rosey* had distinguished between "reproduction . . . in sound" and legal copying.

We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the appellants, as the copy or publication of the same within the meaning of the act. The ordinary signification of the words "copying," "publishing," etc., cannot be stretched to include it.³⁵

The unanimous *White-Smith* decision, written by Justice Day, ultimately agrees with and adopts Justice Shepard's qualitative differentiation (from *Stern*) between musical compositions and the means of their auditory reproduction on the basis that piano rolls "neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope." The court limits the reach of the exclusive right to "printing or otherwise multiplying copies of those sheets of music," and

32. *Id.* at 9 (citing § 4952).

33.

We cannot perceive that the amendment of § 4966 . . . providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, can have the effect of enlarging the meaning of the previous sections of the act which were not changed by the amendment. The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions, so as to prohibit their public performance. There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers. This amendment was evidently passed for the specific purpose referred to, and is entitled to little consideration in construing the meaning of the terms of the act theretofore in force.

Id. at 16.

34. *Id.* at 12 (emphasis added) (citing *Kennedy v. McTammany*, 33 Fed. Rep. 584).

35. *White-Smith*, 209 U.S. at 12 (citing *Stern v. Rosey*, 17 App. D.C. 562). Even if phonorecords of sound recordings would have been eligible for protection in their own right (an issue not raised here, as plaintiff argued it was the sheet music being copied), that is different from whether a phonorecord can constitute a copy of a printed score.

not “sounds indicated by or on those sheets” or “any mechanism for the production of such sounds.”³⁶ In justifying his narrow construction, Justice Day observes, “Throughout the act it is apparent that Congress has dealt with the concrete, and not with an abstract, right of property in ideas or *mental conceptions*.”³⁷

In considering the meaning of copy, the *White-Smith* court starts with a general definition—not given by statute—of “a reproduction or duplication of a thing.”³⁸ This may not get one very far, but it does emphasize that refined sense of reproduction for which “duplication” is synonymous, versus any conceivable use (e.g., sound in the air).³⁹ Though the words may seem like alternatives, the conjunction “or” denotes equivalence.⁴⁰ So, merely re-expressing the content—in any form, for any purpose—was not automatically sufficient to qualify as copying where the activity could not be characterized as duplicative (or multiplicative) of the

36. *Id.* at 13 (emphasis added) (e.g., “conveying . . . meaning . . . to the eye”). It is not the lack of eye-visibility per se that was of concern, but the lack of like usability—which in this particular case happened to be eye-visibility. Justice Shepard (in *Stern*) had relied in part on the fact that most phonorecords convey no meaning “to the eye of even an expert musician.” *Stern v. Rosey*, 17 App. D.C. 562. This comports with the multiplicative quality found inherent in the concept.

37. *White-Smith*, 209 U.S. at 16 (emphasis added). The court reasons strongly against reading any abstract right in creative content into the concrete rights actually granted.

Musical compositions have been the subject of copyright protection since . . . 1831 . . . and laws have been passed including them since that time. When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. [The statute] provides that two copies of a book, map, chart or musical composition, etc., shall be delivered at the office of the Librarian of Congress. Notice of copyright must be inserted in the several copies of every edition published, if a book, or if a musical composition, etc., upon some visible portion thereof.

Id. at 15-16. Observe how this parallels Lord Mansfield’s description of “copy” back in *Millar*; Parts III-VI argue that Congress has yet to abandon this model.

38. *Id.* at 17. “What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing.” *Id.*

39. This matter was not engaged on minimal-fixation grounds, but on the grounds of what constitutes a copy. *Id.* at 17.

40. *Id.* at 17. Had the phrase been designed to espouse a definition of copy (n-or-v) spanning the conceivable realm of either term separately, that would be irreconcilable with the court’s subsequent colloquial use of “reproduce” in referring to specifically excluded activity (i.e., reproduction of sound by mechanical means). *Id.* The equating with “duplication” serves a limiting role, as that term holds relatively narrower meaning. *Id.*

original.⁴¹ Does this actually tighten the standard, or is it just a distinction without a difference? Justice Day first dispenses with the notion that (re)producing sound vibrations amounts to copying their written counterpart. “It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning.”⁴² One must distinguish his loose colloquial use here of “reproduce” from his higher legal hurdle for “copy,” although in their copyright capacities the terms have long been interchangeable.⁴³

Secondly, the opinion rejects the argument that the physical rolls themselves constitute copies of the sheets—chiefly on the grounds of how differently the two objects are experienced.⁴⁴ “[E]ven those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer.”⁴⁵ “These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.”⁴⁶ Interestingly, the opinion concedes in dicta that the reproduction right (even in 1908) can apply to methods not yet developed, provided the activity still met the appropriate criterion.⁴⁷ Hence, the unanimous court’s settled meaning for copying—while not means-specific like “printing”—captures only those acts tantamount to “duplicating” or “multiplying,” the predominant

41. For sheet music then, this would mean “a written or printed record of it in intelligible notation.” *Id.* at 17. This is not because that is the only way something could be a copy of anything, but only because that is the only way something could be a copy of sheet music (whose purpose was deemed to be readable by musicians).

42. *White-Smith*, 209 U.S. at 17. “In no sense can musical sounds which reach us through the sense of hearing be said to be copies [of sheet music] . . .” *Id.*

43. “What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing.” *Id.* I have explained how the “or” equates reproduction with duplication, and it is fairly straightforward that the “as” equates both of those with “copy.” I therefore treat “copy,” “reproduction,” and “duplication” as synonymous for both the processes and objects they denote. It is also interesting that Justice Day implicitly blends his analysis of “copying” with that of “copy (n).”

44. *Id.* at 18.

45. *Id.*

46. *Id.*

47. *White-Smith*, 209 U.S. at 14. “Any mode of copying [sheet music], whether by printing, writing, photography, or by some other method not yet invented, would no doubt be copying.” *Id.* (emphasis added). The prospect of unforeseen technology was not neglected; one cannot accuse this court of being arbitrarily rigid or tunnel-visioned about the law’s capacity to flexibly adapt where appropriate.

criterion that centered on a key theme: suitability for like purposes (i.e., substitutionary potential).⁴⁸

In addition, the Court also factors defendant intent. It considers the purposes toward which the defendant subjectively directed his activity, along with those that the end product objectively served.⁴⁹ So, a copy need not only be similarly usable (in this case, eye-readable) by the same users (here, skilled musicians), but also the result of a process consciously aimed towards that end. Though the infringement branch of copyright law has never imposed a separate mens rea element, one must view any infringement inquiry in terms of the specific exclusive rights implicated; infringement does not exist in isolation, but only with respect to certain proscribed actions.⁵⁰ Many action verbs are inherently qualified; take as an example the word “repair.” It generally connotes activity with purposeful direction.⁵¹ While Justice Day is not precise as to extent (possibly because it was not necessary here to look beyond actual suitability), his sense of copy and copying appears to embody some element of intent to duplicate.⁵²

Finally, the *White-Smith* opinion closes by recognizing that its deliberately unimaginative definition of copy may indeed deprive copyright owners of certain controls that perhaps they should enjoy, but

48. *Id.* at 17. I use “purpose-suitability,” “substitutability,” and “multiplicity” in describing the *White-Smith* standard.

49. *Id.* at 11-18. For example, this is indicated when the court states that the rolls are “not intended to be read as . . . sheet music.” *Id.* at 18 (emphasis added). One could respond that the opinion focuses on objective suitability more than subjective intent, but the court does not dismiss the latter entirely. Unfortunately, however, this aspect of the court’s reasoning is less explicit. But I would also note the favorably-cited phrasing from *Kennedy* referring to the purpose for which an object is “designed,” as the word “design” likewise bears a connotation of conscious volition. *Id.* at 12 (citing *Kennedy v. McTammany*, 33 Fed. Rep. 584).

50. The statute describes infringement as follows: “Anyone who violates any of the exclusive rights of the copyright owner as provided . . . is an infringer of the copyright or right of the author, as the case may be.” 17 U.S.C. § 501(a) (2000). Infringement is defined expressly in terms of enumerated exclusive rights. *See id.*

51. “To restore to a sound or healthy state.” *Merriam-Webster Online Dictionary, Repair*, <http://www.m-w.com/dictionary/repair>. Admittedly, this authority is of limited value as connotations are not intrinsic to an “official” definition—only suggested by common usage. Nevertheless, it would seem contrived to apply the word to some random, fortuitous restoration occurring by happenstance. Chasing the point one step further, the definition of “restore” is “to put or bring back into existence or use. *Merriam-Webster Online Dictionary, Restore*, <http://www.m-w.com/dictionary/restore>.

52. *See White-Smith*, 209 U.S. at 18. If still unchanged today—as I go on to argue—it would quell many issues regarding involuntary “reproduction” (e.g., ISP liability, subconscious copying). It may also ease some of the murkier factual inquiries into purpose “suitability,” and even free many uses which might otherwise be copying but for an intent—perhaps evidenced by good-faith efforts—not to substitute them so as to substantially replicate the purpose(s) served by the original work.

nonetheless concludes that only Congress can redraw the boundaries between exclusive and free uses.⁵³ This marks an interesting contrast to the later holding of *Kalem Co. v. Harper Bros.*,⁵⁴ in which the U.S. Supreme Court more loosely construes the separate “dramatization” right so as to include motion pictures.⁵⁵ Justice Holmes, the author of that opinion, offers a restrained concurrence in *White-Smith*, commenting that a more just and sensible law would protect all aspects of works constituting their “essence” or their “meaning and worth.”⁵⁶ But despite such sympathy for copyright owners, he joins the unanimous decision declining to judicially stretch “copying” into anything more than it was.⁵⁷ Frustrated with an outcome he feels compelled to support, he nonetheless concedes, “The

53. See *id.* at 18. “[S]uch considerations address themselves to the legislative and not to the judicial, branch of the government.” *Id.*

54. 222 U.S. 55 (1911).

55. *Id.* at 61.

By Rev. Stat., § 4952, as amended . . . , authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of [the work] this copyright was infringed. We are of opinion that [the work] was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word.

Id. Once again, the Supreme Court is quite open to considering novel activity, but only within the parameters of the original concept; the Court views Congress’s provision here as being more elastic than the reproduction right. Also, courts around that time applied a looser—though not boundless—standard for alternative “versions” of works such as abridgments. See *Ricordi v. Mason*, 201 F. 182 (CCNY 1911), *aff’d*, 210 F. 277 (2d Cir 1912); but see *Macmillan Co. v. King*, 223 F. 862 (D.C. Mass. 1914). The threshold was not . . . a hair-trigger, but relatively few derivative abridgments would be excused without authorization.

56. *White-Smith*, 209 U.S. at 19 (Holmes, J., concurring). “One would expect the protection to be coextensive not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its meaning and worth.” *Id.*

57. See *id.* at 18-19 (Holmes, J., concurring).

In view of the facts and opinions in this country and abroad to which my brother Day has called attention I do not feel justified in dissenting from the judgment of the court, but the result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand.

Id. at 18-19 (Holmes, J., concurring).

restriction is confined to the *specific form*, to the collocation devised”⁵⁸

Despite a jarring result leaving owners (temporarily)⁵⁹ without recourse against auditory reproduction, the Court’s reasoning is strong. First, the fact that courts had recognized “fair use” exemptions from liability long before these were ever codified reveals inherent limits on what activities the early statutes had ever monopolized.⁶⁰ This original understanding reflected the finite domain of copyright.⁶¹ Before fair use was codified in 1976, the term was often employed to refer to non-infringing activity along with any otherwise infringing (“technically” infringing) uses deemed to be privileged regardless—typically on various policy grounds courts found

58. *Id.* at 19 (Homes, J., concurring).

59. Congress soon granted new rights (discussed next) to alleviate this problem. 17 U.S.C.A. § 1(e) (1909). With them came the compromise of compulsory licensure, not covered here. *Id.*

60. In 1841, Justice Story had grappled with when a taking is infringing:

So, in cases of copyright, it is often exceedingly obvious . . . whereas, in other cases, the identity of the two works in substance . . . often depend[s] upon a nice balance of the comparative use made in one of the materials of the other . . . for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other.

Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841) (emphasis added). He begins with this general framework, but then later confronts the matter of partial-copying by saying that it can be enough to infringe if “the labors of the original author are substantially to an injurious extent appropriated;” he invokes “the value of the materials taken, and the importance of it to the sale of the original work” along with the quantity taken. *Id.* at 348. Nevertheless, I believe the central theme to be that these various factors (e.g., quantity, importance/vitality, impact on value, comparative use) serve primarily as aids or tools in evaluating substitutability—or a lack thereof—which his introduction seems to foreshadow. *See Harper v. Shoppell*, 26 F. 519, 520 (1886) (characterizing market impact as a “test” for supercession).

61. Another significant milestone came in 1853, when Judge Grier ruled that a translation of “Uncle Tom’s Cabin” into German was not a copy. “[T]he author’s exclusive property in a literary composition or his copyright, consists only in a right to multiply copies of his book . . . and *not* in . . . his conceptions and inventions, which may be termed the essence of his composition . . .” *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (emphasis added). A language translation seems more a derivation (not protected in 1853) than a reproduction, however I think an abridgment could indeed be a copy (or a “reprinting”) as well as a derivation, if there exists substantial overlap in the purpose(s) to be served—a point I make later regarding “partial copies.”

implicit within the law.⁶² Furthermore, the piecemeal structure of the law led courts to parse rights with precision and constraint.⁶³ Going back to

62. There are occasions when otherwise-monopolized uses can be excused, though one could argue that an “intent” element for certain activity would significantly curtail such a need. Today’s section 107 (fair use) privileges some actual reproduction, derivation; it applies “notwithstanding” the five rights listed in section 106. I do not detail here the evolution, policies, or codification of “fair use” theory, but in the contemporary landmark fair use case of *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 455 n.40 (1984). The U.S. Supreme Court mentions how various policy considerations do inevitably enter the analysis:

Copying a news broadcast may have a stronger claim to fair use than copying a motion picture A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote. Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use

Id. at 455 n.40. (Of course, I would probably view a braille version as analogous to a language translation, thus being closer to a derivation than a copy, but the principle of weighing policy merit is still relevant.) Even the dissent, though drawing the line quite differently, does not dispute that policy judgments are inherent to fair use analyses. Arguably, the doctrine has been applied in many respects so as to often roughly match the early standard in ultimate result. Nevertheless, much of what fair use allows was never actually restricted in the first place, so one cannot assume that but for a fair use “exception” a given act is otherwise proscribed. This presumption shifts the burden (if fair use be deemed an affirmative defense) as well as substantively expands the scope of the monopoly to sweep anything not otherwise privileged! Exclusive rights have always been defined in the positive, not simply as the inverse of their exceptions.

63. *Harper*, 26 F. at 520.

The statute not only makes provisions for copyright[ing] charts, prints, cuts, engravings, etc., but makes a distinction between infringement of a book and of a cut, engraving, etc. A book is infringed by printing, publishing, importing, selling, or exposing for sale any copy of the book. Section 4964, Rev. St. A chart, print, cut, engraving, etc., is infringed by engraving, etching, working, copying, printing, publishing, importing, selling, or exposing for sale a copy of the chart, cut, etc. Section 4965.

Id. The *Harper* court concludes from this language that “copying without printing or publishing is infringement only as to [a] cut, chart, print, engraving, etc.” *Id.* This case also illustrates the commingling often occurring between the issues of substitutability and financial harm: “The law does not tolerate an appropriation which tends to supersede the original. A test frequently applied is whether the extracts, as used, are likely to injure the sale of the original work.” *Id.* Note how there is no problem of circular reasoning in harmonizing these concepts, because the only “harm” in question here deals with actual sales of the original work, rather than some normative policy matter of what additional markets owners should dominate. Because printing and copying works has always been a separate right from vending and distributing such copies, the prospect of lost sales would seem to be operating here as a metric for assessing supercession, as opposed to vice

“printing” and “reprinting,” the earliest grants were not open-ended formulations but conspicuously targeted ones. And as no statutory definition existed for the term “copying” that *White-Smith* was construing, the historical legal context in which the word emerged provided the most reasonable meaning. Hence, copying a musical composition was not a question of content, but one of substitution—the functional⁶⁴ equivalent of “printing” for books (i.e., “*otherwise multiplying*”).

The next year, Congress addressed some inadequacies of the existing copyright scheme in a comprehensive revision. This 1909 Act restricted making unauthorized sound recordings—existing in a distinct class of reproductions called “phonorecords”—of compositions by adding in section 1(e) an exclusive right “to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.”⁶⁵ Far from being a repudiation of *White-Smith*, this revision followed years of grappling with how to protect composers against the unauthorized “reproduction of music by mechanical means,” in addition to whatever public-performance rights they might enjoy.⁶⁶

versa (as in many modern fair use analyses). It would indeed beg the question to define “copying” as harming the market for “copies” of a work; reproduction must first be defined independently, so it can be established what the copyright owner is getting the right to sell.

64. I do not mean “functional” in the utilitarian sense of having some practical application, but only with respect to the author’s creative purpose(s). Here, the court decided that the composer’s purpose was for musicians to read his works, visually, so that was what had to be recreated—by printing, or otherwise. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 13 (1908).

65. 17 U.S.C.A. § 1(e) (1909). The new arrangement right in Section 1(e) was enumerated separately from the undisturbed right to copy, which was reiterated in the first section, 1(a), along with the classic rights to print, reprint, publish, and vend (staples going back to 1790). 17 U.S.C. § 1(e) (1909). So the reproduction right, though greatly supplemented, was not itself redefined. Congress left intact the meaning settled by a unanimous Supreme Court the previous year. *White-Smith*, 209 U.S. at 1 (Note again how the unofficial “broad sense” of reproduction can refer even to something as intangible as the sound waves a device (re)produces. One should not conflate this connotation with violative “copying;” such vibrations are not even minimally fixed, much less comparably or substitutably so, as required in *White-Smith*).

66. The House Report (from the committee on Patents) on the 1909 Act begins with multiple references to the growing pressure for a major overhaul. “For years men familiar with the copyright laws of this country have urged the necessity of a complete revision.” H.R. Rep. 2222 (Feb. 22, 1909) at 1, *reprinted in* 6 E. FULTON BRYLAWSKI & ABE GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (F.B. Rothman ed., 1976). “The pressing need of a revision of the copyright laws was urged by the President in his message to Congress in December, 1905.” *Id.* Specifically, the report mentions the particular emerging need to address what was being called “reproduction of music by mechanical means.” *Id.* at 4. “Subsection (e) of section 1 of the bill, which deals with the reproduction of music by mechanical means has been the subject of more discussion and has taken more of the time of the committee than any other provision in the bill.” *Id.* “Not only in the

The House Report from the committee that unanimously approved H.R. 28192 in 1909 confirms that the first subsection merely perpetuates existing rights along with the case law construing them:

Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word ‘copy,’ practically adopts the phraseology of the first copyright act ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.⁶⁷

Also note that any direct sensory-perceptibility requirement—sometimes a barrier to copyright eligibility (e.g., for piano rolls)—would later be expressly disclaimed in the next revision of 1976.⁶⁸

So, the meaning of copy from *White-Smith* was implicitly affirmed by the very statute that ironically counteracted that case’s result. The 1909 Act actually accommodated the status quo—represented by the correct⁶⁹ 1908 holding—by tacking on the 1(e) arrangement and setting right.⁷⁰ So, a plaintiff today need not seek to strain the meaning of copy and reproduce to assert that his work ‘A’ is in some sense “reproduced” by making a

United States but in England and nearly all the countries of Europe this question is troubling the courts and the legislative bodies.” *Id.* at 5. The report also observes that article 13 of the Berne Convention (to which the United States was not a party) had recommended legislation to grant authors of musical works an exclusive right to control their reproduction by mechanical means. *Id.* at 6.

67. *Id.* at 4 (emphasis added). Two years earlier in 1907, when *White-Smith* was pending before the Supreme Court, there was some disagreement as to whether Congress should add the arrangement right of section 1(e), since they did not yet know whether piano rolls would be characterized as copies of compositions. The House Bill from 1907 (H.R. 25133) contained in 1(e) only the commercial public performance right, an omission which the House Report justified by noting “should the court hold [for the defendant], Congress can then take up the question of giving further protection to musical authors, if it deem it wise to do so, in a separate bill.” H.R. Rep. 7083 (Jan. 30, 1907) at 9, reprinted in BRYLAWSKI & GOLDMAN, *supra* note 66. Though the new Act did not end up getting passed until 1909 anyway, this shows how removed the piano-roll issue was from 1(a) and the term “copy.”

68. Section 102(a) speaks to works requiring the “aid of a machine or device.” 17 U.S.C. § 102(a) (2000). It had only been a few years earlier that sound recordings—fixed in phonorecords—became eligible for copyright. See *The Sound Recording Amendment*, *infra* note 90, § 3.

69. See generally *White-Smith*, 209 U.S. at 1. This is important, because Congressional inaction does not have the power to ratify flawed case law. As I have stated, my first objective was establishing that the *White-Smith* doctrine was correct as of its time.

70. This feature of copyright is largely subsumed in today’s generalized derivation right of section 106(2). See 17 U.S.C. 106(2) (2002).

related work ‘B.’ Whether or not ‘B’ requires a machine, it now enjoys protection in its own right if authored or authorized by the copyright owner in ‘A,’ and if not, ‘B’ might still violate derivation rights in ‘A’—provided in either case that ‘B’ is both minimally creative and sufficiently fixed.⁷¹ (It is notable that, still today, a piano roll is classified as a “phonorecord” instead of a “copy;” it is telling that Congress avoids any hint of tampering with the settled understanding of the concept, even while extending it!) So the actual facts of *White-Smith* should indeed lead to a different result now, but not because the legal sense of “reproducing” was ever expanded to cover turning sheet music into a sound recording.⁷²

Accordingly, *White-Smith*’s definition of copy is still controlled under the 1909 Act. In Section 1(a), Congress bundled this activity with the classic rights to print, reprint, publish, and vend—offering no sign of (and indeed disclaiming) any new standard. The principal criterion was an object’s capacity—and to some extent, design—to create the same user experience as the author’s work. It is noteworthy that Congress preserved the historical language of “print” and “reprint” in the 1909 revision.⁷³

71. It is debated whether infringing derivative works even need to be fixed, though I later discuss how the definition of creating any original “work” of authorship (a type of which is the derivative work, according to section 101) depends upon fixation. It belies the notion of exclusivity to restrict the public from doing something that the author himself cannot even do (e.g., make an unfixed derivative “work”).

72. Applying the standard from *White-Smith*, the two are hardly interchangeable. But it would involve an “arrangement” under the 1909 Act, and a “derivative work” now, if deemed to have additional originality (i.e., some creative judgment). 17 U.S.C. § 106(2) (2000), 17 U.S.C. § 101 (2000). (A derivative work could also potentially be substitutionary—infringing two separate rights.) I address the copy-phonorecord distinction in Part III. In 1936, Judge Learned Hand seems to stretch the standard to usage-in-any-similar-context, even if not truly duplicative of the author’s original work. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936). He says that fair and non-infringing use is limited to that which steers clear of uniquely creative “expression.” Of course, this may turn on the question of what the original work’s purpose is. If the author’s purpose were construed broadly enough, e.g. to merely have the content be used in any similar context, then such would indeed satisfy the traditional standard. But aside from parallel independent creation (in which case each author enjoys his own copyright), the Judge presents the question as though taking sufficient protectable content is enough by itself to be copying. While I would agree that no amount of non-taken (i.e., new) material necessarily detracts from the potential infringement of any taken material. *Id.* at 56. This should not mean that any sufficient taking and merely related use of the latter automatically amounts to a “copy.” For that, it must still be found to actually duplicate the original work by substituting for the author’s purpose (whatever that is found to be).

73. 17 U.S.C.A. § 1(a) (1909).

While their inclusion need not imply mutual exclusivity with “copy,”⁷⁴ the redundant verbiage colors the reading; sandwiching the new term within the 1790 phrasing stresses that “copy” simply extends Justice Day’s “otherwise multiplying” standard so as to establish its blanket applicability across all protected works—an inference strongly confirmed by the House Report.

Major supplements to the reproduction right notwithstanding, it is difficult to maintain that the 1909 Act abrogated the operative “like-purpose” test.⁷⁵ In the initial vacuum left by Congress, the *White-Smith* court rationally defaulted to a straightforward, traditional definition, reaching a most sensible conclusion that copying means substituting for the author’s purpose(s) served by his original work. Then, Congress left intact this meaning in 1909,⁷⁶ and again in 1976 (as I argue next in Part III). Moreover, not even the common meaning has appreciably changed between 1908-09 and 1976.⁷⁷ Despite some loose colloquial uses of the word “copy” in various nonduplicative technical contexts,⁷⁸ the term’s

74. Ironically, this change broadened the reproduction right somewhat for books, by not limiting their infringement only to literal “printing,” but also adding the more flexible, functionally-equivalent standard of multiplication already in use for musical compositions and other works enjoying a right in “copying” prior to 1909. Remember that copying was deemed as printing or otherwise multiplying.

75. One must carefully recognize that substitutability is a distinct inquiry from the notion of harm to a copyright owner, as the latter presupposes some base line allocation of rights. (It must first be established to what an owner is legally entitled before it becomes meaningful to speak of violating it.) As a practical matter, substitutability plays a role now via the often-determinative “fourth factor” in evaluating fair use under section 107: effect on the plaintiff’s market. *BMG Music v. Gonzales*, 430 F.3d 888, 890 (7th Cir. 2005).

76. Shortly before the 1976 revision, the U.S. Court of Claims addressed the reach of the 1909 Act in a fair use analysis. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1973). Contrasting the 1909 work-neutral allocation of exclusive rights in 1(a) from the previous work-specific breakdown discussed in *Harper*, the opinion observes, “The 1909 Act obliterated any such distinction in its text. It provides in § 5 a list of all classes of copyrightable subject matter (including books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right ‘to print, reprint, publish, copy and vend the copyrighted work.’ Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5.” *Id.* at 1350. But while allowing that books could be infringed other than strictly by “printing,” the court did note longstanding acceptance of “photographing” and “photostat,” in cautioning “we cannot stop with the dictionary or ‘normal’ definition of ‘copy’—nor can we extract much affirmative help from the surfacial legislative text.” *Id.* However, I have contended that the 1(a) wording did suggest constraint by stringing “copy” within the 1790 verbiage, and the 1909 Act’s legislative history only reinforces this.

77. As argued earlier, changes in “everyday” meaning ought not control to whatever extent transpiring post-codification, but the case for an expansive meaning is only weakened by its poor linguistic support.

78. Purely functional and facilitative data reiteration or storage falling short of an operationally-independent multiplication (i.e., a viable substitute) of a digital work, e.g., memory

general sense remains fairly exacting—typically equated with such terms as “imitation” or “reconstruction.”⁷⁹ This is not to suggest some absurdly absolute molecule-by-molecule requirement offering no realistic protection, but the standard employed by the Supreme Court—and left in place by Congress—was more exacting than blanket usage or re-expression. Of course, courts do have to decide how closely an object must parallel each original’s purpose(s) to be found substantially substitutable (i.e., infringing), as well as how broadly to identify such purpose(s) in the first place.⁸⁰

Thus far, I have established what it meant to copy before the 1909 Act, along with the fact that the Act only entrenched this meaning. While the new statute did apply an exclusive reproduction right to more things, and also added new protections perhaps overdue, neither the text nor the legislative history support departing from the reproductive standard identified in *White-Smith*. This means that going into the next revision of 1976, “to copy” was to substantially substitute—or multiply—the tangible object constituting an author’s original work, serving a substantially similar purpose as the same. Next, I discuss the 1976 Act governing today, demonstrating that this standard has yet to be disturbed (at least under objective-meaning originalism).

III. THE CURRENT REPRODUCTION RIGHT

The latest incarnation of the reproduction right is section 106(1) of the Copyright Act of 1976, giving each copyright owner the exclusive right

buffering, caching.

79. *Merriam-Webster Online Thesaurus, Copy*, <http://www.m-w.com>.

80. The latter could be viewed as roughly analogous to “claim construction” in patent law. As a hypothetical extreme, any copyrightable work could have a “purpose” of making the world a better place, but such platitudes hardly make for a helpful standard. Had the *White-Smith* court defined the purpose of sheet music to be simply for people to hear its notes be played, instead of to be visually understood and performable by human musicians, then it probably would have been easier to show infringement. Recall Justice Shepard’s notion of serving some purpose within the original work’s “scope.” Note the key role here of an intent element for creation: if courts are guided by the subjective intent of authors, they need not themselves render judgment as to what creative purpose(s) a work of authorship could “reasonably” serve. On the other hand, if courts will not inquire into the actual intent behind an author’s work, they must then attempt to “objectively” assess the creative purpose(s) served by each given work. As I submit in Part III, the standards for intent should equate between an original work of authorship and copies thereof, based upon the respective definitions of each.

“to reproduce the copyrighted work in copies or phonorecords.”⁸¹ So what is the modern significance of this phrase? Professor Stern suggests, “[t]he verb ‘reproduce’ and noun ‘copy,’ individually or in combination, are not so self-defining and so full of intrinsic content that it is a simple task to discern from studying them *as words* what policies the copyright law embodies in defining infringement (and its correlative, owners’ rights).”⁸² While this may be true, I aim to show that nothing within the 1976 Act operates to affirmatively alter the previously settled and ratified standard. That is, “reproduce . . .” mirrors the 1909 activity referenced by “copy,” which in turn reiterated the 1870 articulation “copying” which the U.S. Supreme Court had narrowly construed to require like-purpose suitability by design.⁸³ Accordingly, this standard was still in force afterwards.

Congress has never defined the act of reproducing—given formerly by “copy” (v.) and now by the operative verb “reproduce.” Congress did, however, give definitions for the qualifying nouns “copies” and “phonorecords” in section 101 (analyzed shortly).⁸⁴ Each reproductive manifestation necessarily falls into one of these two object classes. Reading the function and outputs together, they appear to reiterate the settled understanding of the former right “to . . . copy,” albeit denoted with alternative phrasing (i.e., “to reproduce . . . in copies”) to facilitate extending the concept to non-visually-perceived material (i.e., “. . . and phonorecords”).⁸⁵ Provided the now-codified definition for either object class does not itself affect the definition of the proscribed activity, the new phrasing would simply apply the traditional standard to newly protected⁸⁶ sound recordings along with everything else.

Consider copy (n.)—Section 101 defines copies as “material objects . . . in which *a work* is fixed . . . and from which *the work* can be perceived, reproduced, or otherwise communicated.”⁸⁷ The definition

81. 17 U.S.C. § 106(1) (2000). Section 106 provides the current exhaustive list of exclusive rights granted.

82. Richard H. Stern, *Cases and Materials*, available at <http://docs.law.gwu.edu/facweb/claw/ch3a.htm>.

83. See generally *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

84. See 17 U.S.C. § 101 (2002). Each of the five exclusive rights provided by section 106 is structured with an infinitive verb followed by its direct object (e.g., “to reproduce the copyrighted work,” “to prepare derivative works,” “to distribute copies”), then modified by one or more prepositional phrases (e.g., “in copies,” “based upon the copyrighted work,” “of the copyrighted work”).

85. 17 U.S.C. § 106(1) (2006).

86. A reproduction right had only been granted for sound recordings as of 1971. *The Sound Recording Amendment*, P.L. No. 92-140, § 3, 85 Stat. 391 (1971).

87. See 17 U.S.C. § 101 (2002). As in 1908-09, the loose colloquial sense of “reproduce” appears again to describe what a copy itself does, rather than the process of its own coming into existence. Also, the definition expressly permits the “aid of a machine or device,” so as to

(mutually) excludes phonorecords, which are defined similarly except that they fix “sounds,” whereas copies fix any work other than a sound recording. The open-ended latter language—allowing a work to be communicated in any way—might seem to imply that any expression of a work’s content would qualify. But one must also examine what constitutes the “work” that must be both “[re-]fixed” and “communicated” (separate requirements).⁸⁸ Both works and copies thereof are defined in terms of fixation, a concept requiring copies as well as eligible original works (which are presumably subject to the same minimal-fixation standard)⁸⁹ to exist in some particular kind of usable, physical form.⁹⁰ Lest this statutory⁹¹ linchpin of copyright be relegated to a mere procedural hurdle, one must—consistent with the *White-Smith* approach—consider it intrinsic to the work itself. The 1976 Act grants protection to “works of authorship” irrespective of format, instead of focusing on particular forms of media (some of which are rather interchangeable).⁹² However, this in no way mitigates the innately—and legally—commingled role of inspiration’s physical manifestation in comprising each work: whether an author chooses paper, piano roll, film, clay, or ice and whether he makes it large

encompass duplications of those works which themselves get experienced indirectly (e.g. films can be eligible works, so copies of them are “copies.”) 17 U.S.C. § 102(a) (2000) (emphasis added).

88. 17 U.S.C. § 101 (2006). Note too that the definition of phonorecords likewise permits any means of communication for the fixed sounds, yet this does not mean that communicating something other than those actual recorded sounds could plausibly qualify. The particular sounds themselves are what must ultimately be communicated somehow, not merely their underlying content. For example, a machine or device displaying the content of sound via some graphical representation would implicate not just the means of communication, but the kind and quality of work being communicated. (The means-neutral, format-neutral theme of the 1976 Act does not loosen the standard for judging reproduction; indeed, it elevates the importance of this limiting principle.) Conversely, fixed sounds are only “reproductions” of other fixed sounds. It is perfectly consistent to say that the “sound recording” is what the law protects rather than just the “phonorecord,” because many different kinds of phonorecords could interchangeably or substitutably fix the same sounds. Analogously, the law protects movies or audiovisual works rather than DVDs, and software rather than disks.)

89. The definition of “copies” invokes the term “fixed,” which is defined only once (in close proximity). 17 U.S.C. § 101 (2006). However, fixation is defined with reference to a “tangible medium of expression,” which is not defined. Merriam-Webster offers a current definition of “medium” as “a mode of artistic expression or communication,” and then one for “mode” as “a manifestation, form, or arrangement of being.” See *supra* note 51.

90. Fixation affects the meaning of both work and copy(n)—remember Justice Day’s (and Lord Mansfield’s) elevation of the “concrete” over the “abstract.” It comes into play in two areas: 1) the minimum threshold for any work to exist (and thus also the de facto minimum threshold for any copy to possibly exist), and 2) defining each individual work’s legally-recognized status—that which a “copy” must repeat.

91. I avoid here any constitutional issues regarding the definition of “writings.”

92. 17 U.S.C. § 102(a) (2006).

or small, robust or delicate, stationary or mobile. Some works are suited for visual consumption, others for auditory, others for both; some to be enjoyed individually, others collectively; some perpetually repeatable on-demand, others for a more fleeting experience. In any event, it is the nature and quality of the human sensory⁹³ experience ultimately sought by the author's fixation that a copy needs to recreate.

Each newly "created" work is defined into legal existence by its first fixation;⁹⁴ thus, fixation is not merely a ratification step en route to protecting an author's thoughts. Any single work—as opposed to a different, alternatively fixed work is not multiplied by a work of a different nature expressing the same underlying content (e.g., phonorecords of sounds relating to works that were initially fixed inaudibly for visual perception).⁹⁵ Though this might seem to involve a question of "usefulness," the reality is that some fixations—going back to the analysis in *White-Smith*—are only suitable for certain uses; one should distinguish using a work to experience it from using it for some practical application.

Copies thus must be fixed, and thus usable, however similar to the original is necessary to substantially constitute the same work. So fixation for a copy is, in effect, more particularized than for a new work—but only by virtue of the fact that there is a finite set of already-created and fixed works of which copies could be made, in contrast to the boundless realm of potential new fixations. Additionally, insofar as an author's intent is integral to his new work, this strengthens the case that a copyist's intent is likewise integral to any reconstruction, meaning that the sensory experiences from both objects must be by design.

Furthermore, merely validating that all communicative modes are acceptable (also true of new works)⁹⁶ in no way mitigates the distinct requirement that the work be (re)fixed. A work's—thus also a copy's—tangible nature remains paramount: by equating creation with fixation rather than conception, the statute defines works not in terms of

93. I later address the related problem of extending copyright protection to those works never perceived by human senses; whether legally valid or not, such a severe departure from copyright tradition does radically expand the realm of eligible works, although there is no reason why my standard of purpose-suitability could not still be applied to those items as well. Multiplying a work's functionality need be assessed with no less scrutiny than multiplying a work's aesthetic value.

94. See 17 U.S.C. § 101 (2002). The section 101 definition of how a work first gets created relies entirely upon the principle of fixation.

95. Such things might prove to be derivative works, but they should not be restricted on 106(1) grounds. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

96. This does serve to maximize copyrightability however—almost any creative fixation can now be a work, eligible for the protections of section 106. But one still has to actually copy it in order to violate 106(1). See 17 U.S.C. § 106 (1) (2000).

their ethereal significance, but rather by their realized material incarnation. Recall the *White-Smith* formulation of reproducing “a thing,” not “a concept.”

Further, section 101 applies the term “copies” even to the object embodying an author’s original work, further equating the two thresholds of minimal-fixation while at the same time particularizing each copy’s definition to its original. That is, the original is just another (albeit the first) copy, implying interchangeability (substitutability) with non-originals. The definition of creating a work even speaks of fixing it “in a copy,” supporting the additional inference that even the noun bears an intent element reflecting the author’s own creative purpose(s).⁹⁷ Also observe that “the copyrighted work” is the direct object of “reproduce” in section 106(1). The same logic applies; it is not a right to reproduce “any variation of the work—derivative or otherwise,”⁹⁸ but a right to reproduce “the copyrighted work.” A copy is not an object fixing “any work which involves the copyrighted work’s protectable expression,”⁹⁹ but only an object in which “the work” is fixed. In sum, the infinite domains for communicative means and fixation methods (for copies as well as originals) are qualified by what it is that is being fixed and communicated—namely, the original work, defined in meaningful part by the experiential uses for which the author had first fixed it.

As with section 1(a) of the 1909 Act, the scope of the reproduction right was again expanded only in the sense of protecting more things, not in the sense of being evaluated any differently. “[C]opies or phonorecords”

97. This does assume courts would at least look to the intent of the author; otherwise, as I noted earlier, courts must decide what “objective” creative purpose(s) a work could “reasonably” serve. See *White-Smith*, 209 U.S. at 1. These two inferences from section 101—equating standards of both fixation and intent between originals and copies—could be countered by positing that the statutory references to new works involve mere subsets of what “copy”(n.) could mean (i.e., more stringent tests for fixation and intent), whereas for reproduced works they span the “full” meaning. But this proposition seems backwards if one accepts the preceding argument that all copies are defined strictly in terms of their respective tangible originals.

98. 17 U.S.C. § 101 (2006). It only qualifies as a “derivative work” if additional creative judgments are contributed. (A derivative work is a kind of original work of authorship.) But if an item is neither a copy nor a derivative work, then it would not violate any of the exclusive rights, because those are the only two rights about making objects. So, items avoiding any restriction would be those which both 1) lack any common creative purpose with the original, and 2) lack creative additions. I do not analyze in this Article the standard for what constitutes “preparing a derivative work” under section 106(2), but minimal creativity is needed for any kind of work.

99. The idea-expression dichotomy (*Baker*) doctrine should not be confused to imply that just because certain content is protectable, that it is protected against all use. As with *Sheldon*, one should still have to actually duplicate the author’s work sufficient to be substitutable for the author’s original purpose (whatever that is deemed to be in a given case).

are simply the complete range of all reproductive output;¹⁰⁰ still, making a phonorecord would only be reproductive with respect to a phonorecord. To believe that section 106(1) prohibits making a phonorecord of even a non-phonorecord, one would need to believe that Congress subtly eradicated the like-purpose standard of its operative verb through its use of a noun whose very existence seems designed in large part to avoid disturbing any established meanings. If copy (n.) and phonorecord are mutually exclusive, as mentioned earlier, and if an author's initial fixation—other than a phonorecord—is itself termed a copy, a distributive reading would then yield the untenable equivalent, “to reproduce the [first copy] in . . . [additional] copies and [non-copies]!” (If using X to make something mutually exclusive with X is now reproduction and copying, then the activity's definition has lost all boundaries.) With this understanding of works and their copies as distinctly fixed material objects, I proceed to analyze the activity implicated by section 106(1).

How closely must a given object resemble some work's initial fixation in order to constitute a (re)fixation of it?¹⁰¹ At what point is it “the [same] work?” One does not find this information in the statute (express or implied), so one properly reverts to the traditional standard: whatever duplicates the creative purpose(s) of the author's fixation. At the margins, this inquiry can be heavily fact sensitive (e.g., books on tape, television interview transcripts, similar songs,¹⁰² music samples,¹⁰³ photographs of 2-

100. Subsections 106(1)-(3) use the plural forms of the nouns “copies,” “phonorecords,” and “works,” and yet there is general agreement that reproducing, deriving, or distributing is prohibited even if done only once. Such abstract usage of count-nouns reinforces a primary emphasis on the activities delineated by the series of operative infinitive verbs. *See* 17 U.S.C. 106 (2000). In the case of “reproduce,” the still undefined concept appears unchanged by the noun “copies,” whose definition is particularized to respective original works.

101. This inquiry overlaps the issue of infringement, which typically employs a “substantial similarity” test, of which there are multiple variations. I accept this as a general standard for infringement—but my focus here is on what must be “substantially simulated” to specifically infringe the reproduction right. Beware that thinking of infringement (or wrongful appropriation, for that matter) in a vacuum would, in effect, lead to a generalized content-use right. A narrow sense of copy and copying effectively serves to absorb many murky idea-expression analyses, which stop at which content is protected—not asking what it is protected against.

102. Instead of deciding whether two given songs are “substantially similar” in some nebulous sense, pose the somewhat more exacting (though still unavoidably subjective) question of whether experiencing the defendant's song substantially substitutes for experiencing the plaintiff's—not because substitutability is just a handy proxy for likely economic harm, as in a fair use analysis, but because it is the foundational legal criterion for “copy.” If not, the plaintiff would be left to argue that it is alternatively a derivative work. The extent to which music can “influence” each other before implicating derivation is another matter.

103. The sixth circuit recently held all digital sampling—however short—to be infringing, subject only to the (often unpredictable) fair use defense. *See* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). The circuit court apparently inferred a special “sampling right”

D artwork, and perhaps even objective duplicates confined strictly to nonsubstitutionary use¹⁰⁴). Nevertheless, some objects clearly make reasonable substitutes, even if only for a subset¹⁰⁵ of purposes (e.g., tapes or audio files made from CDs, quality artwork replicas, songs downloaded to a computer hard drive, photocopies, or visual files scanned from books), while others clearly do not (e.g., written descriptions of nonverbal art, movie scripts, low resolution thumbnail graphics,¹⁰⁶ films and videos capturing incidental music or artwork, some transformational uses, functional, or facilitative digital memory). This fact-driven analysis lies at the heart of “reproducing in copies” today as much as it did in 1908.

In applying a decades-old statute to unforeseen technologies, analogizing new activities to their preexisting counterparts can sometimes help to identify which ones fall within the originally understood reach of a dated provision. For example, digital photocopying works differently from analog,¹⁰⁷ yet both processes operate within the 1976 conception of copying, as both are directed (objectively and subjectively) towards multiplying sheets of paper for comparable usability. The same cannot be said, for example, of the ephemeral data generated incident to the process

for sound recordings that effectively enjoy an even tougher infringement standard than the actual explicit rights! *Id.*

104. This depends on whether some threshold element of intent is deemed to have been preserved in the reproduction right. As mentioned, motives do now come into play via the “fourth factor” (effect on plaintiff market) of a fair use analysis—because even perfect “copies” made truly for purposes such as index-building or temporary sampling would indeed inflict less harm on the copyright owner’s market. Alternatively, it could simply be recognized as nonsubstitutionary and thus nonduplicative, falling outside of section 106(1) altogether. *See* 17 U.S.C. 106(1) (2002). Section 107 (fair use) can only affect activities which are monopolized by section 106 in the first place. Because there is no “indexing right,” “sampling right,” or “content-expression right,” such rights only exist (and thus fair use only matters) to whatever extent they may be intrinsic to those actually imparted (e.g. reproduction, distribution, public performance). *See* 17 U.S.C. § 107.

105. My understanding is that any substantial overlap in purpose or experiential use could plausibly support a finding of substantially similar purpose-suitability. In other words, a partial substitute may be enough. This relates to the issue of partial copies, because a partial copy could at most be a partial substitute.

106. There may actually be times where some margin of substitutability could be argued for this; for example, when the thumbnail graphics are used not only for practical things like indexing and previewing, but also for small displays (e.g., cell phones). In *Perfect 10 v. Google*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), the district court finds such uses consumptive and superseding in rejecting a fair use defense. Note that mere pixel-reduction probably lacks the added originality to be a derivative work, so unless the substitutability threshold is met, there may be no recourse under section 106. Whether by design or default, there will always be gaps in any piecemeal enumeration of exclusive rights; to seek exclusive control over all usage would be to invalidate the very notion of itemized exclusive rights. By that rationale, 106 would either have to be read holistically or struck down.

107. *See Wikipedia, Photocopying*, available at <http://en.wikipedia.org/wiki/Photocopier>.

of viewing a web site. By applying protection to copies made via “any method now known or later developed,”¹⁰⁸ the statute covers any functionally comparable reproductive processes—but recall that even the *White-Smith* court had no quarrel with novel methods. This principle in no way widens the meaning of the activity or its tangible product. For instance, inherent to experiencing many works in the electronic age is voluminous utilitarian data replication;¹⁰⁹ such facilitative activity is hardly duplicative of a work’s ultimate purpose. Unlike digital photocopying, this does not even parallel any earlier-contemplated practice; rather, it is necessary to simply use many works.¹¹⁰ Operational data replication is not some new method of reproducing a work—it is a method or means of a given work’s operation.

Something else worth mentioning is the classic copyright doctrine of the idea-expression dichotomy; this has in some ways limited the reach of the reproduction right.¹¹¹ *Baker v. Selden*¹¹² established that taking only those elements which are constitutionally and statutorily unprotectable (i.e., “ideas”) does not constitute violative reproduction.¹¹³ Such caps on protectability are entirely consistent with the narrowness of the right’s original conception, as even a partial copy of a work must substantially substitute for some identifiable portion of a work’s protectable aspects in order to meet the early standard. For example, section 102(b) precludes a copyright in a picture from imparting an exclusive right to make use of any objects depicted within the picture.¹¹⁴ While the statute stipulates that the

108. From the definition of “copies,” 17 U.S.C. § 101 (2000), necessarily mirroring the ways original works may be fixed so as to ensure coverage for any work.

109. See *Wikipedia, Random Access Memory*, available at http://en.wikipedia.org/wiki/Random_access_memory. The statute expressly disclaims protection for a work’s “method of operation.” 17 U.S.C. § 102(b) (2000). This is in perfect harmony with my advocated standard: a method of operation is wholly instrumental to—rather than duplicative of—the ultimate human experience(s) contemplated by the author.

110. I do not take a position here on whether there should be a “use right,” just that there is not one now. I do not delve into the normative policy issues, like whether it would thwart or advance some purported overarching purpose of copyright law (e.g., protecting property owners; serving the public; promoting science and art).

111. Although as I noted with respect to *Sheldon*, this analysis of protectability is a separate one from whether copying occurred by a given taking.

112. 101 U.S. 99 (1879).

113. *Id.* at 106. Interestingly, the more restrictive like-purpose standard could ease the nebulous task of applying the merger doctrine, by mooted the issue with respect to subduplicative uses. Of course, in many instances this may just shift the \$64,000 question to the separate issue of derivation, under 106(2).

114. 17 U.S.C. § 102(b) (1990). This was only intended to reinforce the classic dichotomy. H.R. Rep., at 57. S. Rep., at 54. This is another example of how merely making certain exemptions explicit in no way implies a presumption of liability otherwise.

picture's copyright does not "extend" to its depicted objects, this also reflects the *White-Smith* standard, which regards taking content for use in a different context as simply nonreproductive. The doctrine is in harmony with the like-purpose standard.

At this point, I have laid out the history of the reproduction right from its initial encapsulation by a unanimous Supreme Court in 1908 continuing through its respective subsequent codifications in 1909 and 1976.¹¹⁵ While both statutes restructured it with expanded applicability, granting it to additional classes of works, neither one redefined it or expanded the types of activities it covers. The historical standard of substitutability for reproduce and copy thus persists through the 1976 revision. But as I go on to discuss, many courts have not been adhering to this.

Also consider the jurisprudential implications of a drifting reproduction right. Though Congress might well have the power to opt for some looser sense of reproduction flatly rejected by the U.S. Supreme Court, it has never (yet) done so. Still, precedent has proceeded to stretch the meaning of "reproduce" far beyond anything conveyed by the 1909 (Part II) or 1976 (Part III) statutes. As a non-technological example of such departures, the second circuit upheld a finding of unauthorized copying against the publisher of a trivia game-book called the "Seinfeld Aptitude Test" based upon the television series "Seinfeld."¹¹⁶ This lowering of the bar has been especially rampant in modern digital contexts—and evidently not pursuant to any legislative intervention.

Bear in mind the statutory originalist framework: Insofar as judicial usurpation of the lawmaking process is thought to thwart democratic accountability, this would seem most problematic for legislation conceived as a "bargain" on behalf of the public,¹¹⁷ as all (federal) intellectual

115. 17 U.S.C.A. § 1(a) (1909); 17 U.S.C. § 106(1) (1976).

116. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998). Undeniably, creative expression was taken and used in substantial quantity, but to what end? Arguably a derivative work, but clearly not a "copy." Again, infringement is only meaningful in the context of enumerated rights. Establishing a taking is not enough; yes, the creative expression is protected, but only against certain uses. Nevertheless, this court only looks to whether the content is similar! The [defendant's work] easily passes the threshold of substantial similarity between the contents of the secondary work and the protected expression in the original. *Id.* at 141. The circuit court cited a prior case, in which it had similarly held that still photographs of a ballet could infringe the underlying choreographic work—directly rejecting a requirement that a copy must "recreate" the original. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 163 (2d Cir. 1986).

117. To the extent that such a bargain could be thought of as a "public contract," it is noteworthy that the common law of contracts elevates objective over subjective understandings. *See Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (Va. 1954). (This case is a fixture of many law school Contracts casebooks.) This is not to diminish the value of legislative history—which under my originalist approach can refine and bolster enacted text without contradicting it—but it strengthens the argument for using reasonable meaning in IP.

property is in the United States.¹¹⁸ Congress could ordain new rights specifying additional uses it may wish to restrict, or perhaps even redefine the reproduction right—but absent either, courts should not infuse into the latter an omnibus “right to use expressive content in any way.” At the very least, the burden should reside with proponents of the expansive redefinition to demonstrate that a reasonable person in 1976 would have read “to reproduce . . . in copies” to really mean “to express or utilize . . . in any fixed form.” Unless or until Congress votes for a new “content (re)expression right,” the judiciary ought not to unilaterally impose such a drastic measure. And while one could invoke *stare decisis* in favor of perpetuating judicial misconstruction of the reproduction right, there is indeed Supreme Court precedent for overruling longstanding but erroneous copyright case law.¹¹⁹ While such separation-of-powers arguments are typical in originalism (particularly at the statutory level), it seems an especially appropriate consideration in IP, where Congress is essentially a designated go-between for cutting a deal. The Constitution does not appear to contemplate that society’s “bargain” strikers would be the unanswerable courts.

Next, I proceed to chronicle events in copyright taking place under this present system (post-1976), continuing in my theme that nothing has yet legitimately altered what it means to “reproduce [a] copyrighted work . . .”¹²⁰

118. As mentioned, the constitutional framers adopted the earlier-referenced *Donaldson* approach to copyright (at least at the federal level—I do not here address issues of preemption or state-law copyright), which in 1774 overturned (or at least counteracted) *Millar*, which had held that authors enjoy perpetual exclusive rights under natural law—notwithstanding the expiration of any statutory rights such as from the Statute of Anne, which had been argued to merely augment the common law. Perhaps Congress could entertain mixed motives including sympathy to natural-law rights, but statutory originalism bars federal courts from independently considering such factors.

119. Courts used to apply an unacceptably forgiving standard for originality, called the “Sweat of the Brow Doctrine,” out of sympathy to those who work hard to compile uncreative works like telephone directories. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Apart from the issue of whether the 1976 Act would have even been constitutional if it had relaxed the “creativity” element, the absence of any new statutory definition for “original” works of authorship was held to imply a continuation of the prior standard (deemed implicit in the 1909 Act). Lower-court decisions straying from this test—under either statute—were repudiated without regard to their age, prominence, or policy appeal.

120. 17 U.S.C. § 106(1) (2006).

IV. EARLY DEVELOPMENTS IN THE MODERN SCHEME

This section first addresses an issue that plagued copyright law in the late 1970s—protecting computer software. I do question the extent to which copyright was ever even granted in such works, contending that the true range of software covered by copyright is more limited than certain cases reflect. But in any event, the substitutability standard for reproduction right itself goes unaffected, despite judicial misunderstandings to the contrary.

In 1980, Congress adopted the Commission on New Technological Uses (CONTU) majority report's recommendations, once again widening copyright's subject-matter eligibility.¹²¹ While now expressly protecting computer programs,¹²² it was not evident at first that this also extended to object code (binary machine language). A couple of cases from the 1980s, *Franklin Computer Corp. v. Apple Computer, Inc.*¹²³ and *Apple Computer Inc. v. Formula International, Inc.*,¹²⁴ overturned a longstanding principle that copyright is only for works that ultimately get conveyed to human beings.¹²⁵ Consequently, software was held protectable regardless of whether its creative expression is ever perceived by humans, directly or indirectly.¹²⁶ However, there was significant debate among some CONTU commissioners (particularly in Commissioner Hersey's dissent, with which Commissioner Nimmer's concurrence partly sympathized) as to both the constitutionality and the wisdom of granting copyright to communications which are not ultimately directed toward the human mind or senses.

It is far from conclusive that this was really the effect of either the 1976 or 1980 legislation. While section 102(a) permits eligible works to be experienced "directly or with the aid of a machine or device," this appears to presume that the ultimate destination will be the same (i.e., human perception) in either case.¹²⁷ (This would seem, in principle, applicable to source code and object code alike,¹²⁸ but source code can more easily

121. 17 U.S.C. §§ 101 & 107 (2006).

122. Computer programs were added to the section 101 definition of "literary works," subject to two express user privileges in section 117 ensuring "owners" a right to back-up, as well as to take any "essential step" in utilizing the program. See 17 U.S.C. § 101; 17 U.S.C. § 107.

123. *Franklin Computer Corp. v. Apple Computer, Inc.*, 464 U.S. 1033 (1984).

124. *Apple Computer Corp. v. Formula Int'l, Inc.*, 725 F.2d 521 (9th Cir. 1984).

125. *Id.* at 523-24.

126. *Id.*

127. 17 U.S.C. § 102(a).

128. See *Wikipedia, Object File*, available at http://en.wikipedia.org/wiki/Object_Code; *Wikipedia, Source Code*, available at http://en.wikipedia.org/wiki/Source_Code. Object code is binary machine language (bits of 1s and 0s); source code is what programmers first compose, in one of several programming languages, which then gets converted—through compilation or interpretation—to binary, for computer implementation.

satisfy the standard because, at the very least, it is understood by fellow programmers.) Hence, if works (and thus copies thereof) were formerly expected to at some point be experienced by humans, then section 102(a) would not change that.

The courts in *Franklin* and *Formula* cited a need to give meaningful effect to the 1980 amendment's definition of "computer program" which allows instruction; (code) to be used "directly or indirectly" to yield a specified result.¹²⁹ But all that proves is that all software enjoys the preemptive safe-harbors of section 117, privileging both archival and "essential steps" of operation.¹³⁰ It does not follow from this that every such program must automatically be recognized as a copyright eligible work—much less a copy of one—if other criteria (e.g., ultimate human consumption) are not met as well. Inferring this from the definition of a class of prospective works makes the dubious leap of claiming that because computer programs—or aspects of them—could potentially receive copyright protection, that they always will. Depending on how broadly these terms were construed, this approach could have pervasive implications for various utilitarian articles incorporating digitally actuated features.¹³¹

Why do I explore subject-matter eligibility in analyzing the reproduction right? Because many 106(1) infringement disputes arise over software, aspects of which may not even be statutorily¹³² entitled to copyright protection at all. So at least to that extent, an arguably illegitimate reproduction right has been extended via judicial expansion of copyright eligibility to a realm where Congress has never actually gone—namely, those computer programs whose creative aspects are never perceived by humans. Granted, the consequences of rectifying such an

129. *Apple Computer*, 725 F.2d at 525.

130. See National Commission on New Technological Uses of Copyrighted Works, Final Report 1 (1979) [hereinafter CONTU Report], <http://digital-law-online.info/CONTU/contul.htm>. The CONTU report describes the exclusions to be provided in section 117 as ensuring that those "in rightful possession of copies of computer programs [are] able to use them freely . . ." Once again, one can see the implications of reading a presumption of liability into a safe-harbor provision. *Id.*

131. Conceivably, anything with electronic components involving some form of digital "instructions" is susceptible to this line of thinking. While there is no doubt as to the ingenuity and creativity involved in designing such products, it is questionable that Congress actually overturned a longstanding eligibility requirement in order to grant all of them copyright. Although, many could fit the patent regime, given the different approaches to IP for "authors" (copyright) vs. "inventors" (patent).

132. It would probably be constitutional to do so, however, because few would claim that Congress could not protect all software somehow (e.g., a patent or sui generis regime), and there is no requirement that the various IP systems be neatly classified into mutually-exclusive categories making maximum sense.

error after decades of commercial reliance could prove disruptive, but such pragmatic considerations would not predominate in an originalist approach (and unlike with constitutional law, Congress could quickly revive the status quo—properly). While repudiating this error would likely only shift the relevant policy decisions to other branches of IP law (perhaps under the patent umbrella), much use of copyright for software has always been a force-fit (at best) anyway.¹³³

Aside from the eligibility issue concerning both source code as well as object code, the latter has curiously been characterized as a copy of the former. (This notion disturbingly resembles a claim that “compiled” piano rolls—embodiments of a primitive machine language—are “copies” of their corresponding sheet music.¹³⁴) Doubtless it is a use—and a crucial one. But as source code cannot be implemented (for computer operation) without first being compiled and interpreted into machine language, characterizing this operative utilization as copying seems quite a contrivance.¹³⁵ Because indirectness of execution is no bar to copyright eligibility, compilers are permissible intermediaries which ought not threaten eligibility for software’s protectable aspects. But, taking such a step cannot constitute reproduction where it produces no viable substitute or duplicate.¹³⁶ Hence, whether or not a given program is or should be copyrightable, the standard for what constitutes reproducing it was not disturbed by the 1980 amendments.

133. Not only could Congress quickly counteract any correction if the perceived need was sufficiently great, it might even be an opportunity to reconsider which IP system is appropriate for those computer programs (or elements thereof) whose creative aspects neither directly nor indirectly reach human senses.

134. While sheet music’s direct uses are more widespread than those of source code, neither bears similar purpose-suitability to its corresponding compiled form. Object code can no more easily be understood by skilled programmers than can piano rolls by skilled musicians, nor is it any more readily substituted for its non-compiled counterpart. Of course, if either were deemed to involve additional creative judgment, as many human language translations arguably do, it could be a derivative work—whether authorized or infringing.

135. This is true even without the “essential step” exemption in section 117, based simply on the lack of suitability for like purposes—a fact never more evident than when the purposes are mutually exclusive! Also remember that 117 applies only to operating “computers,” not any other electronics. Moreover, as noted earlier, the law expressly confirms non-protection for methods of operation—which compilation is. *See* 17 U.S.C. § 117.

136. This is a fact-sensitive inquiry, as compiling a single program multiple times could potentially be partially multiplicative if used simultaneously; this could raise issues of the programmer’s purpose (and also licensure, which I do not address).

V. APPROACHING THE DMCA

A couple of cases from the 1990s (before the DMCA) set the stage for later developments. The first was *MAI Systems Corp. v. Peak Computer, Inc.*¹³⁷ which espouses a markedly expanded reproduction right. *MAI* is the landmark case holding that data replication in RAM constitutes “copying” for section 106 purposes. The facts involve a third-party commercial service (Peak) performing computer maintenance and repair through, in part, the necessary reloading of customers’ diagnostic or utility software activity that had only been authorized (by MAI) to the actual software owners themselves. The Ninth Circuit finds RAM copies to be “fixed,” and thus holds the “copies” infringing.

The *MAI* court concedes some ambiguity among the available authority, including *Formula* and the CONTU report (arguably a form of legislative history, though prepared by a commission rather than Congress), all vaguely affirming that loading a program into the memory of a computer (never defined) could potentially qualify as “reproducing” it.¹³⁸ This is indeed a plausible effect of the 1980 amendments, as it could potentially be partially multiplicative, for example, to load a program onto several computers (or a multi-tasking computer) simultaneously. But it would not follow that such a provision must necessarily ensnare all temporary “copies,” even those not meeting the traditional standard.¹³⁹ For what it is worth, the House Report from 1976 indicates a clear intent to exclude at least some forms of ephemeral copies from the definition of fixation.¹⁴⁰ While only giving examples in terms of technology common at the time,¹⁴¹ the general reference is to “purely evanescent or transient reproductions.”¹⁴² This is also consistent with Section 101’s minimal threshold for fixation requiring more than a “transitory duration” (not defined), which the Ninth Circuit opinion implies that RAM copies satisfy (a rather moot point, though; just because it is minimally fixed does not mean it is duplicative of a work). This view would later be expanded even to digital “intermediate copies” for only “the briefest of existence” in

137. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (1993).

138. *Id.* at 518-19.

139. By my standard, the transient nature of certain memory is significant not because it could not plausibly be deemed minimally “fixed,” but because it is facilitative of—not substituting for—the originally-fixed work.

140. H.R. Rpt. 94-1476, at 53 (Sep. 3, 1976).

141. The examples included television, film projections, and momentary computer memory. *Id.*

142. *Id.* Once again, this is most likely a clarification of a norm as opposed to an “exception.”

*Tiffany Design Inc. v. Reno-Tahoe Specialty, Inc.*¹⁴³ The MAI-plus approach was perhaps attractive to courts impatient for Congress to confront the perceived inadequacies of a decades-old Copyright Act.

Where exactly does the MAI court go wrong? Could RAM data *ever* constitute a “copy” under the originalist approach? Perhaps of a work of authorship that is itself fixed in RAM (some forms now are minimally stable so as to arguably warrant protection for whatever creative purposes they do serve), but such a limited existence would rarely achieve overlapping uses with more versatile data fixations (e.g., CD, DVD, hard disk).¹⁴⁴ Though the first party to store a program, song, or movie might well also have been the first to place it in RAM at some point, the purposes of that first RAM-fixation are not what are later repeated by the purely facilitative RAM in a playing device or even a diagnostic repair computer.¹⁴⁵ Even if the rightsholder then also ran and played it through RAM first, this is not a creational fixation—but simply a utilization of the finished work.

Analogously, a sandcastle might be a copy of another sandcastle, while still being subreproductive¹⁴⁶ of, say, a sculpture—even one with “substantially similar” content—if the latter is fixed so much more durably, portably, as to render the immobile and highly-transient sandcastle an inadequate substitute. Substitutability remains critical. Moreover, because most digital means of use are purely instrumental pursuant to the author’s design. Any data, generated incident to

143. *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1121 (D. Nev. 1999).

144. As noted later, even a very different (e.g., less stable) data storage format might sometimes multiply use of a computer program (e.g., loading simultaneously)—depending on a given program’s purpose(s). Of course, a CD or DVD player could conceivably be made to hold substantial portions of a work in memory for substitutable use even after the disk is removed, but this is not how the buffers are now arranged; moreover, a user should also have to intend to use the player multiplicatively rather than facilitatively.

145. Section 101 does allow for protection for works in various stages of progress. While it is clear under my standard that computer RAM or CD and DVD memory buffers do not “copy” the particular physical objects that end-users have purchased (or purchased the authorization to make directly themselves, in the case of commercial Internet downloads), a question still might arise whether users are copying any prior incarnation of the works. But even this is doubtful. *See* 17 U.S.C. § 101. Though programming, recording, editing, may utilize RAM—even creationally—these uses are not comparable to the use for which household RAM gets employed in enabling the ultimate consumption of the works. MAI should have had to show that Peak’s RAM data was designed to duplicate some purpose for which the program was made. I do not deny that evolving technology may indeed be shrinking gaps between what various objects could be used for, but the fundamental standard has not changed; plaintiffs should at least still have to successfully argue that substantial substitutability and substitution occurs, in order to prevail on 106(1) grounds.

146. This would not speak one way or the other to the sandcastle potentially being a derivative work.

experiencing the work accordingly, probably lacks the requisite creative contribution to qualify as a derivative work—be it original, infringing or authorized. Hence, most consumer RAM use would not generally implicate copyright. I next look to another instance of a court grappling with the reproduction right in the context of computer memory.

*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*¹⁴⁷ Is the other significant pre-DMCA case. It involves the issue of Internet service provider (ISP) liability for Usenet postings. The district court notes that, per *MAI*, statutory “copies” were made in the hardware infrastructure belonging to the defendant.¹⁴⁸ However, it distinguishes on the matter of causation, finding that customers initiating the infringing activity were the only parties who could be directly liable.¹⁴⁹ At most, the ISP could potentially incur indirect liability (contributory or vicarious). The court expresses concern that “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”¹⁵⁰ While the reasoning is more sound than in *MAI*, the court’s reliance on policy concerns (fear of stifling the Internet, adequacy of existing protection) does venture beyond a statutory originalist rationale.¹⁵¹

The defense had argued that an ISP is merely a conduit with respect to infringing material, and thus statutory “reproduction” occurs no more there than in analogous passive facilitators of more conventional means (e.g., common carriers).¹⁵² The *Netcom* court, largely sympathetic to this functional-equivalence rationale, also rejects a counterargument that holding ISPs directly liable could be good policy because it forces them to take all feasible measures to minimize infringing activity (which is, of course, an argument for what the law should be—not what it is).¹⁵³ More recently, *Costar Group, Inc. v. Loopnet, Inc.*¹⁵⁴ did offer some post-DMCA validation of *Netcom*—rejecting the plaintiff’s contention that the ruling had only been a temporary bridge to the DMCA.¹⁵⁵ This case correlates culpability with volitional initiation—an intent-level short of willfulness¹⁵⁶

147. 907 F. Supp. 1361 (N.D. Cal.1995).

148. *Id.* at 1368.

149. *Id.* at 1369-71.

150. *Id.* at 1370.

151. *See generally id.* at 1361.

152. *Religious Tech. Ctr.*, 907 F. Supp. at 1370 n.12.

153. *Id.* at 1375.

154. *Costar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

155. *Id.* at 549, 552-54.

156. *See id.* at 549-51. Copyright has never required that a copyist realize the illegality of his action in order to be infringing.

but higher than pure strict liability (as with vicarious liability).¹⁵⁷

Though the Copyright Act was augmented in 1980 (Part IV) and in 1998 (Part VI) to patch certain perceived shortcomings, there is scant indication that Congress ever supplanted the traditional reproduction right with a broader conception. The standard thus still centers upon a purported reproduction bearing substantially similar purpose-suitability to a protected work. (Going back to “printing” and “reprinting,” the reproduction right has always targeted multiplication of experiential use.) Moreover, a copyist’s intent in making or using an object is arguably a distinct element of the proscribed activity. Today, as in 1908, many things one might colloquially call “reproduction” are actually nonduplicative uses falling within no present exclusive right—frustrating copyright owners, who then seek judicial recourse. But as Justice Holmes lamented, Congress has not seen fit to grant wholesale control over everything pertaining to a work’s “meaning and worth.”

I have now covered the development of the reproduction right up to the most recent major legislation concerning it—the Digital Millennium Copyright Act of 1998, which is the topic of Part VI.

VI. THE DIGITAL MILLENNIUM COPYRIGHT ACT

In this final section, I examine the most recent amendments to the current statute, coming from the 1998 Digital Millennium Copyright Act; I show that they, like the 1976 and 1980 legislation, still do not disrupt the *White-Smith* substitutability and like-purpose standard for reproduce and copy. This legislation is based heavily upon the “White Paper,” a report by the National Information Infrastructure (NII) Task Force (and its prior draft, the “Green Paper”).¹⁵⁸ While positing a most sweeping reproduction right,¹⁵⁹ it presents itself mainly as an argument for how purportedly existing law could be applied in a digital environment. More importantly, the DMCA text does not change the language of section 106 or section 101 so as to increase the scope of section 106(1).

157. *Id.* This may be the most compelling recent authority affirming an intent and purpose element to the reproduction right; deliberateness need not be explicit if it is deemed intrinsic to “reproduce” and “copies.”

158. Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995).

159. *Id.* § I(A)(6)(a). This portion on the reproduction right makes the unqualified assertion that “[i]t has long been clear under U.S. law that placement of copyrighted material into a computer’s memory is a reproduction of that material,” parenthetically invoking the statutory definition of “copies.” As discussed in Part III, this not only mischaracterizes the noun, but neglects any analysis of the operative verb and phrase.

Nothing in the statute or its legislative record supplies, ratifies, or otherwise implies any definitional change to “reproduce” and “copies”—hence the reproduction right remains after the DMCA what it was before.¹⁶⁰ Again I emphasize the exclusively congressional power to alter the federal copyright bargain: if the NII Task Force desired a substantive expansion of the reproduction right, then that is what it should have sought. Instead, the NII took the position that such a content-usage right was already a given—independent of any additional copyright measures. On this, the White Paper relies entirely upon its view of pre-DMCA law, because new legislation could hardly become enacted merely by convincing Congress that it has already enacted it (a far cry indeed from bicameralism and presentment).

So, did the White Paper accurately represent existing law? Professor Litman suggests that the IITF Report (commenting on the 1994 draft) does assert rights for copyright owners which exceed the section 106 enumeration.

By vesting copyright owners with control of any reproduction or transmission of their works, and then defining reproduction and transmission to include any appearance, even a fleeting one, of a protected work in any computer, and any transfer of that work to, from, or through any other computer, the Draft Report’s recommendations would enhance the exclusive rights in the copyright bundle so far as to give the copyright owner the exclusive right to control reading, viewing or listening to any work in digitized form.¹⁶¹

She also observes that the report effectively espouses “the evolution of the reproduction right into something more encompassing than envisioned in any copyright revision until now.”¹⁶²

David Nimmer responds that neither *MAI* nor the White Paper constitute any threat to traditional copyright jurisprudence—only the

160. Even if in 1998 Congress had misperceived the scope of the 1976 reproduction right as being broader than it actually was, a congressional misunderstanding of prior legislation would not serve to amend it. (If anything, it shows a lack of perceived need—and thus a lack of intent—to do so.) Even within any limited secondary role that legislative history might legitimately perform in informing a textualist approach, one Congress’s belief about another Congress’s intent so long ago is hardly probative of it. *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947); *United States v. Price*, 361 U.S. 304, 313 (1960).

161. Jessica Litman, *The Exclusive Right to Read*, 13 *CARDOZO ARTS & ENT. L.J.* 29, 31-32 (1994).

162. *Id.* at 40.

context is novel but not the principle.¹⁶³ In commenting that a right to read is “not a revolutionary addition to the copyright owner’s exclusive rights,”¹⁶⁴ he seems to argue that modern technology merely facilitates the management—thereby perhaps enhancing the inherent benefit—of those very rights which copyright owners already do enjoy. However, this thinking seems to already presuppose the expansive definition for copy, for I readily concede that owners are entitled to any windfall accruing from fortuitous increases in the value of their actual rights.

Turning now to the specifics of the DMCA, section 512 and the changes to section 117 are the key provisions. By expressly permitting those computer maintenance and repair activities that *MAI* had restricted, the new subsections 117(c) and (d) have been said to imply that such activity would be infringing but for this express exception.¹⁶⁵ Similarly, section 512 excuses an ISP from liability for specified activities (passive transmission, caching, nonvolitional storage, linking), provided various criteria are met and certain procedures followed.¹⁶⁶ However, in neither case would the plain language of such tightly crafted provisions rationally permit such a profound negative inference. This then leaves only the extra-textual grounds of legislative intent—and yet Congress did not even seem to believe it was changing the law with respect to the instrumental reproductions covered in section 117¹⁶⁷ or the ISP activities of section

163. See David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J. LAW & TECH. 1, 5-9. (1996).

164. *Id.* at 16.

165. For example, Professor Ginsburg suggests that the inclusion of section 117(c) “appears to confirm” that RAM copying constitutes reproduction under the Copyright Act. Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 141 n.14 (1999).

166. 17 U.S.C. § 512 (2006).

167. The report from the Senate Judiciary Committee cites *MAI* and a narrow purpose of counteracting its result. “Title III of the bill amends section 117 of the Copyright Act (17 U.S.C. 117) to ensure that independent service organizations do not inadvertently become liable for copyright infringement merely because they have turned on a machine in order to service its hardware components.”

This legislation has the narrow and specific intent of relieving independent service providers, persons unaffiliated with either the owner or lessee of the machine, from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made.

Sen. Rpt. 105-190, at 19 (May 11, 1998). Also, the introductory paragraph of the report refers to this provision as a “clarifying” exemption to ensure computer servicing will not be endangered. *Id.* at 2. This supports interpreting the new section 117 as at most silent on the underlying *MAI* approach.

512.¹⁶⁸ On textualist-originalist grounds, this is of course not dispositive, but it does dampen any hopes of attributing the purported change to implied intent.

Other logical inconsistencies arise in the argument to expand the reproduction right via implied legislative intent. First of all, the legislative record mentions an early draft of the WIPO copyright treaty (implemented by the DMCA) containing a provision, article 7, expanding the definition of “reproduction” to include “any direct or indirect reproduction whether permanent or temporary, in any manner or form.”¹⁶⁹ However, because this proposal was too “controversial,” it was abandoned and replaced with a “statement that simply confirmed that the reproduction right in Article 9 of the Berne Convention applies fully in the digital environment.” The rejection of the proposed definition suggests that Congress thought at least some senses of “reproduction” fall outside the legal meaning. Because the 1989 legislation implementing the Berne Convention¹⁷⁰ did not change the reproduction right, the Senate Report only confirms that the 1976 definition still controls, albeit now “fully applicable” to the digital environment (this is uncontested anyway; no one suggests the right got any narrower). Admittedly, this is not irreconcilable with the IITF report, but it means that if the IP Working Group was wrong about the existing law (as I have argued in Parts II and III), then the DMCA does not save it. The statute’s text is silent on the reproductive standard, and one cannot

168. The Senate Report speaks to Section 512 in terms of providing a margin of certainty.

Rather than embarking upon a wholesale clarification of [ISP liability], the Committee decided to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.

Sen. Rept. 105-190, at 19.

As provided in subsection (k), Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.

Id. at 21. Of course, just because Congress may not mind that the law was “evolving” in the courts does not justify it; as I have argued, the legislative branch must affirmatively act to alter the bargain.

169. *Id.* at 5.

170. The Berne Convention Implementation Act of 1988 amended much of title 17 U.S.C. to comply with the treaty, none of which affected the definition of “reproduction.”

plausibly invoke legislative intent when the very inference sought therefrom is explicitly disclaimed by the legislative history.

Another interesting example defies the notion of expansion-by-implication. The No Electronic Theft (NET) Act of 1997 amended Section 506 to criminalize reproduction exceeding a certain quantity. Prospective application of *MAI* would have counted each of X replications incident to each of Y uses of a work,¹⁷¹ thereby counting one stand-alone copy as X * Y copies. Senator Hatch sought to preempt this unintended interpretation with a floor statement explaining “it is not the intent of this bill to have the incidental copies made by a user of a digital work counted more than once . . .”¹⁷² This endorses the original definition for reproduction, and rebuffs the IITF Report’s assertion that *all* computer-memory copies have “long been clear” to be covered by the reproduction right. Granted, the 105th Congress’s opinion on an enactment by the 94th is no more binding here than with the DMCA, but it is no less probative on the Congressional understanding of reproduction at about the same time—further rendering legislative intent an untenable basis for propagating the theory of *MAI* and its progeny.

As a third and final exhibit on this point, one could even look to Congress’s most recent position on the matter. Title II of the Family Movie Act of 2005 explicitly allows technology which selectively blocks out certain objectionable material from movies, but only “if no fixed copy of the altered version is created” in the process. This strongly indicates that Congress does *not* presently deem the RAM copies integral to the permitted technology to constitute “fixed copies” of those stored works whose performance they enable.

As with sections 102(b) and old 117, it is fallacious to automatically presume that safe-harbor exemptions imply a default of liability. Surely Congress may carve windows of legal certainty without prejudicing the state of the law otherwise. For example, the vague “fair use” allowance of Section 107 may well overlap with some more specific exceptions; however, failure to elsewhere privilege a given activity would not preclude it from also being fair use.¹⁷³ In addition, the first-sale doctrine (a limitation on the distribution right) was held to be an inherent boundary on

171. 17 U.S.C. § 506(a)(2) (2000).

172. 143 Cong. Rec. S12689-01, 12690-12691 (Nov. 13, 1997).

173. E.g., section 112 privileges certain temporary copies instrumental to lawful transmissions, but this should not be construed to bar section 107 from potentially covering the same activity. Remember that section 107 redundantly exempts many things which had never even been monopolized in the first place, so it is equally unsound to infer a presumption of section 106 liability for anything failing the fair use test. The converse is also true; just because something is not fair use does not mean it cannot be otherwise privileged (or even that it is necessarily multiplicative in the first place!).

the original concept of “vending” long before such a limitation was expressly codified in section 109.¹⁷⁴ So, perhaps the 105th Congress did not know exactly how broad the reproduction right was, and did not wish to delve into the matter. Instead, the safe route was to just offer an automatic free pass for jumping through certain hoops. Nevertheless, if archiving, essential steps, computer repair and maintenance, passive transmission and storage, and caching are truly not duplicative in the historical sense of substitutably multiplying authors’ works, then no liability should attach with or without the redundant inoculations from section 512 or the old or new provisions of section 117.

In sum, a sound analysis of the White Paper, the DMCA text, and its legislative history confirms that this statute did not affect the state of the reproduction right. In 1998, as in 1909, a vexed Congress sought to counteract certain undesirable results, but in neither case did it act to change the traditional definition of copy. The like-purpose meaning articulated in the 1908 decision, and perpetuated by the 1909 Act, still stands in 2006.

VII. CONCLUSION

Novel technologies will always pose challenges to the application of laws that could not have contemplated their arrival. This is especially true in intellectual property; in patent law, technology is the very subject matter in question, and in copyright law it has proved—from the printing press to the internet—integral to the monopolies it vests. Copyright’s goal of protecting creative expression in works of authorship has always been an exclusive right to reproduce these works. In this Article, I have traced the progression of the reproduction right from its early roots to the present. While it has been extended to more types of works, as well as supplemented with additional rights, the fundamental criterion of what it means to reproduce a work has never been redefined.

The central standard for judging reproduction under copyright law was crystallized almost a century ago by a unanimous Supreme Court

174. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908). Interestingly, this case is from the same year as *White-Smith*—with its opinion also written by Justice Day. He says the law protects the right to “multiply and sell” works, and that the right to vend was conceived to “make [the] right of multiplication effectual.” This seems to indicate that the distribution right was originally driven by the reproduction right—both of which were fundamentally about quantity-control, not content-control. I suspect this should strengthen a rationale for employing a functional equivalence approach to modern digital first-sale analyses. Of course, it would have to be resolved whether mere quantity-control—i.e., negating the effect of a multiplicative act—would thus be legally tantamount to non-multiplication.

opinion;¹⁷⁵ it hinged upon the notion of suitability for like purposes (substitutability). Congress soon revamped the system, reaffirming the classic exclusive rights dating back to 1790 (print, reprint, publish, and vend) in the first section of the 1909 Act, stringing within it the term “copy” with no new definition. (Congress then detailed new rights in subsequent sections.) The next overhaul came with the current 1976 Act, providing in section 106(1) a continued right “to reproduce the copyrighted work in copies . . .” No statute has ever defined the activity of reproduction (v.) and copying, but its product “copies” was defined with direct reference to original works—which themselves get defined into existence in terms of their initial fixation (not abstract conception). Then in 1980, the Act was amended to help deal with software (per the CONTU report) in some ways that caused considerable confusion and controversy over subject-matter eligibility, but even so, nothing was done that could be said to have expanded the qualitative scope of the reproduction right.

Looking to the DMCA of 1998, this ad-hoc patchwork legislation was likely prompted by fears sparked from *MAI* (and the trend it foreshadowed), and the prospect of hindering internet service, computer repair, and other technologies. This law is best understood as a legislative insurance policy designed to inoculate specific activities from the consequences of a judicially-expanding reproduction right.¹⁷⁶ This is evident from the narrowly-tailored language of the safe-harbor provisions, bolstered by consistent legislative history, and confirmed by the internal inconsistencies of arguments purporting to invoke legislative intent to support a negative inference of “default” liability. No policy was set by Congress other than to secure a margin of safety for a particular class of prospective defendants. This neither affirms nor rejects the deviant case law that placed said defendants in such jeopardy in the first place; sidestepping controversial precedent is not tantamount to ratifying it. As I have argued, it would be counterfactual to construe every statutory safe-harbor provision or clarifying exemption as an implicit declaration of presumed liability.

Therefore, the exclusive reproduction right should still be analyzed according to the historical meaning outlined in Parts II and III. As of now, the standard still turns on duplication and multiplication and arguably even purposeful direction (intent) towards that end. Not the 1976 Act, nor its

175. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

176. I avoid discussing the policy merits (e.g. how much ISP-liability is “best”)—sticking here to matters of analytical interpretation. If anything, though, strict adherence to the boundaries of the exclusive rights makes it easier to defend them more absolutely—without need for many exceptions.

1980 amendments, nor the 1998 legislation broadens in substance this traditional definition.¹⁷⁷

Many courts thus far to confront digital reproduction seem to accept (with astonishingly little challenge) that even facilitative, instrumental data replication is within the reproduction right. Even most defenses offered (as in *MAI*) erroneously concede that as long as substantial expressive content from a work gets taken and minimally fixed, that a statutory “copy” (n.) is in fact made—leaving themselves only such recourses as fair use, copyright misuse, or some altruistic appeal to the statute’s supposed higher purposes. Applying the interpretive approach of statutory originalism to the copyright law calls for a prompt reinstatement of the only meaning for reproduce ever enacted—that first articulated in *White-Smith* and perpetuated ever since. The terms of federal intellectual property bargains should not be recast outside of the democratic lawmaking process, and there is copyright precedent for correcting a longstanding misallocation of rights. Perhaps a paradigm rooted primarily in the notion of discrete physical embodiments of expressive works of authorship is antiquated today, but it remains our system, for better or for worse. Unless and until Congress acts affirmatively to alter the fundamental right to multiply one’s creation, the theory of *MAI* should be repudiated, and “to reproduce . . . in copies” should be restored to its original meaning: multiplying or substituting the creative purpose(s) of an original work of authorship, in light of the ultimate sensory experiences for which the author’s object—the first copy—was initially fixed.

177. This is why, for example, I do not focus principally on the question of “permanence” versus “transience,” for that is but one possible way to demonstrate nonmultiplicity. The substitutability standard is therefore adaptable to changing technology (it only cares about actual electron behavior to whatever extent necessary to draw a comparison of respective purposes in the particular case at hand).

