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THE PUBLIC DISPLAY OF DIGITAL LIBRARY COLLECTIONS

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This Article evaluates the scope of the public display right in the context of digital library collections, and suggests an interpretation of the right that tries to make sense of the practical concerns that its drafters expressed when creating it. In short, the Article focuses on the sometimes-forgotten but important fact that the unauthorized display of copyrighted works is only an infringement of the copyright owner's exclusive right if the work is displayed to "the public." The Copyright Act nowhere defines the term "the public," but viewed in light of its legislative history and interpretive guidance from the courts, this Article argues that the "public" part of "public display" can be read as meaning "the public market for copies" of the work. When a display does not impact the traditional public market for copies of the work—i.e., when one exploits copies at a level of use consistent with traditional uses like library lending, for example—there is no public display and therefore no infringement of the public display right.

I. INTRODUCTION

Digital copies of millions of copyrighted books lie virtually untouched somewhere on Google's servers.[1] A related collection of under-exploited content rests in the digital collection of the HathiTrust.[2] Similarly, vast stores of cultural and scientific

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[1] *See* Joab Jackson, *Google: 129 Million Different Books Have Been Published*, PCWORLD (Aug. 6, 2010, 1:20 PM), http://www.pcworld.com/article/202803/google_129_million_different_books_have_been_published.html ("As of June, the company has scanned 12 million books.").

[2] *See Statistics Information*, HATHITRUST, http://www.hathitrust.org/statistics_info (last visited Dec. 5, 2011) (listing 9.8 million currently digitized volumes, but only 2.6 million public domain works that are currently available for full

content—both print and born digital materials—remain effectively unread because readers cannot view them online, outside of the libraries and archives that hold them. Many have asked why this vast store of cultural material, which can be freely checked out in physical formats from many libraries around the world, must remain inaccessible in the digital form. This Article seeks to address this digital access incongruity by explaining how copyright law has facilitated limited library lending in the past and how it may continue to do so in the future, at least where the application of the public display right is at issue.

This Article argues that, so far as the public display right is concerned, unauthorized but limited display of digital copies of copyrighted works is not an infringement of the copyright owner's exclusive rights because such a display is not to the "public." Viewed in light of the legislative history and interpretive guidance from the courts, this Article argues that the "public" part of "public display" can be read as meaning "the public market for copies" of the work. When a display does not impact the traditional market for copies of the work—i.e., when one exploits copies at a level of use consistent with traditional uses like library lending, for example—there is no public display and therefore no infringement.

It is important to state from the beginning that this construction of the public display right does not overcome all of the hurdles that impede digital lending. While understanding the public display right is important for addressing the access puzzle, it is only one part. Other rights, such as reproduction and distribution, stand as more immediate hurdles to full digital library access. Nevertheless, public display remains as a right of importance to future applications and one that, this Article argues, can be entirely consistent with pre-digital uses.

Why are so many collections of works largely unavailable for online viewing? The short answer is that many of these works are not available online because their owners, when they can be

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viewing). Both the Google and HathiTrust collections grant limited access for uses such as text-mining, search, and snippet views. *Id.*

found,[3] have not authorized online viewing, and because those who wish to make them available (namely, digital libraries) feel that they are not permitted to do so because copyright law restricts such unauthorized access.[4] But the law does not grant blanket control to

[3] Many works in these collections are thought to be "orphan works" (i.e., works whose owners cannot be located), which are problematic because even if users seek permission from owners, none can be obtained. Maria A. Pallante, *Orphan Works and Mass Digitization: Obstacles and Opportunities*, 27 BERKELEY TECH. L.J. (forthcoming 2012); *see* JOHN P. WILKIN, COUNCIL ON LIBRARY AND INFO. RES., BIBLIOGRAPHIC INDETERMINACY AND THE SCALE OF PROBLEMS AND OPPORTUNITIES OF "RIGHTS" IN DIGITAL COLLECTION BUILDING (2011), *available at* http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html /wilkin.pdf (estimating that up to fifty percent of the in-copyright holdings of the HathiTrust should be considered orphan works); *see generally* DAVID R. HANSEN, BERKLEY DIGITAL LIBRARY COPYRIGHT PROJECT, WHITE PAPER NO. 2, ORPHAN WORKS: MAPPING THE POSSIBLE SOLUTION SPACES (2012), *available at* http://ssrn.com/abstract=2019121 (reviewing the most recent proposals to address the orphan works problem).

[4] This rather blunt formulation of the problem has a reciprocally (and dangerously) blunt solution: Simply convert unauthorized access into authorized access. This happens regularly; users (and the libraries and archives that act on their behalf) seek out and pay for licenses that permit online use. For large scale access, research libraries do so by expending massive amounts on "big deal" licensing packages. But even on a large scale, licensing for digital access is not a complete solution because it ignores the situation where licensors cannot be found, are difficult to negotiate with, or may not understand or even respond to the request for use. This problem is broadly considered to cover so-called "orphan works" whose owners cannot be located, but also other works that are similarly difficult to license. *See generally* DAVID R. HANSEN, BERKLEY DIGITAL LIBRARY COPYRIGHT PROJECT, WHITE PAPER NO. 1, ORPHAN WORKS: DEFINITIONAL ISSUES (2011), *available at* http://ssrn.com/abstract=197 4614.

Furthermore, while publishers of the core collection of library holdings are sometimes willing and able to license access to their works, libraries and archives collect and preserve many unique—and for preservation purposes, arguably more important—sets of materials whose copyrights are held by less sophisticated parties. Finally, by licensing, libraries also abdicate a central part of their charge—to curate and preserve the cultural and scientific record. When a library licenses for mere access (but not ownership) of a work, the burden of preservation shifts from the holding library to commercial publishers whose incentive to preserve may only last as long as the work retains commercial viability. Without owning a copy of the work at issue, a library or archive cannot ensure complete preservation of that item for the future.

copyright owners. This has long been a feature of the Copyright Act's structure of rights and limitations:

> The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead . . . the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated . . . he does not infringe.[5]

While it is true that the exclusive rights are broad, they are not boundless. So, the more complete answer is that access to these works should be restricted only if access runs afoul of one of the six exclusive rights circumscribed in section 106 of the 1976 Copyright Act[6] ("Copyright Act" or "Act") or the use does not fall within one of the several limitations on those rights as codified in sections 107–122 of the Act.[7]

This is a basic point, but one worth making when considering the ways in which digital collections of copyrighted works might be made viewable online. It is through these specific exclusive rights and the yet more specific limitations on those rights that Congress created a "balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."[8] The specific rights and limitations underlying this balance also enable the core economic fiction that copyright relies upon: the making of inherently non-rivalrous intellectual goods into rivalrous ones through the grant of a "limited monopoly"[9] so that authors may obtain a return on their creative investment in the marketplace.[10]

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[5] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393–95 (1968); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 (1984) ("Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.").

[6] 17 U.S.C. § 106 (2006).

[7] *Id.* §§ 107–122.

[8] Stewart v. Abend, 495 U.S. 207, 228 (1990).

[9] *Sony Corp.*, 464 U.S. at 429; *see also* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP.

It is also through these specific rights and exceptions that digital collections have, in some ways, been left out in the cold. In the digital context, a familiar set of exclusive rights has continued to meet the interests of rightsholders by maintaining the exclusivity of their works.[11] But limitations on those exclusive rights—statutory exceptions worded to protect specific and narrow uses—are often unable to provide balance in the face of technological change.[12] It is true enough that those exceptions may, under the correct circumstances, enable some access to digital collections, and the breadth of those exceptions should be fully explored.

But access that is reliant on exceptions alone comes at a cost. Practically speaking, digital access that is reliant on exceptions to the exclusive rights is costly because exceptions are raised as

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PROBS. 33, 42 (2003) (describing the perceived necessity of more refined legal rules to deal with the increasingly non-rivalrous nature of intellectual goods in an age where copying is almost completely costless). The "public good" rationale for the limited monopoly is a basic theory underlying intellectual property rights in general. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13 (2003); David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 97–100 (2010) (reviewing the idea of intellectual output as a "public good").

[10] In many cases, the return may not be directly to authors but to secondary content owners (e.g., publishers). This is so despite, in the words of former Register of Copyrights Barbara Ringer, the modern Copyright Act's "break with the two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author." Letter from Marybeth Peters, Register of Copyrights, U.S. Office of Copyrights, to James McGovern, Congressman (Feb. 14, 2011), *reprinted in* 147 CONG. REC. E182 (2001) (quoting Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 490 (1977)).

[11] Most notably, the rights of reproduction and distribution. *See* 17 U.S.C. § 106(1)–(3).

[12] Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing That Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29, 32 (2008). ("Copyright law has always sought to strike a balance between protecting the interests of authors and providing access to these works by the public. To this goal, our copyright laws have accorded to public libraries certain exemptions to the exclusive rights provided to copyright owners in section 106 of the Copyright Act." (footnote omitted)).

affirmative defenses;[13] in the event of actual litigation, this necessitates more probing and costly legal proceedings to prove their application. These exceptions are also specific to certain rights; requiring these exceptions to distort themselves to meet challenges they were never meant to address may also be costly in terms of unintended and inconsistent application with respect to their specific purposes.[14] More importantly though, continued reliance on exceptions alone runs the risk of leaving behind an idea embedded in the structure of the Copyright Act, that the exclusive rights carefully demarcated in section 106 grant owners broad, but not boundless, control over copyrighted works.

Thus, this Article examines the breadth of one particular exclusive right—public display—and how it applies in the context of digital collections of copyrighted works. The Article does so with specific regard to the vast stores of cultural and scientific materials in our nation's libraries, archives, and museums. Though public display is probably one of the least understood of the six exclusive rights,[15] its importance for digital collections is thus far

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[13] *See generally* CRAIG JOYCE ET AL., COPYRIGHT LAW 436–37 (7th ed. 2006) (reviewing the structure of the Act and the general orientation of the limitations as affirmative defenses raised in response to a claim of infringement).

[14] The obvious exception to this very general statement is fair use, which is described as an " 'equitable rule of reason,' which 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.' " Stewart v. Abend, 495 U.S. 207, 236 (1990) (citations omitted). Fair use, however, has come to be more defined and itself has logical limits. *See generally* Jason Schultz & Aaron Perzanowski, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. (forthcoming 2012) (describing the challenges of using the fair use exception to justify a wide variety of personal uses because of, for example, judicially developed limitations on the right beyond applications that are easily identified as "transformative"); Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537 (2009) (describing specific "policy-relevant clusters" to which fair use can be seen consistently applied).

[15] *See, e.g.*, R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. ILL. L. REV. 83, 102–03 (2001). As explained below, *infra* Part III, since the inception of the public display right in the 1976 Act, it has been seldom interpreted by the courts.

understated. The right was only first created in the 1976 Copyright Act, and although its application to the digital environment was envisioned even at the time of enactment, it has remained seldom relied upon alone because other rights—in particular, reproduction and distribution—have accomplished much of what it was designed to do. When public display is raised in litigation, it is often in the context of other rights and the markets that those rights have created. This is consistent with the purpose for which the public display right was created, and represents an interpretive stance that might inform unresolved questions about how public display applies in the digital realm.

Part II provides a brief introduction to the public display right and its history. Part III of this Article reviews how the public display right interacts with the other exclusive rights and how, when asserted, it is often done so in conjunction with other rights. Part IV outlines an interpretation of "public display" that focuses on the public market for copies of the work, an approach that would allow digital copies of works to be treated similarly to physical copies. Finally, Part V outlines what this interpretation of the public display right means for digital lending of library and archive collections.

II. UNDERSTANDING PUBLIC DISPLAY

Before exploring the ways that public display has been used and how it should be interpreted, it is important to understand exactly how the statute defines the public display right and why it was created. Given that the right is so seldom discussed in the literature or in case law, this Part reviews in some detail the statutory structure of the right and the legislative history related to its creation.

A. *Statutory Text*

Public display is among the six exclusive rights that section 106 grants copyright owners.[16] It provides that the copyright control extends "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."[17] "Display" is defined as "to show a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."[18] The elements of display—"to show" and "a copy"—are so basic and inclusive that many copyrighted works are always the subject of a display—a library book carousel or a picture hanging on the wall are good examples—and "to show a copy" could cover virtually any situation where a creative work sees the light of day. So, the right is qualified by the term "publicly."[19]

"To perform or display a work 'publicly' " is itself defined in the Act to cover two situations:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
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> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[20]

Clause (1) captures direct displays and clause (2) captures displays through a transmission. Direct public displays are defined by the location in which they are made; they can be either in a place

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[16] 17 U.S.C. § 106(5). The other rights are reproduction, preparation of derivative works, distribution, performance, and public performance of sound recogdings by means of a digital audio transmission. *Id.* § 106(1)–(4), (6).

[17] *Id.* § 106(5).

[18] *Id.* § 101.

[19] *Id.*

[20] *Id.* This definition of "publicly" is shared by both public performance and public display. *Id.* How the two differ is discussed *infra* Part III.

"open to the public" or in a semi-public place where a substantial number of persons gather together.[21] The semi-public part of clause (1) was apparently intended to expand the reach of the right beyond places open to the public, to also include performance or display in places "such as clubs, lodges, factories, summer camps, and schools."[22] Direct public displays are so familiar that they almost go unnoticed: Billboards, books on the shelf of a bookstore, or posters hanging on the wall of a restaurant are all valid examples.

Because of fears that the public display right would reach so broadly as to capture many accepted, everyday exhibitions of copyrighted works, Congress also created a specific "first sale" exception for direct display of works lawfully made under the Act.[23] Section 109(c) provides that:

> Notwithstanding the [public display] provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.[24]

Ultimately, the exception in section 109(c) undoes much of what clause (1) in the definition above accomplishes. Section 109(c) excludes essentially all non-transmitted public displays except for

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[21] *Id.*

[22] H.R. REP. NO. 94-1476, at 64 (1976). This phraseology was intended to counteract the decisions in *Metro-Goldwyn-Mayer Distribution Corp. v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932), which held performances in these semi-public places to be outside the scope of the performance right under the prior Copyright Act. *Id.*

[23] *See* 17 U.S.C. § 109. Other specific exceptions to the public display right (and public performance) are found in section 110 of the Act. *See id.* § 110.

[24] *Id.* § 109(c). "The concept of 'the place where the copy is located' is generally intended to refer to refer to a situation in which the viewers are present in the same physical surroundings as the copy, even though they cannot see the copy directly." H.R. REP. 94-1476, at 80. Also note that despite this limitation, "[a]s in cases arising under section 109, this does not mean that contractual restrictions on display between a buyer and seller would be unenforceable as a matter of contract law." *Id.* at 79. Leaving open contractual restrictions raises questions about the applicability of the exception to licensed library collections.

displays of works not made lawfully under the Act,[25] or projections that are of more than one image at a time.[26] Direct display of a forged painting would violate the display right, as would multiple simultaneous projections of a lawful copy to many people, even if in one place.[27] Outside of those situations, clause (1) is generally left to cover only public performances, which are not subject to the section 109(c) limitation.[28]

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[25] 17 U.S.C. § 109(c). The meaning of the term "lawfully made under this title" is not entirely clear in the context of § 109, particularly for what "under this title" means. *Id.*; *see* John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 222 (2d Cir. 2011) ("[W]e hold that the phrase 'lawfully made under this Title' in § 109(a) refers specifically and exclusively to copies that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works.").

For libraries and museums this undetermined meaning is troubling because it could mean that many ordinary direct displays are not permissible if the work was produced overseas. For example, a Picasso "manufactured" in France or Spain may not be permitted to be publicly displayed, even directly, in the United States under this reading of section 109's "lawfully made under this title" clause. It is relatively clear, however, that if a work is made in direct violation of a provision of the Act, it is not lawfully made. *See e.g.*, Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 51–52 (1st Cir. 2010) (holding that if display of work was in violation of moral rights granted under the Visual Artists Rights Act—also part of Title 17, protecting artists' moral interests in their works—the public display of that work would not be "lawful" for purposes of section 109(c)).

[26] 17 U.S.C. § 109(c). The 1966 House Report explains (under the language at the time):

> [T]he exemption would extend only to public displays that are made 'either directly or by the projection of no more than one image at a time.' . . . For example, where each person in a lecture hall has his own viewing apparatus in front of him, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

H.R. REP. NO. 89-2237, at 68 (1966).

[27] This distinction relates to the overall theme of the public display right as supporting markets established by other rights. *See* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.11.2 (3d ed. 2011) ("The single-image limitation recognizes that to permit users to display more than one image of the same work simultaneously could supplant the market for copies.").

[28] Commentators have suggested that performances were not similarly excepted in section 109(c) because there is a difference in the type of market for

For the purposes of displaying digital collections, the second clause of the definition is most pertinent. It provides that public display also means "to transmit or otherwise communicate" a display to either a place specified in clause (1), or to the public,[29] regardless of the place of reception. Clause (2) is expansive in that it applies to displays to the public through any technological means, regardless of whether individual members of the public are capable of actually receiving the display in the same place or in separate places and at the same time or at different times.[30] The term "transmit" is likewise defined broadly in the statute with respect to performance or display to mean "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[31] Although not commonplace at the time of the Act's passage, public displays via transmission are now fairly common. Think, for example, of the electronic billboards in Times Square: Each displays a transmission of an image of a work that is located somewhere else (likely stored on a remote server) to a place open to the public.

The application of the public display right to copies of works shown over digital networks is fairly obvious, and has already been

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each; performance of works protected by the public performance right (e.g., movies or songs) have a significant in-person market, but public display of art work, for example, is much less significant. *See* Reese, *supra* note 15, at 92. Professor Goldstein has asserted that the same market distinction should matter in the context of considering what is "public" for purposes of display or performance. *See* GOLDSTEIN, *supra* note 27, § 7.10. This distinction is discussed in more detail *infra* Part IV.

[29] 17 U.S.C. § 101.

[30] *Id.* The 1976 House Report explains:

> Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service.

H.R. REP. NO. 94-1476, at 64–65 (1976).

[31] 17 U.S.C. § 101.

tested in the online environment in a number of cases.[32] Indeed, in a thorough exposition of the public display right, Professor Anthony Reese describes the creation of the right as "a remarkable act of foresight" on the part of Congress and the Copyright Office to anticipate digital networked communications that would enable useful display of copyrighted works in ways that do not require making a new copy.[33] Examples are of the kind we are used to seeing every day—for example, the showing of a copy of an image on the open web to anyone who happens upon it would seem to be uncontroversially labeled a transmission to the public, and has in fact been held to be a public display (although ultimately fair use) in *Perfect 10 v. Amazon.com, Inc.*[34] Closer to the library and educational context, displaying online educational materials to students in an open assembly might also qualify as display via transmission to the public.

Considering the section 109(c) exception and the two-clause definition of "publicly," one can piece together that public display applies, in the context of a digital transmission, to a location where many people are permitted to view the work—either a place open to the public or a semi-public place where more than family or friends can see the display[35]—or simply to "the public," which is qualified to include displays even where members of the public can receive the transmission at different places or different times.[36] For

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[32] *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007) (holding that the open and online display of copies of images held on defendant's servers was prima facie infringement of plaintiff's public display right, but that in-line "framing" of images hosted elsewhere was not a public display); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp.2d 321, 332 (D.N.J. 2002), *aff'd*, 342 F.3d 191 (3d Cir. 2003) ("[P]roviding clip previews online constitutes a 'public display' that violates the copyright owner's exclusive right 'to display the copyrighted work publicly.' "); *see also* Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002), *aff'd in part, rev'd in part*, 336 F.3d 811 (9th Cir. 2003) (initially holding that the linking and framing of Kelly's photographs on Arriba Soft's website infringed Kelly's public display right, but later vacating that holding because the issue was not raised below).

[33] Reese, *supra* note 15, at 84.

[34] 508 F.3d 1146, 1160 (9th Cir. 2007).

[35] 17 U.S.C. § 101.

[36] *Id.*

digital transmissions of library holdings (for example, the transmission of an image of a page of a book to a user's laptop) focusing on the location where the display is made would be inapposite in most cases, since the location could be almost anywhere, including the privacy of the user's own bedroom or in the corner of a coffee shop. Without knowing the precise location, the display must be examined as to whether it was made to the public under the second part of clause (2). This is where the difficulty arises. Many of the terms in clause (2)—including "transmit" and "display"—are explicitly defined in the Act and give some outline of the breadth of the right.[37] Others (most importantly, "the public") are not.

B. *Legislative History*

To begin to understand what the right of public display is meant to address, it is instructive to look to the legislative history. Reliance on legislative history always comes with caveats, however.[38] For the Copyright Act, the most recent revision process was sixteen years long and spanned the tenure of three Registers of Copyright, four Presidents, and scores of Representatives and Senators.[39] The revision process also included input from a unique mix of industry and special interest groups.[40] As a result, at least one Supreme Court Justice has referred to this tangled history as

[37] *Id.*

[38] For a complete documentation of the revision process, see OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman, ed., 1981). A concise overview of the lengthy revision process is available in Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 305–42 (1989); *see also* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987). For an excellent and detailed review of the legislative history of the public display right in particular, see Reese, *supra* note 15, at 92–102. This Article benefits tremendously from Professor Reese's work in collecting and discussing legislative history related to the creation of the public display right.

[39] *See generally* Litman, *Copyright, Compromise, and Legislative History*, *supra* note 38.

[40] *Id.*

"notoriously impenetrable."[41] From the history standing alone, it is difficult to draw conclusions about specific interpretations of the public display right that finally emerged in the 1976 Act.[42] Nevertheless, the rather complete documentation does lend some hints about the general problem with which Congress and the Copyright Office were concerned as they slowly developed the right into its final form.

By the time Congress created the public display right in 1976,[43] it had reviewed several possible variations of the right over the nearly two-decade-long revision process. The first iteration extended only to a copyright owner's right to exhibit pictorial, graphic, and sculptural works, and that limited right was further narrowed by a provision that specifically ended the right after a first sale of the work.[44] As Professor Reese explains, these limitations meant that the owner of the copyright would effectively

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[41] Tasini v. N.Y. Times Co., 972 F. Supp. 804, 812 (S.D.N.Y. 1997), *rev'd sub nom*. Tasini v. N.Y. Times Co., Inc., 206 F.3d 161 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001) (statement of then-Judge Sotomayor).

[42] Indeed, the text of the public display right or related definitions changed dozens of times over the revision process. One must be cautious when using such scattered history for a particular interpretation. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 851–61 (1992) (describing the appropriate use of legislative history, in conjunction with other tools in cases of, among others, specialized legislative meaning, to identify a reasonable purpose, and choosing among reasonable interpretations of a politically controversial statute). Justice Breyer goes on to note that in cases of vague or conflicting history—which is often present in the 1976 Act documentation—one legitimate option remains: "[D]o not use it. No one claims that legislative history is *always* useful; only that it *sometimes* helps." *Id*. at 862 (internal quotation marks omitted).

[43] *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 (2006)).

[44] STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 6 (Comm. Print 1964) [hereinafter 1964 PRELIMINARY DRAFT] ("Copyright in pictorial, graphic, and sculptural works shall include the exclusive right to exhibit copies by broadcasting or retransmission . . . . [T]his right shall end with respect to a particular copy as soon as its first sale or other transfer of ownership has taken place.").

have received a right analogous to the common-law literary right of first publication; as with that right, the public exhibition right contemplated at this stage would have ceased upon the first lawful transfer of the work.[45]

The several built-in limitations on the right—specifically, its application to only visual materials and its effective termination upon transfer of the work—were quickly loosened in subsequent versions. The Copyright Office in its 1965 Supplementary Report explained that though display of visual works was its initial concern when it suggested the exhibition right, it recognized that written works (such as "books, articles, the text of the dialogue and stage directions of a play or pantomime") might also be widely disseminated through public displays, and so require similar protections.[46]

By the time of the 1965 revised version, which broadened the scope beyond visual materials and provided that the right should survive the first sale, public display was discussed primarily in relation to the scope of protection under other rights and their continued usefulness in maintaining the copyright owner's monopoly privileges for the purpose of extracting economic value from their works. Thus, the Copyright Office report explained that:

> [W]e have become increasingly aware of the enormous potential importance of showing, rather than distributing, copies as a means of disseminating an author's work. . . . Equally if not more significant for the future are the implications of information storage and retrieval devices; when linked together by communications satellites or other means, these could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images. It is not inconceivable that, in certain areas at least, "exhibition" may take over from "reproduction" of "copies" as the means of presenting authors' works to the public.[47]

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[45] Reese, *supra* note 15, at 95.

[46] STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL at 20 (Comm. Print 1965) [hereinafter 1965 SUPPLEMENTARY REPORT].

[47] *Id.*

Although the digital networked communications were not yet widespread, there was significant fear that their development would hinder existing markets for reproductions. The concern about the impact of public displays on the continued scope of protection provided by other rights is repeated throughout the legislative history. The House Report for the final 1976 Act explains a similar concern in the context of the section 109(c) exception for non-transmitted public displays:[48]

> The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to *place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected*. . . . [P]rojection of more than one image at a time, or transmission of an image to the public over television or other communication channels, would be an infringement for the same reasons that reproduction in copies would be.[49]

This concern went so far that book publishers, anxious about diminishing markets for copies of their works, proposed what amounted to a merger of the rights; the proposal suggested that, in essence, where a display was made in lieu of a copy, the display should be treated as a reproduction.[50] The House Judiciary Committee rejected the proposal, flatly stating that it wished to maintain reproduction and public display as conceptually distinct (though failing to explain why).[51] To address the concerns of the publishers, however, the Committee further reduced the scope of the then-proposed section 109 first-sale limitation, leaving out simultaneous projections of the same image, even to viewers located in the same place as the copy of the work.[52] The example used by the Committee to justify this limitation—preventing

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[48] Following the Register's 1965 Supplementary Report, the right was changed from one of public exhibition to public display because of concern for distinguishing "the well-established use of the word 'exhibit' in the motion picture industry to refer to the performance of a motion picture," from the term "exhibit" as used in the draft revision bills. H.R. REP. NO. 89-2237, at 56 (1966); 1965 SUPPLEMENTARY REPORT, *supra* note 46, at 23.

[49] H.R. REP. NO. 94-1476, at 80 (1976) (emphasis added).

[50] H.R. REP. NO. 89-2237, at 55.

[51] *Id.* at 56.

[52] *Id.* at 56, 67–68.

multiple, simultaneous displays of the same copy to individual viewing devices in a lecture hall—seems clearly tied to the reproduction market for textbooks.[53] But whatever the precise market in mind, the Committee again cited its desire to place reasonable restrictions on display so that the copyright owner's market for reproduction and distribution would not be affected.[54] At the same time the report continued to emphasize that "[n]o provision of the bill would make a purely private display of a work a copyright infringement."[55]

In explaining particular applications of the right, the legislative history also evidences these same concerns. Former Register Abraham Kaminstein, for example, gives his thoughts on what the right should cover in this 1965 Hearings testimony:

> [D]isplay[ing] the work temporarily on a . . . screen . . . would be an infringement only if the image of the work is transmitted beyond the location of the computer in which the copy is stored; I do not believe that the transitory image of a copyrighted work, taken from an authorized reproduction stored in a computer and consulted at the computer site, should be treated as different from the consultation of a book in a library.[56]

Although this is an early view of the right, Register Kaminstein recognized that reproduction and transmitted displays are tied together, while also acknowledging that the traditional limitations on copyright owners' control—for example, allowing patrons to view a book in the library—should at least be so acknowledged in the digital realm.[57]

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[53] *Id.* at 68.

[54] *Id.*

[55] *Id.* at 56.

[56] *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before Subcomm. No. 3 of the Comm. on the Judiciary, Part 3*, 89th Cong. 1861 (1966) (statement of Abraham Kaminstein, Register of Copyrights).

[57] While Register Kaminstein seemingly takes a broad and location-centered view of public display in the first part of his statement, it should be tempered by the realization that this statement was made partly in the context of a discussion about a potential limitation on the reproduction right to enable unauthorized storage in a data processing machines; Register Kaminstein's position was that such an exception was unnecessary and would hurt copyright owners' markets.

In these and other instances, public display is cast in the legislative history as a right needed to ensure the support of markets established by other rights. Indeed, as discussed in the next Part of this Article, public display is often relied upon for this purpose, supporting markets created by reproduction, distribution, or performance.

III. PUBLIC DISPLAY AND THE OTHER EXCLUSIVE RIGHTS

Given the supporting role that public display was—at least in part—created to play, it makes sense to consider how it has worked in conjunction with other rights. The Part below outlines how public display relates to the rights of public performance, reproduction, and distribution. Because public display is so little discussed in legal disputes or legal policy documents, the conclusions below are necessarily inferred from an uncomfortably thin record of case law, but are nonetheless instructive to illustrate the supporting role that this right has thus far played.

A. *Public Display and its Relation to Public Performance*

One of the more confusing aspects of the public display right is its relation to the right of public performance. The performance right is codified in section 106(4); public display is in section 106(5). "Perform" is defined to mean "to recite, render, play, dance, or act [a work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[58] Recall that display requires showing a copy of a work, either directly or by means of a device such as on a film, slide, or television image.[59]

The two rights share some common elements. The most notable is that both share a common definition of the term "publicly," the details of which are discussed above. Public

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Similarly, a broad exception for public display would also hurt those same markets. *Id.*

[58] 17 U.S.C. § 101 (2006).

[59] *Id.*

performance and public display are also treated similarly in many of the specific exceptions. Some of the specific exceptions enumerated in section 110 of the Act (for nonprofit performances) apply to public displays as well,[60] as do a few other particular exceptions and limitations.[61] Indeed, in the revision process of the section 110 exceptions, initiated in the late 1990's to expand coverage for online educational purposes, the two were almost always discussed as a group both by the Copyright Office[62] and in committee reports from both houses of Congress.[63]

The most obvious distinction between the two rights is linguistic. One can hardly perform a picture, nor does one ordinarily display a song.[64] This is borne out in types of works covered by each right. The right to public performance covers "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works,"[65] and in a more limited way, to sound recordings performed "by means of a digital audio transmission."[66] Public display applies to those same works (except sound recordings), but also reaches to "pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work."[67]

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[60] *See id.* § 110(1)–(3), (5) (enumerating exceptions for face-to-face teaching, educational transmission, religious services, and performance or display on a device ordinarily used in private homes).

[61] *See id.* § 111(c) (addressing cable transmissions); *id.* § 112 (addressing ephemeral recordings); *id.* § 118 (addressing noncommercial broadcasting); *id.* § 119(a) (addressing satellite transmissions); *id.* § 122 (addressing local retransmissions).

[62] REGISTER OF COPYRIGHTS, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION *passim* (1999), *available at* http://copyright.gov/reports/de_rprt.pdf.

[63] *See id.*; S. REP. NO. 107-31, at 8–11 (2001); H.R. REP. No. 107-687 *passim* (2002).

[64] *See, e.g.*, 1965 SUPPLEMENTARY REPORT, *supra* note 46, at 21 ("[T]he bill regards the showing of motion pictures as a 'performance' rather than an 'exhibition,' and an exhibition right would, of course, be inapposite with respect to sound recordings which are purely aural in nature.").

[65] 17 U.S.C. § 106(4).

[66] *Id.* § 106(6).

[67] *Id.* § 106(5).

Similarly, under the current Act, public performance does not require a copy of the work in order to perform it; one need merely "recite, render, play, dance, or act [the work], either directly" or indirectly.[68] Performance is not dependent on a copy of the work because many performances can do without the material object of a copy; an actor reciting memorized lines is an easy example. Public display, however, is difficult to imagine without the showing of some material object, either directly or indirectly through a transmission. Thus, to display a work simply means to show a copy of it in a variety of ways.[69] While this requirement may exist largely for practical reasons, it is also one that ties the public display right to the right of reproduction (copies) in a way that public performance is not.

The distinction, however, goes much deeper. To understand what the public performance right is intended to protect requires an examination of its creation. The right to "act, perform, or represent the same" in a public place was first codified in 1856.[70] This right was primarily intended to benefit playwrights and the market for in-person performance of their works.[71] That right extended only

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[68] *Id.*

[69] *Id.*

[70] An Act Supplemental to an Act entitled "An Act to Amend the Several Acts Respecting Copyright," Approved February Third, Eighteen Hundred and Thirty-One, ch. 169, 11 Stat. 138, 139 (1856) (hereinafter Public Performance Amendment of 1856); *see also* REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION, *supra* note 62, at 79, *available at* http://copyright.gov/reports/de_rprt.pdf. The 1856 Act granted to "the author or proprietor of any dramatic composition, designed or suited for public representation" the "sole right . . . to act, perform, or represent the same . . . on any stage or public place." Public Performance Amendment of 1856, *supra*, at 139. The right was apparently the culmination of over twenty years of lobbying to enact a "Dramatic Copyright" to give American authors an incentive to capture some of the market that European productions enjoyed. *See* Oren Bracha, *Commentary on the U.S. Copyright Act Amendment 1856*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), (L. Bently & M. Kretschmer eds., 2008), *available at* http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_us_1856.

[71] *See* Jessica Litman, *The Invention of the Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1402–03 (2010) (reviewing the role of playwrights in the enactment of the 1856 amendment).

to dramatic works but covered all types of performances (both for-profit and nonprofit).[72] After lobbying on the part of composers, dramatists, and even interested members of Congress themselves, the right was then expanded in 1897 to also reach public performances of musical compositions.[73] The 1909 Act further tweaked the right: While the 1909 Act continued to provide broad protection for dramatic works, it also provided that nonprofit musical performances were not covered under the right.[74] Similarly, nonprofit dramatico-musical compositions could be performed by a variety of religious and charitable organizations without prior authorization.[75] These changes were apparently uncontentious and were rarely raised in court.[76] The right was modified again in 1952 to reach for-profit performances of nondramatic literary works,[77] a change motivated in part by new technological abilities to perform these works in new forms (e.g., a book on tape or a book on record),[78] as the drafters recognized that

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[72] Public Performance Amendment of 1856, *supra* note 70, at 139; *see also* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1.2756 (Westlaw Supp. 2011). The limitation to public performances of dramatic works survived the 1871 general revision. *See* An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, ch. 230, 16 Stat. 198, 212 (1870) (providing authors and inventors the "sole liberty" of "in the case of a dramatic composition . . . publicly performing or representing it").

[73] An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes, Relating to Copyright, ch. 4, 29 Stat. 481, 481 (1897). The 1897 Act distinguished between for-profit and nonprofit uses by providing greater penalties in the case of for-profit infringements. *Id.* For a complete history of the amendment, see Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157 (2007).

[74] An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

[75] *Id.* at § 28.

[76] PATRY, *supra* note 72, § 14.4.

[77] An Act to Amend Title 17 of the United States Code Entitled "Copyrights" With Respect to Recording and Performing Rights in Literary Works, Pub. L. No. 82-575, 66 Stat. 752, 752 (1952).

[78] *Recording and Performing Rights in Certain Literary Works: Hearings on H.R. 3589 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 82nd Cong. 6 (1951) (statement of John Schulman, Authors League of America, Inc.)

"the hearing public as a market for literary work is becoming as important as the reading public."[79]

Finally, in 1976 the right was extended to both dramatic and non-dramatic works of the particular types listed in the statute. The nonprofit restriction was removed from the definition of the right itself, but parts of it were maintained in specific exceptions;[80] only certain nonprofit public performances (and public displays) were outside the coverage of the right.[81] Those include nonprofit uses generally covered by section 110 of the Act, which allows for (among other uses) face-to-face and certain online educational, religious, and nonprofit performances of nondramatic works for no commercial gain.[82]

("[T]he author, who is given exclusive, so far as putting out books is concerned, finds himself entirely without protection if someone wants to take his novel and put it on a record.").

[79] H.R. REP. NO. 82-1160, at 2 (1951).

[80] H.R. REP. NO. 94-1476, at 62–63 (1976) ("[The new statutory scheme] is more reasonable than the outright exemption of the 1909 statute. The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. *In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write.*" (emphasis added)).

[81] *Id.* at 62. This structure was thought about in the context of foreign articulations of author rights and limitation. *Id.* ("The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.")

[82] 17 U.S.C. § 110 (2006). Section 110 carves out a number of oddly-specific exceptions to the performance right (and in some cases, also display right), which tend to allow unauthorized use in cases where the potential market gain is relatively insignificant compared to the overall benefit afforded by unauthorized use. These include "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization"; performance of nondramatic musical works by government or nonprofit organization in the context of an agricultural or horticultural fair; "performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of

Just a brief review of the origins of the public performance right illustrates the variety of intended markets and authors that the right seeks to protect. The right to public performance is a far older right that protects a variety of interests, most of which are centered on markets for works in forms that enable consumers to consume the work in different and new formats (e.g., watching a novel acted out as a movie or play, or listening to a book on tape). This is distinct from public display, which, according to the legislative history, is concerned with substitutions in media (e.g., from books to display of text on a screen), but not necessarily substitutions in form. While public display is intertwined with public performance in many ways, the two remain distinct rights with distinct purposes. Similarly, public display has a complicated, and in many cases, dependent relationship with other of the exclusive rights.

B. *Relationship with Other Rights*

Traditionally, the exclusive rights of reproduction and distribution provided much of the protection that copyright owners desired. In a world of physical copies, these rights restricted the ability of a user to copy a book or to distribute those copies, and around those exclusive rights numerous exceptions developed to allow users some flexibility with physical copies. The doctrine of first sale was developed as an exception to the distribution right, allowing users to resell or lend out lawful copies of copyrighted works.[83] This exception is central to the practice of library lending

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the performance is to promote the retail sale of copies"; "performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or . . . handicapped"; performance on a single occasion of ten-year or older dramatic literary work for the blind or handicapped, performance of nondramatic literary or musical works by veterans associations if proceeds go to charity; and "the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture." *Id.* § 110(6)–(11).

[83] *Id.* § 109(a) ("Notwithstanding the provisions of section 106(3), [the distribution right,] the owner of a particular copy or phonorecord lawfully made

of print materials.[84] Likewise, the exceptions found in section 108 of the Copyright Act provide that it is not an infringement of the reproduction or distribution right for libraries to make copies of works for certain preservation and library lending purposes.[85] These and other copyright exceptions have been updated to some extent to cope with aspects of the digital world,[86] but for the most part they are still firmly grounded in a world where physical and in-person use of works is the primary concern.[87] Although digital access could certainly be seen on the horizon, this is the world that existed in 1976 when the Act was passed.

As the legislative history contemplated, the public display right has mostly been used to support markets established by other rights. Case law on public display illustrates just how bundled the right has become: Of about forty post-1978 reported decisions citing to section 106(5) (public display), only a handful discuss the right without an intertwined alleged violation of either the reproduction or distribution rights.[88] In the early days of the web,

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under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."). The doctrine was judicially recognized in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

[84] *See* Brief of Amici Curiae American Library Association, Association of College and Research, & the Association of Research Libraries in Support of Petitioner, Kirsaeng v. John Wiley & Sons, Inc., No. 11-697 (U.S. 2012), 2012 WL 2641851 (explaining importance of first sale for library lending); Kevin L. Smith, *Eyes Wide Open?*, LIBR. J. (Sept. 6, 2012), http://lj.libraryjournal.com/2012/09/opinion/peer-to-peer-review/eyes-wide-open-peer-to-peer-review/ (explaining the importance of the first-sale right to library lending and the perverse outcomes that would result if the right were restricted in various ways).

[85] 17 U.S.C. § 108.

[86] For example, section 110 was updated to allow for educational transmissions and section 117 was modified to allow copying of computer programs for certain purposes. *Id.* §§ 110(2), 117.

[87] *Id.* §§ 107–120.

[88] This is not necessarily the full corpus of public display decisions. Notable cases where public display stands alone tend to be in the physical (not digital) realm. *See, e.g.*, Mass. Museum Of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 51 (1st Cir. 2010) (denying museum's motion for summary judgment on grounds that public display of unfinished artwork might not fall

public display was not tied to acts that necessarily implicated those rights. In *Playboy Enterprises, Inc. v. Frena*,[89] for example, the court approached public display as relatively distinct from reproduction and distribution. In that case, Playboy Enterprises brought a copyright infringement suit against George Frena, operator of a bulletin board service ("BBS"), which hosted unauthorized high-resolution copies of Playboy-owned photographs that were made available for subscribers to browse, view, and download.[90] Though Playboy also alleged infringement of its distribution rights, the court discussed the online viewing of the images primarily as a matter of public display.[91] Harkening back to cases dealing with in-person displays, the court focused on the location and associational dimensions of the right that are described in clause (1) of the definition of public display.[92] The court ultimately found that the BBS was open to the public, or that it was at least available to a substantial number of persons outside of a normal family or circle of friends, and, therefore, held that the display was public for copyright purposes.[93]

The online independence of public display was quickly lost. Only a few years later in *Religious Technology Center v. Netcom*

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within the section 109(c) exception for direct display because exhibition of art in unfinished state without artists approval could violate the artists rights under the Visual Artists Rights Act, thus making the copy "not lawfully made" under the title); *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1140 (C.D. Cal. 2009) (denying preliminary injunction for infringement of display right of copyrighted cartoon characters shown in sales sheets sent to retailers because the display was not "public" and denying claim for display on display racks because of lack of substantial similarity).

[89] 839 F. Supp. 1552 (M.D. Fla. 1993).

[90] *Id.* at 1554.

[91] *Id.* at 1557–59. The court did discuss downloadable copies as implicating the distribution right, but in the context of the separate issue of copies of the works that would ultimately reside on user's computer for more than just the period of time required for the initial display. *Id.* at 1556.

[92] *Id.* at 1557.

[93] *Id.* (citing Thomas v. Pansy Ellen Products, 672 F. Supp. 237, 240 (W.D.N.C. 1987) (addressing display at a trade show); Ackee Music, Inc. v. Williams, 650 F. Supp. 653 (D. Kan. 1986) (addressing performance of copyrighted songs at private club)).

On-Line Communication Services, Inc.,[94] the shift was obvious.[95] *Netcom*, like *Playboy*, discussed the legitimacy of BBS storage and access to copyrighted content.[96] Rather than directly addressing the public display right, however, the court in *Netcom* focused first on the reproduction right, relying on *MAI Systems Corp. v. Peak Computer, Inc.*,[97] (an intervening decision by the Ninth Circuit) for the proposition that a temporary instantiation of a work stored in a computer's temporary memory constituted a copy (i.e., reproduction) under the Copyright Act.[98] The court ultimately held that user-uploaded copies (stored on Netcom systems for eleven days) were indeed reproductions, but that Netcom was not directly liable for those reproductions because there was no causal or volitional act on Netcom's part.[99] The court went on to also hold that Netcom was not directly liable for infringing the public display right by mere possession of a copy of a work that is accessible to the public, because of similar causation problems.[100]

For public display purposes, the important point from *Netcom* and similar cases is that the very same facts supporting the court's finding for reproduction also support its finding regarding the public display right. The two had become so fused together that display in the online world almost necessarily means that the reproduction right is infringed. In so doing, the precise scope of the public display right—limited most obviously by its adjectival modifier, "public"—becomes either irrelevant or presumed, as reproduction has no such limitation.

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[94] 907 F. Supp. 1361 (N.D. Cal. 1995).
[95] *Id.* at 1368.
[96] *Id.*
[97] 991 F.2d 511 (9th Cir.1993).
[98] *Netcom*, 907 F. Supp. at 1368.
[99] *Id.* at 1371. Prior to the creation of the DMCA safeharbors for internet service providers, this volitional test was a more important means of separating internet service providers from the massive liability created by their users. *See* Matthew D. Lawless, Comment, *Against Search Engine Volition*, 18 ALB. L.J. SCI. & TECH. 205, 213–26 (2008) (discussing the DMCA safeharbor, the volitional test, and its more recent applications).
[100] *Netcom*, 907 F. Supp. at 1372.

The co-dependency of these two rights is only reinforced (and further muddled) in later cases. In *Perfect 10, Inc. v. Amazon.com, Inc.*,[101] for example, the Ninth Circuit reviewed the propriety of the Google Image Search system. Perfect 10, owner of a website that hosts pictures of nude models, sued claiming that the reproductions and display of images in Google Images' search results constituted copyright infringement.[102] The Google image search system operates in two stages: First, to create its index of the images, the system crawls individual websites collecting contextual information about the site's images, and it then makes and stores (on Google-controlled servers) low-resolution thumbnail copies of the images for display in the user search results.[103] Second, when a user actually clicks on the thumbnail search result image, Google directs the user to the website where the image was originally located.[104]

Adopting what the district court referred to as the "server test," the Ninth Circuit concluded that because the statutory definition of public display requires the showing of a copy of the work, Perfect 10 had at least made a prima facie case of public display infringement on this point because Google had thumbnail copies of the images stored on its servers in the first stage and had communicated those images to users.[105] With similar reasoning, the court also concluded that the second part of the system—linking users to full-sized copies of the work held on a third-party website—did not constitute direct infringement of the display right because Google was not communicating a copy of the image that Google hosted, but rather, HTML code which directed users to the original site.[106] Addressing the objection that this approach

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[101] 508 F.3d 1146 (9th Cir. 2007).

[102] *Id.* at 1151.

[103] *Id.* at 1155–57.

[104] *Id.*

[105] *Id.* at 1160. The court ultimately held that the creation and use of these thumbnails was likely to be fair use. *Id.* at 1168.

[106] *Id.* at 1161.

collapses the public display right into the reproduction right,[107] the court offered that the section 106 rights not only overlap, but also in some circumstances, must be asserted together to make an infringement claim.[108] On the facts before it, however, the court could only so conclude by implicitly deciding that the copies made were also displayed "publicly," an issue not discussed in the opinion.

Finally, an important discussion of the union of these rights was presented in *The New York Times Co., Inc. v. Tasini*.[109] In *Tasini*, freelance authors who contributed articles to print periodicals sued when the publishers of those periodicals made the articles available electronically to subscribers of the NEXIS database.[110] The publishers claimed privilege to use the works in their new database based on section 201(c), which provides that, in the absence of an express agreement, the copyright owner of a collective work (e.g., a newspaper) has certain privileges to reproduce and distribute copies of individual contributions (e.g., news articles) as part of the collective work or any subsequent revisions of the collective work.[111]

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[107] *Id.* ("Nor does our ruling that a computer owner does not display a copy of an image when it communicates only the HTML address of the copy erroneously collapse the display right in section 106(5) into the reproduction right set forth in section 106(1). Nothing in the Copyright Act prevents the various rights protected in section 106 from overlapping. Indeed, under some circumstances, more than one right must be infringed in order for an infringement claim to arise.").

[108] *Id.*

[109] 533 U.S. 483 (2001).

[110] *Id.* at 487–88.

[111] 17 U.S.C. § 201(c) (2006) ("Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.").

The publishers asserted that they were merely asserting their privilege to make a revision of the work in a digital format.[112] The authors countered with two points: (1) Taking the articles out of their original context and allowing users to access each article individually was not a revision within the meaning of the Act,[113] and (2) the privilege extends only to reproduction and distribution; making the articles accessible to viewers through the database also implicated the public display right.[114]

The district court agreed with the publishers.[115] For the authors' second proposition—that the privilege only extended to reproduction and distribution, but not public display—the court explained that by focusing so closely on the public display right, the authors failed to understand the nuanced relationship between it and the right of reproduction.[116] Reviewing the legislative history, the court explained that it revealed a "design to extend display rights, in 'certain limited circumstances,' to the creators of collective works";[117] where reproduction and distribution were otherwise permitted, any incidental public display of the work would be permissible.[118] Ultimately, the district court was reversed, but on the grounds that using the articles in digital format was not within the section 201(c) privilege.[119]

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[112] Reply Brief For Petitioners at 2, *Tasini*, 533 U.S. 483 (2001) (No. 00-201).

[113] Respondents' Brief at 15–25, *Tasini*, 533 U.S. 483 (2001) (No. 00-201).

[114] *Id.* at 25–26.

[115] Tasini v. N.Y. Times Co., 972 F. Supp. 804, 817 (S.D.N.Y. 1997), *rev'd sub nom.* Tasini v. N.Y. Times Co., Inc., 206 F.3d 161 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001).

[116] *Id.* at 816.

[117] *Id.* at 817.

[118] *Id.*

[119] On appeal, the Second Circuit reversed, holding that the electronic copies simply did not fall within the scope of the section 201(c) privilege; it never mentioned the public display issue in its opinion. *See* Tasini v. N.Y. Times Co., Inc., 206 F.3d 161, 166 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001). The Supreme Court granted certiorari, but ultimately agreed with the Second Circuit. *Tasini*, 533 U.S. at 488. The Court specifically declined to answer the public display question. *Id.* at Appendix I (letter from Marybeth Peters, the Register of Copyrights at the U.S. Office of Copyrights, establishing her position on the U.S. Supreme Court Case, *N.Y. Times Co., Inc. v. Tasini*); *id.* at 498 n.8.

Although *Tasini* is primarily concerned with a section of the Act that has limited applicability outside of the collective works that are the subject of section 201(c), it raises important questions that relate to all of the cases discussed above about how public display operates together with reproduction. The reasoning of the district court in *Tasini* relied on the idea that "reproduction" results in "copies," which are defined to be "material objects . . . in which a work is fixed . . . and from which the work can be *perceived*."[120] Thus, the court concluded that "the right to reproduce a work, which necessarily encompasses the right to create copies of that work, presupposed that such copies might be 'perceived' " and so displayed.[121] Subsequent decisions have not squarely addressed the issue, and it remains an open question.[122]

How this reasoning might apply in other situations is difficult to determine. For example, if one is granted a right to reproduce and distribute via a license (rather than a statutory grant, as was the case in *Tasini*), does that also include the attendant right to display publicly? The logic of the district court would seem to answer that question in the affirmative. To do so, however, would seem to read the "public" part of public display out of the statute. A related question is, if the reproduction or distribution falls within a particular exception in the Act, does that also carry the public display right along with it?[123] For example, section 108(e) of the

(recognizing that it was "an issue the Register of Copyrights has argued vigorously").

[120] 17 U.S.C. § 101 (2006).

[121] *Tasini*, 972 F. Supp. at 816.

[122] *But see* Greenberg v. Nat'l Geographic Soc., 533 F.3d 1244, 1277–81 (11th Cir. 2011) (Birch, J., dissenting) (adopting, almost in totality, the Copyright Office's position on *Tasini*).

[123] The application of specific exceptions beyond the rights identified in each is doubtful, if for no other reasons than such broadening of the exceptions is contrary to the basic structure of the Act. As David Ladd, the former Register of Copyrights, noted:

> The statute sets forth these rights in broad terms, unlimited by general requirements of commerciality or profit, and then provides express and specific limitations . . . to these rights in the [16] sections that follow. The very architecture of the statute thus has compelling advantages in explicitly demarcating the legislature's balance between the rights of ownership and

Act permits libraries and archives to reproduce and distribute an entire work at a users' request if that work is not available at a fair price.[124] Section 108(e) requires that the copy produced become the property of the user and that the library prominently display a copyright warning where orders are taken and on the order forms for the copies.[125] If those requirements are met, and thus the reproduction and distribution fall within the section 108(e) exception, does the library also have the right to display the work to the user publicly?[126]

> the rights of use. By the same token, the statute avoids wholesale exceptions, such as "not-for-profit" uses, which entail too great a risk of eroding the copyright monopoly. Specific claims for additional limitations, qualifications, or exemptions thereby must be subjected to the legislative process and assessed on the whole evidence from all interests, instead of a limited litigation record among a few private parties.

David Ladd, *Home Recording and Reproduction of Protected Works*, 68 A.B.A. J. 42, 43 (1982). Thus, most exceptions within the Act are worded with particular applications or particular types of users in mind. *See, e.g.*, 17 U.S.C. § 108(b). Fair use, a generally applicable exception to all the exclusive rights, may be able to capture uses that do not precisely fall within specific exceptions but that are in line with the purpose of those sections. But even fair use has limits in terms of the uses it can cover. Furthermore, public display itself is the subject of multiple exceptions. For example, exceptions exist for specific nonprofit uses in section 110; for displays of the work "where the copy is located" in section 109(c); and for certain limited displays of useful articles for advertising or commentary in section 113(c).

If exceptions to public display were meant to also accompany the exceptions to other rights, then surely the statute would say so. Changes have been suggested to those exceptions to meet the needs of the digital world through either legislative modification or through more considerate judicial interpretation. Efforts to match those exceptions with the digital world are important, and should include consideration of the public display right.

[124] 17 U.S.C. § 108(e).

[125] *Id.*

[126] *See* PRUE ADLER, JONATHAN BAND & BRANDON BUTLER, RESOURCE PACKET ON ORPHAN WORKS: LEGAL AND POLICY ISSUES FOR RESEARCH LIBRARIES 16 (2011), *available at* http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf (replying to the argument that section 108(e) does not authorize public displays by relying on the idea that users obtain copies of the works that then reside on their home machines, which are copies but not displays). This position is supported in part by *U.S. v. Am. Soc'y of Composers,*

If the public display right described above seems muddled, it is. In litigation, public display is relied upon primarily in connection with other rights, and consequently there is very little interpretation or understanding of how it fits by itself into the overall statutory scheme of protection. Two things, however, are evident. First, public display was created with a desire to preserve markets for works that developed under the reproduction and distribution rights; the legislative history reveals that legislators were troubled that mere shift in media (contrasted with changes in the form of the work as with public performance), would displace the market for copies of the original. Secondly, the public display right is intertwined with the other exclusive rights in a way that makes it dependent on, and in some ways subservient to, their interpretation. It is also clear that public display might be important in the online environment, but it is unclear exactly how.

IV. DEFINING "PUBLIC" DISPLAY FOR DIGITAL TRANSMISSIONS

This Article asserts that public display can be self-limiting in a way that approximates the behavior that reproduction and distribution and their attendant exceptions have exhibited for physical copies of works. Such an approximation would allow for greater access to copyrighted works online, while preserving the markets for individual copies of the work that have been important economic incentives for creators. Display by itself is sweeping in application: "[T]o show a copy" is essentially all that is required.[127] The right is limited, however, by the term "publicly,"[128] and it is upon that limitation that this Article focuses.

Authors & Publishers, 627 F.3d 64 (2d Cir. 2010), which addresses the issue in the context of public performance. *Id*. at 73 ("Because the electronic download itself involves no recitation, rendering, or playing of the musical work encoded in the digital transmission, we hold that such a download is not a performance of that work, as defined by § 101.").

[127] *See supra*, Part II.

[128] The idea that public display is self-limited by the term "public" is no revelation. *See* GOLDSTEIN, *supra* note 27, § 7.11 ("Section 106(5) balances the interests of copyright owners in profiting from displays of their works against the interest of copyright users in displaying works freely in circumstances that

This Article proposes an interpretation to focus its application on the problems that Congress sought to address, while avoiding an overly broad application that would stifle the types of uses currently found permissible in the physical context.[129]

More specifically, this Article suggests that "the public" can be reasonably understood to mean the public market for the work. Thus, for purposes of public display, "the public" can be defined as "a number of people that would affect the market for individual copies." This focus fits with the general concept of rivalry that supports the markets for reproduction and distribution. Book rightsholders thrive on the reproduction right because only one person can effectively use a copy of the book at a time; more copies must be obtained if others want to simultaneously read it. Similarly, a display right that is bound by that same concept of rivalry would backstop the market for copies that it was meant to support. It would also provide a built-in mechanism by which courts can map the display right to the more fundamental, utilitarian principles of copyright.[130]

To understand what this proposed definition means, it is useful to first examine current judicial definitions of the term "the public" to see whether such a definition is reasonable given the current state of the case law. This Article concludes that it is. After such an examination, this Part concludes by demonstrating how this definition would operate within the text of the Act to enable activities like online viewing of digital collections by individual users.

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do not justify the expense of license negotiations with the copyright owner; the right's limitation to 'public' displays is an example of this balance.").

[129] In some ways, this approach presents the opposite side of the existing debate over personal use and the range of motion that individuals users are (or should be) permitted under copyright law. *See, e.g.*, Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

[130] *See, e.g.*, Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 33–38 (2010) (discussing proposals to building into the infringement analysis an analysis of whether use of the work is commercial or has a commercial effect, which would align with the underlying purpose of U.S. copyright law).

A. *Existing Definitions of "The Public"*

Recall that public performance and display are bounded by a two-clause definition of the term "publicly."[131] Clause (1) covers displays in specific locations—in places either open to the public, or to places that are semi-public because the group of people gathered in those places exceeds a normal circle of family or friends.[132] Clause (2) covers transmissions of displays to those same locations, but also covers displays that are simply to the public, whether members of the public are capable of receiving the display at the same place or different places, and at the same time or different times.[133]

Both clauses (1) and (2) rely on the phrase "the public," but the Act fails to define the term.[134] The omission was intentional, or at least acknowledged, at the time of enactment. As one astute observer noted at the 1964 hearing on the bill, "the word 'publicly' is defined by referring back again to the word 'public.' You have just transformed an adverb into a noun. . . . [T]here is no definition

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[131] 17 U.S.C. § 101 (2006). The statute states:

> To perform or display 'publicly' means—
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> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id.

[132] *Id.*

[133] *Id.*

[134] *See* Reese, *supra* note 15, at 15 (noting the absence of a definition); *see also* Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 134 (2d Cir. 2008) ("The statute itself does not expressly define the term 'performance' or the phrase 'to the public.' "). Note that beyond performance and display, the distribution right also requires a distribution be to the public for it to infringe. Cases examining the violation of that right may also be instructive, though the public aspect of that right seems to be motivated by other concerns related to actual publication of the work. *See* Hotaling v. Church of Latter-Day Saints, 118 F.3d 199, 203–04 (4th Cir. 1997); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 299 (3d Cir. 1991).

of what 'the public' is."[135] Although this term is both undefined and central to the meaning of the right, few courts have ventured to define the term even in the context of public performance, and none have stated what the term means in the context of public display.

Instead, courts addressing the issue have tended to use the clause (1) location-based approaches to defining whether the display or performance was made publicly,[136] with many courts falling back on the semi-public language in clause (1) as a justification for finding the facts before it constitute a public display or performance.[137] Some courts have ventured to examine

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[135] H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION, PART 5: 1964 REVISION BILL WITH DISCUSSION AND COMMENTS 62 (Comm. Print 1964) [hereinafter 1964 REVISION BILL DISCUSSION AND COMMENTS]. The same observer went on to explain, under the text at the time, which was similar to the enacted version, that, "[i]n clause (A) some of the curse is taken off this, because you have a disjunctive phrase stating '. . . or at any place where a substantial number of persons . . . [etc.].' But in [the transmission clause] we are right back where we started from." *Id.* As described below, courts have tended to seize upon this semi-public language as a guiding light.

[136] This location-based approach is mimicked in the Act itself. Such a focus makes sense when one considers that when most of the relevant language was enacted, the place of viewing (e.g., a movie theater, or a person's home) largely determined the size and importance of the market at issue. So, for example, the term "the public" is approached by location in many definitional sections of section 101. 17 U.S.C. § 101 ("An 'establishment' is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods . . . . A 'food service or drinking establishment' is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble . . . . The term 'motion picture exhibition facility' means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public.").

[137] For example, in *Thomas v. Pansy Ellen Prod., Inc.*, 672 F. Supp. 237 (W.D.N.C. 1987), the court was asked to determine whether the display of an unauthorized reproduction of child's toy at a manufacturers' associational trade show constituted public display. *Id.* at 240–42. Even though the trade show was open only to members of the manufacturing association, the court was quick to note that, under the semi-public language in clause (1), the trade show gathered together more than just the normal circle of family or friends. *Id.* Thus, although the semi-public language in clause (1) was included as an

the more amorphous location-based concept of "open to the public," but almost always do so in the context of the right of public performance, not display. These cases are nonetheless instructive because public performance and public display share a common definition of publicly that at least arguably means that same thing for both rights. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*,[138] for example, the Third Circuit was asked to decide whether a video rental store infringed the copyright owners' public performance right when it transmitted video cassette recordings from the front of the store to a small number of patrons inside private booths in the back of the store.[139] Relying on the "place open to the public" language, the court concluded that the public performance right was infringed because the store (and its service) was open to any member of the public who paid the appropriate fee.[140] Emphasizing that a place can be open to the public even if the place is not actually occupied by a crowd, [141] the Third Circuit later held that videos viewed in a private room at a rental store also violated the public performance right.[142] It explained, "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public,' even though they are usually occupied only by one party at a time."[143] Other courts

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additional exception to the general extension of the right to display in "places open to the public," the *Thomas* court adopted it as its first stop in interpreting the rule.

For distributed digital transmissions, focusing on the location of the display is not always sensible, although some courts have followed this route. *See, e.g.*, Playboy Enters. v. Frena, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993) (holding display online through BBS site to be public display either because it was open to the public, or because it was a semi-public place).

[138] 749 F.2d 154 (3d Cir. 1984).

[139] *Id.* at 156–57.

[140] *Id.* at 159. The court did cite to clause (2) of the definition to bolster the proposition that a performance may still be public even if members of the public are capable of viewing the performance see it at different times. *Id.*

[141] *Id.* At least one other circuit has found similarly. *See, e.g.*, Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1012–20 (7th Cir. 1991).

[142] Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 63 (3d Cir. 1986).

[143] *Id.*

answering similar questions, however, have held the opposite, finding that performances inside private spaces such as a hotel room or in a private bar were not open to the public.[144]

Either way, location-based approaches are of limited use in the context of digital networked communications because the place of reception could be anywhere on the planet. Some transmitted performances and displays can be to a place open to the public, such as in the video stores, movie theaters, bars, and other such places. But for many transmitted performances, the place of reception could just as likely be on a laptop in an individual's bedroom. The transmit clause of the definition of "publicly" contemplates a location-neutral approach, and a few courts have attempted to discern its meaning, particularly in the context of public performance.[145]

The court in *On Command Video Corp. v. Columbia Pictures Industries*[146] tackled the issue head-on. On Command Video designed a new video viewing system for hotels that consisted of a computer program, a bank of video cassette players, and an electronic switch that would allow the hotel to remotely transmit a performance from a video cassette located in a centralized location to a particular user's hotel room at the user's command.[147] Though

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[144] *See* Columbia Pictures Indus., Inc., v. Prof'l Real Estate, Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989) (addressing performance in a hotel); *see also* Nat'l Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 729–33 (8th Cir. 1986) (addressing performance in a bar).

[145] The court in *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp.2d 627 (E.D. Pa. 2007), cited to cases that rely on interpretations of this language, and it did so for the purpose of determining whether images shown on a computer screen constituted public display. *Id.* at 635. The *Healthcare Advocates* court, however, at the same time cited to the semi-public language in clause (1) in support of its conclusion that, "the display of copyrighted images on computers in an office constitutes a public display." *Id.* Although the transmit clause language in clause (2) would seem to more naturally apply, it is unclear whether the court meant to base its ruling upon that language. In either case, the court offered very little additional analysis to support its conclusion and thus it is difficult to say with certainty what that decision means under either clause (1) or clause (2). *See id.*

[146] 777 F. Supp. 787 (N.D. Cal. 1991).

[147] *Id.* at 788.

the court concluded that performances received inside the hotel rooms were not in a place open to the public as required under clause (1), the performances were nonetheless "to the public" under the transmit language in clause (2).[148] The court explained that the transmission was to the public because "the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, 'public' one regardless of where the viewing takes place."[149]

Under analogous facts, the district court in *Warner Brothers Entertainment Inc., v. WTV Systems, Inc.*[150] recently came to a similar conclusion. In that case, WTV Systems operated a "DVD rental" service for online access to streams of DVDs through a website called Zediva.[151] When a user requested to view a particular DVD, a lawfully purchased copy of the DVD (preloaded into one of the hundreds of DVD players owned and hosted on-site by WTV) would be called up and transmitted over the Internet to the user's computer.[152] The *Zediva* court held that such a system violated the copyright owners' public performance right under the transmit language of clause (2).[153] Citing to *On Command*, the court held that the performance was public because "the relationship between Defendants, as the transmitter of the performance, and the audience, which in this case consists of their customers, is a commercial, 'public' relationship regardless of where the viewing takes place."[154]

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[148] *Id.* at 789–90.
[149] *Id.* at 790.
[150] 824 F. Supp. 2d 1003 (C.D. Cal. 2011).
[151] *Id.* at 1005.
[152] *Id.*
[153] *Id.* at 1008.
[154] *Id.* The court also cited to the *Redd Horne* case cited above to support the proposition that Zediva's operations infringed the public performance right because "[c]ustomers watching [copyrighted works] on their computer through Zediva's system are not necessarily watching it in a 'public place,' but those customers are nonetheless members of 'the public.' " *Id.* at 1009 (citing Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984)). But the court in *Redd Horne* based its decision primarily on the place of reception (a video store that was open to the public), and not on the precise

Both the *On Command* and *Zediva* courts took an approach to defining "the public" that emphasized the commercial relationship between the parties as the determinative factor. Even considering that these cases are about public performance, not display (which should, perhaps, be viewed differently),[155] both could have the same result under the definition proposed by this Article. This Article argues, however, that because copyright law is primarily an economic tool, it makes more sense to examine the market effect directly rather than looking to the nature of the relationship between the parties. The reception by a number of people who would impact the market for the work[156] would yield a similar result as examining whether a relationship was commercial, but with the added advantage that it would also assess market impact for non-commercial displays that also impact the market.[157]

The court in *Cartoon Network LP, LLLP v. CSC Holdings, Inc*. (*Cablevision*)[158] also addressed clause (2) and transmissions to the public.[159] Recall that in that case, CSC Holdings (Cablevision)

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nature of "the public" itself. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984). The district court explicitly took this focus. *See, e.g.*, Columbia Pictures Indus., Inc. v. Redd Horne Inc., 568 F. Supp. 494, 500 (W.D. Pa. 1983), *aff'd sub nom*. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984) ("Our finding is based on the view that the viewing rooms at Maxwell's more closely resemble mini-movie theaters than living rooms away from home."). On appeal, the Third Circuit flatly declined to conduct a further analysis of even the semi-public clause, stating that "we agree with the district court's conclusion that Maxwell's was open to the public." *Redd Horne*, 749 F.2d at 159. While the district court did state that clause (2) "bolstered" the point, it did not base its holding upon it; on review, the Third circuit took a similar approach. *Id*.

[155] *See infra* notes 195-197 and accompanying text.

[156] Note that because public performance does not require a copy of the work to infringe the right (unlike public display, which does require a copy), it makes little sense to approach "the public" in terms of its impact on the market for copies; thus, this Article uses "effect on the market for the work" here instead. 17 U.S.C. §§ 106(4), 106(5) (2006); *id.* § 101 (2006).

[157] Ignoring market impact by non-commercial performances was cited by the court as one of the reasons it rejected the approach in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (Cablevision), 536 F.3d 121, 139 (2d Cir. 2008).

[158] *Id.*

[159] *Id.* at 139.

provided a service where copies of TV performances were made and stored on its RS-DVR service at a user's request, and could then be transmitted to the user via a television in his or her home.[160] After deciding that the copies transmitted to the users were of insufficient duration to constitute a copy or reproduction for purposes of the Copyright Act,[161] the court also had to address whether the transmission of those performances violated the plaintiff's public performance right.[162] The court ultimately held that the public performance right was not infringed, but only by following a rather convoluted path through the statutory text.[163]

Starting with the proposition that the person capable of receiving a given performance at issue was of significance, and combining with that the idea that "a transmission of a performance is itself a performance," the court ultimately focused its analysis on the group of people capable of receiving the transmission to determine whether the transmission was to the public.[164] Because the system that Cablevision employed would only transmit a unique copy of the work to the user who directed that the copy be made, the court concluded that the potential audience for the transmission was so limited as to fall outside of a public performance.[165] Although the *Cablevision* court contends that it interprets the phrase "to the public," its review and application of the transmission language avoids the "to the public" phrase by focusing instead on the particular transmissions of a unique copy of a work and the group of people capable of receiving that transmission.[166] On the facts before it, where only the individual who directed the creation of the copy could receive the recording,

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[160] *Id.* at 123–25.

[161] *Id.* at 127–30.

[162] *Id.* at 134.

[163] *See id.* at 139; *see also* Jeffrey Malkan, *The Public Performance Problem In* Cartoon Network LP v. CSC Holdings, Inc., 89 OR. L. REV. 505 (2010) (explaining the logic behind the court's decision in this issue).

[164] *Cablevision*, 536 F.3d at 136–38.

[165] *Id.* at 137 (finding consideration of the uniqueness of the copy important because, "in general, any factor that limits the potential audience of a transmission is relevant").

[166] *Id.* at 138–39.

the court concluded that the transmission was not to the public.[167] While this approach adds an extra (and rather complicated) layer to the analysis, it ultimately does not answer the underlying question about the nature of "the public" in this context.

This same basic approach was adopted by the district court in *American Broadcasting Companies., Inc. v. Aereo, Inc.*[168] That case centered around Aereo's digital streaming system, which allows users to view (or record) live transmissions of New York City area television broadcasts.[169] Like Cablevision, Aereo operated by providing users with unique access to their own personal copy of the work, as well as their individualized antenna to receive the initial broadcast transmission.[170] Based on these basic similarities the court denied ABC's preliminary injunction motion, finding that the Aereo system was "materially identical" to the Cablevision system, at least for purpose of the public display right.[171] Also like *Cablevision*, the *Aereo* court skirted the need to define "the public" by focusing on the particular copy and transmission.[172]

The *Aereo* court, however, recognized a second important similarity that bears more directly on understanding the nature of the public display right before it—the court pointed out that the importance in *Cablevision* of the "undercurrent to the Second Circuit's reasoning suggesting that the Cablevision system merely allowed subscribers to enjoy a service that could also be accomplished using any standard DVR or VCR."[173] The *Aereo* court went on to explain that this purposeful approach meant that "[t]o the extent that the Second Circuit's holding in *Cablevision* was premised on an inability to distinguish Cablevision's system

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[167] *Id.* at 139.
[168] Nos. 12 Civ. 1540 (AJN), 12 Civ. 1543, 2012 U.S. Dist. LEXIS 96309 (S.D.N.Y. July 11, 2012).
[169] *Id.* at *2.
[170] *Id.* at *2–4.
[171] *Id.* at *11.
[172] *Id.* at *21.
[173] *Id*. at *20.

from otherwise lawful activities, Aereo's system deserves the same consideration."[174]

Finally, it is worth noting that the above interpretations are all focused on public performance, and not display. As explained above, there are basic differences between public performance and public display, in terms of the issues Congress sought to address and the way in which each right is defined in the text of the Act.[175] First, recall that while public display requires a showing of a copy of the work, public performance does not.[176] Thus, an emphasis on the nature of and market for copies—rather than the market for work or the commerciality of the context—may be an appropriate consideration when looking at the public display of a copy of the work.

Second, the types of materials that are publicly displayed are often characteristically different from performances. Although the two share a common definition of publicly, as Professor Goldstein explains:

> [The] two rights may require that the statutory definition be applied differently to each. Because performances are characteristically animated or audible, they naturally tend to attract a crowd whenever they are given in a public place. A manuscript or drawing displayed in the same public place may not attract nearly the same number of people nor affect the market for the copyrighted work so substantially. As a consequence, courts determining whether a work has been publicly displayed under the terms of section 106(5) will consider whether, as situated in the public space, the work was likely to attract members of the public to view it.[177]

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[174] *Id.* at *37.

[175] *See supra* Part II.A.

[176] This is so despite the *Cablevision* court's statement that "no transmission of an audiovisual work can be made, we assume, without using a copy of that work." Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 137 (2d Cir. 2008). While true, a transmission of an infringing performance in general can easily be made without a copy of the work.

[177] GOLDSTEIN ON COPYRIGHT, *supra* note 27, § 7.10 (comparing Streeter v. Rolfe, 491 F. Supp. 416 (W.D. La. 1980) with Burwood Prods. Co. v. Marsel Mirror & Glass Prod., Inc., 468 F. Supp. 1215 (N.D. Ill. 1979)). *But see* PATRY, *supra* note 72, § 15.3 (criticizing Professor Goldstein's approach because the

While Professor Goldstein discusses the distinction in relation to the location of a performance or display, which is governed by the clause (1) open to the public or semipublic language, the same intuition would seem to hold for transmissions. Performances have developed markets based on the act of performance itself. Thus, transmissions that impact those performance markets should be treated differently than transmissions of potentially-public displays, the exclusive right of which is designed to protect markets from adverse impacts that are created with a shift in medium from physical copies to displays on a screen. Because of these differences, even where the definition of "the public" in the context of public performance is perhaps in conflict with the definition proposed by this paper, the conflict may not be fatal as the two rights need not follow precisely the same path to achieving their intended purposes.

B. *Situating the Definition Within the Text of the Act*

Fitting the proposed definition into the statutory text illustrates how it both supports the outcomes of prior case law and complies with the legislative motivation for creation. For clause (1) of the definition, using the proposed language of "a number of people who would affect the market for individual copies" would have little or no impact. Clause (1) is concerned with direct displays and directs its focus on particular locations—either places that are semi-public, or places that are open to the public.[178] The definition would have no impact on the semipublic places clause, because that section does not rely on a definition of "the public."[179] For places that were deemed open to the public under an even less precise approach, such as was the case of the private video viewing rooms in *Redd Horne*,[180] would remain open to the public under this definition because those places are open to a significant

statutory language and, he concludes, the legislative history, make no such distinction).

[178] *See* 17 U.S.C. § 101 (2006).

[179] *See* discussion *supra* Part IV.A.

[180] Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 156–57 (3d Cir. 1984).

number of people (indeed, any paying customer), the number of which would undoubtedly impact the market for individual copies. Whether that number of people actually view the work is irrelevant, because the place is open and accessible to that group of people.

Application to the transmission clause in clause (2) of the definition of public display is more complicated. The first part of clause (2) simply covers transmissions of a display to a place covered by clause (1).[181] With the proposed approach of this Article, the meaning of the location of the display—either a semipublic place or a place open to the public—is the same as that noted above and would have a result identical to that explained in the previous paragraph.

The second part of clause (2) covers transmissions of a display that are simply transmitted to the public, whether the members of the public capable of receiving the display receive it in the same place or in separate places and at the same time or at different times.[182] Transposing in the proposed definition of "the public" yields a statement about transmitted public display that is both intuitive and that captures many of the concerns expressed in the legislative history and in the existing case law:

> To . . . display a work 'publicly' means . . . to transmit or otherwise communicate a . . . display of the work . . . to [a number of people that would affect the market for individual copies of the work], . . . whether the members of [that group] capable of receiving the . . . display receive it in the same place or in separate places and at the same time or at different times.[183]

To understand how this would work in practice, it is useful to work through some examples. Imagine a university library that holds a digitized copy of a book that resides in its physical collection. The physical copy is impounded while the digital copy is made available to users. Any university affiliated faculty, staff, or students can log on to the library's website to view the book, and they are warned that access is for personal viewing only. Assume

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[181] 17 U.S.C. § 101.
[182] *Id.*
[183] *Id.*

that one student logs on to view the book on her laptop. Under the above interpretation, the display would not be public because one student accessing the work would not be a number that would affect the market for individual copies. Absent the online display, the student could have easily checked out the physical book from the library; the market for the copies would remain unchanged. If a second, third, or fourth person were to view the display, however, this would certainly impact the analysis because, ordinarily, only one person may use the physical copy at any given time.

Clause (2) provides that a display can be to the public even if members of the public receive the transmission of the display in the same place or a different place, and at the same time or at a different time.[184] Digital transmissions are in fact valuable because they permit viewers to do these things—to look at a copy of a work in the comfort of their own homes (different places) and whenever they wish (different times).

When more than one person views a display across space, and particularly across time, the market-based definition proposed here is particularly useful. Suppose a transmission of a display is made to one student in January 2012. As is often the case with works in academic collections, the work is then viewed again two years later by another student in January 2014. Although in this case one copy of the work is viewed by more than one viewer, the market effect would be negligible or nonexistent, and so the display would not be public for purposes of the Act. If, however, the views were simultaneous, or involved many views in immediate succession, the market might be impacted.

Thus, for the temporal aspect, displays and the transmissions that enable them would be viewed on a sliding scale; if more than one person viewed a copy of the work simultaneously, of course, then the market would be negatively affected because two readers cannot ordinarily use one copy at the same time. That display would then be public. But, the further apart in time the viewers are, the lower the impact on market for copies because users can

[184] *Id.*

ordinarily share a copy spread over such a time (as libraries have always done with physical books).[185] Additionally, aggregating the displays for purposes of establishing an effect on the market would require discounting the value of future views to their present value (because viewing the work now is more valuable than viewing the work six months from now); at a certain point far in the future, the value of those views becomes insignificant.[186]

This built-in temporal sliding scale also addresses many of the concerns with which the *Cablevision* court attempted to grapple. Recall that that court, in parsing the language surrounding "to the public," focused heavily on the particular transmission, the group of people capable of receiving it, and the particular copy transmitted.[187] The court took a transactional view of transmission, essentially requiring that each transmission use a unique copy of the work to avoid making the transmission one to "the public."[188] That transactional requirement is needed because without it complicated questions about the duration of a particular transmission would arise (e.g., if a transmission is displayed to one

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[185] The market impact may not be limited only to simultaneous views. Libraries in the physical world have, necessarily, worked in a certain amount of friction that separates uses. If a user checks out a book on Friday and returns it on Monday, it ordinarily will take one or two extra days for the library to process and reshelve that book. Thus, the next user would only have access to it days after it has been returned. This type of built in friction, perhaps on a case-by-case basis, might be considered when examining market impact. It could, for example, help preserve the markets that exist for bestsellers that are checked out in rapid succession from public libraries, as public libraries often need to buy several copies of those works to match demand plus the intervening friction. For other less popular works, a more moderate pace might allow only one copy to serve as the display copy over a long period of time. Of course, as markets evolve and come to exist primarily in the on-demand digital context, these considerations would fade.

[186] For example, if a patron had to purchase a copy of a $50 book forty years in the future, the present value of that book would only be $6.00, assuming continuously compounded interest at a rate of 5%. Aggregating many such displays would affect the market for copies, but one or a few future views would, in at least some cases, have virtually no impact today.

[187] Cartoon Network LP, LLLP v. CSC Holdings, Inc. (*Cablevision*), 536 F.3d 121, 138 (2d Cir. 2008).

[188] *See id.*

user now, and another ten years from now, is that the same display?), and whether views over the long-term should be aggregated to determine whether it was to the public.[189] But the intense reading that the Second Circuit conducts becomes unnecessary if the public is thought of as the public market for the work, which already factors in the temporal component.

To point out the simplicity of the approach, consider that under the facts of *Cablevision*, the result is the same when using the proposed definition of "the public." As the *Aereo* court observed when interpreting *Cablevision*, there is an "undercurrent to the Second Circuit's reasoning suggesting that the Cablevision system merely allowed subscribers to enjoy a service that could also be accomplished using any standard DVR or VCR," i.e., "otherwise lawful activities."[190] The undercurrent implicitly recognizes what the proposed definition makes explicit—that displays (or performances, in this case) which affect the public market for the work are what matter; performances of only personal copies—otherwise lawful—have no impact on the market because those copies can already be made without seeking permission from (or sending compensation to) the rightsholder. In the same way, digital displays that equate to real-market activities that are otherwise lawful (e.g., library lending of a book) have no market affect and should therefore not be considered to "the public."

The approach of this Article, and the above applications, shows that viewing the public aspect of public display as meaning the public market for copies of the work is a workable option to enable some limited online displays of works that might otherwise be restricted. This approach does not solve the problems of allowing users to download, manipulate, and make further uses of these works, but it does allow for the online viewing of these works in a way that would provide great benefit.

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[189] *See* Malkan, *supra* note 163, at 533–42 (noting similar hypothetical problems with related approaches, as explained by Professor Nimmer).

[190] Am. Broad. Cos., Inc., v. Aereo, Inc., No. 12 Civ. 1540 (AJN), 12 Civ. 1543, 2012 U.S. Dist. LEXIS 96309, at *36–37 (S.D.N.Y. July 11, 2012).

V. PUBLIC DISPLAY AND ITS IMPORTANCE TO DIGITAL COLLECTIONS

Public display has special significance to digital collections, but its scope is not well understood in that context. One reason for this is that displays in the traditional context of libraries, archives, and museums are in-person and are not contentious in terms of the user's right to display. For example, when the Museum of Modern Art displays Andy Warhol's "Gold Marilyn Monroe," it exhibits a copy[191] in a gallery open to the public (many people, in large numbers, can come in and see it), of a pictorial or graphic work,[192] thus making it a public display. Although it is public, section 109(c) of the Act provides that the Museum, as owner of the "particular copy"[193] of a work lawfully made under the Act, is entitled without prior authorization to display the copy publicly to viewers present at the place where the copy is located.[194] Similarly, a library might be said to display a printed book when it lends it to a patron, simply because the library shows a copy of it, but a personal viewing of the work by a single patron is unlikely to be considered public, and even if a display of the book were to be made public, section 109(c) would seem to provide protection.

Because of limitations on the right in the context of direct displays, the right of public display is of most interest in cases of transmission.[195] Recall that to "transmit" requires that one "communicate [a performance or display] by any device or process

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[191] *See* 17 U.S.C. § 101 (2006).

[192] *See id.* § 106(5) (listing the types of works covered by the public display right).

[193] *Id.* § 109(c). Note that one definitional quirk of the 1976 Act is that originals are included in the term "copies." *Id.* § 101 ("The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed.").

[194] *Id.* § 109(c).

[195] *Id.* § 101 ("To perform or display a work 'publicly' means . . . (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.").

whereby images or sounds are received beyond the place from which they are sent."[196] Transmissions are the means by which displays are made in the online environment. So far, however, the rights of reproduction and display have existed in a largely coterminous way—where display is apparent (though not necessarily public display), so then is reproduction.

A. *Reproduction and Display Online*

Courts and plaintiffs have clung to the rights of reproduction and distribution as the default tool for copyright protection, even in the online realm where users often access only incidental copies in the course of viewing the work. The RAM copy doctrine, which emerged from the Ninth Circuit's decision in *MAI Systems Corp. v. Peak Computer, Inc.*,[197] enabled this approach. The court in *MAI* held that, because copies contained in a computers' temporary random access memory (RAM) can be "perceived, reproduced, or otherwise communicated, . . . the loading of software into the RAM creates a copy [and therefore a reproduction] under the Copyright Act."[198]

The initial reaction to *MAI* and later courts' interpretation of *MAI* was that the court was mistaken.[199] They argued that incidental copies like those contained in RAM are not "fixed" as copies for purposes of copyright protection because they did not

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[196] *Id.*

[197] 991 F.2d 511 (9th Cir. 1993).

[198] *Id.* at 519. *See, e.g.*, Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294 (D. Utah 1999) (citing *MAI*, 991 F.2d at 518, to support the proposition that "[w]hen a person browses a website, and by so doing displays [the work], a copy of the [the work] is made in the computer's [RAM], to permit viewing of the material. And in making a copy, even a temporary one, the person who browsed infringes the copyright.").

[199] *See, e.g.*, Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1258–77 (2001) (reviewing some of the early criticism). *But see, e.g.*, Joshua C. Liederman, Note and Comment, *Changing the Channel: The Copyright Fixation Debate*, 36 RUTGERS COMPUTER & TECH. L.J. 289, 292 (2010) (noting support for the standard developed by courts following *MAI*).

exist "for a period of more than transitory duration,"[200] which is a part of the statutory definition of "copies." Nevertheless, the broad interpretation applied in *MAI* has many supporters, most important among them several sister circuits,[201] the Copyright Office,[202] and at least one Presidential administration.[203]

Recently, however, the strength of this doctrine has eroded in certain respects. The Second Circuit in *Cablevision*[204] explained how *MAI* can be read narrowly to avoid finding that all temporary instantiations of a work constituted a copy.[205] That court addressed the issue of whether temporary buffer copies of TV programming, made through remote-storage DVR systems owned by Cablevision, constituted copies for purposes of the Act.[206] The court emphasized that under the Act, copies must exist for more than a transitory duration, and rejected the idea that the *MAI* court would

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[200] 17 U.S.C. § 101; *see generally* Aaron Perzanowsi, *Fixing Ram Copies*, 104 NW. U. L. REV. 1067 (2010) (providing a concise review of the RAM copy doctrine).

[201] *See* DSC Commc'ns Corp. v. DGI Techs., Inc., 81 F.3d 597, 600 (5th Cir. 1996) (citing *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335–37 (9th Cir. 1995), *abrogated by* Apple Inc. v Pystar, 658 F.3d 1150, 1158–59 (9th Cir. 2011); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 235 (7th Cir. 1995); Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1120–21 (D. Nev. 1999); Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs., 983 F. Supp. 1167, 1177–78 (N.D. Ill. 1997); Indep. Serv. Orgs. Antitrust Litig. v. Xerox, 910 F. Supp. 1537, 1541 (D. Kan. 1995); *see also* Jonathan Band & Jeny Marcinko, *A New Perspective on Temporary Copies: The Fourth Circuit's Opinion in CoStar v. Loopnet*, 2005 STAN. TECH. L. REV. 1, 14 n.34 (2005) (listing decisions taking this view of *MAI*).

[202] *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 110–11 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[203] *See* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 27, 215–18 (1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

[204] 536 F. 3d 121 (2d Cir. 2008).

[205] *Id.* at 128–30.

[206] *Id.*

read this requirement out of the Act without even discussing it.[207] Criticizing an approach that reads *MAI* more broadly,[208] the court concluded that on the facts before it—where "data resides in the buffer for no longer than 1.2 seconds before being automatically overwritten"—that no copy was made.[209]

Other decisions, notably, the Fourth Circuit decision in *CoStar Group, Inc. v. LoopNet, Inc.*,[210] preceded the *Cablevision* court's decision, and offer similar statements about the limited scope of the RAM copy rule.[211] While these decisions are so far the exception rather than the rule, their potential effect is far-reaching and could alter the nature of online communications.[212] If use of the reproduction right is no longer a foregone conclusion stemming from every online display, the public display right takes on added significance as potentially the only remaining tool for copyright owners to protect their interests in that realm.

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[207] *Id.* at 128.

[208] *Id.* at 129 ("As we have stated, to determine whether a work is 'fixed' in a given medium, the statutory language directs us to ask not only 1) whether a work is 'embodied' in that medium, but also 2) whether it is embodied in the medium 'for a period of more than transitory duration.' According to the Copyright Office, if the work is capable of being copied from that medium *for any amount of time*, the answer to both questions is 'yes.' The problem with this interpretation is that it reads the 'transitory duration' language out of the statute.").

[209] *Id.* at 130 ("Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not 'embodied' in the buffers for a period of more than transitory duration, and are therefore not 'fixed' in the buffers. Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term.").

[210] 373 F.3d 544 (4th Cir. 2004).

[211] *Id.* at 550–51.

[212] *See, e.g.*, Melissa A. Bogden, Comment, *Fixing Fixation: The RAM Copy Doctrine*, 43 ARIZ. ST. L.J. 181, 203–20 (2011) (discussing implications of the apparent circuit split and the variety of ways to harmonize that split).

B. *Public Display and Online Libraries*

Even with the reproduction right remaining as the primary means of protecting rightsholders online, public display may still be important in its own right for digital collections. Although libraries, archives, and museums have lived in the online world as long as it has existed, these institutions have only begun to foray into the realm of digital transmissions by offering online displays of their holdings.[213] These forays are not mere experimentation, however, and serious efforts are underway to create massive digital libraries and archives in a way that will transform the way users access library and archive holdings. The Digital Public Library of America and Europeana are two recent and notable initiatives,[214] but the motivation and groundwork for those projects has existed for quite some time. Libraries and archives started cautiously with digitization projects focusing on special collections of works clearly in the public domain. Digitization projects funded or affiliated with the Institute of Museum and Library Science ("IMLS")—many of which focus on public domain materials—number nearly 1,000;[215] these represent only a small subset of similar efforts. Libraries have also experimented with digitizing in-copyright and potentially in-copyright works.[216] These efforts were approached with much trepidation and institutions have

[213] *Id.*

[214] *See* DIGITAL PUBLIC LIBRARY OF AMERICA, http://dp.la/ (last visited Oct. 30, 2011); EUROPEANA, http://www.europeana.eu (last visited Nov. 10, 2012).

[215] There are, of course, many digitized projects focusing on published "core" collection works that are clearly in the public domain. HathiTrust reports that around 21 percent of its collection was published before 1923, amounting to about 2 million volumes. *See* Wilkin, *supra* note 3. Many more works published after 1923 are also in the public domain because of failure to comply with formalities under the Copyright Act of 1909. Distinguishing those works from works currently protected by copyright is a difficult and time consuming process.

[216] *See* Laura N. Gasaway, *Libraries, Digital Content, and Copyright*, 12 VAND. J. ENT. & TECH. L. 755, 760 (2010) (reviewing some recent projects to digitize in-copyrighted works and the difficulties encountered in obtaining rights clearance).

typically only proceeded to digitize works in ways that they hope will minimize the risk of costly infringement suits.[217]

Interest in digital access to cultural materials extends well beyond those institutions that are typically thought of as a library or archive.[218] Projects like the Internet Archive aim to offer "permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format."[219] They, like many traditional libraries,[220] also hope to preserve and maintain access for born digital materials found on blogs, websites, listservs, and bulletin boards.[221] For these purposes, born digital increasingly includes materials traditionally associated with physical media; many academic journals, for example, are available in online-only formats,[222] and

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[217] *See* LAURA CLARK BROWN, JUDY RUTTENBERG & KEVIN L. SMITH, TRIANGLE RESEARCH LIBRARIES NETWORK, THE TRIANGLE RESEARCH LIBRARIES NETWORK'S INTELLECTUAL PROPERTY RIGHTS STRATEGY FOR DIGITIZATION OF MODERN MANUSCRIPT COLLECTIONS AND ARCHIVAL RECORD GROUPS 6 (2011), http://www.trln.org/IPRights.pdf (discussing a risk management strategy for the digitization and online access of modern manuscript collections).

[218] The terms "library" or "archive" do have special legal significance for purposes of certain exceptions to the exclusive rights. *See, e.g.*, 17 U.S.C. § 108 (2006) (providing that "it is not an infringement of copyright for a library or archives" to make certain copies for preservation or limited distribution purposes). These terms, however, are neither defined in the act, nor have they been defined by the courts. *See, e.g.*, N.Y. Times Co., Inc. v. Tasini, 533 U.S. 483, 503 n.12 (2001) (declining to decide whether a so-called "electronic library" maintained by publishers was included in the term "libraries" as used in the Copyright Act).

[219] *About the Internet Archive*, INTERNET ARCHIVE, http://www.archive.org/about.php (last visited Oct. 30, 2011).

[220] *See* Gasaway, *supra* note 216, at 766.

[221] *See, e.g.*, WEB ARCHIVING SERVICE, http://webarchives.cdlib.org/ (last visited Nov. 16, 2012).

[222] This is almost always the case for open-access journals. *See, e.g.*, *PLOS ONE Journal Information*, PUBLIC LIBRARY OF SCIENCE, http://www.plosone.org/static/information.action (last visited Nov. 10, 2012). In the area of law reviews, many journals are also online-only. *See, e.g.*, *Everything You Need to Know About VJOLT*, VA. J.L. & TECH., http://www.vjolt.net/about.php (last visited Oct. 30, 2011). Due to costs of purchasing and storing copies, there are serious efforts to persuade all law journals to cease publishing print copies

audiovisual works are often produced and distributed solely across the web.

Why have so many libraries gone to such great lengths to digitize, collect, and maintain access to these materials online? The answer is so intuitive it hardly needs citation: "If it's not on the Web, it doesn't exist."[223] It is also no revelation that users' primary interests are no longer tied to physical access to copies of copyrighted works. While in the past the printed book was often the only embodiment of the creative work, users today access content across a variety of devices and in a number of formats. It is for this reason that most major libraries now spend more money on providing their users with electronic access to these works than they do on traditional print acquisitions.[224] Despite this change in access norms, reproduction and distribution still play an important legal role in protecting rightsholders' interests, even if interpretations as seen in *Cablevision* and *CoStar* do take firmer hold.

Digitization projects like those undertaken by Google Books or the HathiTrust will always implicate the reproduction right. Because those projects convert analog materials into digital, the conversion of those works necessarily requires the creation of a fixed digital copy. While those reproductions may be acceptable if they fall within one of the specific exceptions (in particular, fair use or the library privileges under the Act),[225] the reproduction

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altogether. *See Durham Statement on Open Access to Legal Scholarship*, BERKMAN CENTER FOR INTERNET & SOCIETY (Feb. 11, 2009), http://cyber.law.harvard.edu/publications/durhamstatement.

[223] Sarah Stevens-Rayburn & Ellen N. Bouton, *"If It's Not on the Web, It Doesn't Exist at All": Electronic Information Resources—Myth and Reality*, Vol. 153 LIBR. & INFO. SERVICES IN ASTRONOMY III, 1998, at 195.

[224] *See* ASS'N OF RESEARCH LIBRARIES, ARL STATISTICS 2008–09, 20–21 (Martha Kyrillidou & Shaneka Morris, eds.) (2011), *available at* http://www.arl.org/bm~doc/arlstat09.pdf.

[225] *See* 17 U.S.C. §§ 107, 108 (2006) (addressing fair use and library privileges). "Format shifting" under these exceptions is only permissible in certain situations. *See, e.g.*, *id.* § 108(c) (allowing libraries and archives to make limited reproductions of works that are currently stored in obsolete formats); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444–56 (1984)

right must still be overcome at the conversion from one medium to another. Similarly, to the extent that those services allow users to download and retain digital copies of the scanned works, the reproduction and distribution rights may also be implicated.

But what of services that neither convert materials from print to digital, nor allow users to retain locally stored copies of those works? This situation is an increasingly plausible access solution for libraries. Libraries can lawfully purchase or obtain digital copies of works, and have the capability to exhibit those works without the demand from users that the works be turned into copies stored on the users' own machine. If the stored data were transitory enough in duration, users' online access may not necessarily implicate the reproduction or distribution rights. Public display, however, may remain an obstacle.

Repositories of born-digital materials require no conversion (and therefore, no additional reproductions), but may implicate the public display right if viewed online.[226] As libraries and archives acquire these materials, they should remain cognizant of the rights necessary to display those works in a meaningful way. Licensed works raise similar concern. As *Tasini* and subsequent cases illustrate, public display may not necessarily be joined to grants of permission with respect to the reproduction right. If electronic license packages negotiated by libraries include only rights of

(holding that in home "time-shifting" of television shows onto tape for later viewing could be a lawful personal use).

[226] One potential reproduction-right concern with all of these materials is the automated creation of backup copies. The systematized practice of "digital preservation" only emerged within the last twenty years and there is little law on how issues like the automatic creation of backup copies or drive imaging work with respect to copyright law. *See* Peter B. Hirtle, *The History and Current State of Digital Preservation in the United States*, *in* METADATA AND DIGITAL COLLECTIONS: A FESTSCHRIFT IN HONOR OF TOM TURNER 138 (Elaine Westbrooks & Keith Jenkins, eds., 2009), http://cip.cornell.edu/DPubS/Repository/1.0/Disseminate?view=body&id=pdf_1&handle=cul.pub/1238609304 (citing JUNE BESEK, COPYRIGHT ISSUES RELEVANT TO THE CREATION OF A DIGITAL ARCHIVE: A PRELIMINARY ASSESSMENT (Council on Library and Information Resources and the Library of Congress, 2003), *available at* http://www.clir.org/pubs/reports/pub112/contents.html).

reproduction and distribution, but not display, it is unclear what can be done with those works when presented openly to many users.

In the absence of the reproduction and distribution rights, either because they do not apply or because they are licensed or purchased, copyright restrictions on online access to digital copies of textual or visual materials must, if they exist at all, rest on the right of public display. As this Article attempts to make clear, public display is not a particularly distinct or well-defined right. The general thrust of the problem that Congress was trying to address is clear—that public exhibitions of works should not cannibalize the markets established by reproduction and distribution, but the exact way that the public display right achieves this goal is not well answered in the text of the statute, legislative history, or the case law.

VI. CONCLUSION

Public display is but one of the rights that stand before digital libraries that seek to enable greater access to their holdings. The rights of reproduction and distribution and the exceptions that accompany those rights have allowed physical libraries to operate within the copyright system of limited monopoly balanced with public access. The Copyright Act is shrewd in this regard; its basic aim is to permit this monopoly and therefor foster a market upon which owners can capitalize. Online, the rights of reproduction and distribution have swollen beyond the market protection originally envisioned.[227] Should the expanse of those rights recede (as it appears they might), rightsholders must turn to other of the

[227] Jonah M. Knobler, *Performance Anxiety: The Internet and Copyright's Vanishing Performance/Distribution Distinction*, 25 CARDOZO ARTS & ENT. L.J. 531, 533 (2007) ("But the crisis in copyright law occasioned by the Internet extends beyond the infamously widespread availability of unauthorized, infringing content and the attendant controversy over the liability of file-sharing services. It goes deeper, to the very question of whether traditional categories and distinctions in copyright law—such as the once obvious distinction among 'performances,' 'reproductions,' and 'distributions'—remain meaningful and applicable in the Internet context at all.").

exclusive rights to protect their interests. Public display is a likely candidate. Even without such a reduction in force, a precise understanding of the exclusive rights is important to determine the reasons why access is inhibited and the ways that it can be remedied.

Public display is another one of the six exclusive rights that may hinder access to digital collections. Because public display is so seldom seen in the disputes and resulting case law that guide current practice, it is unclear what role public display has. It may, for example, reach just as broadly—or perhaps even further—as reproduction and distribution currently do in the online context. This Article presents a way to avoid that. By focusing the definition of the right on the protection of markets for which the public display right was created, this Article attempts to carve a tenable path between absolute monopoly on the one hand, and absolute public access on the other. The definition suggested here preserves the limited monopoly rights of owners in a way that maintains the rivalrous good fiction that is seen in other parts of the Act. At the same time, it leverages the value-maximizing role that libraries have traditional played by allowing one copy to be displayed to many users, but in a way that avoids impact on the traditional markets associated with that work.