

# NINTH ANNUAL BAKER BOTTS LECTURE

## WHAT COPYRIGHT OWES THE FUTURE

*R. Anthony Reese\**

### INTRODUCTION

The prospect of giving a public lecture on copyright intimidates me. This is in part because of a small book entitled *An Unhurried View of Copyright* by then-Harvard Law professor Benjamin Kaplan.<sup>1</sup> (Some of you may be more familiar with Kaplan as one of the principal architects of the Nuremburg Trials or as a justice on the Massachusetts Supreme Judicial Court.<sup>2</sup>) I never met Professor Kaplan. But when he passed away in 2010 at age 99,<sup>3</sup> I felt the loss to the copyright world very keenly. In 1966, Kaplan gave the Carpentier Lectures at Columbia Law School, published the following year as *An Unhurried View of Copyright*. Although the book is only about 125 pages, it is a magnificent tour through copyright history, doctrine, and policy. It has been said that the European philosophical tradition consists of a series of footnotes to Plato.<sup>4</sup> I would say that much of modern American copyright

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\* © 2012 R. Anthony Reese. Chancellor's Professor of Law, University of California, Irvine. My special thanks to Craig Joyce for his extremely generous hospitality to me during my time in Houston on the occasion of the lecture, and I want to thank Paul Morico of Baker Botts for his hospitality and his kind comments on my lecture. Thanks also to my colleagues at UC Irvine School of Law for their comments on an earlier version of this lecture. This Article draws in part on some portions of my article *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).

1. BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967).
2. Bruce Weber, *Benjamin Kaplan, 99; Crucial Figure in Nazi Trials*, N.Y. TIMES, Aug. 25, 2010, at B9.
3. *Id.*
4. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 63 (Harper & Row 1960) (1929) ("The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.")

scholarship consists of a series of footnotes to Kaplan. So you can see why I found the idea of a public lecture on copyright daunting.

Having plucked up my courage, I have chosen as my topic “What Copyright Owes the Future.” It may seem unusual to talk about copyright and future generations. But copyright indeed purports to restrain future behavior. Once an author creates a work, copyright law says that for at least 70 years—and often for 100 years or more—most use of that work will require the copyright owner’s permission.<sup>5</sup>

In essence, copyright law makes a promise to future generations. The law says that if an author today creates a work—a book, a song, a film, a play, a photograph, a painting—then sometime, a long way down the road, that work will pass out of copyright protection.<sup>6</sup> And at that point in time, the inhabitants of the future will be able to copy the work freely, or adapt it, or sell it, or use it in any other way that copyright had restricted until then.<sup>7</sup>

But that promise is at best illusory, and at worst fraudulent, if, by the time a work’s copyright expires, the work itself no longer exists. Copyright’s restraints on what can legally be done with a work may come to an end, but the copyright expiration will have no practical effect. On the day after the copyright expires, no citizen of the future will in fact be able to use the now-public-domain work in any of the ways that the law would then allow.

So at a minimum, copyright law and the copyright system owe the future an obligation to do whatever they can to help ensure that many works of authorship survive for future audiences to read, to listen to, to watch. And, we can hope, to learn from and enjoy.

I want to explore this subject in a bit more detail in four steps. First, I’ll look at why preserving creative works is important and valuable.<sup>8</sup> Next, I’ll talk about the ways in which copyright law has traditionally encouraged—or not encouraged—

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5. See 17 U.S.C. § 106 (2006) (granting exclusive rights to copyright owners); 17 U.S.C. § 302(a)–(c) (2006) (establishing, among other provisions, both the basic copyright term of the author’s life plus 70 years and, for works made for hire, a copyright term lasting the shorter of 95 years from publication or 120 years from creation).

6. 17 U.S.C. § 302(a)–(c) (2006) (providing for a limited copyright protection period).

7. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 892 (2012) (explaining that once a work’s term of copyright protection ends, the work becomes freely available as part of the public domain).

8. See *infra* Part I.

the preservation of copyrighted works.<sup>9</sup> Third, I'll look at how digital technology and computer networks, such as the Internet, pose new challenges for preserving creative works.<sup>10</sup> And finally, I'll consider briefly how we might rethink and revise copyright law to respond to these digital challenges.<sup>11</sup>

## I.

Let me begin by discussing the importance and value of preserving creative works for the future. Preservation obviously has great value to historians of all stripes—social, cultural, political, legal, literary, and otherwise. The more material they have to work with, the more productive future historians can be in trying to understand their past.<sup>12</sup> But preserving authors' works is not just important for historians. Preservation also has value for the artists and creators of the future. One needn't look much further than down the road from my own law school at UC Irvine to an amusement park in Anaheim and the Disney characters based on the Germanic children's stories collected by the Brothers Grimm<sup>13</sup> and on other public domain sources<sup>14</sup> in order to realize that works from the past may be important for creating new works, including commercially valuable new works.

Great scientists have said that they can see a little further by standing on the shoulders of giants—those whose work they build on.<sup>15</sup> In the realm of artistic creation, when an author draws on what has come before, perhaps the author and the audience can not only see a little further, but understand and feel a little more deeply.

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9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1043 (2007) (“[F]uture historians will value the most complete and accessible record of knowledge.”).

13. *Cinderella*, *Snow White*, and *Sleeping Beauty* are the classic Disney films based on characters and stories in Grimm's collection of fairy tales. *Tangled* and *The Princess and the Frog* are later examples.

14. See, e.g., ALICE IN WONDERLAND (Walt Disney Productions 1951) (based on Lewis Carroll's 1865 novel); THE JUNGLE BOOK (Walt Disney Productions 1967) (based on Rudyard Kipling stories first published in 1893–1894); THE LITTLE MERMAID (Walt Disney Productions 1989) (based on Hans Christian Andersen's fairy tale first published in 1837).

15. The saying is often attributed to Isaac Newton, who wrote in a 1675/6 letter to Robert Hooke: “If I have seen further it is by standing on the shoulders of Giants.” ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS 31 (1965). On the complicated story of the origins of the phrase, see generally MERTON, *supra*.

And often, new works build not only on prominent older works, but also on now-obscure ones. Take, for example, Martin Scorsese's award-winning 2002 film *Gangs of New York*, which was based on Herbert Asbury's long out-of-print 1927 book.<sup>16</sup> The *New York Times* reported, "For years, [the book] was available only in . . . thrift shops, [or on] guest-room night tables and the occasional country cottage bookshelf. That's where the director Martin Scorsese . . . found it one icy New Year's Eve [in his 20s], while he was house-sitting on Long Island."<sup>17</sup> He read it and became obsessed with making a film based on the book.<sup>18</sup> Just as we today benefit when authors create new works that draw upon surviving works from the past, surely future audiences will thank us if works that are created today survive for 75 or 150 years, or longer, to serve as the basis for future authors to draw on.

Perhaps most importantly, though, preserving creative works will benefit the readers, viewers, and listeners of the future. As Jessica Litman has reminded us, readers, viewers, and listeners are essential to the purpose of copyright.<sup>19</sup> She writes,

The most important reason we encourage creators to make . . . works of authorship is so that people will read the books, listen to the music, look at the art, and watch the movies. We want readers, listeners, and viewers to enjoy the works, learn from them, interact with them, and communicate with one another about them. That is the way that copyright law promotes the Progress of Science.<sup>20</sup>

It seems to me that this is true not only of readers, viewers, and listeners at the time a work is created, but into the future as well. Clearly not everything that is authored today will be of interest to large numbers of people 200 years from now. But many of those works will surely be of interest to *some* future audience. Have you encountered and enjoyed a song, a play, or a movie from 50 years ago, 100 years ago, 200 years ago, even though it is not now widely known or appreciated? Preserving today's works can give future audiences that same opportunity.

And in passing on a creative legacy to future audiences, we ought to cast our preservation net widely. We should not count on our ability to predict which of today's works will appeal to future

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16. Polly Shulman, *An Icy Night, an Old Book, and Decades Later . . .*, N.Y. TIMES, Sept. 8, 2002, § 2, at 34.

17. *Id.*

18. *See id.*

19. *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 13 (2010).

20. *Id.* (footnotes omitted).

audiences. We should be generous enough to those audiences to not simply impose our contemporary tastes and prejudices on them. I think that we would not be entirely happy if, for example, the only nineteenth-century English-language novels that remained available to us now were the ones that were most popular in their own day, such as Harriet Beecher Stowe's *Uncle Tom's Cabin*.<sup>21</sup>

After all, tastes may change, and some creators may be ahead of their time. So a work that isn't much appreciated when it is created may appeal more strongly to a later generation's sensibilities. Herman Melville's *Moby-Dick* and Kate Chopin's *The Awakening* are examples. Critics and the public received these books unfavorably when they were first published.<sup>22</sup> The books languished in obscurity for years, and only later did they come to be regarded as important.<sup>23</sup> Some of today's creators may similarly find future audiences more receptive to their work than we are. (I suspect that many of today's creators *hope* that that will happen.)

And works created by authors who belong to marginalized groups may not find a wide audience or commercial success when they are published. But in a later era, these works may be valuable documents for understanding the marginalization and oppression that the authors and others felt, and how they experienced it, survived, and pushed forward. For all these reasons, keeping creative works alive will give future audiences a broad range of authorship from which to choose in their reading, viewing, and listening.

## II.

Having argued for the importance of preserving creative works for the future, let me now turn to the question of how copyright law has dealt with the issue of preservation.

It might seem that copyright law's most important mechanism for encouraging preservation is granting copyright

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21. Michael Winship, *Two Early American Bestsellers*, COMMON-PLACE (Apr. 2009), <http://www.common-place.org/vol-09/no-03/winship> (describing the early success of *Uncle Tom's Cabin*).

22. See, e.g., Gay Barton, *Chopin, Kate O'Flaherty*, in 4 AMERICAN NATIONAL BIOGRAPHY 836, 838 (John A. Garraty & Mark C. Carnes eds., 1999); Hershel Parker, *Melville, Herman*, in 15 AMERICAN NATIONAL BIOGRAPHY, *supra*, at 277, 280.

23. See, e.g., Barton, *supra* note 22, at 838; Parker, *supra* note 22, at 280–83; Erica Noonan, *Meet Ahab's Wife*, LAWRENCE J.-WORLD, Dec. 5, 1999, at 2D (“‘Moby-Dick’ was a commercial failure in America, selling fewer than 6,000 copies before Melville’s death in 1891 . . . . The book was out-of-print for decades before eventually earning a place in virtually all university American literature classes.”).

owners exclusive rights in their works. The opportunity to try to earn financial rewards by exploiting a work would certainly seem to give copyright owners every reason to preserve their works. Unfortunately, we have many examples demonstrating that this incentive is not always enough.

The early decades of the film industry provide one example. Many producers saw little reason to keep their films for future re-release. Hundreds of feature films were made each year, leaving little need to reissue older films.<sup>24</sup> The cost of safely storing movies printed on volatile nitrate film stock was high, whereas immediate money could be made by reclaiming the silver from the film.<sup>25</sup> It might have been perfectly economically rational for a film studio not to have maintained copies of its films. But as a result, an estimated 80% of the films made in the United States during the silent era, up until 1929, no longer exist here.<sup>26</sup> And of American features produced before 1950, only about half still exist.<sup>27</sup>

The early decades of television offer another example. Live television broadcasts that were never recorded are obviously entirely lost. But even once television was being recorded, that didn't ensure that programs would survive. Networks often erased recorded shows. Newscasts, sports events, soap operas, game shows, and late-night programming (such as *The Tonight Show*) were particularly vulnerable.<sup>28</sup> As a result, TV's historical record has yawning gaps.<sup>29</sup>

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24. ANTHONY SLIDE, NITRATE WON'T WAIT: A HISTORY OF FILM PRESERVATION IN THE UNITED STATES 17–18 (1992) (“[F]ilm producers in the [1910s] and [1920s] paid scant attention to the need to safeguard their films for . . . future commercial release. With an average of 6,000 feature films produced in each decade, there was little, if any, need to resurrect an old film for reissue.”); see also David Pierce, *The Legion of the Condemned—Why American Silent Films Perished*, 9 FILM HIST. 5, 7 (1997) (explaining that costs of reissuing films were prohibitive considering the expected market).

25. See Pierce, *supra* note 24, at 6–10. Pierce offers an excellent recounting of the many reasons why so few early films survived. See *id.*

26. 1 LIBRARIAN OF CONGRESS, FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION 3–4 (1993).

27. *Id.* (“Anecdotal evidence suggests that survival rates for other film types, even major studio newsreels and shorts, are lower.”).

28. See 1 LIBRARIAN OF CONGRESS, TELEVISION AND VIDEO PRESERVATION 1997: A STUDY ON THE CURRENT STATE OF AMERICAN TELEVISION AND VIDEO PRESERVATION 6–7 (1997); Jeff Martin, *The Dawn of Tape: Transmission Device as Preservation Medium*, MOVING IMAGE, Spring 2005, at 49, 56.

29. Recorded television footage is not the only aspect of the medium's history to suffer neglect. In 2000, “47 boxloads of long-lost scripts and other memorabilia from ‘Your Show of Shows,’ ‘The Admiral Broadway Revue,’ and many other pioneering television productions” were found in a closet in New York's City Center, where they had apparently sat undisturbed for nearly 40 years after being stored in the closet (which was later “locked and painted shut”) by an early television producer. Glenn

This is true not only for U.S. television. A similar fate befell programming at the BBC and other British broadcasters. The confluence of a number of issues—including contracts with actors' unions governing reruns, as well as the cost of videotapes—led the BBC and other broadcasters to “wipe” tapes of recorded shows—that is, erase them or record new shows over them—until the 1970s.<sup>30</sup> The book that details this history has the evocative title, *Missing, Believed Wiped*.<sup>31</sup>

Fans of the long-running BBC series *Doctor Who* will be familiar with the situation. While a previously lost episode seems to be rediscovered every few years,<sup>32</sup> many of the early episodes are still missing.<sup>33</sup> Bob Dylan's first acting appearance was in a 1963 BBC drama called *The Madhouse on Castle Street*.<sup>34</sup> But you can't watch his performance today, because it was wiped in 1968.<sup>35</sup> And Monty Python fans might have found it hard to “look on the bright side of life”<sup>36</sup> if a close call in the 1970s had turned out differently. According to Python Terry Gilliam, the BBC was preparing to wipe the tapes of the first series of *Monty Python's Flying Circus*, when Terry Jones, a fellow Python, found out about it and managed to buy the tapes and preserve them.<sup>37</sup>

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Collins, *Mother Lode of TV Comedy Is Found in Forgotten Closet*, N.Y. TIMES, Nov. 14, 2000, at A1.

30. DICK FIDDY, *MISSING, BELIEVED WIPED: SEARCHING FOR THE LOST TREASURES OF BRITISH TELEVISION 6–9* (2001).

31. *Id.*

32. See, e.g., Dave Itzkoff, *Lost 'Doctor Who' Episodes Rematerialize*, N.Y. TIMES, Dec. 13, 2011, at C3 (describing the discovery of a 1965 and a 1967 episode in the collection of a British television engineer); *BBC Finds Missing Dalek Episode*, BBC NEWS (Jan. 15, 2004), <http://news.bbc.co.uk/2/hi/entertainment/3400429.stm> (describing the discovery of a 1965 episode); *Missing Dr Who Found*, BBC NEWS (Jan. 14, 1999), <http://news.bbc.co.uk/2/hi/entertainment/254418.stm> (describing the discovery of a 16mm film that was sent to New Zealand in 1967).

33. See *Missing Dr Who Found*, *supra* note 32 (noting 109 of 470 episodes missing as of 1999).

34. Chris Hastings, *BBC Launches Global Search for Bob Dylan's Lost Acting Debut*, SUNDAY TELEGRAPH (May 29, 2005), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1490972/BBC-launches-global-search-for-Bob-Dylans-lost-acting-debut.html>; see also Chris Hastings, *TV's Buried Treasure: Classics Saved*, INDEPENDENT (Dec. 11, 2008), <http://www.independent.co.uk/arts-entertainment/tv/features/tvs-buried-treasure-classics-saved-1061357.html>; T.J. Worthington, *Arena: Dylan in the Madhouse*, OFF THE TELLY (Sept. 28, 2005), <http://www.offthetelly.co.uk/?p=4010>.

35. Worthington, *supra* note 34.

36. MONTY PYTHON, *Always Look on the Bright Side of Life*, on MONTY PYTHON'S LIFE OF BRIAN (EMI Import 2006) (1979).

37. MONTY PYTHON: ALMOST THE TRUTH (THE LAWYER'S CUT) (Eagle Rock Entertainment 2009) (interview with Terry Gilliam). *Contra* Maureen Ryan, *And Now for Something Completely Excellent: A History of 'Monty Python's Flying Circus'*, CHI. TRIB. (Oct. 15, 2009), [http://featuresblogs.chicagotribune.com/entertainment\\_tv/2009/10/monty-](http://featuresblogs.chicagotribune.com/entertainment_tv/2009/10/monty-)

Perhaps it is no coincidence that some of these examples come from the years in which a new medium—such as motion pictures or television—was just developing. When a new medium is in its infancy, no one knows whether it is anything more than a flash in the pan. So most people working in the industry may not see any point in worrying about preserving their creations for the future, when they don't know whether they will be out of a job before long.<sup>38</sup>

But even after an industry or medium is well established, copyright protection doesn't always provide a sufficient incentive for preservation, as the example of the MGM Music Library shows.<sup>39</sup> The movie musical is perhaps one of the brightest spots in the history of the MGM film studio. Movies such as *The Wizard of Oz*, *Singin' in the Rain*, and *An American in Paris* represented the work of some of the day's greatest composers, lyricists, singers, actors, and dancers, and many were both commercially and critically successful. But the full orchestral scores for those musicals no longer exist.<sup>40</sup> By the 1940s, the MGM Music Library was one of the largest music collections in the country.<sup>41</sup> It was full of material from the movie musicals,<sup>42</sup> but it also included musical material from MGM's other movies, such as the scores to the studio's *Tom & Jerry* cartoons.<sup>43</sup> In the late 1960s, though, the studio wanted to cut its storage costs. So it dumped the music library—film scores, recordings, and all—into a landfill that

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python-flying-circus-documentary-ifc.html (stating that Terry Gilliam prevented the Monty Python tapes from being wiped).

38. See Clive Davis, *The Yellow Brick Road to the Proms*, TIMES (London), July 31, 2009, Times2, at 5 (“[T]he people responsible for creating the golden age of Hollywood song and dance had more pressing matters to worry about: there were deadlines to meet, budgets to juggle. Posterity tended to come a poor third in an industry where reputations were measured by the previous week's box-office returns.”).

39. On the destruction of the MGM Music Library, see generally Josh Getlin, *Keeping Track of the Scores*, L.A. TIMES, Dec. 16, 2004, at A1, which describes MGM's 1970 decision to dump musical scores and recordings into a landfill in order to cut storage costs.

40. See Getlin, *supra* note 39 (including Gene Kelly's “I've Got a Crush on You,” an outtake cut from *An American in Paris*, and the original orchestral score for Judy Garland's “Somewhere over the Rainbow,” from *The Wizard of Oz*, in the list of now-destroyed works in the MGM Music Library); Ivan Hewett, *John Wilson's Plea for 'Light Music'*, DAILY TELEGRAPH (June 24), 2009, <http://www.telegraph.co.uk/culture/music/classicalmusic/5626073/John-Wilsons-plea-for-light-music.html>.

41. Performing Arts Special Collections, Univ. of Cal., L.A., Library, *Finding Aid for the Warner Brothers Studios Music Collection*, ONLINE ARCHIVE CAL. 2 (2009), <http://cdn.calisphere.org/data/13030/r5/kt5h4nf1r5/files/kt5h4nf1r5.pdf>.

42. *Id.*

43. Kenneth Walton, *A Wonderful Wizard of Scores*, SCOTSMAN (Dec. 14, 2007), <http://www.scotsman.com/news/a-wonderful-wizard-of-scores-1-703692>.

became, depending on which source you consult, a golf course or the 405 Freeway.<sup>44</sup>

Because of MGM's massacre of its musical heritage, when British conductor John Wilson wanted to perform the music from classic MGM musicals with a full orchestra, he had to reconstruct the scores.<sup>45</sup> Working with whatever short scores or individual parts survive, he listens intensively to the soundtracks and recreates the orchestration—he “listen[s] to every single bar of the lost scores and laboriously write[s] down every note he hears for every instrument.”<sup>46</sup> A three-minute song can take a week to reconstruct.<sup>47</sup> But at least the existing copies of the films and the soundtracks make it possible to reconstruct these scores, and the audience appears to be grateful: his concerts of film music have been enormously popular in Britain.<sup>48</sup>

So simply giving copyright owners exclusive rights in their works does not necessarily seem to have provided enough incentive to preserve these works. What else has copyright done to encourage the preservation of creative works?

For the most part, copyright law hasn't explicitly addressed preservation. The first express recognition of preservation concerns came in the 1976 Copyright Act.<sup>49</sup> In Section 108, the statute imposes some limits on the copyright owner's rights in

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44. Compare Walton, *supra* note 43 (suggesting that the MGM library lies buried under a California golf course), with Stephen Holden, *Saving Old Scores from Pop's Dustbin*, N.Y. TIMES, Oct. 6, 2010, at C8 (reporting Michael Feinstein's statement that the library was used as landfill to build a Los Angeles freeway), and Getlin, *supra* note 39 (describing the library as buried in a landfill near the Golden State Freeway). While MGM's massacre of its musical heritage spurred substantial activity in the world of film music preservation, it was not a singular event. See Getlin, *supra* note 39. Michael Feinstein, who not only performs twentieth-century American pop music but also works to preserve it, reports that in 1985 he learned that Columbia Pictures was discarding some of its musical collection. *Id.* He visited the studio in Burbank and found a librarian separating film scores into two piles. *Id.* The ones that were for movies that got at least three stars in Leonard Matlin's movie guide were to be saved; the others were being thrown away. *Id.* The few that Feinstein managed to save included scores by well-known composers, such as Jule Styne and Sammy Cahn. *Id.*

45. Walton, *supra* note 43.

46. *Id.*

47. Davis, *supra* note 38.

48. See Hewett, *supra* note 40 (discussing Wilson's revival of long-forgotten film scores); Adam Sweeting, *TV 'Scandal' that Makes Parky Fume*, DAILY TELEGRAPH (Dec. 23, 2010), <http://www.telegraph.co.uk/culture/music/8221195/TV-scandal-that-makes-Parky-fume.html> (noting the “wild public enthusiasm” for Wilson's performances and the potential for follow-up ventures).

49. Copyright Act of 1976, Pub. L. No. 94-553, § 108, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 108 (2006)).

favor of some preservation activities by libraries and archives.<sup>50</sup> The Section 108 limits are relatively narrow, but they do provide some breathing room for preservation. (For example, the law allows libraries and archives to record television news broadcasts for preservation purposes.<sup>51</sup>)

But even without being designed to do so, copyright law has traditionally fostered preservation in at least two important ways. Perhaps most importantly, copyright law has promoted the production and circulation of copies of copyrighted works. The most fundamental rights reserved to the copyright owner have been the rights to make and sell copies—physical embodiments—of her work.<sup>52</sup>

And once the copyright owner makes and sells copies of her work, copyright law facilitates the continued circulation of those copies by not allowing the copyright owner to control resale, rental, or lending.<sup>53</sup> This has allowed the flourishing of libraries, which buy copies and lend them.<sup>54</sup> And copyright law has allowed secondhand markets, such as used bookstores and used record stores, to circulate copies of works once their current owner no longer wants them.<sup>55</sup>

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50. See 17 U.S.C. § 108(b) (2006) (allowing library reproduction and distribution of unpublished work for, *inter alia*, “purposes of preservation and security”); 17 U.S.C. § 108(c) (2006) (allowing library reproduction of published work, if certain conditions are met, for the purpose “of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen”).

51. See 17 U.S.C. § 108(f)(3), (i) (2006); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.2.2, at 7:71 (3d ed. Supp. 2012).

52. 17 U.S.C. § 106(1), (3) (2006). These rights in some form date back to the first U.S. Copyright Act in 1790, which granted copyright owners the exclusive right of “printing, reprinting, publishing, and vending” their works. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

53. 17 U.S.C. § 109(a) (2006). See generally R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 580–84 (2003) (explaining that pursuant to the first sale doctrine a copyright owner does not retain control over the subsequent distribution of his work).

54. Copyright law has also generally allowed stores to rent copies of copyrighted works. 17 U.S.C. § 109(a) (2006). *But see* 17 U.S.C. § 109(b) (2006) (barring rental of sound recordings and computer programs). Today, of course, we think of renting movies or audiobooks, but at times in our past, book rentals were also common. See, e.g., CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 95 (1999) (noting that for-profit “circulating libraries” survived into the 1950s); Kathleen M. Rassuli & Stanley C. Hollander, *Revolving, Not Revolutionary Books: The History of Rental Libraries Until 1960*, 21 J. MACROMARKETING 123, 124–25 (2001); Richard Roehl & Hal R. Varian, *Circulating Libraries and Video Rental Stores*, FIRST MONDAY (May 2001), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/854/763>. Indeed, Amazon.com has recently begun renting printed textbooks. Salvador Rodriguez, *Amazon Rolls Out Rental Program for Printed Textbooks*, L.A. TIMES, Aug. 7, 2012, at B3.

55. Reese, *supra* note 53, at 586.

You may wonder, “How does promoting the creation and circulation of copies promote preservation?” It turns out that distributing a work in multiple copies to a variety of owners can be one of the best mechanisms to help ensure that the work will survive into the future.

One writer has described the question of a work’s survival as a race.<sup>56</sup> It’s a race between a copy of an author’s work, on the one hand, and pursuing enemies, such as war, natural disaster, indifference, and intolerance on the other.<sup>57</sup> As long as at least one copy stays ahead in the race, the author’s creation survives and can be appreciated.<sup>58</sup> The more copies that are running the race, the more chances the work has to win.<sup>59</sup>

Thomas Jefferson, in 1791, stated the principle rather eloquently when he argued for preserving historical and state papers “not by vaults and locks . . . but by such a multiplication of copies, as shall place them beyond the reach of accident.”<sup>60</sup> And one current preservation project has summed up the principle succinctly: “Lots of Copies Keep Stuff Safe.”<sup>61</sup>

We see this principle in operation in the history of the works that have come down to us from the past. Many works from very long ago exist today because a single copy, often one of many copies that were once made, survived long enough to be rediscovered and, once printing technology became widely available, circulated in large numbers. Alexander Stille points out in *The Future of the Past* that

[t]he works of authors such as Homer and Virgil survived intact because of their enduring popularity and the multiple copies that were made at different times. But many of the works we regard as fixtures of our culture (including Plato) were lost for centuries and are known to us only because of a copy or two that turned up in medieval monasteries or in the collections of Arab scholars. Some works of undoubted

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56. REVEL NETZ & WILLIAM NOEL, *THE ARCHIMEDES CODEX: HOW A MEDIEVAL PRAYER BOOK IS REVEALING THE TRUE GENIUS OF ANTIQUITY’S GREATEST SCIENTIST* 65–66 (2007) (recounting the plot of a film that William Noel helped to make, in which Archimedes raced against “war, indifference, and the second law of thermodynamics” to save his book from destruction).

57. *See id.* at 65.

58. *See id.*

59. *See id.*

60. *Monuments of the Past: To Ebenezer Hazard*, in THOMAS JEFFERSON: WRITINGS: AUTOBIOGRAPHY, NOTES ON THE STATE OF VIRGINIA, PUBLIC AND PRIVATE PAPERS, ADDRESSES, LETTERS 973 (1984).

61. *What is LOCKSS?*, LOCKSS, <http://www.lockss.org/about/what-is-lockss/> (last visited Nov. 23, 2012). LOCKSS “is an open-source, library-led digital preservation system.” *Id.*

greatness did not survive at all: Sophocles is known to have written some 120 plays, of which we possess only nine.<sup>62</sup>

A less familiar example comes from Iceland. In the early 1100s, an Icelandic priest known as Ari the Learned wrote a book, now known as *The Book of the Icelanders*, recounting the island's history since it had been first settled 250 years earlier.<sup>63</sup> In the early 1200s, a scribe made a vellum manuscript copy of the book.<sup>64</sup> A few centuries later, in Scandinavia the Renaissance sparked scholarly interest in Old Icelandic Literature.<sup>65</sup> As part of this renewed interest, one of Iceland's bishops in the 1600s commissioned a priest to make two paper copies of the vellum manuscript of *The Book of the Icelanders*.<sup>66</sup> Less than a century later, the thirteenth-century vellum manuscript had disappeared, and this important historical record is known today only from the later paper copies.<sup>67</sup>

The operation of this "Lots of Copies" principle is easy to understand. Any particular copy of an author's work is subject to threats to its survival: the ravages of time and use, environmental conditions, as well as natural and man-made disasters, such as flood, fire, earthquakes, and war. The more copies that exist, the more likely it is that at least one of them will survive.<sup>68</sup>

And this preservation effect results not just from the greater number of copies. If copies are distributed widely, many copies will be held in different locations and under different conditions, and will be subject to different risks. Some will be in seismically active zones, subject to earthquakes, and others won't. Some will be in hurricane-prone areas, subject to flood, and others will not.

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62. ALEXANDER STILLE, *THE FUTURE OF THE PAST* 308 (2002).

63. SIR WILLIAM ALEXANDER CRAIGIE, *THE ICELANDIC SAGAS* 2, 4–5, 21–24 (1913); Margrét Eggertsdóttir, *Manuscript Resources in Iceland*, ARIZ. CENTER FOR MEDIEVAL & RENAISSANCE STUD., <http://www.acmrs.org/academic-programs/online-resources/CARA/manuscriptsIceland> (last visited Nov. 23, 2012).

64. Margrét Eggertsdóttir, *From Reformation to Enlightenment*, in 5 *A HISTORY OF ICELANDIC LITERATURE* 174, 198 (Daisy Neijmann ed., 2006); see also Eggertsdóttir, *supra* note 63.

65. Eggertsdóttir, *supra* note 63.

66. Halldór Hermannsson, *Introductory Essay to ARI THORGILSSON, THE BOOK OF THE ICELANDERS* 39–40 (photo. reprint 1966) (Halldór Hermannsson ed. & trans., 1930) (1123); Eggertsdóttir, *supra* note 63.

67. See Hermannsson, *supra* note 66, at 40; Eggertsdóttir, *supra* note 63.

68. See Reese, *supra* note 53, at 605–06 (calculating that, if any single copy of a work has, for example, a one in one hundred chance of being destroyed each year, then if only one copy exists, the chance that that copy will survive at the end of two hundred years is only 13%, while if one hundred copies of the work exist, then the chance that at least one copy will survive at the end of two hundred years is greater than 99%).

Some will be kept in high humidity, others at low humidity; some at high temperatures, others at low temperatures. Some, like the thousands of books in Dr. Magnus Hirschfeld's Institute for Sexual Research in Berlin that were destroyed in May 1933 as part of the Nazi campaign to burn "un-German" books, will be kept in countries where intolerance leads to destruction.<sup>69</sup> Others will stand on shelves in nations less disturbed by such outbreaks. So the diversity of conditions under which copies are held will help increase the chances that a copy will survive.

And this is hardly only a Western phenomenon. In China, during approximately the three centuries before and after the start of the Common Era, at least five major destructions of important libraries took place in imperial capitals or major cities.<sup>70</sup> As one Chinese author explained, "We find repeatedly that no sooner was a national collection built up than it was partly destroyed or scattered, only to be recovered and restored in the succeeding dynasties, although in the process many works were lost beyond the hope of recovery."<sup>71</sup> Yet in out-of-the-way places in ancient China, some copies survived. In the early 1970s, three tombs of noble personages, buried in the second century BCE, were discovered near Changsha, the capital of Hunan province, at a site called Mawangdui.<sup>72</sup> Two had been undisturbed for over two millennia.<sup>73</sup> One of the tombs contained silk manuscripts that proved to be the earliest manuscripts of the Chinese classics the *I Ching* and the *Tao Te Ching* known at that time.<sup>74</sup> Indeed, the Mawangdui manuscript of the *I Ching* is far

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69. See FERNANDO BÁEZ, A UNIVERSAL HISTORY OF THE DESTRUCTION OF BOOKS 206–09 (Alfred MacAdam trans., 2008); RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS 16–17, 51 (1986). On Nazi book burning more generally, see BÁEZ, *supra*, at 206–23, and MATTHEW BATTLES, LIBRARY: AN UNQUIET HISTORY 164–79 (2003).

70. LUCIEN X. POLASTRON, BOOKS ON FIRE: THE DESTRUCTION OF LIBRARIES THROUGHOUT HISTORY 85–91 (Jon E. Graham trans., 2007).

71. *Id.* at 88 (quoting K.T. Wu, *Libraries and Book-Collecting in China Before the Invention of Printing*, 5 T'IENTSIA MONTHLY 237, 237 (1937)).

72. See David D. Buck, *Three Han Dynasty Tombs at Ma-wang-tui*, 7 WORLD ARCHAEOLOGY 30, 30–32 (1975).

73. *Id.*

74. Robert G. Henricks, *Introduction to LAO-TZU TE-TAO CHING: A NEW TRANSLATION BASED ON THE RECENTLY DISCOVERED MA-WANG-TUI TEXTS*, at xiv (Robert G. Henricks trans., 1989) (noting that in the case of the *I Ching* and the *Lao-tzu* (also known as the *Tao Te Ching*), the Mawangdui manuscripts "are now the earliest known versions"); Edward L. Shaughnessy, *Introduction to I CHING: THE CLASSIC OF CHANGES* 14 (Edward L. Shaughnessy trans., 1996). In 1993, an even earlier version of the *Tao-te Ching* was discovered in a tomb at Guodian. Robert G. Henricks, *Introduction to LAO TZU'S TAO TE CHING: A TRANSLATION OF THE STARTLING NEW DOCUMENTS FOUND AT GUODIAN 1* (Robert G. Henricks trans., 2000).

older than any other known to exist at the time it was discovered.<sup>75</sup>

To illustrate how the wide dispersal of copies can be an effective means of preservation of creative works, let me offer a tale of the Yukon. Not a tale of Sergeant Preston, and his wonder dog King. Instead, a tale of a place called Dawson City.<sup>76</sup> The Klondike gold rush that began in 1896 gave birth to a boom town called Dawson, which swelled to over 30,000 residents and became the capital of the new Yukon Territory.<sup>77</sup> When the gold rush came to a quick end, Dawson's population plummeted.<sup>78</sup> But the city remained.<sup>79</sup> And moving pictures remained one of the entertainments for the inhabitants who were left.<sup>80</sup>

The movies made their way to Dawson by traveling from town to town, being shown at a cinema in each town and then shipped on to the next.<sup>81</sup> Dawson was the end of this particular geographic distribution chain.<sup>82</sup> Ordinarily, a film print that had circulated through an entire distribution chain would be returned to the studio or the distributor, but evidently the studios weren't willing to bear the expense of shipping the heavy cans of film back almost from the Arctic Circle.<sup>83</sup> So the film distributors entrusted the prints to the Dawson City branch of the Canadian Bank of Commerce.<sup>84</sup>

Dawson City not only had a cinema; it also had a swimming pool.<sup>85</sup> In 1929, though, the swimming pool was filled in to make way for what might seem to be a more weather-appropriate sports facility—a hockey rink.<sup>86</sup> And someone decided that the ideal material to fill the pool would be the hundreds of reels of

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75. Shaughnessy, *supra* note 74, at 14.

76. The story of the Dawson City film discovery is drawn from Sam Kula, *Rescued from the Permafrost: The Dawson Collection of Motion Pictures*, ARCHIVARIA, Summer 1979, at 141, 141–46 (1979) [hereinafter Kula, *Rescued from the Permafrost*] and Sam Kula, *There's Film in Them Thar Hills!*, 4 AM. FILM, July–Aug. 1979, at 14, 15, 18 [hereinafter Kula, *There's Film in Them Thar Hills!*].

77. Charlene Porsild, *Dawson City*, in THE OXFORD COMPANION TO CANADIAN HISTORY 173, 173 (Gerald Hallowell ed., 2004); Kula, *Rescued from the Permafrost*, *supra* note 76, at 141.

78. Porsild, *supra* note 77, at 173.

79. *Id.* at 173–74.

80. *See id.*; Kula, *Rescued from the Permafrost*, *supra* note 76, at 141–42, 146.

81. *See Collections Overviews*, LIBR. CONGRESS, <http://www.loc.gov/acq/devpol/colloversviews/mopix.html> (last visited Nov. 23, 2012).

82. Kula, *Rescued from the Permafrost*, *supra* note 76, at 142.

83. SLIDE, *supra* note 24, at 99; Kula, *Rescued from the Permafrost*, *supra* note 76, at 142.

84. Kula, *Rescued from the Permafrost*, *supra* note 76, at 142.

85. *Id.*

86. *Id.* at 142–43.

film that had accumulated.<sup>87</sup> So into the empty pool, and under the hockey rink, they went.<sup>88</sup>

And there they stayed until 1978.<sup>89</sup> That year, a construction crew broke ground on a vacant lot where a recreation center was being built.<sup>90</sup> They uncovered a few reels of film.<sup>91</sup> Luckily, at that point they called in historians and archivists.<sup>92</sup> Once the digging was through, over 400 salvageable reels of film were excavated in Dawson City.<sup>93</sup>

It might seem surprising that films buried for nearly half a century had survived. Early films like the ones shown in Dawson City were printed on nitrate film.<sup>94</sup> Nitrate film is highly flammable, and it also gradually decomposes.<sup>95</sup> The only known retardant of that deterioration? Storage at low temperatures and low humidity.<sup>96</sup> In Hollywood, this had to be done, if it was done at all, at great expense in temperature-controlled warehouses.<sup>97</sup> In Dawson City, the same effect was achieved, unintentionally, by simply burying the films in the permafrost.<sup>98</sup> As a result, many of the buried films could, with a good deal of restoration work, be saved.<sup>99</sup>

The salvaged movies include Hollywood serials, newsreels, and feature films.<sup>100</sup> When they were discovered, the majority of these films had been considered lost—no remaining copy was known to exist.<sup>101</sup> These no-longer-lost works include a 1917 movie starring the great silent-film comedian Harold Lloyd.<sup>102</sup> Other names represented in the Dawson City find that might be

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87. *See id.* at 142–44.

88. *Id.* at 142–43.

89. *Id.* at 143.

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.* at 144.

94. *Id.* at 142–43.

95. Pierce, *supra* note 24, at 8–9.

96. *See id.*

97. *Cf. id.* at 9–14 (describing the high cost and danger associated with the storage of nitrate films in Hollywood).

98. Kula, *Rescued from the Permafrost*, *supra* note 76, at 142 (“Since Dawson City lies close enough to the Arctic Circle that the ground is permanently frozen to a depth between [ten] and [fifteen] feet, one can only assume that the basement of the Library, [where the bank stored the films,] . . . approximated the refrigerated storage conditions recommended for nitrate film.”). Actually, while the low temperature had helped preserve the film, many reels had been damaged by humidity. *See id.* at 146.

99. *Id.* at 144.

100. *Id.* at 146.

101. Kula, *There’s Film in Them Thar Hills!*, *supra* note 76, at 15.

102. Kula, *Rescued from the Permafrost*, *supra* note 76, at 147.

familiar include Lon Chaney, Lionel Barrymore, Douglas Fairbanks, and D.W. Griffith.<sup>103</sup> The Dawson swimming pool also preserved a copy of Samuel Goldwyn's first independent production<sup>104</sup>—which seems rather ironic, because his successors at Metro–Goldwyn–Mayer would be the ones to consign the great MGM Music Library to the landfill.<sup>105</sup>

Geographic accident may be one of a film preservationist's best friends, because Dawson City turns out not to be the only far-away place where long-lost films have been found. In 2010, Gosfilmofond, the Russian state film archive, donated to the Library of Congress copies of ten previously lost U.S. silent films.<sup>106</sup> The gift was the first installment in a donation of up to 200 old U.S. films that may now exist only in a copy in the Russian archive, where they ended up after being shown in Russian cinemas when they were released.<sup>107</sup> The first set included *The Arab* starring Ramon Novarro and filmed on location in Algiers, and a 1923 film by Victor Fleming (best known for later directing *The Wizard of Oz* and *Gone with the Wind*).<sup>108</sup> And last year, seventy-five U.S. silent films found in the New Zealand Film Archive, almost all of which are thought to survive nowhere else, began being returned to the United States for preservation.<sup>109</sup> They include one of the few surviving silent films by four-time Oscar-winning director John Ford, and one of actress Clara Bow's earliest Hollywood features.<sup>110</sup> The archive's director explained that, like Dawson City, New Zealand was at the end of a film distribution network in the Pacific.<sup>111</sup> By the time a print ended up there, "it was considered largely to have finished its commercial life" and the studios "didn't want to spend the money to ship it all the way back . . . [and] probably . . . issued instructions" to destroy it.<sup>112</sup> In many cases, those instructions appear to have been ignored, and the films eventually found their way to the archive.

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103. *Id.* at 146.

104. *Id.*

105. *See supra* text accompanying note 44.

106. *Russia Presents Library of Congress with Digital Copies of Lost U.S. Silent Films*, LIBR. CONGRESS (Oct. 21, 2010), <http://www.loc.gov/today/pr/2010/10-239.html>.

107. *Id.*

108. *Id.*

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

110. Movshovitz, *supra* note 109.

111. *See id.*

112. *Id.* (quoting Frank Stark, Chief Executive, New Zealand Film Archive) (internal quotation marks omitted).

Another recent case involved Fritz Lang's celebrated 1927 German film *Metropolis*, which influenced such later films as *Blade Runner* and *Star Wars*.<sup>113</sup> Shortly after the movie's unsuccessful premiere in Berlin, it was withdrawn and about an hour was cut from the film.<sup>114</sup> The cuts resulted in what one critic called "an oversimplification of the plot, the disappearance of key scenes, and the sidelining of significant characters."<sup>115</sup> But one person who liked the movie at its premiere was a visiting Argentine film distributor, who immediately purchased the rights and took an uncut print of the film back with him to Argentina.<sup>116</sup> The rest of the story should be easy to predict. The film entered a local critic's private collection and eventually ended up in the Museum of Cinema in Buenos Aires, where it was rediscovered in 2008 and has been used to create a restored version of Lang's original cut.<sup>117</sup>

While many of these examples involve lost films from the United States being found abroad, the United States sometimes gets to play the heroic role of rescuer. Recall that the BBC routinely wiped many of its recordings of television programs well into the 1970s.<sup>118</sup> The Library of Congress recently discovered sixty-eight rare recordings of British television dramas produced between 1957 and 1970.<sup>119</sup> The shows had been imported for broadcast on public television in the United States and were donated to the Library by the predecessor of PBS.<sup>120</sup> They feature actors such as John Gielgud, Maggie Smith, Sean Connery, and Susannah York in original works as well as plays by Shakespeare, Chekhov, Ibsen, and Sophocles.<sup>121</sup>

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113. Larry Rohter, *The Full 'Metropolis'*, N.Y. TIMES, May 5, 2010, at C1; Kate Connolly, *Missing Scenes from Fritz Lang's Metropolis Turn Up After 80 Years*, GUARDIAN (July 3, 2008), <http://www.guardian.co.uk/film/2008/jul/03/news.culture3>.

114. Rohter, *supra* note 113; see Connolly, *supra* note 113 (observing that the public and critics disliked *Metropolis*).

115. Connolly, *supra* note 113.

116. Rohter, *supra* note 113.

117. *Id.*; Connolly, *supra* note 113.

118. See *supra* note 30 and accompanying text.

119. *Library of Congress Discovers Lost British TV Treasures*, LIBR. CONGRESS (Sept. 15, 2010), <http://www.loc.gov/today/pr/2010/10-205.html>; Mark Lawson, *Yesterday's Heroes: The Lost Treasure Trove of BBC drama*, GUARDIAN (Nov. 3, 2010), <http://www.guardian.co.uk/tv-and-radio/2010/nov/03/lost-bbc-drama-missing-believed-wiped>; Vanessa Thorpe, *Lost Tapes of Classic British Television Found in the US*, OBSERVER (Sept. 12, 2010), <http://www.guardian.co.uk/tv-and-radio/2010/sep/12/lost-tapes-classic-british-television>.

120. *Library of Congress Discovers Lost British TV Treasures*, *supra* note 119.

121. Lawson, *supra* note 119; Thorpe, *supra* note 119.

So one important way in which copyright has helped preserve authors' works is by encouraging the production of many copies, which help keep the works safe. The other important way in which copyright law has traditionally fostered preservation is by not interfering much with private copying. Copyright wonks have long debated whether making a single private copy technically violated copyright law.<sup>122</sup> But as a practical matter, someone who in private made a single copy for personal use never faced enforcement claims (which is why the academic debate could rage on, unsettled by any authority).<sup>123</sup>

And private copying turns out to be an important mechanism for preserving works, as a recent baseball example shows. The 1960 World Series pitted the New York Yankees against the Pittsburgh Pirates.<sup>124</sup> The Series went to a seventh game at Forbes Field in Pittsburgh.<sup>125</sup> This was apparently quite a game—a recent book about it is entitled *The Best Game Ever*.<sup>126</sup> The lead changed hands four times.<sup>127</sup> The game made World Series history—the only such game without a single strikeout.<sup>128</sup> As one commentator explained, it featured “19 runs and 24 hits and was played in a brisk 2 hours and 36 minutes. It was full of managerial decisions to second-guess, clutch hits and unlikely heroes, pitchers throwing through pain, and strange, quirky plays.”<sup>129</sup>

To give you an idea of how exciting the game was, I'll summarize just the last couple innings.<sup>130</sup> In the eighth inning, the Yankees pulled ahead, 7–4, and Pittsburgh's prospects looked dim. By the end of the inning, though, the Pirates were winning, 9–7. In the ninth, Mickey Mantle did some tremendous base running to avoid a double play that would have ended the game. And the Yankees tied the score at 9–9 before the Pirates came up to bat. Bill Mazeroski led off for the Pirates. He hit a home run—

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122. See, e.g., Hugh J. Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S.C. L. REV. 153, 154 (1968).

123. ALAN LATMAN, *Study No. 14: Fair Use of Copyrighted Works*, in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 11 (Comm. Print 1960).

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

125. *Id.* at 16–18.

126. See *supra* note 124.

127. David Schoenfield, *The Greatest Game Ever Played*, ESPN (Oct. 13, 2010), <http://sports.espn.go.com/mlb/playoffs/2010/columns/story?id=5676003>.

128. REISLER, *supra* note 124, at 230; Schoenfield, *supra* note 127.

129. Schoenfield, *supra* note 127.

130. This summary is drawn from Schoenfield. *Id.*

the only Game 7 walk-off home run in World Series history—to win the game for the Pirates, 10–9.

But most of you have probably never seen the game, unless you watched it when NBC broadcast it live. As mentioned before, until the 1970s, TV networks and stations routinely erased or discarded their films of sporting events, even ones as important as the World Series.<sup>131</sup> So the only known audiovisual record of the game existed in highlights.<sup>132</sup>

Until recently, that is. In 2009, five reels of 16-millimeter film that recorded the broadcast of the 1960 game turned up—in the cellar of the home of the late Bing Crosby.<sup>133</sup> Crosby was a part owner of the Pirates in 1960, but he was too nervous to watch the Series.<sup>134</sup> Indeed, Crosby feared that if he were even in the country during the Series, he would jinx the team, so he and his wife went to Paris and followed the action by radio.<sup>135</sup> But apparently he knew that if his team did win, he'd be sorry he hadn't seen the games, so he arranged for a kinescope of the broadcast to be made by filming off a TV monitor.<sup>136</sup> And apparently, after he returned to the States and watched the game, he put the film in his cellar, along with many other films and records.<sup>137</sup> It was recently discovered there, and has since been broadcast and is now available on DVD.<sup>138</sup>

So we owe our ability to watch what at least some people consider the best baseball game ever played not to Major League Baseball, or to NBC, but to a private copy made by a viewer. And celebrities aren't the only people who made private copies that preserved important sports broadcasts. A kinescope recording of Don Larsen's perfect game in the 1956 World Series was discovered a few years ago owned by a private film collector.<sup>139</sup> And while both NBC and CBS broadcast Super Bowl I, between the Packers and the Chiefs, from the Los Angeles Coliseum in 1967, apparently neither network retained a tape of the

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131. See *supra* text accompanying notes 28–29.

132. REISLER, *supra* note 124, at 258–59.

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

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

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

139. Mike Dodd, *Telling the Tale of a Perfect Find*, USA TODAY, Oct. 25, 2006, at 3C, available at [http://www.usatoday.com/sports/baseball/2006-10-24-perfect-game-focus\\_x.htm](http://www.usatoday.com/sports/baseball/2006-10-24-perfect-game-focus_x.htm).

game.<sup>140</sup> But in 2011, it was announced that a fairly complete video recording, stored in a Pennsylvania attic for nearly forty years, had been discovered and restored.<sup>141</sup> It was reportedly made by someone who had access to a video recorder at his workplace, and who recorded it in the hope that it might someday be valuable.<sup>142</sup>

And private copying hasn't just preserved sports history—it has saved some of our musical heritage as well. In the late 1930s, William Savory, a jazz musician and recording technician, developed a precursor to the 33-1/3 rpm long-playing record, enabling him to record for far longer than the three minutes that the predominant 78 rpm technology of the day allowed.<sup>143</sup> Savory worked for radio broadcasters and surreptitiously made recordings when he engineered live radio broadcasts of performances from ballrooms and nightclubs by leading jazz musicians of the swing era.<sup>144</sup> Because of his technical expertise, access, and recording format, these recordings are of higher quality than home recordings made by radio listeners and are of longer performances than studio recordings made for 78 rpm records.<sup>145</sup> Nearly 1,000 of Savory's recordings surfaced after his death and include performances by musicians such as Billie Holiday, Louis Armstrong, Benny Goodman, Count Basie and others that had not been heard since their original broadcast.<sup>146</sup>

To sum up, copyright protection doesn't always mean that copyright owners will have sufficient incentive to preserve their own works. But copyright law has encouraged preservation by promoting the circulation of multiple copies and by not interfering with those who make private copies of works that aren't widely distributed.

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140. David Roth & Jared Diamond, *Found at Last: A Tape of the First Super Bowl*, WALL ST. J., Feb. 5, 2011, at A16.

141. *Id.*

142. *Id.*; see also Vincent M. Mallozzi, *Let's Go to the Audiotape*, N.Y. TIMES Dec. 3, 2006, <http://www.nytimes.com/2006/12/03/sports/03cheer.html> (describing John Miley Jr.'s collection of about 100,000 recordings of radio broadcasts of sporting events, which began with recordings Miley made as a child using a wire recorder given to him by his father). Miley's collection has been acquired by the Library of Congress. *Library Acquires Historic Radio & TV Sports Recordings*, LIBR. CONGRESS (Mar. 9, 2011), <http://www.loc.gov/today/pr/2011/11-046.html>.

143. Steven Seidenberg, *Orphaned Treasures: A Trove of Historic Jazz Recordings Has Found a Home in Harlem, But You Can't Hear Them*, ABA J., May 2011, at 47–49.

144. *Id.*; Larry Rohter, *Great Jazz, Long Unheard, Is Rediscovered*, N.Y. TIMES, Aug. 17, 2010, at C1.

145. Rohter, *supra* note 144.

146. *Id.*; Seidenberg, *supra* note 143, at 47–48. The collection also includes some recordings of classical music, some speeches, and a reading by James Joyce. Rohter, *supra* note 144.

## III.

Clearly, creative works have long faced a difficult road to survival. I'd like to talk now about how the prospects of survival have changed with the emergence of digital technologies and computer networks.

The new technological environment may offer some preservation benefits. Old works are being digitized, and new works are born digital.<sup>147</sup> When that happens, it can facilitate the making of more copies of the works. For example, it's now possible to store a digital copy of a book, a song, or a film, and to produce on demand a bound volume or a CD or DVD.<sup>148</sup> This could result in more fresh copies being produced over a work's copyright life, with each copy going out into the world to try to make its way to the future.

The Google Book project offers another example. Google is involved in a very large project—which has been very controversial as a matter of copyright law<sup>149</sup>—to digitize as many existing books as it can, and to make them available online.<sup>150</sup> Digitizing books not only makes them more accessible than when they just sit in the stacks of an academic library or two. It should make it easier for copies of the books to proliferate—both printed copies that could be produced from the book scan, and multiple digital copies that Google or its users might make.

But I'd like to focus on the challenges that digital technologies pose for preservation.

Analog copies of creative works don't require hardware and software to access them. A printed book, or play, or sheet music, or photograph, or a painted canvas—these are all immediately perceptible if the physical copy is maintained. A visit to most any library or art museum will demonstrate that. But digitally stored

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147. See, e.g., CATHERINE C. MARSHALL, *READING AND WRITING THE ELECTRONIC BOOK* 130–32 (2010); Barbara Isenberg, *Going from Easel to iPad*, L.A. TIMES, Jan. 23, 2011, at E1 (describing artist David Hockney's creative evolution toward creating new digital art on an iPad); John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1 (describing efforts by Google to digitize millions of hard-copy books).

148. Reese, *supra* note 53, at 628–29.

149. See, e.g., *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 386–87 (S.D.N.Y. 2012); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669–71 (S.D.N.Y. 2011).

150. See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1314 (2010) (“Google had the vision, technology, and financial resources to undertake a mass digitization effort in 2004.”); Markoff & Wyatt, *supra* note 147 (describing how the Google Books project pushes Google toward its goal to “make all the world's information accessible to anyone with a Web browser”); *About Google Books*, GOOGLE BOOKS, <http://books.google.com/googlebooks/history.html> (last visited Oct. 13, 2012).

works are useless unless the proper equipment is available to translate the stored data into a form that a reader, viewer, or listener can perceive. Just try picking up a USB key and reading a document stored on it without the help of any hardware or software.

The Domesday Book offers a comparative example. The original Domesday Book is a survey of England compiled for William the Conqueror in 1086.<sup>151</sup> It was handwritten in ink on parchment.<sup>152</sup> Today, nine centuries later, it can still be read in Kew at the National Archives.<sup>153</sup>

Between 1984 and 1986, in honor of the book's 900th anniversary, the BBC compiled two interactive videodiscs containing extensive multimedia documentation of life in Britain at the time, including thousands of maps, pictures and data sets.<sup>154</sup> Much of the information was contributed by around a million members of the public.<sup>155</sup> Unfortunately, the BBC Domesday Project was stored on discs that did not become standard.<sup>156</sup> And the data can be accessed only on fairly specialized computers, with specialized software.<sup>157</sup> Unfortunately, in less than two decades, the disc readers, computers, and software became increasingly rare, and the ones that exist are difficult to maintain.<sup>158</sup> Major efforts have been required in order to extract the data and make it available again.<sup>159</sup>

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151. *Digital Domesday Book Unlocked*, BBC NEWS (Dec. 2, 2002), <http://news.bbc.co.uk/2/hi/technology/2534391.stm> (“[T]he original Domesday Book . . . [is] an inventory of England compiled in 1086 by Norman monks.”); *Discover Domesday*, NAT'L ARCHIVES, [www.nationalarchives.gov.uk/domesday/discover-domesday/](http://www.nationalarchives.gov.uk/domesday/discover-domesday/) (last visited Oct. 13, 2012).

152. See *Great Domesday*, NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/domesday/discover-domesday/great-domesday.htm> (last visited Nov. 23, 2012).

153. See *Digital Domesday Book Unlocked*, *supra* note 151; *Domesday Legacy*, NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/domesday/discover-domesday/domesday-legacy.htm> (last visited Nov. 23, 2012).

154. Robin McKie & Vanessa Thorpe, *Digital Domesday Book Lasts 15 Years, Not 1,000*, OBSERVER (Mar. 3, 2002), at News 7, available at <http://www.guardian.co.uk/uk/2002/mar/03/research.elearning>; *Digital Domesday Book Unlocked*, *supra* note 151.

155. McKie & Thorpe, *supra* note 154.

156. See *id.*; *Digital Domesday Book Unlocked*, *supra* note 151.

157. *Digital Domesday Book Unlocked*, *supra* note 151.

158. See McKie & Thorpe, *supra* note 154.

159. *Digital Domesday Book Unlocked*, *supra* note 151; *Domesday Project of the 1980s Given 2011 Website Update*, BBC NEWS (May 12, 2011), <http://www.bbc.co.uk/news/technology-13348198>. Other examples of digitally stored information becoming inaccessible in a relatively short time include New York state land-use and natural-resource inventories from the 1960s, NASA satellite data from the 1970s, and important East German records. Gerd Meissner, *Unlocking the Secrets of the Digital Archive Left by East Germany*, N.Y. TIMES, Mar. 2, 1998, at D5; Claire Tristram, *Data Extinction*, TECH. REV., Oct. 2002, at 36, 38–39.

The contrast between the Domesday Book, still readable nearly a millennium after its creation with no technological intervention needed, and the BBC Domesday Project, which required a high-tech rescue after just fifteen years, illustrates some of the significant hurdles that digital technology can pose for preservation.<sup>160</sup>

Part of the problem is that digital media formats shift far more rapidly than most analog ones. The handwritten papyrus scroll was around for centuries until it gradually gave way to the handwritten vellum codex, which itself was around for centuries until it gave way to the printed paper volume.<sup>161</sup> Contrast the experience with standard computer diskettes. The 8-inch floppy diskette was introduced in 1971, and replaced in 1976 by the 5-1/4-inch diskette, which was in turn replaced in 1984 by the 3-1/2-inch diskette, which itself has become increasingly rare.

And no matter what kind of medium data are stored on, the software needed to access digital data has also been evolving quite rapidly. You may have, squirreled away somewhere, a cache of 5-1/4-inch diskettes that, if they haven't degraded, contain lots of documents created using WordPerfect for DOS. Or perhaps you have a stash of 3-1/2-inch floppies holding documents you wrote using MacWrite, running on the "System" operating system, on an Apple Macintosh. It may not yet be impossible to read your documents, but it is certainly a lot harder than it is to read documents you wrote more recently. Is there any reason to think that the documents you store today on a CD or a USB key won't also be difficult to retrieve in 20 years?

These issues affect creative works that are publicly disseminated, not just those created by private computer users. How confident are you that the books you download to your Kindle today in Amazon's AZW format will be readable in fifty years?<sup>162</sup> Or consider the artist David Hockney, who says that today the medium he works in most often is the iPad, which he uses as a drawing pad.<sup>163</sup> He produces some beautiful work on the device, which he e-mails to friends and colleagues.<sup>164</sup> A senior curator at the Los Angeles County Museum of Art said that she

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160. McKie & Thorpe, *supra* note 154; Jack Schofield, *Digital Dark Age Looms*, GUARDIAN (Jan. 8, 2003), <http://www.guardian.co.uk/technology/2003/jan/09/onlinesupplement3>.

161. NETZ AND NOEL, *supra* note 56, at 67, 70–74, 81–86.

162. See MARSHALL, *supra* note 147, at 122, 126 (noting that readers have expressed concerns about the potential obsolescence of books produced for use with Amazon's Kindle).

163. Isenberg, *supra* note 147.

164. *Id.*

had to get an iPad so she could receive the drawings on the same platform Hockney used to make them.<sup>165</sup> Hockney's earlier paintings and photocollages should be relatively easy to view 100 or 200 years from now, if the physical objects survive. How easy will it be to view his iPad drawings?

In addition, many of the digital copies that are now being distributed have technological protection measures that control, or attempt to control, access to the work stored on the copy.<sup>166</sup> Copyright owners hope that these control mechanisms may help keep infringers from misusing the digital versions of their works, which might otherwise be quite easy to copy and disseminate.<sup>167</sup> But these control measures may further complicate the survival of usable copies of a work into the future. The technological protection measure may introduce another layer of software or hardware that can become obsolete.<sup>168</sup> Again, how confident are you that the music files you bought from iTunes before 2009, encoded using Apple's proprietary FairPlay encryption scheme, will be playable in fifty years?<sup>169</sup>

All of this may explain why Brewster Kahle, whose Internet Archive has already digitized two million books, is nonetheless building an archive of printed books and of film reels.<sup>170</sup> Kahle noted that "[m]icrofilm and microfiche were once a utopian vision of access to all information, . . . but it turned out we were very glad we kept the books."<sup>171</sup> Given the potential for shifts in digital formats and technologies, Kahle's "Physical Archive of the Internet Archive" could turn out to be very useful in the future.<sup>172</sup>

Perhaps the biggest preservation issue created by new digital technology is the move away from dissemination of easily

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165. *Id.*

166. Reese, *supra* note 53, at 613–14, 643–44.

167. *See id.* at 612–14.

168. *See id.* While the law generally prohibits circumventing technological protection measures used by copyright owners, 17 U.S.C. § 1201(a)(1)(A) (2006), in some cases the Library of Congress has adopted exceptions that allow circumvention of obsolete controls. *See, e.g.*, 37 C.F.R. § 201.40(b)(3) (2011) (allowing technological circumvention of copyright material to access computer programs protected by obsolete dongles). But even if circumvention is legally permissible, it may still pose technological hurdles to accessing the content protected by the obsolete control.

169. *See, e.g.*, Kate Bevan, *You Mean My Two-Year-Old iPad Can't Take This Year's Software?*, *GUARDIAN* (July 4, 2012), <http://www.guardian.co.uk/technology/2012/jul/04/apple-ipad-software-update> (explaining how the writer's iPad was effectively obsolete after two years because she could not install new software).

170. David Streitfeld, *In a Flood Tide of Digital Data, an Ark Full of Books and Film*, *N.Y. TIMES*, Mar. 4, 2012, at A1.

171. *Id.* (quoting Brewster Kahle) (internal quotation marks omitted).

172. *See id.*

transferrable physical copies, and the consequent loss of the “lots of copies” that would keep the works “safe.”<sup>173</sup> Many works are being disseminated principally or exclusively by transmission. Consider YouTube. You can go to a YouTube page, and YouTube will stream the video on that page to you so that you can watch it. But when you do, you don’t ordinarily end up with a copy of the video you’ve just watched. If you want to see the video again, you have to go back to the YouTube page again. A great deal of content is made available online this way—by transmission, rather than by the distribution of copies—not only by YouTube, but by many other websites and services that allow a user to view or listen to content, but not to download it.

Given the principle that “lots of copies keep stuff safe,” disseminating works by transmission may mean that there won’t be lots of copies floating around. People may view, or read, or listen to a work online, but they won’t retain any copy of it. For creative works disseminated online, many fewer copies will likely exist to keep the work safe.

Such a shift will mean that the copies maintained by the copyright owner will often have to bear all of the risk of damage, loss, disappearance, and destruction. Many copyright owners will no doubt take care to make regular backup copies, and have redundant backups in multiple locations. But we have seen that at least some copyright owners in the past have viewed the costs of preservation as unacceptably high. Recall the MGM Music Library.<sup>174</sup> So we might justifiably worry about how careful some current and future copyright owners will be in preserving their creative works, especially given the continuing costs involved as media and formats change.

With respect to preservation, then (as in so many other ways), digital technologies and computer networks present tremendous challenges to our obligation to transmit our creative works to the future.

#### IV.

Finally, I want to return briefly to the role of copyright in making good on that obligation.

It seems to me that preserving creative works isn’t only, or even primarily, a task that copyright law can accomplish. The important work of archives and libraries, on their own and in

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173. See Reese, *supra* note 53, at 635–36.

174. See text accompanying footnotes 39–44.

partnership with creators and copyright owners, will likely be the most important part of keeping creative works alive for future audiences.

But given what I've described as copyright law's obligation to try to ensure that creative works reach future audiences, I think it is worth exploring what small role copyright might play to encourage or assist in preservation. I noted before that copyright has not traditionally thought very explicitly about preservation issues.<sup>175</sup> Perhaps going forward, in writing and interpreting copyright law, legislators, judges, regulators, and academics should pay more attention to the consequences of their actions for preservation.

And copyright law might do a number of things to better fulfill its obligations to the future. Let me mention just four of them.

*Deposit.* Copyright law's deposit requirement is one mechanism to improve preservation. Today, the copyright statute requires the copyright owner of *every* published work, with a few exceptions, to deposit two complete copies of the work with the Copyright Office for the use of the Library of Congress.<sup>176</sup> And if a copyright owner wants to register her claim of copyright in a work, she must deposit copies to do so.<sup>177</sup>

Copyright's deposit requirement has contributed significantly to preservation before. A prime instance involves, once again, early motion pictures. Until 1912, motion pictures were not expressly protected by copyright.<sup>178</sup> Photographs, though, had been copyrightable since 1865.<sup>179</sup> Early film producers (starting with Thomas Edison) took advantage of this by registering their films as photographs.<sup>180</sup> In order to do so, they submitted rolls of frame-by-frame contact prints of their films on paper.<sup>181</sup> These paper copies were much more stable than

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175. See *supra* text accompanying note 49.

176. 17 U.S.C. § 407 (2006).

177. 17 U.S.C. § 408(a)–(c) (2006).

178. See Townsend Amendment, ch. 356, 37 Stat. 488 (1912) (amending the 1909 Copyright Act to protect motion pictures).

179. See Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (amending the 1831 Copyright Act to extend copyright protection to photographs).

180. See SLIDE, *supra* note 24, at 36; Erik Barnouw, *Introduction to KEMP R. NIVER, EARLY MOTION PICTURES: THE PAPER PRINT COLLECTION IN THE LIBRARY OF CONGRESS*, at xv (Bebe Bergsten ed., 1985); *Early Motion Pictures Free of Copyright Restrictions in the Library of Congress*, LIBR. CONGRESS, <http://www.loc.gov/rr/mopic/earlylmp.html> (last visited Nov. 23, 2012).

181. SLIDE, *supra* note 24, at 38.

the nitrate prints of the films.<sup>182</sup> For many early motion pictures, the paper copies have survived and the film prints have not.<sup>183</sup> Many of the earliest movies that can be seen today have actually been transferred back to film from the paper prints deposited with the Copyright Office.<sup>184</sup>

Another example of the preservation value of copyright deposits involves MGM's orchestral film scores dumped into the landfill. The studio had deposited reduced piano scores for those films with the Copyright Office, and those rather skeletal scores have given conductor John Wilson the bare outline that he can use as a starting point in recreating the full orchestrations.<sup>185</sup>

The deposit requirement might be used to help deal with some of the current preservation challenges. The Copyright Office has already begun to do this. In 2010, it adopted an interim regulation under which it can require deposit of works that are published only online.<sup>186</sup> We can hope that the Office continues to pursue this avenue for collecting digital works.

And the deposit provisions might also be amended to require a copyright owner to deposit additional copies of a work whenever the owner issues the work in a new format. This could help ensure that the copies in the Library of Congress's collection do not become obsolete and that the Library does not bear the entire burden of migrating works to new formats as old ones fade away.

*Section 108.* The specific provisions of the current copyright statute that limit copyright owners' exclusive rights in favor of libraries and archives have not changed much since 1978, and don't deal with many of the preservation problems raised by digital formats and online publication.<sup>187</sup>

Nearly five years ago, a high-level working group of copyright experts, librarians, and copyright owners issued a report in which all parties agreed on recommendations for

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182. See NIVER, *supra* note 180, at x; *Early Motion Pictures Free of Copyright Restrictions in the Library of Congress*, *supra* note 180.

183. NIVER, *supra* note 180, at ix-x; SLIDE, *supra* note 24, at 17; *Early Motion Pictures Free of Copyright Restrictions in the Library of Congress*, *supra* note 180.

184. See NIVER, *supra* note 180, at x.

185. See Walton, *supra* note 43.

186. Mandatory Deposit of Published Electronic Works Available Only Online, 75 Fed. Reg. 3,863, 3,869 (Jan. 25, 2010) (codified at 37 C.F.R. § 202.24 (2011)).

187. Amendments in 1998 allowed qualifying library and archival reproduction for preservation purposes to be in digital format, rather than "in facsimile form" as had been required under Section 108 as originally enacted. 2 GOLDSTEIN, *supra* note 51, § 7.2.2, at 7:67; Digital Millennium Copyright Act, Pub. L. No. 105-304, § 404, 112 Stat. 2860, 2889-90 (1998) (codified as amended at 17 U.S.C. § 108 (2006)).

substantial updating of Section 108.<sup>188</sup> For example, the group recommended that Section 108 be amended “to permit libraries and archives to capture and reproduce publicly available online content for preservation purposes, and to make those copies accessible to users for purposes of private study, scholarship, or research.”<sup>189</sup> This would be a small step toward addressing the preservation concerns discussed above that can arise when a copyright owner makes a work available by online transmission, rather than by distributing the work in multiple copies that can be held by many different copy owners.<sup>190</sup> Unfortunately, the group’s recommendations have not yet resulted in amendments to the statute. While we wait for action, the legality of some preservation activities undertaken by traditional libraries and archives may remain contestable.<sup>191</sup> So will activity by innovative organizations such as the Internet Archive, which preserves much online content and makes older versions of Web pages available through the “Wayback Machine.”<sup>192</sup> Enacting the working group’s proposals would be an excellent first step in improving copyright law’s preservation consciousness.

*Orphan Works.* Some attention has been paid in recent years to the problem of “orphan works,” that is, works whose copyright owner “cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”<sup>193</sup> This problem of orphan works is obviously particularly relevant to questions of preserving copyrightable works for future generations to enjoy, because the longer a work is preserved, the older the work becomes and the more likely that it will be difficult to identify the current copyright owner.<sup>194</sup> A work’s orphan status disappears the day the

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188. See SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT 31–94 (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

189. *Id.* at 80.

190. See *supra* text accompanying note 173.

191. See SECTION 108 STUDY GRP., *supra* note 188, at 82 (“Organizations that currently collect and archive online content rely on fair use or seek permissions. But the applicability of fair use is uncertain, and seeking permissions is time-consuming, expensive, and generally yields frustratingly thin results.” (footnotes omitted)).

192. *Wayback Machine*, INTERNET ARCHIVE, <http://archive.org/web/web.php> (last visited Nov. 23, 2012). The Internet Archive would not necessarily qualify as an “archive” entitled to take advantage of the preservation exception recommended by the Section 108 Study Group, which is why that group’s recommendations are only one step toward improving copyright law’s ability to make good on its promise to future generations.

193. REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

194. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (Breyer J., dissenting) (“The older the work, . . . the harder it will likely prove to find the current copyright holder.”).

work's copyright expires and it enters the public domain.<sup>195</sup> But because the copyright term now lasts for such a long time, many works may become orphans long before their copyright term ends.<sup>196</sup> When that happens, someone other than the now-unknown copyright owner may need to act to preserve the work, but will have no way to get permission for any preservation efforts that involve acts that come within the exclusive rights of the copyright owner.<sup>197</sup> The party who wants to act to preserve the work will either have to forgo those efforts or take the risk that her actions might lead to claims of copyright infringement.<sup>198</sup>

William Savory's 1930s recordings of live jazz performances offer an example of the problem. The National Jazz Museum's executive director estimated that around 75% of the recordings need to be preserved or restored, which requires transferring the recordings from Savory's discs to digital recordings.<sup>199</sup> This involves reproducing the recordings, an act ordinarily reserved to the copyright owner under Section 106.<sup>200</sup> But who is the copyright owner in recordings of, for example, a performance of all of the musicians in the Benny Goodman Orchestra that was broadcast by radio station WNEW and recorded, without express authorization from the radio station or any of the musicians, by Savory? The answer is exceedingly unclear.<sup>201</sup> And while the reproduction necessary to save or restore these orphaned recordings should easily qualify as fair use, making the preserved recordings available to the public might not.<sup>202</sup> But requiring the museum to lock away the preserved recordings for half a century or more until they enter the public domain<sup>203</sup> seems likely to diminish the incentives necessary to take the

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195. See REGISTER OF COPYRIGHTS, *supra* note 193, at 1.

196. See *id.* at 16.

197. See *id.* at 1.

198. See *id.*

199. See Rohter, *supra* note 144.

200. See 17 U.S.C. § 106(1) (2006).

201. Rohter, *supra* note 144 ("The short answer is that ownership is unclear," said June M. Besek, executive director of the Kernochan Center for Law, Media and the Arts at the Columbia University School of Law.); Seidenberg, *supra* note 143, at 48 ("Tracking down all the parties who may have a copyright interest in these performances, and therefore an entitlement to royalty payments (or to enjoining their distribution), is a monumental—and quite possibly an impossible—task." (quoting David G. Post, Professor, Temple University School of Law) (internal quotation marks omitted)).

202. See 17 U.S.C. § 107 (2006) (describing fair use of copyrighted material).

203. Because these works are sound recordings fixed before February 15, 1972, the recordings are not protected by federal copyright, but are instead protected, if at all, by state law. 17 U.S.C. § 301(c) (2006). That state law protection will be preempted by federal copyright law, and the recordings will enter the public domain, on February 15, 2067. *Id.*

steps today that may be necessary to ensure that the recordings survive.

The Copyright Office conducted an inquiry into the problem of orphan works and issued a report in 2006 that recommended amending the Copyright Act to sharply limit the remedies available in infringement suits against users of orphan works.<sup>204</sup> That recommendation, however, has not led to any amendment to the Copyright Act, so the orphan works problem remains unaddressed. Although the Copyright Office's recommended statutory language—or any other legislative solution to the orphan works problem—would not be focused specifically on preserving copyrighted works for the future, it could certainly offer significant assistance to those who are involved in doing so.

*Private Copying.* Perhaps most controversially, copyright law could recognize the important role that private copying has played in preservation. Jessica Litman has argued forcefully for recognizing a broader conception of what she calls lawful personal use.<sup>205</sup> Professor Litman hasn't specifically talked about the preservation value of private copies as part of the sphere of such lawful personal use, but it seems to me to offer yet another reason to think seriously about recognizing more lawful personal use than we seem to today.

Particularly when works are disseminated principally by transmission, rather than by the distribution of tangible copies, the preservation value of copies made by individuals for private use should weigh in favor of treating those copies as noninfringing.

#### CONCLUSION

I want to emphasize that I don't mean to suggest that every scrap of creative work can, or should, be saved and preserved. Preserving everything is certainly unrealistic, and probably undesirable, in a system in which every fixed and minimally creative work of authorship is copyrighted. But neither should we simply let the vagaries of time and fate determine which creative works of our day, and from the past, our descendants will be able to read, and listen to, and watch.

Let me conclude by offering my own explicit footnote to Professor Kaplan's *An Unhurried View of Copyright*. In the book, he wrote, "Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh

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204. REGISTER OF COPYRIGHTS, *supra* note 193, at 93–127.

205. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1915 (2007).

signals or messages to stir human intelligence and sensibilities . . . .”<sup>206</sup> He noted how important copyright law had been in getting creative works published, so that their messages might be received.<sup>207</sup>

But he added, “Eliciting publication is not an end in itself. Publication without easy access to the product would defeat the social purpose of copyright . . . .”<sup>208</sup> He understood the importance of access to copyrighted works for the development of individuals and society.

Professor Kaplan was talking about access to creative works when they are created and published.<sup>209</sup> But I think his view of the social purpose of copyright also applies to copyright’s obligation to see that some of these works’ messages will stir human intelligence and sensibilities in the future as well.

Remember that if this lecture had been given 100 years ago, *we* would have been the “future audience” that the lecturer would have been talking about. Our lives and work have been enriched by having access to creative works that have come down to us from decades and centuries past. We have benefitted, because in the past the copyright system kept its promise to the future—to us. We therefore have a responsibility to try to help the creative works of our day reach the readers, listeners, and viewers of the twenty-second century, and beyond.

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206. KAPLAN, *supra* note 1, at 74.

207. *Id.* at 74–76.

208. *Id.* at 75–76.

209. *Id.* at 74–76.