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# Photography, Creators, and the Changing Needs of Copyright Law

*Thomas B. Maddrey\**

## I. INTRODUCTION

Imagine a hypothetical photographer. She has a passing interest in the art, takes pictures primarily with her smartphone, and uses her point-and-shoot camera when she has the time and inclination. This hypothetical photographer is naïve when it comes to copyright law in America. As such, she is similar to the millions of other photographers who now find themselves squarely in the crosshairs of a dangerous game of protections and infringement, rights and rules. Let us imagine this photographer as we wade through the morass of photographic development and the development of modern copyright law.

The photographic image changed the world. Photography is so ubiquitous that it is hard to imagine a time before the art existed. Imagine a world in which no one knew how other countries looked, who had won a close race, or even how our planet appeared from space. Photography made all of this possible. Photography is a relatively young art that emerged in the early 1800s,<sup>1</sup> but its impact is universal and striking. At the same time, European-based copyright law started to develop in the new colonies and brought a host of problems, but few solutions.<sup>2</sup> The clash between the genesis of photography and outdated copyright laws caused many problems. The advent of the new age of photography may ultimately signal the downfall of some of these outdated copyright laws.<sup>3</sup>

The average American is bombarded daily with magazine images, Internet websites, newspapers, and a variety of other image-dense media. Yet, there is another side to each and every image, and that is the rights of the photographer who captured the image.<sup>4</sup> Copyright protections are so basic as to even be included in the United States Constitution. Article 1, Section 8, Clause 8 of the Constitution states, “Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited

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1. BEAUMONT NEWHALL, *THE HISTORY OF PHOTOGRAPHY: FROM 1839 TO THE PRESENT* 13 (5th ed. 1982).

2. *See generally* TYLER T. OCHOA, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 140–43 (Peter K. Yu ed., 2007) (analyzing the origins of British, French, and American copyright laws).

3. *See id.*

4. *See id.*

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>5</sup> From this constitutional language, American copyright law emerged.<sup>6</sup> The seminal Copyright Act of 1976 codified many of these now-statutory rights.<sup>7</sup>

The moment a picture is taken, a single right of copyright is vested in the photographer because that is the moment the image becomes fixed in a “tangible medium.”<sup>8</sup> To receive the full protection of the law, however, the photographer must also affirmatively register his or her copyright with the United States Copyright Office.<sup>9</sup> It is then that the photographer is granted the rights and protections to the full extent of the law.<sup>10</sup> Unfortunately, those who lack knowledge of these registration requirements will never receive full copyright protection. It can be presumed that the vast majority of non-professional photographers do not realize they *could* be granted formal copyright protection. This is a shame because full copyright protections provide many important rights. Copyright owners have a kind of “limited monopoly” over a series of rights pertaining to their copyrighted works.<sup>11</sup> These rights include rights of reproduction, publicity, first publication, and to create derivative works.<sup>12</sup> If any of these rights are violated, the copyright holder may file a copyright infringement cause of action against the purported infringer.<sup>13</sup>

Where are most photographers placing their images once they have been taken? By and large, these images are going online in numbers the likes of which the world has never seen.<sup>14</sup> Facebook is now the largest repository of images that has ever existed.<sup>15</sup> It is estimated that Facebook stores over 140 billion photos on its servers, which is 10,000 times the number of photo-

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5. U.S. CONST. art. I, § 8, cl. 8.

6. *See id.*

7. 17 U.S.C. § 101 (2012).

8. *Id.* § 102.

9. *Id.* § 411(a).

10. *See id.*

11. *Fair Use Frequently Asked Questions*, TEACHING COPYRIGHT, <http://www.teachingcopyright.org/handout/fair-use-faq> (last visited Sept. 8, 2013).

12. 17 U.S.C. § 106 (2012).

13. *Definitions (FAQ)*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-definitions.html> (last visited Sept. 8, 2013).

14. *See generally Internet 2012 In Numbers*, ROYAL PINGDOM (Jan. 16, 2013), <http://royal.pingdom.com/2013/01/16/internet-2012-in-numbers/> (stating, for example, that approximately 300 million photos are added to Facebook every day).

15. Jonathan Good, *How Many Photos Have Ever Been Taken?*, 1000 MEMORIES (Sept. 15, 2011), <http://blog.1000memories.com/94-number-of-photos-ever-taken-digital-and-analog-in-shoebox>.

graphs stored in the Library of Congress.<sup>16</sup> It is further estimated that there are 2.5 billion people with digital cameras in the world.<sup>17</sup> If each of these individuals took 150 photos in a year, that means they would collectively capture 375 billion photographs in that year alone. In fact, these statistics probably underestimate the true growth of photography online, as the industry grows exponentially each year. All of these photographs have copyright protection attached each time a shutter is snapped.<sup>18</sup>

The advent of putting cameras in cell phones and computers is quickly expanding the number of individuals who can be photographers. Ordinary phone users are now able to capture an untold number of still images, all of which can be easily disseminated.<sup>19</sup> However, the ineffectiveness and insensibility of modern copyright law poses many problems for these new photographers. When the last major statutory revision of the Copyright Act occurred in 1976, the idea of putting a camera in a phone was decades away. With such advances in technology, modern copyright law also must advance to extend this new class of photographers the basic protections they deserve.

The art of photography can be described by its history, beginning in 1827 with the first permanent photograph.<sup>20</sup> One hundred ninety years later, photography has transformed from a chemical based process of silver halide crystals to a digital amalgam of pixels and photons.<sup>21</sup> Although photography is the youngest of the traditional arts, its development heralded a new way that the world saw itself. Every photograph has a different purpose. Some are iconic, grafted into the minds of generations of Americans, forever linked to the events they represent.<sup>22</sup> Yet, others serve an evidentiary purpose, i.e., proving that such a thing exists or occurred.<sup>23</sup> Photographs are silent wit-

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16. *Id.*

17. *Id.*

18. 17 U.S.C. § 408(a) (2012).

19. *See Internet 2012 In Numbers*, *supra* note 14.

20. NEWHALL, *supra* note 1, at 13.

21. *See generally* Dick Merrill, *Digital Photography Essentials #002 "Pixel Size"*, DIGITAL OUTBACK PHOTO, [http://www.outbackphoto.com/dp\\_essentials/dp\\_essentials\\_02/essay.html](http://www.outbackphoto.com/dp_essentials/dp_essentials_02/essay.html) (last visited Sept. 8, 2013) (explaining the attributes of pixels in an image sensor); *Silver Halide Emulsions*, KODAK, <http://www.kodak.com/US/en/corp/researchDevelopment/whatWeDo/technology/chemistry/silver.shtml> (last visited Sept. 8, 2013) (explaining silver halide emulsions).

22. *See* Kyle Almond, *What Makes An Image Unforgettable?*, CNN (Sept. 4, 2013, 11:43 AM), <http://www.cnn.com/2013/09/01/us/the-flag-iconic-images/>.

23. SUSAN SONTAG, *ON PHOTOGRAPHY* 5 (Picador 2001) (1977).

nesses to otherwise fleeting moments.<sup>24</sup> One can no more separate the photograph from the photographed; they are one and the same.

Unlike writing, painting, sculpting, and other traditional arts, photography underwent revolutionary changes in its initial years of existence.<sup>25</sup> The process of creating photography today bears little resemblance to the photography creation process of the last 190 years.<sup>26</sup> The methods and techniques have drastically changed, morphing into a new, yet still recognizable, combination of modern technology and age-old principles. In the last ten years alone, digital photography has emerged not as an avant-garde alternative to film photography, but as the only commercially viable method of photography.<sup>27</sup> It is even becoming difficult to find places capable of developing a roll of film.<sup>28</sup> This transition in technology has led to the ubiquity of photography. Suddenly it is possible to put cameras in virtually anything: computers, laptops, phones, tablets, necklaces, watches, and more.<sup>29</sup> With this ubiquitous availability of cameras, people are demanding immediate access to pictures. Websites like Flickr,<sup>30</sup> Facebook,<sup>31</sup> and Photobucket<sup>32</sup> provide an online space to share pictures and stories of our lives. Digital photography has also lowered the per-image cost of taking a photograph to virtually nothing. A photographer no longer must measure the cost of film, processing, and printing. Now, the costs associated with photography are more aptly described as

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24. Robert Abramson, *Silent Witness, Photography in the Modern Age*, PHOTO.NET (Jan. 15, 2009, 07:46 PM), <http://photo.net/philosophy-of-photography-forum/00S7z6>.
  25. See generally Mary Bellis, *Photography Timeline*, ABOUT.COM, <http://inventors.about.com/od/pstartinventions/a/Photography.htm> (last visited Sept. 8, 2013) (timeline of photography, film, and cameras).
  26. See generally *id.* (identifying the drastic changes in photography technology).
  27. See generally *id.*
  28. See Colleen Surridge, *Last Kodachrome Role Processed in Parsons*, THE WICHITA EAGLE, (July 23, 2010), <http://www.kansas.com/2010/07/14/1403115/last-kodachrome-roll-processed.html>.
  29. See generally *Hidden Cameras*, BRICKHOUSE SECURITY, <http://www.brickhousesecurity.com/category/hidden@ameras.do?gclid=CI6Vla6GiLkCFZSY4AodHHAA4w> (last visited Aug. 25, 2013) (providing examples of the versatility and adaptability of digital cameras).
  30. FLICKR, <http://www.flickr.com> (last visited Mar. 15, 2013) (photo sharing website).
  31. FACEBOOK, <http://www.facebook.com> (last visited Mar. 15, 2013) (social media sharing website).
  32. PHOTOBUCKET, <http://www.photobucket.com> (last visited Mar. 15, 2013) (photo sharing website).

“start-up costs.”<sup>33</sup> The bottom line is that once you acquire your photography equipment, your ongoing monetary investment becomes negligible. However, photographers incur many costs that are not readily obvious.

As the number of photographers has increased, photo image theft has similarly multiplied.<sup>34</sup> However, it is not always clear when one’s use of another’s photograph constitutes copyright infringement. For example, copyright law sometimes allows individuals to use copyrighted images if that use is considered a “fair use.”<sup>35</sup> “Fair use” is an affirmative defense to copyright infringement and codified in the Copyright Act.<sup>36</sup> Specifically, section 107 sets out four factors regarding whether a copyright user’s use of a copyright qualifies under the fair use exception, as follows: (1) the purpose and character of the use; (2) the nature of the copyrighted use; (3) the amount and substantiality of the portion used in relation to the whole; and (4) the effect of the use on the potential market of the copyrighted work.<sup>37</sup> Problematically though, interpretation of these four factors and application of the fair use doctrine has been relatively inconsistent and has further muddled copyright law.

Over time, the monetization of photography transitioned from selling pictures based on “royalties” to selling pictures in a “royalty free” model.<sup>38</sup> This means that pictures are sold “as is” for one low price without any further royalties or limits on use, rather than initially priced based upon their use.<sup>39</sup> This model serves multiple goals. First, it rewards the photographer taking the image by providing a set price for their work. Second, it simultaneously lowers the cost of the image and the desire to reproduce the photo without a license. Third, it serves copyright goals by encouraging photographers to create without liberalizing the “fair use” exception for their work. Royalty-free photography may be the wave of the future, and copyright law must adapt to keep pace.

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33. See *Is Digital Cheaper Than Film?*, VIRTUAL PHOTOGRAPHY STUDIO, <http://virtualphotographystudio.com/2010/12/is-digital-cheaper-than-film/> (last visited Sept. 8, 2013).

34. See Jaron Schneider, *Selling Stolen Images: Mango Proves Companies Can Do the Right Thing*, FSTOPPERS (Sept. 6, 2013), <http://fstoppers.com/selling-stolen-images-mango-proves-companies-can-do-the-right-thing>.

35. See 17 U.S.C. § 107 (2012) (codifying the fair use doctrine).

36. *Id.*

37. *Id.*

38. Alex Wild, *What Does “Royalty Free” Mean?*, SCIENTIFIC AMERICAN (Jan. 10, 2012), <http://blogs.scientificamerican.com/compound-eye/2012/01/10/what-does-royalty-free-mean/>.

39. *What are Royalty Free Images?*, STOCK PHOTO GUIDES, <http://www.stockphoto-guides.com/use/royalty-free/what-are-royalty-free-images> (last visited Aug. 25, 2013).

The interplay of photography and copyright is a complex topic that is changing rapidly. Unfortunately copyright law changes slowly in major increments, while photography changes incrementally each day.<sup>40</sup> Full understanding of how these two related phenomenon could coexist, first requires examining the history of both to determine if the evolution of photography and copyright can guide us towards a suitable solution for the future.

## II. HISTORICAL CONTEXT

American photography and copyright law have concurrently matured, each encountering different challenges throughout history. Examination of the chronicles of each topic will demonstrate how the lack of protection for the new generation of photographers derives from the growth of the last generation of creators.

### A. The History of Photography

Joseph Nicéphore Niépce captured the oldest surviving photograph in 1827, though the process of affixing light to paper was likely pioneered in the 1790s by Thomas Wedgewood.<sup>41</sup> Wedgewood found that by sensitizing papers and leather with various chemicals, the “image” could be affixed for a period of time.<sup>42</sup> He had one problem, though, and that was making the rest of the print non-sensitive to light while retaining the image.<sup>43</sup> This problem proved intractable until Niépce found the solution sometime in the early 1800s.<sup>44</sup> Since then, photography has had a meteoric rise in popularity, with no signs of flagging interest.

Prior to the invention of a permanent photograph, the *camera obscura* was used to project an image on a wall, and then paint or draw over it, resulting in more lifelike art.<sup>45</sup> This technology was widely used during the Renaissance and up through the 18th century as the demand for more accurate portraits swept Europe.<sup>46</sup> Niépce called his new invention *heliographs*,<sup>47</sup> but it was Louis Daguerre with his *daguerreotypes* that became the household name in photography.<sup>48</sup> In 1838, Daguerre was credited with creating one of the first photographs to depict a human subject.<sup>49</sup> His work astounded the

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40. See generally *id.*

41. NEWHALL, *supra* note 1, at 13.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 9.

46. *Id.*

47. NEWHALL, *supra* note 1, at 15.

48. See *id.* at 18.

49. *Id.* at 16.

French public, but his methods remained a closely held secret. In response, the French government made him a deal: if he published his invention, he would be awarded a generous annuity for life.<sup>50</sup> Daguerre published his work in a manuscript that made its way around the world, eventually arriving in New York where it launched photography as an art form in the United States.<sup>51</sup>

While Daguerre ultimately received the credit, many other European pioneers helped pave the way for popular acceptance of photography. Men such as William Henry Fox Talbot and Sir John Herschel aided Daguerre considerably during the 1830s.<sup>52</sup> From 1830–1860, the first photographic renaissance was occurring. Emboldened by the success of the *daguerreotype* and recent scientific discoveries, Talbot created a new and improved method of photography he named the *calotype*.<sup>53</sup> This process produced more life-like images and was the stepping-stone to “wet-plate” photography in the 1850s and 1860s.<sup>54</sup>

Meanwhile in America, Mathew Brady, the most celebrated photographer of his era, was putting wet-plate photography to good use.<sup>55</sup> Brady was well known for his work photographing the important people of the day, such as the photograph of Abraham Lincoln depicted on the five-dollar bill.<sup>56</sup> Lincoln once stated that two things put him in the White House: his Cooper Union speech and the portraits captured by Brady.<sup>57</sup> Brady later became best known for his work documenting the Civil War.<sup>58</sup> This was the first time photography was used to show conflict as it actually existed.<sup>59</sup> His images of the savagery and brutality of war were transmitted around the country, providing the first glimpse to what heretofore remained the subject of lore and story.

Until this point, photography was primarily documentary in nature. With its roots in the lifelike drawings of the *camera obscura*, photography delighted and amazed the masses with frozen moments in time of real life

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50. *Id.* at 23.

51. *Id.*

52. *Id.* at 19.

53. NEWHALL, *supra* note 1, at 43.

54. *Id.* at 59.

55. *See id.* at 89.

56. *Id.* at 70.

57. *Id.*

58. *Civil War: Mathew Brady Photo Gallery*, HISTORY.COM, <http://www.history.com/photos/civil-war-mathew-brady> (last visited Sept. 8, 2013).

59. *Photography and the Civil War*, CIVIL WAR TRUST, <http://www.civilwar.org/photos/3d-photography-special/photography-and-the-civil-war.html> (last visited Sept. 8, 2013).



scenes. Portraits were made of the dead so they could be remembered.<sup>60</sup> Families were photographed possibly once in a lifetime, and images captured to celebrate events or happenings. As the process of creating a photograph became easier, photography transitioned from a documentary to an art form.<sup>61</sup> The newly found freedom of photographers allowed them to focus on taking pictures for art's sake, something that was a novel idea in this period. Previously, photography was celebrated as a way of creating images with more detail than a painting. As photography revolutionized, images were purposefully captured with less detail as an artistic measure.<sup>62</sup>

Photography conquered its next obstacle in the 1870s: photographing motion. Almost all technological advancements in this area came from one man, Eadweard Muybridge.<sup>63</sup> Muybridge rose to prominence in 1878 when he created a series of pictures depicting a galloping horse. Though it may seem quaint by the standards of the modern age, there was a serious disagreement among scientists at this point in history about whether a horse lifted all four feet off the ground at the same time while galloping.<sup>64</sup> Using his new technology, Muybridge ended the debate by capturing an image of a galloping horse with all four feet off of the ground at the same time.<sup>65</sup> The work of Muybridge helped to usher in a new use for photography, that of evidentiary purpose. As Susan Sontag wrote in her seminal critique of photography, "A photograph passes as incontrovertible proof that a given thing happened."<sup>66</sup>

Around the same time, two important changes happened in the world of photography. The first was the rise of Alfred Stieglitz, the father of American photography.<sup>67</sup> The second was the Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*.<sup>68</sup> Stieglitz was to photography what Da Vinci was to the Renaissance. He was the engine that pushed the art form further. Those who were championed by Stieglitz became instant heroes in the bur-

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60. See Ben Mattison, *The Social Construction of the American Daguerrotype Portrait: The Mourning Portrait*, AMERICAN DAGUERROTYPES.COM, <http://www.americandaguerrotypes.com/ch3.html> (last visited Sept. 8, 2013).

61. See NEWHALL, *supra* note 1, at 73.

62. Lisa Hostetler, *Pictorialism in America*, THE METROPOLITAN MUSEUM OF ART, [http://www.metmuseum.org/toah/hd/pict/hd\\_pict.htm](http://www.metmuseum.org/toah/hd/pict/hd_pict.htm) (last visited Sept. 8, 2013).

63. NEWHALL, *supra* note 1, at 119.

64. *Freeze Frame: Eadweard Muybridge's Photography of Motion*, NAT'L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/muybridge/index.htm> (last visited Sept. 8, 2013).

65. *Id.*

66. SONTAG, *supra* note 23, at 3.

67. NEWHALL, *supra* note 1, at 171.

68. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

geoning American photographic community. In 1921, a critic wrote this about the photographs of Stieglitz:

They made me want to forget all the photographs I had seen before, and I have been impatient in the face of all photographs I have seen since, so perfect were these prints in their technique, so satisfying in those subtler qualities which constitute what we commonly call "works of art."<sup>69</sup>

Stieglitz popularized the notion of photography as art.<sup>70</sup> The history of American photography can be split as "Before Stieglitz" and "After Stieglitz." It was Stieglitz's view that photography was indeed art, deserving all the same recognition and respect as painting, sculpture, drawings and more.<sup>71</sup> Thus when the Supreme Court took up the case of *Burrow-Giles v. Sarony* in 1884, the photographic community eagerly awaited the result.<sup>72</sup> Before 1884, photographs were not afforded copyright protection.<sup>73</sup> In *Burrow-Giles*, the Supreme Court heard a challenge brought by a lithographer who felt that a copyright could not be conferred on a photograph.<sup>74</sup> The Court disagreed, holding that it "entertain[ed] no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author."<sup>75</sup> This landmark ruling codified the inclusion of photographs as deserving of copyright protection in the common law, eventually resulting in the codification of photographs in the 1909 Copyright Act, which still remains protected today.<sup>76</sup>

The 1900s brought forth the refinement of American photography. Students of Stieglitz dominated the next forty years of photographic work. These visual descendants of Stieglitz included Edward Weston, Ansel Adams, Imogene Cunningham, and Walker Evans, many of who conspired to develop their own photography movement dubbed "F/64" after the photographic aperture of the same value.<sup>77</sup> Collectively, they were known as proponents of the "Straight Photography" movement.<sup>78</sup> This movement em-

69. NEWHALL, *supra* note 1, at 171.

70. Tiffany M, *Alfred Stieglitz: Photography as Art*, PICTURECORRECT, <http://www.picturecorrect.com/tips/alfred-stieglitz-photography-as-art/> (last visited Sept. 8, 2013).

71. *Id.*

72. *See generally Burrow-Giles*, 111 U.S. at 53.

73. *Burrow-Giles*, 111 U.S. at 58.

74. *Id.* at 55.

75. *Id.* at 58.

76. 17 U.S.C. § 102.

77. Lisa Hostetler, *Group f/64*, THE METROPOLITAN MUSEUM OF ART, [http://www.metmuseum.org/toah/hd/f64/hd\\_f64.htm](http://www.metmuseum.org/toah/hd/f64/hd_f64.htm) (last visited Sept. 8, 2013).

78. NEWHALL, *supra* note 1, at 167.

phasized taking pictures of the world with the most detail possible, obscuring nothing.<sup>79</sup> As Paul Strand once said, “The artist’s world is limitless. It can be found anywhere, far from where he lives or a few feet away. It is always on his doorstep.”<sup>80</sup> The straight photography movement was a direct response to the pictorialist movement of the late 1800s that emphasized indistinct blurry movements, reminiscent of the impressionist school of painting.<sup>81</sup>

A latecomer to the straight photography movement was Ansel Adams, who later became the most celebrated American photographer of all time.<sup>82</sup> Adams photographed nature in a way that lent gravitas and drama to his photographs.<sup>83</sup> Adams was famous for his commissioned photographs of the national parks of the United States.<sup>84</sup> It is from this series of photographs that Adams gained widespread notoriety.<sup>85</sup> Like Mathew Brady before him, Adams showed the public a glimpse of something many had never seen, and it was right in their own country. In many ways, the modern environmental movement originated in the “National Parks” series of images by Adams.<sup>86</sup>

A new company simultaneously changed the face of *how* pictures were taken. In 1888, Eastman Kodak was founded.<sup>87</sup> This company dominated the field of photography by producing cameras, film, processing materials, and accessories for over 100 years.<sup>88</sup> Kodak singlehandedly revolutionized how the world took pictures by making cameras that appealed to the masses. This ideal was embodied in their slogan of the time: “You press the button, we do the rest.”<sup>89</sup> Suddenly, photography was taken from the hands of a few skilled practitioners to millions of consumers, all desiring devices to commemorate their personal memories. Prior to Kodak, the major technological advances

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79. Hostetler, *supra* note 62.

80. Paul Strand, PHOTOQUOTES.COM, <http://www.photoquotes.com/showquotes.aspx?id=112&name=Strand,Paul> (last visited Mar. 15, 2013).

81. See generally Hostetler, *supra* note 62.

82. James Maynard, *The History of Photographers—The Seven Best*, MOSAIC BLOG (Feb. 20, 2013), <http://www.mosaicarchive.com/2013/02/20/the-history-of-photographers-the-seven-best/>.

83. Ansel Adams, THE CENTER FOR CREATIVE PHOTOGRAPHY, <http://ccp.uair.arizona.edu/item/4538> (last visited Sept. 8, 2013).

84. *Ansel Adams Photographs*, THE NATIONAL ARCHIVES, <http://www.archives.gov/research/ansel-adams/> (last visited Sept. 8, 2013).

85. Adams, *supra* note 83.

86. *History: Ansel Adams*, SIERRA CLUB, <http://www.sierraclub.org/history/ansel-adams/> (last visited Mar. 15, 2013).

87. 1879–1929, KODAK, [http://www.kodak.com/ek/US/en/Our\\_Company/History\\_of\\_Kodak/Milestones\\_-\\_chronology/1878-1929.htm](http://www.kodak.com/ek/US/en/Our_Company/History_of_Kodak/Milestones_-_chronology/1878-1929.htm) (last visited Mar. 15, 2013).

88. *Id.*

89. *Id.*

were incremental; after Kodak, photography exploded.<sup>90</sup> Photography became both art form, evidence, journalism, and record. Most importantly, the wide distribution of Kodak's merchandise expanded the number of people who could be photographers and, by direct consequence, the number of things that could be photographed.

From Kodak's inception in 1888 to the late 1990s, film photography dominated. But, a new competitor was looming on the horizon, one that would shake up the established photography world forever. In the early 1970s, the government granted the first patent for a "filmless camera."<sup>91</sup> The first digital camera was created shortly thereafter in 1975.<sup>92</sup> The first digital camera weighed eight pounds, recorded black and white images, had a resolution of .01 megapixels, and took twenty-three seconds to capture an image.<sup>93</sup> After the invention of the digital camera, the pace of technological innovation ramped up considerably.

Pixels, the building blocks of digital photographs, are light gathering sensors that produce the raw data that creates photographs.<sup>94</sup> In 1986, Kodak developed the first "megapixel" sensor.<sup>95</sup> A megapixel is one million pixels.<sup>96</sup> As what might be the most striking comparison of the pace of innovation, the United States government sent the Hubble telescope into space in 1990.<sup>97</sup> It was equipped with a 2.5 megapixel camera.<sup>98</sup>

It was not until the early 1990s that consumers had widespread access to digital cameras. In 1991, the Kodak DSC100 went on sale with a 1.3 megapixel sensor.<sup>99</sup> The first mass-market digital camera gained traction merely ten years ago, in 2003.<sup>100</sup> The Canon Digital Rebel entered the market

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90. *See id.*

91. Jason Row, *A Brief History of Digital Photography*, LIGHT STALKING (Oct. 22, 2012), <http://www.lightstalking.com/a-brief-history-of-digital-photography>.

92. *Id.*

93. *Id.*

94. *Megapixel*, TECHTERMS.COM (June 19, 2007), <http://www.techterms.com/definition/megapixel>.

95. Bob Brooke, *The Brief History of Digital Photography*, BOB BROOKE'S DIGITAL STUDIO, <http://www.bobbrooke.com/digitalstudio/digitalhistory.htm> (last visited Mar. 15, 2013).

96. *Megapixel*, *supra* note 94.

97. *Hubble Essentials*, HUBBLESITE, [http://hubblesite.org/the\\_telescope/hubble\\_essentials/](http://hubblesite.org/the_telescope/hubble_essentials/) (last visited Mar. 15, 2013).

98. *Id.*

99. Brooke, *supra* note 95.

100. Phillip Greenspun, *History of Photography Timeline*, Photo.net (Jan. 2007), <http://photo.net/learn/history/timeline>.

with a sub-\$1000 price,<sup>101</sup> and suddenly digital photography had a wide audience. The rise of digital photography was meteoric. One year later Kodak, the stalwart company of photography, ceased film camera sales in many markets.<sup>102</sup> In 2005, digital camera sales overtook film camera sales for the first time, never to retreat.<sup>103</sup>

As of 2011, it was estimated there were 3.5 trillion photos in existence.<sup>104</sup> Every two minutes, we as a society take approximately as many photos as were taken in the 1800s.<sup>105</sup> However, amendment to the copyright law has not kept pace with the explosion in the number of photographic works. Copyright law in America is still based on the Copyright Act of 1976. Accordingly, it is time for a new system. To know what that system should look like, we must first examine the history of copyright law.

## B. The History of Copyright

The roots of American copyright law can be traced directly to Gutenberg and the invention of the printing press.<sup>106</sup> The invention of the printing press allowed authors and publishers to widely disseminate printed materials.<sup>107</sup> However, an overzealous British government persecuted authors and publishers in order to censor their publishing.<sup>108</sup> The culmination of this attack on free authorship established the Stationers' Company in 1557, a government-sanctioned guild that possessed exclusive authority over British publications, and reserved the right to shut down the operations of any other publisher.<sup>109</sup> Through the Stationers' Company, the British government controlled publishing.

Prior to modern copyright law, the publisher of a published work retained all rights to publish, produce, copy, and print the work.<sup>110</sup> These rights later passed to the publisher's heirs, instead of to the actual creator of the

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101. *Id.*

102. *Kodak Embraces Digital Revolution*, BBC NEWS (Jan. 13, 2004, 8:25 PM), <http://news.bbc.co.uk/2/hi/business/3394183.stm>.

103. *Kodak's Digital Sales Overtake Film*, DIGITAL PHOTOGRAPHY REV. (Jan. 31, 2006 1:34 PM), <http://www.dpreview.com/news/2006/1/31/kodak-sales>.

104. Good, *supra* note 15.

105. *Id.*

106. *See Early Writings and the Beginning of Book Printing*, HIST. OF COPYRIGHT, [http://www.historyofcopyright.org/pb/wp\\_27fa9cd0/wp\\_27fa9cd0.html](http://www.historyofcopyright.org/pb/wp_27fa9cd0/wp_27fa9cd0.html) (last visited Mar. 15, 2013).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

work.<sup>111</sup> The Licensing Act that granted the Stationers' Company its power lapsed in 1694 under the pressure of numerous academics and authors of the time, including John Locke and John Milton.<sup>112</sup> After a tumultuous sixteen-year period of essentially lawless authorship, the British Parliament in 1710 enacted the Statute of Anne, which codified the first modern copyright laws.<sup>113</sup>

The Statute of Anne made two major changes to former copyright laws. First, the statute granted authors, instead of publishers, the copyright to their own works.<sup>114</sup> Second, the statute limited the term of a copyright to fourteen years, after which the author could apply for an extension of the copyright.<sup>115</sup> To gain copyright protection, however, the author must have registered the book with the Stationers' Company and deposited it at the Stationers' Company.<sup>116</sup> After these two conditions were met, the author was granted his copyright.<sup>117</sup>

The Statute of Anne served as the template in America for both the Copyright Clause of the United States Constitution, as well as the Copyright Act of 1790.<sup>118</sup> The Copyright Clause specifically grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>119</sup> The first exercise of this granted power in the United States was the Copyright Act of 1790.<sup>120</sup> In almost all ways, the Act tracked the language of the Statute of Anne. Authors had to register their work and deposit in accordance with the formalities of the law.<sup>121</sup> Only then could copyright protection be granted.<sup>122</sup> The fourteen-year term with an option to renew if the author was still alive at the end of the term remained.<sup>123</sup>

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111. *Early Writings and the Beginning of Book Printing*, *supra* note 106.

112. *Id.*

113. *First Copyright Law*, HIST. OF COPYRIGHT, [http://www.historyofcopyright.org/pb/wp\\_ff342f50/wp\\_ff342f50.html?0.3628534853924066](http://www.historyofcopyright.org/pb/wp_ff342f50/wp_ff342f50.html?0.3628534853924066) (last visited Mar. 15, 2013).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *United States Copyright Law*, HIST. OF COPYRIGHT, [http://www.historyofcopyright.org/pb/wp\\_fe548a29/wp\\_fe548a29.html?0.22300588130019605](http://www.historyofcopyright.org/pb/wp_fe548a29/wp_fe548a29.html?0.22300588130019605) (last visited Mar. 15, 2013).

119. U.S. CONST. art. I, § 8, cl. 8.

120. *United States Copyright Law*, *supra* note 118.

121. *Id.*

122. *Id.*

123. *Id.*

The primary difference between the Copyright Act of 1790 and the Statute of Anne was the inclusion of charts and maps as protected classes in the American law.<sup>124</sup>

The first major revision of copyright law in the United States was the Copyright Act of 1831.<sup>125</sup> Primarily pushed through Congress by Noah Webster, the prolific author and creator of Webster's Dictionary, this revision extended the copyright term from fourteen to twenty-eight years and added musical compositions to the list of protected works, among other advances.<sup>126</sup>

It would be seventy-eight years before Congress once again took up the refinement of American copyright law with a major revision in the Copyright Act of 1909.<sup>127</sup> Under this revised act, the length of the renewal term was extended to twenty-eight years to match the initial term.<sup>128</sup> However, by the text of the act, the protection only applied to the work if two criteria were met: (1) the work was published, and (2) the work had a "notice of copyright" affixed.<sup>129</sup> If a published work did not have the notice of copyright, the 1909 Act provided no copyright protection, and the work fell directly into the public domain.<sup>130</sup>

### III. CURRENT STATE OF COPYRIGHT LAW IN AMERICA

The Copyright Act of 1976 set the stage for modern copyright law.<sup>131</sup> In addition to its primary principles as outlined in the original text, many amendments and alterations have been grafted onto the 1976 language in attempt to keep pace with technological innovation.<sup>132</sup> As the Court held in *Sony Corp. of America v. Universal City Studios, Inc.*, "From its beginning, the law of copyright has developed in response to significant changes in technology."<sup>133</sup> In *United States v. LaMacchia*, the court determined that, "a copyright . . . is unlike ordinary chattel because the holder does not acquire exclusive dominion over the thing owned."<sup>134</sup>

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124. *Id.*

125. *Id.*

126. *United States Copyright Law*, *supra* note 118.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Copyright Act of 1976*, LAWS.COM, <http://copyright.laws.com/copyright-act-of-1976/copyright-act-of-1976> (last visited Sept. 8, 2013).

132. *See Copyright Law: Preface*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/title17/92preface.html> (last visited Sept. 8, 2013).

133. *Sony Corp.*, 464 U.S. at 430.

134. *United States v. LaMacchia*, 871 F. Supp. 535, 537 (D. Mass. 1994).

In addition, the Copyright Act of 1976 codified the “fair use” standard, consequently giving the judiciary significant leeway to determine what constitutes copyright infringement. Unfortunately, many courts are ill-equipped to adequately differentiate what constitutes “fair use” and what use constitutes condemnable infringement. Congress thus placed the burden of policing copyright on the creator with the codification of a much needed, yet seldom understood “fair use” standard. This change necessitates the creator be even more vigilant in their Sisyphean task. These issues have left modern copyright law a murky abyss, confusing even the savviest creators.

### A. The Copyright Act of 1976

The 1976 Act replaced all preceding United States copyright laws. The first aim of the Act was to incorporate new forms of expression and creation into the classes of protected works.<sup>135</sup> The categories now included: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.<sup>136</sup> In 1990, architectural works were added as an eighth category.<sup>137</sup>

One of the most important sections of the new act is section 102(a), which states that “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”<sup>138</sup> This alleviated the major problem of the Copyright Act of 1909 that stated a work had to be published and affixed with a copyright notice before protection applied.<sup>139</sup> In the revised language, once the work is “fixed” in a “tangible medium of expression,” copyright protection applies.<sup>140</sup> Creators now have a presumptive copyright on their work from the moment it is fixed.<sup>141</sup> In the case of photographers, it is often said that the instant you press the shutter, the work has been fixed and you have been granted your copyright. But, being granted a copyright is vastly different from registering that copyright.<sup>142</sup> Only works with registered copyrights can elect the full panoply of remedies in a copyright infringement case.<sup>143</sup>

In section 106, the Act outlines six exclusive rights all creators have once their work is fixed in a tangible medium. These six exclusive rights

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135. *Copyright Act of 1976*, *supra* note 131.

136. 17 U.S.C. § 102.

137. *Id.*

138. *Id.*

139. *United States Copyright Law*, *supra* note 118.

140. 17 U.S.C. § 102.

141. *See id.*

142. *See* 17 U.S.C. §§ 102, 408 (2012).

143. *See* 17 U.S.C. §§ 501–05 (2012).



include; (1) the right to reproduce the copyrighted work in copies or phonorecords; (2) the right to prepare derivative works based upon the copyrighted work; (3) the right to distribute copies to the public; (4) the right to perform the copyrighted work; (5) the right to display the copyrighted work; and (6) the right to perform the copyrighted work by means of a digital audio transmission.<sup>144</sup> Collectively, these six rights form the backbone of the Act, and are granted at the same time the work is fixed.<sup>145</sup> But, as held in *Twentieth Century Music Corp. v. Aiken*, “if an unlicensed use of a copyrighted work does not conflict with an ‘exclusive’ right conferred by the statute, it is no infringement of the holder’s rights. No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.”<sup>146</sup>

If you own a copyright that is infringed, the infringer may raise the affirmative defense of “fair use,” codified in section 107 of the Act.<sup>147</sup> Recently, many cases have utilized the fair use defense in the context of social media and Internet situations. There are four factors to be considered in the test of whether an infringing use of a copyrighted work is a “fair use.”<sup>148</sup> These include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the original work used; and (4) the effect of the use upon the market.<sup>149</sup> Each of these factors will be discussed in Section E below.

Another major change in the Act is the addition of extended terms of protection. The Copyright Act of 1909 limited the copyright protection to an initial term of twenty-eight years, followed by an extension of twenty-eight years.<sup>150</sup> The 1976 Act increased this to the life of the author plus fifty years.<sup>151</sup> Later, in 1998, the Copyright Term Extension Act (“CTEA”) increased this number to the author’s life plus seventy years for regular copyrights.<sup>152</sup> This increase in term serves to better protect both the creator and the progeny of the creator, as well as the reputation of the creator.<sup>153</sup>

Finally, the Act provides that while works no longer have to be registered with the Copyright Office to gain copyright protection, the work must be registered in most cases before a copyright infringement action can be

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144. 17 U.S.C. § 106.

145. *Copyright in General*, U.S. COPYRIGHT OFFICE (July 12, 2006), <http://www.copyright.gov/help/faq/faq-general.html>.

146. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

147. 17 U.S.C. § 107.

148. *Id.*

149. *Id.*

150. *United States Copyright Law*, *supra* note 118.

151. *Id.*

152. *Id.*

153. *Id.*

brought.<sup>154</sup> Unfortunately, this is a barrier to the uniform, and a mostly toothless impediment in the copyright protection system.

The 1976 Act redefined what copyright law meant in America, but other countries were putting pressure on the United States to join the Berne Convention, an international agreement governing copyright between the signatory countries.

## B. The Berne Convention

The Berne Convention was an agreement between countries to honor the copyrights of authors from outside their borders.<sup>155</sup> This posed direct problems for the United States, as the first Copyright Act of 1790 expressly limited the scope of protection to United States citizens.<sup>156</sup> Though the Berne Convention was adopted in many countries by 1886, it was not until 1989 that the United States finally acceded to the terms of the agreement as one of the last industrialized nations to do so.<sup>157</sup>

## C. Copyright Term Extension Act (CTEA)

As envisioned in 1976, the duration of copyright protection was the life of the author plus fifty years.<sup>158</sup> The Copyright Term Extension Act ("CTEA") sought to change this; when passed it increased the term to life of the creator plus 70 years.<sup>159</sup> The amendment to the 1976 Act was promoted by Sonny Bono prior to his death, prompting some to call it the Sonny Bono Act.<sup>160</sup> The Act sought to bring the United States in line with Europe's copyright protection terms.<sup>161</sup>

The CTEA had its detractors; most notably law professor, Dennis Karjala.<sup>162</sup> Karjala argued that extending the term of copyright protection "would impose substantial costs on the United States general public without supplying any public benefit."<sup>163</sup> Opponents took their case all the way to the

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154. 17 U.S.C. §§ 408, 411.

155. *International Copyright Laws and Their Effects*, HISTORY OF COPYRIGHT, [http://www.historyofcopyright.org/pb/wp\\_f12e0c69/wp\\_f12e0c69.html](http://www.historyofcopyright.org/pb/wp_f12e0c69/wp_f12e0c69.html) (last visited Mar. 15, 2013).

156. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1802).

157. *International Copyright Laws and Their Effects*, *supra* note 155.

158. *United States Copyright Law*, *supra* note 118.

159. *Id.*

160. Robert MacMillan, *Eldred v. Ashcroft: A Primer*, WASHINGTON POST (Jan. 15, 2003), [http://www.washingtonpost.com/wp-srv/technology/articles/eldred-primer\\_100902.htm](http://www.washingtonpost.com/wp-srv/technology/articles/eldred-primer_100902.htm).

161. *United States Copyright Law*, *supra* note 118.

162. *Id.*

163. *Id.*

Supreme Court in *Eldred v. Ashcroft*.<sup>164</sup> Though it was argued that the extension would violate the “limited time” provision of the original Copyright Clause, the Court upheld the extension of the CTEA as constitutional.<sup>165</sup>

#### D. Digital Millennium Copyright Act (DMCA)

The notable 1976 amendment to the Copyright Act, entitled the Digital Millennium Copyright Act (“DMCA”), was an attempt by Congress to combat the rampant copyright piracy born at the start of the digital revolution.<sup>166</sup> The DMCA contains two major sections: (1) the anti-circumvention provisions; and (2) the Online Copyright Infringement Liability Limitation Act.<sup>167</sup>

The anti-circumvention provisions encompass multiple rules and regulations prohibiting individuals from sidestepping technological measures intended to protect an author’s work.<sup>168</sup> Section 1201 of the DMCA states, “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>169</sup> This provision bans the use of technology or any other means to circumvent content-protection features included in an author’s work.<sup>170</sup> This would include the process of “jailbreaking” a cellular phone, or decrypting a RAW file from a camera with unauthorized software.<sup>171</sup>

The Online Copyright Infringement Liability Limitation Act creates a “safe harbor” for online service providers both from their own direct infringement and from the activities of the users of their service.<sup>172</sup> According to section 512(a)-(d), online service providers can use the safe harbors granted when they transmit, cache, store, or link to infringing material.<sup>173</sup> While this safe harbor protects providers from monetary damages, it still re-

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164. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003), *reh’g denied*, 538 U.S. 916 (2003).

165. *Id.* at 208.

166. *DMCA Report Executive Summary*, U.S. COPYRIGHT OFFICE, [http://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](http://www.copyright.gov/reports/studies/dmca/dmca_executive.html) (last visited Oct. 18, 2013).

167. See 17 U.S.C. §§ 512, 1201 (2012).

168. 17 U.S.C. § 1201.

169. *Id.*

170. *Id.*

171. Karl Bode, *DMCA Gets Dumber: Smartphone JailBreaking Illegal in 2013*, DSLREPORTS.COM (Oct. 26, 2012), <http://www.dslreports.com/shownews/DMCA-Gets-Dumber-Smartphone-JailBreaking-Illegal-in-2013-121800>; Editorial, *Nikon Encrypts D2X White Balance Metadata*, PHOTOSHOPNEWS.COM (Apr. 17, 2005), <http://photoshopnews.com/2005/04/17/nikon-d2x-white-balance-encryption/>.

172. See 17 U.S.C. § 512.

173. 17 U.S.C. § 512(a)-(d).

quires performance of specific actions, such as disabling links to infringing material.<sup>174</sup>

This is a troubling section of the DMCA. On one hand, the DMCA seeks to uphold strong copyright protection by implementing anti-circumvention measures. On the other, it grants immunity to the central hub of piracy and circumvention—online service providers. Revisiting our hypothetical photographer, if another Facebook user steals pictures from the original photographer and disseminates those images via Facebook, Facebook has no liability. This is a gaping hole in the otherwise strong shield of domestic copyright protection.

Furthermore, the online service provider is not required to take any action until the copyright holder sends a notice that copyrighted material is being disseminated. This puts the onus on the creator to constantly police the Internet, looking for infringers. That is an unfair burden to place on creators, and it is a battle they will never win. There may not be an easy solution to this issue, but the answer is not to immunize the source of so many of the problems.

#### E. Fair Use in Copyright Law

For many years after the opinion in *Folsom v. Marsh*, fair use was a common law principle in the United States.<sup>175</sup> The Copyright Act of 1976 codified fair use in 17 U.S.C. § 107.<sup>176</sup> The idea is that a copyrighted work used in an infringing manner can still be considered a non-infringement if the use satisfies fair use criteria.<sup>177</sup> Recently, many cases have utilized the fair use defense in the context of social media and Internet situations. There are four factors to consider when determining if an infringing use of a copyrighted work constitutes “fair use.”<sup>178</sup> These include: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the original work used, and (4) the effect of the use upon the market.<sup>179</sup> These factors are not exclusive and courts can, and do, consult other factors when making the determination as to what comprises fair use. As the Supreme Court held in *Campbell v. Acuff-Rose Music*, the four statutory factors may not “be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>180</sup>

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174. *Id.*

175. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

176. 17 U.S.C. § 107.

177. *See id.*

178. *Id.*

179. *Id.*

180. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

For a period of time it was well considered that the fourth factor, the effect of the use on the potential market for the copyrighted work, was the most important factor in this determination. In *Harper and Row v. Nation Enterprises*, the court held the fourth factor was “the single most important element of fair use.”<sup>181</sup> Uses that infringed on the creator’s ability to make money were often deemed unfair, and uses that did not involve the same type of monetary interference tilted the scales towards fair use.<sup>182</sup>

The first factor has also been frequently discussed. This factor brings in the idea of commercialization. The courts have been very unwilling to allow a commercial infringement of copyright stand, which relates directly to the purpose and use of the infringement. In *Leibovitz v. Paramount Pictures*, the court recounted “that commercial use is only ‘a separate factor that tends to weigh against a finding of fair use.’”<sup>183</sup>

The prevailing importance of the fourth factor was discounted in *Campbell v. Acuff-Rose Music* wherein the court abandoned the language in *Harper* in favor of a holistic reading of all four factors, to be decided on a case-by-case basis, with no one factor being determinative.<sup>184</sup> Following this precedent, it is important to examine each factor and how it fits into copyright infringement.

The first factor concerns the “purpose and character” of the use in question.<sup>185</sup> Often the determination with respect to the first factor concerns the balance between “transformative” uses and “derivative” uses.<sup>186</sup> Transformative uses are historically viewed more favorably because they advance the art and provide something new.<sup>187</sup> As the *Campbell* court noted, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”<sup>188</sup> It also contemplates whether the use is educational or commercial in nature.<sup>189</sup> Educational uses will have a greater tendency to fall under fair use, though this is not a bright-line rule.<sup>190</sup> In *Campbell*, the court held:

The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the origi-

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181. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

182. *See id.* at 567.

183. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 585 (quoting *Harper & Row*, 471 U.S. at 562)).

184. *Campbell*, 510 U.S. at 577–78.

185. 17 U.S.C. § 107.

186. *See Campbell*, 510 U.S. at 579.

187. *Id.*

188. *Id.*

189. 17 U.S.C. § 107.

190. *See Campbell*, 510 U.S. at 584.

nal creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”<sup>191</sup>

The idea of a work being transformative does not appear in either the original copyright statute<sup>192</sup> or the section 107 fair use additions.<sup>193</sup> This is an entirely judge-made rule at common law. However, it serves the important purpose of determining the nature of the work, as well as its purpose. Works that are deemed transformative are more likely deemed as fair use because they further the art and support the aims of the copyright law. Uses that are not considered transformative, such as derivative works, are less likely to receive fair use protection because they do not fulfill that same aim.

Determining if the use was commercial or non-commercial is imperative when deciding the outcome of a fair use defense. The Supreme Court held in *Sony*, “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>194</sup> There is a sound policy reason behind these holdings. By its very nature, a commercial use where the infringer profits off the infringement is precisely the type of situation where the creator would have been compensated for their work had the infringement not occurred.

The second factor is the nature of the copyrighted work; it examines the copyrighted material to determine where it falls on the spectrum of warranting copyright protection.<sup>195</sup> Works that are creative and “original works of authorship” are more likely to warrant copyright protection.<sup>196</sup> In addition, unpublished works are less likely to be deemed fair use because when an infringement occurs, there is a loss not only of the right of reproduction but also of the right of first publication, which cannot be returned to the creator.<sup>197</sup>

The third factor concerns the amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole.<sup>198</sup> Work that infringes on only a small portion of the original may pass the hurdle of fair use more easily.<sup>199</sup> Work that uses a majority or all of the protected material are deemed as “serving the same purpose” as the original and unlikely to pass

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191. *Id.* at 579.

192. *See* 17 U.S.C. § 102.

193. *See* 17 U.S.C. § 107.

194. *Sony Corp.*, 464 U.S. at 451.

195. 17 U.S.C. § 107.

196. *Fair Use Frequently Asked Questions*, *supra* note 11.

197. *See* 17 U.S.C. § 106.

198. 17 U.S.C. § 107.

199. *See Fair Use Frequently Asked Questions*, *supra* note 11.

the fair use bar.<sup>200</sup> This is often a deceptive factor. Even when the work infringed comprises the entire work, such as in the photograph appropriated for a movie poster in *Leibovitz v. Paramount Pictures*, the court may still find that the use is parody or some other overall fair use and discount this factor in the analysis.<sup>201</sup>

The fourth factor deals with the effect of the use upon the potential market for, or value of, the copyrighted work.<sup>202</sup> This factor directly concerns the commercial harm that has been inflicted on the creator and copyright holder. If in the first factor a commercial use was found, the harm to the creator may be a major factor. However, if under the first factor the use was deemed transformative, then the idea of economic harm is diminished because the work did not duplicate the form or market of the original.

These four factors are the bed on which the doctrine of fair use is built. The degree of judicial discretion exercised in determining what constitutes fair use is extreme. It places the decisions of judges ahead of the needs and knowledge of creators. Yet through education and reform, fair use can be improved, and with it the rights of creators and the demands of users can both be honored.

## F. The Public Domain

It is worth mentioning what happens to a work when a copyright expires. At the end of the duration of copyright, the work enters into the public domain.<sup>203</sup> Some works do not qualify for copyright protection.<sup>204</sup> These ineligible works are generally non-creative works that are factual by nature.<sup>205</sup> These pieces are part of the public domain.<sup>206</sup> A creator can directly place her work into the public domain, and there are ways to do so, such as the Creative Commons, which is discussed below.<sup>207</sup>

## IV. ANALYSIS

Think back to our hypothetical photographer. She is now more confused than ever. Where should she turn? We must always remember that copyright law serves a dual function. It first preserves the right of authorship and pro-

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200. *See id.*

201. *See Leibovitz*, 137 F.3d at 117.

202. 17 U.S.C. § 107.

203. *Definitions (FAQ)*, *supra* note 13.

204. *See* 17 U.S.C. § 102.

205. *See What Does Copyright Protect?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-protect.html> (last visited Sept. 8, 2013).

206. *Definitions (FAQ)*, *supra* note 13.

207. *See About*, CREATIVE COMMONS, <http://www.creativecommons.org/about> (last visited Oct. 20, 2013).

tection to the creator.<sup>208</sup> It then serves the public good through controlling the flow of works into the public domain.<sup>209</sup> The rights of the newly minted photographers who upload photographs taken with their smartphones and point-and-shoot cameras are essentially invisible. The government protections created by statute are locked in a labyrinth of complexity. Only by educating the public and changing the way copyright protection is monitored and unlocked can these photographers hope to see the protections they necessarily deserve.

A series of reforms could transform copyright protection from the age of the printing press into the modern era. By enacting progressive copyright laws and practices, future technological innovation would be free from a series of backwards protections. In essence, these reforms can be boiled down to five Es: (1) Education on Copyright Law, (2) Embedding Protection, (3) Efficient Registration, (4) Enhancing Fair Use, and (5) Enforcing Existing Copyright Law. Taken together, these reforms could restore the balance of power that has leant too far in promotion of the public good by tilting it back toward the rights of creators.

#### A. Education on Copyright

The first prong of protection for a class of photographers is copyright education. Recent headlines have described large multinational companies pursuing individual copyright infringers.<sup>210</sup> These stories, while sensational, obscure the real issue: copyright protection exists for all, “big media” and individuals alike. Demonizing the actions of companies seeking to protect their intellectual property disgraces all photographers wronged by infringement, as well as any who may seek copyright protection. Educating the public as to what makes creators create will give copyright protection the positive attention it deserves.

Formal publishing is no longer required to obtain copyright protection under the Copyright Act of 1976.<sup>211</sup> The most important lesson that copyright education can offer to the picture taking population is that a copyright is granted once a work is “fixed.”<sup>212</sup> This means that the moment a shutter is pressed or a phone tapped, the image is “fixed” within that camera’s memory and entitled to copyright protection. This may be the single most valuable lesson copyright education can offer to the picture taking population. Regrettably, it is a sad truth that most photographers are not educated on their instantaneous copyright protections and fail to diligently protect their work.

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208. *United States Copyright Law*, *supra* note 118.

209. *Id.*

210. See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED.COM (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

211. See 17 U.S.C. § 102.

212. *Id.*



There are multiple way a would-be infringer can fleece the unwitting copyright holder. For example, it is common to see advertisements enticing novice photographers to “get into the business” by shooting their own work and entering into a contract that grants a copyright to the employer rather than the photographer.<sup>213</sup> This is an especially insidious method of taking a copyright from unsuspecting photographers. The alternative model promotes fairness by guarantying the employer the bounty of the shoot but retaining the copyright for the photographer. Essentially, the photographer would “license” the photographs to the employer without transferring the copyright. Many photographers have been deprived of their rights by schemes such as these, but education can help limit this type of nefarious contracting.

For the amateur photographer, the consequences can be even more dire. Oblivious to their protections, many photographers on Facebook and Flickr are approached by a myriad of companies and individuals seeking to “borrow” their photographs. In many cases, the uses for these images might be benign. For example, an admiring fan of a landscape image may desire to hang the image on the wall. In this situation, the photographer knows she is foregoing payment to do a good deed. Most importantly, neither the individual asking nor the photographer are discussing the transference of copyright. However, in a more frequent scenario, the company that contacts the photographer may be looking to reproduce photographs or some other use otherwise prohibited by the copyright statute without photographer permission. The uneducated photographer will often transfer these rights without understanding they possessed them in the first place, hence demonstrating that education is the key to protection.

Thus far, we have discussed education of copyright protection from the point of view of the photographer; however, the education of a potential infringer is even more vital. Accordingly, educating the public about the rights of photographers, artists, and creators whose work they seek to appropriate will help inform the populace about the host of work available outside of copyright infringement. Though the largest source of artistic material is in the public domain, it often does not have the variety of photographs desired. Creative Commons is an organization that thus serves an important purpose.<sup>214</sup> Creative Commons is a system of furnishing the world with creations, whether artistic, literary, musical, or photographic in nature, and embedding them with rights that are clearly seen on the item’s face.<sup>215</sup> These rights allow for publication, reproduction, derivative works, and other varied

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213. *Definitions (FAQ)*, *supra* note 13.

214. CREATIVE COMMONS, <http://www.creativecommons.org> (last visited Sept. 8, 2013).

215. *Marking/Creators*, CREATIVE COMMONS (Oct. 17, 2013), <http://wiki.creativecommons.org/Marking/Creators>.

rights.<sup>216</sup> Moreover, each image has a set of rights, and in most cases, companies and individuals do not have to pay to use Creative Commons tagged images.<sup>217</sup> The Creative Commons model is an excellent starting place for responsible companies seeking free, high quality photography. By respecting the inherent rights of creators, Creative Commons is one outlet seeking to right the imbalance of copyright protection.

Nevertheless, Creative Commons is just a starting point. What of our hypothetical photographer who shoots and uploads images to Facebook? She displays her picture to the masses without knowing her rights. Regrettably, there are few avenues for her once her picture is on Facebook. Her first line of defense is to educate herself on the privacy settings of Facebook and similar websites.<sup>218</sup> If an infringer cannot see your photograph, it cannot be stolen. Yet it is up to websites like Facebook, who single-handedly stores more images than any other entity in the history of the world,<sup>219</sup> to implement a second line of defense. If Facebook and similar sites were to implement a mandatory Creative Commons-like system for uploaded photographs, it could go a long way toward educating the public on copyright law and protecting the images of its users.

Ultimately one must question if this approach is feasible. Under such a system, a user would receive information during registration about any statutory rights associated with their work along with the option to set permissible actions for the use of their photographs. Permissible actions on an image could range from a complete lock that grants no rights outside of the photographer, to wide-open use without restrictions. Under such a system, the largest entities controlling photography in the world would be setting a precedent of respect for photographs and copyright protections. In addition, every user would receive these protections as well.

But what is the concern of infringement, our photographer may ask. Surely that would not happen to me, right? In fact, it has likely already happened, and more than once. As an example of the egregiousness of infringers, look at the story of photographer Gina Kelley, Danielle Smith posted a Christmas card photo taken by Kelly on an online social networking site.<sup>220</sup> Shortly thereafter, a family friend saw the picture, wall-sized, as an adver-

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216. *About*, CREATIVE COMMONS, <http://www.creativecommons.org/about> (last visited Oct. 13, 2013).

217. *Frequently Asked Questions*, CREATIVE COMMONS (July 29, 2013, <http://wiki.creativecommons.org/FAQ>).

218. *See Privacy*, FACEBOOK, <https://www.facebook.com/help/445588775451827> (last visited Sept. 8, 2013).

219. Good, *supra* note 15.

220. *Missouri Family's Christmas Card Photo Ends Up in Czech Grocery Store Ad After Mom Posts It Online*, NY DAILY NEWS (June 11, 2009, 10:32 AM), <http://www.nydailynews.com/news/world/missouri-family-christmas-card-photo-ends-czech-grocery-store-ad-mom-posts-online-article-1.376943>.

tisement on a store in Prague, Czech Republic.<sup>221</sup> This type of infringement happens more than one might think, and unfortunately is the hardest type of infringement to detect. Our photographer would hate for that to happen to her. But what can she do to protect herself? Without a family friend halfway around the world, the infringement would never have been noticed or stopped. This is where a new way of tagging and embedding copyright into images could be beneficial. If every image bore the copyright of its photographer, any infringement would be deemed *willful* infringement, and much easier to defend in court.

Copyright education is the lynchpin of a population informed of their constitutional rights. However, it is only one prong of a complete system of reform. While education works at a superficial level, current technology is sophisticated enough to allow the elements of copyright protection to be “hard coded” into each and every photograph taken. Therefore, the next step in our systemic reform of the copyright system concerns embedding protection.

## B. Embedding Protection

Almost since the beginning of the printed word, authors have imprinted their books and writings with the signature of copyright protection common to the day.<sup>222</sup> Currently the United States uses the copyright symbol, ‘©’.<sup>223</sup> Unfortunately, what is easy to do in written material may be harder to do to a photograph. Should each and every handmade copy bear the copyright symbol on its back? What about those images only viewed online, how should we signify protection for these images? Finally, what of the photographers who are unaware of their protections? Should the lack of a copyright symbol act as *de facto* permission to infringe? Luckily, modern technology has rendered many of these questions moot.

In the world of digital photography, photons travel from the sun through space and the atmosphere to register on a digital sensor.<sup>224</sup> Through a system of digital to analog converters, microchips, and other electronic components, an image is recorded on a digital memory card associated with a camera.<sup>225</sup> Embedded deep within the code of that image is what is referred to as

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221. *Id.*

222. *Early Writings and the Beginning of Book Printing*, *supra* note 106.

223. *See* 17 U.S.C. § 401 (2012).

224. *Understanding Digital Camera Sensors*, CAMBRIDGE IN COLOUR, <http://www.cambridgeincolour.com/tutorials/camera-sensors.htm> (last visited Sept. 8, 2013).

225. *Id.*

metadata.<sup>226</sup> This metadata contains the building blocks of the image such as the shutter speed setting, the aperture, and the lens used to develop the image.<sup>227</sup> No matter where this image travels, as long as it remains untouched, the metadata will survive; if you can see the image, you can see the data.<sup>228</sup>

Fortuitously, there is even a metadata field for Copyright Status<sup>229</sup>—meaning that a simple regulatory change mandating that this field always default to “Copyrighted” would provide a wide range of implications. For instance, such a change would provide advance notice to any infringer that an image is subject to protection. It would also help the advancement of knowledge about copyright status and copyright protection. Once every image is subject to protection and can only be discarded by an affirmative act, it is a small leap in logic to conclude that every other image taken before the implementation of this regulation is also subject to protection, whether it contains metadata or not. Sometimes the smallest changes can turn the tide of an infringement-based culture.

Perhaps the most intractable of the problems facing the copyright system is how to match up an image with its creator. Metadata can support this mission. When setting up a camera, owners have to go through a series of steps. At the very least, they must set the date and time in the camera. It is here that camera manufacturers, either of their own volition or at the behest of an interested Congress, could prompt the user to enter their name, email address, phone number, or some other piece of identifying information. This information would automatically attach to all pictures taken by the camera’s metadata, which could then be used to determine copyright ownership. A privacy-conscious consumer could avoid entering this data, but the advance in public education would not be lost; images are protected. You are the creator. You have rights.

Through education on copyright status and embedding protection, we have created two avenues, either of which could be used to enhance the knowledge and rights of creators and users. Among the remaining issues, a small quirk remains. While you own your copyright the moment you take the image, you have not “registered” the copyright until you make an affirmative action with the copyright office.<sup>230</sup> A registered copyright has the full protection of law and, more importantly, carries stiffer fines and penalties for infringers if the action goes before a court.<sup>231</sup> Revamping the registration process to be more efficient must be our next goal.

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226. KATRIN EISEMANN, SEAN DUGGAN & TIM GREY, *REAL WORLD DIGITAL PHOTOGRAPHY* 157, 195–96 (3d ed., 2010), *available at* <http://www.peachpit.com/articles/article.aspx?p=1644832&seqNum=3>.

227. *Id.*

228. *Id.*

229. *Id.*

230. 17 U.S.C. § 408(a).

231. *See* 17 U.S.C. §§ 502–05.

### C. Efficient Registration

Current law requires the creator to register their copyright with the Copyright Office before receiving the full protection of the law.<sup>232</sup> It is then an action can be brought against an infringer. But why have this second step? Are we not simply placing an impediment into the path of those who need protection the most? The answer to this problem can be found by cutting the proverbial “Gordian Knot.” Simply eliminate this next step.

It is my view that each photograph taken should be granted the full protection of the law, registration notwithstanding. Registering an image should be an optional step to streamline the process of litigation, but should not be used to withhold protection of the law. There are many problems with this solution, however, the first being the continued function of the Copyright Office. Without an incentive for registration, the number of registrations would necessarily decline. Deprived of registrations and the money they generate, the Copyright Office may find itself in a revenue crunch with no clear exit path. In fact, this solution may end up weakening the cause of creators by helping to hasten the demise of a stalwart friend of copyright protection.

Acknowledging that in the short term this may be an unsolvable problem, a long-term alternative solution may be in order. The current process of registration is cumbersome.<sup>233</sup> The Copyright Office has made strong steps to streamline registration by the implementation of the Electronic Copyright Office.<sup>234</sup> This online web portal allows for the upload of images to be registered for copyright, but still requires the creator to reach out to the Copyright Office, either in person or online, to register their work.<sup>235</sup> Instead, a solution may be to bring the Copyright Office to the creator.

Allowing registration to take place through the major websites of the day, such as Facebook and Flickr, could serve the purpose of easily registering those unaware of the registration process. For a yearly fee, all the uploaded pictures would be registered. This would significantly reduce the barrier to registration, resulting in millions, or billions, more photographs being registered. As an added benefit, this would increase the revenues to the Copyright Office.

Education about copyright creates an informed public. Embedding protection into the photograph itself helps to protect the single image. Efficiently redesigning the registration system would benefit the Copyright Office as well as the creator. But all of these reforms are for naught if an infringer can simply invoke an antiquated “fair use” defense and have the copyright in-

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232. See 17 U.S.C. § 408.

233. See *id.*

234. *Online Services*, ELECTRONIC COPYRIGHT OFFICE (Feb. 12, 2013), <http://www.copyright.gov/ecol/>.

235. See 17 U.S.C. §§ 408–09 (2012).

fringement charges dropped.<sup>236</sup> Enhancing and redefining the concept of “fair use” must be our next goal.

#### D. Enhancing Fair Use

The doctrine of fair use is a contentious subject for content creators.<sup>237</sup> On one hand, everyone agrees, content creators in particular, that there must be exceptions to the inflexible copyright statute for uses that may be educational in nature, parodies of the original, non-commercial uses, etc.<sup>238</sup> On the other hand, fair use has become the rallying cry for infringers who seek its protections when all other avenues are blocked.<sup>239</sup> Foreshadowing what would transpire if the doctrine of fair use were widely used, Justice Story held in *Folsom v. Marsh* that “what constitutes a fair and bona fide abridgement, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion.”<sup>240</sup> Indeed, it has proven to be so. In this age of social media and on demand news, more and more infringers are relying on the fair use defense, which in turn places the pressure squarely on the judiciary to determine what is “fair.”

There are four primary factors to evaluate when looking at a use and determining if that use is fair, as follows: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.<sup>241</sup> These four factors have been the subject of vigorous debate in the courts, with major modifications coming seemingly at random.

The fair use doctrine needs extensive renovation. It has morphed from a well-intentioned principal to a doctrine in search of an infringement, used at will and without concern for the truth. There are some uses that are clearly fair. Education may be the most important of these. The ability of educators to appropriate images, music, words, and other copyrighted material is central to the aim of promoting the public good. Likewise, parody should be a protected use. In effect, one creator is sacrificing her copyright for another creator. The end result is that both creators flourish.

One of the most concerning invocations of fair use is carving out an exception for “news” sources.<sup>242</sup> Often, in search of a story, newspapers both

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236. See 17 U.S.C. § 107.

237. Kenneth D. Crews, *The Law of Fair Use and The Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605 (2001).

238. *Id.* at 606.

239. *Id.* at 605.

240. *Folsom*, 9 F. Cas. at 345.

241. 17 U.S.C. § 107.

242. *Fair Use*, U.S. COPYRIGHT OFFICE (June 2012), <http://www.copyright.gov/fls/fl102.html>.

in print and online will appropriate images that belong to creators from around the globe. When this happens, and the creator is concerned, the immediate defense of “fair use” rears its ugly head. We can look at this situation in two different ways. First, given the infrastructure of copyright protection as it stands today, should there be a “news” exception? Second, if the aforementioned suggestions were implemented, what then for a “fair use” of news?

It would be hard difficult for an editor to run a newspaper today. The news cycle is a temperamental beast with a glut of images available online expressing almost every conceivable human emotion and idea. But the solution is never infringement. Editors must remain vigilant about their responsibility to safeguard images they use, as they would safeguard words composed by their writers. With the current broken model of copyright protection, there may be a “news” exception that falls under fair use, perhaps out of necessity. If the perfect image cannot be tracked to its creator, a court may find that the infringement was made in the service of bringing the public the news, and all avenues visited to avoid infringement.

If these recommendations were implemented, we could safely do away with the “news” exception for copyright infringement. A Creative Commons, rights-based system of securing images with rights suitable to the paper would eliminate infringement.<sup>243</sup> In addition, the ability to track each and every picture back to its creator would greatly decrease the improper use of stolen images. This ideal may be years away, but the news industry is one of the worst populations of infringers, and cloaking themselves in fair use cheapens the defense.<sup>244</sup>

Fair use is an oft-used and seldom-warranted defense to infringement. But it can only be used after an action has commenced. The final step in copyright reform is that of enforcing the copyrights that already exist and taking a proactive approach to these situations. Only if the threat of enforcement exists will these recommendations be implemented.

## E. Enforcing Existing Copyright

As has been mentioned countless times, many photographers are unaware of their rights, especially the right of copyright protection. Many more would be interested in their rights if they knew how their images were being used. The Internet is awash with stories of stolen images being used for nefarious purposes by infringers, both big and small.<sup>245</sup> More acutely, when individuals profit off of work that is not their own, our collective sense of right

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243. *About*, CREATIVE COMMONS, *supra* note 207.

244. See Raymond Baldino, *Content Aggregation: Spreading or Stealing the News?*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Summer 2012), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/content-aggregation-spreadi>.

245. Schneider, *supra* note 34.

and wrong is naturally put on guard. It is time that the community of creators are able to rely on copyright enforcement to protect their work.

The new wave of social media, crowdsourcing, and global participation has created a system whereby infringers could be held accountable for their actions. Imagine a world in which we could “right-click” on any image available on the Internet and see the creator. In addition to all the recommendations above, it is imperative that all creators look out for each other by using technology that protect the rights so valuable to each of them. Take for example TinEye, an online reverse image search engine.<sup>246</sup> A creator simply uploads their image, and TinEye searches the Internet to see if that image has been used elsewhere.<sup>247</sup> It even provides a link to the page where the image is displayed.<sup>248</sup> TinEye is a great start, but it only scratches the surface of the Internet. Only by harnessing the power of the Internet to police the actions of infringers can the creative community look out for each other and protect their hard-earned copyrights.

## F. The Ultimate Solution

The ultimate solution to copyright infringement may be hard to see from our vantage point in 2013. Extensive reformation is needed at both the governmental level and in the minds of creators, big and small. But it will take a concerted effort on the part of all interested parties to make a dent in the well-established copyright world. One organization doing this work is the American Society of Media Photographers (ASMP).<sup>249</sup> ASMP is on the cutting edge of photography interest groups fighting for stronger protections for creators at the congressional level. A recent major issue concerned “Orphan Works,” or works for which the creator cannot be found.<sup>250</sup> Orphan Works legislation seeks to curtail the copyright protection granted upon creation and limit it to a much shorter time span when the creator is not located after a diligent search. This protects those using the works from an infringement charge if the creator were to appear upon publishing. There is currently no Orphan Works legislation before Congress, but if any legislation appears, ASMP and other media organizations will closely follow the action on this legislation.<sup>251</sup>

The ultimate solution necessarily should encompass all the aforementioned recommendations. If each and every one were implemented, the state

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246. TINEYE, <http://www.tineye.com> (last visited Sept. 2, 2013).

247. *See id.*

248. *Id.*

249. AM. SOC’Y OF MEDIA PHOTOGRAPHERS, <http://www.asmp.org> (last visited Sept. 2, 2013).

250. *Orphan Works*, ASMP.ORG, <http://asmp.org/articles/orphan-works.html#.Ui1vwlwXRhc> (last visited Sept. 8, 2013).

251. *Id.*



of copyright law in America would greatly improve. Unfortunately, copyright legislation moves slowly, and educating the populace to take action to preserve their rights can be a daunting task. The most readily available options are the proposed changes for corporations such as Facebook, Google, Flickr, camera manufacturers, and the host of interested parties that make up the backbone of the image making and retention system in America to implement. Only with changes at the institutional level will the public begin to see just how important it is to protect these Constitutional-based rights.

## V. CONCLUSION

There are no easy answers to balancing copyright protection for creators and access for the public, but the answer is never copyright infringement. Creators must retain an incentive to create. When the economic incentive accompanying a great work is removed, many creators are forced to abandon the craft for more pragmatic concerns. Alternatively, for those “accidental” creators who take pictures of their everyday lives and never know that they are the subject of copyright protection, it is even more important to create a net to catch those who prey on unwitting individuals.

The history of photography has revealed that the photograph is the end result of a young art. As a whole, photography is still developing into the medium it is meant to be. There will be both big and small technological changes in the years to come. Copyright law must seek to craft a system that is strong enough to provide protection to the least among us, but sufficiently flexible to evolve with the times and technological advancements. The original copyright statutes did not contemplate the photograph.<sup>252</sup> How could they? Throughout many years and court cases, the judiciary and Congress granted protection to this nascent art, the future of which could never have been anticipated.<sup>253</sup>

Now let us return one last time to our hypothetical photographer. She has examined the history of copyright law and photography. She has watched the two grow in fits and starts, all the while waiting for copyright protection to catch up with the community of photographers that snap and share, oblivious to their precarious position. Perhaps it is inevitable that a statutory construction cannot keep pace with technological innovation, and in that respect we must laud the Copyright Act of 1976 for removing the publishing and notice requirements.<sup>254</sup> Now our photographer can be sure that she owns the intellectual property created through her vision and perseverance.

She is now educated on infringers, those who would seek to pilfer her work for their own gain. She knows her options, her remedies, and possible results. Armed with this knowledge, she can go to Facebook or Flickr and

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252. Benjamin W. Rudd, *Notable Dates in American Copyright: 1783–1969*, U.S. COPYRIGHT OFFICE, 137–38, <http://www.copyright.gov/history/dates.pdf>.

253. *See generally id.*

254. *See* 17 U.S.C. § 102.

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post her pictures with abandon, knowing she is protected, fought for by centuries of creators in countless countries. Her photography uses her life as a subject, and that life is secure.

She also knows what must change in the coming years. The advent of new technology will always place pressure on creators to protect their work from those who would steal it. But through education, protection, registration, and understanding fair use, she can feel confident that a knowledgeable judiciary will fill the gaps and holes in the law. She is confident in the power of the five Es—Education on Copyright, Embedding Protection, Efficient Registration, Enhancing Fair Use, and Enforcing Existing Copyright—to support and enhance the existing laws, and enact new laws when needed in the future.

Through both judicial decisions and Congressional action, copyright laws in the United States are desperately attempting to keep up with technology. It may be unfair to demand more of a legislative body as the widespread adoption of digital cameras has drastically changed the landscape of copyright. There are many actions needed at a legislative level to help ease the burden on the age-old copyright system, but these things take time.

In general, the framework of the copyright structure is still functional. It is the implementation that is broken. The founders of our country could never have imagined a day wherein each person would have access to the entire world at their fingertips. Vigorous enforcement of copyright helps everyone by incentivizing creation and encouraging use within a lawful framework, without the fear of prosecution. The copyright system as a whole may be broken, but each user has a responsibility to care for what they create and advocate for the protection of their rights. Only by endeavoring to protect the works of all creators will the creative soul of America be completely fulfilled. We all have a responsibility to ensure that the country continues to create. It begins and ends with copyright protection. Everyone is now a photographer. Everyone should now be protected.

