United States Response to ALAI 2021 ALAI Questionnaire

COPYRIGHT, COMPETITION AND INNOVATION

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*****Please note that any references to the Copyright Act or the Act refer to the Copyright Act of 1976, 17 U.S.C. §101 et. seq.*****

1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

Identify and explain any specific instances where market competition and innovation concerns have been specifically addressed by copyright law or caselaw in your country. This may include by means of:

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

Innovation in the copyright context encompasses the creation of original works and is closely tied to the idea of progress. The US Constitution 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."[3] Thus, the goal of spurring innovation is at the heart of US copyright law's grant of exclusive rights and concomitant limits on competition. To promote innovation, Congress has limited competition.

The scope of exclusive rights in the United States has several features that spur innovation. First, the constitutional requirement of originality ensures that exclusive rights attach only to original works of authorship.[4] American copyright law then grants authors of sufficiently original creative works five exclusive rights enabling the author to control the markets for: reproduction, derivative works, distribution of copies, performance, and display.[5] The exclusive nature of these rights, by definition, limits competition. Nevertheless, Congress defined, and courts have interpreted, these rights to balance innovation and competition through alternately expansive and limiting language and readings. When confronting innovative technology in particular, courts have interpreted the Copyright Act purposively. For example, the Supreme Court has analogized recent innovations to technologies developed before the advent of the Act and regulated in the Act (such as cable

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[3] U.S. Const., Art. I § 8.

[4] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351 (1991) ("[O]riginality is a constitutionally mandated prerequisite for copyright protection.").

[5] 17 U.S.C. § 106.

television) to determine whether the challenged use falls within the scope of exploitations which Congress intended to limit competition in favor of the author's exclusive rights.[6]

Moreover, American copyright law fosters competition by distinguishing between copyrightable works (expressions) and non-copyrightable elements (ideas and facts) and by imposing a requirement of originality. Non-copyrightable elements may be copied without incurring infringement liability.[7] In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, for example, a negative finding on a particular phonebook's copyrightability led the Court to hold that a competing phonebook which appropriated names and addresses from the former was non-infringing because the original work did not have the requisite originality to qualify for copyright protection.[8] Works must bear a modicum of originality as well, although that bar is set purposefully low so to accommodate even simple works.[9]

The exclusive right of reproduction covers the making of a copy in any material form. The statute defines a copy as fixed in a "sufficiently permanent or stable" material form "for a period of more than transitory duration."[10] The exclusive right to reproduction persists despite changes in technology: Reproductions coming within the scope of the author's exclusive right can be fixed "by any method now known or later developed."[11] Thus, faxed photocopies,[12] RAM copies,[13] and digital files containing sound recordings[14] can infringe the exclusive right to reproduction even though § 106(1) (the provision setting out the author's exclusive right to reproduction) predates the development of these technologies. In recent cases, rather than seeking an applicable statutory

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[6] *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431, 444 (2014) (calling the innovative streaming service "for all practical purposes a traditional cable system").

[7] *E.g., Feist* at 361,347 (holding "names, towns, and telephone numbers" of a provider's subscribers are non-copyrightable facts and explaining that facts are not eligible for copyright protection, "[B]ecause facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."

[8] *Feist* at 364 ("The raw data are uncopyrightable facts, and the way in which Rural selected, coordinated, and arranged those facts is not original in any way. Rural's selection of listings -- subscribers' names, towns, and telephone numbers -- could not be more obvious, and lacks the modicum of creativity necessary to transform mere selection into copyrightable expression.").

[9] *Feist* at 345. ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.")

[10] 17 U.S.C. §§ 106(1), 101.

[11] *Id.* § 101.

[12] Pasha Pubs., Inc. v. Enmark Gas Corp., 1992 WL 70786, at *1 (N.D. Tex. 1992).

[13] MAI Systems Corp. v. Peak Comput. Inc., 991 F.2d 511, 518 (9th Cir. 1993).

[14] London-Sire Records v. Does, 542 F.Supp. 2d 153, 171 n.23 (D. Mass. 2008). This case acknowledged Congress' 1976 abrogation of *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) in which the Court had held that perforated sheets representing sheet music were not copies within the meaning of contemporaneous copyright law because they were not intelligible to humans. Even though the digital format in *London-Sire* was novel and non-intelligible to humans, copyright law applied. *See also* Capitol Records LLC v. ReDigi, Inc., 910 F.3d 649, 656–57 (2d Cir. 2018) (explaining downloaded digital song files cannot be digitally resold through an internet storage service without reproducing them in the process).

exception, courts have limited the liability of some novel forms of content delivery by ruling that the conduct at issue did not constitute *prima facie* infringement of the exclusive right to reproduction, for example because the delivery was automated and non-"volitional" on the part of the service.[15]

American copyright law also grants authors the exclusive right to "prepare derivative works based upon the[ir] copyrighted work."[16] Control over derivative works may prevent competition within markets for the copyrighted work and limit innovation that uses the copyrighted work as source material. In *Micro Star v. Formgen, Inc.*, for example, the Ninth Circuit held that user-generated levels of a video game—sequels, essentially—were derivative works.[17] Rejecting the fair use defense, the court observed that the work was "made purely for financial gain" that might otherwise have accrued to the plaintiff.[18] In *Horgan v. Macmillan, Inc.*,[19] the Second Circuit considered whether the publication of a book featuring photographs of the "Balanchine Nutcracker" infringed the holder of the choreography's right to prepare derivative works.[20] The court acknowledged the difficulty in recreating choreography yet nevertheless observed that a "single instant [captured in a photograph] communicates far more than a single chord" in a symphony.[21] With a photograph of a leap, for example, a viewer "understands instinctively" what preceded and followed the instant photographed based on the laws of gravity, and someone who recently viewed the performance "could probably perceive even more."[22] So perceiving, they might recreate parts of the dance and enter the original work's market. Thus, the exclusive right to prepare derivative works allows the copyright holder to maximize the exploitation of her work in secondary markets.

The third exclusive right is to distribute copies of a copyrighted work.[23] Control over distribution may limit competition, for example, by granting authors control over first dissemination of copies

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[15] Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008) (holding "transitory" digital storage of a copyrighted work to enable remote recording via DVR does not constitute reproduction); Fox Broad. Co. v. DISH Network LLC, 747 F.3d 1060, 1067 (9th Cir. 2014) (recognizing volitional requirement for reproduction so that the user of a system—but not operator of the system—is liable for any direct infringement).

[16] 17 U.S.C. § 106(2) ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."); 17 U.S.C. § 101.

[17] Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) ("A copyright owner holds the right to create sequels, . . . and the stories told in the [challenged] files are surely sequels.") (citing Trust Co. Bank v. MGM/UA Entertainment Co., 772 F.2d 740 (11th Cir.1985)).

[18] *Micro Star*, 154 F.3d at 1113.

[19] *Micro Star*, 154 F.3d at 1112.

[20] 789 F.2d 157 (2d Cir. 1986).

[21] *Horgan*, 789 F.2d at 163.

[22] *Id.*

[23] 17 U.S.C. § 106(3) (granting the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.").

of their works.[24] Innovations, however, have tested what acts count as "distribution" and who should be liable. Courts have agreed that digital dissemination qualifies as a distribution,[25] even when the copy resides only in computer memory.[26] What is still unclear is how long a copy needs to reside in the memory to trigger the distribution right.[27] If the amount of time an unauthorized copy resides in the computer memory is deemed "nontransient," and thus protected by copyright, it is still unclear who is responsible for that infringement. Is it solely the entity that sent the copy with the intent to distribute or does liability also rest with the service that facilitated that distribution by communicating the copy to other users? If it is the former, then communication services may flourish free of copyright restraints (provided they lack any knowledge of infringement).

American copyright law also grants authors the exclusive rights to perform and/or display their works publicly.[28] Courts often apply these rights to innovative technology by analogizing to pre-1976 technology. Thus, one court understood "performance" in the context of video-upload websites by analogizing to movie theaters.[29] Similarly, the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.* analogized Aereo's technology to earlier transmission forms (including cable/CATV) despite differences in "behind-the-scenes" mechanics.[30] Moreover, and in contrast to the confusion over whether a download service provider or a user thereof is the infringing distributor of unauthorized downloads, the *Aereo* majority held that both a service's provider and its user can infringe on the performance right.[31] By contrast, where an innovative

[24] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985) (holding the right to distribution includes the right to first publication). The Digital Millennium Copyright Act (DMCA) effectively renewed this right for the digital era by prohibiting the circumvention of access controls, thus limiting both competition (for publication) and innovation (of circumvention technology). *See* 17 U.S.C. § 1201(a).

[25] Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding an operator of an electronic bulletin board that made images available for download liable for unauthorized distribution); Religious Tech. Ctr. v. Netcom, 907 F. Supp. 1361, 1369 (N.D. Cal. 1995) (holding a user of a file hosting service would be liable for copyright infringement for files made available to others for download); *Napster*, 239 F.3d at 1014 (9th Cir. 2001) (holding a user who uploads files to a sharing service for others to download infringes the exclusive right to distribution); CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 551–52 (4th Cir. 2004) (holding that the DMCA did not affect *Netcom*'s authority); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162–63 (9th Cir. 2007) (holding users but not service provider directly liable for infringement); BWP Media USA, Inc. v. T & S Software Assocs., Inc., 852 F.3d 436, 442 (5th Cir. 2017) (placing the facts into "the *Netcom* line of cases").

[26] *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that infringing "'copying' for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM).

[27] 17 U.S.C. § 512(a)'s grant of immunity to ISPs applies only to transient storage. Whether electronic communication is "transient" requires a fact-specific inquiry. *See* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1116 (9th Cir. 2007).

[28] 17 U.S.C. § 106(4)–(6).

[29] Flava Works, Inc. v. Gunter, 689 F.3d 754, 760–61 (7th Cir. 2012).

[30] 573 U.S. 431, 443 (2014).

[31] *Id*. at 445.

technology increases an authorized user's viewing options without giving that user the ability to copy or further distribute the work, courts have found the technology non-infringing.[32]

Courts similarly turn to "familiar guiding principles"[33] when deciding how to apply the display (§ 106(5)) right to innovative technologies. In a recent case, for example, a court held that embedding a Tweet containing an image on a website, even though the Tweet and image were hosted on a third-party website, qualified as a public display on the primary website.[34] In *Goldman v. Breitbart News Network, LLC*, the Southern District Court of New York recognized that someone can violate a copyright holder's exclusive right to publicly display the work "by means of any device or process" and concluded that Supreme Court precedent stands for the proposition that "liability should not hinge on invisible, technical processes imperceptible to the viewer."[35] Recently, a different judge on the same court agreed with *Goldman v. Breitbart* in rejecting the so-called 'server test'[36] which holds that a public display occurs only on the website that hosts the disputed content. In *Nicklen v. Sinclair Broadcast Group, Inc,*[37] the Southern District echoed the Supreme Court's concern that making infringement hinge on "invisible, technical processes" would be "contrary to the text and legislative history of the Copyright Act."[38]

Finally, copyright holders in sound recordings also have a distinct exclusive right to public performance of those works via "digital audio transmission."[39] This provision responds to innovative digital audio playback options by reserving to copyright owners rights over webcasting and interactive streaming of sound recordings. For a more detailed discussion, see Question 1.3.

1.2.- Defining (or interpreting) the scope of exempted uses (Exceptions & Limitations) on account of competition and innovation concerns.

In addition to limiting interpretations of the exclusive rights, US law accounts for competition and innovation through a variety of exempted uses.

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[32] *See* Fox Broad. Co. v. DISH Network LLC, 160 F. Supp. 3d 1139 (C.D. Cal. 2015), *aff'd*, 747 F.3d 1060 (9th Cir. 2014) (holding that DVR technology allowing content viewing on multiple devices does not perform the content publicly); *Cartoon Network*, 536 F.3d at 138 (concluding that because "each RS–DVR transmission is made to a given subscriber using a copy made by that subscriber, . . . such a transmission is not 'to the public'" and thus does not infringe the copyright holder's exclusive right to public performance).

[33] Goldman v. Breitbart News Network, LLC, 302 F.Supp. 3d 585, 586 (S.D.N.Y. 2018).

[34] *Id.* at 593 (citing 17 U.S.C. § 101) (emphasis in original).

[35] *Id.* at 595; *see also Frena*, 839 F. Supp. at 1557 (analogizing electronic display to paid subscribers to display at a trade show and at a private club) (first citing Thomas v. Pansy Ellen Prods., 672 F.Supp. 237, 240 (W.D.N.C. 1987); then citing Ackee Music, Inc. v. Williams, 650 F.Supp. 653 (D. Kan. 1986)).

[36] The Server Test, first defined in Perfect 10 v. Amazon.com, Inc. et al., 508 F.3d 1146 (9th Cir. 2007), holds that liability for direct copyright infringement on the internet requires the image to have been stored on the defendant's server; merely linking to a third party's page does not constitute infringement .

[37] *Nicklen v. Sinclair Broadcast Group, Inc.*, 2021 WL 3239510 (S.D.N.Y. 2021).

[38] *Id*. at 4.

[39] 17 U.S.C. § 106(6).

Fair Use

The Copyright Act exempts from infringement actions unauthorized "fair uses" of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[40] Judges assess fair use by considering the facts and circumstances of each case. Under section 107, the court should evaluate "the purpose and character of the use," "the nature of the copyrighted work," "the amount and substantiality of the portion used," and the use's effect on the market for the original work, but this is not an exhaustive list and courts may take other considerations into account.[41]

The first and fourth factors in particular account for innovation and competition. The first fair use factor accounts for innovation by requiring courts to consider the innovative value of the use, that is, whether the new use is "transformative."[42] Examples of transformative uses include use of copyrighted material to create an online search index[43] and using student essays to create a plagiarism detector.[44] Other cases have found reverse engineering a system with non-competitive intentions[45] to be fair use in a situation where the defendant did not use the process to reproduce the code but to break down the object code and understand which non-copyrightable functional concepts needed to be reproduced to make the defendant's product compatible with the plaintiff's existing system.[46]

Similarly, the fourth fair use factor expressly requires courts to consider the impact on the market for the original work, including derivative markets. Courts endeavor to ascertain whether the defendant's use competes with actual or potential markets for the author's work.[47] Thus, incidental inclusion of copyrighted content may be fair use where the aggregate effect of similar acts would

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[40] *Id.* § 107.
[41] *Id.* § 107(1)–(4).
[42] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *accord* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021).
[43] *Perfect 10*, 508 F.3d at 1165; Authors Guild v. Google, Inc., 804 F.3d 202, 216 (2d Cir. 2015).
[44] A.V. v. iParadigms, LLC, 562 F.3d 630, 639 (4th Cir. 2009).
[45] *E.g.*, Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522–23 (9th Cir. 1992) (disassembling copyrighted computer program to understand unprotected elements is transformative); Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 608 (9th Cir. 2000) (reverse engineering operating system to create compatible system is fair use).
[46] *Sega*, 977 F.2d at 1527.
[47] *Harper & Row*, 471 U.S. at 568; Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith 19-2420-cv at 47 (2d Cir. August 24, 2021) ("[T]he question under this factor is not solely whether the secondary work harms an existing market for the specific work alleged to have been infringed. . . . Rather, we must also consider whether 'unrestricted and widespread conduct of the sort engaged in . . . would result in a substantially adverse impact on the potential market'" for the primary work) (quoting Campbell, 510 U.S. at 590 (internal quotation marks omitted) (alterations adopted)). The second use must "usurp[]" part of the primary work's market, not merely damage it. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006).

not create competition with the original work.[48] By contrast, where the aggregate effect of similar acts would be to compete with the original work, courts are less willing to find fair use.[49]

One recent Supreme Court case may lead courts to reconsider the balance of innovation and competition when assessing fair use claims. In *Google LLC v. Oracle America, Inc.*, the Court held repurposing functional code to create a new platform is transformative fair use.[50] The Court acknowledged the alleged infringing use occurred in a market that the copyright holder was exploiting, and therefore deprived the copyright owner of control over that market.[51] Nevertheless, emphasizing the dubious copyrightability of the copied code, the Court took a "rising tide" view toward the appropriation: in the Court's view, the alleged infringer expanded the market for all parties by appropriating the code,[52] and the copyright holder "would benefit from the reimplementation of its interface into a different market."[53] The Court also held that, given the scope of investment by third parties in learning and innovating based on the copyrighted code, the overall market—and the public—would be harmed by enforcing the copyright owner's exclusive rights.[54] This decision, like all fair use decisions, is based on the specific facts and circumstances before the Court and, therefore, may provide limited precedent, particularly given the Court's repeated emphasis on the highly functional nature of a work the Court deemed "far from the core" of protected works of authorship.

First Sale

The first sale doctrine further limits an author's exclusive rights by distinguishing the author's rights to the work from a copy owner's rights to a particular copy of the work.[55] The owner of a particular copy of a copyrighted work "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[56] The limit on copyright owners' control over copies they distribute may create competition where resold copies compete with new copies

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[48] *Compare* Italian Book Corp. v. American Broad. Cos., Inc., 458 F. Supp. 65, 70 (S.D.N.Y. 1978) (holding aggregate use of song in background of newscast would not impede licensing market for song) *with* Ringgold v. Black Entertainment Television, Inc.126 F.3d 70, 80-81 (2d Cir. 1997) (holding that defendant's placement of plaintiff's story quilt in a set background, visible for only seconds, nevertheless limited the licensing market for plaintiff's work).

[49] *E.g.*, American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926–27 (2d Cir. 1994) (limiting reproduction where a market might exist for a copyright holder); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1386–87 (6th Cir. 1996) (en banc) (emphasizing the fourth statutory factor to hold commercial photocopying is not fair use); *Napster*, 239 F.3d at 1015 (widespread downloading of MP3 files off the internet destroys market for the primary work and is thus not fair use).

[50] *Oracle*, 141 S. Ct. at 1202–04.

[51] *Id.* at 1207.

[52] *Id.* at 1204 (quoting Brief for Microsoft Corporation as *Amicus Curiae* 22).

[53] *Id.* at 1204 (internal citation omitted).

[54] *Id.* at 1208.

[55] 17 U.S.C. § 109. This right is limited in relation to Works of Visual Arts (as defined in 17 U.S.C. §101) by section 106A.

[56] *Id.* § 109(a).

distributed by the copyright owner. For example, a used book may be resold at a lower price than new copies produced from the same manuscript. Similarly, the owner of a particular copy "is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."[57] This would allow the purchaser of a painting to loan that painting to a museum, even when doing so might create competition for museum interest in the artist's other works. Courts have upheld some attempts by copyright holders to limit the applicability of the first sale doctrine, such as by classifying transfers of possession of copies as licenses rather than sales of ownership.[58]

Limitations on Contributory Liability

Another way US copyright law supports innovation is by limiting contributory infringement liability. The DMCA's safe harbor provision, for example, exempts internet service providers (ISPs) from liability where their users infringe copyrights, provided the ISPs have met certain conditions.[59] By exempting ISPs whose services are not intended to facilitate infringement, US law encourages the development of ISPs; without the exemption, the liability risk of hosting user-generated content would discourage investment in ISPs. The liability limitation, in turn, supposedly encourages the growth of the internet. (For more on the DMCA, see Question 4.1.) Case law follows a similar line of reasoning. In *Sony Corp.*, for example, the Court held that is the manufacturer and distributor of the videotape recorder were not liable for contributory copyright infringement because their device was "merely capable of substantial noninfringing uses."[60] By contrast, providers of innovative services intended to facilitate infringement or with substantial infringing possibilities may be contributorily liable for their users' actions.[61] Similarly, although

[57] *Id.* § 109(c).

[58] Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111 (9th Cir. 2010) (holding a computer software user was a licensee rather than an owner); *see also* Disney Enters., Inc. v. Redbox Automated Retail, LLC, 336 F.Supp. 3d 1146, 1152 (C.D. Cal. 2018) (holding a DVD distributed with download code can be governed by a license limiting first sale doctrine's application).

[59] 17 U.S.C. § 512.

[60] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 942 (2005) ("Liability under our jurisprudence may be predicated on . . . distributing a product distributees use to infringe copyrights, if the product is not capable of 'substantial' or 'commercially significant' noninfringing uses.") (Ginsburg, J., concurring) (quoting *Sony Corp.*, 464 U.S. at 442); *Perfect 10*, 508 F.3d at 1170 (quoting *Sony Corp.*, 464 U.S. at 442); *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 912–13 (D.C. Cir. 2018) (concluding *Sony Corp.* and *Grokster* remain good law but were inapposite to the facts of the case).

[61] *Napster*, 239 F.3d at 1020 (holding program designed to facilitate infringing reproduction contributorily liable for the infringement); *Grokster*, 545 U.S. at 935 ("[W]here evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony* [*Corp*]'s staple-article rule will not preclude liability."); EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79, 100 (2d Cir. 2016) (holding service provider that "acted in a manner intended to promote infringement" contributorily liable for users' infringement) (citing *Grokster*, 545 U.S. at 935); *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc.*, 881 F.3d 293, 307 (4th Cir. 2018) (holding an ISP may be contributorily liable for its users

the Audio Home Recording Act of 1992 shields manufacturers of "digital audio recording devices" from some infringement actions based on the actions of customers using their devices,[62] courts have held that certain challenged technologies are not exempted "digital audio recording devices."[63]

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, Extended Collective Licensing, etc) or "joint-tariffs", "one-stop-shops" … and explain their impact in the market

In the United States, compulsory licensing and collective management regimes are primarily, but not exclusively, centered on the music industry.

The U.S. regulates rates for certain uses of music, such as for the reproduction and distribution of musical works and the public performance of sound recordings by non-interactive webcasters. These rates are set by a government-appointed body, the Copyright Royalty Board (CRB). (We discuss the CRB below, and in our answer to Question 3.4.) In addition, in the case of a dispute between a licensee and a performance rights organization (listed below) with respect to the royalty to be paid for public performance of musical works, either party can apply to a New York federal court to determine the rate.

In addition to the music-oriented statutory licensing system, the Act includes compulsory licenses for secondary transmissions by cable systems,[64] for satellite carriers,[65] and by satellite carriers for local retransmissions.[66] Section 111, enacted as part of the Copyright Act of 1976,[67] creates a compulsory licensing system for "secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico."[68] The license was created because of "the perceived need to differentiate for copyright payment purposes between the impact of local versus distant broadcast signals

use of a peer-to-peer file sharing network despite noninfringing potential uses of its service); *see also* 17 U.S.C. § 1201(a)(2)(b) (circumscribing the exemption where a device's noninfringing capabilities are limited).

[62] 17 U.S.C. § 1008.

[63] *E.g.*, Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999) (finding handheld playback devices on which files from a computer can be transferred are not "digital audio recording devices" under 17 U.S.C. § 1001(3) because they "implicate the home taping and piracy concerns to which the [Audio Home Recording] Act is responsive"); *accord* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001).

[64] 17 U.S.C. § 111(c)–(d).

[65] *Id.* § 119.

[66] *Id.* § 122.

[67] Pub. L. No. 94-553, 90 Stat. 2541.

[68] 17 U.S.C. § 111(c)(1).

carried by cable operators" but accounts for the different sizes of operators.[69] The licensing regime applies to both local and distant retransmissions.

Local and distant retransmissions by satellite are split into two statutory licenses. The first, section 119 (originating in the Satellite Home Viewer Act in 1988[70]), recognizes a statutory license for secondary transmissions of distant television programming by satellite that is similar to the cable transmission license except royalties are calculated on a per-subscriber basis.[71] The license applies to retransmissions for private home viewing and for viewing in a commercial establishment if the original transmission is non-network.[72] The other satellite statutory license, section 122 (first enacted as part of the Satellite Home Viewer Improvement Act of 1999[73]) creates a statutory license for secondary transmissions by satellite of television broadcast stations within a local market,[74] of significantly viewed stations,[75] of low-power programming,[76] and of other special exceptions for states with few media markets.[77]

For both cable and satellite statutory licenses, the Federal Communications Commission promulgates rules, regulations, and authorizations governing these licenses.[78] The CRB determines the sections 111 and 119 licensing rates,[79] but the section 122 license is royalty-free except in special circumstances.[80]

Collective Management

The United States does not have a vast collective management regime. The most prominent collective management organizations in the United States are the Mechanical Licensing Collective (MLC)—created by the recently enacted Music Modernization Act—which administers mechanical licensing and royalties under the U.S. compulsory mechanical license, and the performance rights organizations (PROs) ASCAP (the American Society of Composers, Authors, and Publishers), BMI (Broadcast Music International), SESAC (Society of European Stage Authors and Composers) and GMR (Global Music Rights). In addition, the government-created entity SoundExchange administers the compulsory licenses for public performance of sound recordings.

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[69] U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals at 4–5 (Aug 1997) ["1997 Report"].
[70] Pub. L. No. 100-667, 102 Stat. 3949.
[71] 1997 Report at 8.
[72] 17 U.S.C. § 119(a)(1)–(2).
[73] Pub. L. No. 106-113, 113 Stat. 1501.
[74] 17 U.S.C. § 122(a)(1).
[75] *Id*. § 122(a)(2).
[76] *Id*. § 122(a)(3).
[77] *Id*. § 122(a)(4).
[78] *Id.* §§ 111(c)(1); 119(a)(1)–(2); 122(a)(1)–(4).
[79] *Id.* § 801(b)(1)–(2).
[80] *Id.* § 122(a)(5); (c).

Prior to the launch of the MLC on January 1, 2021, The Harry Fox Agency, owned by SESAC, was the leading collective for mechanical rights licensing and collections. HFA now serves as a vendor (or "back office") for the MLC.

The Copyright Clearance Center (CCC)[81] is a voluntary collective management organization that does not operate under a compulsory license. CCC primarily licenses written materials to academic institutions and businesses around the world. For more information on their collective licensing practices, see their white paper available here.[82]

Compulsory Licenses for Musical Works

The reproduction and distribution of musical works (commonly known as "mechanical rights") has long been governed by a compulsory license in section 115 of the U.S. Copyright Act, which was recently updated with the passage of the MMA in 2018.[83] Originally the compulsory license covered the making of "hard copies" (e.g., vinyl, tape, CDs), but in 1995 the law was changed to embrace digital copies, or "digital phonorecord deliveries (DPDs)."[84] (The physical embodiment of a recorded musical composition is referred to as a "phonorecord.") The compulsory license is available only if the primary purpose of making phonorecords of the musical work is to distribute them to the public for private use, including by means of a DPD, and phonorecords of the musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work. The compulsory license is not available for the initial release of a musical work unless the copyright owner consents.[85] It is not available for recording music onto the soundtrack of an audiovisual work. Nor is it available for creating recordings for purposes such as distribution to commercial establishments for background music through services such as Muzak®. The license applies only to the creation of phonorecords of sound recordings of non dramatic musical compositions; it does not permit the reproduction of third-party sound recordings.

Because some terms of the compulsory license are inefficient (e.g., frequency of accounting and payment), some users opt instead to pursue voluntary, privately negotiated licenses with the rightholder (usually a music publisher). Under a negotiated private license, licensees may seek

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81 Copyright Clearance Center, http://www.copyright.com (last visited July 21, 2021).

82 Lois F. Wasof, Mark Seeley, and R. Bruce Rich, Creating Solutions Together, Copyright Clearance Center (2020), https://www.copyright.com/wp-content/uploads/2021/01/CCC_CreatingSolutionsTogether_Ebook_2020.pdf.

83 Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018) (hereinafter "MMA"). The effective date of the MMA as a whole is the date the president signed it, Oct. 11, 2018 (MMA § 106), but blanket licenses were not available until Jan. 1, 2021. *See generally* MMA § 102 (amending 17 U.S.C. § 115(d)); 17 U.S.C. § 115(e)(15).

84 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-392, 109 Stat. 336, 344 (1996) (codified as amended at 17 U.S.C. §§ 106, 114-115 (1996)).

85 17 U.S.C. § 115(a)(1)(A).

rates lower than the statutory minimum rates, which do not apply to negotiated agreements. Many practitioners thus feel that the statutory rate thus has acted as a ceiling, and not a floor.[86]

The statutory rates for the mechanical license are determined by the Copyright Royalty Judges (CRJs).[87] The MMA does not change the rate for compulsory licenses, but requires the CRJs to apply a market-based willing buyer/willing seller rate-setting standard, replacing a policy-oriented section 801(b)(1) rate-setting standard. The current statutory rates for the mechanical license are available at https://www.copyright.gov/licensing/m200a.pdf.

The Music Modernization Act

Until modified by the MMA,[88] the U.S. compulsory licensing regime required potential licensees to seek licenses on a composition-by-composition basis. With the advent of online digital music providers, the section 115 license became increasingly onerous, because these entities sought to license reproduction rights for millions of musical compositions.[89] Record labels (who owned the copyright in the sound recordings) were delivering their catalogues to the digital music providers, often without information regarding the owners of the copyrights in the musical compositions. Some digital music services were expending a great deal of money in attempting to perform the necessary due diligence to obtain compulsory mechanical licenses; others simply used the songs without meeting the requirements for the mechanical license.

These problems led Congress to overhaul section 115 by enacting the MMA in 2018.[90] The MMA reformulated the mechanical license with regard to digital music providers—referred to in the MMA as “digital service providers” (DSPs), so we will use that term hereafter. While the prior rules remain in place for the manufacture of physical products, the MMA establishes a blanket compulsory license system for DSPs to engage in downloads and on-demand streaming.[91] The MMA essentially updates the compulsory licensing process for the digital age. DSPs will provide funding for the MLC, whose responsibilities include the creation of a large database of musical works and rightholders.[92] The DSPs will also pay royalty fees for usage.[93]

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[86] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 2014 (Feb. 5, 2019) (codified at 37 C.F.R. pt. 385) (citing Expert Report of Jeffrey A. Eisenach, Trial Ex. 3027 ¶ 10 (“[A]s a matter of economics the Section 115 license operates as a ceiling but not a floor on Section 115 royalties.”)).

[87] 17 U.S.C. § 801 et seq.; *see also* answer *infra* to Question 3.4.

[88] See *supra* note 77.

[89] Digital Music Providers require a mechanical license since streaming requires making copies, and more copies are made if the customer is allowed to pause or download a streamed composition for use offline.

[90] MMA § 102.

[91] MMA § 102 (codified as amended at 17 U.S.C. § 115(d)(1)(B)).

[92] MMA § 102 (codified as amended at 17 U.S.C. §§ 115(d)(7)(A), (3)(E)(i)(IV)).

[93] MMA § 102 (codified as amended at 17 U.S.C. §§ 115(c)(1)(A)–(B)).

The MLC blanket license in effect frees DSPs from the time and expense of seeking licenses composition by composition. The MLC, overseen by a board of music publishers and songwriters, administers the blanket license, receives and distributes royalties (including royalties for which no copyright owner can be identified), and is to develop and maintain a comprehensive musical works database. The MLC is funded by the DSPs, so the MMA also provides for the appointment of a digital licensing coordinator (DLC) to coordinate the activities of the DSPs in relation to the MLC's operations and budget. DSPs and rightholders may also choose to enter into voluntary licenses, which can be administered by the MLC or another entity privately, at any rate they agree upon. Both the MLC and the DLC will be nonprofit entities.[94]

The MMA gave the Copyright Office responsibility for designating the MLC. Effective July 8, 2019, the Office named a group of music publishers and songwriters to act as the MLC.[95] The MLC launched operations on January 1, 2021.

1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. …)

Most licensing practices in the United States favor market competition and innovation. As you see from the answers within, the United States government takes a very small role in regulating private licensing agreements. It is up to individuals and corporations alike to negotiate the terms and conditions that best suit their needs, and the system relies on those agreements, even if the two parties did not have equal bargaining power.

1.5.- By any other means?

2. A STUDY CASE: DATA ECONOMY

Data is called the "new oil" for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)

2.1.- Is "machine reading" an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

[94] See MMA § 102 (codified as amended at 17 U.S.C. §§ 115(d)(3)(A)(i), (5)(A)(i)).

[95] Designation of Mechanical License Collective and Digital Licensing Coordinator, 84 Fed. Reg. 32274 (July 8, 2019).

Yes, any form of duplication, whether by hand or machine, is considered an act of reproduction in the United States. Any copying is therefore covered, if applicable, by the Act, subject to the same limitations and exceptions as any other work covered by the Act, and licensable by the copyright holder. US courts have held the systematic scanning of print books to be fair use for purposes of indexation (but not delivery of substantial amounts of content) and assistance to the visually impaired.[96] As mentioned in the answer to Question 1.3, the case law regarding the machine scanning of copyrighted materials extends forty years into the past with the cases involving the photocopying of scientific journal articles in *Williams v. Wilkins Co. v. United States*, a case tried prior to the adoption of the Act and its codification of fair use, which found that despite the defendant agencies' photocopying of over one million pages a year, the plaintiff had not proven the probability of future harm.[97] Post-1976, cases like *Princeton University Press v. Michigan Document Services, Inc.*[98] and *American Geophysical Union v. Texaco, Inc*.,[99] however, used the fair use rubric enumerated in § 107 to find the photocopying of scholarly articles infringing, citing the plaintiff's lost licensing royalties.

In the digital age, 'machine reading' takes the form of scanning and digital reproduction. It is clear that copying a digital file can be considered a violation of a copyright holder's § 106(1) right of reproduction. In *Capitol Records, LLC v. ReDigi, Inc*., the Second Circuit examined whether a second-hand music marketplace for digital downloads violated the music copyright holders' reproduction right.[100] The court ruled that the fixing of a digital file on ReDigi's server, and then on the new owner's device, created unlawful reproductions.[101] There is, of course, the fair use defense which can allow what would otherwise be infringing digitization, often in the name of encouraging innovation. Perhaps the most significant examples of this (in terms of amount of material scanned) were *Authors Guild v. Google, Inc.*[102] and *Authors Guild v. HathiTrust*.[103] In these separate but similar cases, Google scanned tens of millions of books (sourced from cooperating libraries) to create searchable databases.[104] The Second Circuit held both uses

[96] *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).
[97] 487 F.2d 1345, 1354 (Ct. Cl. 1973) ("[T]here is inadequate reason to believe [the plaintiff] is being or will be harmed substantially by these specific practices.").
[98] 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc).
[99] 60 F.3d 913, 931 (2d Cir. 1994).
[100] 910 F.3d 649 (2d Cir. 2018).
[101] *Id.* at 659; *but see Cartoon Network*, 536 F.3d at 129–30 (holding that the act of buffering in the operation of an RS-DVR system does not create copies within the meaning of § 101 because no data resides in a buffer for more than 1.2 seconds before being automatically overwritten. Because the copyrighted works were not embodied in the buffers for a period of more than transitory duration, they were not "fixed" as defined under § 101 of the Act, and, thus, did not violate the copyright owner's reproduction right.).
[102] 804 F.3d 202 (2d Cir. 2016).
[103] 755 F.3d 87 (2d Cir. 2014).
[104] In *Google*, authors of published books under copyright brought a class copyright infringement action against Google for its Google Book Project. The project made digital copies of books submitted by major libraries and allowed the public to search the texts and see small portions of the text from the search result. Similarly, in *Hathi Trust*, authors brought a copyright action against the HathiTrust Digital Library, a collaborative repository of digital

qualified for the fair use exception due to the transformative nature of the projects.[105] For more on these cases, please see our answer to Question 1.2.

2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

For this answer, we will assume that "data produced by the Public sector" means works produced by the government or its entities, rather than by private actors. In general, works produced by federal government employees are automatically in the public domain under § 105(a) of the Act:

> Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

As noted, this does not apply to the states or their jurisdictions, and thus those entities may own the copyright in works produced by their employees (or transferred to the states by the copyright holder(s)). This right is limited, however, by the Government Edicts Doctrine, which is not a codified law but rather an axiom developed through 19th century case law.[106] This doctrine prohibits court reporters, judges and legislators from claiming copyright in the work product they prepare in their official capacities. A recent Supreme Court case involved the Official Code of Georgia Annotated (OCGA), a compilation of the state of Georgia's laws accompanied by annotations written by a service hired for the purpose.[107] The annotations consisted of legislative history, commentary and research references, among other notations.[108] Although the Code itself states that the annotations are part of the official code and that the statutory portions "shall be merged with annotations," Georgia law notes that the annotations themselves do not have the force of law.[109] In 2013, Public.Resource.Org, a non-profit organization, purchased the print version of the OCGA and its supplements, scanned them, and uploaded them to its website where they were available free of charge to the public.[110] The State of Georgia sued for copyright infringement and

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content from research libraries, which allowed the public to search keywords and/or access the full text if the patron had a certified print disability. In both cases, the Second Circuit discussed the 4-factors of fair use and concluded that both uses were protected under the doctrine. In both, the Court found that the keyword search function was transformative and did not compete with the copyright owners for market share. 804 F.3d at 215; 755 F.3d at 101. In addition, in *HathiTrust*, the Court held that the full access for reading-disabled patrons also constitute fair use even if it is not transformative, because Congress specified that making copies of books available to the blind is a permitted purpose. 755 F.3d at 102.

[105] *Google*, 804 F.3d at 225; *HathiTrust*, 755 F.3d at 103.

[106] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834); Banks v. Manchester, 128 U.S. 244, 252 (1888); Callaghan v. Myers, 128 U.S. 617, 645–47 (1888).

[107] Georgia v. Public.Resource.Org., Inc., 140 S. Ct. 1498 (2020).

[108] *Id.* at 1504.

[109] *Id.* at 1504–5.

[110] *Id.* at 1505.

lost. The Supreme Court ruled that the Code was produced by workers as part of their official duties for the government and, under the Government Edicts Doctrine, was therefore not subject to copyright protection.[111]

There are also plenty of applications available that take public data, such as tax records[112] or train schedules[113] and reformat them in a way that is easily accessible to the general public. It is not certain whether the reformatted versions would enjoy copyright protection; easily accessible organization may lack the originality required for copyright. On the other hand, the computer programs that drive the reformatted versions may be protectable in their own right.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:

N.b. In general, American antitrust law has lain dormant for many years, but President Biden has recently announced his administration's intent to investigate the effect of industry consolidation on racial, income and wealth inequality. His focus is on enforcing antitrust laws with a goal of fostering competition and lowering consumer prices for a variety of products and services ranging from prescription drugs to cable television. For more information, please see his Executive Order of July 9, 2021, which is available at the link below.[114]

3.1.- "Essential facilities" doctrines to foster the development of downstream markets

We do not have an Essential Facilities doctrine in the United States. Instead, we have a patchwork of ways in which important information can be capitalized on by those wishing to use material gathered or created by others in new ways. One of those ways is through the courts which have used the fair use doctrine (see answer to Question 1.2) to allow what would otherwise be considered an infringing use because they feel it is in the best interest of society. In cases as recent as *Google LLC v. Oracle America, Inc.*, courts have excused *prima facie* infringement because the copying allowed programmers familiar with the Sun Java API to call up particular tasks quickly,

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[111] *Id.* at 1504; *but see* Shyamkrishna Balganesh, "Long Live the Common Law of Copyright!: Georgia v. Public.Resource.Org, Inc. and the Debate Over Judicial Role in Copyright," 121 COLUM. L. REV. 1 (2021).
[112] *See, e.g.,* "Zillow," a website available at www.zillow.com, or an application available in the Apple Store.
[113] *See, e.g.,* "On Time" Application in the Apple Store which provides live updates of commuter train service in the New York metro area.
[114]https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

thereby allowing them to build applications for Android mobile devices quicker.[115] Later in the same Opinion, Justice Breyer quotes the Federal Circuit's 2014 ruling that said, "[Fair use] both permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[116] This idea that there can be a limit on copyright's reach when it potentially inhibits others from using material necessary to exploit any other creative use of the work goes as far back in American case law as it does in American legislation.[117]

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

There remains some vertical integration by producers/distributors of content, especially by major tech companies. Most cable or satellite television systems provide subscribers with a decoder, often built into the "Cable Box" or "Set Top Box." Cable Companies also offer subscribers access to streaming apps designed for subscribers' pre-existing Apple TV, Amazon, Roku, and other devices that work in place of a decoder, thus allowing subscribers access to programming on devices (including phones, computers, and televisions) not connected to decoders.[118] Furthermore, most of the major American tech companies (Google, Microsoft, Amazon) produce compatible apps for both their devices and other companies' devices. By contrast, although Apple allows content by these other companies onto Apple devices, Apple content is more difficult to view or use on devices produced by other companies. Thus, you can watch Apple TV+ content on an Amazon or Roku device through an Apple-developed app, but you can only watch Apple TV+ programs via the Internet on a Google (Android) or Microsoft device. Other Apple content is either only available using compatibility software (e.g., computer applications, like Garageband) or not available on non-Apple devices at all (e.g., Apple Fitness+).

Apple Platforms

- Google's content platform is YouTube Premium, which includes YouTube Premium TV shows and movies as well as YouTube Music. The YouTube iOS app supports YouTube Premium: https://apps.apple.com/us/app/youtube-watch-listen-stream/id544007664. It's possible YouTube Premium may be more expensive if you buy it through the iOS app, but you may also be able to log in to an existing account at the normal price: https://www.tomsguide.com/us/youtube-tv-vs-youtube-premium,news-24592.html.

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[115] 141 S. Ct. 1183, 1193–4 (2021).

[116] Id. at 1195 (*citing Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339, 1354 (2014)).

[117] Meeropol v. Louis Nizer, Doubleday & Co., 560 F.2d 1061 (July 28, 1977); Fair Use was codified in the Copyright Act of 1976, which didn't go into effect until January 1, 1978. Nevertheless, *Meeropol* is an example of cases which referenced § 107 before its effective date.

[118] *E.g.*, Optimum TV, https://www.optimum.com/tv (last visited Aug. 17, 2021) (leasing equipment at a $20/month rate); Spectrum TV App, https://www.spectrum.com/apps/spectrum-tv-app (last visited Aug. 17, 2021) (explaining how users can use the Spectrum TV app to control their Set-Top Boxes); Verizon Fios TV Packages and Plans, https://www.verizon.com/home/fiostv/ (last visited Aug. 17, 2021) (showing that all Fios TV plans include a Set Top Box).

- You can also download Google-developed web apps, including Chrome, Drive, and Docs for iPhone and Mac: https://apps.apple.com/us/developer/google-llc/id281956209.
- Microsoft has developed compatible versions of most of their programs for your iPhone or Apple computer: https://www.pcworld.com/article/2158948/10-indispensable-iphone-apps-for-windows-users.html.
- You can watch Amazon Prime TV or read Amazon Kindle originals on your Apple devices through Amazon-developed apps: https://apps.apple.com/us/developer/amzn-mobile-llc/id297606954.

Google Platforms

- Although you can watch Apple TV+ programs on Roku, Amazon Fire TV, and some smart TVs through an Apple-designed app for those devices, there is currently no Apple TV+ app for Android. As an alternative, you can watch Apple TV+ programs via the Internet on an Android device: https://9to5google.com/2019/11/18/how-to-watch-apple-tv-on-your-android-phone/.
- You can listen to Apple Music (and any exclusive associated content) on an Android device through an official Apple app for Android: https://support.apple.com/en-us/HT210412.
- Google's Chromebook operating system (Chrome OS) can run any app in the Google Play store for Android devices. So Google laptops have the same limitations with regard to Apple programs as Android devices: https://www.makeuseof.com/what-is-chrome-os/.
- Some Apple-exclusive programs, like Apple Fitness+, are unavailable on Google or other developer platforms: https://www.apple.com/apple-fitness-plus/.

Microsoft Platforms

- You can run Mac programs on a Windows computer, but you may need to download compatibility (Virtual Machine) software to run the Mac operating system. The issue is not that Apple doesn't allow it but rather that Apple has not developed compatible programs (with the exception of Apple Music): https://tweaklibrary.com/how-to-run-mac-apps-on-windows-10/.
- The Microsoft store for Windows phones is incredibly limited: https://www.microsoft.com/en-us/store/apps/windows-phone.

Amazon Platforms

- You can watch Apple TV+ programs on Amazon Fire TV through an Apple-designed app: https://9to5google.com/2019/11/18/how-to-watch-apple-tv-on-your-android-phone/.
- The Amazon app store includes content by other producers, including Google (YouTube) and traditional studios and broadcasters (Paramount+, ABC, etc.): https://www.amazon.com/s?rh=n%3A3427287011&fs=true&ref=lp_3427287011_sar.

3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting …

The main American example of government licensing price-setting is the Copyright Royalty Board (CRB). The CRB is organized by 17 U.S.C. §§ 801–05 and composed of three Copyright Royalty Judges (CRJs),[119] appointed to six-year terms,[120] who must be specialists in copyright law, economics, or quasi-judicial proceedings.[121] The Board oversees copyright law's statutory licenses and royalties,[122] which "permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner."[123] Section 803 specifies requirements for CRB proceedings, though some royalty determinations and adjustments have additional requirements.[124] Renewed rate-setting generally occurs every five years.[125] Persons with significant interests in the proceedings are invited to participate by submitting briefs or other information,[126] and novel questions of interpretation arising during the rate-setting process are referred to the Register of Copyrights.[127] After a voluntary negotiation period for stakeholders, the Board then determines rates.[128] Determinations must generally be made within one year of initiating proceedings or at least fifteen days before an old rate expires.[129] The Board must publish a written record supporting any determination along with the determination.[130]

The largest collective management organizations in the United States are the performing rights organizations (PROs) American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[131] The PROs work on behalf of copyright owners of musical works to negotiate collective royalty agreements with performers and broadcasters. ASCAP and BMI

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[119] 17 U.S.C. § 801(a).
[120] *Id.* § 802(c).
[121] *Id.* § 802(a)(1).
[122] *Id.* § 801(b). American statutory licenses and royalties are found in 17 U.S.C. §§ 111(d) (statutory licenses for secondary transmissions by cable systems), 112(e) (statutory license for transmission of sound recording), 114 (statutory license of certain transmissions of sound recordings), 115 (compulsory license for making and distributing phonorecords), 116 (negotiated licenses for public performances by means of coin-operated phonorecord players), 118 (statutory license for noncommercial broadcasting), 119 (statutory license for secondary transmissions of distant television programming by satellite), 1004 (statutory royalties for digital audio recording devices), and 1007 (outlining distribution of royalty payments).
[123] For more information on the CRB, visit the Board's website: http://crb.gov.
[124] *Compare* 17 U.S.C. § 801(b)(1) (mandating the Board "make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004") *with Id.* § 801(b)(2) (mandating the Board "make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions").
[125] 17 U.S.C. § 804(b).
[126] *Id.* § 803(b)(2)(C) (permitting CRJs to deny participation to people without significant interest).
[127] *Id.* § 802(f)(1)(B).
[128] *Id.* § 803(b)(3).
[129] *Id.* § 803(c)(1).
[130] *Id.* § 803(c)(3).
[131] For more information on these organizations, visit their websites at https://www.ascap.com and https://www.bmi.com.

then collect and distribute the licensing fees and royalties. Government involvement in ASCAP and BMI agreements is twofold: First, the PROs represent the interests of copyright holders in proceedings before the CRB, including providing comments during rate-setting determinations. Second, ASCAP and BMI royalty agreements are governed by federal consent decrees.[132] The federal government entered into consent decrees with ASCAP in 1941 "to remedy the competitive concerns that arise from the exclusive, collective, and blanket licensing of individual copyrights" by prohibiting exclusive licensing and protecting the right of ASCAP and BMI members to separately license their works.[133] The consent decrees limit the PROs' freedom to set licensing rates.

An example of court-condemned anti-competitive licensing practices is the forced breakup of movie studio control over movie theaters. In 1948, a district court held ASCAP's licensing practices violated American antitrust law in *Alden-Rochelle, Inc., v. American Soc. of Composers, Authors and Publishers* (*ASCAP*).[134] ASCAP at the time licensed music rights to motion picture producers—with the exception of performance rights—so that producers could produce a soundtrack to accompany their films. Producers, who themselves were members of ASCAP, then licensed the films to only those motion picture theaters that had agreed to ASCAP's blanket music performance licensing terms.[135] In *Alden-Rochelle*, the court noted that so-called per-piece licenses between ASCAP members and motion-picture theaters were "commercially impracticable."[136] Nevertheless, the court then found ASCAP's practices violated antitrust law[137] by restraining "interstate trade and commerce" and "competition among the members of ASCAP in marketing the performing rights of their copyrighted works," and by preventing members from independently licensing their works to movie studios, which would then be able to license their motion pictures to theaters operating without blanket ASCAP licenses.[138] ASCAP, in the court's view, thus unlawfully "combine[d] the monopoly of the copyright of the motion picture with the monopoly of the copyright of the musical compositions."[139]

4. ONLINE MARKETS: "VALUE GAPS" (ONLINE PLATFORMS)

Notice that complete and valuable information resulting from the stakeholders' dialogue and written consultations currently launched by the EU Commission will be available at

[132] *See* Letter from Maria A. Pallante, Register of Copyrights, to Rep. Doug Collins (Jan. 29, 2016) (available at https://www.copyright.gov/policy/pro-licensing.pdf) (discussing the state of music licensing in the United States).
[133] A 2021 Department of Justice review of the consent decrees is available here: https://www.justice.gov/atr/page/file/1355391/download.
[134] 80 F. Supp. 888 (S.D.N.Y. 1948).
[135] *Id*. at 892.
[136] *Id.* at 893.
[137] 15 U.S.C. § 1.
[138] *Alden-Rochelle*, 80 F. Supp. at 894.
[139] *Id.*

the time of the Congress. [*https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591*](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591)

[*https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder*](https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder)

Please include only information that is specific to your country.

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

There are no directly relevant norms or caselaw addressing the value gap issue as applied to user-generated content (UGC) platforms. In the U.S., damages for copyright infringement are structured (a) to compensate the copyright owner "for losses from the infringement" and (b) to prevent the infringer "from unfairly benefiting from a wrongful act," neither of which are directly aimed at addressing the value gap problem.[140]

There are two types of actual damages that are available to the plaintiff in a copyright infringement case: "damages suffered by him or her as a result of the infringement" and "any profits of the infringer that are attributable to the infringement."[141] The first of these typically encompass any lost licensing fees due to the infringement. This does not directly address the value gap problem—i.e., the disproportionality between the revenue generated by the infringement and the value returned to the copyright holder—because this damage is awarded regardless of the infringer's revenue derived from the infringement. Second, while profits "attributable to the infringement" indirectly address the value gap issue by awarding the copyright owner the infringer's profit derived from the unauthorized use of the copyrighted work, it is not per say aimed at reducing the value gap.[142] In fact, these damages are focused not on compensating the copyright holder but rather on punishing the infringer by "mak[ing] him disgorge the profit to ensure that he [does] not benefit from his wrongdoing."[143] Therefore, damages attributable to the infringement are calculated solely based on the infringer's gross revenue and the deductible expenses, without any consideration to the proportion between the gross revenue and the revenue attributable to the copyright holder.[144] The only burden the plaintiff has to claim damages attributable to the infringement is to show a "causal nexus between the infringement and the infringer's gross revenue" as long as the nexus is not too speculative.[145]

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[140] H.R. Rep. 94-1476, at 162 (1976).

[141] 17 U.S.C. § 504(b).

[142] *See, e.g.,* Andreas v. Volkswagen of Am., Inc., 336 F.3d 789, 796 (8th Cir. 2003) (explaining these profits can be direct or indirect, as long as they result from the copyright infringement).

[143] On Davis v. The Gap, Inc., 246 F.3d 152, 159 (2d Cir. 2001); *see also* Walker v. Forbes, Inc., 28 F.3d 409, 412 (4th Cir. 1994) ("By stripping the infringer not only of the licensing fee but also of the profit generated as a result of the use of the infringed item, the law makes clear that there is no gain to be made from taking someone else's intellectual property without their consent.").

[144] 17 U.S.C. § 504(b) ("In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue").

[145] Polar Bear Prods., Inc. v. Timetx Corp., 384 F.3d 700, 711 (9th Cir. 2004); *see, e.g.*, Leonard v. Stemtech International Inc., 834 F.3d 376, 395 (3d Cir. 2016) (holding that the copyright holder could not recover the infringer's gross revenue because the link between the profit and the infringement was not sufficient).

As applied to user-generated content (UGC) platforms, there have been cases that implicitly discuss value gap but none specifically address the issue; some decisions have allowed a value gap to persist. In *Viacom International., Inc. v. YouTube, Inc.*, Viacom alleged "direct and secondary copyright infringement based on the public performance, display, and reproduction of approximately 79,000 audiovisual clips that appeared on the YouTube website."[146] Throughout the lawsuit, there were several discussions of the copyright owner's revenue lost to the infringement, although none directly concerned how much of such revenue should be equitably returned to the copyright owner to lessen the value gap.[147] For example, at the district court level, the only discussion of YouTube's revenue from the alleged infringement of Viacom's content was in relation to profits "directly attributable to the infringements," while there were no mentions of revenue in the appellate opinion.[148] That said, the court's ruling that actual knowledge of infringement meant "knowledge of specific and identifiable infringements of particular individual items," and not knowledge of infringing activity in general has made it almost impossible for copyright holders to effectively police the web and has, thereby, allowed user-generated content sites to increase the value gap generated by the posting of infringing content on the internet[149].

Several provisions of the DMCA limit the UGC platforms' liability to copyright holders in cases of infringement regardless of the existence of a value gap. For example, the "safe harbor provisions" allow qualifying UGC platforms to limit their copyright infringement liability based on "transitory digital network communications," "system caching," "information residing on systems or networks at [the] direction of users," and "information location tools."[150] Thus, in *Viacom*, despite YouTube's unauthorized use of Viacom's content, the district court on remand ultimately held that YouTube was protected under the DMCA's "safe harbor provision."[151] Similarly, in *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, the Ninth Circuit held that Veoh, a publicly accessible website that enables users to share videos with other users, is an "access-facilitating" service covered within the scope of the safe harbor provision so long as the statutory requirements are met.[152, 153]

Broadly speaking, these provisions are meant to prevent the potential runaway liability that UGC platforms might be faced with due their users' activities, regardless of the value gap problem the

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[146] 676 F.3d 19, 26 (2d Cir. 2012).

[147] *See, e.g., Brief for American Society of Composers, Authors, and Publishers, et al., As Amici Curiae Supporting Plaintiffs* at 4 *Viacom,* 718 F.Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07-CV-02103-LLS). ("As a result of this online piracy [by UGC platforms] . . . [copyright holders] have suffered significant revenue losses."). This amicus brief and several others in this case refer to the Congressional hearings on the Digital Millennium Copyright Act (144 Cong. Rec. 9239) during which Sen. John Ashcroft (R-MO) stated, "Piracy is a large and growing problem for many content providers . . . Billions of dollars in pirated material is lost every year," but these discussions are centered not on equitable relief for the copyright holders but rather on the limited scope of the DMCA's "safe harbors" provisions.

[148] *Viacom*, 718 F.Supp. 2d 514, 527 (S.D.N.Y. 2010) ("There may be arguments whether revenues from advertising, applied equally to space regarding of whether its contents are or are not infringing, are 'directly attributable to' infringements.").

[149] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 23, *quoting Viacom,* 718 F.Supp.2d 514 at 523.

[150] 17 U.S.C. § 512(a)–(d).

[151] *Viacom*, 940 F.Supp. 2d 110, 122 (holding that YouTube is not liable to Viacom because it is protected under the safe harbor provision, 17 U.S.C. §512(c)).

[152] 718 F.3d Cir. 1006, 1018 (9th Cir. 2013).

[153] *See* 17 U.S.C. § 512(c) (outlining the statutory requirements of the safe harbor provision).

infringing activities may pose.[154] Thus, "mere knowledge of infringing potential or of actual infringing uses" does not subject a product distributor or service provider to liability" absent intent to infringe.[155] In such cases, even if it is more equitable to return to the copyright owner the proportion of the revenue attributable to the copyrighted material, the copyright holder is without any monetary remedies in the U.S.

However, a caveat to DMCA liability protection is that the service provider must have "adopted and reasonably implemented" a policy for terminating repeatedly infringing users as well as "standard technical measures."[156] The central idea behind this requirement is to "encourage[] copyright owners and [internet service providers] to work together to establish technical means by which service providers can cheaply and easily identify infringing material."[157] This has not met with unmitigated success, however, as no standard technical measures have been adopted.

It should be noted that there have been Congressional hearings about DMCA reform on both the House and the Senate side. The Senate held six hearings in 2020 at the request of then-Chairman of the Senate Judiciary Committee Thom Tillis (R-NC). Senator Tillis then presented a draft of The Digital Copyright Act of 2020 (DCA) in December of that year.[158] The Committee considered, among other reforms, a notice-and-stay-down remedy. Senator Tillis' party, however, lost the Senate majority in November 2020, and, therefore, he is no longer Chair of the Judiciary Committee (which is now chaired by Senator Dick Durbin (D-IL). Senator Tillis intends to continue pursuing copyright reform, but without the chairmanship, it is possible that his timeline may be longer than originally anticipated. It is worth noting that other Senators on the Judiciary Committee are equally interested in reform in this area, but are not, perhaps, as enthusiastic about a comprehensive overhaul of the current legislation. On the House side, Representative Jerry Nadler (D-NY) now chairs the House Judiciary Committee. He, too, has long held an interest in copyright reform, and so it will be interesting to see what Congress generates in the coming years.

4.2.- Are there any norms and/or relevant case law or licensing addressing news aggregation?

Depending on how it is done, news aggregation in the United States may amount to copyright infringement. In *Associated Press v. Meltwater U.S. Holdings, Inc.*, the Associated Press (AP)—a news cooperative publishing up to 2,000 articles daily—sued a software service that crawled the internet to create an archive of news articles, then allowed users to search and save specific articles.[159] The court held Meltwater's commercial service directly competed with one of the

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[154] *See* Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1038 (9th Cir. 2013) ("The possible reach of liability [for UGC platforms] is enormous, particularly in the digital age.").

[155] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 920 (2005).

[156] 17 U.S.C. § 512(i)(1)(A)–(B).

[157] BWP Media USA Inc. v. Polyvore, Inc., 922 F.3d 42, 55 (2d Cir. 2019); *see also* Ventura Content, Ltd. v. Motherless, Inc., 885 F.3d 597, 615 (9th Cir. 2018) ("One can imagine a digital version of the old c in a circle (©) automatically triggering the uploading software to exclude material so marked by the copyright owner.").

[158] Senator Tillis' summary is available at https://www.tillis.senate.gov/services/files/0B0551E3-4CA2-4B49-9896-56427B7B7F77 (last visited July 21, 2021). The full text of the discussion draft is available here https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B (last visited July 21, 2021).

[159] 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

Associated Press's licensing markets—as partly evidenced by Meltwater refusing to pay the AP's requested licensing fee to use the articles for its intended purpose.[160] In part because Meltwater's business model involved sharing copyrighted content in a way that competed with the copyright owner's established licensing market, the court rejected Meltwater's fair use defense.[161] This decision has since been favorably cited for the proposition that "use of copyrighted material that merely repackages or republishes the original is unlikely to be deemed a fair use."[162] Other courts have similarly found that there is a limit to how much of a copyrighted news article may be copied and shared by an aggregator.[163]

Another avenue for protection against competition by news aggregators may be the "hot news" misappropriation tort under the laws of the various States. A 2011 court analysis found "hot news" claims may be preempted by federal Copyright Law unless an issue of "free riding" exists.[164] "Free-riding" exists where the secondary publisher has put in little effort of their own.[165] This may fairly describe news aggregators' conduct in some cases. Thus, aggregators' compilation efforts may be tortious under state laws where they take and republish copyrighted content (as opposed to creating their own articles based on the facts underlying the copyrighted content).

There is a limited amount of post-*Meltwater* litigation between news aggregators and publishers, which may reflect post-*Meltwater* norms of partnership between the organizations. For example, after *Meltwater*, the AP and Meltwater announced a deal to "jointly develop products that combine AP content with Meltwater's online media analytics capabilities."[166] More recently, Facebook News, an aggregator of sorts (here: a social media website), announced a partnership with news organizations.[167] These partnerships may be an attempt by aggregators to preempt *Meltwater*-style litigation.

In 2021, a bipartisan group of Senators introduced a bill that would "provide a temporary safe harbor for publishers of online content to collectively negotiate with dominant online platforms regarding the terms on which content may be distributed."[168] This bill, if enacted, would exempt news publishers from antitrust liability for collective negotiations with news aggregators, whether

160 *Id.* at 560–61; *accord* Int'l Code Council, Inc. v. UpCodes, Inc., 2020 WL 2750636, at *27 (S.D.N.Y. 2020) ("Where an alleged infringer effectively competes with companies that license the plaintiff's work, that may also tend against a finding of fair use.").
161 *Meltwater*, 931 F.Supp. 2d at 561.
162 Pierson v. DoStuff Media, LLC, 2019 WL 5595236, at *10 (W.D. Tex. 2019) (quoting *Meltwater*, 931 F.Supp. 2d at 551); Estate of Barré v. Carter, 272 F.Supp. 3d 906 (E.D. La. 2017) (same); *see also* Balsley v. LFP, Inc., 691 F.3d 747, 759 (6th Cir. 2012) (holding transmitting a work in a new medium is not a transformative use).
163 *E.g.*, Midlevelu, Inc. v. ACI Info. Grp., 989 F.3d 1205, 1211-12 (11th Cir. 2021), *cert. denied*, 2021 WL 2637905 (2021) (holding a blog did not grant a license to an aggregator to copy and republish content).
164 Barclays Capital Inc. v. Theflyonthewall.com, 650 F.3d 876, 903 (2d Cir. 2011).
165 *Barclays*, 650 F.3d at 902.
166 *AP, Meltwater settle copyright dispute*, ASSOCIATED PRESS (July 29, 2013), https://www.ap.org/ap-in-the-news/2013/ap-meltwater-settle-copyright-dispute.
167 Claire Atkinson, *Facebook announces effort to partner with media to promote journalism*, NBC NEWS (Oct. 27, 2019), https://www.nbcnews.com/news/all/facebook-announces-effort-partner-media-promote-journalism-n1072511.
168 S. 673, 117th Cong. (2021).

related to price or other concerns.[169] Both this bill and a companion House bill[170] are currently with relevant congressional committees.

4.3.- Is there any norms and/or relevant case law addressing other value gaps?

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[169] *Id.* § 2(b).
[170] H.R. 1734, 117th Cong. (2021).