

U.S. Response to ALAI Punta del Este Questionnaire

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[The cited paragraph numbers refer to those in the program.]

Authors' Note: The Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <<http://www.copyright.gov>>. Statutory references in this response are to Title 17, unless otherwise indicated. Many of the cases cited herein are available at <<http://www.findlaw.com>>.

2.1 Protected rights

Protected patrimonial rights: How do countries put into effect the new rights (or clarified rights) established by the treaties?

The United States takes the position that intellectual property treaties are not self-executing. They must be implemented by national legislation. For example, U.S. adherence to the Berne Convention was implemented by the Berne Convention Implementation Act (“BCIA”), Pub. L. No. 100-568, 102 Stat. 2853 (1988); its adherence to TRIPS was implemented by the Uruguay Round Agreements Act (“URAA”), Pub. L. No. 103-465, 108 Stat. 4809 (1994); and its adherence to the WIPO Treaties by the WIPO Copyright and Performances and Phonograms Treaties Implementation Act, Title I of the DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998). Cases involving rights established or clarified by treaties are decided pursuant to the implementing legislation, and not by direct reference to the underlying treaties.

Reproduction rights

Subsequent to the TRIPS and WIPO treaties, did your national law specify that reproduction rights apply to digital copies? If your law has not so specified, are amendments expected? In lieu of or in addition to legislation, did your country's case law already apply reproduction rights to digital copies?

Does the legislative or judicial coverage of digital copies include temporary or transient copies?

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Prior to TRIPS and the WIPO copyright treaties, U.S. courts had already held that the exclusive rights of the copyright owner extended to digital copies of software that are created in the random access memory (RAM) of a computer when the software is run. E.g., *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671 (1994). The court in *MAI v. Peak* reasoned that those copies, even though temporary, were “sufficiently permanent or stable” to allow the program to be “perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* at 519, citing the definition of “fixed” in § 101 of the Copyright Act.

Subsequent courts have followed *MAI v. Peak*'s holding that digital copies are “copies” for purposes of the copyright law. See the discussion in U.S. Copyright Office, DMCA Section 104 Report (August 2001) at 118-20 (“Section 104 Report”), at < http://www.copyright.gov/reports/studies/dmca/dmca_study.html>. However, not all courts have ultimately found that such copies were infringements of copyright. For example, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), the court addressed the question whether an internet service provider directly infringed plaintiff's copyright when it reproduced an infringing work in the course of transmitting messages posted to an online bulletin board. The court held that those reproductions (which were not just in RAM, but were stored on Netcom's system for as long as eleven days to facilitate the transmissions) were “copies” for purposes of the copyright law. However, it concluded that Netcom had no direct liability, because the copies were merely “incidental copies” that Netcom's computers made automatically as the result of a process initiated by a third party. *Id.* at 1372. Section 512 of the Copyright Act codifies this aspect of the *Netcom* result as it relates to internet access service providers.

Right to distribute tangible objects

Did Article 6 of the WIPO Treaty (Article 8 of the WPPT), which provides for a right of distribution, result in actual or pending changes to your national copyright law? Has caselaw played a role in the development of the distribution right?

Is the right of distribution co-extensive with art. 6, or is it broader? Does the right of distribution of tangible articles persist after the first sale?

Prior to joining the WCT and the WPPT, the United States already had in its law a right of distribution. Section 106(3) of the Copyright Act provides that one of the exclusive rights of the owner of copyright is “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.” The distribution right is limited by the first sale doctrine, which provides that the owner of a particular copy that was lawfully made under the Copyright Act “is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. . . .” § 109(a). In other words, the distribution right with respect to a tangible copy of a copyrighted work is “exhausted” after the first sale (except with respect to certain types of works, such

as computer programs and sound recordings, for which the law provides a rental right.) The right of distribution is broader than article 6, as discussed below.

Right to make available to the public

Has Article 8 of the WIPO Treaty (Article 10 of the WPPT), completing the right of communication to the public by the right to make available to the public, resulted in actual or pending changes in your national copyright law? Has caselaw played a role in the development of the making available right?

The right embraced in article 8 of the WIPO treaty is covered by a number of rights under U.S. law. The copyright owner's exclusive distribution right, discussed above, is not limited to distribution of tangible copies. Early court decisions addressing use of copyrighted works on the internet held that making a work available over the internet for end user downloading, without authorization, effects a distribution of copies in violation of the copyright owner's exclusive distribution right. See, e.g., *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993); *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996). The first sale doctrine, discussed above, does not apply to copies distributed in digital form. See Section 104 Report, *supra*, at 78-80.

Other means by which works of authorship are made available over the internet implicate at least one, and sometimes more, of the existing copyright rights under U.S. law. For example, "streaming" a work over the internet implicates the right of public performance; that performance might also constitute a digital phonorecord delivery under §§ 114 and 115 of the Copyright Act, since at least a temporary copy is made on the user's computer in the course of streaming. (This issue has not yet been resolved under U.S. law.)

Downloads of copyrighted works implicate both the distribution right (as discussed above) and the reproduction right. Performing rights societies have claimed that a download also constitutes a public performance, although that argument was recently rejected by a U.S. court. See *United States v. ASCAP*, 2007 US Dist. Lexis 31910 (S.D.N.Y. Apr. 25, 2007).

Is the implementation of the right to make available made through the right of communication to the public? Through the right to distribute copies? Through reproduction rights? By an independent right? By an accumulation of various rights?

It is implemented by an accumulation of various rights, as discussed in the preceding response.

What is the relationship between ownership of the making available right and the characterisation of the right (see previous question)?

The way in which the right is characterized may have economic significance under U.S. law and business practices, especially where musical works and sound recordings (phonograms) are concerned. For example, if the means of making

available a sound recording is deemed a reproduction, then the underlying musical work is subject to a compulsory license, and revenues generally go to the music publisher, which passes it on to the composers to the extent required by their contract. The sound recording is not subject to a compulsory license, but revenues from downloading similarly go first to the record company, which passes them on to the performers as may be required by their contracts.

If, on the other hand, the means of making available is deemed a public performance, the revenues from the performances of the musical works go directly to the performing rights societies. The performing rights societies allocate the revenues according to the frequency with which works are performed. They divide the revenues equally between the music publishers and composers and pay the composers directly. If the performance constitutes a webcast subject to the compulsory license in § 114 of the Copyright Act, revenues go to Sound Exchange, which remits them to the record companies and the performers in accordance with the terms of the statute.

In general authors and performers tend to fare better financially if the activity is considered a performance.

What national law do your country's courts apply to determine ownership of the making available right when the work is communicated (or made available) from one country, and received in another?

In *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2nd Cir. 1998), the United States Court of Appeals for the Second Circuit held that ownership of copyright should be determined by the law of the country with the most significant relationship to the parties and the copyrighted work at issue. In that case, the court held that Russian law applied to determine initial copyright ownership of newspaper articles that were created by Russian nationals and first published in Russia. The court also held that U.S. law applied to determine whether the copyrights had been infringed. The court in *Itar-Tass* found that Berne speaks to the question of the law applicable to determine infringement: the law of the country for which protection is sought, i.e., in that case, U.S. law. *Id.* at 89-90.

2.2 *New requirements*

Technological protection measures

- *How has this new requirement been established, not only as concerns legal texts but also through case law and/or administrative decisions and/or inter-professional agreements?*

The requirements concerning technological protection measures were implemented in U.S. law through the WIPO Copyright Performances and Phonograms Treaties Implementation Act of 1998, Title I of the DMCA, which added chapter 12 to Title 17 of the United States Code (Pub. L. No. 105-304, 112 Stat. 2860, 2863).

§1201(a) prohibits the circumvention of a “technological measure that effectively controls access to a work” protected under Title 17. Examples of such technological protection measures (“TPMs”), referred to as “access controls,” include passwords and encryption. Thus, §1201(a)(1) prohibits the act of hacking a password or decrypting an encrypted work.

In addition, §1201(a)(2) prohibits manufacturing, importing, offering to the public, providing or otherwise trafficking in (hereafter, “trafficking”) in any “technology, product, service, device, component or part thereof” (hereafter, “device/service”) that circumvents access controls (e.g., DeCSS for DVDs), if the device/service: (1) “is primarily designed or produced for the purpose of circumventing” the access control, (2) “has only limited commercially significant purpose or use other than to circumvent” access controls, or (3) is knowingly marketed for use in circumventing access controls.

Similarly, §1201(b) prohibits trafficking in any device/service that circumvents TPMs that effectively protect a right of a copyright holder under Title 17 in a work or a portion thereof (an example of this type of TPM would be a “copy control” technology – one that prevents the user from making a copy of the work displayed).

§1201 provides for a number of exemptions, excusing conduct that would otherwise violate the prohibition on circumventing access controls contained in §1201(a), under specific and detailed conditions. These exemptions include those for:

- nonprofit libraries, archives and educational institutions to allow them to determine whether or not they would like to acquire a work, §1201(d)**
- law enforcement, intelligence, and other government activities, §1201(e)**
- reverse engineering of computer programs for the sole purpose of identifying and analyzing elements of the program necessary to achieve interoperability with other programs, §1201(f)**
- encryption research, §1201(g)**
- protection of minors by preventing their access to materials on the internet, §1201(h)**
- circumvention with the sole effect of identifying and disabling the capability of a TPM to collect personally identifying information, §1201(i)**
- security testing, §1201(j).**

The law also provides for a triennial administrative proceeding, pursuant to which the Librarian of Congress may institute additional exemptions. The proceeding is discussed in greater detail below.

- *What are the civil, administrative; and criminal remedies against unauthorized circumvention of the technological protection measures, and against unauthorized distribution of circumvention devices or services? Are the remedies autonomous (sui generis); are they specific to the copyright law, or are general tort remedies applied? Is the magnitude of the remedy equal to that incurred in the case of copyright infringement? If not, why?*

The civil remedies for violation of §1201 (anticircumvention of technological protection measures) and §1202 (copyright management information) are set out in §1203, while criminal remedies are described in §1204.

Civil Remedies

Damages. The primary civil remedy is monetary damages. Prior to entry of a final judgment, the complainant may elect actual damages or statutory damages. Actual damages consist of the actual damages incurred as a result of the violation and, so long as they are not included in the calculation of actual damages, the profits that the defendant earned as a result of the violation.² The statutory damages for each act in violation of §1201 can range from \$200 - \$2,500, as the court deems just. The statutory damages for each violation of §1202 can range from \$2,500 to \$25,000.³ In the event that a violator becomes a repeat offender within three years of the initial final judgment, damages may be tripled at the court's discretion.⁴ In the case of a violator that was "not aware and had no reason to believe that its acts constituted a violation," the court *may* reduce or remit damages, but if that violator is a nonprofit library, archive, educational institution or public broadcasting entity, the court *must* remit damages.⁵

Injunctions. In addition to awarding damages, a court has the power to order a temporary or permanent injunction, so long as it does not constitute a prior restraint on free speech.⁶

Impoundment. A court may also order the impounding of circumvention devices "on such terms as it deems reasonable" during the pendency of an action, and the modification or destruction of such devices as part of a final judgment.⁷

Costs and Attorney's Fees. Using its discretion, the court may order the recovery of costs by or against any party other than the United States and it may award the prevailing party reasonable attorney's fees.⁸

² §1203(c)(2).

³ §1203(c)(3).

⁴ §1203(c)(4).

⁵ §1203(c)(5).

⁶ §1203(b)(1).

⁷ §1203(b)(2), (6).

⁸ §1203(b)(4), (5).

As noted above, there is a specific provision in the law addressing civil remedies for violation of §§1201 and 1202; the court does not merely apply general tort remedies. There are also specific provisions for civil remedies for copyright law violations (§§502-505). Those remedies are similar to the ones provided in §1203. However, the amount of statutory damages available for an act of copyright infringement ranges from \$750 - \$30,000, which may be reduced to \$200 for an innocent violation and increased to as much as \$150,000 for a wilful violation under §504(c).

Criminal Penalties

A person who violates §1201 or §1202 willfully and for purposes of commercial advantage or private financial gain can receive a maximum fine of \$500,000 and/or a maximum of 5 years in prison for the first offence.⁹ The penalties increase to a maximum fine of \$1,000,000 and/or a maximum of 10 years in prison for a subsequent offence.¹⁰ Nonprofit libraries, archives, educational institutions and public broadcasting entities are exempt from criminal penalties.¹¹

What solutions has your country's law found to reconcile the benefits of certain exceptions and the respect for the technological protection measures?

- *Does the legislation establishing technological measures provide for circumstances justifying personal or preliminary actions (furnishing of means) to circumvent the technological measures (e.g., for the positive benefit of an exception)?*

In general, it is not permissible to furnish the means of circumvention, even so that the beneficiary can make a noninfringing use. Legislators were concerned that if circumvention devices became available, their use could not, as a practical matter, be restricted only to situations in which use of the protected work would be noninfringing. In only a few circumstances is it permissible to furnish the means of circumvention. See, e.g., § 1201(e) (law enforcement, intelligence and other government activities; § 1201(f) (reverse engineering).

- *More generally, how has your country's legislation, administrative measures and case law attempted to ensure the balance between technological protection and the benefit of certain exceptions?*

Pursuant to an administrative rulemaking proceeding conducted by the Copyright Office every three years, the Librarian of Congress may create additional exemptions.¹² The purpose of the proceeding is to determine whether users of any particular class of copyrighted works are, or are likely to be, adversely affected in their ability to make noninfringing uses of a particular class of copyrighted works by the prohibition against circumventing technological access controls. If so, the Librarian of Congress, upon the recommendation of the Copyright Office, will

⁹ §1204(a)(1).

¹⁰ §1204(a)(2).

¹¹ §1204(b).

¹² §1201(a)(1)(B)-(E).

promulgate additional exemptions that remain in effect only until the next rulemaking proceeding.

There have been three rulemaking proceedings to date. The Copyright Office has taken the position that the proponents of an exemption have the burden of proof, and that mere assertions of possible adverse effects are not sufficient to warrant an exemption. A proponent must come forward with evidence of actual or potential adverse effects. In the first two rulemaking proceedings, the Office concluded that it had to define the “particular class” of works solely with reference to characteristics of the class, and not with reference to the purpose of the use. In the most recent rulemaking, however, it modified its position, concluding that it was permissible in some cases to further refine a particular class of copyrighted works by reference to the users or uses for which the exemption was sought.¹³ In the most recent rulemaking, the Librarian allowed six additional exceptions, including:

1. Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

2. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

3. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement

¹³ Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472-01, 68474 (Nov. 27, 2006). The Copyright Office recognized that continued adherence to its prior rule put it in the difficult position of having to grant an exemption for an entire class of works to accommodate a narrow noninfringing use, or deny an exemption for the narrow noninfringing use because of the adverse consequences of granting it for the entire class of works. In particular, the Office granted an exemption for “audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.” Proponents of the exemption persuaded the Copyright Office that they needed to circumvent CSS, the technological protection measure commonly used on DVDs, in order to make compilations to show to their film classes. However, the Office was concerned about the adverse effects on right holders if the class of works were defined broadly to permit circumvention of access controls on audiovisual works without regard to the user or intended use.

or repair is no longer reasonably available in the commercial marketplace.

4. Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.

5. Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.

6. Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

More information about the rulemaking is available at <http://www.copyright.gov/1201/>. It is important to note, however, that the rulemaking proceeding can establish new exemptions to the prohibition against the act of circumventing access controls, but it has no effect on the provisions barring distribution of circumvention devices or provision of circumvention services.

Courts have tried to interpret § 1201 to achieve reasonable results, though the reasoning they have employed is sometimes strained. For example, they have rejected efforts to use § 1201 to thwart competition in the replacement parts market. In *Lexmark Int'l, Inc. v. Static Controls Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), the court held that the program regulating access to Lexmark's printer engine program (the printer engine program governed printer functions and, accordingly, the types of printer cartridges with which the printer would interact) did not fall within § 1201. The court found that the protection mechanism at issue did not effectively control access to the printer engine program for purposes of the statute because the printer engine program was accessible by other means. In *Chamberlain Group, Inc. v. Skylink Technologies*, 381 F.3d 1178 (Fed Cir. 2004) *aff'd* by 381 F.3d 1178 (Fed. Cir. 2004), *cert denied* by 125 S. Ct. 1669 (2005), the court held that circumvention of access controls on a program that controlled the functions of a garage door opener did not violate § 1201 since the access controls were not designed to protect against infringing use of a work of authorship.

- *Who decides when the conditions justifying circumvention are fulfilled? A commission that develops an exception applicable to all concerned users ? A commission that develops an exception case-by-case? A court to whom a user wishing to benefit from an exception has made appeal? Are business practices developing to help determine when circumvention should be permitted?*

See the preceding response.

Some people remain concerned about the balance struck by § 1201. Bills have been introduced in every Congress since the DMCA was passed in 1998 to modify the law in some way, but none has come near to passing.

Copyright Management Information (CMI)

Has the implementation of this requirement to protect CMI been efficient in ensuring the viability of information communicated with the work?

(Please explain the substance of the laws, decrees, court or administrative decisions or other professional practices, with references and hyperlinks or copies)

17 U.S.C. §1202 was enacted as part of the DMCA to implement art. 12 of the WIPO Copyright Treaty, which requires contracting States to provide effective and adequate legal remedies for anyone who knowingly engages in the alteration or removal of rights management information “knowing or having reasonable grounds to know it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention.”

§1202(a) prohibits a person “knowingly and with the intent to induce, enable, facilitate or conceal infringement,” from (1) providing false copyright management information or (2) distributing or importing for distribution false copyright management information. For purposes of §1202, “copyright management information” includes: the title, author, copyright owner, and other identifying information about the work or any of the above, including information set forth on a copyright notice, terms and conditions for use of the work, identifying numbers or symbols referring to such information and, with the exception of public performances by radio and television broadcast stations: the name of and other identifying information about a performer whose performance is fixed in a work other than an audiovisual work, and in the case of an audiovisual work, the name of and other identifying information about a writer, performer, or director who is credited in the audiovisual work.

§1202(b) prohibits: (1) intentionally removing or altering copyright management information, (2) distributing or importing for distribution any copyright management information, and (3) distributing or importing for distribution, or publicly performing works, copies of works or phonorecords, knowing that copyright management information has been removed or altered without the authority of the copyright owner or the law, knowing, or with regard to civil

remedies set forth in § 1203, having “reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement under” Title 17.

The need for actual knowledge of the removal of CMI coupled with at least constructive knowledge that the removal will lead to copyright infringement has proven to create a high threshold for finding a § 1202 violation.

In *Kelly v. Arriba Soft Corp.*, 77 F.Supp.2d 1116 (C.D.Cal.1999), aff’d, 336 F.3d 811 (9th Cir. 2003), the court ruled there was no violation of §1202 when defendant’s web search engine failed to include CMI when it displayed thumbnail images of plaintiff’s photographs. The CMI appeared in the text of plaintiff’s website, but defendant’s crawler retrieved only the images. The court held that Arriba Soft did not violate §1202, reasoning that it had not “removed” any CMI because the CMI was not embedded in plaintiff’s images, but was included elsewhere on his website. It also concluded that defendants didn’t intentionally omit CMI or knowingly distribute works from which the CMI was omitted. *Kelly* establishes a high threshold for protection under §1202; even intentional removal was not unlawful where the copyright owner could not prove that the removal would encourage or facilitate copyright infringement.

In *Gordon v. Nextel Comms.*, 345 F.3d 922 (6th Cir. 2003), defendants intentionally removed CMI from plaintiff’s posters, which they planned to use as part of the set design of a television commercial. However, the court held that the removal was done without the requisite “reason to know that the removal would induce, enable, facilitate, or conceal an infringement,” since at the time the CMI was removed, defendants believed that the poster had been cleared for use in the television commercial. *Id.* at 926-27. Similarly, in *Schiffer Pub., Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q.2d (BNA) 1090 (E.D.Pa. 2004), the court held that a defendant that scanned and republished plaintiff’s photos without the copyright notice did not violate §1202. The court concluded that because defendant was unaware that individual photographs from within a larger work were copyrighted, they could not be found to have the requisite knowledge to violate §1202 when they removed the CMI from plaintiff’s photographs. *Id.* at 1102. Further, the placement of the CMI on the inside cover of the larger book, rather than on or near the photographs themselves, precluded the court from finding that CMI had in fact been removed at all. *Id.*

The IQ Group, Ltd. v. Wiesner Pub. LLC, 409 F. Supp. 2d 587 (D.N.J. 2006) illustrates another potential barrier to establishing a violation of §1202. Plaintiff claimed that CMI, consisting of a logo and a hyperlink, was wrongfully removed; the court viewed the logo as a trademark, thereby finding no CMI to consider. By focusing on maintaining the distinction between copyright and trademark, *IQ Group* provided an extremely narrow interpretation of CMI.

The recent case of *McClatchey v. AP*, 82 U.S.P.Q.2D (BNA) 1190 (WD Pa. 2007), may signal a more positive trend in protection for CMI. An AP photographer took a picture of Valencia McClatchey holding her copyrighted photograph, taken on September 11, 2001 of the crash site in Pennsylvania. The original analog photo

included the title and the author's name, but AP cropped the picture so that the CMI that appeared on the photo was removed. A district court denied the AP's motion for summary judgment on McClatchey's claim of copyright infringement and violation of §1202. The court rejected defendant's argument that the CMI was not protectable because it was not digital, and ruled that a reasonable factfinder could conclude that by cropping out the CMI, AP, whose business is to provide stories and photographs for use by its members, had the requisite intent to induce, enable, facilitate or conceal infringement.

2.3 Exceptions

2.3.1. *General view of the three-step test*

Does your country's legislation explicitly incorporate the three-step test?

No, though many of the same considerations are reflected in the fair use factors. See 17 U.S.C. § 107. The United States will, however, take the three-step test into account in considering new statutory exceptions to copyright. See, e.g., U.S. Register of Copyrights, Report on Orphan Works 61-65 (Jan. 2006), available at <<http://www.copyright.gov/orphan/orphan-report.pdf>>.

If not, may (or must) a court apply the test?

As discussed in the first question above, the United States does not consider intellectual property treaties to be self-executing, so a court will apply the three-step test only to the extent is reflected in existing U.S. law.

In what order are the three steps of the test examined? What definitions have been given by legislation; administrative measure or caselaw to each of the conditions?

Not applicable.

Has the WTO panel decision of June 2000 concerning the interpretation of local exceptions by national courts had an impact on the interpretation of exceptions by your country's courts?

As discussed above, U.S. courts apply national law in interpreting copyright exceptions.

2.3.2. *Interoperability*

Do your country's laws or administrative regulations contain provisions concerning interoperability of computer programs with other computer programs? Of computer programs with other works in digital format?

U.S. courts have held that it is a fair use to reverse engineer a computer program for the purpose of achieving interoperability. See *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), amended, 1993 U.S. App. Lexis 78 (9th Cir. Jan. 6, 1993). The fair use cases on this subject to date have addressed only interoperability between computer programs. However, the fair use doctrine is sufficiently flexible that a court could, in appropriate circumstances, find that it is a fair use to reverse engineer to achieve interoperability between a computer program and another work in digital format.

There is an exemption from the anticircumvention provision in § 1201 for reverse engineering. It allows circumvention of a technological access control measure “for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program *with other programs*, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement. . . .” § 1201(f)(1) (emphasis supplied). Section 1201(f) attempted to codify the doctrine of fair use as it applied to reverse engineering at the time that the DMCA was passed. Thus, although the fair use doctrine could in the future allow a broader reverse engineering, the exemption in § 1201(f) is limited to reverse engineering to achieve interoperability between programs.

Nevertheless, the Copyright Office through the rulemaking proceeding has the ability in appropriate cases to respond to other situations in which the anticircumvention provisions pose an obstacle to interoperability. In the most recent rulemaking proceeding, an application was made for an exemption to allow circumvention of computer programs contained on cellphones that operate as “software locks” to prevent cellphone owners from lawfully switching to another communications network. The Copyright Office granted the exemption, described above.

Do your country’s judicial decisions address interoperability of computer programs with other computer programs? Of computer programs with other works in digital format?

See discussion above.

Do your country’s laws contain provisions concerning interoperability related to the presence of technological protection measures (e.g., for purposes of overcoming the inability to read lawfully acquired files on certain playback devices)? Describe the system in place (e.g., legal provisions, special commissions with the power to require interoperability) to achieve interoperability.

See discussion above.

(Please explain the substance of the laws, decrees, court or administrative decisions or other professional practices, with references and hyperlinks or copies.)

3. The author's place in copyright as modernized by the TRIPS Agreement and the WIPO Treaties

Please indicate the effect on the human author (i.e., on the actual creator; not a juridical person) of the legislative, administrative, and court decisions implementing the TRIPs and WIPO Treaties. To what extent have authors (as opposed to corporate copyright owners), benefited from these modernizations? To what extent have these modernizations harmed authors? Please take into account as well any relevant business or industry practices.

The United States' implementation of the TRIPS Agreement and WIPO Treaties through the passage of the DMCA has had no single overarching effect on individual authors. Rather the effects on authors have been varied and largely influenced by the efforts of other distribution chain participants to adapt to the changing market for digital goods. Following are some of the effects DRM measures have had in the music, video, and book industries; these should be representative of trends affecting creators generally.

Music

The music industry has been at the center of the DRM debate. The effects on music creators have been mixed.

The industry's initial efforts to impose DRM measures on digital music, by copy protecting audio CDs, met with consumer criticism regarding the negation of some recognized fair uses. The skepticism intensified when DRM-encoded discs often proved to be unplayable on devices that were supposedly compatible with the protections, and conversely, playable on noncompliant hardware.¹⁴ Irrespective of negative effects on users, there seems to be a popular perception that music distributors and record companies derive greater benefit from this particular DRM measure than musicians do.

However DRM measures enabled some new business models for music distribution. Many of these are helpful to musical artists, particularly to those who work independently of a major record label and are relatively less well known. For example:

- **Subscription services: Several companies offer access to a digital music library on a subscription basis, including Yahoo, Napster, Real's Rhapsody, and AOL. The services offer two different price points: Users may stream songs to their computers on the provider's proprietary player software; for a higher monthly payment they may transfer music to a compatible portable music player. However the songs may not be burned to CD unless they are purchased at additional cost. Any songs that have been downloaded but not purchased become unplayable once the subscription has been terminated.¹⁵**

¹⁴ Report of the Center for Democracy & Technology, "Evaluating DRM: Building a Marketplace for the Convergent World" September 2006, p. 7 (<http://www.cdt.org/copyright/20060907drm.pdf>)

¹⁵ See, e.g., Rhapsody FAQs, http://www.rhapsody.com/rhapsody_faqs#1

- **Internet radio:** Internet radio stations deliver audio content in a programmed stream, over which users have little control. Some stations allow users to rate the broadcasted music, so that songs they dislike will be skipped in the future.
- **Time and usage limits:** “Other copy- or access-protected services allow downloads, but limited as to number of copies permitted, number of plays authorized, or time allotted to listen or view. iTunes offers one of the best-known and most successful copy-limited download schemes.”¹⁶ Users may play songs purchased on iTunes on five devices authorized by Apple¹⁷ and burn audio playlists to CD seven times for personal, noncommercial uses.¹⁸ For musicians, one advantage of internet music stores like iTunes over bricks-and-mortar establishments is that their songs’ availability for purchase doesn’t depend on a store’s inventory or restocking decisions. But while conventional wisdom might hold that the greatly reduced costs of packaging and distributing digital music should translate into higher royalties for musicians compared with CD sales, in fact this seems not to be the case. According to the Future of Music Coalition, musicians usually receive 10-14% royalties on CD sales and on digital store sales.¹⁹ But they may actually net slightly more per song on digital sales, since the royalty on CD sales includes deductions, such as packaging and breakage, that should not apply to digital sales.²⁰
- **New payment methods:** While many individual authors and artists and independent producers may disseminate their works with no technological restrictions on access or copying, new DRM-related payment methods are also taking shape, thus enabling creators directly to reap the benefits of digital exploitation. For example, the Mindawn online music service sells both unprotected permanent downloads of recorded music posted by independent artists, and DRM-protected “demo files” -- conditional downloads that allow the prospective buyer to “play it in full up to 3 times, and then the local copy of the file will self-destruct.”²¹
- **New avenues for artist recognition:** GarageBand.com is a prominent internet music company that gives artists an opportunity to gain exposure among music enthusiasts, radio stations, and recording labels in exchange for making their songs available for peer review. “Musicians are offered the ability to make their content (i) available only in streaming format (not downloadable), (ii) downloadable in MP3 format or (iii) as licensed under a Creative Commons license.”²²

¹⁶ Jane C. Ginsburg, The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act, pp. 24-25.

¹⁷ <http://docs.info.apple.com/article.html?artnum=93014>

¹⁸ <http://www.apple.com/legal/itunes/us/service.html>

¹⁹ <http://www.futureofmusic.org/itunes2.cfm>

²⁰ Id.

²¹ See Mindawn Artists’ FAQ re “demo files”: “The user can play it in full up to 3 times, and then the local copy of the file will self-destruct. The file is not playable outside of our player software, and our player “knows” how many times it has been played.” <https://www.mindawn.com/artists.php>

²² “When ‘streaming-only’ is selected, Garageband.com does not allow the direct downloading of mp3s. The songs available for download are served out by a program that checks the download permissions for that particular song. The songs that are streamed through our streaming player are delivered using a

- **“Lending” music:** Lending, a traditional “fair use” of copyrighted items, does not have a direct correlate in digital-format works. However users of online music services can effectively “lend” parts of their music collections to friends by sharing playlists. For example, Musicmatch allows subscribers to send playlists consisting of twenty songs to twenty people, which may be played by non-subscribers within the Musicmatch software up to three times.²³

Prominent business leaders, including Steve Jobs of Apple, Dave Goldberg of Yahoo, and Rob Glaser of Real, have urged the music companies to remove DRMs²⁴, and Bill Gates has advised users to avoid DRM-constrained music.²⁵ These appeals appear to be primarily concerned with removing copy limitations on purchased music, a protection measure frequently criticized for inhibiting fair use and for engendering user frustration over the lack of interoperability between various file formats and music players. While DRMs presumably will persist in the digital music space as long as there is a demand for music subscription services, skepticism in some quarters of the industry regarding the feasibility of protecting copyrighted works with TPMs has produced some notable business models.

- **Independent music vendors:** Most “independent” digital music companies on the internet, such as CD Baby, Audio Lunchbox, and Magnatune, do not use any form of DRM.
- **DRM-free music offerings by major retailers and record companies:** In 2007 Amazon announced that it will launch a digital music store that sells music only in the MP3 format, a decision that some industry analysts believe will exert sufficient pressure on labels to force them to remove restrictions.²⁶ The MP3 format lacks a DRM layer; MP3 files can be edited or copied and are universally playable on audio hardware. EMI, one of the four largest music labels, has agreed to sell DRM-free music on Amazon; it is already selling DRM-free versions of its songs on iTunes for \$1.29, while the DRM-enabled (and lower sound quality) versions remain available for sale for \$0.99²⁷. The “iTunes Plus” songs are free of copy protections and other use restrictions and are encoded in a version of the AAC format that is supported by non-Apple devices, though not as universally as the MP3 format.²⁸
- **Redistribution of profits from revenue streams:** Consumer backlash against the music industry’s DRM regime is a market factor contributing to

protocol that only serves out small portions of the song at a time--thereby not allowing the whole song to be cached on the end-user's computer.” E-mail from Brooke Hammerling, Brew Media Relations, June 18, 2007.

²³ See “Use and Purchase of Musicmatch On Demand for Musicmatch Jukebox version 9.0 or 10.0,”

<http://www.musicmatch.com/info/terms/index.htm>

²⁴ <http://www.eff.org/deeplinks/archives/005115.php>

²⁵ <http://www.engadget.com/2006/12/14/ce-oh-no-he-didnt-part-xxi-gates-tells-consumers-to-ditch-dr/>

²⁶ *Music Service From Amazon Takes On iTunes* *The Wall Street Journal* May 17, 2007

²⁷ *iTunes songs unlocked--at a cost; For 30 cents more, EMI will sell its tracks on Apple's site with better sound quality and no copying restrictions.* *Los Angeles Times* April 3, 2007

²⁸ http://blog.wired.com/gadgets/2007/04/what_will_play.html

- declining CD sales.²⁹ An indirect effect on musicians is that record labels have begun to look at other economic models for dividing revenues with their artists; for instance there have been instances of labels contracting for a share of concert and merchandise profits, a source of income that has traditionally belonged exclusively to the musicians.³⁰
- **Patronage/private financing of authors and artists:** At McGill University's March 2007 conference on "Digital Dystopia," Bruce Lehman expressed the view that we are in a post-copyright era and can expect a revival of the patronage model.³¹ ArtistShare, which connects artists with interested patrons, is an example of such a model. The philosophy behind its founding is that there is "no way to protect digital music from being shared," and the company seeks instead to fund the end product by having "participants" invest in "a previously untapped resource: the creative process and experience."³² The bulk of the companies' artists are musicians, but the roster carries at least one music composer, a visual art, and a writer.³³
 - **Street performer protocol:** Similar to the patronage model, the street performer protocol was proposed by computer security consultants John Kelsey and Bruce Schneier.³⁴ Under this system, which its developers liken to a "ransom note," an author pledges to release her next work to the public domain once a stated level of donations is met. Interested consumers then donate funds toward the publication of the work. The protocol appears to have been successfully applied mostly to software authoring projects. But variations on the concept, employing creative commons licenses or traditional copyrights, have been employed in various art forms. Some notable examples, albeit outside the United States, can be found in German company SellaBand, which permits "believers" to purchase "parts" in an artist's project,³⁵ and in the British rock band Marillion, who financed their

²⁹ See Report by the Center for Democracy and Technology, "Evaluating DRM: Building a Marketplace for the Convergent World," p. 7 <http://www.cdt.org/copyright/20060907drm.pdf>; also Bruce Lehman's presentation at McGill March 2007 conference on "Digital Dystopia", <http://mediasite.campus.mcgill.ca/mediasite2/viewer/Viewer.aspx?layoutPrefix=LayoutTopLeft&layoutOffset=Skins/Clean&width=800&height=631&peid=6e197c68-0b63-4474-ac3b-f770e220de0e&pid=2276b8bb-0299-4f9e-9be8-d83d3539f313&pvid=501&mode=Default&shouldResize=false&playerType=WM64Lite#>, starting at 11:00

³⁰ <http://www.cirpa.ca/Page.asp?PageID=122&ContentID=837&SiteNodeID=66>

³¹ <http://mediasite.campus.mcgill.ca/mediasite2/viewer/Viewer.aspx?layoutPrefix=LayoutTopLeft&layoutOffset=Skins/Clean&width=800&height=631&peid=6e197c68-0b63-4474-ac3b-f770e220de0e&pid=2276b8bb-0299-4f9e-9be8-d83d3539f313&pvid=501&mode=Default&shouldResize=false&playerType=WM64Lite#>, starting at 11:00

³² <http://www.artistshare.com/home/about.aspx>

³³ http://www.artistshare.com/home/featured_artists.aspx

³⁴ http://www.firstmonday.org/issues/issue4_6/kelsey/

³⁵ Once the target of \$50,000 has been raised, SellaBand allocates \$30,000 to recording a promised CD and the remainder for manufacturing, packaging, and distributing the music to the "believers." The music is made available for free downloads on the website, and advertising revenues are shared between the artists, their supporters, and SellaBand. Profits from CD sales are also divided between the artists and their supporters. http://www.sellaband.com/site/conditions_artist.html.

most recent albums via advance sales.³⁶ Fundable, an American company facilitating “group action,” mainly serves as a fundraising conduit for charitable purposes, but artistic endeavors such as a musical CD, a documentary film, and a choreography are listed among its “Recently Completed Group Actions.”³⁷

In *MGM v. Grokster*³⁸, the U.S. Supreme Court held that peer-to-peer (P2P) file sharing companies which distributed their products with the object that its users would infringe copyright could be liable for the resulting acts of infringement. (Although this case is not directly related to the DMCA’s provisions regarding circumvention of technological measures, may be relevant to the question of how recent court decisions have affected authors.) According to the Recording Artists’ Coalition, which estimates there were 25 billion illegal downloads of songs in 2006, the harm to artists from P2P file sharing has been devastating.³⁹ Following the *Grokster* decision, several P2P companies agreed to multi-million dollar settlements with record companies. The RAC is currently trying to ascertain whether any of the settlement money has made its way to the artists.⁴⁰

Video

With the advent of TPMs came a variety of business models for distributing digital video. Several models for video sales are analogous to those used in the music industry, though there is greater application of time-limited uses.

- **DVDs:** All DVDs have copy-protections and other use restrictions; for example DVD content may only be viewed on a playback device approved by the DVD Copy Control Association.⁴¹ Additionally some DVDs require mandatory playing of promotional materials, and the “region coding” employed on most DVDs only permit discs to be played in the geographic market in which they were purchased.⁴²
- **Streaming-only services:** YouTube, the popular internet video site, is an example of a service that provides streaming-only access.
- **Copy-protection of downloaded content:** Users of Amazon’s Unbox service who have a broadband internet connection may purchase and download movies to certain compatible TiVo DVRs or to their computers, for viewing

³⁶ <http://www.soundonsound.com/sos/sep03/articles/marillion.htm>;
<http://www.npr.org/templates/story/story.php?storyId=1081295>

³⁷ See

http://www.fundable.org/recentlycompleted?SearchableText=&portal_type%3Alist=GroupAction&review_state=finished&review_state=finished-approved&sort_on=finished_time&sort_order=descending

³⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

³⁹ Phone conversation with Jay Rosenthal, Co-legal counsel to the Recording Artists’ Coalition, June 25, 2007.

⁴⁰ Id., see also <http://www.recordingartistscoalition.com/>

⁴¹ Report of the Center for Democracy & Technology, “Evaluating DRM: Building a Marketplace for the Convergent World” September 2006, p. 5 (<http://www.cdt.org/copyright/20060907drm.pdf>)

⁴² Id.

within Amazon's proprietary software. Videos may also be burned to DVD, but the burned copies can't be read by DVD players.⁴³

- **Time-limited services:** "Time-loaded downloads [permit] the user to keep the file for some period of time, or [require] the user, once she has opened the file, to view it within a certain period. The experience for the user approximates a movie rental, but without having to go to the store to acquire or return the film."⁴⁴
- **Age-dependent pricing or services:** "Services such as Movielink and CinemaNow, the major independent internet movies-on-demand services, have begun to allow users to burn a single DVD copy of each movie downloaded from the repertoire of older films."⁴⁵ Older movies are typically available at a lower cost; renting "Last Chance" movies costs a dollar less than the most recent films at Movielink and CinemaNow.⁴⁶
- **Streaming television:** "... A new service called Slingbox allows a user to log in anywhere in the world and watch streaming video transmitted from his home television. A user can watch on only one remote computer at a time and cannot record programs remotely."⁴⁷

The question of whether DRMs on video content benefits or injures individual actors, screenwriters, and directors who work on a film is complicated by the fact that in the United States, the producer – often a corporation – is considered the author and owns the copyright. Some individual contributors to a film may receive a small royalty percentage, so DRM measures presumably have some marginal benefit for them. However, the majority of writers, performers, and directors do not receive royalties at all.

Books

⁴³ http://www.amazon.com/gp/help/customer/display.html?nodeId=3748&#watch_tv

⁴⁴ For example, the Microsoft Xbox videogame system now offers content licensed from CBS, Warner Brothers, MTV, and Paramount; it will have 1,000 hours of content available by the end of the year. Customers pay \$1.99 for the right to watch a movie any time within a two-week window. Once a customer begins watching the movie, he will have 24 hours to finish watching. See "Xbox Live to offer TV downloads," BBC News, 7 November 2006, <http://news.bbc.co.uk/2/hi/technology/6124042.stm>. The BBC has tested iMP, software that allows users to request BBC programs interactively for watching or listening on their computers. The DRM technology allows the BBC to set limits specifically for each show; some shows might reside on computers for only a day, others for two weeks. See Simon Perry, "More details of BBC iMP revealed - All content DRM'd," Digital-Lifestyles.Info, 26 February 2004, http://digital-lifestyles.info/display_page.asp?section=distribution&id=1009. From J. Ginsburg's paper, p. 25.

⁴⁵ See Bill Rosenblatt, "Movielink and CinemaNow Add DVD Burning," DRM Watch, July 20, 2006, <http://www.drmwatch.com/ocr/article.php/3621401> (criticizing services for allowing users to make only one copy of internet-on-demand movies). From J. Ginsburg's paper, p. 25.

⁴⁶ http://www.cinemanow.com/How_It_Works_rent.aspx?grpID=1000;
http://www.movielink.com/store/web/browse/displayCategoryMain.jsp?categoryId=LAST_CHANCE&pageStyle=detail&sort=lastChanceDate&avail=+&start=1&categoryName=Last%20Chance&modelID=model1

⁴⁷ See Sling Media Press Release, "Sling Media Gives Consumers Their TV "Anywhere-Anytime" with the Slingbox," (June 30, 2005), http://us.slingmedia.com/object/io_1157566576257.html. From J. Ginsburg's paper, p. 25.

While DRMs have long been used on ebooks, the effects on authors have been diverse, with the greatest benefits accruing to the authors least likely to be published by a trade or mass market book publisher. In contrast to digital music and video, ebooks are still a niche market.⁴⁸ However within that niche are several notable models for making written works available to consumers.

- **Epublishing companies:** The growth of the internet has given rise to publishers who exclusively produce electronic books, as well as ebook divisions of trade publishers. There are two ways writers directly benefit from contracting with an epubliher versus traditional print publishers. First, because of the lower costs of production, online publishers are more willing to take risks on authors and books that haven't proven their profitability. For example, Ellora's Cave, an online publisher of romance novels hailed as an epublihering success, was founded by Tina Engler when her novels were rejected by the print publishers for being too sexually explicit.⁴⁹ Second, whereas royalties from print sales are generally 5 – 15 % of the cover price, authors typically receive 30 – 50% of the sale price from epubliherers.⁵⁰ But when trade publishers sell electronic versions of the titles in their catalog, royalty terms are less uniform: Random House pays authors 50% on electronic book sales.⁵¹ At the other end of the spectrum, authors receive a 6% royalty on ebooks from romance publisher Harlequin, which cites the current unprofitability of its ebook division to justify the low rate.⁵² Between the extremes is academic publisher BrownWalker Press, which pays authors the same royalty irrespective of the medium of sale. But epublihering is not necessarily the promised land for authors: Epubliherers usually don't pay advances and don't promote their books as extensively as print publishers, and in most genres ebook authors are considered to be lower grade writers (romance being the exception).⁵³
- **Copy and use limitations on ebooks:** The publishing industry has experimented with reading software that limits copying and other uses of digital books, as well as with dedicated ebook hardware. Adobe Reader, a fairly widely-used application, requires users to register devices on which they wish to read books; users may "activate" up to six computers and six Palm PDAs.⁵⁴ In June 2007 Adobe announced the release of Adobe Digital Editions, designed for reading digital publications.⁵⁵ The new product uses a

⁴⁸ The Association of American Publishers estimates ebook sales at \$22 million as of October 2006, while Ebook Corporations Ltd. Estimates that 2006 sales totaled \$130 million.

<http://www.bookbusinessmag.com/story/story.bsp?sid=45785&var=story>

⁴⁹ <http://dearauthor.com/wordpress/2007/05/13/jaid-black-found-of-elloras-cave-clears-the-air/>

⁵⁰ The Science Fiction and Fantasy Writers of America estimates royalties from print publishers at 10-15% and epubliherers at 40-50%. <http://www.sfw.org/beware/epubliherers.html> Other sources estimate print royalties at 5-10%, <http://www.ecommercetimes.com/story/2773.html>, and ebook royalties at 30-50%, http://www.smartbitchestrashybooks.com/index.php/weblog/harlequin_e_book_royalties/.

⁵¹ <http://teched.vt.edu/gcc/NewsFeatures/EPNewAbstracts/OctDec2000.html>, citing Investor's Business Daily, Nov. 17, 2000.

⁵² <http://dearauthor.com/wordpress/2006/12/31/why-harlequin-authors-should-move-to-e-publishing/>

⁵³ <http://www.sfw.org/beware/epubliherers.html>

⁵⁴ <http://kb.adobe.com/selfservice/viewContent.do?externalId=315823&sliceId=2>

⁵⁵ <http://www.adobe.com/aboutadobe/pressroom/pressreleases/200706/061907DigitalEditions.html>

DRM called ADEPT (Adobe Digital Editions Protection Technology), which “supports both purchase and lending transactions.”⁵⁶ As for reader hardware, Sony recently introduced a reader model that uses electronic paper, a display technology that mimics the properties of real paper.⁵⁷ The reader uses Sony’s proprietary BBeB Book file format to manage content use.⁵⁸ Books may be read on up to six devices, one of which must be a computer.⁵⁹

- **Social DRM:** Some book publishers don’t place any software restrictions on their ebooks but rather rely on “social DRM.” For example Pragmatic Programmers, which publishes books in print and ebook form, as well as PDF-only versions of certain titles, stamps the buyer’s name in the footer of the electronic version of sold copies.⁶⁰ They also encode identifying information (but no personal data) into the PDF, to enable any copy traded on the internet to be traced to its source.
- **Ebooks without DRMs:** One print publisher, Baen Books, distributes electronic versions of some of its titles without any DRMs.⁶¹ The ebooks can be read online or downloaded in several file formats. Eric Flint, an author whose books are available on the website explains the ethos behind the “Baen Free Library”: “Losses any author suffers from piracy are almost certainly offset by the additional publicity which, in practice, *any* kind of free copies of a book usually engender.”⁶²
- **Google Book Search:** In December 2004 Google announced the program now known as the Google Book Search,⁶³ in which it planned to “scan, digitize, and make searchable the collections of five of the largest libraries in the world.”⁶⁴ There are four viewing levels for the digitized material: (1) A book is fully viewable if the copyright owner has consented to make it so available or if it is in the public domain; (2) the cover, table of contents, and short sequences of pages are viewable if the author or publisher has joined Google’s Partner Program; (3) information about the book, plus a few sentences showing the search term in context can be viewed if the copyright holder has opted out of the program; and (4) for some works, basic information about the book and how to obtain a copy is available, but a preview is not.⁶⁵ Google’s position on its controversial program is that it benefits authors and publishers by publicizing their books, generating revenue from advertisement sales that is shared with the rights holders, and generating “click-through” sales at online booksellers.⁶⁶ But the Association

⁵⁶ <http://www.adobe.com/products/adept/>

⁵⁷ http://www.learningcenter.sony.us/assets/itpd/reader/reader_features.html

⁵⁸ http://www.learningcenter.sony.us/assets/itpd/reader/reader_specs.html

⁵⁹ <http://www.mobileread.com/forums/showthread.php?t=7714>

⁶⁰ http://www.pragmaticprogrammer.com/starter_kit/faqs/fridays.html

⁶¹ <http://www.baen.com/library/>

⁶² Id.

⁶³ The Electronic Library The New York Times December 21, 2004

⁶⁴ http://news.com.com/Googles+battle+over+library+books/2100-1025_3-5907506.html

⁶⁵ <http://books.google.com/googlebooks/about.html>;

<http://books.google.com/googlebooks/screenshots.html#bookinfo>

⁶⁶ http://books.google.com/googlebooks/newsviews/facts_fiction.html

- of American Publishers and the Authors Guild disagreed, suing for copyright infringement.⁶⁷
- **Other searchable web applications:** Google’s was neither the first nor the last web application enabling full-text searches of books. Amazon’s “Search Inside” feature, which preceded Google Book Search, likewise caused the Authors Guild concern; however unlike Google’s program, books were only searchable with the publisher’s permission.⁶⁸ Technology publishers O’Reilly and The Pearson Technology Group developed an even earlier application in 2001, with Safari Books Online.⁶⁹ Subscribers may search content in titles belonging to the two publishers, as well as several other technology publishers who participate in the program.⁷⁰ A limited number of chapters per month may be downloaded as PDFs⁷¹, and most of the books may be printed, but not in their entirety.⁷² Other publishers have rolled out their own searchable databases; both Random House and HarperCollins introduced search features on their web sites in February 2007.⁷³
 - **Advertiser-funded web books:** In 2006 HarperCollins announced that one of its business books would be freely available in html format at the author’s web site (<http://www.brucejudson.com/>).⁷⁴ The site, which has a search feature, displays advertisements; rather than receiving sale royalties, the author is paid a portion of the advertising revenue.
 - **Prerelease editions:** O’Reilly Media, publisher of computing technology books, started its “Rough Cuts” program in 2006, in which readers can purchase electronic versions of upcoming books through Safari Books Online. The manuscript may be viewed online, downloaded, and printed two to six months before the book is published.⁷⁵ Buyers can also participate in the editorial process, which is particularly useful in light of the rapid pace of change and decentralized technical knowledge in the IT industry. Pragmatic Programmers operates a similar “Beta Book” program.⁷⁶
 - **Serialization:** Combining the concepts of prerelease digital editions and nineteenth century serial publication of novels, Baen Books sells a subscription service whereby readers can access html versions of in-progress books on a password-protected web site. Manuscripts may be printed from the site and saved using a word processing program.⁷⁷ The final version is published in various ebook file formats.

⁶⁷ <http://publishers.org/press/releases.cfm?PressReleaseArticleID=292;>

http://www.authorsguild.org/news/sues_google_citing.htm

⁶⁸ *Amazon Offer Worries Authors* *The New York Times* October 27, 2003

⁶⁹ <http://safari5.bvdep.com/>

⁷⁰ <http://www.safaribooksonline.com/whysafari/faqs.php>

⁷¹ Id.

⁷²

<http://support.safaribooksonline.com/display/1n/index.asp?c=&cpc=&cid=&cat=&catURL=&r=0.8480493>

⁷³ *Mouse Feeds Bookworms* *The New York Times* February 28, 2007

⁷⁴ <http://newsbreaks.infotoday.com/nbreader.asp?ArticleID=15986>

⁷⁵ “When you buy a book on the Rough Cuts service, you get access to an evolving manuscript. You can read it online, download as a PDF, or print. Once you’ve purchased a Rough Cuts title, you have a chance to shape the final product - you can send suggestions, bug fixes, and comments directly to the author and editors.” <http://www.oreilly.com/roughcuts/faq.csp>

⁷⁶ http://www.pragmaticprogrammer.com/starter_kit/faqs/beta_faq.html

⁷⁷ <http://www.websubscription.net/t-faq.aspx>

- **Street performer protocol:** There have been a handful of attempts to implement variations of the street performer protocol (see discussion above regarding applications to music creation) in the ebook medium. The most public was Stephen King's serialized novel project in 2000. *The Plant* was issued on King's website for \$1 per installment and was free of DRMs, relying instead on "the honor system."⁷⁸ The project fizzled after five months when, to his readers' ire, King announced that he would not complete the novel.⁷⁹ Another notable implementation was The Storyteller's Bowl, a collaborative effort directly based on the street performer protocol.⁸⁰ The project never managed to produce any content, and the site is now available only on internet archives.⁸¹ However a few science fiction writers continue to experiment with the idea.⁸²

Photography

The internet's growth propelled the consolidation of stock photography companies into two major players, Getty and Corbis, who focused on digital images rather than tangible assets such as transparencies.⁸³ The development of the digital photography market also led to an abundance of stock photo product. These market conditions resulted in photographers' decreased bargaining power with stock photo agencies and generally lower prices for photography.⁸⁴

Photographers sometimes employ measures such as watermarking images or adding ownership information to a digital image's metadata. A few software companies offer products that promise copy protection of web pages and images, including protection against screen capture utilities.⁸⁵ However DRMs such as copy protection and use-limiting software have not been widely adopted in the field of photography.⁸⁶ Some photographers who make their images available on the

⁷⁸ <http://www.wired.com/culture/lifestyle/news/2000/06/36915>

⁷⁹ <http://www.wired.com/culture/lifestyle/news/2000/11/40356>

⁸⁰ <http://web.archive.org/web/20000817171813/www.storytellersbowl.com/index.htm>

⁸¹ <http://www.terrania.us/journal/2004/09/street-performers-bowls-plantsand.html>

⁸² In 2005 Lawrence Watt-Evans promised to post a new chapter each week of *The Spriggian Mirror*, the ninth of a series of books, if readers donated \$250. The novel was completed in October 2005, and he followed the same serialization model with the tenth book, *The Vondish Ambassaor*, in 2007. The earlier book was included in an electronic journal in 2006, and it is no longer available for free download. (See <http://www.ethshar.com/thesprigganexperiment0.html>;

<http://www.ethshar.com/thevondishambassador0.html>) Sharon Lee and Steve Miller also undertook a reader-funded serialization project in 2007. Their novel is freely available with no DRM restrictions, but the authors have included the conditions of use on their website, specifying that readers may not "Copy the work and sell it, or pass it off as your own. *Fledgling* is copyright by Sharon Lee and Steve Miller. In addition, Liaden Universe® is a registered trademark. That means the universe, the characters, the story and the right to sell it belong to Sharon Lee and Steve Miller." (<http://www.korval.com/fledgling/>)

⁸³ <http://www.techweb.com/wire/story/TWB20000907S0008>

⁸⁴ See Dan Heller's discussion of the "Stock Industry in the Digital Age." <http://www.danheller.com/biz-agencies1.html#1>. Also, IT Week reports that photographer's royalty rates have decreased from 50% to 0-35% due to Getty and Corbis' monopoly status in the industry.

<http://www.itweek.co.uk/itweek/comment/2174223/pic-agencies-portray-copyright>

⁸⁵ <http://www.artistscope.com/copysafe/>

⁸⁶ Yet unauthorized use of copyrighted images is an industry concern. There is anecdotal evidence on the internet that Getty and Corbis have threatened legal action against persons using their images without

internet rely on TPMs in the form of web scripting methods. For example right-click contextual menus and Internet Explorer's image toolbar can be disabled,⁸⁷ but success with these methods depends in part on which web browser the would-be infringer is using. Alternatively, creators may overlay a transparent blank image on top of the real one to inhibit downloads,⁸⁸ or encrypt their source code so that image locations can't be easily discerned.⁸⁹

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authorization. <http://www.itweek.co.uk/itweek/comment/2174223/pic-agencies-portray-copyright>;
<http://groups.google.com/group/help-for-victims-of-getty-images?hl=en>

⁸⁷ <http://webdesign.about.com/od/graphics/a/aa020801a.htm>;

<http://www.wildlifephotonet.net/articles/webdesign/imageprotection.html>

⁸⁸ <http://javascript.about.com/library/blimgprot.htm>

⁸⁹ <http://www.wildlifephotonet.net/articles/webdesign/imageprotection.html>