IV. RECOMMENDATIONS

A. COPYRIGHT

It is difficult for intellectual property laws to keep pace with technology. When technological advances cause ambiguity in the law, courts look to the law's underlying purposes to resolve that ambiguity. However, when technology gets too far ahead of the law, and it becomes difficult and awkward to adapt the specific statutory provisions to comport with the law's principles, it is time for reevaluation and change. "Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes."[529]

> From its beginning, the law of Copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.[530]

The Working Group has examined the adequacy of the Copyright Act to cope with the pace of technological changes. In applying the law to new uses, media and technology, the issues presented vary. Certain issues merely require an explanation of the application of the current law, and clearly are appropriately covered. Others present rights or limitations that clearly fit within the spirit of the law but the letter of the law is in need of clarification to avoid

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[529] H.R. REP. NO. 101-735, 101st Cong., 2d Sess. 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6938 (report accompanying legislation granting copyright owners of computer software an exclusive rental right).

[530] *Sony*, *supra* note 361, at 430-31.

uncertainty and unnecessary litigation. Still others need new solutions. Technology has altered the balance of the Copyright Act -- in some instances, in favor of copyright owners and in others, in favor of users. The goal of these recommendations is to accommodate and adapt the law to technological change so that the intended balance is maintained and the Constitutional purpose is served.[531]

While it is not advisable to propose amendment of the law with every technological step forward, neither is it appropriate to blindly cling to the status quo when the market has been altered.

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.[532]

Throughout more than 200 years of history, with periodic amendment, United States law has provided the necessary copyright protection for the betterment of our society. The Copyright Act is fundamentally adequate and effective. In a few areas, however, it needs to be amended to take proper account of the current technology. The coat is getting a little tight.[533] There is no need for a new one, but the old one needs a few alterations.

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531 *See* discussion of the Constitutional purpose of copyright *supra* pp. 19-23.

532 *Sony*, *supra* note 361, at 431.

533 *See supra* p. 13.

1. THE TRANSMISSION OF COPIES AND PHONORECORDS

a. THE DISTRIBUTION RIGHT

The Copyright Act gives a copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work" to the public. It is not clear under the current law that a transmission can constitute a distribution of copies or phonorecords of a work.[534] Yet, in the world of high-speed, communications systems, it is possible to transmit a copy of a work from one location to another. This may be the case, for instance, when a computer program is transmitted from one computer to ten other computers. When the transmission is complete, the original copy typically remains in the transmitting computer and a copy resides in the memory of, or in storage devices associated with, each of the other computers.[535] The transmission results essentially in the distribution of ten copies of the work. However, the extent of the distribution right under the present law may be somewhat uncertain and subject to challenge. Therefore, the Working Group recommends that the Copyright Act be amended to expressly recognize that copies or phonorecords of works can be distributed to the public by transmission, and that such transmissions fall within the exclusive distribution right of the copyright owner.

The proposed amendment does not create a new right. It is an express recognition that, as a result of technological developments, the distribution right can be exercised by

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534 *See* discussion *supra* pp. 70-73.

535 In contrast, a "standard" distribution of a copy necessarily divests the distributor of his copy. In the case of a distribution by transmission, the distributor generally retains his copy of the work and a reproduction is distributed.

means of transmission -- just as the reproduction, public performance and public display rights may be.[536]

It is argued by some that the existing right of distribution encompasses transmissions of copies and that no amendment is necessary. Indeed, the distribution right, as set forth in Section 106(3) of the Copyright Act, can be -- and, in at least one case, has been -- interpreted to include transmissions which distribute copies of works to, for example, the memories of computers. Transmission, it is argued, is logically and legally a means of distribution. The Working Group has no argument with such an interpretation; it properly conforms to the intent of the distribution right and, we believe, is correct from both a practical and legal standpoint.

Others suggest that amendment of the law may not be necessary because even if the distribution right does not cover the distribution of reproductions by transmission, the reproduction right is clearly implicated and that will protect the copyright owner. However, the fact that more than one right may be involved in infringing activity does not, and should not, mean that only one right should apply.[537] Each

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[536] It has been suggested that recognition of distribution by transmission may diminish the public performance right. However, if a work is publicly performed by transmission, then there has been a public performance -- whether or not the distribution right is or is not also involved. The fact that some transmissions may constitute a reproduction and distribution of copies to the public does not mean that transmissions that constitute public performances are not public performances. The scope of the public performance right is not diminished by the recognition that a transmission may fall within the scope of the distribution right. If a copy of a motion picture is transmitted to a computer's memory, for instance, and in the process, the sounds are capable of being heard and the images viewed as they are received in memory, then the public performance right may well be implicated as well. *See* 17 U.S.C. § 101 (1988) (definition of "perform").

[537] The exclusive rights, "which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely, and . . . each subdivision of an exclusive right may be owned and enforced separately." HOUSE REPORT at 61, *reprinted in* 1976 U.S.C.C.A.N. 5674.

of the exclusive rights is distinct and separately alienable and different parties may be responsible for infringements or licensing of different rights -- and different rights may be owned by different people.[538] Because transmissions of copies may constitute both a reproduction and a distribution of a work, transmissions of copies should not constitute the exercise of just one of those rights. Indeed, those licensed only to reproduce a work should not be entitled to also distribute the work through transmission -- thereby displacing the market for the copyright owner or his distribution licensee.

> Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction.[539]

Clearly, not all transmissions of copies of copyrighted works will fall within the copyright owner's exclusive distribution right. Moreover, even if a transmission of a copy falls within the scope of the right, it is not necessarily unlawful. First, the distribution must be a distribution *to the public*. The case law interpreting "publication" provides guidance as to what constitutes distribution to the public.[540] If a distribution would not constitute a publication of the work, then it would likely be found to be outside the scope of the copyright owner's distribution right. Therefore, the transmission of a copyrighted work from one person to another in a private e-mail message would not constitute a distribution to the public.[541] Second, all of the limitations,

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538 *See* discussion *supra* pp. 45-47.

539 HOUSE REPORT at 61, *reprinted in* 1976 U.S.C.C.A.N. 5674.

540 *See* discussion *supra* pp. 28-32. The term "public" as used in connection with the distribution right is not coincident with the meaning assigned to that term in connection with the public performance or public display right.

541 If copies of works are offered to the public -- even though they

exemptions and defenses that currently apply to the distribution right and allow users to distribute certain copies to the public or to distribute copies under certain circumstances will continue to apply. For example, any exercise of one of the exclusive rights may be fair use -- including the reproduction and distribution of copies by transmission.

Some are of the view that the current language of the Act does not encompass distribution by transmission. They argue that the proposed amendment expands the copyright owner's rights without a concomitant expansion of the limitations on those rights. However, since transmissions of copies already clearly implicate the reproduction right, it is misleading to suggest that the proposed amendment of the distribution right would expand the copyright owner's rights into an arena previously unprotected. Further, even if the premise is correct (that the amendment expands the distribution right), the conclusion that the limitations of that right are not similarly expanded is invalid. The limitations on the right -- which place certain distributions to the public outside the scope of the copyright owner's right -- would necessarily expand to also place similar distributions by means of transmission outside the scope of the right.

Nevertheless, there is no reason to treat works that are distributed in copies to the public by means of transmission differently than works distributed in copies to the public by other, more conventional means.[542] Copies distributed via transmission are as tangible as any distributed over the counter or through the mail. Through each method of distribution, the consumer receives a tangible copy of the work.

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may be distributed one copy at a time -- it would likely constitute distribution to the public. *See* 17 U.S.C. § 101 (1988) (definition of "publication"); 1 NIMMER ON COPYRIGHT § 4.04 at 4-20.

[542] In the future, transmission may become the conventional means of distribution.

When the public performance right was initially granted, it was thought to encompass only "live," in-person performances. When it became clear that copyrighted works could be publicly performed by other means -- *i.e.*, broadcast and, later, cable transmissions -- the law was clarified. The same is true today with respect to the distribution right. Transmission is a means of distribution of copies, just as it can be a means of performance. However, the differences of opinion summarized above underscore the need for clarification and legal certainty. The costs and risks of litigation to define more clearly the right -- and the time achieving such clarity would take -- would discourage and delay use of the NII.

b. RELATED DEFINITIONAL AMENDMENTS

The Working Group also recommends other related amendments to two definitions.

TO "TRANSMIT"

As explained above, under current technology, a copy of a work may be transmitted. However, the Copyright Act defines only what it is to transmit a performance or display of a work. Therefore, the Working Group recommends that the definition of "transmit" in Section 101 of the Copyright Act be amended to include a definition of a transmission of a reproduction.[543]

How to delineate between these types of transmissions is a difficult issue to resolve. The transmissions themselves hold no clues; one type often looks the same as the other during the transmission. If the transmitter intends to transmit a performance of the work, as well as to distribute a reproduction of it -- or if the receiver is able to hear or see

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[543] Under the proposed definition, to transmit a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent.

a performance of the work in the course of receiving a copy of it -- what rights are exercised by the transmission? A transmission could be a transmission of a reproduction or a performance or both. The resolution of these issues should rest upon the specific facts of the case. Such issues will typically be clarified between rightsholders and users in appropriate license arrangements. If confusion or disagreement exists in a specific context, the courts -- rather than Congress -- are in the better position to determine which, if any, exclusive rights are involved in a particular transmission. Courts regularly make such determinations in other cases where rights overlap.[544]

"PUBLICATION"

The legislative history of the Copyright Act makes clear that "any form of dissemination in which a material object does not *change hands* . . . is not a publication no matter how many people are exposed to the work."[545] Thus, a work that is only displayed or performed via the NII would not be considered published, no matter how many people have access to the display or performance, because a material object -- a copy of the work -- does not change hands.[546] However, in the case of transmissions of

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[544] To delineate between those transmissions that are communications of performances or displays and those that are distributions of reproductions, one may look at both ends of the transmission. Did the transmitter intend to communicate a performance or display of the work or, rather, to distribute a reproduction of the work? Did the receiver simply hear or see the work or rather/also receive a copy of it? Did the receiver simply receive a copy or was it possible for her to hear or see it as well? License rates and terms will assist in determining the intent of the parties.

[545] *See* HOUSE REPORT at 138 (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 5754.

[546] *See* discussion *supra* pp. 28-32. The House Report also states, however, that the definition was intended to clarify that the offering of copies or phonorecords to a group of, for instance, wholesalers, broadcasters or motion picture theater operators constitutes publication if the purpose of the offering is "further distribution, public performance, or display." *See* HOUSE REPORT at 138, *reprinted in* 1976 U.S.C.C.A.N. 5754. Therefore, if an author offers copies

reproductions, the recipients of the transmissions receive copies of the work (*i.e.*, copies of the work have been distributed) -- although they may not have "changed hands" in the literal sense.

Whether the transmission of copies of works is clearly within the scope of the distribution right is also a problem with respect to the act of publication by the transmission of copies. Indeed, the definition of "publication" incorporates the language used to describe the distribution right, which the Working Group's proposal amends.[547] Publication largely turns on whether the work has been distributed to the public. Thus, if copies of a work may be distributed to the public by transmission, then a work may be published by the transmission of copies to the public. Therefore, consistent with the proposed amendment of the distribution right, the Working Group recommends that the definition of "publication" in Section 101 of the Copyright Act be amended to recognize that a work may be published through the distribution of copies of the work to the public by transmission.[548]

The effects under the law of a work being considered published (rather than unpublished) generally are negative from the viewpoint of the copyright owner. Published works, for example: (1) must be deposited in the Library of Congress; (2) are subject to more limitations on the exclusive rights, including a broader application of fair use;

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to bulletin board system operators or others for further distribution, public performance or public display on a computer network, publication may occur.

[547] Under the current law, the distribution right is identified as the 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." *See* 17 U.S.C. § 106(3) (1988). Publication is "the distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *See* 17 U.S.C. § 101 (1988) (part of definition of "publication").

[548] Under the law of the United Kingdom, making a work available to the public by means of an electronic retrieval system constitutes publication. *See* Copyright, Designs and Patents Act of 1988, § 175(1)(b).

(3) must meet certain author nationality or domicile requirements to be eligible for protection; and (4) must bear a copyright notice if published before March 1, 1989.[549] However, the designation of works distributed to the public by transmission as published will be important in the case of works distributed first -- or solely -- on-line. The deposit requirement will aid in the preservation of those works, which otherwise might be updated or revised on-line, destroying -- or at least obscuring -- the original published versions. This may be particularly critical in preserving the scholarly and scientific record.[550]

Just as not all distributions of copies by transmission will constitute distributions to the public (and fall within the distribution right), not all transmissions of copies will constitute publication. Private e-mail messages would not be regarded as published.[551] Neither would other restricted transmissions of copies, such as those in a typical corporate setting, where transmissions of copies within the company computer network are restricted as to further distribution.[552] However, as in the print environment, the distribution of copies to a small group under circumstances where further distribution is authorized would publish the work.[553]

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549 *See supra* notes 68-83 and accompanying text.

550 In the print domain, prior published editions are more easily and generally available for reference, partially because of the deposit requirement, but primarily because subsequent versions do not override the originals -- which is possible in the on-line environment.

551 *See* discussion *supra* pp. 28-32.

552 *See* discussion of the doctrine of limited publication *supra* pp. 31-32.

553 *See White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952) (unrestricted circulation of 200 copies of a manuscript to friends and acquaintances published the work); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958) (distribution of approximately 100 sets of forms to corporate officers and surety companies for possible purchase of more constituted publication).

c. THE IMPORTATION PROVISIONS

The Working Group also recommends that the prohibitions on importation be amended to reflect the fact that, just as copies of copyrighted works can be distributed by transmission in the United States, they can also be imported into the U.S. by transmission. If an infringing literary work, for instance, were physically shipped into the U.S. in the form of a paper copy, a CD-ROM disk or even stored on a memory chip, then it would be an infringing importation if the statutory conditions existed.[554]

Cross-border transmission of copies of copyrighted works should be subject to the same restrictions as shipping them by airmail. Just as the distribution of copies of a copyrighted work is no less a distribution than the distribution of copies by mail, the international transmission of copies of copyrighted works is no less an importation than the importation by airmail.

Although we recognize that the U.S. Customs Service cannot, for all practical purposes, enforce a prohibition on importation by transmission, given the global dimensions of the information infrastructure of the future, it is important that copyright owners have the other remedies for infringements of this type available to them. Therefore, the Working Group recommends that Section 602 of the Copyright Act be amended to include importation by carriage or shipping of copies as well as by transmission of them.

2. PUBLIC PERFORMANCE RIGHT FOR SOUND RECORDINGS

Transmissions of sound recordings will certainly supplement and may eventually replace the current forms of distribution of phonorecords. In the very near future, consumers will be able to receive digital transmissions of

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554 *See* discussion of the importation right *supra* pp. 107-09.

sound recordings on demand -- for performance in the home or for downloading -- from the so-called "celestial jukebox." The legal nature of such transmissions -- whether they are performances or distributions -- has been widely debated. As discussed above, the Working Group recommends that Section 106 of the Copyright Act be amended to make clear that copies or phonorecords can be distributed by transmission. However, many of these transmissions will clearly constitute exercise of the public performance right -- a right which the Copyright Act fails to grant to copyright owners of sound recordings.[555]

The lack of a public performance right in sound recordings under U.S. law is an historical anomaly that does not have a strong policy justification -- and certainly not a legal one. Sound recordings are the only copyrighted works that are capable of being performed that are not granted that right. Therefore, for example, to transmit a performance of a sound recording without infringement liability, an audio-on-demand service acting as a "celestial jukebox" must obtain a license from, and pay a royalty to, the copyright owner of the underlying musical work (*i.e.*, the person or entity who owns the rights in the notes and the lyrics), but it does not have to obtain permission from, or pay a license fee to, the copyright owner of the sound recording or the performer. The Working Group believes that this inequity should be rectified.

Public performance rights are granted in many foreign markets. Due to the lack of a performance right in the United States, U.S. performers and record companies are denied their fair share of foreign royalty pools for the public

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[555] Some transmissions that clearly constitute public performances may, in effect, substitute for distributions in the future. If consumers are offered a service through which they can receive a performance of any sound recording at any time, they may stop buying phonorecords. The market for distributed phonorecords may shrink to include only the providers of that service to consumers.

performance of U.S. sound recordings in some countries and are in danger of losing access to their share in others.

By granting performance rights in sound recordings, the United States will treat the creators of these culturally and economically important copyrighted works the same as all other works capable of being publicly performed. This legislation will provide increased incentive for the creators of sound recordings to produce and disseminate more works, thereby expanding consumer choice. In addition, the enactment of these rights will strengthen the hand of Government negotiators and private advocates seeking a fair share of foreign royalty pools.

Some argue that copyright owners of sound recordings should not be granted a public performance right because they derive some indirect benefit from the public performance of their works. This argument is based on the theory that the public performance of a work increases the sales of reproductions of that work. Therefore, the copyright owner gets an indirect benefit (*i.e.*, increased sales of reproductions) from the so-called "free advertising" that public performances provide. This, in fact, may be true in some cases. However, it is not a valid policy argument against providing sound recording copyright owners with the full panoply of exclusive rights other copyright owners enjoy.

The exercise of one right often increases the value of the exercise of another right, but we do not restrict any other copyright owners from exercising *all* of his or her rights. For instance:

- The copyright owner of the musical composition embodied in a sound recording is paid both when recordings of the composition are sold *and* when the composition is publicly performed -- even though the public performance might increase the number of records sold and thus benefit the copyright owner.

- Serial excerpts from a novel that are published in a magazine might increase sales of the book, but the magazine nonetheless must obtain permission from the author of the book.

- The copyright owner of that novel may also increase his book sales when a motion picture based on the novel is released. However, no one suggests that the motion picture company should not have to pay the copyright owner of the novel for the right to turn it into a movie, just because the movie might indirectly benefit the copyright owner.

The copyright owners of sound recordings should be able to decide for themselves, as do all other copyright owners, if "free advertising" is sufficient compensation for the use of their works. If the users' arguments regarding the benefit copyright owners derive from the public performance of their sound recordings are correct, the users should be able to negotiate a very low rate for a license to do so.

It also has been argued that the copyright owners of sound recordings should not be granted the "exclusive" right that all other copyright owners enjoy, but instead be subject to a compulsory license, so that they cannot act as a "gatekeeper" to the licensing of performances of the musical works embodied in sound recordings. It is asserted that while a copyright owner of a sound recording with an exclusive public performance right could block the performance of the musical work by denying a license to publicly perform the sound recording, the copyright owner of the musical work could not. This argument is based on the incorrect assumption that copyright owners of musical works are not granted exclusive public performance rights. Section 106(4) of the Copyright Act clearly grants exclusive rights to the copyright owners of musical works, and, while virtually all music performance licensing is handled for those copyright owners by performing rights societies on a nonexclusive basis, the copyright owners could license their

performance rights on an exclusive basis if they chose to do so.[556]

Two bills introduced in the 104th Congress would grant a very limited performance right in sound recordings.[557] A *full* public performance right -- *particularly* with respect to all *digital* transmissions -- is warranted. There is no just reason to afford a lower level of protection to one class of creative artists. Further, *any* special limitations on this right weakens our position internationally. The digital communications revolution -- the creation of advanced information infrastructures -- is erasing the distinctions among different categories of protected works and the uses made of them.

3. LIBRARY EXEMPTIONS

The copyright law carefully balances the rights of copyright owners with the legitimate needs of users. Nowhere is this balancing more apparent than in the exemptions that are intended to permit libraries reasonable use of copyrighted works to serve the legitimate demands of their patrons.

Many have expressed concern that the special exemptions for libraries in Section 108 of the Copyright Act are no longer relevant in the digital era. Libraries, of course, may make fair use of any copyrighted works pursuant to the provisions of Section 107.[558] Section 108, however, provides additional exemptions specifically for libraries and archives On the one hand, there are those who

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[556] If the copyright owners of sound recordings abused the exclusivity that the law should provide, the solution would lie in the enforcement of the antitrust laws -- where the music licensing problems have been addressed -- not in the reduction of rights under the Copyright Act.

[557] *See* S. 227, 104th Cong., 1st Sess. (1995); H.R. 1506, 104th Cong., 1st Sess. (1995).

[558] *See* discussion *supra* pp. 73-82.

believe that since licensing of transactions of works in digital form will be a feature of the digital distribution systems of the future, there is no need for library exceptions. Each copying transaction will be cheap and libraries can simply pay for all of the copying in which they engage. On the other hand, there are those who believe that unrestricted copying in libraries should be the rule, without the special conditions and limitations set forth in Section 108.

The Working Group agrees with neither those who would delete the exemptions for library copying nor those who would permit wholesale copying in libraries. It believes that there is an important public interest in exempting certain library uses of copyrighted works and that the public interest is no less important -- and, indeed, may be more important -- when such use involves digital technology. It also believes that there is an equally important interest in recognizing the legitimate interests of copyright owners in licensing uses of their works through voluntary systems.

Therefore, notwithstanding the legislative history of the 1976 Act which clearly intended that Section 108 did not permit digital reproduction,[559] the Working Group believes that it is important to expand the exemption so that digital copying by libraries and archives is permitted under certain circumstances. In supporting this departure from the generally accepted view of the scope and intention of Section 108, the Working Group believes that the law must preserve the role of libraries and archives in the digital era.

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[559] The legislative history makes it clear that digital uses are generally not encompassed by Section 108: "Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but *could not reproduce the work in 'machine-readable' language* for storage in an information system." HOUSE REPORT at 75, *reprinted in* 1976 U.S.C.C.A.N. 5689; Senate Report at 67 (emphasis added). The Senate Report also speaks precisely of "the *photocopying* needs of . . . multi-county regional systems." *Id.* at 70 (emphasis added).

Libraries and archives are the trustees of our collective knowledge and must be able to make use of digital technology to preserve the Nation's heritage and scholarship. Therefore, the Working Group recommends that the library exemptions be amended: (1) to accommodate the reality of the computerized library by allowing the preparation of three copies of works in digital form, with no more than one copy in use at any time (while the others are archived); (2) to recognize that the use of a copyright notice on a published copy of a work is no longer mandatory; and (3) to authorize the making of digital copies for purposes of preservation.[560]

4. REPRODUCTION FOR THE VISUALLY IMPAIRED

The NII offers real opportunities to many visually impaired people to participate in learning, communication and discourse to a greater extent than when only conventional modes of communication are available. With the aid of software and computer equipment that is widely available, people now have the capacity to view text on CD-ROM on screen in a "large-type" format even if the publisher did not include such a feature, but the publication and distribution of large-type editions remains very important. To ensure fair access to all manner of printed materials, it is necessary to amend the copyright law.

The laws of many Berne Convention countries contain express exemptions from liability for the unauthorized manufacture and distribution of Braille or other editions designed to assist the visually impaired.[561] The Working

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[560] The Working Group believes that replacement copies may be digital in nature, and may be made under this provision only when an unused replacement is not available in either digital or analog form.

[561] *See*, *e.g.*, Section 53D of the Australian law (privilege conditioned on copyright owner's abstention from market for Braille edition); Section 18 of the Finnish law (Braille editions and talking books may be manufactured "for use by lending libraries for blind persons"); Section 80 of the Portuguese law (Braille

Group believes that similar provisions should be included in the Copyright Act, and has modeled its proposal on the Australian law, so as to maintain private rights while recognizing certain readers' special needs. The proposed amendment would provide an exemption for non-profit organizations to reproduce and distribute to the visually impaired -- at cost -- Braille, large type, audio or other editions of previously published literary works in forms intended to be perceived by the visually impaired, provided that the owner of the exclusive right to distribute the work in the United States has not entered the market for such editions during the first year following first publication of the work.[562]

5. CRIMINAL OFFENSES

Although the Copyright Act provides criminal penalties when the infringement is willful and is for purposes of commercial advantage or private financial gain,[563] the dismissal of the criminal charges in *United States v. LaMacchia* demonstrates a serious lacuna in the criminal copyright provisions: it does not now reach even the most wanton and malicious large-scale endeavors to copy and provide on the NII limitless numbers of unauthorized copies of valuable copyrighted works unless the copier seeks profits.[564] Since there is virtually no cost to the infringer, certain individuals are willing to make such copies (or assist others in making them) for reasons other than monetary reward. For example, someone who believes that all works

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editions may be manufactured if not for profit).

562 The visually impaired were the only users with a disability who provided comments or testimony concerning a need for a narrow exemption to ensure the availability of literary works in a usable form. By its recommendation of such an exemption for the visually impaired, the Working Group does not intend to dismiss the possibility that other disabled users may have needs of which it has not been made aware and, therefore, has not considered.

563 *See* discussion of criminal offenses *supra* pp. 126-28.

564 *See* discussion of the *LaMacchia* case *supra* p. 127.

should be free in Cyberspace can easily make and distribute thousands of copies of a protected work and may have no desire for commercial advantage or private financial gain.

The Working Group agrees with the *LaMacchia* court:

> Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One could envision ways that the copyright law could be modified to permit such prosecution. But, "[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment."

Therefore, the Working Group generally supports the amendments to the copyright law and the criminal law (which sets out sanctions for criminal copyright violations) set forth in S. 1122, introduced in the 104th Congress by Senators Leahy and Feingold following consultations with the Justice Department. The bill would make it a criminal offense to willfully infringe a copyright by reproducing or distributing copies with a retail value of $5,000 or more. By setting a monetary threshold and requiring willfulness, the bill ensures that merely casual or careless conduct resulting in distribution of only a few copies will not be subject to criminal prosecution and that criminal charges will not be brought unless there is a significant level of harm to the copyright owner's rights.[565]

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[565] As noted earlier, the idea/expression dichotomy and the limitations on the exclusive rights, including fair use, address First Amendment concerns. *See supra* pp. 32-35, 73-100 and note 227. *See also Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("First Amendment protections [are] embodied in the [Copyright] Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use").

6. TECHNOLOGICAL PROTECTION

The ease of infringement and the difficulty of detection and enforcement will cause copyright owners to look to technology, as well as the law, for protection of their works. However, it is clear that technology can be used to defeat any protection that technology may provide. The Working Group finds that legal protection alone will not be adequate to provide incentive to authors to create and to disseminate works to the public. Similarly, technological protection likely will not be effective unless the law also provides some protection for the technological processes and systems used to prevent or restrict unauthorized uses of copyrighted works.

The Working Group finds that prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use is in the public interest and furthers the Constitutional purpose of copyright laws. Consumers of copyrighted works pay for the acts of infringers; copyright owners have suggested that the price of legitimate copies of copyrighted works may be higher due to infringement losses suffered by copyright owners. The public will also have access to more copyrighted works via the NII if they are not vulnerable to the defeat of protection systems.

Therefore, the Working Group recommends that the Copyright Act be amended to include a new Chapter 12, which would include a provision to prohibit the importation, manufacture or distribution of any device, product or component incorporated into a device or product, or the provision of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights under Section 106. The provision will not eliminate the risk that protection systems will be defeated, but it will reduce it.

The proposed prohibition is intended to assist copyright owners in the protection of their works.[566] The Working Group recognizes, however, that copyright owners may wish to use such systems to prevent the unauthorized reproduction, for instance, of their works, but may also wish to allow some users to deactivate the systems. Furthermore, certain uses of copyrighted works are not unlawful under the Copyright Act. Therefore, the proposed legislation prohibits only those devices or products, the primary purpose or effect of which is to circumvent such systems *without authority*. That authority may be granted by the copyright owner or by limitations on the copyright owner's rights under the Copyright Act.

It has been suggested that the prohibition is incompatible with fair use. First, the fair use doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work. Otherwise, copyright owners could not withhold works from publication; movie theatres could not charge admission or prevent audio or video recording; museums could not require entry fees or prohibit the taking of photographs. Indeed, if the provision of access and the ability to make fair use of copyrighted works were required of copyright owners -- or an affirmative right of the public -- even passwords for access to computer databases would be considered illegal. Second, if the circumvention device is primarily intended and used for legal purposes, such as fair use, the device would *not* violate the provision, because a device with such purposes and effects would fall under the "authorized by law" exemption.

Concern has also been expressed with regard to the ability to defeat technological protection for copies of works not protected by copyright law, such as those whose term of

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[566] Legislation of a similar type has been introduced with respect to technological protection of audiovisual works. *See*, *e.g.*, S. 1096, 102d Cong., 1st Sess., 137 Cong. Rec. S. 6034 (1991); H.R. 3568, 101st Cong., 1st Sess., 135 Cong. Rec. H. 7924 (1989).

protection has expired or those in the public domain for other reasons (such as ineligibility for protection). However, devices whose primary purpose and effect is to defeat the protection for such works would *not* violate the provision. The proposed provision exempts all devices, products and services primarily intended and used for legal purposes, which would include the reproduction and distribution of copies of works in the public domain. Further, a protection system on copies of works in the public domain would not qualify with respect to such copies as a system which "prevents or inhibits the violation of any of the exclusive rights of the copyright owner under Section 106." Works in the public domain are not protected by copyright, and thus have no copyright owner or exclusive rights applicable to them. Finally, while technological protection may be applied to copies of works in the public domain, such protection attaches only to those particular copies -- not to the underlying work itself.[567]

It has also been suggested that the provision places an unwarranted burden on manufacturers. The proposed amendment would impose *no* requirement on manufacturers to accommodate any protection systems, such as those required in Chapter 10 of manufacturers of digital audio recording devices.[568] The provision would only prohibit the manufacture of circumvention devices.[569]

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[567] Copies of the work in the marketplace free from copyright protection could be freely reproduced (and, in fact, the lower distribution costs of the NII may encourage increased availability of public domain works). Further, technological protection that restricts the ability to reproduce the work by technical means does not prevent reproduction by other means (such as quoting, manually copying, etc.).

[568] However, the Working Group does encourage the equipment manufacturing and copyright industries to work together on bilateral solutions for other types of recording devices and categories of works. In response to a request from Congressional leaders, representatives of the motion picture industry and the consumer electronics industry are presently drafting a joint legislative proposal addressing legal and technical measures pertaining to consumer recording of motion pictures. This proposal would set forth a technical means to be applied that would respect the legitimate commercial

Neither does the proposed amendment require copyright owners to use technological protection, or, if they do, to employ any particular type. Copyright owners should be free to determine what level or type of protection (if any) is appropriate for their works, taking into consideration cost and security needs, and different consumer and market preferences. Moreover, there is no evidence that one technological protection system could -- or should -- take care of all types of works.

Legislation of this type is not unprecedented. The Copyright Act already protects sound recordings and musical works by prohibiting the circumvention of any program or circuit that implements a serial copy management system or similar system included in digital audio recording devices and digital audio interface devices. Section 1002 provides:

> No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a [serial copy management system or similar system].[570]

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expectations of copyright owners and the reasonable and customary copying practices of consumers.

[569] Some have suggested that while manufacturers will surely know the primary *purpose* of the devices they produce, they may inadvertently find themselves liable for devices which they intended for legal purposes, but which have the incidental effect of circumventing copyright protection systems. For a manufacturer to find himself in this situation, the device would have to fail to be used primarily for the purpose for which it was sold, and be *primarily* used, to the surprise of its manufacturer, for defeating protection systems. It is likely that such a situation would occur rarely, if ever. (It would be self-defeating for copyright owners to begin using a protection system that an existing device could defeat.) However, the chapter contains an "innocent violation" provision for just such a case. A court would have the ability to reduce or eliminate altogether any damages for which the manufacturer would otherwise be liable, to avoid an unfair result but still protect the copyright owner.

[570] 17 U.S.C. § 1002(c) (Supp. V 1993).

The Communications Act includes a similar provision:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by [Section 605(a)] shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.[571]

Precedent for this type of legislation is also found in the international arena. The NAFTA requires each party to make it a criminal offense to "manufacture, import, sell, lease or otherwise make available a device or system that is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal . . . ."[572] In 1988, the United Kingdom enacted legislation prohibiting the manufacture, distribution or sale of a device designed or adapted to circumvent copy-protection systems.[573]

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571 47 U.S.C. § 605(e)(4) (1988).

572 *See* NAFTA, *supra* note 446, at art. 1707(a). The NAFTA also requires parties to make it a civil offense to "receive, in connection with commercial activities, or further distribute, an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal or to engage in any activity prohibited under [the criminal provisions]." *See* NAFTA, *supra* note 446, at art. 1707(b).

573 *See* Copyright, Designs and Patents Act of 1988, Part VII, § 296.

7. COPYRIGHT MANAGEMENT INFORMATION

In the future, the copyright management information associated with a work -- such as the name of the copyright owner and the terms and conditions for uses of the work -- may be critical to the efficient operation and success of the NII. Copyright management information will serve as a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work. The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of copyrighted works on the NII. Reliable information will also facilitate efficient licensing and reduce transaction costs for licensable uses of copyrighted works (both fee-based and royalty-free).

The public should be protected from false information about who created the work, who owns rights in it, and what uses may be authorized by the copyright owner. Therefore, the Working Group recommends that the Copyright Act be amended to prohibit the provision, distribution or importation for distribution of copyright management information known to be false and the unauthorized removal or alteration of copyright management information. Under the proposed amendment, copyright management information is defined as the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation -- to provide adequate flexibility in the future.[574]

While the proposed amendment does not require copyright owners to provide copyright management

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[574] Other information that may become important to the efficient operation of the NII includes the country of origin of the work, the year of creation or first publication, a description of the work, the name and other identifying information of licensees and standardized codes.

information, it does require that when such information is included, it be accurate. However, the Working Group encourages copyright owners to include the information to enable consumers to more easily find and make authorized uses of copyrighted works. Nor does it specify standardized formats or content, although private sector initiatives in this area are underway and are also encouraged by the Working Group. Finally, it does not require transmitting entities to include the copyright information as part of their transmission of a work where such information has been included in the work.[575] However, such a proposal deserves further consideration.

The proposal prohibits the falsification, alteration or removal of any copyright management information -- not just that which is included in or digitally linked to the copyrighted work. Many users will obtain such information from public registers, where the integrity of such information will be no less important. The proposal also contains a knowledge requirement; therefore, inadvertent falsification, alteration or removal would not be a violation.[576]

B. PATENT

The present law governing the eligibility of inventions for patent protection and the enforcement of patent rights appears adequate to address the needs of inventors and the public with regard to technology used on the NII. The NII will increase the accessibility and content of the body of prior art, which in turn will affect patentability determinations. The law governing information that properly is considered part of the prior art appears to be

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[575] While a transmitting entity may not remove the copyright management information, if such information is not included in the normal course of the transmission (such as when a work in digital form is broadcast through analog transmission), no violation would occur.

[576] For criminal liability, both knowledge and the intent to defraud are required.

adequate to address new forms of "printed" publications; however, some issues related to the authenticity, including the date of origination, the contents as originally disclosed, and the extent of dissemination of electronically disseminated publications, deserve further study.

The Working Group recommends that the Patent and Trademark Office obtain public input related to measures that can be adopted to ensure the authenticity of electronically-disseminated publications, particularly with respect to verifying the contents and date of first public dissemination of the publication, and evaluating the substantive value of the information contained in the publication as to its role in patentability determinations.

The Working Group also recommends that the PTO explore the feasibility of establishing requirements or standards that would govern authentication of the date and contents of electronically-disseminated information for purposes of establishing their use as prior art. Such standards would assist in patentability determinations, whether they occur before the PTO or before a court. To develop such standards, the PTO should invite public comment and work with other interested Federal agencies working on authentication standards outside the direct sphere of the patent system.

C. TRADEMARK

The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks must be sufficiently flexible to accommodate the changing goods and services available in connection with the NII and the GII. Such flexibility is essential to the owners of marks identifying goods and services connected with the NII and the GII, as well as to the continued viability of the International Classification system in the electronic information age. Therefore, the Working Group recommends that the Patent and Trademark Office, in the context of WIPO experts meetings on the International Classification system,

propose changes to the International Classification system to ensure that the system reflects the goods and services of modern information technology. Additionally, the Working Group recommends that the Patent and Trademark Office regularly update its *Manual for the Identification of Goods and Services* to reflect new goods and services used on or in connection with the NII and GII.