

White Paper

Copyright Law for the Digital Library: Framework of Rights and Exceptions

Prepared in furtherance of the Digital Music Library Project
National Science Foundation
NSF Award No. 9909068

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18 September 2001

I. Introduction

One can summarize succinctly the copyright principles of central importance to the successful development of the Digital Music Library (DML): Most of the music related works that may be available through the DML are likely protected by copyright law; many of the intended uses of the works could infringe the rights of the copyright owners; some of those uses are permitted under various exceptions in the federal copyright statutes. The core of American copyright law is built on exactly these principles. The law creates a series of rights that belong to the copyright owner, and the law creates exceptions to those rights for the benefit of the public.

This paper will offer a brief summary of the rights and exceptions provided in the U.S. Copyright Act, with emphasis on their relevance to the DML. Subsequent papers will elaborate on certain of the matters raised here, and this paper is intended to provide the crucial background for those future studies.

This paper is premised on the assumptions that copyright law in fact protects any particular work in question, and that the copyright has not expired. Those assumptions are detailed in another study for this project.¹ This paper is also centered solely on U.S. copyright law.² The rights and exemptions surveyed here tell only whether the work is subject to copyright restrictions and not whether other legal requirements may apply.

II. Rights of the Copyright Owner

A. The Economic Rights

The fundamental operative approach of copyright law is to grant legal rights to the creators of new works. The U.S. Constitution gives Congress the power to “secure to authors” the “exclusive right” to their “writings.”³ Congress has exercised that power principally in the enactment of Section 106 of the Copyright Act, which grants to copyright owners these essential rights with respect to most works:⁴

1. the right to reproduce the work in copies.
2. the right to make derivative works.
3. the right to distribute the work in copies to the public.
4. the right to perform the work publicly.
5. the right to display the work publicly.

The main point of the itemization of rights is to identify the specific legal rights that the owner holds and to identify correspondingly when someone may have violated those rights and committed an infringement. For example, if someone else holds the copyright to a particular work, and you make copies of it, you may have infringed the reproduction right. If you share the copies with colleagues, you may have infringed the distribution right. If you write a summary of the work, you may have infringed the right to make derivatives. If you stand on the street corner and show the work to the passersby and read it aloud to the assembled gathering, you may have violated the rights of public display and public performance. The ability to commit potential infringements is easy under the law; exemptions accordingly are of great importance to prevent a proliferation of violations and to allow many beneficial activities to proceed.

For now, one needs to understand the scope of rights established under the law. Consider this simple example:

Wanda is a professor of music and would like to include on a DML system images of photographs and documents about Igor Stravinsky, as well as copies of the scores to his compositions and sound files of recordings of his great works. Stravinsky died in 1971, thus many of his works remain under copyright protection. Assume for this example that all of the works that Wanda would like to use currently have copyright protection.

The possibilities for potential infringements are numerous. First, one could argue that reproducing the works from their original versions onto the DML constitutes a violation of the reproduction right. Second, one might plausibly assert that the conversion of the work to a digital format suitable for the DML is the making of a derivative work. Third, as each user accesses the materials, the DML is perhaps effecting a display of the work on the user’s computer screen. Fourth, if the user is able to listen to the sound recording, or watch a video, the activity could constitute a performance of the

work and yet another violation. Quite simply, the fundamental activities of the DML can theoretically give rise to a violation of all rights of the copyright owners.⁵

One can find some limited relief from the looming scope of possible violations in the specific listing of the types of works to which the owners' rights apply. When Congress enacted Section 106 in 1976, it applied some of the owners' right only to certain types of works. The rights of reproduction, distribution, and derivative works apply generally to all types of works. The display right, however, applies only to "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. . . ."⁶ The performance right applies only to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. . . ."⁷

Of particular significance to the DML, the right of public performance applies to "musical" works but not to "sound recordings." While Congress in the 1970s added sound recordings to the scope of copyrightable works,⁸ it also made clear that this class of newly protected works would not enjoy the full benefits of the law. In the case of the "performance" of a sound recording of music, the copyright owner of the underlying composition may well have rights, but the copyright owner of the recording does not.

This peculiar state of the law had yielded some excruciating and practical consequences. For example, when a recording is played on the radio, the composer has performance rights and is entitled to charge a royalty for the right to use the song on the air. But the performers who recorded the work have a copyright in the sound recording, and that copyright lacks a performance right. They have no recourse against the radio station and no legal right to collect royalties from the broadcast.

Congress addressed this discrepancy in 1995 by adding a sixth right of the copyright owner to the itemized list in Section 106. For the first time, the rights associated with the copyright to a sound recording included the right of public performance, but only with regard to "digital audio transmissions."⁹ An analog transmission, as in a typical radio or television signal, is not an infringement of this new right. But many radio stations are converting to digital transmission, and many listeners connect to Internet websites to receive their music of choice. These transmissions are often exactly within the scope of the law.

This provision, however, will merit further study in a future paper. It is filled with complications, convolutions, and exceptions.¹⁰ To conclude that all digital audio transmissions are subject to the new rights of the owner of the recording would be misleading; yet one can conclude now as before that the rights of the owner of the underlying composition apply to public performances of the recorded work, regardless of whether the content of the recording is music, literature, or yet some other type of work.

B. Moral Rights

Moral rights are a relatively new addition to American law, and they apply in the U.S. in a narrow manner to a limited class of works. Fundamentally, moral rights give creators of new works the right to prevent their mutilation or distortion, and the right to have the author's name on the work or removed from the work if so desired.¹¹ This legal right has been a powerful tool in many European countries, where film directors have successfully prevented alteration of their motion pictures, and where authors have protected the integrity of their stories and characters.

Such assertions of moral rights under U.S. copyright law would most certainly fail. First, moral rights in the U.S. apply only to a limited category of "works of visual art."¹² Generally, the rights extend only to artists with regard to their paintings, drawings, prints, or sculpture. Not even all such works gain these protections. Second, the rights generally apply only during the life of the artist.¹³ Copyrights survive for years after, but moral rights do not. Third, only the artist has the rights. They can be waived, but not transferred.¹⁴ Thus, a publisher or other party that succeeds to the ownership of the copyright will not also be able to assert moral rights. Finally, the rights established under American law are relatively narrow and conditional. For example, the artist has rights to prevent the destruction of a work, but only upon proof that the acts are "prejudicial" to the artist's "honor or reputation."¹⁵

Moral rights exist under American copyright law, but one can readily anticipate that they are not likely to have a significant application to many of the materials and uses of works in connection with the DML.

C. New Rights Under the Digital Millennium Copyright Act (DMCA)

The DMCA, enacted by Congress in October 1998, added new rights for copyright owners, notably the right to prevent "circumventions" of "technological protection systems" controlling access to copyrighted works, and the right to include "copyright management information" (CMI) on copies of works.

The first of these provisions is a broad right that can effectively restrict access to protected works that might be available online or on a CD-ROM or on other media that can be subject to a password restriction or other access control. Bypassing that system to reach the materials can now be a new form of violation of copyright law.¹⁶ This statute includes numerous exceptions that permit some users to circumvent the restrictions, but only under narrow and meticulous conditions.¹⁷ Even the provision ostensibly for the benefit of libraries¹⁸ will have limited practical use, and if it is incorrectly applied the action becomes a violation, and the user can face stiff penalties.¹⁹

Another new form of violation can arise from the removal or alternation of CMI on a work.²⁰ CMI is broadly defined to include not only the copyright notice, but also the

name of the author or copyright owner, the title of the work, and the performers or writers credited on an audiovisual work.²¹ CMI also encompasses terms and conditions for the use of work—such as restrictive prohibitions printed in a book as well as “click-on” contracts governing downloaded materials.

This law creates a violation, for example, when one intentionally removes or alters CMI in connection with inducing or enabling an infringement of the work.²² A violation can occur under several other fact patterns, but a violation generally requires an intentional action or at least knowledge that the CMI has been removed or altered. As a practical matter this law signals great caution before tampering with the CMI on any work, and in the case of a digital library any work uploaded onto the system should include all CMI that might appear on the original.²³

III. Exceptions to the Rights of Copyright Owners

Just as the granting of rights to owners is a fundamental precept of American copyright law, so is the creation of exceptions to, or limitations on, those rights. The constitutional provision that empowers congress to establish rights for owners specifies that those rights are for the purpose of “promot[ing] the progress of science and useful arts.” The theory is that by granting rights, the law is encouraging the creation of new works and the investment in their production and dissemination. The law also includes the theory that limitations on those rights similarly prevent restrictive monopolies and permit the public to utilize the works in certain beneficial ways that pose relatively little risk to the owners and are their own form of “progress.”

The U.S. Copyright Act includes sixteen separately numbered statutory sections that detail various exceptions to the rights of owners.²⁴ “Fair use” is only one of those sections.²⁵ Some of them are of special application for cable television stations and satellite broadcasters.²⁶ Some provisions only apply to architectural works,²⁷ computer programs,²⁸ coin-operated jukeboxes,²⁹ and licenses for the use of music in connection with transmissions of educational public television broadcasts.³⁰ These provisions are unlikely to be important for the DML.

Some of the statutory exceptions will merit detailed analyses in future studies. Most notably in this group will be fair use;³¹ performances and displays in classrooms and in distance education;³² the use of materials by libraries for preservation, research, and interlibrary loans;³³ the complications of the rights associated with “digital audio transmission” of sound recordings;³⁴ and the “compulsory license” for making recordings of existing musical works.³⁵

A few other exceptions may have some possible relevance to the DML and may be summarized relatively succinctly. The following is an overview of those provisions, and they are not likely to be the subject of more detailed future studies under the DML project.

Section 109(a): The First-Sale Doctrine.

This provision broadly allows a person who acquires a lawfully made copy³⁶ of a copyrighted work to transfer possession or ownership of that particular copy to another person.³⁷ It is a major exception to the copyright owner's distribution right. It is also an essential exception that makes many practical uses of works possible. For example, without the first-sale doctrine, a retailer would not be able to sell a book to a customer, and the buyer could not give the book to a friend. Without this doctrine, a library could not allow users to check out books, music scores, and sound recordings, and the local video store could not rent tapes to customers. All of these activities could otherwise be unlawful distributions of copyright protected works.

The provision is not comprehensive. In particular, through a series of amendments beginning in 1984, Congress barred application of the doctrine to the commercial lending of sound recordings and computer programs.³⁸ Congress was acting to restrict businesses that rented, for a fee, these particular types of media that a customer could easily duplicate. In the process, however, Congress specified in the statute that common lending of these materials by nonprofit educational institutions and by nonprofit libraries is not prohibited.

Nevertheless, this provision may bear little relationship to the DML. It applies to a transfer of possession or ownership of the copy itself. Generally, the DML will not transfer a copy of a work, but rather will permit users to access stored files for viewing or listening. The first-sale doctrine could apply only if the digital library does not make a copy of the work, but instead transfers to the user the actual content file in the library's possession.

Some application of this doctrine nevertheless remains possible. For example, if as a matter of technological processing, the DML actually transmits to the user a copy of a file in order to effectuate access, one might argue that such transmission is a distribution of the work, and that the distribution is not an infringement because of the first-sale doctrine. A condition to the doctrine, however, is that the copy transferred be "lawfully made" under the terms of the Copyright Act. Application of Section 109(a) thus depends on reaching a satisfactory conclusion that the copy was made within the limits of "fair use" or some other exception or with permission.

Section 109(c): Displays of the Original Work.

Like the first-sale doctrine, this provision is essential for the lawful pursuit of many common activities. It is a major exception to the display right of the copyright owner, and Section 109(c) permits the owner of a "lawfully made" copy³⁹ of a work to display that copy "to viewers present at the place where the copy is located."⁴⁰ This simple statute makes possible the display of artwork in museums and the showing of new books and other works in the display cases of stores. Without this right, an artist or photographer could control all public viewings of a work, a shop could not put the latest

works in the front window, and a library might not even be able to place materials on shelves that are accessible to the public.

This statute applies only to displays and not to performances. Thus, it can apply to viewings of images, text, single images of an audiovisual work, and other static works.⁴¹ It cannot apply to performances of audiovisual works, sound recordings, or musical works.

This provision might have some application to the DML. Again, the law presupposes that the copy in question is “lawfully made,” so that legal analysis is in order here as well.⁴² That provision might be most easily satisfied if the DML includes materials that are made with permission, or if the materials are acquired in digital format and the digital original from the supplier is the copy that is stored on the DML system.⁴³ On the other hand, Section 109(c) permits the display of the work “either directly or by the projection of no more than one image at a time,” but only “at the place where the copy is located.” In other words, if the DML includes a lawfully made work, this provision of the Copyright Act still restricts its viewing only to the location of the DML itself. The law has not elaborated further. Developers of the DML and other systems will need to explore further whether this condition confines access to the building or general physical location of the computer system, or whether access is permitted within a broader physical space, such as throughout the campus or university and perhaps at terminals outside those geographical boundaries.

Section 109: Two More Requirements

Both the first-sale doctrine and the provision permitting displays in Section 109(c) share one more crucial requirement: if the party seeking to transfer or display the work acquired it directly from the copyright owner, the user must have received actual ownership of the copy and must not have acquired possession “by rental, lease, loan, or otherwise, without acquiring ownership of it.”⁴⁴

To understand this language, consider this possibility: A library sometimes acquires works directly from the copyright owner, such as when a composer donates manuscripts to the library or archives. The library has the statutory right to further transfer possession of those materials and to display them, but only if the library has acquired actual ownership of the materials. If, however, the library acquired the materials by loan from the copyright owner, then the library does not have the rights granted under Section 109. By contrast, if the library received the materials by loan from someone other than the copyright owner, then the library is permitted the exercise the rights under Section 109(a) and 109(c).

All of these situations are subject, of course, to any conditions in any agreement between the parties and subject to general law related to the dispossession and use of the relevant property. Indeed, if the library has received materials as a loan from a collector or from the copyright owner or from anyone, the arrangement should be documented in

an agreement that details the library's rights to make any further conveyances of the works as well as the right to make displays and other uses of the work.

A second requirement applies only to the first-sale doctrine of Section 109(a), and it is a baffling statutory change that will likely prove arcane and unworkable in most situations. As detailed in another paper,⁴⁵ effective 1 January 1996, Congress "restored" the copyrights to foreign works that had expired in the U.S. due to lack of formalities or because they were sound recordings fixed before 15 February 1972.⁴⁶ At the same time, Congress amended Section 109(a) to bar the first-sale doctrine with respect to copies of works that have "restored" copyrights, if the copies were made before the rights vested, which is generally the beginning of 1996.

Perhaps this code provision had some well-meaning purpose—perhaps to remove from circulation copies of works that were produced during the years when the foreign claimants had no legal rights under American law. But in practical application, this statute is bizarre. It essentially would require, for example, a library or a bookstore to investigate each work to determine not only whether it is subject to a restored copyright, but also whether the particular copy was made before a certain date.⁴⁷ Vast quantities of foreign works that do not meet the statutory requirements must be removed from circulation. Fortunately, this requirement only bars the distribution of the copies "for purposes of direct or indirect commercial advantage." Thus, the for-profit bookstore might have to remove materials from its stock, as might also the private corporate library, but the nonprofit library should be able to continue lending copies of the earlier copies despite their "restored" copyright status.

Section 121: Formats of Works for Persons with Disabilities

Congress added this section in 1997 to enable certain organizations to make and distribute special formats of works "exclusively for use by blind or other persons with disabilities."⁴⁸ As with most exceptions in the Copyright Act, Section 121 is highly specific and limited. The provision applies only to copies or phonorecords of "previously published, nondramatic literary" works. Thus, it applies to typical textbooks, nonfiction, and novels, as well as to "phonorecords" of sound recordings of the same works. But the statute does not apply to audiovisual works, musical works, sound recordings of musical works, or dramatic works such as plays. Moreover, only certain nonprofit organizations or governmental agencies that have a "primary mission" of providing services for persons who are blind or have other disabilities.⁴⁹ The details in the statute establish further restrictions on the usefulness of this statute.

This provision has only some modest possibilities for benefiting the DML. It is useful only if the DML reaches persons who are blind, if the university or a unit of the university qualifies as an authorized agency to offer these services, and if the special formats of the works are exclusively for the users who are blind or have other disabilities. Even then, the statute has no application to musical works or sound recordings of music.

At best, the DML might make use of this statute with regard to text and other nondramatic literary works.

IV. Conclusion

This overview of rights and exceptions is a sample of the analysis that lies ahead in determining the relevant law and applying it to the facts involved in the DML. The few summaries of specific exceptions set forth above demonstrate that even the simplest of exceptions involve numerous conditions and requirements and ultimately apply only to narrow ranges of possibilities. When they apply, they are powerful and valuable. When they do not apply, they are of no help and are sometimes the source of much frustration.

Nevertheless, the framework of rights and exceptions is at the center of understanding and applying the fundamentals of copyright law to the DML. If a proposed use includes the exercise of reproduction, distribution, or one of the other rights of the copyright owner, the use can be an infringement and lead to potentially severe legal consequences. On the other hand, if the use can fit within one of the exceptions, the use is lawful and is not an infringement, and the various penalties for a violation cannot apply.

Working with the framework of rights and exceptions can determine whether the deployment of the DML can lead to copyright infringement or is perfectly permissible under the law. Future studies in connection with the DML will explore in greater detail many of the issues raised in this paper for a fuller understanding of the relevant copyright law.

In working with the exceptions, however, one must bear in mind that almost all of them are highly detailed in their scope of coverage. They usually apply only to narrow classes of works, only under rigorously confined circumstances, and only with regard to specific uses of the works. If a specific exception can apply to a desired activity of the DML, the law serves the needs well. But to the extent that no relevant exception exists, or if the relevant exception is too narrow or restrictive, one can still turn to the broader and more flexible exception of fair use. Not everything will be within fair use, to be sure. But fair use is flexible in its scope of coverage and its applicability to all types of works and the vast variety of innovative applications of technology.

Future papers prepared in accordance with the DML project will examine details of fair use and other relevant exceptions to the rights of copyright owners. The following provisions of American copyright law are likely to be the subject of detailed studies:

- Section 107: Fair Use
- Section 108: Copying by Libraries
- Sections 110(1) and 110(2): Performances and Displays for Education
- Audio Home Recording Act

¹ For additional papers on copyright issues related to the DML, see <http://www.dml.indiana.edu/legal/index.html>.

² The U.S. Copyright Act is codified at 17 U.S.C. § 101 et. seq.

³ U.S. Const., art I, sec. 8.

⁴ 17 U.S.C. § 106. Section 106 also includes a sixth itemized right, related to the performance of a sound recording. That provision is detailed later in this paper.

⁵ Bear in mind that this paper focuses on the fundamentals of copyright law. While it will survey the possibilities of infringement and the possibilities of exceptions to the rights of owners, the use of music in particular is often subject to performance-right licenses available from ASCAP, BMI, and other agencies.

⁶ 17 U.S.C. § 106.

⁷ 17 U.S.C. § 106.

⁸ This issue of copyright protection for sound recordings is enormously complex. Sound recordings have the benefit of copyright protection in the U.S. only if they were made on or after 15 February 1972. 17 U.S.C. § 301(c). On the other hand, effective as of the beginning of 1996, Congress extended protection to sound recordings from before that date if they were of foreign origin. Thus, foreign sound recordings enjoy greater rights than do domestic works. 17 U.S.C. § 104A. This aspects of copyright law are summarized in another paper at <http://dml.indiana.edu/pdf/dml-copyright-duration-report.pdf>. Adding to the complications surrounding sound recordings, Congress in 1995 added a new limited right of public performance for both domestic and foreign recordings in the context of “digital audio transmissions,” as mentioned in the next paragraphs of the present paper.

⁹ 17 U.S.C. § 106(6).

¹⁰ 17 U.S.C. § 114(d).

¹¹ 17 U.S.C. § 104A(a).

¹² 17 U.S.C. § 104A(b). The Copyright Act further defines “work of visual art” to encompass only certain types of art works, and only if produced in 20 or fewer copies. 17 U.S.C. § 101.

¹³ 17 U.S.C. § 104A(d). The statute generally applies moral rights only to works created on or after 1 June 1991. The statute also applies moral rights to works created before that date, but only if the title to the work has not been transferred by the author (although the law grants no rights with respect to violations that may have occurred before that date). In a peculiar twist, for such works, the moral rights also last not merely for the life of the author, but through the entire term of the copyright on the work, which is generally seventy years after the author’s death.

¹⁴ 17 U.S.C. § 104A(e).

¹⁵ 17 U.S.C. § 104A(a).

¹⁶ 17 U.S.C. § 1201(a)(1)(A) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

¹⁷ 17 U.S.C. § 1201(d)(j).

¹⁸ 17 U.S.C. § 1201(d) (permitting under rigorous conditions the right of libraries and educational institutions to access restricted materials to determine whether they would like to purchase the work).

¹⁹ 17 U.S.C. §§ 1303 & 1204 (establishing civil and criminal penalties, although § 1204(b) excludes libraries and educational institutions from criminal penalties).

²⁰ 17 U.S.C. § 1202(b).

²¹ 17 U.S.C. § 1202(c).

²² 17 U.S.C. § 1202(b).

²³ Depending on the interpretation one brings to the statute, this provision has profound implications for the management of information resources and their availability on the DML or by any other means. The statute defines CMI with extraordinary breadth, then bars its removal under certain conditions. The statute never specifies whether the CMI must be provided by the copyright owner in order to be protected. Thus, the DML project will most assuredly include descriptive or identifying “metadata” on the electronic files associated with a particular work. The breadth of the statute suggests that possibility that one could find an infringement when even this metadata is altered or removed, even though it was never seen or approved by the copyright owner. Further, if any of the metadata erroneously identifies the work or any of its attributes, that, too, could conceivably be a violation. These possibilities seem highly unlikely, and violations can

generally occur only if the individual acted knowingly or intentionally in providing the flawed CMI or altering or removing the CMI, but these example also illustrate the deficiencies in the drafting of the statute and the potentially contentious and controversial situations that the new law is likely to engender.

²⁴ 17 U.S.C. §§ 107-122.

²⁵ 17 U.S.C. § 107.

²⁶ 17 U.S.C. §§ 111, 119 & 122.

²⁷ 17 U.S.C. § 120.

²⁸ 17 U.S.C. § 117.

²⁹ 17 U.S.C. § 116.

³⁰ 17 U.S.C. § 118.

³¹ 17 U.S.C. § 107.

³² 17 U.S.C. § 110(1) & (2).

³³ 17 U.S.C. § 108.

³⁴ 17 U.S.C. § 114(d).

³⁵ 17 U.S.C. § 115.

³⁶ The notion of a “lawfully made” copy is of enormous importance in this doctrine. The first-sale doctrine applies only if the copy itself is one that is “lawfully made under this title,” which means that the copy is made either with the authority of the copyright owner in exercise of the owner’s reproduction right, or the copy is made as a matter of fair use or other right established under the Copyright Act for someone other than the copyright owner to make the copy. Thus, a researcher who makes a copy of an article or recording that is within fair use may in turn give or lend that copy to a colleague or anyone else just as if the copy had been specifically authorized by the copyright owner and sold through customary commercial channels.

³⁷ 17 U.S.C. § 109(a).

³⁸ 17 U.S.C. § 109(b)(1)(A).

³⁹ See note 36 above.

⁴⁰ 17 U.S.C. § 109(c).

⁴¹ In the definitions in the Copyright Act, a “display” of “a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 U.S.C. § 101.

⁴² See note 36 above.

⁴³ Later studies in connection with the DML will explore fair use and the specific statute allowing the library to make copies for preservation and research. These provisions of the Copyright Act hold additional promise for “lawfully made” copies.

⁴⁴ 17 U.S.C. § 109(d).

⁴⁵ <http://dml.indiana.edu/pdf/dml-copyright-duration-report.pdf>.

⁴⁶ 17 U.S.C. § 104A(h)(6).

⁴⁷ For most works from most countries, the date of importance will be 1 January 1996. Yet the statute provides for a later date to be critical, if the work is from a country that, for example, joins the World Trade Organization or adheres to the Berne Convention on a later date, or if the work in question is the subject of a formal “Notice of Intent to Enforce” the restored copyright. See 17 U.S.C. § 104A(c). Not only does the statute require meticulous investigation of each work, but the construction of the language fails to address how the law might apply to works that are not the subject of the formal notice procedures in the statute.

⁴⁸ 17 U.S.C. § 121.

⁴⁹ 17 U.S.C. § 121(c)(1).