

**Boston University
Journal of Science & Technology Law**

Column

Copyright Protection for Photographs in the Age of New Technologies

Michael S. Oberman, Esq. & Trebor Lloyd, Esq.

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Copyright Protection for Photographs in the Age of New Technologies[†]

Michael S. Oberman, Esq. and Trebor Lloyd, Esq.*

1. Introduction

Over one hundred years ago, the United States Supreme Court first confronted issues at the intersection of new technology and copyright law. In 1884, the new technology was photography, and the Court was called upon to decide whether a photograph was the "writing" of an "author" that could be protected under the Copyright Clause of the United States Constitution.¹ Put another way, did a photographer who reproduced the exact features of his subject by means of a camera create a copyrightable work? The Supreme Court decided that a professional portrait photographer engaged in much more than the manual operation of a new machine. By posing his subject and selecting and arranging costume, background, and lighting, the photographer produced a protectable expression "entirely from his own original mental conception."² Since the decision, photographer's choices of subject matter, lighting, and camera angle have repeatedly been found to comprise a creative expression that makes a photograph more than a mechanical fixation

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* Mr. Oberman, A.B., cum laude, 1969, Columbia University J.D., cum laude, 1972, Harvard Law School, is a partner in the New York firm of Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, where he practices intellectual property law and commercial litigation. Mr. Lloyd, B.A., 1966, Jacksonville University, J.D., magna cum laude, 1993, Benjamin N. Cardozo School of Law, is an associate at Kramer Levin, and also practices intellectual property law and commercial litigation. Wendy Stryker, a third-year law student at New York University, who was a summer associate at Kramer Levin, assisted in the preparation of this Column. A version of this Column appeared in *The National Law Journal*, Copyright 1995, The New York Law Publishing Company.

¹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); see also U.S. CONST. art. I, § 8, cl. 8.

² *Burrow-Giles*, 111 U.S. at 60.

lacking originality.³ The photographer's eye, in effect, reflects "the personal reaction of an individual upon nature, . . . something irreducible, which is one man's alone."⁴ [1]

Now, at the edge of a new century, a rich stock of photographic images can be appropriated and manipulated in ways that were previously unachievable. New computer technologies can convert photographs to a digital form that can be colorized, texturized, stretched, squeezed, or otherwise altered and then transported in the blink of an eye.⁵ Digital scanning technology also makes it inexpensive and easy to obtain high-quality copies of a photographer's works, and to incorporate these photographs, or elements of these photographs, into new and different works. [2]

Case law provides guidance, if only by analogy, as to what might constitute infringement in specific instances involving the new technologies. In particular, familiar concepts, including the exclusive rights given to an author by section 106 of the Copyright Act of 1976 ("Act") to control reproductions of, or derivative works based upon, a copyrighted work, and the defense of fair use under section 107 of the Act, point the way.⁶ This column discusses what has transpired so far in this largely undeveloped area and attempts to map out the contours of infringement of photographs in a new age. [3]

2. *Scope of Infringement*

³ See *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir.), cert. denied, 113 S. Ct. 365 (1992); see also *Gentieu v. John Muller & Co., Inc.*, 712 F. Supp. 740, 742 (W.D. Mo. 1989), appeal dismissed, 881 F.2d 1082 (8th Cir. 1989); *C. Blore & D. Richman, Inc. v. 20/20 Advertising, Inc.*, 674 F. Supp. 671, 677 (D. Minn. 1987); *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987); *Pagano v. Chas Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).

⁴ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

⁵ "It's always been possible for someone to take bits and pieces of a work manually. Those are issues that we've been facing for over 100 years, but . . . digitalization has facilitated this to a degree we haven't contemplated before." Susan Orenstein, *Digital Multimedia Madness*, LEGAL TIMES, Sept. 13, 1993, at S29 (quoting Paul Goldstein). See generally PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (1994). Digital technology is now sufficiently affordable that the number of people with access to equipment to make high-quality digital reproductions of photographs has increased dramatically. James A. Martin, *Computers Make It Easy to Steal As Technology Advances, Copyrighted Materials Are Becoming More Vulnerable*, S.F. EXAMINER, Apr. 17, 1994, at C1.

⁶ See Copyright Act of 1976, 17 U.S.C. §§ 106, 107 (1994). Where an infringement involves a numbered, limited set of photographs, a defendant may also violate the so-called moral rights of the photographer, the rights of attribution and integrity set forth in 17 U.S.C. § 106A.

Subject to the fair use defense,⁷ the appropriation of an existing photograph is likely to infringe upon the photographer's right to control the reproduction of that photograph, as well as the right to authorize the creation of derivative works based upon it. Courts also have indicated that the subsequent transportation of the digitized photographic image may infringe the photographer's rights of distribution and display.⁸ [4]

At the outset, the initial scanning of photographs is likely to constitute a copyright infringement in itself. Only a limited number of claims involving digital scanning of photographs have been publicly asserted to date, and none has been judicially resolved.⁹ Courts generally have recognized, however, that the initial input of material into a computer constitutes copying.¹⁰ [5]

⁷ See *infra* Part 3.

⁸ See, e.g., *Playboy Enterprises, Inc. v. Starware Publishing Corp.*, 900 F. Supp. 433, 438 (S.D. Fl. 1995). In *Playboy*, the defendant, a CD-Rom manufacturer, digitally reproduced Playboy's photographs onto approximately 10,000 CD-Rom disks, without authorization. *Id.*

⁹ In *FPG Internal Corp. v. Newsday, Inc.*, 94 Civ. 1036 (S.D.N.Y. 1994), FPG, a photo stock house, and some photographers claimed that Newsday had scanned the stock house catalogue and used the scanned photos without consent. *Id.* (complaint on file with author). Newsday apparently did not deny that the photographs had been substantially copied by means of a computer scan, but instead asserted that the subsequent uses made of the photographs were fair uses. David Walker, *Newsday, FPG Settle Copyright Infringement Dispute*, PHOTO DISTRICT NEWS, Jan. 1995, at 24, 26. The parties settled the dispute prior to judgment on the merits. *Id.*; see also Charise K. Lawrence, *David Bowie Makes Amends Over Bloody Good Photos*, NAT'L L.J., July 3, 1995, at A27. The authors represented photographer Dona Ann McAdams in a dispute with musician David Bowie, who authored a magazine article that included a computer-generated print of performance artist Ron Athey that was based upon McAdams's photograph. The use was without acknowledgment of McAdams's photograph; Bowie maintained his print was a fair use of the photograph. This dispute was settled amicably out of court. *Id.*

¹⁰ See, e.g., *Micro-Sparc, Inc. v. Amtype Corp.*, 592 F. Supp. 33, 35 (D. Mass. 1984) (quoting FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS ("CONTU Report") at 31) (stating that the placement of a work into a computer is the preparation of a copy); *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 600 F. Supp. 933, 943 (N.D. Ill. 1984) (holding that the inputting of data directly into a computer data base constitutes copying); 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.08 (1995) (inputting a computer program into a computer is the preparation of a copy); see also *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (copying for purposes of copyright law occurs when computer program is transferred from a storage device to computer's random access memory); *Williams Electronic, Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 876-77 (3d Cir. 1982) (same); *Advanced Computer Serv. v. MAI Sys. Corp.*, 845 F. Supp. 356, 362-63 (E.D. Va. 1994) (copying for purposes of copyright law occurs when a computer program is transferred from a storage device to computer's read only memory); *Bly v. Barbury Books, Inc.*, 638 F. Supp. 983, 986 (E.D. Pa. 1986) (inputting of data directly into a computer data base constitutes copying). This conclusion has been buttressed by a recent "White Paper" issued by the Commerce Department and chaired by Bruce A. Lehman, Commissioner of Patents and Trademarks, which expressly opines that the scanning of a photograph into a digital file is the making of a copy that may implicate the reproduction rights of the photographer or copyright holder. BRUCE A. LEHMAN, U.S. DEPT. OF COMMERCE, INTELLECTUAL PROPERTY AND THE

In *West Publishing Co. v. On Point Solutions, Inc.*¹¹ the defendant, a publisher of databases for the legal profession, used a computer scanner and optical character recognition software to scan West Publishing Company's copyrighted advance sheets of the Southern Reporter. The scanning process copied entire West case reports, including West's copyrightable headnotes and synopses. While the protectable elements of the West publications were deleted before the cases were placed on defendant's databases, the temporary storage of the full case reports was found to be an intermediate copying that infringed West's copyrights.¹² [6]

In *Curtis v. General Dynamics Corp.*,¹³ plaintiff's photograph, "Wheelchair on a Porch in Athens, Ohio," was copied on a photostat machine, cropped, enlarged, and placed into a "comprehensive" to be used as a model during the development of advertising based on the wheelchair image.¹⁴ A subsequent photographer used the comprehensive as a model for a new photograph, and that second photographer's work was then used in the advertisement.¹⁵ The court first found that the making of a copy of the photograph on the photostat machine was a copyright infringement in itself.¹⁶ It then found that the creation and use of the comprehensive were a second infringement.¹⁷ Finally, the court found that the use of the second photographer's work in the advertisement was also an infringement of the original photograph.¹⁸ [7]

Suppose that unlike in the *Curtis* case, someone were to scan a protected photograph, but instead created a final product that was *not* substantially similar to the original work. Would the intermediate copy still be infringing if used to make a final product that was substantially *different* from the original work? Although

NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 65 (Sept. 1995).

11 No. CIV.A.1:93-CV2071MHS, 1994 WL 778426 (N.D. Ga. Sept. 1, 1994).

12 *Id.* at *2. The scanned copies were contained in the defendant's computer's random access memory, fixed discs, and floppy disks. *Id.*

13 18 U.S.P.Q.2d (BNA) 1608 (W.D. Wash. 1990).

14 *Id.* at 1612.

15 *Id.* at 1613.

16 *Id.* at 1615-16.

17 *Id.*

18 *Id.* at 1617.

scanning of photographs in this context seems to be an unexplored question, again, case law presents close analogies. [8]

In *Walker v. University Books, Inc.*¹⁹ the narrow question before the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) was whether the plaintiff’s copyrighted work, a set of 72 “I Ching,” or fortune-telling, cards, could be infringed by the defendant’s blueprints for cards that the defendant had not yet produced.²⁰ The court below had decided that “plans, preparations, or blueprints of a final product” were not “*tangible reproduction[s]*” of a work that could give rise to liability for damages.²¹ The Ninth Circuit disagreed and held that an intermediate copy of a protected work, although existing in a different medium from the protected work, could itself be infringing.²² If there was infringement, the plaintiff could recover statutory damages, and possibly attorney’s fees, despite the fact that the defendants had not realized any economic gain from the intermediate copy.²³ [9]

In *Sega Enterprises Ltd. v. Accolade, Inc.*,²⁴ another Ninth Circuit decision, the court held that intermediate copying of computer object code through reverse engineering could infringe, regardless of whether the end product also infringed.²⁵ While the court found that the particular intermediate copying before it was a fair use, it reaffirmed the general holding of *Walker I* that intermediate copying could be an infringement in and of itself.²⁶ [10]

Applying the reasoning of these two cases, there appears to be little doubt that the optical scanning of a photograph alone may infringe. The photographer has the right to decide whether and, if so, the terms upon which, the use of an original photograph is to be authorized. Consequently, it would appear that a photographer potentially could be entitled to some measure of damages where an original work has been scanned without authorization, even if the infringer’s final product bears little resemblance to the original work, and even if the intermediate work had no commercial use. [11]

¹⁹ 602 F.2d 859 (9th Cir. 1979) [hereinafter *Walker II*].

²⁰ *Id.* at 862.

²¹ *Walker v. University Books, Inc.*, 193 U.S.P.Q. (BNA) 596, 602 (N.D. Cal. 1977).

²² *Walker II*, 602 F.2d at 864.

²³ *Id.*; see 17 U.S.C. § 505 (1994).

²⁴ 977 F.2d 1510 (9th Cir. 1992).

²⁵ *Id.* at 1519.

²⁶ *Id.* at 1518.

Familiar principles of copyright law should govern whether an end use, such as publication, of a scanned photograph constitutes infringement. The basic test for copyright infringement is access plus substantial similarity.²⁷ Where the photograph has been scanned *and* altered, the issue to be answered is whether the original work is qualitatively important in the allegedly infringing work. If a central or important image of the original work gives rise to the commercial or aesthetic appeal of the allegedly infringing work, substantial similarity should be found.²⁸ Thus, absent fair use or another defense, infringement should be found. [12]

In addition, one court specifically held in *Playboy Enterprises, Inc. v. Frena*²⁹ that the display of photographic images on a computer screen, and the downloading or uploading of those images, might be an infringement of the photographer's or copyright holder's rights of display and distribution.³⁰ In *Playboy*, the defendant, an operator of a subscription computer bulletin-board server, displayed copyrighted Playboy photographs on the bulletin board.³¹ Subscribers to the service both transferred the photographic images from the bulletin board to their own personal computers ("downloading") and transferred the images from these personal computers to other persons ("uploading").³² [13]

The court first ruled that supplying a product that contained unauthorized copies of Playboy's photographs was a "distribution" in violation of the right to public distribution guaranteed to copyright holders.³³ In addition, the court held that the display of the photographic images on a computer screen was a showing of photographic images by means of a device or process to a substantial enough

²⁷ 3 NIMMER & NIMMER, *supra* note 10, §§ 13.02, 13.03.

²⁸ See, e.g., *Rogers*, 960 F.2d at 301. In *Rogers*, the defendant's sculpture "String of Puppies" was closely modeled after the plaintiff's photograph "Puppies." *Id.* at 304-05. The Second Circuit found the sculpture to be an infringing use, and further held the fair use defense inapplicable, despite the defendant's contention that the primary purpose of the work was for social commentary. *Id.* at 308-11; see also *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 713 (S.D.N.Y. 1987) (concluding that a poster infringed upon an artist's work even though only a small portion of the poster's design could be considered similar).

²⁹ 839 F. Supp. 1552 (M.D. Fla. 1993).

³⁰ *Id.* at 1556.

³¹ *Id.* at 1554.

³² *Id.* at 1562.

³³ *Id.* at 1556; see 17 U.S.C. § 106(3).

audience that the display constituted a "public display."³⁴ Such a public display was, again, a violation of a right reserved to the copyright holder.³⁵ [14]

3. Fair Use

Even if the copying and use of a photograph are otherwise infringing, a person might still avoid liability under the "fair use" doctrine. This doctrine recognizes that at times the "competing interest of society in the untrammelled dissemination of ideas"³⁶ may outweigh the interests of the copyright holder. Under section 107 of the Copyright Act of 1976, the courts consider four factors in determining fair use: (1) the purpose and character of the [second] use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁷ It is within the area of fair use that the user's desire to exploit the new technologies, and the photographer's interest in the control and marketing of the original work, are likely to be resolved. [15]

The Supreme Court's most recent decision on fair use is *Campbell v. Acuff-Rose Music, Inc.*,³⁸ where the question was whether 2 Live Crew's parody of Roy Orbison's song, "Oh, Pretty Woman," was a fair use. From the point of view of the photographer concerned about digital scanning, the most important pronouncement in *Acuff-Rose* is that a "transformative" derivative work that incorporates substantial elements of pre-existing works might be a fair use, even if that use was a concededly commercial one. A "transformative" work was described as a work that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."³⁹ Such a work, according to the Court, furthers the goals of copyright, which are to promote science and the arts.⁴⁰ [16]

³⁴ *Playboy*, 839 F. Supp. at 1556-57; see 17 U.S.C. § 101.

³⁵ *Playboy*, 839 F. Supp. at 1556-57.

³⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 n.12 (1984) (quoting foreword to B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT vii-viii (1967)).

³⁷ 17 U.S.C. § 107.

³⁸ 114 S. Ct. 1164 (1994); see generally Brief of Amici Curiae National Music Publishers' Association, Inc., Michael Jackson D/B/A/ ATV Music, Mac Davis, Dolly Parton, Nashville Songwriters' Association International, National Academy of Songwriters and The Songwriters Guild of America in Support of Respondent, *Campbell v. Acuff-Rose Music*, 114 S. Ct. 1164 (1994) No. 92-1292 (Marvin E. Frankel, Esq., and Michael S. Oberman, Esq., were the principal authors of the brief).

³⁹ *Acuff-Rose*, 114 S. Ct. at 1171.

One commentator has suggested that *Acuff-Rose* has significantly shifted the fair use balancing test to favor those who use significant portions of the unlicensed, pre-existing copyrighted works of others to form "new creative, commercial 'derivative works'," particularly creators of digital and multimedia works.⁴¹ The Supreme Court's view of transformative use, however, was articulated particularly in the context of parody, a species of comment and criticism. The Supreme Court noted that works of parody by their very nature must copy the heart of the pre-existing work.⁴² It also pointed out that a parody, unlike other derivative works, is unlikely to harm a copyright holder's market, in that the parodic work is not likely to be a market substitute for the copyright holder's original work.⁴³ Outside the area of parody, moreover, the purpose for substantial borrowing should be more carefully scrutinized.⁴⁴ Verbatim copying may reveal a lack of transformative character in the new derivative work.⁴⁵ If the underlying work is being copied merely to "avoid the drudgery in working up something fresh," the other factors, such as the commercial nature of the derivative work and the derivative work's ability to serve as a market substitute for the copyright holder's work, "loom larger."⁴⁶ [17]

A finding of fair use is, to be sure, a fact-sensitive determination, and it is difficult to predict how specific claims will be resolved without a full fact pattern. The appropriation of an existing photograph for a computer-generated new work is nonetheless unlikely to be found to be a fair use, especially if the new work borrows heavily from its source. Photographs are commonly licensed, and stock photo sources are beginning to make their works available for authorized multimedia uses.⁴⁷ A use that attempts to circumvent an available license or to override an

40 *Id.*

41 Richard R. Wiebe, *Deriving Markets from Precedent*, THE RECORDER, Mar. 21, 1994, at 10.

42 *Id.* at 1176.

43 *Id.* at 1177.

44 *Id.* at 1175.

45 *Id.*

46 *Acuff-Rose*, 114 S. Ct. at 1172.

47 See Orenstein, *supra* note 5, at S37.

author's preference not to grant a license should be found to interfere with the potential market of the original photograph.⁴⁸ [18]

The resolution of claims of fair use are likely to turn on issues such as the following: First, to what extent does the second use transform the original photograph, and what is the purpose of the use? In *Rogers*, for example, a photograph was transposed to an entirely different medium (sculpture), purporting to be fine art replete with social commentary; the court found that the copying of the photograph "was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work."⁴⁹ Second, to what extent will the original photograph be viewed as a highly creative work? In *Rogers*, this second factor militated against a finding of fair use where the original photograph was a "creative [and] imaginative . . . published work of art" by an author who made his living as a photographer.⁵⁰ As a general rule, a creative work is insulated from the fair use defense more than a factual work.⁵¹ Photographs should typically be treated as creative even when they capture public sights. Indeed, photographers with a good eye in the proper place at the proper time have given us scores of indelible images that mark the course of recent history.⁵² Third, to what extent does the second work quantitatively and qualitatively utilize the original photograph? Even the use of a small portion of a photograph may defeat a fair use claim where the use constitutes a wholesale or verbatim replication of significant elements of the photograph.⁵³ And finally, to what extent does the second use fit within the

⁴⁸ See, e.g., *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir. 1994). In *Texaco*, the defendant corporation's scientists routinely copied articles from the plaintiff's scientific journals. The court held that such copying, although not for "commercial exploitation," did not constitute fair use, as it served "the same purpose for which additional subscriptions are normally sold, or . . . for which copying licenses may be obtained." *Id.* at 924.

⁴⁹ *Rogers*, 960 F.2d at 310.

⁵⁰ *Id.*

⁵¹ 3 NIMMER & NIMMER, *supra* note 10, § 13.05.

⁵² Fair use is particularly pertinent where a "factual" photograph has been found under one narrow scenario. Where an amateur's film captured a momentous, and otherwise inadequately recorded, event in history, the public's interest in viewing the pictorial record of that event was found to outweigh the photographer's copyright interests. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding that copies of individual frames of a motion picture film of President Kennedy's assassination, which were reproduced in the defendant's book *Six Seconds in Dallas*, constituted fair use).

⁵³ "Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity." *Curtis*, 18 U.S.P.Q.2d (BNA) at 1615 (quoting *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987)); see also *Meeropol v. Nizer*, 560 F.2d 1061, 1070-71 (2d Cir.), *cert. denied*, 434 U.S. 1013 (1977) (holding that copying less than one percent of the defendant's entire written work may constitute infringement and may not constitute fair use, and remanding for further consideration of evidence).

customary markets for the original photograph? If the market in which a defendant used an allegedly infringing work is a market the copyright owner could have entered, the use would not be fair because it would deny the copyright owner a licensing fee, a factor clearly diminishing the value of the original work. At least one court has found that the potential value of a photograph may be diminished where the plaintiff may have wanted to release a numbered and limited edition of the photograph, and the defendant diluted the value of that limited edition by an unauthorized use of the photograph.⁵⁴ [19]

4. *Contributory Infringement*

Manufacturers of digital scanning devices risk possible lawsuits over contributory infringement. In *Sony Corp. of America v. Universal City Studios, Inc.*,⁵⁵ owners of copyrights in television programs and films brought suit against Sony, the manufacturer of the Betamax video recording machine, asserting that Sony was contributorily liable for producing the technology that consumers used to make unauthorized copies of copyrighted works.⁵⁶ Sony, in defense, contended that the potential for infringement posed by the Betamax was outweighed by the beneficial uses of the machine, most notably "time-shifting," that is, the copying of programs for later viewing when owners of the Betamax were unable to watch a program at the time it was scheduled for broadcast.⁵⁷ The Supreme Court, ultimately holding that time-shifting was a fair use of copyrighted works, articulated this test for contributory infringement: "[T]he sale of copying equipment, like the sale of other columns of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses."⁵⁸ [20]

The legitimate industrial and commercial uses of digital imaging are apparent.⁵⁹ The legal and medical professions regularly use imaging services for

⁵⁴ *Richard Anderson Photography v. Brown*, No. 85-0373-R, 1990 U.S. Dist. LEXIS 19846, at *3 (W.D. Va. Apr. 16, 1990). The facts of *Richard Anderson Photography* are recited in *Richard Anderson Photography v. Radford Univ.*, 633 F. Supp. 1154, 1155-56 (W.D. Va. 1986).

⁵⁵ 464 U.S. 417 (1984).

⁵⁶ *Id.* at 420.

⁵⁷ *Id.* at 423-26.

⁵⁸ *Id.* at 442.

⁵⁹ Among the more fascinating developments in the use of digitized photographic images today is the growing interest in creating digital libraries of photographs and digital libraries of art derived from photographs of artwork. For example, Bill Gates, through his company Corbis, has purchased the Bettmann Archives for the purposes of such electronic conversion, including "millions of historical

easy storage, access, and display of documents, diagrams and other images. By use of digital imaging, ruined photographs can be restored to their original luster, with colors again vibrant and images enhanced. Manufacturers of scanning devices could point to these and other uses in the face of any claims of contributory infringement. [21]

While the manufacturer of a digital scanning device could escape liability under the rule of *Sony*, the operator of such a device could incur liability even if that operator was not the end user. If, for example, a business were to scan copyrighted photographs and place them on computer discs for customers who then used the images on the disc in an infringing way, the business could be liable for facilitating the infringement.⁶⁰ Moreover, the operator of a computer service that makes unauthorized copies of photographs available to others to download or upload them to or from their own computers could be liable for infringement—even if that operator did not make the copies itself—on the grounds that, while there was no copying, the display and distribution was an infringement for which the operator was liable.⁶¹ [22]

5. Conclusion

When photography itself was the new technology, the Supreme Court found that traditional copyright principles warranted statutory protection for photographs under the Copyright Clause of the Constitution.⁶² With new technologies today making possible uses of photographs that were unimagined even a short time ago,

photographs [creating] a visual chronicle of the 20th Century." Steve Lohr, *Huge Photo Archive Bought by Chairman of Microsoft*, N.Y. TIMES, Oct. 11, 1995, at A1. For similar purposes, Corbis also possesses rights agreements with the State Hermitage Museum in St. Petersburg, Russia, the National Gallery in London, England, the Philadelphia Museum of Art, the State Russian Museum, the Kimball Art Museum, the Seattle Art Museum, and the Barnes Foundation, and has begun to distribute "virtual galleries" on CD-Rom. *Id.*; see also *Gates Adds Art Image Rights*, USA TODAY, Nov. 7, 1995, at 7B. While Bill Gates's grand visions have captured the headlines, others have preceded him in offering on-line digitized photo libraries on the Internet. John Holusha, *A Photo Library at a Few Clicks of the Keyboard*, N.Y. TIMES, Oct. 30, 1995, at D5.

⁶⁰ See *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984). In *RCA Records* the defendant was engaged in the commercial venture of copying cassette tapes that contained copyrighted materials. *Id.* at 337. The court specifically rejected the notion that the rule of *Sony* might shield a "middleman" from liability. *Id.* at 339.

⁶¹ See *Playboy*, 839 F. Supp at 1556; *supra* notes 29 and 30 and accompanying text; see also *Religious Technology Center v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal. 1995) (acknowledging that even absent direct liability for infringement of copyright, a bulletin board operator may be liable for contributory infringement, or may be vicariously liable).

⁶² U.S. CONST. art. I, § 8, cl. 8.

existing copyright doctrines should once again control and should comfortably distinguish between infringing and non-infringing uses of photographs. [23]