
ARTICLES

DISAPPEARING CONTENT[†]

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ABSTRACT

One of the great advantages of digital content has been that, for the last forty years, people have had access to whatever content they want, whenever they wanted it. That is starting to change. We're moving backwards. Content is disappearing—not just becoming available only in limited times or circumstances but becoming entirely unavailable.

It doesn't need to be that way. It is now cheap and easy enough to make all content available. If the copyright owner can't or won't continue to provide a published work, others should be permitted to pick up the slack. Fair use should encompass a right of access to published content. That right, like all of fair use, ought to have limits and exceptions. I discuss a number of complications and reasons why copyright owners might lawfully remove content. But a basic right to continued access to published work is consistent with the fundamental purposes of copyright.

In the past, we might have aspired to a world in which all the works of history were available forever. That's now an achievable goal. The dead hand control of copyright shouldn't stand in the way.

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INTRODUCTION

El Ministerio del Tiempo (The Ministry of Time) is a TV series that ran for four seasons on Spanish TV and got picked up by Netflix. It tells the story of a group of government bureaucrats who travel back to various points in time to prevent alteration or damage to the history of Spain. It is smart, funny, and has excellent character development. You really should watch it.¹

There's just one problem: you can't. It's not on television anymore, even in Spain. And it's no longer available on Netflix, one of the many shows that Netflix removes every month to make room for content with higher demand.² Nor can you find it on Amazon, or Hulu, or any of the growing number of TV streaming sites.³ Even the old-school standby—DVD—won't help you, at least in the United States. DVDs are region coded, part of an antiquated effort to make piracy harder,⁴ and *El Ministerio del Tiempo* was only ever released with a "region 2" code, which means American (or Asian) devices won't play it.⁵ Maybe you can find it on a pirate site somewhere, but there is no legal way to watch the show. It has disappeared.

In Part I, I explain why more and more content is disappearing, no longer effectively accessible to customers who for decades have been able to access content on demand. In Part II, I suggest some things copyright law could do to keep content from disappearing.

I. A BIG STEP BACKWARDS

For the past forty years, longer than most Americans have been alive,⁶ the defining characteristic of content has been that people could watch, read, or listen to what they wanted when they wanted it. It wasn't always so. For most of the history of the entertainment industry, movies and television shows were

¹ Try to see *El Ministerio del Tiempo* (Onza Partners and Cliffhanger Feb. 24, 2015).

² Kudos to the *Boston University Law Review* editor Kaitlin Ostling who found it on Netflix . . . in Nicaragua. I'm contemplating a trip there now

³ Since this writing, Amazon added the first two seasons—but only those seasons—to Prime Video and only with a subscription to FlixLatino. *El Ministerio del Tiempo*, AMAZON PRIME VIDEO, https://www.amazon.com/Cualquier-Tiempo-Pasado/dp/B08L7HTVRY/ref=sr_1_1?crd=F1RD92FBS8XV&dchild=1&keywords=el+ministerio+del+tiempo&qid=1623364952&s=instant-video&sprefix=el+m%2Cinstant-video%2C208&sr=1-1 (last visited Sept. 1, 2021).

⁴ See Peter K. Yu, *A Hater's Guide to Geoblocking*, 25 B.U. J. SCI. & TECH. L. 503, 507-12 (2019) (criticizing efforts to divide access to content by region).

⁵ And since it was released in Spain, even if you could watch it, it might not come with English subtitles. The Nicaraguan Netflix version doesn't.

⁶ The median age of the U.S. population was 38.4 years in 2019. See Statista Rsch. Dep't, *Median Age of the Resident Population of the United States from 1960-2019*, STATISTA (Jan. 20, 2021), <https://www.statista.com/statistics/241494/median-age-of-the-us-population/#:~:text=In%202018%2C%20the%20median%20age,even%20younger%2C%20at%2029.5%20years.&text=The%20year%202035%20is%20expected,population%20of%20the%20United%20States> [https://perma.cc/AA4L-PVPF].

offered at specific times for limited runs.⁷ If you didn't see it when the content owner decided to show it to you, you were out of luck. Video content was, in effect, a sort of livestream that offered no opportunity to record or replay it. Miss it when it was shown? Too bad for you.

Things were somewhat better with music and books. If you happened to buy a book or a record you could keep it and enjoy it at your leisure. But whether you could find the song or book you wanted was again largely at the mercy of the entertainment industry, which decided what stayed in print and what got stocked on store shelves.⁸ Stores with limited space tended to stock current bestsellers and a small archive of "classic" music or books.⁹ But if a song or a book didn't make it to that iconic status, it would disappear from stores after a year or two. Then your best hope was to borrow one from a library for a limited period or to frequent used book or record stores in hopes of finding a resale copy.¹⁰

Recording devices changed all that. If you couldn't watch something when it was on TV, you could record it to watch later.¹¹ With more difficulty (as there was rarely a schedule), you could do the same thing with songs played on the radio. Content owners fought tooth and nail to stop the recording of content, because they structured their business models around windows of availability

⁷ See, e.g., *January 29, 1990*, TV TANGO, <http://www.tvtango.com/listings/1990/01/29> [<https://perma.cc/64SB-QJRQ>] (last visited Sept. 1, 2021) (showing tv guide for evening of January 29 of 1990).

⁸ See Alan Rinzler, *Shelf Wars: What Authors Need to Know About Bookstore Visibility*, ALAN RINZLER CONSULTING ED.: BOOK DEAL (Apr. 13, 2010), <https://alanrinzler.com/2010/04/shelf-wars-what-authors-need-to-know-about-bookstore-visibility/> [<https://perma.cc/47DB-NJAE>].

⁹ See Mike Shatzkin, *Buying Is a Hard Thing for Bookstores to Do Effectively, and That Becomes an Increasingly Important Reality for Publishers*, IDEA LOGICAL CO. (Jan. 23, 2013), <https://www.idealog.com/blog/buying-is-a-hard-thing-for-bookstores-to-do-effectively-and-that-becomes-an-increasingly-important-reality-for-publishers/> [<https://perma.cc/3ML8-QEJ7>].

¹⁰ R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 586-90 (2003) (explaining how secondary markets, rentals, and libraries make works available without permission of copyright owner).

¹¹ *DVR*, TECHTERMS, <https://techterms.com/definition/dvr> [<https://perma.cc/EKC7-TBHP>] (last visited Sept. 1, 2021) ("[A DVR] can be used to record, save, and play back television programs.").

and because they worried about losing ad revenue.¹² But once they lost that fight, they discovered—as they always seem to—that allowing people access to content when they wanted it greatly expanded the market, to their benefit as well as consumers'.¹³ Copyright owners began selling copies of movies and TV shows to the public, though they faced the same store-shelf constraint that books and music did.¹⁴ Then, the growing popularity of the Internet allowed copyright owners to capitalize on that discovery, selling books, CDs, and DVDs online for works that would never make it onto brick-and-mortar store shelves.¹⁵

But while the availability of recording and of physical media for purchase online dramatically expanded the number and kinds of works people had access to, it shifted the storage problem from the retail store to the user, who quickly

¹² See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 491 (1984) (holding manufacturing of VCRs was not copyright infringement even though consumers could use them to record copyrighted television content); see also Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. ON TELECOMM. & HIGH TECH. L. 125, 128-30 (2011) (discussing entertainment industry's fights against cassette tapes and VCRs). This lovely graphic was the 1970s equivalent of the "you wouldn't steal a car" anti-piracy ads. *Id.*



¹³ See James Lardner, *How Hollywood Learned to Stop Worrying and Love the VCR: Home Video Has Diminished the Power of the Studios—But Not Their Profits.*, L.A. TIMES (Apr. 19, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-04-19-tm-1667-story.html>; see also M. Bjørn von Rimscha, *How the DVR Is Changing the TV Industry—A Supply-Side Perspective*, 8 INT'L J. ON MEDIA MGMT. 116, 117-18 (2009) (discussing DVR as "supply-side innovation" that benefits content distributors more than consumers); Lemley, *supra* note 12, at 131 ("[The DVR] revitalized [the television] industry because a lot of people like me who didn't watch television suddenly discovered that when they could choose when and where they wanted to see their programming, there was actually a bunch of good stuff on. And the 2000s became the Golden Age of television.").

¹⁴ See Everett Rogers, *Video Is Here to Stay*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/reading-room/video-here-stay> [<https://perma.cc/LJV8-NUNH>] (last visited Sept. 1, 2021) ("[T]he fast takeoff in VCR adoption came only when a quantity – and variety – of pre-recorded cassette tapes, especially movies, became readily available, at low cost, through the neighborhood video store.").

¹⁵ See Padraig Belton & Matthew Wall, *Did Technology Kill the Book or Give It New Life?*, BBC NEWS (Aug. 14, 2015), <https://www.bbc.com/news/business-33717596> [<https://perma.cc/BJQ9-6ZQN>].

ended up with a bulky library of content.¹⁶ Digital downloads and remote storage in turn alleviated that problem. After once again fighting tooth and nail to prevent consumers from getting their content in digital form,¹⁷ content owners yet again realized that they benefited from the latest system, as their marginal distribution and storage costs dropped almost to zero. Consumer storage costs didn't disappear, but they changed; digital downloads don't take up physical space, but they require electronic devices with larger and larger memories.

Over the past decade, both video and music content have largely moved from digital downloads to streaming. Streaming technology took advantage of the ubiquity of broadband Internet connections.¹⁸ People no longer had to download content in advance to have access to it. It would come to them in real time as they requested it over a broadband Internet connection. Paul Goldstein's "celestial jukebox" from a quarter century ago has come to life—not just for music but for all content.¹⁹

Content owners tried to stop this revolution too,²⁰ but once again they were fortunate the courts largely rejected their efforts to stifle the technology. The ease and convenience of streaming has made it the dominant way people get their music and video content today,²¹ and content owners have turned that into

¹⁶ See Jacob Waite, *The Horrifying World of VHS Collectors*, MEDIUM (June 26, 2017), <https://medium.com/@waiteski/the-horrifying-world-of-vhs-collectors-35853f093e8> (noting how avid VHS collectors encounter storage constraints).

¹⁷ See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139-40 (2d Cir. 2008) (holding remote storage DVR does not infringe Cartoon Network's reproduction right); *Fox Broad. Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139, 1172-73 (C.D. Cal. 2015) (finding DISH's PrimeTime Anytime and commercial-skipping DVR services did not violate Fox's copyrights); Lemley, *supra* note 12, at 130-31 (discussing entertainment industry's fight against MP3 player and DVR). See generally Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004) (discussing history and economics of digital copyright infringement).

¹⁸ See aricarlospena, *Netflix's Growth Alongside Digital Transformation*, DIGIT. INNOVATION & TRANSFORMATION: MBA STUDENT PERSPS. (Feb. 1, 2018), <https://digital.hbs.edu/platform-digit/submission/netflixs-growth-alongside-digital-transformation/#> [<https://perma.cc/AJ7U-DVE3>] (linking Netflix's success to its innovative use of streaming technology).

¹⁹ PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 125 (1994) (“[A] technology-packed satellite orbiting thousands of miles above earth, awaiting a subscriber's order—like a nickel in the old jukebox, and the punch of a button—to connect him to a vast storehouse of entertainment and information . . .”).

²⁰ See, e.g., *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 437-38 (2014); *Ferrick v. Spotify USA Inc.*, No. 16-cv-08412, 2018 U.S. Dist. LEXIS 86083 (S.D.N.Y. May 22, 2018).

²¹ Netflix use alone surpasses cable and satellite use combined. See *After a Boom Year in Video Streaming, What Comes Next?*, PWC, <https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/consumer-video-streaming-behavior.html> [<https://perma.cc/9RYH-BHVG>] (last visited Sept. 1, 2021). And streaming makes up the majority of music industry revenue. Statista Rsch. Dep't, *Music Industry Revenue Worldwide from 2012 to 2021, by Source*,

an ongoing rather than a onetime revenue stream.²² And once again, despite predictions of disaster, content owners are making more money under the new system than they were before.²³

Streaming has benefits. It is far better for the environment than printing plastic discs and moving them from place to place on trucks.²⁴ It is also better in significant ways than downloads.²⁵ Content no longer takes up space on the user's device. It might not take up space on the content creator's system either, as most streaming is done through third parties like YouTube, Amazon, or Netflix.²⁶ It can be stored in the cloud in efficient servers with lots of room and fast, reliable delivery.²⁷ And consumers can access streamed content from any

STATISTA (Jan. 8, 2021), <https://www.statista.com/statistics/239276/growth-of-the-global-music-revenue-by-type/>.

²² The Music Modernization Act of 2018 significantly expanded the returns copyright owners receive from streamed music. Orrin G. Hatch—Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

²³ Broadcast industry revenue doubled from 2005 to 2019. Amy Watson, *Estimated Revenue of the U.S. Broadcasting Industry from 2005 to 2019*, STATISTA (Jan. 18, 2021), <https://www.statista.com/statistics/184176/estimated-revenue-of-the-us-broadcasting-industry-since-2005/> [<https://perma.cc/TXC6-N9RS>] (“In 2019, the American broadcasting industry generated a total revenue of 177.48 billion U.S. dollars, an increase from 173.89 billion U.S. dollars in 2018. This 2019 estimate represents the highest annual aggregate revenue of the U.S. broadcasting industry in the time frame from 2005 to 2019, including radio networks, television broadcasting, and cable.”). Music industry revenue declined sharply after 1999, albeit arguably from an artificial high, but it has been increasing for years and has grown more than 50% since 2014. Felix Richter, *From Tape Deck to Tidal: 40 Years of U.S. Music Sales*, STATISTA (Mar. 5, 2021), <https://www.statista.com/chart/17244/us-music-revenue-by-format/> [<https://perma.cc/88BL-U938>]. Video game industry revenue doubled from 2006 to 2020. Omri Wallach, *50 Years of Gaming History, by Revenue Stream (1970-2020)*, VISUAL CAPITALIST (Nov. 23, 2020), <https://www.visualcapitalist.com/50-years-gaming-history-revenue-stream/> [<https://perma.cc/WB2X-Z6P6>].

²⁴ Will Bedingfield, *We Finally Know How Bad for the Environment Your Netflix Habit Is*, WIRED (Mar. 15, 2021, 6:00 AM), <https://www.wired.co.uk/article/netflix-carbon-footprint> [<https://perma.cc/B7T5-S73L>] (“Netflix claims that one hour of streaming on its platform in 2020 used less than 100gCO₂e (a hundred grams of carbon dioxide equivalent) – that’s less than driving an average car a quarter of a mile.”).

²⁵ See Sarah Griffiths, *Why Your Internet Habits Are Not as Clean as You Think*, BBC (Mar. 5, 2020), <https://www.bbc.com/future/article/20200305-why-your-internet-habits-are-not-as-clean-as-you-think> [<https://perma.cc/7RL2-LWDY>] (“Many of the major cloud providers, however, have pledged to cut their carbon emissions, so storing photos, documents and running services off their servers where possible is one approach to take.”).

²⁶ Increasingly the latter also create their own content. See Alan Sepinwall, *The 20 Best Shows Made for Streaming—So Far*, ROLLING STONE (Nov. 21, 2018, 1:54 PM), <https://www.rollingstone.com/tv/tv-features/20-best-streaming-original-shows-so-far-757702/> [<https://perma.cc/98YR-FBTV>].

²⁷ *Case Study: How Netflix Uses Cloud for Innovation, Agility and Scalability*, CLOUDSINE, <https://www.cloudsine.tech/news-trends/case-study-how-netflix-uses-cloud-for-innovation-agility-and-scalability/> [<https://perma.cc/53RT-RMKQ>] (last visited Sept. 1, 2021) (“By

device—at least as long as they have a broadband Internet connection.²⁸ Streaming also makes economic sense as a value allocation mechanism. It allows the market to value intensity of preference, rewarding those who write songs people play over and over again more than those whose songs are played once or twice and allowing people to try out content without making a significant investment in purchasing a disc or paying to download a movie.²⁹

But streaming had one important, unforeseen effect—it took control over what content was available out of the hands of consumers.³⁰ Unlike DVDs or digital downloads, which were (mostly) buy-and-keep arrangements,³¹ what you can stream at any given time depends on what is available on streaming platforms. And unlike downloads, where people tend to access any given piece of content on the server only once and then replay it locally, streaming requires that the provider devote lots of resources to popular content that many people want to stream at the same time. Further, content licensing deals usually last only for a limited time and frequently include up-front or minimum payments rather than just pay per stream.³²

running on [the cloud], [Netflix] provided billions hours [sic] of service to customers around the globe.”).

²⁸ The move to streaming is frustrating for frequent airline travelers, since no one could accurately describe airplane Internet as broadband. And it’s a problem for those in poor or rural areas that lack broadband access. See Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. CTR. (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> [<https://perma.cc/R95G-TSGT>].

²⁹ While physical sales and downloads generally offer unlimited use for a fixed price and compensate artists according to the number of sales, streaming compensates artists based on the number of times a work is played. See Dmitry Pastukhov, *What Music Streaming Services Pay Per Stream (And Why It Actually Doesn’t Matter)*, SOUNDCHARTS BLOG (June 26, 2019), <https://soundcharts.com/blog/music-streaming-rates-payouts> [<https://perma.cc/974P-9H7W>].

³⁰ For an early prediction along these lines, see Reese, *supra* note 10, at 630-34.

³¹ Aaron Perzanowski and others have noted that the move to digital content often came with contract restrictions on what you could do with that content and even whether you really “owned” it at all. Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 798 (2019). Courts have held that there is no right to resell digital content akin to the right to resell a book or DVD. *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 655 (2d Cir. 2018). And there have been notorious cases where content providers sought to take back digital content they had already provided to users—including, in a delicious piece of irony, George Orwell’s 1984. See also Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 585-86 (2019) (explaining how companies engage in remote interference, “the practice of employing an over-the-air update to remotely alter or deactivate a physical device”); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1108-09 (1998).

³² Brian Beers, *How Netflix Pays for Movie and TV Show Licensing*, INVESTOPEDIA (Aug. 6, 2020), <https://www.investopedia.com/articles/investing/062515/how-netflix-pays-movie-and-tv-show-licensing.asp> [<https://perma.cc/FP3Y-PUL7>].

The result of all this is that it doesn't always make sense for Netflix to keep a large library of content around. Netflix may maximize its revenues by devoting a lot of bandwidth to streaming *Tiger King* to many people rather than offering a wider array of content that relatively few people are interested in and for which it has to pay minimum fees. Especially when it comes time to renegotiate deals, Netflix may just drop the show from its catalog.³³ Indeed, every month various people publish a list of dozens of movies and TV shows that will disappear from Netflix over the following thirty days.³⁴ Those include not just shows that never found a significant audience but blockbusters and highly acclaimed movies that are just a few years old.³⁵ Like the old-style record and bookstores, everything but the newest and most popular movies and TV shows are quickly moved out to make room for new stuff.

Video games face a similar cycle. As Glynn Lunney has shown, the vast majority of video games sell few if any copies.³⁶ The game developer may stop supporting the game or simply remove it for no reason.³⁷ And unlike movies, many games (multiplayer games, obviously, but even others) require continued support from the developer and updates to work with new platforms and software.³⁸ In addition, game platforms like PlayStation and Steam will sometimes remove those games without explanation, perhaps because of a licensing dispute or violation of terms of service,³⁹ but perhaps because older or

³³ On YouTube, by contrast, videos are forever, at least for now. See Shivang, *YouTube Database—How Does It Store So Many Videos Without Running Out of Storage Space?*, 8BITMEN.COM, <https://www.8bitmen.com/youtube-database-how-does-it-store-so-many-videos-without-running-out-of-storage-space/> [https://perma.cc/8SFA-UB8S] (last visited Sept. 1, 2021). But with over 500 hours of content uploaded to the site every minute, YouTube may eventually decide it's not worth storing old videos with few or no views. Anmar Frangoul, *With Over 1 Billion Users, Here's How YouTube Is Keeping Pace with Change*, CNBC (Mar. 14, 2018, 4:54 AM), <https://www.cnbc.com/2018/03/14/with-over-1-billion-users-heres-how-youtube-is-keeping-pace-with-change.html> [https://perma.cc/5YAS-XVAQ]. Indeed, they have already stopped monetizing them. See *YouTube Partner Program Overview & Eligibility*, YOUTUBE HELP <https://support.google.com/youtube/answer/72851?hl=en> [https://perma.cc/P3PK-DN93] (last visited Sept. 1, 2021).

³⁴ See, e.g., Savannah Salazar, *What's Leaving Netflix: August 2021*, VULTURE (July 23, 2021), <https://www.vulture.com/article/whats-leaving-netflix-movies-shows.html>.

³⁵ *Id.*

³⁶ Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1, 37-50 (2020). This is a general phenomenon. See CHRIS ANDERSON, *THE LONG TAIL* 6-10 (2006) (showing that vast majority of works get very few users).

³⁷ *Games at Risk of Removal*, STEAM, <https://store.steampowered.com/curator/31857481-Games-at-risk-of-removal/list/35810> [https://perma.cc/QH4J-AJFG] (last visited Sept. 1, 2021).

³⁸ See David Fried, *What Does a Game Dev Team Do After a Game Is Released?*, QUORA (2017), <https://www.quora.com/What-does-a-game-dev-team-do-after-a-game-is-released-Is-the-entire-team-needed-to-maintain-the-game> [https://perma.cc/2VES-EPZY].

³⁹ Andy Chalk, *Valve Removed 1000 Games from Steam Because Publishers Were 'Abusing' Steamworks*, PC GAMER (Nov. 25, 2019), <https://www.pcgamer.com/1000-games-were-just-removed-from-steam-and-we-dont-know-why/> [https://perma.cc/AC8U-GHKW].

low-performing games just aren't lucrative enough,⁴⁰ or they hope to upsell users on a more expensive version.⁴¹ Games have even been removed from the world because their creator decided they were making the world a worse place.⁴²

Something similar happens with music, though more often because of licensing issues than storage space.⁴³ As the world moved from music downloads to streaming services like Spotify and Apple Music, people lost control over their playlists, because whether a song stayed on that playlist became a function of whether the streaming service had a continuing license. Songs take up much less space than videos, so streaming services are less likely to remove a song merely because it is unpopular. But the licensing regime for music is more complicated,⁴⁴ and songs periodically disappear from Spotify and other services because licenses lapse or are being renegotiated.⁴⁵ More commonly, users who put one version of a song on a Spotify playlist may find it replaced by a different version,⁴⁶ perhaps because one of the copyright owners

⁴⁰ meterano7, *List of Games Removed from PS Store*, PSNPROFILES (Jan. 17, 2017), <https://forum.psnprofiles.com/topic/44702-list-of-games-removed-from-ps-store/> [<https://perma.cc/D7AD-UXJX>].

⁴¹ See *Original Release of Ghost of Tsushima Now Available Only Through Director's Cut Pre-order*, DELISTED GAMES (July 6, 2021), <https://delistedgames.com/original-release-of-ghost-of-tsushima-now-available-only-through-directors-cut-pre-order/> [<https://perma.cc/XU48-YG75>] (noting that Sony removed \$40 listing of game *Ghost of Tsushima* from PlayStation's storefront and only makes available *Director's Cut* edition, which costs minimum of \$59.99).

⁴² See, e.g., Lan Anh Nguyen, *Exclusive: Flappy Bird Creator Dong Nguyen Says App 'Gone Forever' Because It Was 'An Addictive Product'*, FORBES (Feb. 11, 2014, 2:30 AM), <https://www.forbes.com/sites/lananhnguyen/2014/02/11/exclusive-flappy-bird-creator-dong-nguyen-says-app-gone-forever-because-it-was-an-addictive-product/> [<https://perma.cc/8GLT-7BD6>].

⁴³ See generally Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1117 (2014) (discussing ongoing "battle over terrestrial performance rights—that is, the right of a copyright holder to collect royalties for plays of a sound recording on terrestrial radio," and the licensing landscape which controls music streaming).

⁴⁴ See *id.* 1132-36; Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 537 (2014); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIA. L. REV. 237, 240-50 (2001).

⁴⁵ See, e.g., Mark Savage, *Hundreds of K-pop Songs Disappear from Spotify*, BBC NEWS (Mar. 1, 2021), <https://www.bbc.com/news/entertainment-arts-56237626> [<https://perma.cc/VM5P-YAFC>] (stating that Spotify referenced the end of a licensing deal as the reason for disruption).

⁴⁶ See Chrissel313, *Why Do Songs on Spotify Change?*, SPOTIFY CMTY. (Apr. 6, 2017, 9:09 PM), <https://community.spotify.com/t5/Content-Questions/Why-do-songs-on-Spotify-change/m-p/1636198#M16009> [<https://perma.cc/YBD7-SU28>]; earlz, *Spotify Is Playing a Different Version of Some Songs*, SPOTIFY CMTY. (Jan. 23, 2014, 5:21 PM), <https://community.spotify.com/t5/Desktop-Linux/Spotify-is-playing-a-different-version-of-some-songs/m-p/662984#M1684> [<https://perma.cc/YQ5V-WHZA>]. Try to hear, e.g., MIKE POSNER, *Cooler Than Me*, on 31 MINUTES TO TAKEOFF (J Records 2010). You'll likely get one of several alternate versions, not the main radio cut.

prefers to push people to that version or because some versions of a song (like movie soundtracks) carry only limited rights.⁴⁷

The fact that content is removed from a streaming service doesn't necessarily mean it is gone forever. If you downloaded a game or made a copy of a movie or song rather than just streaming it, you might still have access to it. And because we haven't yet fully moved to streaming, some of the content may still be available on older formats like CDs, DVDs, or music downloads. But that is mostly an artifact of the hybrid download/streaming system we have today. As we move more and more exclusively to streaming, we should expect to see fewer works made available in the form of physical disks in the first place. Download options will likely also become rarer. And groups that make regular reliance on fair use or other statutory exemptions, like teachers and churches, can't simply make a use that is unquestionably permitted if they don't have an actual copy or download to use as the basis for, say, showing in class.

Is there a way to keep consumer access to this disappearing content?⁴⁸ One possibility would be to move from streaming back to downloads or physical media—some system that involves physical possession and ownership. But that seems unlikely, and would undo the advantages of a streaming regime.

Perhaps we could avoid having content disappear by having consumers make permanent copies of their streams. But that's not a satisfactory solution either. While consumers today can often make their own copies,⁴⁹ it is not clear that they can do so without permission, and even less clear that they will be able to do so legally in the future. While consumers own physical books, CDs, and DVDs and have the right to resell them,⁵⁰ they probably don't own digital downloads,⁵¹ and they certainly don't "own" things they stream, like the songs

⁴⁷ See Peter Lawton & Claire Munro, *Music in Films: The Soundtrack Album*, THINKSYNC MUSIC (2012), <http://thinksyncmusic.com/guides/music-in-film-the-soundtrack-album/> [<https://perma.cc/43ZT-XZMY>] (noting difficulties in releasing film soundtrack albums due to limited rights).

⁴⁸ The problem would be much less significant if copyright terms didn't last so long. When copyrights expired after fourteen years, it was less likely that content would be inaccessible by the time the copyright expired. See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647 (1943) ("Anglo-American copyright legislation begins in 1709 with the Statute of 8 Anne, c. 19. That act gave the author and his assigns the exclusive copyright for fourteen years from publication . . ."). But with copyright terms lasting ninety-five years or more, we cannot rely on copyrights expiring before the works disappear. 17 U.S.C. § 302.

⁴⁹ Spotify Premium, for instance, allows consumers to download the songs they stream. But the right to keep those downloads extends only as long as the consumer keeps paying the monthly fee for Premium. See *Spotify Premium – Spotify (US)*, SPOTIFY, <https://www.spotify.com/us/premium/> [<https://perma.cc/4VQ4-XMED>] (last visited Sept. 1, 2021).

⁵⁰ 17 U.S.C. § 109(a).

⁵¹ See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (holding that "a software user is a licensee rather than an owner of a copy"). For discussion of the problems this creates for consumers, who tend to expect that they own "their" copies, see Aaron

in a Spotify playlist. Further, the “permanent” download may not be so permanent, as users of both Netflix and Amazon Kindle have found out to their chagrin when their purchased works disappeared.⁵² Nor is it obvious that consumers can just convert a stream into a permanent copy. Making copies from a stream generally violates terms of use, and copyright owners have sued to stop it.⁵³ The result of the “tethered economy” is that even devices we think we own are often subject to restrictive license agreements, and our content can disappear from those devices too.⁵⁴

Copyright owners may like the newfound control the streaming environment gives them to “pull back” content for a variety of reasons. Maybe they want the ability to change that content.⁵⁵ Maybe they no longer want it out in the world because it is offensive to modern sensibilities.⁵⁶ Maybe they think they will maximize their revenue by making their works available only for limited

Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2068-69 (2012).

⁵² Netflix has downloaded content “expire” after a set amount of time. *Downloaded Title Says ‘Expired,’ NETFLIX: HELP CENTER*, <https://help.netflix.com/en/node/54865> [<https://perma.cc/4ADR-QRWG>] (last visited Sept. 1, 2021). And Amazon infamously erased downloaded content from users’ Kindle devices—again ironically, George Orwell’s 1984. See Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), <https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>.

⁵³ See, e.g., *Fox Broad. Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139, 1139 (C.D. Cal 2015); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008).

⁵⁴ See generally Hoofnagle et al., *supra* note 31. Hoofnagle, Kesari, and Perzanowski offer an in-depth analysis of the extent of tethering in the modern world of connected consumer devices and the legal restrictions it imposes on consumer access and autonomy. Their focus is on other issues than copyright, however, and is on what happens to devices and content once a copy exists in a consumer’s hands. The problem is parallel to, but distinct from, the one I discuss. See also Crootof, *supra* note 31, at 585-93 (discussing businesses that use remote access to consumer devices to remove content or interfere with its operation).

⁵⁵ Try to find an original, unedited 1977 version of *Star Wars* today. It’s not easy. They have all been replaced by the *Episode IV* version, which changed not only the title (it is now called “A New Hope”) but also added new content, including, most notably, making it seem that Han Solo didn’t shoot first. Sean Hutchinson, *Why Finding the Original 1977 ‘Star Wars’ Verges on the Impossible*, POCKET, https://getpocket.com/explore/item/why-finding-the-original-1977-star-wars-verges-on-the-impossible?utm_source=pocket-newtab [<https://perma.cc/8RAF-VJQA>] (last visited Sept. 1, 2021).

⁵⁶ See, e.g., Rebecca Alter, *Every Blackface Episode and Scene That’s Been Pulled from Streaming So Far*, VULTURE (June 29, 2020), <https://www.vulture.com/2020/06/blackface-tv-episodes-scenes-removed-streaming.html>; Sean Malin, *Interrogating, and Culling, TV’s Archive*, N.Y. TIMES, Aug. 19, 2020, at C1 (listing episodes of TV shows taken down from Hulu, Netflix, and Amazon because they contained content deemed offensive or featured actors accused of misconduct); *Dr. Seuss: Six Books Withdrawn over ‘Hurtful and Wrong’ Imagery*, BBC NEWS (Mar. 4, 2021), <https://www.bbc.com/news/entertainment-arts-56250658#:~:text=Among%20the%20six%20children's%20titles,after%20consulting%20experts%20and%20teachers> [<https://perma.cc/MSJ7-8LH7>] [hereinafter *Six Books Withdrawn*]; Reese, *supra* note 10, at 597-98 (discussing withdrawal of *Amos ‘n Andy* and *Speedy Gonzales* cartoons).

windows.⁵⁷ Or maybe they think old works will cannibalize demand for new works they want to push in the future.⁵⁸ That last reason is particularly likely when the content is sold to a new company that competes with that content.⁵⁹ Indeed, companies sometimes buy competitors just to get control of their content.⁶⁰

Even if creating permanent copies from a stream is legal, it's not a full solution to the problem of disappearing content. It may protect those who had access to the work while it was streaming and thought to download and keep it. But it won't help you watch *El Ministerio del Tiempo*, the original *Star Wars*, or any of the other shows, songs, or games that disappeared before you knew you wanted to experience them. And it won't help anyone who wants access to something like an online video game or other app that requires continued connection and support.

In short, an unanticipated consequence of the move to streaming is that more and more content will effectively disappear from the public eye, at least legally.⁶¹ For the first time in forty years, we're moving backwards, making information harder rather than easier to access. That should worry us.

⁵⁷ The Disney "Vault" exemplifies this strategy. See, e.g., Jenna Mullins, *Disney Is Taking a Movie out of the Vault, but Why Do They Hold Our Childhoods Hostage in the First Place?!*, E! ONLINE (Feb. 6, 2015, 3:27 PM), <https://www.eonline.com/news/622675/disney-is-taking-a-movie-out-of-the-vault-but-why-do-they-hold-our-childhoods-hostage-in-the-first-place> [<https://perma.cc/2HJP-HVW9>]; Thomas K. Arnold, *'Bambi' Is Back—for 70 'II' Days*, USA TODAY (Feb. 6, 2006, 9:30 PM), https://usatoday30.usatoday.com/life/movies/news/2006-02-06-bambi_x.htm [<https://perma.cc/MG84-MBMB>]. And record companies tried to pull existing recordings of the Three Tenors to force customers to their new joint recording, an act the D.C. Circuit held violated the antitrust laws because it was done jointly. *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 31 (D.C. Cir. 2005).

⁵⁸ See Matt Zoller Seitz, *Disney Is Quietly Placing Classic Fox Movies into Its Vault, and That's Worrying*, VULTURE (Oct. 24, 2019), <https://www.vulture.com/2019/10/disney-is-quietly-placing-classic-fox-movies-into-its-vault.html> (discussing how Disney's practice of limiting showing of classic movies in theaters focuses audience on new releases).

⁵⁹ People who bought Focals AR glasses, for instance, lost all their functionality after Google bought the product, shut it down, and removed the software from Google and Apple's app stores. See *Winding Down Focals*, NORTH, <https://support.bynorth.com/hc/en-us/articles/360045128691/> [<https://perma.cc/V7BA-8BRU>] (last visited Sept. 1, 2021).

⁶⁰ See Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929, 951-56 (discussing examples of people buying rights to copyrighted works to suppress them). The examples Goldman and Silbey discuss are primarily motivated by a desire not to have a negative depiction see the light of day, rather than by fears of competition. *Id.* On the problem of "killer acquisitions"—companies that buy competitors in order to shut them down—see, for example, Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 1 (2021); Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649, 649 (2021).

⁶¹ We could, I suppose, just pirate all this content. But that doesn't seem a satisfactory solution either. First, it too assumes someone has the ability to receive a stream, make an (illegal) copy, and (illegally) share that copy with others. Even if that happens, not everyone

But perhaps copyright law can help, as I suggest in the next Section.

II. A RIGHT TO ACCESS CONTENT?

A. *Fair Use and Out-of-Print Works*

The goal of copyright law is to encourage not just the creation of new works but also public access to those works. Indeed, the ultimate end goal is to put a variety of new works in the hands of the public.⁶² While there are limited circumstances in which copyright law protects works that are not intended to be shared with the public—private letters, computer source code⁶³—once a work is released to the public, copyright law assumes that the public will have access to it, first by paying a price to the copyright owner and eventually through the mechanism of the public domain.⁶⁴

wants to rely on pirated content. They may believe it is morally wrong to engage in copyright infringement. They may fear being sued or having their Internet access cut off if they are identified as infringing. *See, e.g.,* Mattias Gyllenvarg, *Will My Internet Provider Shut Down My Internet if I Torrent?*, QUORA (2020), <https://www.quora.com/Will-my-internet-provider-shut-down-my-internet-if-i-torrent> [<https://perma.cc/G9GL-3T2E>] (showing people's worry over the consequences of pirating via Torrent); *see also* Mitchell Clark, *Frontier Communications Is Getting Sued by Record Labels for Not Disconnecting Pirates*, VERGE (June 10, 2021, 9:06 PM), <https://www.theverge.com/2021/6/10/22528633/frontier-isp-lawsuit-record-labels-piracy-disconnection> [<https://perma.cc/YU5Q-ZP9H>] (highlighting push for internet service providers to cut off Internet access for pirates). They may find it hard to find a stable source of the content. Legitimate sites may not host the content because they fear copyright liability. *See, e.g., Rules and Policies: Copyright*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/copyright/> [<https://perma.cc/GSD2-WKK7>] (last visited Sept. 1, 2021). And pirate sites may be risky to use in other respects; they may be more likely to contain malware, for instance. Tomáš Foltýn, *Pirate Websites Expose Users to More Malware, Study Finds*, WELIVESECURITY (Mar. 21, 2018, 3:50 PM), <https://www.welivesecurity.com/2018/03/21/pirate-websites-malware-study/> [<https://perma.cc/4DBV-PJ9E>]. Even if none of that were true, I would find it troubling for the law to say the only way to have access to a published work is to violate the law. Nonetheless, pirated content may end up serving as a source from which users can obtain otherwise-disappeared content in order to make fair use of it.

⁶² *See generally* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996) (discussing balancing act between increasing copyright protections to encourage creations of works and reigning it in to broaden access); David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96 (2010) (arguing for adopting a “net benefits” approach towards copyright law).

⁶³ *Folsom v. Marsh*, 9 F. Cas. 342, 346 (D. Mass. 1841) (No. 4,901) (“[T]he author of any letter or letters . . . whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein”); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989). For discussion of circumstances when authors should be able to use copyright to prevent the public from ever accessing a work, see Shyamkrishna Balganesh, *Privative Copyright*, 73 VAND. L. REV. 1, 61-62 (2020); Goldman & Silbey, *supra* note 60, at 970-87.

⁶⁴ *See generally* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing role of public domain in creating incentives for further authorship).

Historically, that assumption was limited by the economics of producing and distributing physical copies of works. It cost money and effort to keep a book or record in print, and even more to keep a movie in theaters.⁶⁵ So it wasn't surprising that older works disappeared from stores, or at least became harder to find. Nonetheless, an obscure book published in the 1920s exists in a number of physical copies. Some might be destroyed or thrown away, but the rest will survive, slowly deteriorating, perhaps for centuries. Other media, like film, is more fragile, but multiple copies still exist to be stored and preserved.⁶⁶ The physical nature of older media makes individual copies more durable, but by the same token makes access to that content much more limited.

But technology has changed that dynamic. It has made it much easier to make old, out-of-print works available to everyone. Google Book Search scanned millions of out-of-print books, stored them, and made them all searchable online.⁶⁷ The Internet Archive takes a snapshot of the entire Internet every few weeks and makes it all available to search.⁶⁸ We no longer need giant libraries to store physical artifacts. It is feasible to have all the world's content available to people who want to get it. Yet at the very time that it is easier to make out-of-print works available to everyone, those works are in fact becoming harder to find, since removing streaming content doesn't leave behind old copies of works people can find in libraries or used record stores (or Internet archives).

The law should respond to that technological change. The public should have continued legal access to published content absent some compelling justification for withdrawing it from the world. That goal would have been aspirational for most of human history. But today it is technically feasible. It is ironic that the way we deliver content is causing large swaths of it to disappear just as it is possible to have access to all of it.

⁶⁵ See, e.g., Dina Zipin, *How Exactly Do Movies Make Money?*, INVESTOPEDIA (Aug. 2, 2020), <https://www.investopedia.com/articles/investing/093015/how-exactly-do-movies-make-money.asp> [<https://perma.cc/K5UV-BJHL>] (“Traditionally, a larger chunk went to the studio during the opening weekend of a film. As the weeks went on, the theater operator's percentage rose. A studio might make about 60% of a film's ticket sales in the United States, and around 20% to 40% of that on overseas ticket sales.”).

⁶⁶ For more information on how film is stored and preserved, see Karen F. Gracy, *Documenting the Process of Film Preservation*, 3 THE MOVING IMAGE 1, 6 (2003); and Francis C. Poole, *Basic Strategies for Film Preservation in Libraries*, 16 TECH. SERVS. Q. 1, 5-7 (1999). For empirical evidence on copyright's effects on film soundtracks, see Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 844-49 (2014).

⁶⁷ *About the Library Project*, GOOGLE HELP, <https://support.google.com/websearch/answer/9690276> [<https://perma.cc/WM3W-KUDC>] (last visited Sept. 1, 2021).

⁶⁸ INTERNET ARCHIVE, <https://archive.org/> [<https://perma.cc/R2Y7-6VZH>] (last visited Sept. 1, 2021). In rare circumstances, content may be removed from the Internet Archive, chiefly for privacy reasons. See David Bixenspan, *When the Internet Archive Forgets*, GIZMODO (Nov. 28, 2018, 11:00 AM), <https://gizmodo.com/when-the-internet-archive-forgets-1830462131> [<https://perma.cc/8TXV-23W2>].

Ordinarily, that lawful access will come from the copyright owner itself or its licensee. Copyright owners can stream content, sell downloads, or sell physical media containing their works. They can also license others the ability to do those things.⁶⁹ When they do any of those things, the public has access to the content. If the copyright owner makes the work accessible, copyright law will operate as it normally does, preventing others from copying that work for most purposes, allowing the copyright owner to reap the rewards.⁷⁰

But if a copyright owner decides to let their work go out of print or otherwise become unavailable (or if the copyright owner itself goes out of business or can't be found),⁷¹ the public's interest in having access to published content is implicated. Copyright's fair use doctrine should allow a third party to make those out-of-print works available unless there are compelling public reasons to deny access.⁷²

Fair use is based on a fact-specific four-factor test, but some of those factors matter more than others.⁷³ Stripped to its essentials, fair use generally permits

⁶⁹ See James Griffin, *Licensing and Exploiting*, COPYRIGHTUSER.ORG <https://www.copyrightuser.org/understand/rights-permissions/licensing-exploiting/> [<https://perma.cc/79Z9-8EKC>] (last visited Sept. 1, 2021).

⁷⁰ One complication is that the author and the copyright owner are often not the same person. The director of *El Ministerio del Tiempo* may well want it to be shared as widely as possible. But if the distributor, not the author, owns the copyright, it is the distributor's decision to withdraw the work that matters for copyright law. If, on the other hand, the author retains the copyright and wants to distribute it, she is free to license it to others if Netflix drops the show. That licensing constitutes exploitation. The work wouldn't disappear, and the fair use issue I discuss here wouldn't arise. I discuss this issue in more detail *infra* notes 123-24 and accompanying text.

⁷¹ See generally Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379 (2012) (discussing orphan works).

⁷² See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) (“[L]onger portions copied from an out-of-print book may be fair use because the book is no longer available. (This has been thought to be true because, presumably, there is little market effect produced by the copying. However, plaintiffs in this case convincingly argue that damage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners.)”).

⁷³ The second fair use factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), rarely matters at all in some circuits. See *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 178 (2d Cir. 2018) (stating that second factor is essentially irrelevant). The Ninth Circuit observed the second factor “has not been terribly significant in the overall fair use balancing.” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997). *But see* *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 451-52 (D.C. Cir. 2018) (emphasizing importance of second factor in limiting copyright for industry standards); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524-26 (9th Cir. 1992) (emphasizing importance of second factor with respect to computer programs). For further discussion on the second factor's insignificance, see Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 532-38 (2008); and Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 576-77

uses of a copyrighted work that serve a legitimate purpose and don't substitute for a sale or license by the copyright owner.⁷⁴ In recent years the legitimate purpose has usually been one that transforms the underlying work itself,⁷⁵ but that isn't required. A use may be fair because it serves a public benefit⁷⁶ or because it is noncommercial and doesn't interfere with the copyright owner's market.⁷⁷

The first factor—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"—might seem to favor the copyright owner in a suit against someone sharing out-of-print content, at least when a defendant makes an out-of-print work available for profit.⁷⁸ Copying an out-of-print work doesn't transform that work. But I think the first factor is capacious enough to weigh access to disappearing content as a purpose favoring a finding of fair use, whether or not the underlying work is transformed. As Jennifer Urban has argued, for at least one important category of disappearing content—so-called orphan works—the fact that no copyright owner can be found is central to the nature of the use being made.⁷⁹ That may be true even if the copyright owner is known but has relinquished any economic interest in the work.⁸⁰ Congress has expressed the view that a finding of fair use should be more likely if a work is out of print.⁸¹

(2008). The Supreme Court's decision in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1201-03 (2021), may change that by emphasizing the importance of the second factor in that case.

⁷⁴ 17 U.S.C. § 107. This is a radical shortening of a very complex, multifactor doctrine that I discuss in more detail below.

⁷⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("The central purpose of this investigation is to see . . . whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" (cleaned up). For further discussion of the transformative use concept's dominance, see Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 908 (2020); and David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 269 n.31 (2003).

⁷⁶ *See, e.g., Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) ("There is a public interest in having the fullest information available on the murder of President Kennedy.").

⁷⁷ *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (finding for fair use in part because "respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works").

⁷⁸ 17 U.S.C. § 107(1).

⁷⁹ Urban, *supra* note 71, at 1395-1401.

⁸⁰ *Id.* at 1397-98.

⁸¹ S. REP. NO. 94-473, at 64 (1975) ("If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it

That conclusion could, if necessary, be grounded in a sufficiently broad conception of transformative use. Even when a work itself isn't transformed, courts have increasingly found uses that open access to works to new markets to be transformative.⁸² But it could also be grounded in a broader recognition of a public purpose supporting nontransformative uses that benefit the world. Part of copyright's access-incentives bargain should be a right to access public content.⁸³ That right means that making available content the copyright owner has withdrawn from the world serves a public purpose, a factor that favors a finding of fair use.

The commercial nature of the use may differ depending on who makes it. Libraries and universities, or other nonprofits making archival uses, have the strongest case. But even commercial entities selling the work won't necessarily have the first factor count against them. The Supreme Court has rejected any presumption that commercial uses are unfair,⁸⁴ and with good reason. Many of the most important transformative uses, as well as public interest uses and those that facilitate access by others (like search engines), are made by for-profit companies.⁸⁵

The fact that content goes out of print doesn't affect directly factors two and three in most cases. Some of those works will be factual works in which protection is thin, but many will be artistic or fictional works at the core of copyright law, so the nature of the work will often support the copyright owner.⁸⁶ But the fact that a work is already published favors a finding of fair use,⁸⁷ and some courts have held inaccessibility to support a finding of fair use under the second factor.⁸⁸ And Goldman and Silbey suggest that acquisition of the

than in the ordinary case"); H.R. REP. NO. 94-1476, at 67 (1976); *see also* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986) (stating that "[a] key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user" and citing Senate Report).

⁸² *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1202-05 (2021); Authors Guild v. Google, Inc., 804 F.3d 202, 229 (2d Cir. 2015); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003); Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887, 1902 (2021). *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), is particularly instructive here. The Court found the digitization of books so they could be made available to the disabled to be a transformative purpose even though the content of the books was unchanged. *Id.* at 105.

⁸³ *See* Lunney, *supra* note 62, at 529.

⁸⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁸⁵ *Id.* at 584.

⁸⁶ *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting) ("[I]nformational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.").

⁸⁷ *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

⁸⁸ *See, e.g.*, Hofheinz v. A & E Television Networks, 146 F. Supp. 2d 442, 447-48 (S.D.N.Y. 2001) (applying this reasoning to use of a trailer for film released almost fifty years

copyright in a work with an intent to suppress it should count in favor of a finding of fair use by those who seek to make the work available.⁸⁹

As for the third factor, people will generally want to use the entirety of a work—for example, watching a movie or playing a song. That weighs against a finding of fair use. But as noted above, those factors are decidedly less important, and they have not prevented courts from finding uses fair.⁹⁰

The most significant change to the fair use analysis when a work goes out of print is to the fourth factor. The fourth factor—effect on the market for the copyrighted work—is traditionally the most important.⁹¹ By abandoning any effort to sell or license the work, the copyright owner should be understood to have relinquished any claim to market harm or effect under the fourth factor.⁹² Copyright owners may well have good economic reasons for doing so; perhaps the work isn't popular enough to justify continuing to make it available. But for that very reason, they should not be heard to complain that someone who continues to make the work available has cut into their sales. They weren't going to make those sales. Nor would there be a legitimate licensing market claim.⁹³ As noted above, a copyright owner who stops making the work available herself but licenses others to make it available hasn't let the work go out of print in the first place, so my analysis here simply doesn't apply. By hypothesis, content that has disappeared is content that the copyright owner neither makes available herself nor licenses anyone else to distribute.

In the ordinary case, then, there is little reason to deny the public access to a work the copyright owner is no longer interested in exploiting. If a copyright owner has let a work go out of print (or has itself gone out of business), others

earlier and not itself available on market and finding that second factor favored fair use); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) (“[L]onger portions copied from an out-of-print book may be fair use because the book is no longer available.”).

⁸⁹ *Goldman & Silbey*, *supra* note 60, at 991-92.

⁹⁰ *See Sony*, 464 U.S. at 456 (finding fair use despite entire work being copied); *Fox Broad. Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139, 1175-76 (C.D. Cal. 2015) (“The fact that [the disputed copies] reproduce an entire work weighs against fair use, but is of ‘very little weight’ compared with other factors due to the limited nature of the ultimate use.” (quoting *Fox Broad. Co. v. Dish Network, L.C.C.*, 905 F. Supp. 2d, 1088, 1104 (C.D. Cal. 2012))).

⁹¹ *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 722 (2011); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 616-17 (2008); Nimmer, *supra* note 75, at 267.

⁹² *See Urban*, *supra* note 71, at 1406-09; Randal C. Picker, *Private Digital Libraries and Orphan Works*, 27 BERKELEY TECH. L.J. 1259, 1280-82 (2012).

⁹³ *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929-30 (2d Cir. 1994) (“[C]ourts have recognized limits on the concept of ‘potential licensing revenues’ by considering only traditional, reasonable, or likely to be developed markets when examining and assessing a secondary use’s ‘effect upon the potential market for or value of the copyrighted work.’” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994))); Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 187-91 (2007).

should be legally entitled to copy that work to make it available to others. Once content is public and the copyright owner has relinquished any interest in profiting from it, there is a public interest in keeping that work available to the world. The fair use doctrine should protect that interest.

That doesn't mean we should expect a raft of fair use cases. Copyright owners have already made the up-front investment to produce the work. Most of them are happy to continue to make it available, or to license someone else to do so, obviating the need to worry about it disappearing. That will be even more likely once it is clear to them that abandoning the work in this way justifies copying and distribution of the work by others. Indeed, interpreting the fair use doctrine in this way may create a "penalty default" rule that encourages them to keep works accessible.⁹⁴ If they still don't distribute the work or license someone else to do so, it will often be because they are out of business or have decided the work isn't worth paying attention to at all. In either case, they would be unlikely to sue someone who picks the work up for continued use. It should be the rare case in which we need to actually litigate a fair use case to prevent content from disappearing.

B. *Complications*

This is law, so naturally it's not quite as simple as that. In this section I consider some ways copyright owners might seek to avoid this result, some arguments that shouldn't prevent a right to access public content, and a few that should. These are the edge cases. Most of the time when content goes out of print, the copyright owner just doesn't care enough to keep it available. Indeed, the copyright owner might not be in business anymore. In the cases I consider in this section, the copyright owner affirmatively wants the world not to have access to the work for some reason. The question is whether we should let them withdraw this content from the world.

1. Unacceptable Justifications for Disappearing Content

Many of the reasons copyright owners might want to make their content disappear are ones that copyright law should reject as inimical to its purposes.

Cannibalization. Copyright owners may remove content because they want to replace it with new content. That new content might be unrelated. Copyright owners who want to promote their newest show may fear that existing shows will cannibalize the market for that show.⁹⁵ I'm not sure that fear is warranted;

⁹⁴ On the idea of penalty defaults, see Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032-33 (1995); and Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95-107 (1989).

⁹⁵ Reese, *supra* note 10, at 594 n.57.

there seems to be plenty of demand for both new and old shows.⁹⁶ But even if they are right that people prefer the old works to the new, that shouldn't justify having the old content disappear altogether. Copyright owners have always faced competition from old content in the form of used books, old movies, and the like. The fact that the move to streaming makes it easier to withdraw those old works from the world doesn't mean the copyright owner should be able to do so. Copyright owners are free to release new works and profit from both new and old works. And they are free to promote the new work to drive traffic there. But they shouldn't be free to remove the old work from public access. If they do, others should be able to provide those works under the fair use doctrine.

Artificial scarcity. While it is a closer case, I think the same should be true of efforts by copyright owners to create artificial scarcity for their works by periodically withdrawing them from public view. Disney is the most prominent user of this strategy. For years, it would periodically re-release its films only at certain times, hoping to lure a new generation of kids into the theaters.⁹⁷ Other studios traditionally created “windows” during which the work is temporarily unavailable while being transitioned from one revenue model to another.⁹⁸ Traditionally, for instance, movies would show in a first-run theater, then in a “sub-run” discount theater, then perhaps on premium cable channels, then be released on DVD, then syndicated to television.⁹⁹ More recently, services like Hulu provided a weird hodgepodge of television shows, offering, not all the episodes in a series, but only those that were old enough—but not too old.¹⁰⁰

That may well have been a profitable strategy. But it is one that should be obsolete in a world where people have grown accustomed to having access to published content when they want it. In the past, Disney could decide when it wanted to sell DVDs of particular movies, but it couldn't prevent the resale or rental of those DVDs by others during its period of artificial scarcity. It shouldn't

⁹⁶ See Mahita Gajanan, *These Are the Most Popular Netflix Shows and Movies—According to Netflix*, TIME (July 16, 2020, 1:09 PM), <https://time.com/5697802/most-popular-shows-movies-netflix/> (“Netflix says its new fantasy series, *The Witcher*, is on track to be its biggest first season of a television series ever, with 76 million member households watching at least two minutes of the show.”); David Renshaw, *Is Rewatching Old TV Good for the Soul?*, BBC CULTURE (Apr. 27, 2021), <https://www.bbc.com/culture/article/20210427-is-rewatching-old-tv-good-for-the-soul> [<https://perma.cc/UE3V-25K5>] (noting enduring popularity of both *The Office* and *The Sopranos*, among other older shows).

⁹⁷ See *supra* notes 57-58 and accompanying text (providing examples of Disney “Vault” in action).

⁹⁸ Edward Jay Epstein, *Hollywood's Death Spiral*, SLATE (July 25, 2005, 2:48 PM), <https://slate.com/culture/2005/07/hollywood-s-death-spiral.html> [<https://perma.cc/83P3-Z4WG>] (“In the early 1980s, in order to avoid having new movies in theaters compete against themselves in video, pay-per-view, pay TV, or free television, the studios set up a series of insulated windows for each format.”).

⁹⁹ See *id.*

¹⁰⁰ *Why Are There Only a Few Episodes of My Show Available?*, HULU: HELP CENTER (July 10, 2021), <https://help.hulu.com/s/article/only-some-episodes> [<https://perma.cc/Z2MK-XQ49>].

now be able to prevent access to that content altogether simply because the world has moved to streaming services, so no one has DVDs to watch or rent.

This is a harder case under fair use doctrine, because Disney can tell a market harm story to justify its withdrawal of content, and unlike most cases of disappearing content, it is not withdrawing the content forever. Nonetheless, I think users should be entitled to retain the access they had to published content even during artificially created blackout periods. And if the copyright owner won't maintain access, others should be permitted to supply that content. As a practical matter, small windows of unavailability are unlikely to provoke copying or litigation as long as the work is in fact about to be released in a new format. Take, for example, Christmas specials that come out every Christmas. That doesn't seem to me a case of withdrawal from the market at other times of the year. But longer periods—indefinite unavailability or withdrawing a work for a year or more—seem more problematic and may draw entry from those who want to make the work accessible. That may not align with the contracts studios wrote in the past. But there is little reason to need or want such versioning in the modern world.

Changing the content. Sometimes copyright owners will want to replace old content with new versions of that content. George Lucas edited *Star Wars* when he released it on video to change the story and add some then-cutting-edge virtual effects, for example.¹⁰¹ Others may want to issue director's cuts of movies or the like. There's nothing wrong with doing that. But when it is coupled with the withdrawal of the original version from public view, those changes become more problematic. The public should have a record of content in its various forms. The copyright owner is free to promote the new form and encourage people to use it. But when it substantively changes the content and withdraws the old version, the world loses something.¹⁰² Others should be free to make that old version available if the copyright owner won't, at least if the content is passive rather than interactive.¹⁰³

That principle needs some limits—the decision to sell only the director's cut of *Blade Runner* shouldn't necessarily justify direct commercial competition by other editions. But libraries, academics, and other non-profit groups should be able to preserve that content and make it available. And if there are substantial differences between the old and new versions, private companies should be able to fill the demand for the old version if the copyright owner won't. I expect that situation to be rare; most copyright owners will offer both old and new versions

¹⁰¹ See *supra* note 55 and accompanying text (noting difficulty of finding original, unedited version of *Star Wars* today). Also, to gut one important scene in the movie, at least from the perspective of *Star Wars* fans.

¹⁰² If there is no substantive change, but rather just remastering of existing content, the copyright owner is not really withdrawing anything of substance from the public.

¹⁰³ On the complications of interactive multiplayer content, see *infra* notes 114-17 and accompanying text.

if there is substantial demand for both. That is even more likely to be true if not doing so would open the old version to copying by others.

Objectionable content. The stakes get even higher when the copyright owner withdraws the content, not to replace it with a modified version, but because the owner no longer wants the content available at all. The copyright owner may have decided she doesn't agree with what she once said. Perhaps a new owner—a corporate buyer or an author's children—has taken over the copyright and wants it removed from public view. Or perhaps an older movie or book is now recognized to be racist, sexist, or homophobic and the copyright owner doesn't want to face controversy.¹⁰⁴ Scientific journals may want to take down a paper that has been retracted. While those desires are sometimes understandable, they don't justify retroactively wiping the public record clean. To the contrary, a substantive desire to withdraw published content from the world actually offers a good reason why a third party making that work available is in the public interest. The public has a right to know what is out there even—perhaps especially—if the copyright owner now wants to pretend it never existed.

An instructive example involves the copyright to Adolf Hitler's *Mein Kampf*. Hitler published the book in Germany.¹⁰⁵ In the 1930s, he published an English translation in the United States that altered the work to tone down the anti-Semitism and conceal many of his ambitions. Alan Cranston, an anti-fascist, translated and published the entire book to demonstrate to Americans the full threat Hitler posed.¹⁰⁶ Hitler's publisher sued him for copyright infringement—and won.¹⁰⁷ I think that result is wrong. Cranston performed a valuable public service by making Hitler's words clear and preventing him from toning them down.

Copyright owners should be free to disavow a work.¹⁰⁸ They certainly don't have to sell or promote the work. But if they decide not to make it available for

¹⁰⁴ See *Six Books Withdrawn*, *supra* note 56. Disney decided not to stream its *Song of the South* on Disney+ because of its racist content, for instance. Jesus Jiménez, *Column on 'Wokeness' Ruining Disney World Experience Draws Backlash*, N.Y. TIMES (Apr. 24, 2021), <https://www.nytimes.com/2021/04/24/business/disney-world-woke-column.html>. Though pretty much every TV show from before 1990 would disappear on that theory.

¹⁰⁵ Wendi A. Maloney, *Mein Kampf Infringer Aimed to Warn of Hitler Threat*, COPYRIGHT.GOV (May 2015), https://www.copyright.gov/history/lore/pdfs/201505%20Lore_May2015.pdf [<https://perma.cc/42S6-D9S6>].

¹⁰⁶ See generally LORRAINE H. TONG, *HITLER ON TRIAL: ALAN CRANSTON, MEIN KAMPF, AND THE COURT OF WORLD OPINION* (2017) (recounting Cranston's work translating and publishing *Mein Kampf* to expose Hitler's true intent).

¹⁰⁷ *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306, 312 (2d Cir. 1939).

¹⁰⁸ Copyright law expressly gives that right only to a small subset of copyright owners—those who make recognized works of visual art in small editions. 17 U.S.C. § 106A. But it is reasonable to expand that right to a general right to disavow association with content. *Cf.* Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, in *REAL LAW @ VIRTUAL SPACE: COMMUNICATION REGULATION IN CYBERSPACE* 251, 256-58 (Susan J. Drucker & Gary Gumpert eds., 1999) (arguing that copyright owners should have stronger rights of attribution and nonattribution online).

moral or political reasons, they shouldn't have the power to stop others from keeping access to the work alive, particularly if doing so allows the world to see what the copyright owner once believed.¹⁰⁹

2. Legitimate Reasons to Make Content Disappear

While fair use should generally protect those seeking to keep once-public content available, there are circumstances in which a copyright owner has a legitimate reason to withdraw content from the public eye.

Security and updating. First, the old content may be broken, or even dangerous. Software programs, for instance, are regularly updated with patches to fix security vulnerabilities.¹¹⁰ The publisher may reasonably worry that someone who disseminates an out-of-date version of a computer program is creating a cybersecurity risk.¹¹¹ That is particularly true if the software operates online, so that the publisher may leave its own system vulnerable if it accepts data from compromised older programs. But even if it isn't regularly online, a publisher may still decide that the legal and economic risks of supporting insecure software are too great.

Cybersecurity is a legitimate reason to replace older versions with newer ones. But even if there isn't a security threat, software and games are frequently updated to fix bugs.¹¹² Modern computer systems are so complicated that it is virtually impossible to release software that is bug-free.¹¹³ Replacing older, buggy code with debugged code seems legitimate, and the fact that a copyright owner releases updates designed to fix errors shouldn't require it to keep offering

¹⁰⁹ Here too the right might be more reasonably limited to academic uses and discussion rather than commercial exploitation of the offensive work.

¹¹⁰ See *About the Security Content of iOS 14.4 and iPadOS 14.4*, APPLE (May 28, 2021), <https://support.apple.com/en-us/HT212146> [<https://perma.cc/3576-EYYN>]; *Security Update for Windows 10, Version 1607, 1703, 1709, 1803, 1809, 1903, 1909, Windows Server 2016 and Windows Server 2019: February 11, 2020*, MICROSOFT, <https://support.microsoft.com/en-us/topic/security-update-for-windows-10-version-1607-1703-1709-1803-1809-1903-1909-windows-server-2016-and-windows-server-2019-february-11-2020-755ab061-817d-144b-e4de-2c4ee4f1d596> [<https://perma.cc/W3H8-4JAX>] (last visited Sept. 1, 2021).

¹¹¹ See Joe Symanovich, *5 Reasons Why General Software Updates and Patches Are Important*, NORTON (Jan. 23, 2021), <https://us.norton.com/internetsecurity-how-to-the-importance-of-general-software-updates-and-patches.html> [<https://perma.cc/9QWY-N8ND>] (“Software updates often include software patches. They cover the security holes to keep hackers out.”).

¹¹² See Megan Farokhmanesh, *Cyberpunk 2077's Latest Patch Fixes Hundreds of Bugs*, VERGE (Mar. 29, 2021, 2:01 PM), <https://www.theverge.com/2021/3/29/22356546/cyberpunk-2077-patch-1-2-bug-fixes-console-stadia>; *About iOS 14 Updates*, APPLE (July 26, 2021), <https://support.apple.com/en-us/HT211808> [<https://perma.cc/X7A7-FJA8>].

¹¹³ *The Myth of “Bug Free” Software*, BETA BREAKERS (Jan. 13, 2016), <https://www.betabreakers.com/the-myth-of-bug-free-software/> [<https://perma.cc/7WLE-QZNT>] (“There is simply no such thing as bug free software.”).

older versions of the code on its site or permit third parties to copy those versions.

Interactive content. Second, copyright owners may have good reason to withdraw old content while issuing new content when the thing the copyright owner wants to change is interactive rather than passively consumed. A copyright owner that updates a multiplayer video game can't always easily make older versions available, because users might not be able to interact across different versions. In that case, there is a stronger argument for replacing the older version altogether so the copyright owner can provide an enhanced experience without forking the game into two versions. Video games often include downloadable extras, for instance, and are frequently updated with bug fixes.¹¹⁴ While the user of a single-player game might choose not to update the game and instead choose to keep the original experience, online multiplayer games can't always handle players interacting with each other while running different versions of the game.¹¹⁵ So there is a good argument to allow video game and other software updates to replace the original version. But books, movies, and music don't need a similar feature.

Two complications to updates of interconnected systems involve platform compatibility and widespread demand for a previous platform. A significant minority of *World of Warcraft* players, for instance, prefer the original version without subsequent updates, to such an extent that they run their own underground servers to allow users to play the original game.¹¹⁶ There is a legitimate question whether users should be allowed to run separate, free-standing versions of obsolete game systems the copyright owner no longer offers. I discuss this phenomenon in the context of game modifications ("mods") and obsolete platforms below.¹¹⁷

Legal restrictions. Third, the copyright owner might be obligated to remove the content because it violates someone else's copyright. The Joan Crawford movie *Letty Lynton*, for example, was pulled from public distribution because it was enjoined after it was held to infringe the copyright in the play on which it was based.¹¹⁸ The plaintiff can still distribute the underlying play (and indeed it

¹¹⁴ See *Downloadable Content (DLC)*, STEAMWORKS, <https://partner.steamgames.com/doc/store/application/dlc> [<https://perma.cc/ZN7A-LRPT>] (last visited Sept. 1, 2021).

¹¹⁵ See *Call of Duty: Modern Warfare Installation and Setup*, ACTIVISION (Oct. 28, 2019), <https://support.activision.com/modern-warfare/articles/call-of-duty-modern-warfare-installation-and-setup> [<https://perma.cc/6H3Y-CR2R>] (stating that users can play single-player mode, but not multiplayer, while they wait for update to install).

¹¹⁶ Morgan Park, *Every WoW Classic Server: How to Pick the Realm for You*, PC GAMER (June 1, 2021), <https://www.pcgamer.com/wow-classic-servers/> [<https://perma.cc/Q6UC-TZPJ>].

¹¹⁷ See *infra* notes 137-40 and accompanying text.

¹¹⁸ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 409 (1940). It has not been exhibited since, and is known in movie buff circles as the "lost Joan Crawford movie." DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 549 (5th ed. 2018).

licensed a competing movie with Hedy Lamarr some years later), but the content added by the defendants is no longer available. Copyright owners obviously shouldn't be required to make a work available if a court has ordered them not to. Even if a court denies an injunction, they aren't obligated to pay damages by continuing to infringe on the original copyright.¹¹⁹

A somewhat closer question is presented by unresolved claims of infringement. Many people sue video and music publishers for copyright infringement, and most of those suits are bogus. Indeed, any sufficiently successful movie seems destined to attract suits from people claiming they came up with the idea for the movie.¹²⁰ A copyright owner might reasonably fear losing such a suit and decide to withdraw the work from publication as part of a settlement. That too should be permissible, though there is a risk that copyright owners will use bogus lawsuits as part of a strategy to withdraw a work for impermissible reasons.¹²¹

Another complication is that some works incorporate other works, and the copyright owner may not have the rights to use those other works. For example, the classic documentary *Eyes on the Prize* included copyrighted material from third parties but didn't get rights to that material for uses that occurred more than ten years after the documentary was released.¹²² If the copyright owner cannot rerelease a work without infringing on components included in that work, presumably the fair user would have the same problem.¹²³

¹¹⁹ This problem isn't limited to infringers. Copyright owners can terminate their licenses after thirty-five years in some limited circumstances, and this has led to litigation and the withdrawal of some works that were authorized when made but whose authorization was then withdrawn. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 227, 238 (1990) (holding that Alfred Hitchcock movie *Rear Window* was subject to such a termination); David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387, 388-98 (2002) (providing history behind Copyright Act and its subsequent amendments relating to its provision of right to terminate transfers thirty-five years after an assignment).

¹²⁰ See, e.g., *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984) (rejecting claim that blockbuster movie *E.T. The Extra Terrestrial* was based on plaintiff's musical play, "Lokey from Maldemar").

¹²¹ Until recently, this wasn't much of a problem because copyright suits were brought against works early in their life. Unfortunately, the Supreme Court abolished the doctrine of laches in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), leading to a flood of dubious lawsuits against old works. Still, most lawsuits are brought against works that are making money (to paraphrase Willie Sutton, "that's where the money is"), and publishers are less likely to want to remove those works from the public eye.

¹²² I am indebted to Tony Reese for this example. See R. Anthony Reese, *Preserving the Unpublished Public Domain*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 55, 67 (Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman eds., 2010).

¹²³ This may be less common of a problem than it seems, both because fair use favors transformative uses and because the underlying copyright owners are presumably objecting

One legal restriction that should not protect those who withdraw content from operation of the fair use doctrine is a license purporting to restrict distribution of the content. Unlike a claim of infringement by a third party, an agreement between the copyright owner and a licensee shouldn't result in no one having the right to distribute the work. A significant fraction of content likely disappears not because the creator wants to withdraw the work but because she granted an exclusive license to a distribution platform like Netflix and that distributor then stopped distributing the work. But "Netflix will make more money streaming something else" isn't a legitimate reason to deny the world access to the content.

That doesn't mean that copyright owners can't sign exclusive distribution deals. They can and they will. But those distribution deals have to involve actual distribution. If the distributor stops distributing, others should be free to step in and keep the work available. Notably, that includes the copyright owner herself, who under my proposal may effectively take back a work she has licensed if the licensee is no longer distributing it.¹²⁴

Ephemeral content. Finally, some content—even content made public—is not intended to be permanent. There is no right of public access to private letters, internal corporate memoranda, etc., at least in normal circumstances.¹²⁵ But there also is no right to permanent public access to works that are intended to be ephemeral. Snaps and stories on social media, for instance, exist for a short period of time and then disappear. Unrecorded theatrical, musical, or dance performances may be public in the moment but aren't meant to be preserved

to the continued use of the work, making it hard for them to credibly assert market harm from that use. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202-05 (2021) (holding that Google's use of Sun's API to make Android mobile apps was transformative where Sun's API was created for desktop and laptop computers).

¹²⁴ *See also* Martin Kretschmer & Rebecca Giblin, *Getting Creators Paid: One More Chance for Copyright Law*, 43 EUR. INTEL. PROP. REV. 279 (2021) (discussing the "use it or lose it" licensing rule under the article 22 of the EU's Digital Single Market law). More on what happens to other fair users if an author takes back their rights *infra* notes 151-55 and accompanying text.

¹²⁵ Works that are never made available to the public are outside the scope of my analysis. They may be withheld for good reasons or bad, but because they were never offered to the public, the fair use analysis differs. *See, e.g.,* Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1313-14 (11th Cir. 2008). The second fair use factor gives copyright owners more control over whether and when to publish a work. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985) (concluding "that the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use" (quoting S. Rep. No. 94-473, at 64 (1975))); *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) (applying *Harper & Row* to "place special emphasis on the unpublished nature of Salinger's letters" in a fair use analysis). That control is not absolute, however. 17 U.S.C. § 107 ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."). For discussion of purely private copyrighted works, see Balganes, *supra* note 63; and Goldman & Silbey, *supra* note 60.

forever. And some works of art deliberately degrade over time.¹²⁶ Copyright owners may create a work intending that it lapse over time. When they do, the public doesn't lose out by having it disappear as a result of a technological change.

3. Where to Get a Copy

Even if making disappeared content available is legal under the fair use doctrine, that doesn't guarantee that anyone actually has a copy they can make available. As I noted in Part I, as the world moves to streaming it may become harder and harder to find those copies unless you are the copyright owner.¹²⁷ Indeed, the problem is worse than it appears; even content creators themselves don't always save their work so that it can be ported to new platforms,¹²⁸ and they sometimes rely on pirated copies to restore and update their own works.¹²⁹

Declaring the distribution of those works to be fair use will help, because it means that anyone who does have a copy can share it. And archival sites like Google Books or the Internet Archive may put out a call for such copies. They should be permitted to make disappeared content available to users in its entirety. But there is another promising source of disappeared content: the Copyright Office.¹³⁰ The Copyright Office requires that anyone who registers their copyright (and most U.S. authors and publishers do) deposit a copy of that

¹²⁶ Subversive artist and prankster Banksy once rigged a painting to automatically shred itself soon after selling at auction for over £1 million. Chris Johnston, *Banksy Auction Stunt Leaves Art World in Shreds*, GUARDIAN (Oct. 6, 2018, 4:11 AM), <https://www.theguardian.com/artanddesign/2018/oct/06/banksy-sothebys-auction-prank-leaves-art-world-in-shreds-girl-with-balloon>. Meanwhile, satirical sculptor Maurizio Cattelan taped a banana to a wall to create his famous *Comedian* sculpture. Sarah Cascone, *Maurizio Cattelan Is Taping Bananas to a Wall at Art Basel Miami Beach and Selling Them for \$120,000 Each*, ARTNET NEWS (Dec. 4, 2019), <https://news.artnet.com/market/maurizio-cattelan-banana-art-basel-miami-beach-1722516> [<https://perma.cc/LH4P-FH4S>].

¹²⁷ See *supra* Part I.

¹²⁸ See R. Anthony Reese, *Super Bowl I, Jazz Radio, and The Glass Menagerie: Copyright, Preservation, and Private Copies*, 51 AKRON L. REV. 1025, 1033-40 (2017) (discussing problem of lost works not preserved by copyright owners).

¹²⁹ See Nathan Grayson, *The Crazy Journey to Save Grim Fandango*, KOTAKU (Nov. 10, 2014, 2:00 PM), <https://www.kotaku.com.au/2014/11/the-crazy-journey-to-save-grim-fandango/> [<https://perma.cc/5MR2-N7QH>] (discussing efforts to resurrect game that "has been out of commission for more than a decade. In the intervening time, it's become harder and harder to even get your hands on a copy of the game—let alone get it to work on a modern operating system."). As the project lead put it, "[i]t's frustrating because if we had just saved the right files, it'd be so much easier." *Id.* The game developers themselves ended up using pirated copies of the game, as well as source code that developers had taken home without permission. *Id.*

¹³⁰ I am indebted to Ryan Vacca and Jacob Goldin for this suggestion. For a proposal to expand the deposit copy requirement, see R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 312-13 (2012).

work.¹³¹ The Copyright Office will release that copy for some purposes, including where there is litigation over a work.¹³² But the office could change its regulations to provide a copy of a deposited work to anyone who certifies that the work is out of print and is no longer being exploited. This won't solve all access problems; not everyone registers their work, and deposits for computer software don't include functioning code.¹³³ But it would be a significant step towards availability of a copy.

4. Disappearing Technology Platforms

While I have focused on the problem of content disappearing because of the shift to streaming and cloud-based remote access, content can also “disappear” not because consumers don't have a copy of it but because they have no effective way to access that copy. Technology platforms change regularly, and they tend to be backwards compatible only for a limited period of time. If you've got a computer program on a floppy disk (either the kinds that were actually floppy or the ones that weren't), music on an eight-track tape, a Betamax videotape, or a Sega Genesis game cartridge, good luck getting access to it.¹³⁴ The content hasn't disappeared—consumers still have relatively durable copies—but as a practical matter no one can access it. This problem isn't limited to video games. Maybe you managed to hold onto a very old computer or a Betamax, but you probably didn't. And even if you did, it likely won't connect to any modern data storage system.¹³⁵ The same may be true of an early Kindle. Andy Warhol, for

¹³¹ 17 U.S.C. § 407.

¹³² See *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 841 (Fed. Cir. 1992) (discussing regulations and their misuse in that case).

¹³³ U.S. COPYRIGHT OFF., COPYRIGHT OFFICE CIRCULAR NO. 61: COPYRIGHT REGISTRATION OF COMPUTER PROGRAMS 1 (2012), <http://copyright.gov/circs/circ61.pdf> [<https://perma.cc/D8Q5-4ZQ2>] (“The copyright law does not protect the functional aspects of a computer program, such as the program's algorithms, formatting, functions, logic, or system design.”).

¹³⁴ This has been a worry since the last millennium, when some were concerned that early digital text would not be preserved. See Jeff Rothenberg, *Ensuring the Longevity of Digital Information*, 26 INT'L J. LEGAL INFO. 1, 1 (1998), <https://www.cambridge.org/core/journals/international-journal-of-legal-information/article/abs/ensuring-the-longevity-of-digital-information/E79AD8F403C068701B09EE018BE4AA72> [<https://perma.cc/6JZ8-6KE5>]. The move to the Internet made obsolete formats less of a problem for text, because it was relatively easy to store and replicate it online. This remains a bigger problem for video games and other large files, however.

¹³⁵ There are companies that will up-convert some kinds of content from old media, but they generally focus on home movies and other personally generated content. See, e.g., VHS to Digital & DVD Service, LEGACYBOX, <https://legacybox.com/products/vhs-conversion> (last visited Sept. 1, 2020). William Gibson has a science-fiction book set decades in the future in which a protagonist collects and preserves working copies of old hardware so people can find their content. WILLIAM GIBSON, *IDORU* (1996).

instance, did early computer art for a Commodore Amiga, but it was lost for years until an archivist managed to recover it.¹³⁶

A right to access published content, then, may turn out to require some sort of right to port that content to modern platforms. Sometimes that can be done by finding an old machine and a way to copy the content to a new machine. In other cases, however, accessing old content may effectively involve recreating it. There is a vibrant underground market for video game emulators—software that emulates an old video game on a modern platform.¹³⁷ Courts have treated copying to permit cross-platform interoperability as fair use, even when the resulting product competes directly with the copyright owner's works.¹³⁸ If, as I suggested in Part II.A, fair use permits defendants to copy out-of-print content, and it also permits porting of published content to new platforms, it ought to permit people to adapt that out-of-print content so it can be effectively accessed using modern systems.¹³⁹ Emulating out-of-print video games on new platforms should be legal. If it isn't, the fair use right to share those games is practically worthless. But copyright owners fight it vigorously.¹⁴⁰

¹³⁶ Whereupon, this being 2021, it was promptly turned into an NFT. Sarah Cascone, *The Warhol Foundation Is Auctioning Off the Artist's Computer-Based Works as NFTs. An Archivist Who Uncovered Them Is Outraged*, ARTNET NEWS (May 21, 2021), <https://news.artnet.com/market/andy-warhol-nft-christies-1971474> [<https://perma.cc/JK4S-63PB>].

¹³⁷ See Jason Cohen, *The Best Emulators for Playing Retro Games on Modern Devices*, PCMAG (Aug. 21, 2020), <https://www.pcmag.com/how-to/the-best-emulators-for-playing-retro-games-on-modern-devices> [<https://perma.cc/AE54-TS7U>].

¹³⁸ See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992) (finding Accolade's reverse engineering of software in Sega's video games to make their own games compatible with Sega game console to be fair use of Sega's software); *Sony Comput. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (holding that making copies of copyright-protected software during process of reverse engineering to create competing platform was fair use).

¹³⁹ See Joseph Godfrey, *Super Mario Decompiled*, 12 HASTINGS SCI. & TECH. L.J. 1, 11 (2020) (suggesting that "it [is] likely that reconstructing and publicly releasing source code would be considered a fair use"). Some have suggested that estoppel or implied license might permit such a use. See Andrew F. Thomas, *Modding the Implied License Doctrine: An Estoppel License Framework for Video Game Mods*, 47 AIPLA Q.J. 545, 561-76 (2019). But the fact that companies resist emulation makes it hard to apply those doctrines to obsolete technology.

¹⁴⁰ See, e.g., *How to Report Potential Infringements of Nintendo Products*, NINTENDO: CUSTOMER SUPPORT, https://en-americas-support.nintendo.com/app/answers/detail/a_id/50131/kw/emulator [<https://perma.cc/5MRQ-BWWL>] (last visited Sept. 1, 2021) (detailing how to report potential infringements of Nintendo products such as "ROM sites, emulators, Game Copiers, Counterfeit manufacturing, or other illegal activities"). For instance, Nintendo sent takedown notices in 2020 to an individual who ported Super Mario 64, a game first released in 1996 and made for the now-obsolete Nintendo 64 platform, to PC. Andy Robinson, *Nintendo Takes Action Against Mario 64 PC Port*, VIDEO GAMES CHRON. (May 8, 2020, 3:19 PM), <https://www.videogameschronicle.com/news/nintendo-takes-action-against-mario-64>

One recent decision found that porting a body of copyrighted work from one platform to another was fair use as a matter of law. In *Monsarrat v. Newman*,¹⁴¹ the court held that the heads of a LiveJournal discussion forum could copy all the historical content of that forum in order to move the discussion off LiveJournal to a different platform.¹⁴² It noted that while the copyrighted material was copied in full, “a full reproduction is consistent with historical and preservationist purposes.”¹⁴³

5. Gaming the System

There is some risk that both copyright owners and defendants will try to evade or game the right to access out-of-print content. Copyright owners might try to avoid having a work declared out-of-print while effectively withdrawing it from public access for reasons I rejected above as impermissible. For instance, they might offer the copyrighted work for an extremely high price or offer it in places or subject to conditions that make it practically inaccessible but allow them to claim that it is still technically in print. Trademark owners have engaged in similar token uses in an effort to avoid being deemed to have abandoned their marks.¹⁴⁴

On the flip side, accused infringers might try to game the right to access content by claiming that remastering or other trivial edition changes cause the previous edition to go out-of-print, allowing them to copy a version of a work

pc-port/ [https://perma.cc/NA5A-UVVY]. For a discussion of how copyright owners have targeted emulators, see, for example, Jessica A. Magaldi, Jonathan S. Sales & Wade Davis, All’s Fair in Love and War but Nothing’s Fair Use on YouTube: How YouTube Policies Favor Copyright Owners and Hinder Legal Fair Use 11-12 (Apr. 6, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569760). Things get more complicated if the content is encrypted, because copyright owners may invoke 17 U.S.C. § 1201 of the Digital Millennium Copyright Act to prevent the unlocking of that content. Thus, even if I could find a DVD of *El Ministerio del Tiempo*, it is likely to be region-coded for Europe, and sharing that work with the public requires not only making a copy but also bypassing the copy control system. Courts have disagreed over whether a desire to make fair use of the underlying work justifies breaking the encryption in that work. *Compare* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202-03 (Fed. Cir. 2004) (yes), *with* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 950-52 (9th Cir. 2010) (no). But that problem may be less significant in practice, because many people who will want to make fair use of a work that has disappeared will already have an unlocked copy of the work. If they don’t, they may not be able to get a copy of any sort, locked or unlocked.

¹⁴¹ No. 20-cv-10810, 2021 WL 217362 (D. Mass. Jan. 21, 2021).

¹⁴² *Id.* at *2.

¹⁴³ *Id.* at *3.

¹⁴⁴ See Christopher T. Micheletti, *Preventing Loss of Trademark Rights: Quantitative and Qualitative Assessments of “Use” and Their Impact on Abandonment Determinations*, 94 TRADEMARK REP. 634, 634-35 (2004); cf. Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 42-51 (2021) (arguing that trade secrets should be free for others to use if their owner abandons them).

that doesn't substantially differ from the work the copyright owner is still selling and profiting from.

Neither form of gaming should be permitted. The good news is that the fair use doctrine, because it is multifaceted and fact-specific, lends itself well to a detailed evaluation of whether content is really out of print and not justified by one of the exceptions noted above. There will naturally be hard cases at the margins. But none of them should distract from the fundamental public right to have continued access to once-published content.

A final problem comes, not from copyright, but from the supplementation of copyright with automated filtering systems. Copyright owners have to consider fair use before sending Digital Millennium Copyright Act ("DMCA") takedown notices.¹⁴⁵ But relatively few YouTube takedowns, for example, come as a result of copyright owner complaints.¹⁴⁶ Most are processed through YouTube's Content ID system.¹⁴⁷ If Content ID flags a published work as copyrighted, it will automatically take the work down even if the copyright owner isn't making the work available and so it should be fair use.¹⁴⁸ So we may need either a registry of out-of-print works¹⁴⁹ or for automated filtering systems to update to exclude out-of-print works from their copyright-driven filtration systems.¹⁵⁰

6. Reappearing Content

What happens if content disappears and then later reappears? I discussed above a copyright owner's efforts to withdraw a work for a limited time period.¹⁵¹ I have in mind here something different—the copyright owner who "rediscovers" a lost work after others are already making fair use of it. True rediscovery will be rare; after all, the work is not truly lost if others have access

¹⁴⁵ See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1133 (9th Cir. 2015).

¹⁴⁶ Lauren D. Shinn, Note, *Youtube's Content ID as a Case Study of Private Copyright Enforcement Systems*, 43 AIPLA Q.J. 359, 363-64, 370-72 (2015).

¹⁴⁷ *The Difference Between Copyright Takedowns and Content ID Claims*, YOUTUBE HELP, <https://support.google.com/youtube/answer/7002106?hl=en> [<https://perma.cc/Y9S5-BTX9>] (last visited Sept. 1, 2021) ("Since January 2014, Content ID claims have outnumbered copyright takedowns by more than 50 to 1.").

¹⁴⁸ Leron Solomon, Note, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 253-54 (2015); Taylor B. Bartholomew, Note, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 68 (2015).

¹⁴⁹ The Berne Convention prevents member countries from requiring registration as a condition of copyright protection. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, 25 U.S.T. 1341, 828 U.N.T.S. 221. But it doesn't prevent creating a registry of works that are no longer being exploited. *Id.*

¹⁵⁰ Platforms aren't required to offer works by fair users. But systems like ContentID are designed to weed out copyright infringement. *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/E5CF-46NB>] (last visited Sept. 1, 2021). It makes little sense to apply them to content that is not infringing.

¹⁵¹ See *supra* note 97 and accompanying text.

to it and are sharing it under the fair use doctrine. More likely is what we might call “opportunistic rediscovery.” A copyright owner who has abandoned a work because it didn’t seem profitable may discover that people still want the work once someone else releases it under the fair use approach I outlined above.¹⁵² Or they may try to take the work back from an exclusive licensee who has stopped distributing the work under the very fair use theory I offer here.

The copyright owner surely has the legal right to start back up selling or licensing the work at that point. Even if she has exclusively licensed it to someone who stopped distributing it, she should have the same right to make fair use of her own disappeared content that anyone else would.

A somewhat harder question is what should happen to the third-party fair user. It might seem unfair to say the fair use has to stop once the copyright owner is back in the game.¹⁵³ But I think the logic of fair use based on disappearing content requires it. The copyright owner is still the owner, assuming they have not gone through the difficult process of expressly abandoning the work.¹⁵⁴ And once they are selling the work again, the independent user is directly competing with them by providing the very same work. That’s hard to justify under fair use. The right to restore disappearing content must end when the copyright owner has brought the work back to life.

That said, the use was fair at the time. The independent user shouldn’t face liability for conduct that was legal (and indeed likely caused the copyright owner to bring the work back). And the law should allow her a reasonable time to wind down operations and sell off inventory without fear of legal liability, just as the Copyright Act has done in situations where it has “restored” lapsed copyrights and cut off the rights of intervening users.¹⁵⁵

¹⁵² One example involves the video game *Age of Empires II*, which was released in 1999. *Age of Empires II: Definitive Edition*, STEAM, https://store.steampowered.com/app/813780/Age_of_Empires_II_Definitive_Edition/ [<https://perma.cc/HN7M-M5JU>] (last visited Sept. 1, 2021) (noting that 2019 Definitive Edition release “celebrates the 20th anniversary of” original game). Like most games, it had a good run for a couple of years but was gradually eclipsed by newer games. But it was rediscovered more than a decade later after a fan-developed expansion grew sufficiently popular that the game was updated and released on Steam. Katie Williams, *After 14 Years, an Age of Empires 2 Fan Mod Becomes an Official Expansion*, PCGAMER (Aug. 19, 2013), <https://www.pcgamer.com/after-14-years-an-aoe2-fan-mod-becomes-an-official-expansion/> [<https://perma.cc/Z96P-QXWM>].

¹⁵³ Gideon Parchomovksy and Abraham Bell make a strong case that fair use, once established, should become a vested right. Abraham Bell & Gideon Parchomovsky, *Propertizing Fair Use*, 107 VA. L. REV. (forthcoming 2021) (manuscript at 28-33) (available at https://scholarship.law.upenn.edu/faculty_scholarship/2250). But even if that is generally true, I don’t think it should be true when the only reason the use is fair in the first place is because the copyright owner isn’t exploiting the work.

¹⁵⁴ On abandonment of copyright, see generally Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487 (2020).

¹⁵⁵ 17 U.S.C. § 104(A).

CONCLUSION

One of the great advantages of digital content has been that for the last forty years, people have had access to whatever content they want whenever they wanted it. That is starting to change. We're moving backwards. Content is disappearing—not just becoming available only in limited times or circumstances, but becoming entirely unavailable.

It doesn't need to be that way. It is now cheap and easy enough to make all content available. If the copyright owner can't or won't continue to provide a published work, others should be permitted to pick up the slack. Fair use should encompass a right of access to published content. That right, like all of fair use, ought to have limits and exceptions. But a basic right to continued access to published works is consistent with the fundamental purposes of copyright.

In the past we might have aspired to a world in which all the works of history were available forever. That's now an achievable goal. The dead hand control of copyright shouldn't stand in the way.