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THE ROMAN LAW ROOTS OF COPYRIGHT

RUS T VERSTEEG*

INTRODUCTION

Modern technology—specifically the computer and its uses via the Internet—increasingly demands that we reconsider and rethink copyright law. This phenomenon is not new. Before computers made us reassess copyright law, other once-new forms of copying, communication, and information transmission did the same for the following: the satellite, the photocopier, the VCR, radio, sound recording, photography, the printing press, and various forms of television, including cable television. Attempting to keep up with technology is one of the things that makes law, and particularly copyright law, so challenging. The law is constantly scurrying to keep pace with changing technology and societal expectations that evolve in the

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1. See, e.g., Monroe E. Price, Reexamining Intellectual Property Concepts: A Glimpse into the Future Through the Prism of Chakrabarty, 6 CARDOZO ARTS & ENT. LJ. 443, 443 (1987) ("There is reason for a reexamination of the doctrinal bases of intellectual property law... since intellectual property doctrines are playing an increasingly important role in controlling information distribution in the formation of new technology.").

2. See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.20, at 264-65 (2d ed. 1995) ("Satellite carriers, by retransmitting from satellite to earth, are essentially engaging in secondary transmissions of copyrighted works.").

3. See id. § 10.11[A],[C], at 328, 330 (describing how the photocopier allows dissemination of copyrighted works "in ways which were not thought possible until recently").

4. See id. § 10.11[A], at 328 (explaining that the videocassette recorder empowers anyone to "reproduce and transmit a copyrighted work cheaply and inexpensively").

5. See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162-64 (1975) (holding that a restaurant owner's radio reception of music was not a performance and did not violate the copyright of the owners).

6. See LEAFFER, supra note 2, § 3.19, at 99-101 (discussing the uniqueness of sound recordings and its copyright issues).

7. See id. § 1.3, at 6 n.22 (noting that the 1865 revisions to the Copyright Act made photographs a copyrightable subject matter.

8. See id. § 1.2, at 3-5 (reviewing the origin of copyright statutes in response to printing press use in England).


wake of changing technology. For example, for the average person, the concepts of “copying” and “fair use” have changed as technology has provided us with the capability of copying greater volumes of material at greater speeds.

When judges and lawmakers confront novel issues, the “law” is rarely clear. In the absence of precedent, they must resolve novel issues by considering how matters such as policy, fairness, economic efficiency, and fundamental legal principles can help them in their decisionmaking. It is commonplace to trace the fundamental principles and the policies of American copyright back to the Constitution. In doing so, it is not unusual to provide nodding reference to the Statute of Anne and a handful of English cases that helped shape the historical and the political basis for that progenitor of English copyright law.

While acknowledging these foundations of modern copyright, this Article takes a different approach through the examination of the Roman law roots of modern copyright. Although it is virtually certain that the ancient Romans did not have a general law of copyright, they did develop the legal principles of property, contract, and liability that have shaped many of the essential building blocks of American

11. See, e.g., Leaffer, supra note 2, § 1.3, at 5-6 (“Although the colonies already had their own forms of copyright laws, the Framers of the Constitution recognized the need for a uniform law of copyright and patents.” (footnote omitted)).

12. See id. § 1.2, at 5 (noting that the Statute of Anne “became the model for copyright law in the United States”).

13. See J.A. Crook, Law and Life of Rome 207 (1967) (stating that one of the generalizations concerning Roman commercial law is that “[t]here was no law of patent or copyright, [and] no protection for property in ideas”; see also Hans Julius Wolff, Roman Law: An Historical Introduction 58 (1951) (stating that “[a]ncient times did not know such a thing as a copyright”).

Matthews explained:
In Rome, where there were booksellers having scores of trained slaves to transcribe manuscripts for sale, perhaps the successful author was paid for a poem, but we find no trace of copyright or of anything like it. Horace speaks of a certain book as likely to make money for a certain firm of booksellers. In the other Latin poets, and even in the prose writers of Rome, we read more than one cry of suffering over the blunders of the copyists, and more than one protest in anger against the mangled manuscripts of the hurried servile transcribers. But nowhere do we find any complaint that the author’s rights have been infringed; and this, no doubt, was because the author did not yet know that he had any wrongs.

Brander Matthews, The Evolution of Copyright, 5 Pol. Sci. Q. 583, 586 (1890) (internal citation omitted). Additionally, Watson observed that Roman private law rarely manifested an interest in what he calls “a public dimension.” Alan Watson, The Spirit of Roman Law 49 (1995). According to Watson, “[t]his absence of a public dimension is marked throughout Roman private law and is one of its most characteristic features.” Id. Since copyright, by its very nature recognizes an important “public dimension,” this absence may partially explain why the ancient Romans failed to develop copyright law.
copyright law today. Roman law precepts can clearly be seen in numerous aspects of copyright doctrine: the essence of copyright as intangible property; the nature of the public domain; different types of copyrightable works (works of authorship) and the sale of them; ownership of copyrights (including joint authorship and work for hire); and liability for copyright infringement. There is little doubt that the greatest gift that the ancient Romans have left to posterity has been their law and legal principles. This fact may be no less true when it comes to copyright. Thus, it may occasionally prove beneficial to look back to the Roman law origins of copyright when seeking answers to the newest copyright questions.

Part I of this Article reviews some of the commonly acknowledged sources of American copyright. Parts II-VII explore specific copyright doctrines whose origins can be traced to preexisting tenets of ancient Roman law: II. Roman Origins of Intangible Property; III. Copyright as a Public Good: The Public Domain; IV. Copyrightable Subject Matter; V. Sale and Other Transfer of Intangibles; VI. Joint Authorship and Work for Hire; and VII. Copyright Infringement.

I. COMMONLY ACKNOWLEDGED SOURCES OF AMERICAN COPYRIGHT LAW

Virtually all writers who pause to mention the basis of modern American copyright point directly to the precise and explicit language in the Constitution. This language empowers Congress to legislate copyright laws, for the purpose of promoting the progress of science, that give authors, for limited times, the exclusive rights to their writ-

14. See infra Parts II-VII.
15. See infra Part II.
16. See infra Part III.
17. See infra Parts IV-V.
18. See infra Part VI.
19. See infra Part VII.
20. See J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 3 (1976) (maintaining that "it may be safely said that... Roman Law was the great cultural legacy of the ancient western world to its descendants"); ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 3 (1991) ("Rome's greatest legacy to the modern world is undoubtedly its private law. Roman law forms the basis of all legal systems of Western Europe with the exception of England (but not Scotland) and Scandinavia."). Watson also noted that the influence of Roman law on the law of England has also been significant, "much greater than is often admitted." Id.
21. See, e.g., LEAFFER, supra note 2, § 1.3, at 5 (noting that since little is known about the Framer's mindset while drafting the Patent and Copyright Clause of the Constitution, "one is left with the language of the Clause itself").
Most who have considered the matter thoughtfully have concluded that the word "science" in this context means "knowledge," coming from the Latin "scientia." But long before the Founding Fathers ever considered the issue of copyright, British legislators and courts had worked out the basic policies and principles. It was from these foundations that the Constitutional drafters borrowed. Still, copyright did not spring fully fledged like Athena from Zeus' brow in British law either. It was a gradual development.

Many earmark the invention of the printing press as the watershed date for the beginning of copyright as a practical concept. Commentators have argued that printing technology provided the first realistic opportunity for authors to recognize the potential economic benefit from their work. Indeed, we know that in 1469 the lawmakers of Venice granted to John of Spira, a printer, the exclusive rights to publish both Cicero's and Pliny's letters for five years. The grant to John of Spira was only the beginning. Others in Venice and elsewhere quickly jumped on the bandwagon and began seeking and securing the exclusive privilege to publish particular works in specific

22. U.S. CONSt. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

23. See, e.g., Graham v. John Deere Co., 383 U.S. 1, 6 (1966) ("Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system . . . . This is the standard expressed in the Constitution and it may not be ignored."); Infodeck v. Meredith-Webb Printing Co., Inc., 830 F. Supp. 614, 621 n.8 (N.D. Ga. 1993) (noting that the term "science" in the Intellectual Property Clause of the Constitution is "generally given its eighteenth century meaning of knowledge or learning" (citing Graham, 383 U.S. at 5)).

24. See generally LEAFFER, supra note 2, § 1.2, at 3-5 (chronicling the emergence of copyright law in England from 1476 through the early-eighteenth century).

25. See, e.g., id. § 1.2, at 3-4 (suggesting that the introduction of the printing press into England, in 1476, while enriching publishers, also "threatened the Crown," who responded with a system of regulation designed to control this "dangerous art"); Matthews, supra note 13, at 588 ("[T]he earliest legal recognition of his [the printer/publisher's] rights was granted less than a score of years after the invention of printing had made the injury possible.").

26. As Matthews explained:

Indeed, it was only after the invention of printing that an author had an awakened sense of the injury done him in depriving him of the profit of vending his own writings; because it was only after Gutenberg had set up as a printer, that the possibility of definite profit from the sale of his works became visible to the author.

Matthews, supra note 13, at 586.

27. See id. at 588 ("The Senate of Venice issued an order, in 1469, that John of Spira should have the exclusive right for five years to print the epistles of Cicero and of Pliny." (citation omitted)).
localities. Thus, the mid- to late-fifteenth century experienced a rise in the legal and social recognition of copyright; taking the guise of an exclusive right granted by the state to a publisher.

In many respects, the sixteenth and seventeenth centuries proved to be crucial in establishing the patterns and theories that justified copyright in England. By the early-sixteenth century, the Venetian concept caught on as the British king began granting exclusive rights to publish specific books to individual printers. In the meanwhile, the printers guild—the Stationers Company—began, after a fashion, to police itself by establishing a registry system whereby a printer registered individual books with the Company to secure the exclusive rights of publication. Thus, a printer was able to acquire exclusive rights in two ways: (1) by royal grant; and, (2) by registration with the Stationers Company. Consequently, and correspondingly, two theories of copyright evolved: (1) copyright as a legislative grant; and, (2)

28. See id. (stating that "[t]he habit of asking for a special privilege from the authorities of the state wherein the book was printed spread rapidly" and providing Venice and other Italian states as examples).

29. See W.F. Wyndham Brown, The Origin and Growth of Copyright, 34 LAW MAG. & REV. 54, 55 (1908) (describing how during the first half of the sixteenth century "[t]he Crown ... claimed prerogative rights, in the case of certain books, to grant the sole privilege of printing them to its assigns").

30. See id. at 57 ("The person who had registered his rights in the books of the [Stationers] Company was the owner, and he might assign those rights to others, provided the title of the assignee was also entered on the register."); see also Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1135-36 (1983) ("Only members of the Company of Stationers could legally print books and only books authorized by the Crown could be published." (citations omitted)); Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 OHIO ST. L.J. 517, 525 (1990) ("By letters Patent, the Queen granted exclusive rights of printing to the members of the Stationers' Company.").

Holdsworth explained:

By registration [with the Stationers' Company] the printer or publisher got an incontestable title to the book registered in his name. It therefore tended to give clearness and precision to the idea of literary property or copyright. The registers show us the growth of this idea. Copyright is protected by the imposition of penalties upon those who infringed it. It is assigned, sold, settled, given in trust; and limited grants are made. Its duration is nowhere stated, unless it is expressly created for a limited period. It is therefore most probable that it was perpetual; and if we regard it, as it was then clearly regarded, as a form of property, it would naturally be considered to be perpetual, unless a general enactment or order could be pointed to which expressly limited it.

W.S. Holdsworth, Press Control and Copyright in the 16th and 17th Centuries, 29 YALE L.J. 841, 844 (1920) (footnotes omitted).

31. See Holdsworth, supra note 30, at 843 ("Unless a printer or publisher had a special patent of privilege from the crown authorizing him to print a certain book, or certain books of a defined class, he was expected to register with the [Stationers'] company all books which he printed or published." (citing Arber, Transcript of the Stationers' Registers (1875-77))).
copyright as a natural right.\textsuperscript{32} On the one hand, the king granted exclusive rights—suggesting that copyright was a right held by the state that could be allocated as the Crown saw fit.\textsuperscript{33} On the other hand, courts came to recognize copyright as a "natural right" of authors and publishers\textsuperscript{34} that accrued as a result of the author's or publisher's labor in the creation of the literary work.\textsuperscript{35} One of the significant outcomes, under either theory, was that copyright, as a distinct form of property, was legally recognized.\textsuperscript{36}

And so, through the end of the seventeenth century in England, the notion of copyright rested essentially on firm ground. Apparently, publishers assumed that their natural, common law copyrights were perpetual; only the royal grants were limited in duration.\textsuperscript{37} Although

\textsuperscript{32} See id. at 841 ("We shall see, too, that the differences between the control exercised indirectly through the Stationers Company, and exercised directly by the crown, are at the root of two very different theories as to the origin and nature of copyright."); Abrams explained:

The champions of common law copyright argued that copyright was a natural right of the author, arising from the act of creation, which was recognized by the common law. The opponents of common law copyright either denied the existence of copyright as a common law right, or argued that it had been "impeached" by the copyright statutes.

Abrams, supra note 30, at 1129. For a similar but somewhat different analysis, see Linda J. Lacey, Of Bread and Roses and Copyrights, 1989 Duke L.J. 1532, 1539. Lacey maintained that "[c]opyright can be considered either (1) a 'natural' right, (2) an artificial right created by the legislature and the judiciary, or (3) a 'personal' right integral to an artist's very identity." Id.

\textsuperscript{33} See Lacey, supra note 32, at 1540-41 (maintaining that some "commentators and historians argue vigorously that there never has been such a thing as a 'natural' right in intellectual property, that any protection an artist enjoys exists solely through the prerogative of the legislature" (citing Abrams, supra note 30, at 1128)).

\textsuperscript{34} See William E. Simonds, Natural Right of Property in Intellectual Production, 1 Yale L.J. 16, 19 (1891) (noting that in the 200 years prior to the passage of the Statute of Anne in 1710, a number of English courts had recognized a common law copyright). Simonds defined a "natural right" as "a right pertaining to a person or his property, existing independently of specific statute law, a right instinctively and universally recognized by all civilized peoples and many uncivilized." Id. at 16.

\textsuperscript{35} See Brown, supra note 29, at 56 (stating that "there came to be recognised a sort of Common law right of property in an author or bookseller to his own literary efforts and work, provided that any exercise of such right did not affect those persons who had obtained a grant from the Crown."); see also Lacey, supra note 32, at 1539 ("The natural rights theory is based on the idea that 'whenever one mingles his effort with the raw stuff of the world, any resulting product ought—simply ought—to be his.'" (quoting Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation," Law, 80 Harv. L. Rev. 1165, 1204 (1967) (construing John Locke's The Second Treatise of Government))).

\textsuperscript{36} See Holdsworth, supra note 30, at 845 (characterizing the development of copyright as "the invention of [a] new form of property").

\textsuperscript{37} See Brown, supra note 29, at 60 (explaining that "authors generally believed that the Statute [of Anne] did not interfere with their Common law right, to publish in perpetuity
the Star Chamber had issued ordinances relating to copyright in 1586 and in 1637, the Statute of Anne, enacted in 1710, is acknowledged by most as the truly significant grandparent of British (and therefore American) copyright legislation. Authors and publishers initially perceived the statute as a positive force. It provided them with legal teeth and equipped them with remedies that included stiff financial penalties for infringement. In addition to the remedies, however, the Statute of Anne stated that the term of exclusive rights was granted only for a specific, limited period of time. With regard to the limited period of protection, legal Historian W.F. Wyndham Brown wrote:

The Act imposed the desired penalties, and it was thought that the times mentioned in the Act merely meant that the imposition of such penalties was only to exist for the periods named, by way of experiment. The authors generally believed that the Statute did not interfere with their Common law right, to publish in perpetuity their literary property.

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38. See Abrams, supra note 30, at 1136 (noting that the Star Chamber Decrees of 1586 and 1637 permitted only members of the Stationers' Company to legally publish books and provided that the Crown could decide which books could be published as well as seizing and destroying unauthorized books and presses).

39. See Leaffer, supra note 2, § 1.2, at 3-5 (chronicling the development of copyright law in England through the Statute of Anne, "which became the model for copyright law in the United States"); Abrams, supra note 30, at 1139 (explaining that in 1710, Parliament passed the Statute of Anne, "the first parliamentary copyright statute and the progenitor of our contemporary copyright laws").

40. See Abrams, supra note 30, at 1139-40 ("Perhaps most significantly, the Statute of Anne provided that an 'author' was the person initially entitled to copyright.").

41. See id. at 1140-41 (pointing out that "[f]or the first time, the author as creator and originator, became the source of the right of copy, and copyright was regarded as the author's reward for his creative efforts" and that publishers would now have copyright protection that they did not have previously to 1710).

42. See Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 7 (1967) (noting that offenders of the Statute of Anne had to forfeit illegally copied books to the owners of the books and to pay as damages one penny per sheet); Brown, supra note 29, at 60 (explaining that the Statute of Anne imposed the penalties that authors desired for copyright protection).

43. See Brown, supra note 29, at 59-60 (describing periods of protection from 14 years up to 28 years); Yen, supra note 30, at 526 & n.55 (explaining that "the Statute [of Anne] granted authors copyright terms of up to twenty-eight years for newly published works" and that the "twenty-eight years consisted of an initial term of fourteen years, with a second term available if the author was still living at the end of the first term" (citing 8 Anne ch. 19 (1710), reprinted in H. Ransom, THE FIRST COPYRIGHT STATUTE 117 (1956))).

44. Brown, supra note 29, at 60.
As publishing became a lucrative business during the eighteenth century, more and more companies entered into the competition, and, as a result, they began testing the limits and interpretation of the Statute of Anne. The critical question that emerged was whether copyright was a perpetual right. Simply stated, many considered that the issue turned on whether copyright was considered a natural right that existed at common law—in which case, the right, like most common law property rights, should be perpetual—or whether copyright was a grant from the state created by legislation—in which case, the government could limit its duration. In 1769, in *Millar v. Taylor*, the King's Bench ruled that copyright was a property right that existed at common law. Nevertheless, a mere five years later in *Donaldson v. Beckett*, the House of Lords decided, on the contrary, that copyright was based on statute, not on common law. Hence, when the drafters

45. See Kaplan, supra note 42, at 22 (suggesting that because the "business of publishing and distributing books [became] bigger, more competitive, [and] more impersonal; the stakes were higher [and] the risks more serious" and, therefore, there was increased pressure to determine the limits of literary ownership).

46. See Brown, supra note 29, at 61 ("Did the Common law right of an author or bookseller to publish his literary property in perpetuity, survive the time limitations imposed by the Statute of Anne?" This was the question around which there raged one of the fiercest storms in the annals of legal history.").

47. 98 Eng. Rep. 201 (K.B. 1769).

48. Id. at 252, 257 (holding that authors have perpetual common law property rights in their work independent of statutory rights); see also Abrams, supra note 30, at 1153 ("Millar marked the great transition in legal thought to analyzing copyright as a right of the author . . . . The majority reasoned that the author had a property right stemming from the act of creation."); Holdsworth, supra note 30, at 858 ("The majority of the court of King's Bench [in Millar] decided that [copyright] was a 'right of property' which existed at common law"); Yen, supra note 30, at 528 (stating that "the decision in *Millar v. Taylor* is important because it established a natural law theory of copyright alongside the economic approach taken by the Statute of Anne").


50. Id. at 844, 846-47; see also Kaplan, supra note 42, at 15 ("The *Donaldson* appeal succeeded in 1774 and the common law perpetuity was repelled and denied.").; Brown, supra note 29, at 62 (stating that in *Donaldson*, "[i]t was held, that, even if there had been a right to perpetuity in literary property at Common law, it was destroyed by the Statute of Anne, and, that any proprietor of copyright had the exclusive right of multiplication only during the periods of time allowed by the Statute"). For an interesting discussion of whether the House of Lords made the correct decision in *Donaldson v. Beckett*, see Brown, supra note 29, at 62-63. Much of Brown's article is an attempt to show that, due to mistaken judges and historical accident, copyright lost its perpetual character, and that it was a mistake for English courts to hold that an author's common law right expired after the statutory protection of the Statute of Anne's period of protection had run its course.

On the other hand, William Simonds has persuasively argued that, even if copyright is deemed a natural common law right, it does not necessarily follow that it is a right that must exist in perpetuity. See Simonds, supra note 34, at 23. According to Simonds:

Sometimes it has been argued that if the theory is correct that there is a natural right of property in intellectual productions, it naturally and inevitably follows
of the United States Constitution considered the matter less than a score of years later, it was quite clear that they perceived copyright as a limited grant bestowed by the government via statute.\(^{51}\) In 1834, the United States Supreme Court held the same in *Wheaton v. Peters.*\(^{52}\)

## II. Roman Origins of Intangible Property

First, let us be frank. As was mentioned, it seems to be quite clear that the ancient Romans did not develop a law of copyright.\(^{53}\) Ancient authors borrowed wholesale from one another to a degree that would easily be considered copyright infringement under modern copyright laws. Generally speaking, authors, painters, and sculptors were funded by wealthy patrons or worked on municipal projects funded by governments.\(^{54}\) Thus, authors and artists had no need to seek a financial reward through making multiple copies of their

that the producer or his representatives must have such right forever, and that such an extraordinary consequence demonstrates the unsoundness of the theory. Not at all. Natural right does not necessarily mean perpetual right. In all forms of society all kinds of property are held under such conditions and limitations as society deems reasonable. Under the right of eminent domain governments take private property for public use, on suitable remuneration, when public necessity and convenience demand it. In some cases private property is taken for public use without compensation, notably when a man's building is torn down to prevent the spread of a conflagration. The disposition of property by last will and testament is regulated and limited by law.

*Id.*

Thus, Simonds concluded: "It is therefore entirely reasonable that society should set a limit to the enjoyment of the natural right of property in intellectual productions." *Id.* at 24.

\(^{51}\) See generally *Leaffer supra* note 2, § 1.8, at 15 (recognizing Congressional power to legislate copyright and patent statutes by conferring limited monopolies on writings and inventions); *Abrams, supra* note 30, at 1175-78 (construing James Madison's writings in *The Federalist* to support the proposition that the Constitutional Convention did not support the natural rights theory of perpetual common law copyright (citing *The Federalist* No. 43 (J. Madison) (B. Wright ed. 1961))).

\(^{52}\) 33 U.S. (8 Pet.) 591, 599 (1834) ("There is, at common law, no property in [patents]; there is not even a legal right entitled to protection . . . . Congress, therefore, when authorized [by the Constitution] to secure their rights, are authorized to do everything; and full power over the subject is delegated to them."); see also *Abrams, supra* note 30, at 1126 ("In *Wheaton,* the Supreme Court set the basic assumptions for the continuing development of copyright doctrine in the United States: copyright is strictly a creature of statute and is not a common law property right or natural right of the author." (citing *Wheaton,* 33 U.S. (8 Pet.) 591)); *Yen, supra* note 30, at 529-31 (discussing how "*Wheaton* can be read as requiring the elimination of copyright's natural law dimensions in favor of increasing emphasis on copyright's economic theory").

\(^{53}\) See *supra* note 13 and accompanying text.

\(^{54}\) See generally *The Oxford Classical Dictionary* 907 (Simon Hornblower & Anthony Spawforth, eds., 3d ed. 1996) (entry for "Gaius Maecenas") (chronicling the life of the first century B.C. Roman friend of Octavian whose "name became proverbial as the greatest patron of the poets" (citation omitted)).
works.\textsuperscript{55} It was, however, significant for the later development of copyright that around A.D. 300 Roman booksellers switched from making their books in scrolls to the \textit{codex} form, essentially "the bound book as we know it."\textsuperscript{56} Undoubtedly, the new form—adapted from merchants' account books—paved the way for easier copying and resulted in a more mobile and user-friendly instrument for readers.

Although they did not establish copyright concepts per se, the Romans did pioneer the constituent elements of intangible personal property that form the basis of copyright.\textsuperscript{57} To begin with, the Roman concept of \textit{res}, property, encompassed all things which had economic value.\textsuperscript{58} In his popular text, \textit{An Introduction to Roman Law}, Barry Nicholas put it this way: "[T]he law of things includes all those rights which are capable of being evaluated in money terms."\textsuperscript{59} There can be little doubt that initially the term \textit{res} ("thing") referred to physical things, \textit{res corporales}. But over time, Roman law came to recognize the existence of intangibles, \textit{res incorporales}, as well.\textsuperscript{60} The Roman jurist Gaius was the first to discuss \textit{res incorporales} as a distinct legal concept.\textsuperscript{61} Gaius published his foundational work, the \textit{Institutes}, in about A.D. 161.\textsuperscript{62} It is most likely, however, that he did not invent it out of whole cloth.\textsuperscript{63} It is probable that the distinction evolved during the

\textsuperscript{55} See Matthews, \textit{supra} note 13, at 586 ("Even after writing was invented, and after parchment and papyrus made it possible to preserve the labors of the poet and the historian, these authors had not, for many a century yet, any thought of making money by multiplying copies of their works."); see also Crook, \textit{supra} note 13, at 204 ("[T]here is no sign that painters or sculptors or musicians came into any special category of dignity. Discussion amongst Romanists centres on the question under what contract payment was made to persons of professional standing.").

\textsuperscript{56} Wolff, \textit{supra} note 13, at 140.

\textsuperscript{57} See generally Barry Nicholas, \textit{An Introduction to Roman Law} 98-99 (1962) (discussing concepts of intangible property held by Roman lawyers).

\textsuperscript{58} See id. (stating that \textit{res} includes physical objects such as a house and abstract things such as debt and that both physical and abstract things are "assets of economic value"); see also Simonds, \textit{supra} note 34, at 16 (defining "property-subject-matter" as "anything capable of reduction to personal possession and having value in exchange").

\textsuperscript{59} Nicholas, \textit{supra} note 57, at 98.

\textsuperscript{60} See Thomas, \textit{supra} note 20, at 125 ("The broad concept of \textit{res} as any economic asset, comprising incorporeal no less than corporeal elements, was one of historical development. It is apparent that the original \textit{res} of Roman Law was the physical thing, the later \textit{res corporalis}"); Nicholas, \textit{supra} note 57, at 98 (noting that \textit{res}, "[i]n its simplest sense . . . denotes merely a physical object" but that "there are also abstract things, things which exist only in the mind's eye, such as a debt, a right of way, and many others"); \textit{supra} note 58.

\textsuperscript{61} See Thomas, \textit{supra} note 20, at 125-26 ("The distinction between \textit{res corporales} and \textit{res incorporales} first appears in juristic literature in Gaius, though it need not be ascribed to him." (footnote omitted)).

\textsuperscript{62} See Wolff, \textit{supra} note 13, at 120.

\textsuperscript{63} See Thomas, \textit{supra} note 20, at 126-27 (analyzing the development of the notion of \textit{res incorporales} through the work of Gaius’ predecessors).
late Republic and early Empire. J.A.C. Thomas characterized the recognition of intangible property as truly significant in historical jurisprudence: “To treat rights as things in themselves was a laudable feat of abstraction and rationalisation.” Furthermore, the Romans recognized that, technically speaking, intangibles could not be possessed in the same manner as tangibles. Because they could not be held in hand like physical objects, discrete rules regarding the sale and transfer of res incorporales developed. The first res incorporales recognized by Roman law were the “praedial servitudes.” These servitudes—alogous in many respects to modern easements—were four in number: iter (the right to travel over another’s land); actus (the right to drive animals over another’s land); via (the right to have a road over another’s land); and, aquaeductus (the right to draw water over another’s land). Eventually, in addition to servitudes like these (intangible rights dependent upon an association with land—similar to our easements appurtenant), Roman law also recognized personal servitudes (somewhat similar to the modern easements in gross) that were not tied to real property. For example, opera servorum was a kind of personal servitude (usus) that entitled a third party to use another’s slave’s services. In any event, copyright—as an intangible property—is similar in some respects to the praedial servitudes. Although a copyright is not tied directly to land, it is linked in some fashion to a

64. See id. at 126 (“The distinction [between res corporales and res incorporales] is probably of late Republican and early imperial development.”).

65. Id.; cf. Nicholas, supra note 57, at 107 (“The distinction [between res corporales and res incorporales] was primarily, however, an academic one, and as such was not generally used by the classical lawyers. But it . . . [has] become part of the legal language of Europe and, to some extent, of the Common law.”).

66. See Nicholas, supra note 57, at 111 (explaining that res incorporales “were . . . incapable of being possessed”); see also Yen, supra note 30, at 538 n.138 (noting that acquisition of incorporeal property by occupatio was inconsistent with the concept of physical possession, possessio).

67. See infra Part V.

68. See generally Watson, supra note 20, at 49-50 (discussing what constitutes “praedial servitudes”).

69. See Thomas, supra note 20, at 126. Thomas explained:

It would appear that the earliest res incorporales were the so-called iura in re known as praedial servitudes which, like ownership itself, had a physical thing, land as the immediate object of their exercise and it would seem that the very oldest of them, the three rights of way, iter, actus, via, and the right to draw water, aquaeductus, were originally conceived of as themselves physical things.

Id. (footnote omitted).

70. See Nicholas, supra note 57, at 144 (explaining that opera servorum was a modification of usus “applicable to . . . the services of slaves”).
material object, since, to be copyrightable, a work must be "fixed in any tangible medium of expression."\(^71\)

III. **Copyright as a Public Good: The Public Domain**

One of the things that makes copyright so intriguing as an academic subject is the concept of the public domain. In American law, works of authorship are protected by copyright if they are original works of authorship fixed in a "tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device."\(^72\) If a work of authorship does not meet this statutory definition, it is said to be noncopyrightable and therefore, in the public domain—owned by the public at large and, thus, not protectable by copyright law.\(^73\) For example, if a work is not original or if it is too ephemeral—skywriting or a sand sculpture—it would not be copyrightable, and, therefore, in the public domain. In addition, a work can enter the public domain after the copyright protection is terminated by operation of law. For example, under the first iteration of the 1976 Copyright Act, a work could lose its protection and enter the public domain if it was published without a valid copyright notice.\(^74\) Additionally, a work enters the public domain after the copyright has expired. For example, under the 1909 Copyright Act, a copyright expired after twenty-eight years unless renewed in a timely fashion.\(^75\) Under the present law, the general rule is that copyrights end seventy years after the author's death.\(^76\) The concept here is relatively simple. Copyrightable works are ordinarily works that benefit society by providing entertainment, aesthetic enjoyment, and/or communicate useful information such as educational materials.\(^77\) The system is essentially a tradeoff, like one gigantic implied contract: the United States government grants exclusive rights to authors for a limited term. In return, the public benefits in two stages. In stage one, the period of copyright protection, the

\(^71\) 17 U.S.C. § 102(a) (1994); see also infra Part IV.A.
\(^72\) 17 U.S.C. § 102(a).
\(^73\) See Leaffer, supra note 2, § 1.5[D], at 12 (describing how works that are not in compliance with the copyright acts can be “injected into the public domain”).
\(^74\) See id. § 1.5[A], at 8.
\(^75\) 17 U.S.C. § 24 (repealed 1978) (“The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . .”); see also Leaffer, supra note 2, § 6.2, at 174 (comparing the twenty-eight year renewal term of the 1909 Act to the life plus fifty years term of the 1976 Act).
\(^77\) See generally 17 U.S.C. § 102(a) (1994) (allowing the copyrighting of materials such as "literary works," "musical works," "dramatic works," "motion pictures," and "sound recordings").
public ordinarily has access to the work and may use it but pays a royalty because the author holds the exclusive rights.\textsuperscript{78} This use of protected works during the period of copyright is in some respects similar to the Roman law notion, \textit{usufructus}. In Justinian's \textit{Institutes}, \textit{usufructus} is defined as "\textit{ius alienis rebus utendi fruendi salva rerum substantia}" which when translated means "a right to use and enjoy the things of others but keeping the substance of those things intact."\textsuperscript{79} The public today may use and enjoy works protected by copyright and may use the fruits of them—so long as those "fruits" are considered merely ideas but not part of the protectable expression of the works. In stage two, once the work enters the public domain, the public has access to the work at a greatly reduced cost—nearly for free—because it does not have to pay the author's royalty.\textsuperscript{80} It really only has to pay production costs. For example, the price for a classical music compact disk is a fraction of that of popular music.

The ancient Romans were among the first to establish expressly and to develop the legal notion that certain types of property should be segregated for public use and incapable of being owned by an individual, like works in the public domain.\textsuperscript{81} Roman law distinguished two kinds of property that are in many respects similar to works in the public domain: \textit{res communes} and \textit{res publicae}.\textsuperscript{82} Gaius\textsuperscript{83} articulated the distinction between public and private property: "Public things are regarded as no one's property: for they are considered to belong to the whole community of the people. Private things are those that belong to individuals."\textsuperscript{84} Those things which were classified as \textit{res com-
munes were things like the air, the sea, and beaches. They were "things of common enjoyment, available to all living persons by virtue of their existence and thus incapable of private appropriation because their utilisation was an incident of personality not of property." On the other hand, "[r]es publicae differed from res communes in that they belonged not to humanity as a whole but to the state, the populus. They comprised the public roads, bridges, ports, fora, or meeting places, theatres, baths and flowing rivers. One enjoyed them as an inhabitant of the state."

In addition to categorizing some property as res communes and res publicae, another Roman law precept that has influenced the modern development of the public domain is usucapio. In many respects, usucapio is similar to our modern notion of adverse possession. In its simplest terms, usucapio entitled a person to acquire ownership of property by using that property when its original owner has apparently abandoned it. In terms of public policy, the principle encourages persons to make productive use of property and discourages "sleeping on one's rights" while allowing otherwise productive property to go to waste. Usucapio is relevant to the development of the public domain in a subtle way. Under prior United States Copyright law, a copyright owner could lose his copyright if he failed to assert his rights in a number of ways. For example, under the original 1976 Act, failure to affix a valid copyright notice and failure to renew a copyright could each send a work into the public domain. In essence, the public

Justinian's treatment of the subject, Watson stated: "On public law he says nothing beyond mentioning public property . . ." Id. at 46 (citation omitted).

85. See THOMAS, supra note 20, at 129.
86. Id.; see also Yen, supra note 30 at 522-23 (noting that objects in nature, for example, are incapable of ownership). Yen reminded us that "the Roman notions of res communes and ferae naturae admonish the natural law thinker not to extend copyright beyond the bounds of what human institutions such as copyright can practicably accomplish." Id. at 547.
87. THOMAS, supra note 20, at 129 (footnote and citations omitted).
88. See id. at 157-65 (explaining the concept of usucapio).
90. See THOMAS, supra note 20, at 157-58 (explaining that under the concept of usucapio, "[t]he principal would appear to have been that, after the appropriate period of possession without disturbance, the acquirer had no need to rely on the auctoritas of his transferor since no one could thereafter successfully challenge his title").
91. See generally CUNNINGHAM ET AL., supra note 89, § 11.7, at 814-15 (discussing the reasons that support the doctrine of adverse possession).
92. See LEAFER, supra note 2, § 4.11, at 125 ("Under the 1976 Act . . . non-compliance with notice formalities can forfeit copyright. . . ."); id. § 6.5[A]-[B], at 179 ("Failure to
acquired "ownership" when the copyright owner abandoned her copyright by failing to observe formalities.

IV. COPYRIGHTABLE SUBJECT MATTER

A. Intangible Work Distinguished From The Material Object

One of the metaphysical challenges for any student of copyright is to grasp the concept that copyrightable subject matter is distinct from the material object in which a copyrightable work is embodied. For example, a "literary work" may be embodied in book form, a "book-on-tape," or on a compact disk. It is, however, the underlying work itself that is protected not the physical embodiment. One of the more interesting debates in Roman law centered around this very distinction. The Roman juristic controversy took the following form.

Imagine that A owns a parchment and that B, in good faith—without knowing that A owns it—writes a poem on it. Or, suppose that A owns a canvas and that B, in good faith—not knowing that the canvas belongs to A—paints a picture on it. Or, suppose that A owns bronze and that B, in good faith—not knowing that the bronze belongs to A—makes it into a statue. The simple question was, who is considered the owner of the poem on the parchment, the painting on the canvas, and the statue of bronze? Roman jurists gave answers that appear somewhat inconsistent if not illogical.

It is difficult to justify the inconsistent approaches that Roman jurists took in these situations. The first inconsistency can be seen in the different treatment afforded to writing versus visual art. In the case where a writer had written on another's parchment, the general Roman law rule was that the owner of the parchment became the owner of the entirety. On the other hand, in the case where a painter had painted on another's canvas, the general rule was the opposite: the painter became the owner of the whole.

comply with renewal formalities [under the 1976 Act] meant forfeiture of copyright to the public domain.

93. See 17 U.S.C. § 202 (1994) ("Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.").

94. See NICHOLAS, supra note 57, at 134 ("[L]etters will accede to the paper, even if they are gold letters."); THOMAS, supra note 20, at 170 ("Writing acceded to the parchment, etc., on which it was done so that the owner of the parchment was owner of the book, essay or the like, even though the writing might have been in gold leaf . . . .").

95. See THOMAS, supra note 20, at 170-71 ("[I]f one person painted a picture on a tablet belonging to another, the painter was the owner of the picture; in short, the tablet acceded to the painting."); see also NICHOLAS, supra note 57, at 134 ("[I]t was eventually held that the canvas acceded to the painting. It is difficult, however, to formulate any principle
In the case of a sculptor who turns another's bronze into a statue, there are subtle factors that may affect the analysis. Roman jurists observed that the statue was actually a *nova species*, a new kind of thing.\(^{96}\)

The two prominent juristic schools, the Sabinians and the Proculians,\(^{97}\) initially adopted different points of view on ownership in these situations. The Sabinians gave ownership to the owner of the materials.\(^{98}\) The Proculians gave ownership to the person who made the *nova species*.\(^{99}\) This method of acquisition—by making a *nova species*—was called *specificatio*.\(^{100}\) A third approach (*media sententia*) was approved by Justinian: if the *nova species* could be restored to its original state, then the material owner was the owner of the new thing, but if it could not be restored, then the sculptor was the owner.\(^{101}\) Also under Justinian, if the sculptor had contributed "any part of the material, the *nova species* should belong to him..."\(^{102}\)

The legal acumen required just to ask this question reveals an appreciation of the concept that there is a significant distinction between an underlying artistic work and the physical object in which that work is embodied. Simply owning a physical object does not necessarily make a person the owner of the intangible work fixed therein.\(^{103}\) And this is the very same concept that operates in modern copyright law in distinguishing a material object from an underlying intangible work of authorship.

which will account for this, since the canvas is acceding to something which had no previous existence and could have no existence without the canvas.

96. See Nicholas, *supra* note 57, at 136 ("Two things may be so united that the identity of the resulting thing is different from that of either of the original two. Or a single thing may be so worked upon that its identity is changed. There is in short, a new thing (*nova species*)."").

97. See generally Thomas, *supra* note 20, at 45-47 (discussing the development of the two schools). According to Thomas, "[t]he schools of jurists became apparent in the first century of the Principate. They are traditionally known as the Sabinians and the Proculians but they are not named after their respective alleged founders..." *Id.* at 45. Additionally, according to Thomas, it is certain that "all the great lawyers of the first one hundred and fifty years of the empire belonged to one or other of the schools." *Id.*


99. See id. at 137 ("The Proculians gave ownership to the maker. He acquired by... his act of making a *nova species*.").

100. See id.

101. See id. (explaining that the doctrine of *media sententia* would give the *nova species* to the maker "only if the materials could not be returned to their former state").

102. *Id.*

103. See supra notes 93-102 and accompanying text (discussing various theories to determine ownership when copyrightable subject matter is distinct from the material object in which it is embodied).
B. Types of Copyrightable Works

Section 102 of the Copyright Act enumerates a nonexclusive list of types of "works of authorship." Among these types are literary works, musical works, dramatic works, pictorial, graphic, and sculptural works, and motion pictures. But on a more abstract level, American copyright law protects only three basic types of works: (1) Compilations, (2) Derivative works, and (3) Free Standing works. This tripartite typology uses, as a basis for classification, the manner in which a work is created rather than its lay-genre. This typology examines the nature of "originality" in a work. Generally speaking, a work is copyrightable as a compilation when its originality stems from the selection, coordination, or arrangement of constituent elements. A work is protectable as a derivative work when its originality is manifest by transforming, adapting, or recasting the work on which the derivative is based. A free standing work is protectable by copyright because its originality is such that it bears no substantial similarity to any other work to which its author has had previous access. Simply put, a free standing work is an original work of authorship that is neither a compilation of preexisting elements nor a derivative based on another preexisting work. It is with respect to this abstract, tripartite typology that Roman law sheds light on modern copyright concepts that relate to the "types" of copyrightable works and the notion of "originality."

105. See id.
106. See 17 U.S.C. §§ 101, 103 (1994) (defining compilations and derivative works and including them as subject matter for copyright protection); see also Russ VerSteeg, Rethinking Originality, 34 WM. & MARY L. REV. 801, 814-18 (1993) (discussing derivative works and compilations as explicitly defined by the statute and defining the nonstatutory category of freestanding works).
107. See VerSteeg, supra note 106, at 814-17 (categorizing works into compilations, derivative works, or free standing according to how the works were developed).
108. See id. at 817-18 ("To evaluate the originality of a work in a coherent manner, a decisionmaker first must determine whether it should be characterized as a compilation, a derivative work, or a freestanding work.").
109. See 17 U.S.C. § 101 ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."); see also VerSteeg, supra note 106, at 814 (construing 17 U.S.C. § 101).
110. See 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.").
111. See VerSteeg, supra note 106, at 816-17 ("As a general rule, a freestanding work is a work that is not substantially similar to any preexisting works or materials.").
112. See id.
Interestingly, the Roman jurist Sextus Pomponius\textsuperscript{113} explained all property in similar terms. According to Pomponius, there were first\textit{corpora quae uno spiritu continentur}, things which are held together as a single entity; second,\textit{corpora quae ex cohaerentibus corporis sunt}, things which exist through cohesion with other things; and, third,\textit{corpora quae ex distantibus corporibus sunt}, things which are comprised of distinct other things.\textsuperscript{114} J.A.C. Thomas elaborated: "Examples of the first category would be a slave, a block of wood, a stone, and so forth; of the second, a house which is built of various materials or a ship or a cupboard; the last category may be illustrated by a legion or a flock or herd."\textsuperscript{115} Pomponius'\textit{corpora quae uno spiritu continentur} are similar in many respects to free-standing works; works that stand on their own two feet, without being derivative and without being compilations. The\textit{corpora quae ex cohaerentibus corporis sunt} are in some ways like derivative works (at least when the base work remains substantially similar to its initial state, even after other material has been added or the base work itself has been changed) and also like compilations (when preexisting materials are blended).\textit{Corpora quae ex distantibus corporibus sunt} are analogous to a collective work, which is a specific kind of compilation that results when "a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."\textsuperscript{116} The crux of the distinctions among these three is the same as it is in modern copyright law. The ownership of the work upon which a derivative is based or the preexisting materials that comprise a compilation or collective is not affected by the originality attributed to the author of that derivative or compilation.\textsuperscript{117}

Other Roman law principles are instructive in determining the ownership of free standing works, derivative works and compilations. Specifically,\textit{occupatio} is pertinent to comprehending the ownership of free standing works,\textit{accessio} helps to explain derivative works, and\textit{adjectio} lends insight into collective works.

\footnotesize
\textsuperscript{113}Pomponius was roughly a contemporary of Gaius—living around the reigns of Hadrian, Antoninus Pius, and Marcus Aurelius (A.D. 117-180). See generally Nicholas, supra note 57, at 31-32 (discussing Pomponius' writing about Augustus); Wolff, supra note 13, at 119-20 (discussing the importance of Pomponius's activities as a writer and as a teacher).
\textsuperscript{114}See Thomas, supra note 20, at 131.
\textsuperscript{115}Id.
\textsuperscript{117}See id. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").
Occupatio is relevant regarding the initial ownership of free standing works. Occupatio was “the acquisition of ownership of a thing which has no owner (res nullius) by taking possession of it.” A common example of acquiring ownership of a res nullius by occupatio is the capture of a wild animal. In some respects, acquisition by occupatio is analogous to creation of a free standing work. In each case someone—the author or occupator—becomes the initial owner of a thing by virtue of being the first to take hold of it. The analogy is clearly not perfect, since with occupatio the owner merely seizes a res that already existed in nature; whereas, when an author creates a free standing work, she makes something that is neither derivative nor merely a collection of the works of others.

The Roman law notion of accessio adds to our understanding of derivative works—works based upon one or more preexisting works. To appreciate the contribution of Roman law to derivative works, it is important to note three things about derivative works. First, a derivative work must bear substantial similarity to the work upon which it is based, and the derivative author’s contribution must be original. Second, the owner of any copyrightable work owns the exclusive right to make or authorize derivatives. Third, a derivative author acquires no copyright when she makes an unauthorized derivative work.

118. Nicholas, supra note 57, at 130; see also Yen, supra note 30, at 522 (“[T]he primary form of [Roman] acquisition was the natural law principle of occupancy, or occupatio.”).

119. See Nicholas, supra note 57, at 130-31 (“[T]he only res nullius which are commonly encountered in everyday life are wild animals, and it is in regard to them that occupatio is mainly discussed.”); see also Yen, supra note 30, at 522-23 (“If a wild animal escaped ... it no longer belonged to its original owner and could become the property of its next captor.” (citation omitted)).

120. See Thomas, supra note 20, at 169-74 (defining accessio as ownership by incorporation into something already owned by the acquirer, and categorizing instances of accessio); see also supra notes 95-103 (discussing accessio in the context of distinguishing a material object from an underlying, intangible work of authorship).

121. See supra note 110 and accompanying text (defining a derivative work).

122. See 17 U.S.C. § 101 (including in the definition of derivative work the requirement that the work “as a whole, represent an original work of authorship” (emphasis added)); see also VerSteeg, supra note 106, at 817 (explaining that for a work to be considered a “derivative work,” it must be “substantially similar” to a preexisting work).

123. See 17 U.S.C. § 106(2) (“[T]he owner of copyright ... has the exclusive rights to ... prepare derivative works based upon the copyrighted work . . . .”).

124. See 17 U.S.C. § 103(a) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).
In Roman law, *accessio* was a means by which one could acquire ownership of tangible property. According to Thomas, "[a]ccessio was the acquisition of ownership of a tangible thing by its incorporation into something which already belonged to the acquirer . . . ." Barry Nicholas explained the concept as follows:

If the identity of one thing (the accessory) is merged and lost in the identity of the other (the principal) the owner of the principal is the owner of the whole. In the example of the cup and the handle, the owner of the cup is the owner of the cup-with-handle. There is said to be *accessio*.

The principle of ownership by *accessio* is, therefore, analogous to the principle in copyright law that gives the owner of the work upon which a derivative is based (the principal) exclusive rights superior to the claims of the derivative author (the author of the accessory). A derivative/accessory author must use the work upon which her work is based (the principal) lawfully as a prerequisite to obtaining a copyright for her derivative. Furthermore, it is useful to recall that, by definition, a derivative author recasts, transforms, or adapts the principal work in such a way that the resulting work is still substantially similar to the principal work. This comports with the Roman concept of *accessio* because, in *accessio*, "the thing acquired should have been incorporated in the other in so subordinate a manner that it lost its identity . . . ." In other words, the audience recognizes the derivative as having been based on a preexisting archetype, not as a free standing work.

*Adiunctio* is a concept that is relevant to compilations, particularly collective works. It is easiest to explain *adiunctio* by example. Imagine that one person owned a chariot and another owned a chariot wheel. If one of those individuals attached the wheel to the chariot, the mere joining of the two objects did not affect the ownership of them as

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125. *See supra* note 120 and accompanying text (defining the Roman law notion of *accessio*).
127. *Nicholas, supra* note 57, at 133.
128. Presumably "lawfully" means either with permission or within the bounds of fair use. *See 17 U.S.C. § 107* (listing the factors to be considered when assessing fair use of a copyrighted work).
129. *See id. § 103(a)* (precluding copyright status from being conferred upon work which has been used unlawfully).
130. *See supra* note 110 and accompanying text (defining derivative work); *see also supra* note 123 and accompanying text (discussing the substantial similarity requirement for derivative work).
separate items of property. The separability of the things was a critical factor. This same principle governs the ownership of collective works where, by definition, "a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."

The Copyright Act states: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." The Romans understood the same principle; if separate items owned by different individuals were combined, so long as each item could be detached, the ownership of those independent items remained intact.

V. SALE AND OTHER TRANSFER OF INTANGIBLES

In the Copyright Act, two key provisions articulate the essential rules regarding the sale and transfer of copyright ownership. Section 201(d)(1) provides: "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession."

Section 204(a) states: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed . . . ." These provisions basically carry two messages. First, one may transfer copyright ownership in practically any legal way imaginable, and second, generally speaking, one must memorialize a transfer of copyright in a writing signed by the transferor.

Legal historian W.F. Wyndham Brown has noted that written proof of a transfer of copyright has been required for over two hundred years: "The person who had registered his rights in the books of the [Stationers'] Company was the owner, and he might assign those rights to

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132. As Thomas explained:

Adiunctio was the separable attachment of one object to another, e.g. the affixing of a wheel to a chariot: if the objects belonged to two different persons, no change of ownership resulted and either party could . . . recover his property, however subordinate it might be to the object to which it was affixed.

Id.


134. Id. § 201(c).

135. See supra note 132 and accompanying text (discussing the concept of adiunctio).


137. Id. § 204(a).

138. See Leaffer, supra note 2, § 5.8[A], at 163-64 (discussing the divisibility of copyright interests).
others, provided the title of the assignee was also entered on the register."\textsuperscript{139}

Roman law permitted the transfer of \textit{res incorporales}.\textsuperscript{140} As a matter of fact, certain \textit{res incorporales} were among the most treasured kinds of property in ancient Italy.\textsuperscript{141} Perhaps, the leap from merely recognizing the legal existence of intangible property to establishing a means by which to transfer it is not so monumental; Roman law however, did, at least accomplish that leap.\textsuperscript{142} Moreover, as is the case with transfer of copyright ownership today, the Romans required special formalities to ensure the validity of a sale of an intangible right.\textsuperscript{143}

In Roman law, there were many different modes by which one could transfer ownership of property.\textsuperscript{144} The most significant for our purposes are \textit{traditio}, \textit{in iure cessio}, and \textit{mancipatio}.

\textit{Traditio} was the most common method of transferring tangible personal property.\textsuperscript{145} It involved a physical transfer of an object from one person to another, along with the intention of the transferor to give up all of his rights to that thing and the corresponding intention of the transferee to accept the same.\textsuperscript{146} Clearly, when someone wished to transfer ownership of a \textit{res incorporales}, \textit{traditio} was not an option, because there was no physical thing to hand over.\textsuperscript{147}

\begin{footnotes}
\item 139. Brown, \textit{supra} note 29, at 57.
\item 140. See Thomas, \textit{supra} note 20, at 281-82. Thomas explained: 
[S]ale of virtually anything was possible, corporeal or incorporeal: hence there could be a valid sale of book debts, servitudes, praedial or personal, an inheritance and the like. In general, the thing had to be in existence at the time of the sale but it was possible to conclude a valid contract in respect of \textit{res corporales} the existence of which was only potential e.g. "next year's crop from that field" or the unborn child of a slave woman. 
\textit{Id.} (footnotes omitted).
\item 141. See supra notes 68-69 and accompanying text (discussing the praedial servitudes).
\item 142. See Crook, \textit{supra} note 13, at 218 ("Most things could be objects of a valid sale, including inheritances, servitudes, and the right to collect debts. You could have sale of something from a stock of things, or sale of a future thing . . .").
\item 143. See infra notes 148-151 and accompanying text (discussing \textit{in iure cessio}, the method of transferring intangibles as developed by the Romans).
\item 144. See generally Watson, \textit{supra} note 20, at 45-48 (discussing the various forms of acquisition of ownership possible under Roman law).
\item 145. See id. at 47 ("The main way of acquiring ownership . . . was by \textit{traditio}, delivery.").
\item 146. See Thomas, \textit{supra} note 20, at 181 ("The requirements of an effective \textit{traditio}, apart from the factual transfer, were an intent on the part of the person by, or in whose name, it was transferred to give ownership of the actual thing delivered to the person by, or in whose name, it was received."); Watson, \textit{supra} note 20, at 47 ("Actual physical delivery—though no further formalities—was usually required [to effect a \textit{traditio}].").
\item 147. See Nicholas, \textit{supra} note 57, at 106 ("[I]ncorporeal things [could] neither be acquired by \textit{usucaptio} nor conveyed by \textit{traditio}"); Watson, \textit{supra} note 20, at 44 ("[\textit{Traditio}] . . . was impossible when the thing was incorporeal, and a different method (\textit{in iure cessio}) had to be used.").
\end{footnotes}
The method of transferring intangibles that the Romans developed was called *in iure cessio*. In some respects, *in iure cessio* was like a quiet title action in which the parties were conspiring. Alan Watson described the procedure as follows: "The transferor and transferee would appear before the magistrate, the transferee would claim that the thing was his, the transferor (who was the true owner) would not put up a counterclaim, and so the magistrate would adjudge the thing to the transferee." This method was used by an ancient Roman, for example, for transferring a common intangible—an inheritance. The significant thing for purposes of copyright law is that *in iure cessio*, as a means for transferring intangibles, required a formal public process. The public nature of the transfer makes it more verifiable.

To understand *mancipatio*, it is first necessary to review two categories of Roman property. Among the many classifications that the Roman jurists used for property were the categories *res mancipi* and *res nec mancipi*. Simply stated, the ancient Romans decided that certain types of property, known as *res mancipi*, were so important that to transfer them validly, one had to observe certain formalities as part of the transfer process. This special transfer process, called *mancipatio*, included the presence of five witnesses, all Roman males over the age of puberty, and a sixth with the same qualifications to hold a scale. The transferee held the object to be transferred and, striking the scale, stated that the object was his. Generally speaking, *res mancipi* were originally things that were important for the well being of an agricultural community: Italic land, slaves, cattle, horses, mules,

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148. See Thomas, supra note 20, at 156 ("In practice, therefore, in developed law, *cessio in iure* was principally associated with the creation, transfer and extinction of *res incorporales."); Watson, supra note 20, at 46 ("Since *in iure cessio* was rather cumbersome, it was used only sparingly, but it had to be used, as the sole possible method of transfer, when what was to be transferred was an incorporeal thing such as a servitude right.").

149. Watson, supra note 20, at 46.

150. See Thomas, supra note 20, at 481 (explaining that "in some cases, the heir could transfer the inheritance to another . . . by *cessio in iure hereditas*.").

151. See id. at 155 ("[C]essio in iure was a mode of transfer and acquisition which required publicity.").

152. See Nicholas, supra note 57, at 105-06 (describing *res mancipi* as "slaves, beasts of draught and burden (oxen, horses, asses, mules), Italic land, and rustic praedial servitudes . . . over such land" while defining all other things as *res nec mancipi*).

153. See id. at 106 ("The practical importance of the distinction [between *res mancipi* and *res nec mancipi*] was that *res mancipi* could only be conveyed by *mancipatio* . . . or *in iure cessio*, a mere delivery was ineffective to pass ownership."); Watson, supra note 20, at 45 ("In historical times *mancipatio* was, in its ordinary form, the usual method of transferring *res mancipi*.").

154. See Watson, supra note 20, at 45.

155. Id.
asses, and the four praedial servitudes.\textsuperscript{156} The four praedial servitudes, interestingly, were intangibles: \textit{iter} ("the right of access across a neighbor's land"); \textit{actus} ("the right to drive cattle across"); \textit{via} ("the right to have a road across"); and, \textit{aquaeductus} ("the right to have an aqueduct across a neighbor's land").\textsuperscript{157} As the law developed, these servitudes could be transferred by either \textit{mancipatio} or \textit{in iure cessio}.\textsuperscript{158} Like copyrights today, these praedial servitudes were considered so vital to Roman society that a formal public procedure was required for a valid transfer of ownership. Since these intangible rights are essentially \textit{in rem}, it is essential to have a public and verifiable transfer.\textsuperscript{159}

VI. JOINT AUTHORSHIP AND WORK FOR HIRE

In modern American copyright law, the author of a work is considered the initial owner of a copyright.\textsuperscript{160} In addition, however, the Copyright Act provides special rules for ownership in two situations: (1) instances of joint authorship;\textsuperscript{161} and, (2) instances of work made for hire.\textsuperscript{162} Simply stated, a work is a work of joint authorship when two or more authors combine their contributions into one work.\textsuperscript{163} A work for hire results in two ways: (1) when an employee creates a copyrightable work within the scope of his or her employment;\textsuperscript{164} or, (2) when an independent contractor creates a work for a commissioning party, provided that two other criteria are satisfied: (a) the type of work created must be within one of the nine categories specified in

\textsuperscript{156} See id. ("The list [of res mancipi] covers the most important things in a primitive farming community."); see also supra notes 68-69, 152.

\textsuperscript{157} See Nicholas, supra note 57, at 105-06 (explaining that among res mancipi were the "rustic praedial servitudes (e.g. rights of way and of water) over such land."); see also Watson, supra note 20, at 49 (listing inter, actus, via, and aquaeductus as the four earliest types of servitudes).

\textsuperscript{158} See Watson, supra note 20, at 50 ("[T]he four original servitudes could be created by mancipato, and all of them could be created by in iure cessio. But since servitudes were incorporeal rights, traditio was not appropriate.").

\textsuperscript{159} See Nicholas, supra note 57, at 103 (articulating the principle that, because in rem rights potentially affect everyone, they should not be secretly created or transferred).

\textsuperscript{160} See 17 U.S.C. § 201(a) (1994) ("Copyright in a work . . . vests initially in the author or authors of the work.").

\textsuperscript{161} See id. § 101 (defining "joint work"); id. § 201(a) ("The authors of a joint work are co-owners of copyright in the work.").

\textsuperscript{162} See id. § 101 (defining "work made for hire"); id. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written statement signed by them, owns all the rights comprised in the copyright.").

\textsuperscript{163} See id. ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.").

\textsuperscript{164} See Leaffer, supra note 2, § 5.2, at 148-50 (discussing 17 U.S.C. §§ 101, 201(b)).
the definition of "work made for hire" articulated in section 101(2) of the Copyright Act,\textsuperscript{165} and, (b) both the independent contractor and commissioning party must sign a "written instrument" stating that the work is a "work made for hire."\textsuperscript{166}

Joint authorship arises in American copyright when "two or more authors" prepare a work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."\textsuperscript{167} In Roman law, the institution known as societas bore a great deal of similarity to joint copyright authorship.\textsuperscript{168} Technically, societas was a kind of partnership contract.\textsuperscript{169} The majority rule in American copyright law requires that each joint author contribute something that is copyrightable.\textsuperscript{170} In Roman law, a partner could contribute assets, work, or advice.\textsuperscript{171} The critical element, however, in joint authorship for copyright is intent. The putative joint authors must intend to merge their contributions.\textsuperscript{172} Similarly, in Roman societas, intent was the sine qua non.\textsuperscript{173} J.A.C. Thomas emphasized this point by stating that "[i]n any form, societas required an intention of associa-

\textsuperscript{165} See id. (explaining 17 U.S.C. § 101). The nine categories enumerated in the provision are as follows: (1) contribution to a collective work; (2) part of a motion picture or other audiovisual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; and, (9) an atlas. 17 U.S.C. § 101(2); see also Leaffer, supra note 2, § 5.2[B], at 149-50 (enumerating these nine categories).

\textsuperscript{166} See 17 U.S.C. § 101 (defining "work made for hire").

\textsuperscript{167} Id.

\textsuperscript{168} In particular, a partnership made for one instance, societas unius rei, in a fashion similar to a joint venture, is analogous. See Thomas, supra note 20, at 301 ("Societas unius rei was an association for a single operation which need not be commercial, e.g., neighbors combining to erect a party wall between their respective properties." (citation omitted)).

\textsuperscript{169} See id. at 300 (explaining that societas "was the Roman form of partnership and consisted in an association of two or more in a common enterprise with a view to their mutual advantage; which need not, as in modern English Law, be pecuniary"); Watson, supra note 20, at 65 (stating that in a societas, "[e]ach partner could contribute assets, his work, or both, and there was no need for the contributions of the partners to be equal . . . [;] unless it was specifically agreed otherwise, every partner shared equally in any profit or loss").

\textsuperscript{170} I have argued elsewhere that this requirement must be understood to mean not that a putative author is required to contribute something that is "fixed in a tangible medium of expression," but rather that her contribution must be original expression—as opposed to merely an idea. See Russ VerSteeg, Defining "Author" For Purposes of Copyright, 45 Am. U. L. Rev. 1323, 1389-40 (1996).

\textsuperscript{171} See Thomas, supra note 20, at 300 ("The essence of the [partnership] contract was a pooling of resources—capital, expertise or labour—for a common purpose . . . ." (citation omitted)).

\textsuperscript{172} See Leaffer, supra note 2, § 5.4[A], at 155 ("What counts [in forming a joint work] is that the authors intended their respective labors to be integrated into one work." (emphasis added)).

\textsuperscript{173} See Thomas, supra note 20, at 301.
tion . . . and was based on mutual trust of the partners between whom it created a kind of brotherhood.”

Under copyright laws, because joint authors are considered tenants in common, a joint author is permitted to sell or otherwise to transfer a nonexclusive license for the copyright without the permission of his fellow joint authors. A joint author is, however, required to make an accounting to his joint authors for their equal shares of any profit. The rule for societas was similar: “If one partner had sold property belonging to the firm, he had to divide the price with his colleagues, taking security for any liability that might result from the sale.”

The fundamental principle that undergirds the concept of work made for hire is the notion that copyrightable work created by A may be considered owned by—and indeed authored by—B due to some preexisting relationship and/or agreement between A and B. In Roman law, several legal principles existed that operated in a similar manner. One such principle functioned to make work done by a slave or by a freedman inure to his master or former master (patron). A Roman patron’s ownership interest in his freedman’s property was so strong that he even acquired his freedman’s property upon death. In a similar fashion, a Roman head of family, the paterfamilias, was considered owner of things acquired by family members, even if he was unaware of the acquisition. In these instances, it is the master-servant-type relationship between the parties that gives the dominant person property ownership: master-slave; patron-freedman; and, pater-

174. Id. (citation omitted).
175. See Leaffer, supra note 2, § 5.4[C], at 158 (“As a result [of creating a joint work], each co-owner can use or license the whole work as he wishes . . . .”).
176. See id. § 5.4[C], at 158 (“[T]he only obligation is a duty to account for profits to the other joint owner. What a joint owner cannot do is transfer all interest in the work—that is, assign the work or grant an exclusive license in it without the written consent of the other co-owners.” (discussing 17 U.S.C. § 204(a) (1994))
177. Thomas, supra note 20, at 303 (citation omitted).
178. See supra notes 164-166 and accompanying text (discussing the requirement necessary to create a “work for hire”).
179. See Thomas, supra note 20, at 185 (stating that “[a] person may acquire both ownership and possession through” slaves and “through independent free man”); see also Crook, supra note 13, at 191 (“The freedman doing his obligatory work for a . . . [patron] was, in labor terms, just an extension of the slave in the less sordid levels of his activity . . . .”)
180. See Crook, supra note 13, at 53 (“Another category of rights of patron over freedman was automatic; it gave him a hold over his freedman’s property, especially on death.”).
181. See Thomas, supra note 20, at 185 (“[A]nything acquired by a filius . . . vested forthwith in his . . . pater . . . , even though the acquisition was effected without his consent.”); id. at 186 (“In the case of acquisition through a peculium administered by a member of the family, the paterfamilias was held to acquire even without particular knowledge of the transaction effected . . . .”).
In copyright law, the same is true. The employer-master owns copyrightable works created by the employee-servant. In fact, in its famous decision, Community for Creative Non-Violence v. Reid, the United States Supreme Court held that common law principles of agency must determine whether a master-servant relationship exists in the employer-employee analysis for work for hire.

As regards work for hire in the context of a specially ordered or commissioned work done by an independent contractor, modern American copyright law is more complicated. Not only must the parties agree that the work to be produced shall be considered "work made for hire" (owned and "authored" by the commissioning party), but the agreement must be in writing, signed by the independent contractor, and the type of work must be of a particular kind. Here the agreement between the parties and the nature of the copyrighted work are the critical factors. There is no perfect analogue in Roman law. The closest were two peculiar sub-species of the contract known

182. In passing, it is probably worth noting that the core concept here is essentially the same concept that operates in an inverse manner to make a master liable for the wrongs of his servant, vicarious liability. This inverse principle applied in Roman law as well. See Crook, supra note 13, at 164 ("When a slave wounds or kills with his master's knowledge the master is undoubtedly liable . . . . Knowledge here means sufferance, i.e. he who could have stopped it is liable if he failed to do so." (quoting Justinian's Digest (44.1-45 pr.) (internal quotations omitted))); id. at 56 ("If [a slave] commits offences his master can choose between paying damages and handing him over."); Thomas, supra note 20, at 382, 396 (explaining that masters were liable for delicts committed by their slaves); Watson, supra note 13, at 32 (describing an action "against a ship's captain, innkeeper, or stablekeeper for any theft or fraud committed in the ship or building by an employee" (emphasis added)). Thomas further explained:

Assuming the complete absence of complicity of the pater or dominus in the matter, if a delict was committed by a member of the family, the head of the family was subjected to noxal liability, i.e. he had either personally to assume responsibility and be liable for damages or to hand over the aggrieved party the errant member of his family (noxae deditio). This was provided already for furtum by the Twelve Tables, was extended to the other delicts and, in developed law, was a generally accepted principle.

Id. at 381 (footnotes and citations omitted).

183. See Leaffer, supra note 2, § 5.2[A], at 148 ("For a work made for hire, initial ownership vests in the employer . . . . [T]he employer-author has the entire right to the work; the employee-creator has no ownership rights whatsoever.").


185. Id. at 740 (concluding that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.").

186. See supra notes 164-166 and accompanying text (discussing the requirements of a "work made for hire").
as locatio conductio: 187 locatio conductio operis faciendi; and, locatio conductio operarum. Locatio conductio operis faciendi "was the placing of a contract for some work to be done or, more accurately, for the production of a specified result for reward, the person commissioning the enterprise being the locator and the party contracting to produce the result, the conductor." 188 Locatio conductio operarum "was the letting of one's services for reward, the workman being the locator and the employer, conductor." 189 In both of these contracts, the locator became owner of the work produced by virtue of the contract. Aside from the limitation as to subject matter, 190 it is also the agreement of the parties, in American copyright law, that determines whether a work that is specially ordered or commissioned may be considered work made for hire. 191

VII. COPYRIGHT INFRINGEMENT

There are at least five Roman legal principles or concepts that, by analogy, add to our understanding of copyright infringement: (1) recognition of intangible injuries; (2) iniuria (damage); (3) furtum (theft); (4) injunctions as remedies; and, (5) persons other than owners of the whole may have standing.

Since copyright is an intangible property (res incorporales), for a cause of action for infringement to exist at all, a legal system must first recognize intangible injuries as actionable. Roman law clearly did. Although an action for iniuria was originally only applicable for physical/tangible injuries, 192 as the law developed, it eventually applied to intangible injuries as well ("verbal assaults"). 193 Interestingly, there was a time when iniuria was understood to encompass unintentional wrongs as well as intentional ones: it "could be committed without

187. See generally THOMAS, supra note 20, at 292-300 (discussing the concept of locatio conductio); WATSON, supra note 20, at 64-65 (discussing the early development of locatio conductio).
188. THOMAS, supra note 20, at 296 (footnotes and citation omitted); see also WATSON, supra note 20, at 64 ("In hire of a work to be done (locatio operis faciendi), the person hired agreed to produce a certain result on a person or thing supplied to him by the hirer.").
189. THOMAS, supra note 20, at 297-98.
190. To be considered "a work made for hire" under 17 U.S.C. § 101(2) (1994), a work must fall within one of the nine enumerated categories. See supra note 165 and accompanying text (listing the nine enumerated categories).
191. Specifically, the agreement must be in writing, it must state that the work is a work made for hire, and it must be signed by the independent contractor. 17 U.S.C. § 101.
192. See THOMAS, supra note 20, at 369 (noting that originally, iniuria was "clearly concerned [only] with physical injury").
193. See WATSON, supra note 13, at 31 (explaining that iniuria "was eventually extended to verbal assaults").
intention." In this regard, the oldest iniuria was similar to copyright infringement. But as the law of iniuria evolved, intent did become a necessary element. Presently, intent serves as a factor that may increase damages for copyright infringement; rather than being an element of a prima facie case.

Another ancient Roman cause of action that was somewhat analogous to modern copyright infringement is furtum, theft. J.A.C. Thomas translated the definition of furtum from the Institutes as follows: "Theft is fraudulent interference with a thing, whether with the thing itself or the use or possession of it: which is forbidden by natural law." This definition is broad enough to include within its scope an intangible injury like copyright infringement. And, during the Roman republic, the concept of furtum expanded further to include "any conduct designed to deprive another of his property." But unlike modern copyright infringement, there was also an intent requirement for furtum:

To take a thing in belief that the victim did not mind, even though events proved that he did, and, a fortiori, in pursuance of a claim made in good faith would not constitute furtum, any more than would dealing with the thing with the intention of thriving, when in truth the supposed victim was amenable to what was done.

In addition, for a thing to be the object of furtum it had to be mobilis (movable). Thus land was not deemed subject to furtum. By analogy, it is highly unlikely that intangibles would have been subject to furtum either.

Thus, although there are technical differences, the central theories at the heart of both iniuria and furtum are also central to our modern theories of copyright infringement: a defendant is liable for

194. THOMAS, supra note 20, at 365 (citation omitted).
195. See 17 U.S.C. § 504(c)(2) (discussing the concept of "innocent infringement").
196. See THOMAS, supra note 20, at 369 ("In developed law, ... iniuria meant, generally, any deliberate affront, insult or contumely to another ..." (footnote omitted) (emphasis added)); id. at 370 ("Being grounded in contumelia, iniuria postulated intention. There could not be a negligent iniuria ...").
197. See, e.g., 17 U.S.C. § 504(c)(2) ("[W]here the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages ... ").
198. THOMAS, supra note 20, at 353. This is Thomas's translation of Institutes IV.1.1.
199. Id. at 354.
200. Id. (citation omitted).
201. See id. at 355.
202. See id. ("[I]t became settled law that there could be no theft of land.").
203. See id. at 355.
damages when he either damages another's property or takes it from him without permission; and, intangible injury is redressable in a manner similar to tangible injury.

In addition to these core concepts, the modern use of injunctive relief is also similar to the ancient Roman principles. One of the most important remedies available to a copyright plaintiff is an injunction. An injunction is especially valuable in intellectual property litigation because an injunction, in essence, stops the bleeding. It prevents a defendant from continuing to harm a plaintiff's interests and also prevents him from continuing to profit. Roman law also recognized that some special circumstances necessitated the granting of an injunction when a plaintiff feared immediate anticipated harm.

Not only was a plaintiff given the opportunity, in certain cases, to seek injunctive relief, but Roman law also recognized that persons with a valid interest in a res also had the right to sue for damage or loss even if they were not, technically speaking, the owner of the res. In copyright, the same principle operates. The Copyright Act provides that any "legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right. . ." This excludes a nonexclusive licensee from standing but ensures that an exclusive licensee may sue. The Roman law rule appears to have been somewhat broader, but by expanding the potential pool of plaintiffs to include exclusive licensees, the copyright law takes the same basic approach as the Roman law; granting standing to those with a sufficient interest in the res.

204. See generally 17 U.S.C. §§ 502, 503 (1994) (stating the different remedies that are available for copyright infringement); LEAFFER, supra note 2, §§ 9.8-9.9, at 300-01 (discussing the test for granting injunctions for copyright violations and resulting remedies thereof).

205. See CROOK, supra note 13, at 166. Crook stated:

[One] set of rules went under the title of damnum infectum, 'damage not yet done.' If you had reason to fear that someone's neglect of his building or other property was likely to do harm to yours you could apply to the authorities and (having sworn that your proceedings were not vexatious) require him to give security or make promises to make good any damage caused; his refusal in this case would lead to your being given possession of the property concerned.

Id.

206. See infra note 210 and accompanying text (providing examples of those given a right to sue for damage who did not technically own the res).


208. See LEAFFER, supra note 2, § 9.18, at 312 (explaining that "the non-exclusive licensee has no standing to bring suit" in a copyright action).

209. See id. ("The owner of an exclusive right may bring suit on his own behalf without having to join the licensor of the right in the action.").

210. See THOMAS, supra note 20, at 356 ("It may be said generally that anyone with a sufficient interest, interesse, in the thing could bring [an action]; more specifically, that a
Modern copyright law is constantly challenged by new technology. This is one of the reasons why copyright is so appealing for lawyers and law students alike. The answers that we have today do not always serve us well tomorrow; and yesterday’s answers are often all but forgotten. Nevertheless, it is important to remain focused on fundamental rules, purposes, goals, and policies when confronted and confounded by new questions. The thesis of this Article has been a simple one. A number of legal principles that developed in ancient Roman law have evolved as central precepts in modern copyright law. In particular, Roman law theories help to explain analogous principles in modern copyright: namely, theories of intangible property, public property (the public domain), the metaphysical components of property as a legal concept (types of copyrightable works), ownership (e.g., joint authorship and work for hire), the sale of copyrights, and theft and/or damage to property (infringement). It is apparent that Roman legal principles form the essential building blocks of many concepts that comprise contemporary copyright doctrine. Therefore, these ancient principles ought to be considered in any thoughtful analysis of modern copyright, even in this age of digital technology.